

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

APPEAL NO. 27930

BERNADINE MAE SHIELDS, AKA BERNADINE SHEILDS,
as Administrator of the Estate of DARELLE RED BEAR, Deceased,
Plaintiff and Appellant,

vs.

SESDAC, INC.,
Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT
CLAY COUNTY, SOUTH DAKOTA

THE HONORABLE STEVEN JENSEN
CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Throughout this brief, Plaintiff and Appellant Bernadine Red Bear, shall be referred to as “Red Bear.” Defendant and Appellee, SESDAC, INC., shall be referred to as “SESDAC.” Decedent Bill Red Bear shall be referred to as “Decedent” or “Bill.”

Any references to the trial transcript will be referenced below as “TT____” with the corresponding page(s). Documents in the record herein will be designated as “R.____” and followed by the appropriate page number.

JURISDICTIONAL STATEMENT

Red Bear appeals from Order Granting Defendant’s Motion for Partial Summary Judgment¹ filed on February 12, 2015 (R.912), Judgment on the Verdict filed on November 2, 2015 (R.1726) and Order Denying Plaintiff’s Renewed Motion for Judgement as a Matter of Law and Motion for New Trial filed June 9, 2016 (R.2352). Appeal is by right pursuant to SDCL §15-26A-3. Notice of appeal was timely filed on July 8, 2016². R.2356.

STATEMENT OF LEGAL ISSUES

I. WHETHER THE TRIAL COURT COMMITTED CLEAR ERROR, REVERSABLE ERROR AND ABUSED ITS DISCRETION BY INTERPRETATING SDCL § 29A-5-507 TO EXTEND LEGAL GUARDIANSHIP BEYOND DECEDENT’S DEATH?

SDCL § 29A-5-507
SDCL § 34-26-14 and 34-26-16

¹ Red Bear’s Petition for Allowance of Appeal from Intermediate Order was denied by the Supreme Court on April 27, 2015. R. 959.

² Notice of Entry of Order Denying Plaintiff’s Renewed Motion for Judgment as a Matter of Law and Plaintiff’s Motion for New Trial was served on June 10, 2016.

II. WHETHER THE TRIAL COURT COMMITTED CLEAR ERROR, REVERSABLE ERROR AND ABUSED ITS DISCRETION BY DENYING RED BEAR'S MOTION FOR CHANGE OF VENUE?

SDCL § 15-5-11(2)
SDCL § 15-6-47(a)
SDCL § 15-6-59(1) and (7)
Batson v. Kentucky, 106 S.Ct. 1712 (1986)

III. WHETHER THE TRIAL COURT COMMITTED CLEAR ERROR, REVERSABLE ERROR AND ABUSED ITS DISCRETION BY DENYING RED BEAR'S REQUEST FOR A SPOILATION INSTRUCTION?

IV. WHETHER THE TRIAL COURT COMMITTED CLEAR ERROR, REVERSABLE ERROR AND ABUSED ITS DISCRETION WHEN IT DENIED RED BEAR A NEW JURY TRIAL BASED UPON THE INCONGRUENT AND AMBIGUOUS JURY VERDICT?

Reinfeld v. Hutcheson, 2010 SD 42, ¶ 19
Henry v. Henry, 2000 SD 4, ¶ 9
Baker v. Holman, 2011 WL 241, 14451, ¶ 13 (N.D. Miss 2011)

STATEMENT OF THE CASE

Bernadine Red Bear alleges that SESDAC wrongfully and negligently caused the death of Decedent Darelle Red Bear. Further Red Bear alleges SESDAC colluded to wrongfully and illegally dispose of Decedent Darelle Red Bear's remains after his death. These actions causing damages to the Plaintiff in this case.

Red Bear appeals from Order Granting Defendant's Motion for Partial Summary Judgment³ filed on February 12, 2015 (R. 912), Judgment on the Verdict filed on November 2, 2015 (R. 1726) and Order Denying Plaintiff's Renewed Motion for Judgement as a Matter of Law and Motion for New Trial filed June 9, 2016 (R. 2352).

³ Red Bear's Petition for Allowance of Appeal from Intermediate Order was denied by the Supreme Court on April 27, 2015. R. 959.

Appeal is by right pursuant to SDCL §15-26A-3. Notice of appeal was timely filed on July 8, 2016⁴. R. 2356.

STATEMENT OF THE FACTS

Between the dates of December 29, 2008 and January 4, 2009, Decedent Darelle “Bill” (or “Billy”) Red Bear became physically sick while developmentally disabled resident and in the sole care, and the “Yale House” group home in Vermillion, Clay County, South Dakota. Decedent Bill Red Bear was exhibiting flu-like symptoms which became increasingly worse from December 29, 2008 through January 4, 2009. (TT 96-97, 100).

Prior to December 29, 2008, Bill Red Bear had been a relatively otherwise healthy 49-year-old Lakota/Native American man who was declared a ward in need of guardianship from the service of his health, safety and welfare. (Ex. 12-21; TT 283-284). Although he was a formal court ordered ward of the state of South Dakota since the late 1980s (Affidavit of Bernadine Red Bear ¶ 4), Decedent was a group home resident of the corporation called SESDAC, Inc., since 2000. (TT 99-100). Decedent was clearly in the physical care, custody and control of SESDAC at the Yale House in Vermillion in late 2008 and leading up to and including January 4, 2009.

Because of Decedent’s increasingly worsening medical/physical condition between the dates December 29, 2008 and January 4, 2009, evidence suggests that he was in a dangerous deteriorating situation with his health. (TT 105-106, 178-179, 186-188, 214-216, 283-284, 286-288).

⁴ Notice of Entry of Order Denying Plaintiff’s Renewed Motion for Judgment as a Matter of Law and Plaintiff’s Motion for New Trial was served on June 10, 2016.

SESDAC employed part-time and full-time resident representatives through the time period that Decedent Bill Red Bear was a resident SESDAC. Two of these part-time group home employees of SESDAC, Matthew Miranda and Ana Nesselhoff had contact with Bill at or about the time he became “unresponsive” and ultimately quit breathing. (Miranda depo., p. 51-85, 90-91; Nesselhoff depo. p. 47-72; Exhibit 1).

At or about 3:45 p.m. on Sunday, January 4, 2009, Miranda came on duty at the end of Nesselhoff’s shift. (TT 46-56). He found Bill Red Bear unresponsive. (TT 105-106). Miranda called his supervisor first (Hower depo. p. 24-25), then called 911 (TT 147-149). Vermillion police officer Robin Hower responded and began CPR. (TT 141-143). The ambulance was dispatched and arrived. Bill is still not breathing on his own, and efforts to resuscitate him went on during the transport to the hospital four blocks away. (TT 47-56; O’Connor depo. p. 25-53). Bill exhibited heart responses which indicated a showing of life still, in his body, until he got to the hospital. (TT 196, 278-279). Despite efforts to revive Bill, he was pronounced dead at 5:03 p.m. The doctors asked SESDAC official’s O’Connor, Weipen and Nikki Clark, if any autopsy was desired. They said no. (Quote “Team” TT 100, 147-151). Weipen, O’Connor and Nikki Clark consulted with each other hospital after Bill died, as to what was to be done with Bill’s remains. No meaningful nor adequate attempt was made to contact Bill’s next of kin, who were the legal persons per SDCL §34-26-16(2), 34-26-14, to decide upon what to do with Bill’s body and his remains. (Affidavit of Bernadine Red Bear ¶6; O’Connor depo. p. 26-29, 46-49). Instead, Clark, Weipen and O’Connor with Velda Bartel’s input jointly decided that Bill would be immediately cremated as soon as his body parts could be harvested. (Clark depo. p. 15-21; O’Connor depo. p. 25-53). Mr.

Bob Hansen, funeral director, was present and heard and witnessed these discussions, and learned that these post-death discussions and intentional conduct were jointly collaborated between SESDAC and Clark, and the motivating force was to save money (Hansen depo. p. 11-12); Hansen did not testify at trial because of the Court's pretrial ruling). It seems convenient that once Bill's body would be cremated with no autopsy, less would be known as to why he died suddenly seriously and mysteriously that day.

Because of this intentional post-death conduct, Bill's rightful next of kin, Plaintiff and all of Bill's siblings, (SDCL §34- 26-16(2)), were denied the right and opportunity to take care of their beloved brother's remains in a spiritual, proper and ceremonial way according to Lakota culture, beliefs and custom. (Affidavit of Bernadine Red Bear ¶11). The Siblings only became aware of Bill's death and what happened to his remains, when his brother Kenneth Red Bear called SESDAC in early April 2009 to speak to Bill and was only then informed what had happened, and what had been done. (Ken Red Bear Affidavit ¶14, 15 and 16; Ken Red Bear TT 337; Bernadine Red Bear TT 642-643). The family found out that Bill was sick for at least five days, then suddenly died. No autopsy was done. His remains were quickly cremated. His tissue and bones were harvested and he was placed in an unmarked pauper's grave in Vermillion. (Affidavit of Bernadine Red Bear ¶16, Bernadine Red Bear TT: 643). SESDAC attempted to evade answering the questions posed by the family in April 2009. SESDAC chose to cover it all up and hoped it would just go away, ironically, just like Bill, and his body. (Affidavit of Bernadine Red Bear ¶24; Bernadine Red Bear TT: 642).

SESDAC had a contractual and agency relationship with the State of South Dakota which allowed SESDAC to wrongfully and illegally dispose of Decedent Red Bear's remains and cause Plaintiff damages.

A. The Contractual/Agency Relationship Between the State of South Dakota and SESDAC.

In the South Dakota Department of Human Services documents found in documents provided by Defendant SESDAC in discovery in the case, are several references to the contractual relationship between SESDAC and the State Department of Human Services (Ex. 10).

Bill Red Bear was in the care, custody and control of SEDAC since 2000 and up to and including the date of Bill's death in Vermillion on January 4th, 2009, Decedent was a resident of SESDAC's Yale House from December 2008 through January 4th, 2009. (O'Connor depo. p.4, 11; Affidavit of Bernadine Red Bear ¶13).

SESDAC, since 2000, had entered into a series of contracts with the State of South Dakota Department of Health Services (DHS), Division of Developmental Disabilities, called "Purchase of Services Agreements." (Ex. 10). The purpose of the agreements, in particular the agreement/contract in effect from June 1st, 2008 to May 31, 2009 (Ex. 10), was "made for the purpose of providing Home and Community Based Services."

Under Section 8, Licensing and Standards Compliance, the contract between SESDAC and DHS states that:

The Provider [SESDAC] agrees to comply in full with all licensing and other standards required by Federal, State, County, City or Tribal Statute, regulation or ordinance in which the service and/or care is provided for the duration of this agreement. Liability resulting from noncompliance with licensing and other

standards required by Federal, State, County, City, or Tribal statute, regulation or ordinance or through the Provider's failure to ensure the safety of all individuals served is assumed entirely by the Provider. (Emphasis added). (Ex. 10).

Under Section 9-Assurance Requirements, the contract between SEDDAC and

DHS states:

The Provider agrees to abide by all applicable provisions of the following assurances: Lobbying Activity, Debarment and Suspension, Drug-Free Workplace, Title VI of the Civil Rights Act of 1964, Section 504 of the Rehabilitation Act of 1973, Title IX of the Education Amendments of 1972, Age Discrimination Act of 1975, Americans with Disabilities Act of 1990, Health Insurance Portability and Accountability Act (HIPPA) of 1996, Charitable Choice Provisions and Regulations, and Deficit Reduction Act of 2005. (Emphasis Added). (Ex. 10).

The contract also applies to Section 19 as it concerns subcontractors of SEDDAC.

(Ex. 10, p. 5).

The contract also specifically addresses the issue of the Hold Harmless contractual obligations, in Section #20:

The Provider agrees to hold harmless and indemnify the State of South Dakota, its officers, agents and employees, from and against any and all actions, suits, damages, liability or other proceedings which may arise as the result of performing services hereunder. This section does not require the Provider to be responsible for or defend against claims or damages arising solely from errors or omissions of the State, its officers, agents or employees. (Emphasis added). (Ex. 10).

B. The Court's Order of Guardianship

By virtue of the contract between SEDDAC and DHS, both entities share responsibility to comply with all laws, regulations, standards and ordinances applicable to providing care, custody and control of developmentally disabled persons (residents/participants) such as Bill Red Bear living in a SEDDAC group home. Betty Oldenkamp, then the Secretary of DHS, was formally appointed as the guardian of Darelle "Bill" Red Bear by Order Appointing Guardian dated August 31st, 2001 and

signed by Circuit Judge Arthur Rusch in Vermillion. (Ex. 11). In the August 31st, 2001 Order, the Court found that Bill "is impaired to such an extent that he lacks the capacity to meet the essential requirements of health, care, safety, habilitation or therapeutic needs without the assistance or protection of a guardian. The court finds the appointment necessary to protect him from neglect, exploitation, and abuse." ... Emphasis added). (Ex.11). The Court also ordered that, "[2] Letters of Guardianship shall issue to Betty Olderkamp, Secretary of Department of Human Services, or designee or successor upon the filing of an Acceptance of Office. 3. The guardian shall have the authority to make decisions regarding the protected persons support, care, health, habilitation, therapeutic treatment, and, if not inconsistent with an order of commitment or custody, determine the protected person's residence. " (Emphasis added). (Ex. 11).

The Court's August 31st, 2001 Order goes on to state: [4]. ... The guardian shall exercise his authority only to the extent necessitated by the protected person's limitations, and if feasible, shall encourage the protected person to participate in decisions, to act on his own behalf, and to develop or regain the capacity to manage his own personal affairs. The guardian shall, to the extent known, consider the express desires and personal values of the protected person when making decisions, and shall otherwise act in the protected person's best interests and exercise reasonable care, diligence and prudence. (Emphasis added). (Ex. 11, 28-32).

The Order of August 31st, 2001, also requires the guardian to report the current physical condition of Bill, the medical and other professional services provided to Bill, and the guardian's evaluation as to the adequacy of the care, and the guardian's opinion as to the current treatment plan. (Ex. 11).

On or about September 23, 2004, Ms. Oldenkamp," as of September 1, 2004 [she] has designated Nikki Clark to act as her designee for Bill" (Ex. 23). No formal "Acceptance of Office" appears to have been filed, however. (Contrary to Ex 11, p. 2). That was made a legal requirement by the Order of August 31st, 2001.

Despite the assertions made by Nikki Clark, the SESDAC officials and/or the DHS officials, as to their alleged "attempts" or "efforts" to contact Bill Red Bear's "family" or "next of kin" following Bill's death [or even during his prolonged illness], the known documented facts support and suggest that very little, if any so-called "attempts" or "efforts" were made by Clark/SESDAC/DHS to contact Bill's immediate family members (Bernadine, Christine, Rachel, Wilma, Sharon, Albert, Kenneth, Cleo or Ben). (Affidavit of Bernadine Red Bear ¶¶16 and 17; O'Connor depo. p. 14-26).

STANDARD OF REVIEW

Review of the issues herein fall within the abuse of discretion standard. *Bland v. Davison County*, 1997 SD 92, ¶ 5 (citing to *State v. Peterson*, 515 N.W.2d 687, 688 (SD 1994); *State v. Arguello*, 502 N.W.2d 548, 551 (SD 1993); *State v. Wellner*, 318 N.W.2d 324, 331 (SD 1982)).

SUMMARY OF ARGUMENT

The trial court erroneously interpreted the guardianship statute, SDCL § 29A-5-507, to extend guardianship beyond death. Under South Dakota law, the decision as to disposition of Decedent's remains should have been decided by Decedent's next of kin, who were identified and known to SESDAC. SDCL § 34-26-14 and 34-26-16. SESDAC did next to nothing to contact Decedent's family after his death and did nothing to contact them when Decedent became gravely ill. SESDAC's agents or actors

simply decided Decedent should be cremated and his organs donated. He was then placed in an unmarked pauper's grave. Decedent's family was not made aware of his death until months later.

Due to the trial court's erroneous interpretation of the guardianship statute, partial summary judgment was granted to SESDAC and thereby precluded Red Bear from being able to bring forth facts and claims to the jury that were necessary for Red Bear to prove causation.

The trial court erred in denying Red Bear's motion for change of venue when the Defendant SESDAC was a major employer in the jury pool area. Change of venue should have been granted also based on the fact that the scope of the jury pool included little to no Native Americans. The only Native American to be empaneled was struck by SESDAC. This prejudiced Red Bear and created reversible error.

Red Bear requested a spoliation instruction. The trial court denied the instruction. Red Bear was severely prejudiced by not having the instruction as it placed a burden of proof upon Red Bear that was beyond preponderance of the evidence and was essential to Red Bear's ability to prove causation.

The jury verdict in this case was ambiguous and incongruent. The trial court committed reversible error by not granting Red Bear's motion for new trial.

ARGUMENT AND AUTHORITIES

I. WHETHER THE TRIAL COURT COMMITTED CLEAR ERROR, REVERSABLE ERROR AND ABUSED ITS DISCRETION BY INTERPRETATING SDCL § 29A-5-507 TO EXTEND LEGAL GUARDIANSHIP BEYOND DECEDENT'S DEATH?

The appointment of any guardian for Bill, legally and effectively terminated by law according to SDCL § 29A-5-507, upon the moment of Bill's death. (Ex. 21) . So any

and all negligent or intentional conduct of SESDAC or its agents, resulted in violation of and unlawful acts concerning Bill's next of kin rights. The outrageous post-death conduct of SESDAC and Clark and others, jointly and with planning and intentional execution, constitutes a direct invasion of the Plaintiff's rights to possess and handle the remains of their deceased brother. See *Chisum v. Behrens*, 283 N.W.2d 235, 240 (SD 1979); (Ex. 28, 29, 30, 31-34).

According to SDCL § 34-26-14, South Dakota statutory law says:

Right to custody of dead body--Coroner's custody pending inquest. The person charged by law with the duty of burying the body of a deceased person is entitled to the custody of such body for the purpose of burying it. However, in the cases in which an investigation or inquest is required by law to be held upon a dead body, by a coroner, such coroner is entitled to its custody until such inquest has been completed. (Emphasis added).

According to SDCL § 34-26-16, the statutory law states:

Persons charged with duty of burial--Grave marker. The duty of burying the body of a deceased person and providing the grave with a permanent concrete, metal anchored in concrete, or stone marker devolves upon the persons hereinafter specified:

- (1) If the decedent was married the duty of burial devolves upon the husband or wife;
- (2) If the decedent was not married but left any kindred, the duty of burial devolves upon the person or persons in the same degree nearest of kin to the decedent, being of adult age, and within this state and possessed of sufficient means to defray the necessary expenses;
- (3) If the decedent left no husband or wife or kindred answering the foregoing description, the duty of burial devolves upon the coroner conducting an inquest upon the body of the decedent, if any such inquest is held; if none, then upon the person charged with the support of the poor in the locality in which the death occurs. (Emphasis added).

According to SDCL § 29A-5-507:

Termination of guardianship or conservatorship upon death of protected person. A guardianship or conservatorship of a protected person shall terminate upon the death of the protected person, if jurisdiction is

transferred to another state, or if ordered by the court following a hearing. (Emphasis added).

According to SDCL §29A-5-505, the statutory law says:

Termination of guardianship or conservatorship upon minor's death or majority--Adoption or emancipation of minor. A guardianship or conservatorship of a minor shall terminate upon the minor's death or attainment of majority, if jurisdiction is transferred to another state, or if ordered by the court following a hearing thereon. A guardianship, but not a conservatorship, shall also terminate upon the minor's adoption or emancipation, and the court may elect to continue a guardianship until the minor's attainment of age twenty-one if the guardian was appointed pursuant to the provisions of chapters 26-7 A, 26-8A, 26-8B, and 26-8C. (Emphasis added).

Despite the plain language of SDCL §29A-5-507, the trial court decided that the guardianship granted by the court in earlier years had a residual effect beyond death and allowed SESDAC to legally handle Decedent's remains. If the Court had applied the correct interpretation of SDCL §29A-5-507, and found that no legal guardianship existed beyond 5:03 p.m. on January 4, 2009, the minute of Bill's death, then the only actors/entities left, were the SESDAC officials, and their uninterrupted, continual and continuing care, custody and control of Bill and his body. SESDAC's own policies included duties to fulfill in the event a "client" of SESDAC, were to pass away while in their custody, physically, constructively and /or impliedly.

The hospital was in no legal position to make any of the post death decisions for the rightful decision makers, Bill's family members. SDCL §34-26-16(2). Clark had no legal authority to act at all on behalf of Bill, his remains, or his family, as of 5:03 that day. As it turned out, SESDAC influenced everything Clark did that day anyway. (Ex. 31).

Although there are no cases directly on point dealing with the interpretation of SDCL §29A-5-507 under circumstances such as these, there are also no other laws, cases or statutes which authorize the Trial Court to determine that a legal guardianship such as this, survives or should survive beyond the specific time of the death of the "protected person" in a "residual" or continuing way (such as the Court indicated in January 2015. The Trial Court was merely speculating on the law, and loosely interpreting the plain meaning of this particular statute, to encompass a meaning that is not even a part of the statute. This cannot be legally done and should have not been done here. This created great incurable prejudice to Plaintiffs entire case.

In looking at the precise language of the statute in SDCL §29A-5-507, the three parts of the single sentence statute, are clearly meant and intended by the state legislature, to be read and interpreted "disjunctively", and not "conjunctively". Red Bear did argue this aspect at the time of the motions hearing in 2015.

Helpful authorities exist that do assist in coming to the conclusion that the trial court in interpreting SDCL §29A-5-507, made a clear error, and abused its discretion in deciding that the guardianship continued beyond the time of death.

In *Wilcox v. Warren Const. Co.*, 95 Or. 125 (Or. 1919), the Supreme Court of Oregon decided a case involving the interpretation of a state statute concerning who had a right to bring an action in a negligence wrongful death case. The Court there, in citing a New York case, *Isaac v. Denver, etc. R.Co.*, 12 Daly (N.Y.) 340, dealt with the statutory interpretation of the word "or" and the word "and", being cited in a single statute, and stated:

"It is a rule in the exposition of statutes that they are to be construed with reference to the principles of the common law, and therefore the law infers that

the act did not intend to make any alteration other than what is specified. Dwaris on Statutes, 695. The words 'or' and 'and' are not always, in deeds and wills, held to a strict grammatical sense; but 'or' may be taken for 'and,' and 'and' for 'or,' as may best comport with the intent and meaning of the grant or devise (Jackson v. Blanshan, 6 Johns. [N. Y.] 57 [5 Am. Dec. 188]); and this may be done in a statute, but there should be strong reasons, in conformity with a clear intention (Potter's Dwaris on Statutes, 199, note 16), because it is a much more serious matter to make such a change in a statute, as a statute is general in its operation; and it certainly should not be done unless it is very clear that such was the intent, taking the whole of the statute together, the general rule being, in respect *132 to statutes, that words are to be taken in their ordinary sense, and not to be extended or changed to comprehend cases within the supposed intention of the Legislature, as courts cannot correct supposed errors, omissions, or defects in legislation; the office of the courts being, as has been said by Dr. Leiber, to bring *16 sense out of the words, and not bring a sense into them." (Emphasis added). *Wilcox*, Id. at 131-32.

The *Wilcox* court also went on to explain how the interpretation of a given statute involves the use of grammatical construction as well, and averred:

It is common learning as a matter of grammar that when in an enumeration of persons or things the conjunction is placed immediately before the last of the series the same connective is understood between the previous members. If the disjunctive conjunction "or" is used, the various members of the sentence are taken separately, while if "and" is used they are to be considered jointly. For instance, deeds are to be acknowledged "before any judge of the Supreme Court, county judge, justice of the **19 peace, or notary public." L. O. L. § 7109. It is manifest that the officers named are to be taken separately, and that the acknowledgment is not to be taken before all of them. The service of one is sufficient. Other illustrations will readily occur to the mind.

"Or" is defined as a "disjunctive often with either or whether as a correlative, used to introduce a word or phrase expressing an object or action, the acceptance of which excludes all the other objects or actions mentioned." Standard Dictionary, 1733. (Emphasis added). *Wilcox*, Id at 141.

Instructively, the *Wilcox* Court went on to also say:

More like the Oregon statute is that of the Missouri Code (Rev. St. 1899, § 8820), quoted in *Cole et al. v. Mayne* (C. C.) 122 Fed. 836, reading thus on the point involved:

And in case of loss of life by reason of such violation or failure as aforesaid, a right of action shall accrue to the widow of the person so killed, his lineal heirs or

adopted children, or to any person or persons who were, before such loss of life, dependent for support on the person or persons so killed.

Judge Philips, construing this enactment, said:

The plain grammatical construction of this statute, which names the beneficiaries disjunctively, gives the right of action: First, 'to the widow of the person so killed'; next, 'to his lineal heirs or adopted children'; and, third, if there be no widow, lineal heirs, or adopted children, 'to any person or persons who were, before such loss of life, dependent for support on the person or persons so killed.' * * * The necessary conclusion from which is that the statute does not give a joint cause of action to all the designated beneficiaries, but an exclusive cause of action to the parties designated, if living, in their order. The logical result therefrom is that no cause of action under this statute arises in favor of the children where the deceased left a widow." (Emphasis added). *Wilcox*, Id. at 134.

Other informative authorities on the statutory interpretation issue are found in *Central Standard Life Ins. Co. v. Davis*, 134 N.E.2d 653,658 (Ill. App.2d 1956); *Lithium Corp. of America, Inc. v. Town of Bessemer City*, 135 S.E.2d 574,577 (N.C. 1964); *State ex. rel Nat. Bank of Commerce of Seattle v. Frater*, 140 P.2d 272,275 (Wash. 2d 1943); *Gutierrez v. Estate of Guitierrez*, 786 S.W.2d 112, 113 (Tex. App. S.A. 1990); *Burch v. Griffe*, 29 S.W.3d 722, 726 (Ark. 2000) (functions and powers of the guardian cease when the ward dies, and that, likewise, the court's power to act also ceases).

The erroneous statutory interpretation by the trial court led the trial court to grant SESDAC's motion for partial summary judgment as to the Count III claims (Failure to Seek Proper Consent for Handling of Deceased Body and Cremation, Negligent Infliction of Emotional Distress, Intentional Infliction of Emotional Distress and Punitive Damages claims), taking away nearly half of Red Bear's cognizable and justifiable causes of action asserted in the Second Amended Complaint. That one decision had such a material and significant effect on the Plaintiffs ability to have a fair and just trial, and ultimately and directly resulted in the result which did occur-a jury finding of "Negligence" against

SESDAC, but no finding of causation of Decedent Bill Red Bear's death as a result of that negligence.

That singular decision by the Trial Court to gut those Count III claims and the Punitive Damages claims from the Plaintiffs case, and from the case in chief, had an effect on the entire case, the strategy, the trial tactics, and the arguments that Plaintiff could or did make or pursue at trial. That one wrongful decision infected the entirety of the proceedings, and poisoned the jury's ability to hear all of the claims of the Plaintiff and all of the Plaintiffs case, so as to leave the jury speculating not just on the law to apply, but to also speculate upon the "cause" of Bill's death, to the point that the jury somehow concluded that Plaintiff did not or could not prove "causation" of Bill's death as linked to SESDAC's conduct.

This is the very scenario that Plaintiff argued would happen as a result of the trial court's ruling initially upon the Motion for Partial Summary Judgment on Count III claims, then later, in the Motion to Reconsider said ruling, and the Plaintiffs Motion in Limine, and Plaintiffs Responses to Defendant's Motions in Limine (specifically motion in limine concerning the Count III claims).

In the instant facts of this case, SESDAC and its agents/actor failed to reasonably contact and notify Plaintiff and Bill's surviving family members of Bill's sickness from December 30, 2008 through January 4, 2009, or his death, the refusal of autopsy, the harvesting and donation of his body parts, his cremation, and/or his subsequent burial in Vermillion. The documentary evidence supporting this assertion were provided to the trial court in response to SESDAC's motion for partial summary judgment. (See App. Red Bear's SUF). These facts included, but are not limited to:

1. Judge Jensen's November 7, 2007 Order Approving Guardian's Annual Report (Ex. 12), the court found that...A. Due notice was given to the protected person and the relatives and interested parties as required by SDCL §29A-5-410, ... (Emphasis added). The Notice of Entry of Order of said Order dated November 19, 2007 indicates that a copy of the Order was sent by first class mail to: Rachel & Christine Red Bear, Box 452, Allen, S.D. 57714. (Ex. 13). Both Nikki Clark and Jenna Wiepen (SESDAC Support Coordinator) were sent copies as well. (TT 96-100).
2. A confidential facesheet dated October 26th, 1999 was provided to Red Bear in discovery and is marked as Ex. 14. There is very distinct handwriting in the lower right danner of that document which states "once a week Bill can call Brother in evenings. Canada 306-332-5577. Albert J. Red Bear." This document proves that this DHS document dated 1999 was in Bill's SESDAC file on hand at SESDAC in Vermillion. It also proves that Bill's brother Albert had been calling for and receiving calls from Bill at Albert's phone number in Canada during the period referenced in the handwritten note. (Ex. 14); (TT 96-100).
3. A Notice of Entry of Order dated September 28th, 2002 indicates that the Notice was sent to Rachel & Christine Red Bear in Allen, South Dakota (Ex. 15). This is a document from SESDAC's file on Bill Red Bear. (TT 96-100).
4. A Notice of Hearing dated August 1st 2002 also indicates the Notice was sent to Rachel & Christine Red Bear in Allen, South Dakota. (Ex. 16). This is a document from the SESDAC file on Bill Red Bear.
5. A Notice of Entry of Order and Notice of Rights dated September 4th, 2001, was sent to Christine Red Bear (Bill's mother), in Allen, S.D., and Rachel Red Bear (Bill's sister) in Allen. (Ex.17), citing SDCL §29A-5-313. This is a document that came from the SESDAC file on Bill Red Bear.
6. A petition for Appointment of Guardian in Case No. GDN No. 01-24, dated June 15th, 2001, includes the names and addresses of "[the] Bill Red Bear's nearest relatives "including Christine Red Bear, mother; Rachel Red Bear, sister; Albert Red Bear, brother. (Ex. 18).
7. When asked a question out of the blue by Jenna Weipen of SESDAC about "where he wanted to be buried", Bill Red Bear in 2008 (less than 1 year before his sudden unexpected death) replied: "I wanted to be buried next to my friend." (Wiepen depo. p. 1-36; Orr depo. p. 61-62; Plaintiffs SUF # 33, 55-59, 61). Bill was referring to a friend in Vermillion who died and was buried in a grave in the cemetery.
8. SESDAC officials, in their team meeting documents in 2008, made several

references to a so called "Burial Fund" with an SPID # 32652 and target dates (Ex. 19, p. SESDAC 2119, SESDAC 2123, 2124).

9. In a Support Plan Meeting on August 15th, 2002, the Report said that: "Bill would like to be more involved with his Native American culture. He has been to a Pow Wow and really enjoyed and would like to meet with a medicine man and go to a sweat lodge. Bill's PCSI and his SC will assist Bill in doing these things. "(Ex. 20; p. SESDAC 984).
10. In the same Support Plan report of August 15th, 2002, the report said: "Bill wants to connect with his family members. Staff will assist Bill in writing letters to the addresses we do have (the addresses will be kept in his working file). Dawna Anderson is also looking into connecting with the tribal council for more information on His family members. (Ex. 20; p. SESDAC 1005-06).
11. In a social history document (Ex. 21; p. SESDAC 994-996), Christine Red Bear (mother) of Allen, S.D. is listed as the contact person. Bill's siblings are listed on that same page and include: Bernadine, Rachel, Sharon, Gloria, Virgus, Albert, Kenneth, Clifus and Benny.... In that document, it says: "Bill states that he is very close to his family, however, there has not been much family contact in the last 12 years. Bill would like to see his family more and be able to go home to the Pine Ridge reservation". (Ex. 20; p. SESDAC 995). And, the document states that, "Bill does not currently have a pre-planned burial arrangement. (Emphasis added). (See also Affidavit Albert Red Bear ¶11).
12. A handwritten letter written by Bill Red Bear to his mother Christine Red Bear, dated March, 2008. (Ex. 27).

The Court should find reversible and clear error in the trial court's decision.

Additionally, the Court should find the trial court abused its discretion by the summary judgment ruling and subsequent pretrial rulings and post-trial rulings related to that issue.

II. WHETHER THE TRIAL COURT COMMITTED CLEAR ERROR, REVERSABLE ERROR AND ABUSED ITS DISCRETION BY DENYING RED BEAR'S MOTION FOR CHANGE OF VENUE?

The trial court committed clear error, reversible error and/or an abuse of discretion in not granting the Plaintiffs Motion for Change of Venue.

A. SESDAC's Relationship with the Community.

Approximately 65 potential jurors were called in to jury selection. Many of them were in fact acquaintances, neighbors, affiliates, and/or business associates, of SESDAC or SESDAC officials or clients. Red Bear was forced to weave her way through these sensitive areas while unavoidably exposing the entire jury panel to statements made about SESDAC's close relationship with the community of Vermillion, the businesses, or how SESDAC did a lot of good things. It created prejudice to Plaintiff in that out of the entire panel, at least 10 to 15 were excused or preempted by Plaintiff as a result of SESDAC contact. See SDCL §15-5-11(2) and SDCL §15-6-47(a) (bias and prejudice), and SDCL §15-6-59(1) and (7).

Red Bear moved for a change of venue before trial for this reason and the trial court denied said motion. The fact that SESDAC was well known to almost every 35 potential juror, proved that this venue would not provide an impartial jury willing to award damages against a fellow lock business, who "did good" in the community.

B. Racial Discrimination/Diversity.

The trial court committed clear error, reversible error and/or an abuse of discretion in not granting the Red Bear's Motion for Change of Venue. Approximately 65 potential jurors were called into jury selection. Out of that pool of 65 potential jurors, 2 potential jurors admitted that they were Native American citizens themselves. Mr. White Horse, and Ms. Daniels. Red Bear, Red Bear's counsel, all of Decedent's siblings (4 of whom testified), and Decedent himself, are all Lakota, Native American citizens. A civil jury is supposed to be constitutionally diverse so that representative racial minority groups should be fairly represented on juries of "their peers". That was most certainly not the case. When race, and racial prejudice was addressed by Red Bear's counsel, many

prospective jurors revealed their truthful bias or influence based upon race, and some were excused. Mr. White Horse said he knew one of Red Bear's witnesses, so he was excused. But Ms. Daniels, a young Native American woman who worked in Sioux Falls, was taken off by one of Defendant's preemptive strikes. There was no nondiscriminatory basis of Ms. Daniels' strike from the jury given by Defendant. It was an obvious move to remove the last remaining Native American potential juror, from the panel. *Batson v. Kentucky*, 106 S.Ct. 1712 (1986); and SDCL § 15-6-47(a) (bias and prejudice) and SDCL §15-6-59(1) and (7); *State v. Roach*, 825 N.W.2d 258, 267 (S.D. 2012). Plaintiff should be entitled to a new trial on all claims in a different venue for this reason.

III. WHETHER THE TRIAL COURT COMMITTED CLEAR ERROR, REVERSABLE ERROR AND ABUSED ITS DISCRETION BY DENYING RED BEAR'S REQUEST FOR A SPOILATION INSTRUCTION?

The stage was set for a confusing case to be tried on the issue of causation, because the very evidence that Red Bear needed to overwhelmingly prove to a jury as to the nexus or link between SESDAC's negligent conduct and Bill's death, was deprived of Red Bear. Red Bear was deprived from presenting the evidence Red Bear had to prove that intentional decisions made by the SESDAC individuals in conjunction with Nikki Clark and the State of South Dakota DHS Advocacy officials, to not have an autopsy done (despite the presence of a very suspicious cause of sudden death to an ordinarily healthy 49 year old man), to quickly have his body parts harvested and donated (eyes, connective tissues, bones, ligaments, etc), and to quickly cremate the entirety of the bodily remains of Decedent that was left which could have been autopsied with 48 hours, and to then bury his ashes in an unmarked grave. With modem technology, a deceased

body can be preserved for months on end, to allow time to contact next of kin. SESDAC was allowed to conceal, dispose of and to spoil, the very evidence needed to prove causation.

It is because of the Court's decision to take away those claims for Plaintiff, that the Plaintiff was denied at trial, the just legal opportunity to have a "Spoilation of Evidence" jury instruction(s) so introduced, read, argued and considered by the same jury that heard five (5) days of testimony. The jury was not given that opportunity to even consider that option under the law.

For the Spoilation of Evidence instruction (proposed instruction No. 21 and 22; TT 960-961), would have completely shifted the burden of proof to the SESDAC, the "spoliator" of the evidence, which was most critical to prove the "causation" of Bill's death. There were no intervening events or circumstances in the time or events in the six (6) days that Bill was sick, while he was in the uninterrupted and continuous care, custody and control of SESDAC and its officials. There we no other actors to blame for the negligent care that Bill received, or more appropriately, did not receive, during those six (6) days. The jury actually found SESDAC guilty of "Negligence". (Ex. 39). The Spoilation instruction would have mandated that the jury place the burden upon SESDAC of proving that Bill's death was not caused the SESDAC's negligence, instead of placing that entire burden upon Red Bear. That is an aspect that most likely would have resulted in a significant money damage award for Plaintiff for compensatory damages, and would have also allowed the jury to consider punitive damages as well. The entire case would have come out differently, in that the jury would have still found "negligence" upon SESDAC, and that SESDAC's negligence, at least "more likely than not", "caused" Bill's

death. Then, it would have been an easy conclusion for the jury to make that SESDAC's actions in destroying the evidence and disposing of his body, was intentional, oppressive, malicious, callous, and a reckless disregard for the rights of Bill's family (SDCL § 34-26-16 rights) in being able to possess, handle and bury their family member's remains. The jury would have been able to hear all of the testimony about what happened in the minutes, hours, days, and months following Bill's death, and how SESDAC did all it could to keep Bill's death, and the circumstances of Bill's death, from his family, and from anyone who wanted to know the truth (including the alleged official investigators from the State DHS agency who were never told the whole story).

The facts as to spoliation are plenty. Bill Red Bear died suddenly and unexpectedly on January 4th, 2009 at or about 5:03 p.m. (1703 hrs). He had been otherwise healthy, and was only 49 years old. (TT 102). He was given no medical care or examination at all from the time he became seriously ill on or about December 29th, 2008 and continued to get worse on through and up to the date of his death on January 4th, 2009 (TT 213-16). The cause of death was suspicious. The police investigation concluded that there was no foul play. (Hower depo. p. 36-38). The coroner did not intervene to order an autopsy, which he very well could have. The treating doctors at the Hospital asked the SESDAC officials and the Guardian, if an autopsy was desire (Clark depo. p. 22; Weipen depo. p. 11-36; O'Connor TT 136-40). The "joint" decision between State officials, the "Guardian", and the SESDAC officials, was made at the Vermillion Hospital almost immediately upon Bill's declaration of death. (Clark depo. p. 12-33; Hanson depo. p. 6-19; O'Connor, TT 136-40; Red Bear's SUF 48-54, 62-65). The "joint" decision made by State officials, the "Guardian," and SESDAC officials, to cremate Bill's

remains was made within two (2) hours after his death, and likely even sooner than that (O'Connor depo. p. 25-53; O'Connor, TT 136-140). The "joint" decision made by State officials, the "guardian" and SESDAC officials, to allow for the harvesting of Bill's body parts (corneas, leg and arm bones, vertebrae, ligaments, etc.), was made at the same time as the decision to cremate. (Clark depo. p. 12-33; Hansen depo. p. 7-19; O'Connor depo. p. 25-53; O'Connor, TT 136-45). Despite the fact the "guardian" and SESDAC officials stated that the decisions not to have an autopsy (despite the uncertain, sudden and curious death), the decision to cremate his body and the decision to allow harvesting of his body parts, were made without concern for economics (concerns for the cost of an autopsy or regular embalming, funeral and burial), Mr. Hansen the funeral director who was also at the Hospital, testified that in fact, according to the way that he observed and heard things on the arrangements, all of the decisions to do what SESDAC/ClarTHS agreed to do with Bill's body, was "entirely based upon economics" (cost of the added services). (Hanson depo. p. 6-19; Ex. 19, 3, 22, 21, 23, 28, 29, 30, 31, 32; O'Connor depo. p. 25-53). Hansen said that SESDAC determined that Clay County should shoulder the expenses for the cremation, funeral and burial. (Hanson depo. p. 8). Obviously, SESDAC's and Clark's denials that economics was involved in the decision making as to cremation, no autopsy, organ donation, should have created an absolute and genuine dispute of material fact on that issue alone. Hanson depo. p. 6-19), (Ex. 22).

In the case at hand, Bill Red Bear was in the care, custody and control of SESDAC for all time and circumstances of his life leading up to the moment of his death. SESDAC and the State had a legal responsibility under SDCL § 34-26-16(2) and §34-26-14, to use reasonable, due diligence to search for and find and contact Bill's next of kin

about his prolonged illness, and then, immediately after he was declared dead. Instead, SESDAC officials and independent contractor Clark (with Bartel's input too) made a joint determination to quickly and cheaply dispose of Bill's remains without due consideration or due diligence to allow Bill's rightful next of kin to decide what to do with Bill's body and remains. SESDAC and Clark, jointly decided, then acted to use the quickest and cheapest means to deal with the messy problem of a mentally disabled Native American man who suddenly died SESDAC custody and control, under uncertain and suspicious circumstances. Defendants jointly agreed to refuse an autopsy that would have shone greater light on the actual cause of death, (neglect or otherwise), and to quickly cremate the evidence of his body, but not before giving parts of that body to tissue harvesters. (O'Connor depo. p. 25-53; Red Bear's SUF 62, 63 64, 65; TT 134-42).

Neither Clark nor Velda Bartel (State independent co actor/former SESDAC employee, and employee), acted solely by themselves. (Contra to Sec. 2f, of the contract between SESDAC and DBS). According to SDCL §29A-5-507, Clark and Bartel had no legal authority to act at all once Bill died. All decision-making and intentional and negligent conduct was done jointly with the SESDAC employees and with SESDAC's consultation, influence, input, motivation and acquiescence. (O'Connor depo. p. 25-53; Plaintiff's SUF 62, 63, 64, 65); O'Connor, TT 136-40; Ex. 36, Transcript of South Dakota Lions Eye Bank interview on January 4, 2009). Facts exist, and would exist in a subsequent trial on these issues, that the ESDAC officials controlled all of those post death decisions.

SESDAC spoiled evidence in this case and did so at an alarming rate. The Court should find the trial court abused its discretion when failing to allow Red Bear a

spoliation instruction and trial court's decision caused clear prejudice and reversible error in Red Bear's case.

IV. WHETHER THE TRIAL COURT COMMITTED CLEAR ERROR, REVERSABLE ERROR AND ABUSED ITS DISCRETION WHEN IT DENIED RED BEAR A NEW JURY TRIAL BASED UPON THE INCONGRUENT AND AMBIGUOUS JURY VERDICT?

The jury in this case found SESDAC negligent in its verdict, but then provided nothing regarding causation and nothing for damages. In *Baker v. Holman*, the court granted a motion for new trial on just such an incongruity. 2011 WL 241, 14451, *13 (N.D. Miss June 13, 2011). The plaintiff in *Baker* brought a Section 1983 claim along with a negligent infliction of emotional distress claim against a former police officer. The jury found for the plaintiff on the negligent infliction claim but determined that the plaintiff was entitled to "0.00" in damages. *Id.* at *1. The court averred:

In order for the jury to render a Plaintiff's verdict for negligence-based emotional distress, the jury must have found that the Plaintiff proved 'substantial proof of an emotional harm' as well as 'emotional distress damages' stemming from that harm. The jury must have also found that the Defendant caused such injuries. However, the jury essentially negated the finding of an actual emotional injury by rendering a verdict of zero damages.

Id. at *12.

The court analyzed other cases and consistently found that where a defendant is liable to a plaintiff for negligence it is inconsistent to award zero damages. *Citing, Davis Hanson Aggregates Southeast, Inc.*, 952 So.2d 330 (Ala. 2006) ("[A] finding that a defendant is liable to a plaintiff for negligence is inconsistent with an award of no damages."); *Fox v. Colony TV & Appliance, Inc.*, 37 656 A.2d 705 (Conn. App. 1995) (holding that because the jury was instructed the finding of liability involved a finding of negligence, which was a substantial factor in causing plaintiff's injuries, a plaintiff's

verdict with zero damages total was inherently ambiguous); *Alabama Power Co. v. Epperson*, 585 So.2d 919 (Ala. 1991) (holding that the trial court correctly granted a new trial on the basis of inconsistency between the award of no damages when that award was juxtaposed with the jury's finding of the defendant's liability in a negligence action)."

The *Baker* court went on to hold the jury's verdict could not be reconciled with the evidence and accordingly a new trial was warranted. *Id.* at *13.

A similar situation occurred in *Hall v. Bergman*, 994 A.2d 666 (2010), where the plaintiff brought both intentional and negligent infliction of emotional distress claims, both of which under Connecticut --- like under South Dakota law regarding negligent infliction of emotional distress --- required proof of actual injury. The jury rendered a verdict in favor of the plaintiff but awarded zero damages. *Id.* at 668. The Court stated:

[W]e must presume that the plaintiff established actual injury under all three of her claims, we also must presume that the plaintiff established damages stemming from that injury. As the Appellate Court observed, however, this presumption is inconsistent with the jury's award of zero damages. Consequently the jury verdict in favor of the plaintiff is insolubly ambiguous. In other words, in such circumstances, 'it cannot be stated with certainty either that the jury found that the plaintiff failed to prove any damages or that the jury was confused as to the correct interplay between damages and liability ... the appropriate course of action when such an ambiguous verdict is [returned] is to order a new trial on all issues.

Id. at 674 (internal citations omitted).

Indeed a verdict of zero damages is difficult to reconcile. In *Malmberg v. Lopez*, the court drove this point home when declaring:

An explicitly stated award of *zero* damages differs from an award of nominal damages. A plaintiff's verdict with a nominal damage award ordinarily suggests that the jury found that despite the defendant's liability, the plaintiff failed to prove damages ... [t]he jury's intent in rendering a plaintiff's verdict with zero damages in a wrongful death action is far less clear.

While there is no exact case on point, South Dakota law supports the above positions. In *Henry v. Henry*, the South Dakota Supreme Court upheld the trial court's decision to grant a new trial to a plaintiff where the jury awarded punitive damages on her intentional infliction of emotional distress claim but gave her zero compensatory damages. 2000 SD 4, ¶ 9, 604 NW2d 285. The court reasoned the jury's verdict demonstrated they believed the plaintiff was subjected to outrageous misconduct because they awarded punitive damages. *Id.* Accordingly, an award of no compensatory damages on the same claim, when there was evidence in the record to support the award, was inadequate or inconsistent with the evidence. *Id.*

In *Reinfeld v. Hutcheson*, the South Dakota Supreme Court upheld the trial court's decision to grant a new trial in a personal injury action based upon the fact that the jury awarded medical expenses but nothing for pain and suffering. 2010 SD 42, ¶19, 783 NW2d 284. Likewise in *Morrison v. Mineral Palace, Ltd.*, the South Dakota Supreme Court held that a new trial should be granted in a personal injury case where the jury awarded amounts for medical expenses but not for pain and suffering or permanent impairment. 1998 SD 33, ¶ 12, 576 NW2d 869, 872. See also, *Welch v. Haase*, 2003 SD 141, ¶ 27, 672 NW2d 689, 698 (holding that a new trial should have been granted in a case where the jury awarded no damages as to certain defendants who admitted liability and where there was undisputed evidence of pain and suffering and pecuniary loss.)

The jury verdict in this case cannot be reconciled. Accordingly the trial court abused its discretion by not granting a new trial.

CONCLUSION

For the foregoing reasons, Red Bear respectfully requests this Court reverse the trial court's decision a

REQUEST FOR ORAL ARGUMENT

Red Bear respectfully requests to present oral argument on these issues.

Dated this 28th day of October, 2016.

Respectfully submitted,

/s/ Shiloh MacNally
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STATE OF SOUTH DAKOTA)
: SS
COUNTY OF CLAY)

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

BERNADINE RED BEAR, a/k/a
BERNADINE SHIELDS, as Administrator
of the Estate of DARELLE RED BEAR,
Deceased,

Plaintiff,

vs.

SESDAC, INC.,

Defendant.

CIV. NO. 11-377

**NOTICE OF ENTRY OF ORDER
GRANTING DEFENDANT'S MOTION
FOR PARTIAL SUMMARY JUDGMENT**

NOTICE IS HEREBY GIVEN that attached hereto is a copy of the Order Granting Defendant's Motion for Partial Summary Judgment in the above-entitled action, the original of which was filed on February 12, 2015, in the office of the Clerk of the First Judicial Circuit, Clay County, at Vermillion, South Dakota.

Dated this 23rd day of February, 2015.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

By:



Michelle Himes Randall

R. Alan Peterson

Attorneys for Defendant

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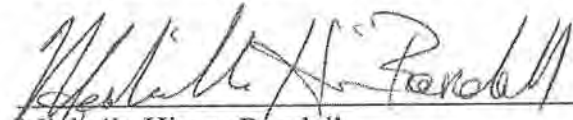
mrandall@lynnjackson.com

CERTIFICATE OF SERVICE

I hereby certify that on 23rd day of February, 2015, I sent to;

Mr. Robin L. Zephier
Abourezk & Zephier, P.C.
2020 W. Omaha Street
PO Box 9460
Rapid City, SD 57709-9460
rzephier@azlaw.pro

by first class mail, postage prepaid, a true and correct copy of **Notice of Entry of Order Granting Defendant's Motion for Partial Summary Judgment** relative to the above-entitled matter.



Michelle Himes Randall

STATE OF SOUTH DAKOTA
COUNTY OF CLAY

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

BERNADINE RED BEAR, a/k/a
BERNADINE SHIELDS, as Administrator
of the Estate of DARELLE RED BEAR,
Deceased,

Plaintiff,

vs.

SESDAC, INC.,

Defendant.

CIV. NO. 11-377

**ORDER GRANTING DEFENDANT'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

This matter having come before the Court for hearing on January 21, 2015 at the Clay County Courthouse on Defendant's Motion for Partial Summary Judgment; and the parties having appeared through counsel, Mr. Robin Zephier on behalf of Plaintiff and Ms. Michelle Randall on behalf of Defendant; and the Court having read and considered the written submissions of the parties, and having heard and considered the arguments and admissions of counsel for the respective parties in open court, the Court finds as follows:

1. That no genuine issues of material fact exist;
2. That the law imposes no duty on the Defendant with respect to the claims made by the Plaintiff in Count Three of her Complaint;
3. That any duty that may have been owed to the Plaintiff with respect to the handling of the decedent's body would fall to the decedent's guardian, the State of South Dakota;

4. That there is no evidence that Defendant engaged in any intentional conduct which would support a claim for infliction of emotional distress; and
5. That Defendant is entitled to judgment as a matter of law as to the Third Count of Plaintiff's Amended Complaint and all issues set forth therein.

NOW THEREFORE it is hereby **ORDERED**:

Summary Judgment should be and is hereby **GRANTED** in favor of Defendant SESDAC, Inc. as to the Third Count of Plaintiff's Amended Complaint and all of the issues pled therein. The reasons for the grant of summary judgment herein are set forth above and in, but not limited to, the transcript of the oral proceedings of January 21, 2015, ^{Court's oral ruling dated} which is ~~attached and incorporated by reference as though fully set forth herein.~~

Dated this 12th day of February, 2015.

BY THE COURT:



The Honorable Steven R. Jensen
Circuit Judge
First Judicial Circuit

ATTEST:

Jessica Bossee
Clerk of Court

By: Nadine Zimmerman
Deputy Clerk

(SEAL)

1 STATE OF SOUTH DAKOTA IN CIRCUIT COURT
2 COUNTY OF CLAY FIRST JUDICIAL CIRCUIT
3

4 * * * * *

5 BERNADINE RED BEAR, a/k/a Civil No. 11-377
6 BERNADINE SHIELDS, as
7 Administrator of the Estate of
DARELLE RED BEAR, Deceased,

Plaintiff,

8 -vs-

9 SESDAC, Inc.,

Defendant.

11 USD Law School
12 Vermillion, SD
13 July 9, 2013
4:00 p.m.

14 * * * * *

15 D E P O S I T I O N O F

16 NIKKI CLARK
17 * * * * *

18 APPEARANCES:

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Sioux Falls, South Dakota 57104

25 Counsel for Defendant;

<p style="text-align: right;">10</p> <p>1 that nature?</p> <p>2 A. No.</p> <p>3 Q. Would you have taken part in such a meeting?</p> <p>4 A. I would have, yes.</p> <p>5 Q. Because you're part of his team, right?</p> <p>6 A. Yes.</p> <p>7 Q. When I say that, you know, somebody on the team</p> <p>8 raised the question Bill, where do you want to</p> <p>9 be buried when you die or when you pass away.</p> <p>10 Do you remember anything of that nature?</p> <p>11 A. No, I don't remember.</p> <p>12 Q. Do you remember at any point in time during your</p> <p>13 association or involvement with Bill Red Bear</p> <p>14 where the issue or the subject of cremation came</p> <p>15 up?</p> <p>16 A. Can you repeat that question?</p> <p>17 Q. Do you remember any discussion that you would</p> <p>18 have had in the presence of Bill Red Bear at any</p> <p>19 point in your involvement with him where the</p> <p>20 issue of cremation came up?</p> <p>21 A. No.</p> <p>22 Q. Are you certain about that, that it never did</p> <p>23 come up?</p> <p>24 A. I don't remember.</p> <p>25 Q. Okay. What about the issue of donating his body</p>	<p style="text-align: right;">12</p> <p>1 expectancies at the time may be coming?</p> <p>2 A. Yes.</p> <p>3 Q. And in Bill's case, when he passed away, he was</p> <p>4 49, wasn't he?</p> <p>5 A. I don't recall the exact date.</p> <p>6 Q. He was a relatively young man?</p> <p>7 A. Yes.</p> <p>8 Q. How much do you know about the circumstances of</p> <p>9 his death before it occurred?</p> <p>10 A. That's another broad question. Can you rephrase</p> <p>11 that one? Ask more specific, a more specific</p> <p>12 question.</p> <p>13 Q. Okay. Well, he passed away on January 4th of</p> <p>14 2009?</p> <p>15 A. Yes.</p> <p>16 Q. Do you know what the cause of death was?</p> <p>17 A. Yes.</p> <p>18 Q. What's your knowledge of that?</p> <p>19 A. He asphyxiated.</p> <p>20 Q. Explain that, please.</p> <p>21 A. He choked. I'm not sure what the definition of</p> <p>22 asphyxiated is. He choked on something and died</p> <p>23 from that.</p> <p>24 Q. Do you know what he choked on?</p> <p>25 A. It was vomit.</p>
<p style="text-align: right;">11</p> <p>1 parts upon his death, do you recall whether or</p> <p>2 not that issue was ever discussed with Bill or</p> <p>3 in his presence at any type of a team meeting or</p> <p>4 conversation?</p> <p>5 A. I don't recall.</p> <p>6 Q. Ms. Clark, as a person who has served in the</p> <p>7 capacity as a representative through the</p> <p>8 Guardianship Program, the issues that I just</p> <p>9 discussed about end-of-life planning -- death,</p> <p>10 burial, cremation, donor considerations -- in</p> <p>11 your activities and your experience, have you</p> <p>12 had to deal with those subjects with residents</p> <p>13 of SESDAC in the past?</p> <p>14 A. With other people that I'm guardian</p> <p>15 representative for?</p> <p>16 Q. Yes.</p> <p>17 A. Yes.</p> <p>18 Q. It's just you don't recall anything specific</p> <p>19 concerning Bill Red Bear. Is that fair?</p> <p>20 A. Correct.</p> <p>21 Q. For the most part then, individuals that are</p> <p>22 nearing death that may have a terminal disease</p> <p>23 or may be elderly, would you agree with me that</p> <p>24 it would be more of an obvious or natural</p> <p>25 discussion to have with those folks because the</p>	<p style="text-align: right;">13</p> <p>1 Q. How did you become aware of that?</p> <p>2 A. I received a phone call.</p> <p>3 Q. From who?</p> <p>4 A. SESDAC.</p> <p>5 Q. Which individual?</p> <p>6 A. I think it was Rennae O'Connor.</p> <p>7 Q. Rennae O'Connor was the service director at that</p> <p>8 time, wasn't she?</p> <p>9 A. I don't know what her title was.</p> <p>10 Q. Jenna Gobel, formerly known as Jenna --</p> <p>11 A. Wiepen.</p> <p>12 Q. Wiepen?</p> <p>13 A. Yeah.</p> <p>14 Q. She was involved in Bill's care prior to his</p> <p>15 death, wasn't she?</p> <p>16 A. Yes.</p> <p>17 Q. Did you have any discussions with Jenna prior to</p> <p>18 Bill's death on the date of his death?</p> <p>19 A. Prior to his death?</p> <p>20 Q. Prior to his death.</p> <p>21 A. Not that I recall.</p> <p>22 Q. Did you have any discussions with Jenna after</p> <p>23 his death on the date of his death?</p> <p>24 A. Yes.</p> <p>25 Q. Let's talk about that, okay? Did that</p>

<p style="text-align: right;">14</p> <p>1 discussion happen here in Vermillion or was it</p> <p>2 over the phone, or what were the circumstances</p> <p>3 of that discussion?</p> <p>4 A. Here in Vermillion at the hospital.</p> <p>5 Q. Was Jenna there?</p> <p>6 A. Yes.</p> <p>7 Q. Who else was there?</p> <p>8 A. Rennae O'Connor.</p> <p>9 Q. Anybody else?</p> <p>10 A. I don't remember anyone else.</p> <p>11 Q. How was it that you ended up at the hospital</p> <p>12 then at that point?</p> <p>13 A. I was called to go there.</p> <p>14 Q. By Rennae?</p> <p>15 A. I'm pretty sure it was Rennae.</p> <p>16 Q. So how did that, I mean, how was that explained</p> <p>17 to you; Bill is on his way to the hospital, he's</p> <p>18 in tough shape or Bill has died and we're taking</p> <p>19 him to the hospital? How did that happen?</p> <p>20 A. I don't recall the actual words. I just knew I</p> <p>21 was to meet them at the hospital.</p> <p>22 Q. Were you surprised?</p> <p>23 A. Yes.</p> <p>24 Q. Was there any explanation given to you as to why</p> <p>25 he was in that condition at that point?</p>	<p style="text-align: right;">16</p> <p>1 A. I don't know that I remember much about what was</p> <p>2 said.</p> <p>3 Q. Did it affect you?</p> <p>4 A. Yes.</p> <p>5 Q. Do you think that you were emotional at that</p> <p>6 point?</p> <p>7 A. Oh yes.</p> <p>8 Q. The other ladies that you said were there have</p> <p>9 indicated that there was a discussion about what</p> <p>10 to do with his remains. Does that fit your</p> <p>11 recollection at all?</p> <p>12 A. I don't remember.</p> <p>13 Q. What do you remember about that?</p> <p>14 A. About conversations?</p> <p>15 Q. Yes.</p> <p>16 A. Not much.</p> <p>17 Q. Did you have any conversations with the</p> <p>18 attending doctor or any of the medical personnel</p> <p>19 there at the hospital?</p> <p>20 A. I don't remember.</p> <p>21 Q. Did you make any notes, personal notes in a</p> <p>22 diary or anything about the events that day?</p> <p>23 A. Yes.</p> <p>24 Q. You did. Do you know if you still have those?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">15</p> <p>1 A. Can you repeat the question?</p> <p>2 Q. I'm trying not to confuse you but I'm --</p> <p>3 A. Yeah.</p> <p>4 Q. You know, the time period that I'm latching onto</p> <p>5 with this question is a fairly narrow time</p> <p>6 period. You said you got a call from somebody</p> <p>7 to go to the hospital and so obviously Bill was</p> <p>8 either there or he was on his way there and I</p> <p>9 just want to know, you know, what was said about</p> <p>10 why he was in that condition or why he was being</p> <p>11 taken to the hospital, you know, those kind of</p> <p>12 things. What can you recall?</p> <p>13 A. To the best that I can remember, I was told that</p> <p>14 Bill had passed away and was at the hospital and</p> <p>15 could I come there.</p> <p>16 Q. So at that point, somebody told you he's already</p> <p>17 dead?</p> <p>18 A. Yes.</p> <p>19 Q. So the conversation that you have with Jenna and</p> <p>20 Rennae at the hospital after you go over there,</p> <p>21 what was the topic? Do you remember?</p> <p>22 A. It would have been about Bill's death.</p> <p>23 Q. Specifically, though, what aspect, what was the</p> <p>24 discussion, what to do with his body, you know?</p> <p>25 Just tell us whatever you can remember.</p>	<p style="text-align: right;">17</p> <p>1 Q. If you would turn those over to Craig.</p> <p>2 MR. ZEPHIER: I'm going to request, Craig,</p> <p>3 that you consider turning those over to me and,</p> <p>4 you know, we'll work out the logistics, if</p> <p>5 there's any objection or whatever.</p> <p>6 MR. KENNEDY: Right. That's fair. Just</p> <p>7 get them to me, and then I'll deal with it and</p> <p>8 you won't have to worry about it.</p> <p>9 Q. (By Mr. Zephier) I just don't want you to</p> <p>10 destroy them.</p> <p>11 All right. Now ultimately Bill's body was</p> <p>12 taken from the hospital. Did you see Mr. Hansen</p> <p>13 out here before you came in?</p> <p>14 A. Yes.</p> <p>15 Q. Did you know him?</p> <p>16 A. Yes.</p> <p>17 Q. Know Mr. Hansen?</p> <p>18 A. Yes.</p> <p>19 Q. Mr. Hansen said he took Bill back to his funeral</p> <p>20 home but only after there was a team that came</p> <p>21 down from Sioux Falls to harvest his body parts.</p> <p>22 Do you remember anything about that?</p> <p>23 A. A little.</p> <p>24 Q. What do you remember?</p> <p>25 A. I remember talking about the donations.</p>

<p style="text-align: right;">18</p> <p>1 Q. Do you remember feeling pressured to make a 2 decision about that issue, what is it?</p> <p>3 A. I would have called Velda Bartel in Pierre and 4 asked --</p> <p>5 Q. Who is she?</p> <p>6 A. She worked for the Department, she has retired, 7 but she worked for the Department of Human 8 Services. She would have worked with Grant's 9 predecessor.</p> <p>10 Q. Oh, okay. So is she a lawyer?</p> <p>11 A. No.</p> <p>12 Q. What was her position, title? I've seen her 13 name mentioned in here.</p> <p>14 A. I don't know if she works at the Department of 15 Human Services.</p> <p>16 Q. Okay.</p> <p>17 A. I don't know her title.</p> <p>18 Q. All right. Was this phone conversation just you 19 and Velda or were others on the phone with you?</p> <p>20 A. It was between me and Velda.</p> <p>21 Q. And were you talking about the issue of donation 22 of body parts?</p> <p>23 A. I would have had to ask her opinion on that, 24 yes.</p> <p>25 Q. And did she give you an opinion?</p>	<p style="text-align: right;">20</p> <p>1 signing something in that respect?</p> <p>2 A. No, I don't.</p> <p>3 Q. Did you have any conversation with any next of 4 kin of Bill Red Bear before that decision was 5 made?</p> <p>6 A. No.</p> <p>7 Q. Do you know of any attempts that were made by 8 you or anyone else to talk with Bill Red Bear's 9 next of kin or family or relatives prior to the 10 decision to donate the body parts?</p> <p>11 A. I know there was attempts made at contacting the 12 family but I don't know when, if it was before, 13 after, during. I know there was attempts to 14 contact them; I just don't know the timeline of 15 when that was</p> <p>16 Q. The decision to donate his body parts was made 17 the very night that he passed away, correct?</p> <p>18 A. Yes.</p> <p>19 Q. And so there really wasn't much time there to 20 contact next of kin, was there, between his 21 death and the decision to donate?</p> <p>22 A. There would not have been a lot of time.</p> <p>23 Q. Just a matter of a couple hours, wasn't it?</p> <p>24 A. I don't remember how much time it was.</p> <p>25 Q. Were you present when the harvesting team came</p>
<p style="text-align: right;">19</p> <p>1 MR. KENNEDY: You have to answer verbally.</p> <p>2 A. I know, I'm thinking.</p> <p>3 MR. KENNEDY: All right.</p> <p>4 Q. (By Mr. Zephier) I can see the wheels turning.</p> <p>5 A. Yeah. Yes, she would have given mean opinion.</p> <p>6 Q. Okay. What was that?</p> <p>7 A. That it would be okay to do that.</p> <p>8 Q. It would be okay to have him, Darelle's, Bill's 9 body parts to be donated. Is that what you're 10 saying?</p> <p>11 A. For me to sign the paperwork to do that.</p> <p>12 Q. Did Secretary Hofer take part in any of that 13 conversation?</p> <p>14 A. I don't know.</p> <p>15 Q. Was there any discussion about whether or not 16 you had any legal authority as the 17 representative of Bill Red Bear after he died 18 whether your authority ceased to exist once he 19 passed away?</p> <p>20 A. That's why we called Velda.</p> <p>21 Q. So Ms. Clark, you then gave the authorization 22 for the donation to happen. Is that right?</p> <p>23 A. I remember being in on the discussion, and I 24 think I recall signing the papers.</p> <p>25 Q. Okay. Do you recall Rennae O'Connor also</p>	<p style="text-align: right;">21</p> <p>1 down?</p> <p>2 A. I don't remember.</p> <p>3 Q. Is that something that you would have 4 remembered, it would have stuck out in your 5 mind?</p> <p>6 A. Yes.</p> <p>7 Q. So the fact that you don't remember, is it 8 likely that you weren't there?</p> <p>9 A. Yes.</p> <p>10 Q. Bob Hansen said that actually the harvesting 11 team came to the hospital when they did their 12 work and then he comes over and picks the body 13 up and he thought went directly down to Sioux 14 City for the cremation. Did you know about 15 those arrangements at all?</p> <p>16 A. I don't recall.</p> <p>17 Q. Did anybody ask you whether or not you had an 18 opinion on whether there should be an autopsy 19 done on Bill Red Bear's body?</p> <p>20 A. I'm sorry, can you rephrase -- or ask that 21 question again. My mind wandered.</p> <p>22 Q. Sure. Did anybody ask you whether or not you 23 would give permission for an autopsy to be done 24 on Bill Red Bear's body following his death?</p> <p>25 A. Did anyone ask me. I don't recall.</p>

<p style="text-align: right;">22</p> <p>1 Q. There have been witnesses that have indicated</p> <p>2 that there was a discussion between law</p> <p>3 enforcement and the medical personnel at the</p> <p>4 hospital regarding an autopsy or whether one</p> <p>5 should or shouldn't be done. Were you present</p> <p>6 during any such discussion at all?</p> <p>7 A. No.</p> <p>8 Q. Were you aware that law enforcement was not</p> <p>9 requesting that an autopsy be done?</p> <p>10 A. No.</p> <p>11 Q. Were you aware that the medical professionals at</p> <p>12 the hospital were not requesting that an autopsy</p> <p>13 be done?</p> <p>14 A. No.</p> <p>15 Q. Ms. Clark, in your capacity as a representative</p> <p>16 of individuals, especially developmentally</p> <p>17 disabled individuals, have you ever had a</p> <p>18 situation come up where you've been asked to</p> <p>19 make these type of decisions on whether an</p> <p>20 autopsy needs to be done on a person's body or</p> <p>21 cremation needs to be done or a body part</p> <p>22 donation is to be done, other than Bill</p> <p>23 Red Bear?</p> <p>24 A. Other than Bill, no.</p> <p>25 Q. So this was a first-time experience for you in</p>	<p style="text-align: right;">24</p> <p>1 Nikki, I would like when I pass away that</p> <p>2 somebody can use my organs to help somebody in</p> <p>3 need, you know, so I want to be a donor, is that</p> <p>4 something important enough where you would,</p> <p>5 remember if he said that to you?</p> <p>6 A. Yes.</p> <p>7 Q. But those didn't happen, did they?</p> <p>8 A. No.</p> <p>9 Q. We couldn't find anything, and when I say "we,"</p> <p>10 I mean my team, myself and my staff, we couldn't</p> <p>11 find anything in the records where there was</p> <p>12 anything indicating a specific individual intent</p> <p>13 by Bill Red Bear that he wanted to be cremated</p> <p>14 or that he wanted to be an organ donor. Would</p> <p>15 that be something in your experience, as a</p> <p>16 representative through the Guardianship Program</p> <p>17 through SESDAC, would that be an important</p> <p>18 aspect enough where it should be somewhere</p> <p>19 within their records, if in fact it happened?</p> <p>20 A. If they had stated that, yes, it should be in</p> <p>21 the records.</p> <p>22 Q. Do you know of any type of directive that would</p> <p>23 have been discussed or attempted to be carried</p> <p>24 out with SESDAC where they were focusing more on</p> <p>25 organ donation or cremation as a means of</p>
<p style="text-align: right;">23</p> <p>1 that regard?</p> <p>2 A. Yes.</p> <p>3 Q. Tough decisions, aren't they?</p> <p>4 A. Yes.</p> <p>5 Q. Do you believe in the personal preference of</p> <p>6 individuals as it concerns the processing or</p> <p>7 disposal of their own individual remains when</p> <p>8 they die?</p> <p>9 A. Do I believe in?</p> <p>10 Q. Personal preference?</p> <p>11 A. Personal preference, yes.</p> <p>12 Q. Normally people would either include those</p> <p>13 desires within a will or a living will, those</p> <p>14 kind of things, wouldn't they?</p> <p>15 A. Yes.</p> <p>16 Q. Bill didn't have such a will or a living will,</p> <p>17 did he?</p> <p>18 A. Not to my knowledge.</p> <p>19 Q. And just so we're clear, if he would have said</p> <p>20 to you at some point along the way Nikki, I want</p> <p>21 to be cremated when I die, is that something</p> <p>22 that you likely would have recalled?</p> <p>23 A. Yes.</p> <p>24 Q. In the same breath, if he would have said to you</p> <p>25 during your association with him, you know,</p>	<p style="text-align: right;">25</p> <p>1 remains disposal of the residents?</p> <p>2 A. That was a long question. Can you ask that</p> <p>3 again?</p> <p>4 Q. I don't think I can.</p> <p>5 MR. ZEPHIER: Would you please read it</p> <p>6 back?</p> <p>7 MS. WIEDERRICH: Sure.</p> <p>8 (The requested portion of the record was read by</p> <p>9 the court reporter)</p> <p>10 A. Okay. I still don't understand it. Try asking</p> <p>11 that again.</p> <p>12 Q. (By Mr. Zephier) Okay. Let me break it down.</p> <p>13 A. Okay.</p> <p>14 Q. Were you aware of any focus in your position,</p> <p>15 you know, serving as a representative with these</p> <p>16 folks where SESDAC was telling people like you</p> <p>17 we need to be more cognizant of having these</p> <p>18 people serve as organ donors or having them</p> <p>19 agree to have their remains cremated?</p> <p>20 A. No.</p> <p>21 Q. Anything like that?</p> <p>22 A. No.</p> <p>23 Q. Bill Red Bear was 49 years old when he died.</p> <p>24 The medical records reveal that he choked on his</p> <p>25 own vomit after being sick for a number of days.</p>

<p style="text-align: right;">26</p> <p>1 In your own personal experience, does that to</p> <p>2 you seem somewhat of a mysterious death?</p> <p>3 A. No.</p> <p>4 Q. No. How would you classify that means of death?</p> <p>5 A. Accident.</p> <p>6 Q. Do you think there is value in the survivors,</p> <p>7 particularly the family, the next of kin to know</p> <p>8 precisely what happened to kill their brother?</p> <p>9 A. Can you ask that again?</p> <p>10 Q. Do you think there is value in the prospect of</p> <p>11 knowing from the standpoint of the next of kin</p> <p>12 and the family as to what it was that literally</p> <p>13 killed their brother?</p> <p>14 A. Yes.</p> <p>15 Q. But there wasn't an autopsy in this case. Do</p> <p>16 you understand that?</p> <p>17 A. Yes.</p> <p>18 Q. In fact, there was a cremation within 48 hours</p> <p>19 of his death. Do you recognize that?</p> <p>20 A. I did not know the time frame but --</p> <p>21 Q. Yeah, it was quick. So we have, you know, a</p> <p>22 death by choking on vomit. We have organs</p> <p>23 donated within 24 hours of his death. We have</p> <p>24 cremation within 48 hours of his death, and no</p> <p>25 autopsy to clearly discover, you know, what his</p>	<p style="text-align: right;">28</p> <p>1 death and particularly in the handling of his</p> <p>2 remains?</p> <p>3 A. Yes.</p> <p>4 Q. Have you been interviewed at all as a part of</p> <p>5 any type of investigation of the death of</p> <p>6 Bill Red Bear other than by me here today?</p> <p>7 A. No.</p> <p>8 Q. I don't want to talk about anything that you may</p> <p>9 have discussed with any of your lawyers, but I</p> <p>10 just need to know if at some point you gave some</p> <p>11 kind of a written or a recorded statement of</p> <p>12 some sort to like a claims adjuster or, you</p> <p>13 know, some other individual other than your</p> <p>14 attorneys. Has that happened?</p> <p>15 A. No.</p> <p>16 Q. Is this the first lawsuit that you've been</p> <p>17 involved in as a witness?</p> <p>18 A. Yes.</p> <p>19 Q. Obviously you know that you're not a party to</p> <p>20 this lawsuit, right?</p> <p>21 A. Yes.</p> <p>22 Q. You're not a defendant, you're not a plaintiff?</p> <p>23 A. Yes.</p> <p>24 Q. In the event that, you know, obviously I'm going</p> <p>25 to defer to Mr. Flynn and Mr. Kennedy</p>
<p style="text-align: right;">27</p> <p>1 body was going through which ultimately caused</p> <p>2 his death. Knowing all of that, can you see why</p> <p>3 a member of his family might be concerned as to</p> <p>4 what happened to him? Is it reasonable for you</p> <p>5 that they would raise questions as to what</p> <p>6 really happened with him?</p> <p>7 A. Yes.</p> <p>8 Q. Now I've talked with Grant about some things</p> <p>9 concerning protocol and regulations and</p> <p>10 certifications and all this stuff and he was</p> <p>11 kind enough to give me some information and</p> <p>12 point out some things that organizations and</p> <p>13 entities like SESDAC need to follow, and one of</p> <p>14 the things was specifically expressed within the</p> <p>15 administrative rules that the community support</p> <p>16 provider needed to be cognizant of human</p> <p>17 dignity. I'm just going to ask you, Nikki, do</p> <p>18 you agree with that concept, that that should be</p> <p>19 something that is required of these type of</p> <p>20 providers in taking care of and having the care,</p> <p>21 custody and control of individuals like</p> <p>22 Bill Red Bear?</p> <p>23 A. Human dignity important, yes.</p> <p>24 Q. In fact, do you think that obligation should</p> <p>25 even survive that individual's life into his</p>	<p style="text-align: right;">29</p> <p>1 ultimately, but is there anything that would get</p> <p>2 in the way for you personally in the event that</p> <p>3 this particular case went to trial where you</p> <p>4 could not testify as a witness at the trial?</p> <p>5 A. No.</p> <p>6 Q. I know you may not want to. I mean, I'm just</p> <p>7 asking is there anything that would prohibit you</p> <p>8 from doing that?</p> <p>9 A. No.</p> <p>10 Q. Okay. We're going to mark a couple of things</p> <p>11 here first and I'm just about done.</p> <p>12 (Plaintiff's Deposition Exhibits 20, 21 and 22</p> <p>13 marked for identification)</p> <p>14 MR. ZEPHIER: Have you seen those before?</p> <p>15 MS. FERRIS: I don't know that I have seen</p> <p>16 those. I know we have pictures at our office,</p> <p>17 but we'll get a copy anyway.</p> <p>18 Q. (By Mr. Zephier) All right. I'm going to show</p> <p>19 you what's marked as Exhibit 20. Have you seen</p> <p>20 that photograph before?</p> <p>21 A. No.</p> <p>22 Q. Do you recognize the setting there?</p> <p>23 A. No.</p> <p>24 Q. Do you recognize Bill Red Bear in that picture</p> <p>25 at all?</p>

<p>30</p> <p>1 A. It looks like him there.</p> <p>2 Q. Do you think you see him in that picture?</p> <p>3 A. I'm not sure. It's just part of a face. So no,</p> <p>4 I don't.</p> <p>5 Q. Do you know what that picture depicts?</p> <p>6 A. No.</p> <p>7 Q. Okay. Let's check out Number 21. Do you</p> <p>8 recognize anybody in that picture?</p> <p>9 A. Well, that looks like Bill in the middle.</p> <p>10 Q. Do you recognize the setting?</p> <p>11 A. No.</p> <p>12 Q. That's not a place that you recognize?</p> <p>13 A. No.</p> <p>14 Q. Let's take a look at Exhibit 22. Do you</p> <p>15 recognize Bill?</p> <p>16 A. Yes.</p> <p>17 Q. Do you recognize any of the people there with</p> <p>18 him?</p> <p>19 A. No.</p> <p>20 Q. The reason I'm showing you these photographs is</p> <p>21 obviously Bill, these are his family. This is</p> <p>22 his family. Did you know Bill to be visited</p> <p>23 from time to time by his family?</p> <p>24 A. Did I know if Bill was visited from time to time</p> <p>25 by his family?</p>	<p>32</p> <p>1 Q. You didn't take part in that?</p> <p>2 A. No.</p> <p>3 Q. Do you know what Dr. Evans' recommendation was</p> <p>4 in that regard?</p> <p>5 A. I was told that he said it was okay.</p> <p>6 Q. Did Dr. Evans ever say go ahead and do it or</p> <p>7 anything of that nature?</p> <p>8 A. I don't know.</p> <p>9 Q. Did you have any contact with Bill Red Bear,</p> <p>10 personally I'm talking about, physical contact</p> <p>11 where you were in the same room with him or did</p> <p>12 you have a phone conversation directly with him</p> <p>13 from December 30, 2008 through the date of his</p> <p>14 death, January 4, 2009?</p> <p>15 A. No, I did not.</p> <p>16 Q. And I'm going to ask you to think back to that</p> <p>17 period of time. Were you made aware during that</p> <p>18 period of time that he was sick?</p> <p>19 A. No, I was not.</p> <p>20 Q. Do you know whether Bill -- well, did you have</p> <p>21 occasion to see Bill on prior occasions where he</p> <p>22 had been sick?</p> <p>23 A. Yes.</p> <p>24 Q. And was there anything in particular that stuck</p> <p>25 out in your mind about these times when he had</p>
<p>31</p> <p>1 Q. Yes.</p> <p>2 A. Yes.</p> <p>3 Q. Did you actually have any personal contact with</p> <p>4 them?</p> <p>5 A. No.</p> <p>6 Q. But it is fair to say that you were aware that</p> <p>7 he did receive visits from his family?</p> <p>8 A. I had heard about visits.</p> <p>9 Q. Okay.</p> <p>10 A. I had not seen any visits.</p> <p>11 Q. Nikki, were you aware of the policy with SESDAC</p> <p>12 where not every visit or contact from family</p> <p>13 members was actually recorded in their</p> <p>14 documents? Were you aware of that?</p> <p>15 A. Was I aware that not every visit is recorded?</p> <p>16 Q. Right.</p> <p>17 A. No.</p> <p>18 Q. Did you attend his funeral?</p> <p>19 A. Yes.</p> <p>20 Q. Do you know Dr. Wayne Evans?</p> <p>21 A. I know of him. I don't recall ever meeting him.</p> <p>22 Q. Do you know of a phone conversation that was had</p> <p>23 with Dr. Evans about whether Bill should be</p> <p>24 cremated shortly after Bill's death?</p> <p>25 A. I was told about that conversation.</p>	<p>33</p> <p>1 been sick which would give you concern for</p> <p>2 whether or not he would ever survive the</p> <p>3 illness?</p> <p>4 A. No.</p> <p>5 Q. He was complaining of, you know, he had a fever.</p> <p>6 There was, you know, symptoms of having a stuffy</p> <p>7 nose, those kind of things. Do you know whether</p> <p>8 Bill was allergic to anything in particular with</p> <p>9 your involvement? I'm talking about medications</p> <p>10 or types of foods, anything of that nature.</p> <p>11 A. Not that I'm aware of.</p> <p>12 Q. Do you know Matt Miranda?</p> <p>13 A. No.</p> <p>14 Q. He was the young man on duty when Bill was</p> <p>15 unresponsive and had that aspiration. Do you</p> <p>16 know if the personnel on duty at Yale House</p> <p>17 during this relative time period were required</p> <p>18 to be trained on CPR?</p> <p>19 A. Staff required to be trained in CPR, yes.</p> <p>20 Q. Were you trained on CPR?</p> <p>21 A. Yes.</p> <p>22 Q. When you got to the hospital after receiving</p> <p>23 that call and you had this discussion about what</p> <p>24 to do with Bill's remains, was there at that</p> <p>25 point any question in your mind as to whether an</p>

1 STATE OF SOUTH DAKOTA IN CIRCUIT COURT
 2 COUNTY OF CLAY FIRST JUDICIAL CIRCUIT
 3

4 * * * * *
 5 BERNADINE RED BEAR, a/k/a Civil No. 11-377
 6 BERNADINE SHIELDS, as
 7 Administrator of the Estate of
 8 DARELLE RED BEAR, Deceased,
 9 Plaintiff,
 10 -vs-
 11 SESDAC, Inc.,
 12 Defendant.

13 USD Law School
 14 Vermillion, SD
 15 July 9, 2013
 16 2:45 p.m.
 17 * * * * *

18 D E P O S I T I O N O F
 19 JENNA WIEPEN GOBEL

20 * * * * *
 21 APPEARANCES:

22 Mr. Robin L. Zephier
 23 Abourezk & Zephier
 24 2020 W. Omaha Street
 25 Rapid City, South Dakota 57702
 Counsel for Plaintiff;

Ms. Jennifer L. Ferris
 Lynn, Jackson, Shultz & Lebrun
 110 N. Minnesota Avenue, Suite 400
 Sioux Falls, South Dakota 57104
 Counsel for Defendant.

ALSO PRESENT: Gerald E. Tracy II, SESDAC
 Beau Barrett, Intern
 Lynn, Jackson, Shultz & Lebrun

<p>2</p> <p>1 INDEX TO WITNESS</p> <p>2</p> <p>3 Examination</p> <p>4</p> <p>5 By Mr. Zephier: Page 3</p> <p>6</p> <p>7</p> <p>8</p> <p>9 INDEX TO EXHIBITS</p> <p>10</p> <p>11 Marked</p> <p>12</p> <p>13 (No exhibits marked)</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>4</p> <p>1 A. Okay.</p> <p>2 Q. And I'm here representing the Plaintiffs in an</p> <p>3 action that's been filed against SESDAC. I</p> <p>4 represent the Estate of Darelle "Bill" Red Bear.</p> <p>5 A. Okay.</p> <p>6 Q. Do you remember him?</p> <p>7 A. I do.</p> <p>8 Q. Do you still live in Vermillion?</p> <p>9 A. No.</p> <p>10 Q. Where do you live?</p> <p>11 A. Nebraska.</p> <p>12 Q. Nebraska. Do you work here in Vermillion?</p> <p>13 A. I do.</p> <p>14 Q. Are you full time?</p> <p>15 A. Yes.</p> <p>16 Q. What's your present position?</p> <p>17 A. I am a service coordinator.</p> <p>18 Q. That's the same thing that Rennae O'Connor is,</p> <p>19 right?</p> <p>20 A. No.</p> <p>21 Q. Oh, she is a service director?</p> <p>22 A. Correct.</p> <p>23 Q. So you're a service coordinator. And is</p> <p>24 Ms. O'Connor your supervisor?</p> <p>25 A. Yes.</p>
<p>3</p> <p>1 The Deposition of Jenna Wiepen Gobel was</p> <p>2 taken at the offices of the USD Law School, 414</p> <p>3 East Clark Street, State Bar Room, Room 133,</p> <p>4 Vermillion, South Dakota, on the 9th day of July</p> <p>5 2013, commencing at the hour of 2:45 p.m.,</p> <p>6 before Lisa Griffin Wiederrich, Court Reporter</p> <p>7 and Notary Public within and for the State of</p> <p>8 South Dakota, Pursuant to Notice.</p> <p>9 JENNA WIEPEN GOBEL</p> <p>10 called as a witness, having been first duly</p> <p>11 sworn, testified as follows:</p> <p>12 EXAMINATION BY MR. ZEPHIER:</p> <p>13 Q. Good afternoon, ma'am.</p> <p>14 A. Good afternoon.</p> <p>15 Q. Would you please state your full name?</p> <p>16 A. Jenna Marie Wiepen Gobel.</p> <p>17 Q. Were you previously known by some other last</p> <p>18 name?</p> <p>19 A. That was Jenna Wiepen.</p> <p>20 Q. And when did you get married or change your</p> <p>21 name?</p> <p>22 A. I was married in September 20, 2008. I don't</p> <p>23 believe it was changed through like the Social</p> <p>24 Security process until like 2009.</p> <p>25 Q. Okay. My name is Robin Zephier.</p>	<p>5</p> <p>1 Q. As a service coordinator, do you have</p> <p>2 individuals under your supervision?</p> <p>3 A. No.</p> <p>4 Q. Where do you mainly work then presently?</p> <p>5 A. Presently?</p> <p>6 Q. Yeah.</p> <p>7 A. I work at the office at 1314 East Cherry Street.</p> <p>8 Q. Main office?</p> <p>9 A. Main office.</p> <p>10 Q. Do you go out and visit any of the individual</p> <p>11 homes from time to time?</p> <p>12 A. I do.</p> <p>13 Q. And what are your duties as a service</p> <p>14 coordinator?</p> <p>15 A. My role as a service coordinator, it is my job</p> <p>16 to develop, facilitate and monitor a person's</p> <p>17 support plan. I facilitate team meetings. I am</p> <p>18 also a point of contact for the team, family</p> <p>19 members, guardian and the person.</p> <p>20 Q. Okay.</p> <p>21 A. I also monitor people's medical needs and ensure</p> <p>22 follow up is completed as needed.</p> <p>23 Q. How long have you been a service coordinator?</p> <p>24 A. I started my position March 20th of 2007.</p> <p>25 Q. Were you a service coordinator back in</p>

<p style="text-align: right;">6</p> <p>1 January of '09?</p> <p>2 A. I was.</p> <p>3 Q. Were you Bill Red Bear's service coordinator?</p> <p>4 A. I was.</p> <p>5 Q. Were you part of his ISP team?</p> <p>6 A. His personal support plan team, yes.</p> <p>7 Q. And back in late 2008 and early 2009 -- well,</p> <p>8 Bill died on January 4, 2009, but back in late</p> <p>9 2008, did you have personal contact with him on</p> <p>10 a daily basis?</p> <p>11 A. I did not have contact with him on a daily</p> <p>12 basis.</p> <p>13 Q. How often would you have contact with him during</p> <p>14 that period?</p> <p>15 A. As a service coordinator, it's my responsibility</p> <p>16 to do quarterly monitoring on the person's</p> <p>17 support plan. That would include, you know,</p> <p>18 visiting the person in their environment.</p> <p>19 Q. What does that entail as far as personal contact</p> <p>20 is concerned?</p> <p>21 A. Visually seeing the person, watching how</p> <p>22 supports are being done that were outlined in a</p> <p>23 person's support plan. I would go into the home</p> <p>24 or the place where the person is doing daytime</p> <p>25 supports and I would watch staff interactions.</p>	<p style="text-align: right;">8</p> <p>1 Q. What's your understanding about the distinction</p> <p>2 between the working file and the master file?</p> <p>3 A. A master file has a collection of lots of</p> <p>4 different records. It includes assessments,</p> <p>5 social histories, medical information, Social</p> <p>6 Security information, like financial</p> <p>7 information, including the support plan and</p> <p>8 quarterly observation monitoring, STO data. So</p> <p>9 that was the master file.</p> <p>10 The working file at that time would have</p> <p>11 included things like the Consumer Info Sheet.</p> <p>12 It would have included if a person had certain</p> <p>13 assessments, those things would have been</p> <p>14 related in there, too. A person like likes and</p> <p>15 dislikes would also be reflected in a working</p> <p>16 file.</p> <p>17 Q. Does the working file get integrated somehow</p> <p>18 with the master file at some point?</p> <p>19 A. What do you mean by integrated?</p> <p>20 Q. The information from the working file gets taken</p> <p>21 into the master file or vice versa?</p> <p>22 A. The working file is built off of the master</p> <p>23 file, meaning a Consumer Info sheet that would</p> <p>24 have people's information on it, family</p> <p>25 contacts. That's also in the master file.</p>
<p style="text-align: right;">7</p> <p>1 I would watch for things that we indicated we</p> <p>2 would be doing in the plan, monitoring that,</p> <p>3 reporting progress.</p> <p>4 Q. And you report progress to who?</p> <p>5 A. I report progress on the person's plan by</p> <p>6 writing notes.</p> <p>7 Q. And who do you report to?</p> <p>8 A. My supervisor is Rennae O'Connor.</p> <p>9 Q. And how often did you have to report -- well,</p> <p>10 let's use Bill Red Bear as an example. How</p> <p>11 often would you report to your supervisor about</p> <p>12 how he's progressing under his plan?</p> <p>13 A. Can you repeat that question? I don't</p> <p>14 understand.</p> <p>15 Q. Sure. You said that you have to periodically</p> <p>16 report to your supervisor the progress of the</p> <p>17 individual plan, and I'm just curious how often</p> <p>18 would you have to do that?</p> <p>19 A. Well, we do actual reporting on the progress of</p> <p>20 the person's plan on a quarterly basis. That</p> <p>21 information is then kept in his file.</p> <p>22 Q. Which file?</p> <p>23 A. His master file.</p> <p>24 Q. Are you aware of the working file?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">9</p> <p>1 That's how the working file is built.</p> <p>2 Q. Are you aware of any policy or protocol or</p> <p>3 procedure within SESDAC to maintain an update</p> <p>4 family or next-of-kin contact list?</p> <p>5 A. When we receive new information from families,</p> <p>6 guardians of new contact information as a</p> <p>7 service coordinator, we would update that</p> <p>8 information.</p> <p>9 Q. And where does that go?</p> <p>10 A. In the person's master file. And then if we</p> <p>11 updated like a Consumer Info sheet because we</p> <p>12 had new information, we would also then disburse</p> <p>13 that back into the working file so that updated</p> <p>14 information is there as well.</p> <p>15 Q. Would you consider yourself familiar with</p> <p>16 Bill Red Bear's situation when he was at SESDAC?</p> <p>17 A. What situation are you referring to?</p> <p>18 Q. In general.</p> <p>19 A. What -- I don't know how to answer that</p> <p>20 regarding --</p> <p>21 Q. Sure.</p> <p>22 A. What situation?</p> <p>23 Q. His living arrangement.</p> <p>24 A. Okay.</p> <p>25 Q. His appearance, his progress, his behavior, his</p>

<p>10</p> <p>1 habits in general.</p> <p>2 A. Is there something specific?</p> <p>3 Q. No. I'm asking a general question.</p> <p>4 A. Okay.</p> <p>5 Q. Do you consider yourself familiar with</p> <p>6 Bill Red Bear's general situation with SEDAC</p> <p>7 over the time period in which you served as his</p> <p>8 service coordinator?</p> <p>9 A. I feel that I am familiar with the things that</p> <p>10 were discussed and developed in his team</p> <p>11 meetings as I facilitated that. Those things</p> <p>12 were part of his plan. That is what I'm</p> <p>13 familiar with.</p> <p>14 Q. Are you familiar with the team meeting that</p> <p>15 occurred some time in 2008, roughly about four</p> <p>16 months before Bill died?</p> <p>17 A. I am.</p> <p>18 Q. And Rennae O'Connor said that she was a part of</p> <p>19 that meeting where his individual plan was</p> <p>20 discussed and the issue about burial came up.</p> <p>21 Do you remember that?</p> <p>22 A. I remember the issue of burial coming up.</p> <p>23 Q. And what do you remember about the discussion?</p> <p>24 A. We had a discussion during that team meeting.</p> <p>25 We had asked the question to Bill about where he</p>	<p>12</p> <p>1 specifically was said to Bill because he was</p> <p>2 developmentally disabled. And if the question</p> <p>3 was posed to him where would you want to be</p> <p>4 buried, is it possible he understood that, that</p> <p>5 one day when he died his body would be buried?</p> <p>6 A. I can't answer if that's truly what Bill</p> <p>7 thought.</p> <p>8 Q. All right. But since you know -- do you know</p> <p>9 for certain that the word "cremation" never came</p> <p>10 up in that meeting?</p> <p>11 A. I do not recall that being brought up.</p> <p>12 Q. So if that was never brought up, do you think</p> <p>13 that Bill Red Bear would assume that it meant</p> <p>14 having his ashes buried beside his friend?</p> <p>15 A. I can't say if that's what he assumed or not.</p> <p>16 Q. That would be kind of an unusual assumption,</p> <p>17 wouldn't it, under those circumstances?</p> <p>18 A. I don't understand what you're asking.</p> <p>19 Q. I'm just asking questions. If you can't answer</p> <p>20 them, then fine. You were a part of that</p> <p>21 discussion. This is all I'm asking is the words</p> <p>22 that you used were "buried," right?</p> <p>23 A. Yes.</p> <p>24 Q. Did you intend to mean burial of his ashes or</p> <p>25 did you intend to discuss with him the burial of</p>
<p>11</p> <p>1 would like to be buried when that time came.</p> <p>2 Bill clearly stated to us and his team members</p> <p>3 that he wanted to be buried next to his friend</p> <p>4 in Vermillion.</p> <p>5 Q. Okay. But the word "buried" was specifically</p> <p>6 used?</p> <p>7 A. Yes.</p> <p>8 Q. Was the word "cremation" ever brought up at all?</p> <p>9 A. We did not discuss that at that time.</p> <p>10 Q. Did you assume that Bill Red Bear was assuming</p> <p>11 that he was talking about burial in the</p> <p>12 classical sense, in a casket?</p> <p>13 A. I can't make that -- I can't speak for that.</p> <p>14 Q. Sure. But I think you said that the question</p> <p>15 was posed to him where do you want to be buried</p> <p>16 when the day comes, right?</p> <p>17 A. Yes. I asked that question.</p> <p>18 Q. Was that you? You asked that question?</p> <p>19 A. I can't recall if I asked that question or</p> <p>20 someone with the team asked that, but I can't</p> <p>21 recall specifically which one actually asked</p> <p>22 that question.</p> <p>23 Q. So it might have been you?</p> <p>24 A. It might have been me.</p> <p>25 Q. Okay. I'm just trying to find out what</p>	<p>13</p> <p>1 his whole body?</p> <p>2 A. We didn't go into the depth of that.</p> <p>3 Q. I understand that. But somebody said the word</p> <p>4 "burial." What did you understand when that</p> <p>5 word was used?</p> <p>6 A. My understanding of that is where he would want</p> <p>7 to be buried such as in where, I mean, you would</p> <p>8 be placed.</p> <p>9 Q. Where something would be placed?</p> <p>10 A. Yes.</p> <p>11 Q. Again, you know, I'm just asking questions. If</p> <p>12 you can't answer them, that's fine.</p> <p>13 A. Okay.</p> <p>14 Q. What you're getting at here is you're talking</p> <p>15 with a developmentally disabled person about</p> <p>16 where he wants to be buried, and you never talk</p> <p>17 about or raise the word "cremation." All I'm</p> <p>18 suggesting is that from your standpoint, when</p> <p>19 somebody in your group addressed that to Bill</p> <p>20 Red Bear about where he would want to be buried,</p> <p>21 isn't it a fair assumption that he understood</p> <p>22 that that was burial in the classical sense,</p> <p>23 that he was going to be put in a coffin and</p> <p>24 buried in the ground?</p> <p>25 A. I'm not sure I can answer that.</p>

14

1 Q. I think you already have. Were you present on
2 the day he died?
3 A. **I was not in Vermillion.**
4 Q. You were not. Where were you?
5 A. **At my home.**
6 Q. And that's in Nebraska?
7 A. **Yes.**
8 Q. But somehow some way you found out he died,
9 right?
10 A. **Yes.**
11 Q. Did you come back to Vermillion after he had
12 died?
13 A. **Not that day.**
14 Q. The next day?
15 A. **Yes.**
16 Q. Was there some meeting or debriefing that was
17 done over what to be done about Bill Red Bear
18 passed away?
19 A. **I received a phone call.**
20 Q. And there was a discussion about his remains.
21 Is that right?
22 A. **Yes.**
23 Q. Was that discussion that you took part in over
24 the phone or were you physically present?
25 A. **That was a conversation I had over the phone.**

15

1 Q. And who was on the other line?
2 A. **Rennae O'Connor.**
3 Q. Okay. Was anybody else on the line?
4 A. **The guardian, Nikki Clark, was present with**
5 **Rennae.**
6 Q. Okay. Anybody else?
7 A. **Not that I can recall.**
8 Q. Was it a direct line, just one on one, or was
9 there a three-way call or a four-way call?
10 A. **No. I recall that just being a, I mean, like a**
11 **cell phone to cell phone type thing. No**
12 **three-way call.**
13 Q. And where were you during that conversation?
14 Were you in Vermillion?
15 A. **No. I was at my home in Nebraska.**
16 Q. In Nebraska. Okay. And the other two women
17 were here in Vermillion?
18 A. **Yes.**
19 Q. At that point, that would have been January 5th
20 of 2009, right?
21 A. **Not when I received that call. January 4 was**
22 **the day I received that call.**
23 Q. Well, Bill passed away, you know, around supper
24 time that day, January 4, 2009, so when was it
25 that this call took place?

16

1 A. **My recollection is that it was later that**
2 **evening that that conversation through the phone**
3 **occurred.**
4 Q. Did they call you?
5 A. **Yes.**
6 Q. And in as much as you can recall, what was the
7 discussion about?
8 A. **Regarding?**
9 Q. What was it? What did you talk about?
10 A. **We talked about the cremation and we talked**
11 **about whether or not that was, what the team**
12 **members' thoughts were on that.**
13 Q. Anything else?
14 A. **That we discussed on the phone or regarding**
15 **cremation?**
16 Q. On the phone in that conversation.
17 A. **Okay. Yep. We also got brought up about organ**
18 **donation and we discussed that.**
19 Q. Okay. And you and Rennae and Nikki were three
20 members of Bill's team. Is that right?
21 A. **Yes.**
22 Q. Where were the other team members?
23 A. **I can't speak to where they were at.**
24 Q. So it was just you three on that conversation?
25 A. **We did not have like a three-way or**

17

1 **multiple-phone conversation at all. I remember**
2 **the conversation that I was given or that I had**
3 **with Rennae and Nikki being present with Rennae**
4 **that they were also going to contact the other**
5 **team members.**
6 Q. Okay. And did they do that?
7 A. **Yes.**
8 Q. Were you a part of the bigger discussion when
9 the other team members joined in?
10 A. **No, because I didn't have a three-way calling**
11 **thing. They had those conversations with them.**
12 Q. So this was happening the very evening that Bill
13 died?
14 A. **Yes.**
15 Q. Were you aware of anything in his records that
16 existed talking about his desires to be
17 cremated?
18 A. **I do not recall any of that information.**
19 Q. Was there anything within his records that you
20 can recall or even personal conversations with
21 him that suggested that he wanted to have his
22 body parts donated?
23 A. **No, I do not recall conversations with Bill**
24 **about that or in his records.**
25 Q. And so those were decisions that were made about

18

1 his remains by people that were not his next of
 2 kin or family. Would you agree?
 3 **A. Yes.**
 4 **Q.** And you were a part of that, right?
 5 **A. Yes.**
 6 **Q.** Did you acquiesce to have his remains cremated?
 7 **A. Can you repeat that?**
 8 **Q.** Did you agree to have his remains cremated?
 9 **A. I gave my opinion on that.**
 10 **Q.** You supported that?
 11 **A. Yes.**
 12 **Q.** Why did you support that?
 13 **A. Because as Bill's team and his guardian present,**
 14 **we were the only people at that time to make**
 15 **that decision.**
 16 **Q.** But why did you decide to have him cremated
 17 yourself? Why did you vote that way?
 18 **A. It was something that, I mean, they indicated to**
 19 **us that that was something Bill, I mean, he**
 20 **was I guess -- the medical professionals had**
 21 **indicated that his body, if we chose, could be**
 22 **used for organ donation. When we discussed**
 23 **that, I didn't feel that that was something that**
 24 **Bill would have been opposed to.**
 25 **Q.** But you really didn't know, did you?

19

1 **A. No.**
 2 **Q.** Because he had never said anything about it?
 3 **A. We never had any conversations regarding organ**
 4 **donation.**
 5 **Q.** So you people on that phone call in that
 6 discussion made the decision for him that was
 7 best for him to donate his body parts?
 8 **A. We were the people available to make that**
 9 **decision.**
 10 **Q.** What was the driving force, I guess the intent
 11 to want to have his body parts donated to
 12 somebody else?
 13 **A. I'm not sure if there's, if I had a driving**
 14 **force behind that other than it was something**
 15 **that could have, I mean --**
 16 **Q.** I sense this is hard for you to talk about. Is
 17 it? It's a very sensitive issue?
 18 **A. Uh-huh.**
 19 **Q.** You know, if you need to take a break, that's
 20 fine, but we need to try to clarify some things.
 21 I'm representing the estate. His sister is the
 22 special administrator. The surviving siblings
 23 have an interest in this. And we're out to find
 24 the truth of what happened, okay?
 25 **A. Okay.**

20

1 **Q.** And when I suggest to you what was the driving
 2 force of that decision, I know that it wasn't
 3 your decision alone, but I just need to try to
 4 find out what the motivation was to say that
 5 somebody should have his dead body parts donated
 6 when he himself has not authorized that. Do you
 7 see what I mean?
 8 **A. Yes. I didn't have opposition to that. I gave**
 9 **my opinion on the matter, as it would be**
 10 **something that would help others. I don't have**
 11 **much more of an opinion on that, other than it's**
 12 **something that could help others have something**
 13 **and that's something Bill could contribute to**
 14 **others.**
 15 **Q.** Okay. That was discussed then?
 16 **A. That was my thought.**
 17 **Q.** Was there anybody in the discussion that was
 18 opposed to that, to the donation?
 19 **A. No. I do not recall.**
 20 **Q.** Everybody agreed?
 21 **A. Team members did.**
 22 **Q.** Were you aware of the fact that there was no
 23 autopsy on his body?
 24 **A. Yes.**
 25 **Q.** Did you have any personal feelings as to whether

21

1 that was appropriate not to have an autopsy in
 2 light of the way that he died?
 3 **A. I have no opinion on that either way. That was**
 4 **not something that the medical professionals had**
 5 **indicated that was needed. That information was**
 6 **I guess okay with me or I didn't have an opinion**
 7 **on that.**
 8 **Q.** Do you have a will?
 9 **A. Me personally?**
 10 **Q.** Yeah.
 11 **A. Can I ask how that applies?**
 12 **Q.** I'm just curious. You know, you're making a
 13 decision on somebody else's body and I'm just
 14 wondering if you've made the same decision for
 15 your own.
 16 **A. No.**
 17 **Q.** Do you have a living will?
 18 **A. No.**
 19 **Q.** Are you an organ donor?
 20 **A. It's been a long time since I've renewed my**
 21 **driver's license. I'm not sure what it**
 22 **correctly states on there.**
 23 **Q.** Do you have it with you?
 24 **A. No, I don't. It's in my car.**
 25 **Q.** Because it would say on there, wouldn't it?

22

1 A. It would.

2 Q. I'm just making an assumption here, but if you

3 don't recall, you probably aren't an organ

4 donor.

5 A. Given my age and it's been probably over five or

6 five years ago probably since I've renewed my

7 driver's license, probably not something that I,

8 you know, had decided to do at that time.

9 Q. Sure. Did you ever meet any of Bill's family,

10 his next of kin?

11 A. No.

12 Q. Did you ever talk with any of them over the

13 phone?

14 A. Not prior to his death.

15 Q. Afterward?

16 A. Yes.

17 Q. We'll get into that.

18 A. Okay.

19 Q. Did you take part in any of the discussion about

20 Bill writing to his family?

21 A. That was a support and his support plan was to

22 write letters to his family, yes.

23 Q. Did he receive letters from his family?

24 A. I know prior, around Christmastime that year was

25 the last thing I recall regarding someone

23

1 supporting him to write a letter to his family.

2 I know there was indication or documentation

3 that he did not receive a letter back at that

4 time.

5 Q. Did you ever see any letters from his family to

6 Bill?

7 A. Not during my time, I did not see an actual

8 letter.

9 Q. Ms. O'Connor has already testified that SEDDAC

10 has a policy that they do not record each and

11 every contact or visit from family members that

12 the resident would have. Are you aware of that?

13 A. That there is or isn't? Sorry, I missed the

14 first part.

15 Q. That there isn't.

16 A. That there isn't a policy. Yes.

17 Q. So theoretically if you're not with that person

18 all the time, if you're not with the resident

19 all the time, there may be things that you

20 yourself are unaware of. Isn't that fair?

21 A. That could be an accurate statement because I'm

22 not with the person every day.

23 Q. Sure. Did you go to the funeral service?

24 A. I did.

25 Q. Did you sign the green book?

24

1 A. That? Yes, I believe so.

2 Q. I think you did, too.

3 A. I believe I'm the one who got that book so --

4 Q. The people that attended the funeral service,

5 for the most part, were they mainly people from

6 SEDDAC?

7 A. There was outside people there, too, outside of

8 people that we support at SEDDAC.

9 Q. What steps were you made aware of or were you

10 personally aware of that were taken to contact

11 Bill's next of kin after he died in the late

12 afternoon of January 4, 2009?

13 A. I can't recall making calls on the 4th. I

14 remember making phone calls the following day,

15 when I was back in the office. Had information

16 in front of me. I was not an on-call person at

17 that time. I didn't have that information in

18 front of me. I wasn't in Vermillion.

19 Q. Okay. So you started making calls on the 5th?

20 A. Yes. That's what I remember.

21 Q. And where were you making calls from?

22 A. I was calling off our Consumer Info sheets.

23 That is a picture of the person and it has

24 family contact information on there. Those are

25 the phone numbers that I used to make contacts.

25

1 Q. Where were you physically, though, when you were

2 calling?

3 A. Oh. My office.

4 Q. On Cherry Street?

5 A. Yep. The main office building.

6 Q. So were those long-distance calls?

7 A. Yes, they would have been. Yep.

8 Q. Do you remember specifically who or what you

9 were calling?

10 A. I was calling, the people who were on the

11 Consumer Info sheet would have been brothers or

12 sisters who would have been on there.

13 Q. Do you remember any of the names?

14 A. Without referring to the actual Consumer Info

15 sheets, I can't tell you specifically who was on

16 there without looking at it.

17 Q. Okay. Did you call any entity or any

18 governmental offices, to your knowledge?

19 A. I did not make that call.

20 Q. Do you know whether Rennae was making calls as

21 well?

22 A. Yes. I believe she made a call to an outside

23 agency.

24 Q. Was she making calls from the main office, too?

25 A. I can't answer to where she was making her calls

<p style="text-align: right;">26</p> <p>1 from.</p> <p>2 Q. I'm just trying to find out because we're going</p> <p>3 to try to get phone records and we need to know</p> <p>4 where they were made from.</p> <p>5 A. Okay.</p> <p>6 Q. Did you ever talk with a human being as a result</p> <p>7 of your calls on the 5th?</p> <p>8 A. On the 5th, no.</p> <p>9 Q. What types of responses were you getting, if</p> <p>10 anything?</p> <p>11 A. From what I can recall, I can't quite tell you</p> <p>12 if they were all like disconnected calls or if</p> <p>13 they were like wrong number calls. I just know</p> <p>14 that they weren't the person that I was asking</p> <p>15 for on the phone.</p> <p>16 Q. Do you remember what part of the country you</p> <p>17 were calling?</p> <p>18 A. South Dakota.</p> <p>19 Q. Do you remember which part of South Dakota?</p> <p>20 A. Okay. I remember there being towns of like</p> <p>21 Allen.</p> <p>22 Q. Do you know where Allen is?</p> <p>23 A. The central part of the state. I'm not from</p> <p>24 South Dakota. I can't give you an accurate</p> <p>25 response on that.</p>	<p style="text-align: right;">28</p> <p>1 specifically how long that took.</p> <p>2 Q. I'll tell you it happened within 24 hours.</p> <p>3 A. Okay.</p> <p>4 Q. Were you aware that he was cremated within 48</p> <p>5 hours?</p> <p>6 A. I guess I'm not familiar on the specific times,</p> <p>7 but I know, I mean, I know that decision was</p> <p>8 made and he went to go be cremated. I mean, I</p> <p>9 knew that process was moving.</p> <p>10 Q. When you ladies were discussing the prospect of</p> <p>11 cremation and donation, was there ever any</p> <p>12 discussion about the fact that cremation would</p> <p>13 be easier and less expensive?</p> <p>14 A. I don't ever recall a conversation that that was</p> <p>15 an easier thing. I recall us contacting, not</p> <p>16 myself personally, but having a conversation</p> <p>17 with another person regarding thoughts on</p> <p>18 cremation.</p> <p>19 Q. Do you believe cremation should be a personal</p> <p>20 preference?</p> <p>21 A. Sorry. Can you repeat your question?</p> <p>22 Q. Yeah. Do you believe cremation is a personal</p> <p>23 preference for the individual?</p> <p>24 A. I believe that if, I mean, if a person has</p> <p>25 expressed that desire, then that would be</p>
<p style="text-align: right;">27</p> <p>1 Q. You don't know where Allen is then?</p> <p>2 A. No. Without looking at a map, I can't tell you.</p> <p>3 Q. Did you recall speaking with any tribal</p> <p>4 authorities?</p> <p>5 A. No. Not on the 5th.</p> <p>6 Q. Were you and Rennae coordinating who you were</p> <p>7 calling, like I'm going to call these people,</p> <p>8 I'm going to call these people, et cetera?</p> <p>9 A. Yes. We had conversations about how -- I</p> <p>10 remember I told her I tried calling the people</p> <p>11 on our Consumer Info sheet. I remember her</p> <p>12 telling me she tried calling, you know, an</p> <p>13 outside party as well. Both, I mean, came up</p> <p>14 with nothing in regards to the numbers that we</p> <p>15 had on his Consumer Info sheet.</p> <p>16 Q. Jenna, were you aware that Bill's body was</p> <p>17 harvested for the tissue and organs and bones</p> <p>18 within 24 hours of his death?</p> <p>19 A. I was aware that that decision was made.</p> <p>20 Q. Were you aware that it actually happened?</p> <p>21 A. I guess, I mean, I'm aware that that decision</p> <p>22 was made, yes, go ahead and do that. I guess</p> <p>23 I'm not familiar with the timeline of that. I</p> <p>24 just know that the decision to do that was made</p> <p>25 within 24 hours. I guess I don't know</p>	<p style="text-align: right;">29</p> <p>1 something that, you know, you would honor.</p> <p>2 But you know, some times those things aren't</p> <p>3 made until after the fact, then there just isn't</p> <p>4 the ability to ask a person.</p> <p>5 Q. Right, right. But do you think it's appropriate</p> <p>6 when the decedent has not made it clear that</p> <p>7 they want to be cremated that the decision</p> <p>8 should be made to go ahead and cremate them</p> <p>9 despite the fact that it's not clear? Do you</p> <p>10 think that's appropriate?</p> <p>11 A. I think given the decision to be cremated or not</p> <p>12 cremated, if that's not something that the</p> <p>13 person has made known, I think the decision just</p> <p>14 has to be made; upon someone's death, someone</p> <p>15 has to make that decision.</p> <p>16 Q. Wouldn't it be better if the decedent was silent</p> <p>17 as to the issue of cremation to not cremate?</p> <p>18 A. I guess I also can't speak that they wouldn't</p> <p>19 also have an opinion about not being cremated.</p> <p>20 I don't know what a person's desire would be.</p> <p>21 Q. Right.</p> <p>22 A. Unless it's asked and it's made known.</p> <p>23 Q. You would like your own personal preference to</p> <p>24 be carried forward upon your death, right? You</p> <p>25 wouldn't want people to make assumptions as to</p>

30

1 what your desires are or were, would you?

2 **A. I think if I personally did not make my personal**

3 **preferences known, then again, someone else has**

4 **to make that decision for me because it wasn't**

5 **known.**

6 **Q. Right. Just so we're clear here, you never had**

7 **any discussion with any next of kin or immediate**

8 **family or relatives of Bill Red Bear that it was**

9 **okay to cremate his body, correct?**

10 **A. I never had any conversations with his family.**

11 **Q. And the same goes for the donation of his**

12 **organs, correct?**

13 **A. Yes.**

14 **Q. Or not to have or request or recommend an**

15 **autopsy, correct?**

16 **A. Correct. I had no conversation.**

17 **Q. Were you a part of any conversation or**

18 **discussion that involved Secretary Hofer about**

19 **whether or not there was a legitimate**

20 **guardianship after Bill passed away?**

21 **A. I was not part of conversations with**

22 **Jerry Hofer. I did not directly speak to him**

23 **about that.**

24 **Q. Were you aware of that conversation?**

25 **A. I recall that being a discussion that, you know,**

31

1 **he would have been involved with as well as, you**

2 **know, Bill's guardian rep, I mean, yes.**

3 **Q. They felt that they might not have legal**

4 **authority to even make that decision. Wasn't**

5 **that the case?**

6 **A. I can't recall those specific details. I wasn't**

7 **specifically involved with those specific**

8 **contacts and conversations.**

9 **Q. Did you talk with Dr. Wayne Evans at all about**

10 **what to be done with Bill's body after he died?**

11 **A. I did not talk to Dr. Wayne Evans about Bill's**

12 **body.**

13 **Q. Did you see Bill at all during the time that he**

14 **was sick from December 30th of 2008 through**

15 **January 4th of 2009?**

16 **A. I can't recall that. That was four and a half**

17 **years ago. I'm not sure.**

18 **Q. Did you have any discussions with any of the**

19 **staff about giving him any type of medication,**

20 **like cough syrup or ibuprofen or Tylenol or**

21 **anything, during that period that he was sick**

22 **before he died?**

23 **A. I can't recall specifically if I had**

24 **conversations regarding that without looking at,**

25 **you know, the medical comments or notes, things**

32

1 **like that.**

2 **Q. Nothing sticks out in your memory?**

3 **A. No.**

4 **Q. You're not a nurse, are you?**

5 **A. No.**

6 **Q. You're not a doctor?**

7 **A. Nope.**

8 **Q. Do you have any medical training?**

9 **A. I have CPR, first aid, med certification.**

10 **Q. Do you know Matt Miranda?**

11 **A. I'm aware that he was a staff.**

12 **Q. Did you know that he was there when Bill went**

13 **into his trouble leading to his death?**

14 **A. Yes. After.**

15 **Q. Were you aware that Bill actually choked on his**

16 **own vomit and died of aspiration?**

17 **A. According to his death certificate, he died of**

18 **natural causes.**

19 **Q. That's not the question I asked.**

20 **A. Okay.**

21 **Q. Were you aware that he choked on his own vomit?**

22 **A. I'm aware that that was a possibility, a**

23 **discussion of what did happen.**

24 **Q. Are you saying maybe that didn't happen, that**

25 **it's a theory?**

33

1 **A. I am not qualified to determine whether or not**

2 **he had aspiration pneumonia.**

3 **Q. Do you know what that is?**

4 **A. Yes.**

5 **Q. Did you ever know of anybody else dying of that?**

6 **A. Without going back to individuals' actual like**

7 **death certificates and things of that nature, I**

8 **don't know if I can recall that without**

9 **referring to information of that sort.**

10 **Q. Do you look at other people's death certificates**

11 **often?**

12 **A. No, I do not.**

13 **Q. This was kind of a rare case, wasn't it?**

14 **A. What do you mean by rare?**

15 **Q. You don't have a person die in your care,**

16 **custody and control at SESDAC every day, do you?**

17 **A. No. Not every day.**

18 **Q. This was a fairly significant event, wasn't it?**

19 **A. It was an unexpected event.**

20 **Q. Forty-nine years old, relatively healthy, all of**

21 **a sudden he's dead?**

22 **MS. FERRIS: Answer out loud.**

23 **A. Oh. Correct, yes.**

24 **Q. (By Mr. Zephier) Did you think that, you know,**

25 **maybe there was a question over why that**

34

1 happened?

2 **A. Yes. I think we all have the question of what**

3 **happened, why did this happen.**

4 **Q.** Do you think an autopsy might have made it a

5 little bit clearer?

6 **A. I'm not sure I can answer that question. I**

7 **don't know if I'm qualified to answer that**

8 **question.**

9 **Q.** You're a human being, aren't you?

10 **A. Correct.**

11 **Q.** You've experienced other people dying, haven't

12 you?

13 **A. Correct.**

14 **Q.** When there's a question about a death, isn't it,

15 you know, based upon your knowledge as living as

16 a human being, isn't it more preferable to know

17 what happened?

18 **A. I'm not able to determine and make that decision**

19 **to do an autopsy on someone. I don't have the**

20 **medical background, expertise to determine when**

21 **an autopsy is needed and not needed.**

22 **Q.** I understand that. However, you are a human

23 being?

24 **A. Yes.**

25 **Q.** Okay. I'll get off that. Are you paid by

35

1 SESDAC?

2 **A. Yes.**

3 **Q.** Do you have any type of independent contractor

4 status with them?

5 **A. I'm employed through SESDAC.**

6 **Q.** But are you an independent contractor?

7 **A. No.**

8 **Q.** Do you know the police officer that responded to

9 the Yale House just prior to Bill dying?

10 **A. No, I do not.**

11 **Q.** Have you talked recently with Matt Miranda?

12 **A. No.**

13 **Q.** Do you know where he is?

14 **A. No.**

15 **Q.** I'm just about done. Let me go through my notes

16 here. Okay. I do have a final area here. In

17 your position with SESDAC, as you're caring for

18 fellow human beings that are in a vulnerable

19 position, are you committed to preserving the

20 individual's humanity?

21 **A. I'm not sure I understand that question.**

22 **Q.** Do you know what the word "humanity" means?

23 **A. I would need you to explain that, what**

24 **specifically you're talking about.**

25 **Q.** You don't understand what "humanity" means?

36

1 **A. I guess I don't know what it's in relationship**

2 **to.**

3 **Q.** I'm just asking do you know what it is? Do you

4 know what it means?

5 **A. Treating others with dignity, respect.**

6 **Q.** See, you knew all along what it meant. Do you

7 agree with that, that in your position that's an

8 important aspect of what you do?

9 **A. Yes.**

10 **Q.** And that ought to be preserved regardless of

11 what happens?

12 **A. It's always important in my job to ensure that**

13 **someone has dignity and respect in all aspects**

14 **of their life.**

15 **Q.** And that would include upon their death,

16 wouldn't it?

17 **A. Yes.**

18 **Q.** Those are the only questions I have. Thank you.

19 **A. Okay.**

20 MS. FERRIS: I don't have any questions for

21 you.

22 THE WITNESS: Okay.

23 MS. FERRIS: Thank you. I tell you what, I

24 keep forgetting this each time. You have the

25 right, basically once you have your deposition

37

1 taken, you have the right to go back through and

2 read your deposition and you can't read it to

3 change the content, but you can read it to see

4 if like a word is flipped or it's not the

5 correct word. I recommend that you waive that

6 right to read it and that you just waive the

7 right to read it.

8 THE WITNESS: Okay.

9 MR. ZEPHIER: Jennifer?

10 MS. FERRIS: Yeah.

11 MR. ZEPHIER: I hate to do this to you. I

12 need her to identify something.

13 **Q.** (By Mr. Zephier) I promise this is --

14 **A. That's all right.**

15 **Q.** I need to ask you this. This is something I did

16 forget. Is it true that you did have contact

17 within the six-month period after Bill had died

18 with members of Bill's family where they were

19 asking you questions as to what happened to

20 Bill?

21 **A. Yes. I had those conversations.**

22 MS. ZEPHIER: Okay. That's it.

23 MS. FERRIS: And do you still waive the

24 reading and signing of the deposition?

25 THE WITNESS: I do.

MS. FERRIS: Thank you.
(Witness excused)

STATE OF SOUTH DAKOTA)
CERTIFICATE
COUNTY OF MINNEHAHA)
I, Lisa Griffin Wiederrich, Court Reporter
and Notary Public within and for the State of
South Dakota:
DO HEREBY CERTIFY that the witness was
first duly sworn by me to testify to the truth,
the whole truth, and nothing but the truth
relative to the matter under consideration, and
that the foregoing pages 1-38, inclusive, are a
true and correct transcript of my stenotype
notes made during the time of the taking of the
deposition of this witness.
I FURTHER CERTIFY that I am not an attorney
for, nor related to the parties to this action,
and that I am in no way interested in the
outcome of this action.
In testimony whereof, I have hereto set my
hand and official seal this 22nd day of July
2013.

Lisa Griffin Wiederrich, Notary Public
My Commission Expires: 11-9-2015

1 STATE OF SOUTH DAKOTA IN CIRCUIT COURT
 2 COUNTY OF CLAY FIRST JUDICIAL CIRCUIT
 3

4 * * * * *
 5 BERNADINE RED BEAR, a/k/a Civil No. 11-377
 6 BERNADINE SHIELDS, as
 7 Administrator of the Estate of
 8 DARELLE RED BEAR, Deceased,

9 Plaintiff,

10 -vs-

11 SESDAC, Inc.,

12 Defendant.

13 USD Law School
 14 Vermillion, SD
 15 July 9, 2013
 16 3:45 p.m.
 17 * * * * *

18 D E P O S I T I O N O F

19 ROBERT J. HANSEN

20 * * * * *

21 APPEARANCES:

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Counsel for Plaintiff;

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ALSO PRESENT: Gerald E. Tracy II, SESDAC

Beau Barrett, Intern
 Lynn, Jackson, Shultz & Lebrun

<p>6</p> <p>1 right?</p> <p>2 A. Yes.</p> <p>3 Q. And that would be Hansen Funeral Home?</p> <p>4 A. Yep.</p> <p>5 Q. Okay. Mr. Hansen, what I want to ask you, if</p> <p>6 you can based upon your individual recollection,</p> <p>7 could you take us through how you first became</p> <p>8 involved with this situation and this individual</p> <p>9 and then just tell us what happened with the</p> <p>10 remains until you finished your involvement with</p> <p>11 this individual, okay?</p> <p>12 A. Okay. If I remember right, I don't believe</p> <p>13 there was an embalming. I believe it was</p> <p>14 immediate cremation. I think it was an issue</p> <p>15 with, and we've had this before, too, is funding</p> <p>16 is a problem with SESDAC patients. So I think</p> <p>17 they were going back and forth as to what means</p> <p>18 of disposition they were actually going to take</p> <p>19 with him. And I believe once the -- I think he</p> <p>20 was a donor, as well, so I think he donated --</p> <p>21 I'm not sure what he donated; tissues, organs.</p> <p>22 I'm not sure what they ended up taking. I don't</p> <p>23 keep records of that, nor do they give me</p> <p>24 records of that. But once that was done, I</p> <p>25 believe we did -- like I said, I only dealt with</p>	<p>8</p> <p>1 donation was decided on, and then after that</p> <p>2 they decided to go with immediate cremation just</p> <p>3 for the simplicity of taking care of everything</p> <p>4 and for the financial reasoning for that because</p> <p>5 it's a lot less expensive. They actually ended</p> <p>6 up going with a county service, which means the</p> <p>7 county will pay for the cost of the service.</p> <p>8 They pay up to \$1,900. So with the \$1,900 we</p> <p>9 could take care of an immediate cremation and</p> <p>10 take care of everything with that so --</p> <p>11 Q. And that would cover the cost of the service,</p> <p>12 too?</p> <p>13 A. Yep. Service, burial, cremation and all that</p> <p>14 stuff.</p> <p>15 Q. And the grave cost?</p> <p>16 A. Yes. I think the grave was possibly donated</p> <p>17 because they didn't have a grave space but I</p> <p>18 don't know for sure. But if I remember right, I</p> <p>19 think we did some phone calls and took care of</p> <p>20 getting him a donated grave space.</p> <p>21 Q. And where were his remains placed? Which</p> <p>22 cemetery?</p> <p>23 A. Out at Bluff View Cemetery, and then later</p> <p>24 disinterred and moved to Allen, South Dakota, is</p> <p>25 it?</p>
<p>7</p> <p>1 the SESDAC, the person in charge over at SESDAC,</p> <p>2 which I would have to look to see who that was.</p> <p>3 And basically the only thing I did was let them</p> <p>4 determine and let me know what they wanted to do</p> <p>5 as far as course of action and what to do for</p> <p>6 disinterment or interment.</p> <p>7 Q. Okay. Can I interrupt you a second?</p> <p>8 A. Yes.</p> <p>9 Q. Do you remember whether that was a man or a</p> <p>10 woman from SESDAC?</p> <p>11 A. I can look real quick. It's probably in here,</p> <p>12 too.</p> <p>13 Q. Sure.</p> <p>14 A. And I might have been in contact, I know I</p> <p>15 contacted Bernadine at one point, too, but I</p> <p>16 think if I remember right, they were having</p> <p>17 trouble getting ahold of the family just as far</p> <p>18 as getting any information from them. I believe</p> <p>19 Rennae O'Connor was my main contact person over</p> <p>20 there. And like I said, I might have talked to</p> <p>21 a couple different people, but she was the one I</p> <p>22 tried to go through for most of the information.</p> <p>23 Q. Okay. And I interrupted you. You were going</p> <p>24 through your scenario there.</p> <p>25 A. Like I said, I believe what happened was the</p>	<p>9</p> <p>1 Q. Yeah.</p> <p>2 A. I think it's in the Exhibit 17 there. I think</p> <p>3 it's in there.</p> <p>4 Q. That was at the request of his brother Albert?</p> <p>5 A. Yes. Yep.</p> <p>6 Q. And that's the first page?</p> <p>7 A. Yep.</p> <p>8 Q. Do you see the name Albert there?</p> <p>9 A. Yep. And then there's a Disinterment Permit on</p> <p>10 page 3 that was sent in for that disinterment.</p> <p>11 It gives the lot, block and grave number of the</p> <p>12 space and Bluff View Cemetery that was</p> <p>13 temporarily used.</p> <p>14 Q. Bob, did you do the disinterment?</p> <p>15 A. Yes.</p> <p>16 Q. And so then you handed over the remains to his</p> <p>17 brother?</p> <p>18 A. I believe it was Albert that took those. I</p> <p>19 thought I had a record of that, but I don't show</p> <p>20 that form in my --</p> <p>21 Q. And then was that pretty much the extent of your</p> <p>22 involvement in this situation?</p> <p>23 A. Yes.</p> <p>24 Q. Now I want to go to some particulars, if I</p> <p>25 could, with you. Because the decision was made</p>

<p style="text-align: right;">10</p> <p>1 to cremate the remains, I saw records in here</p> <p>2 from Siouxland Crematory?</p> <p>3 A. Uh-huh.</p> <p>4 Q. Was that your normal crematory?</p> <p>5 A. Yep. Back then that's who we used. It was down</p> <p>6 in Sioux City.</p> <p>7 Q. Can you explain the transfer of the body from</p> <p>8 the hospital when he was declared dead to when</p> <p>9 he came into your custody and then, you know,</p> <p>10 take us through that?</p> <p>11 A. Sure. After the harvesting got done --</p> <p>12 Q. Yes.</p> <p>13 A. -- they took of everything they were doing, and</p> <p>14 then I went over and made the removal. And I'm</p> <p>15 assuming directly, I mean, that's what I had</p> <p>16 going on, so I went directly down to Sioux City.</p> <p>17 And at that point, once we make the drop-off at</p> <p>18 the crematory there, we're basically done from</p> <p>19 there so --</p> <p>20 Q. And then how did the remains get back to you?</p> <p>21 A. Same way, I went and picked them up and brought</p> <p>22 them back here.</p> <p>23 Q. And by that point we're talking about an urn?</p> <p>24 A. Yep. A container approximately the size of a</p> <p>25 shoe box. Just a smaller container so --</p>	<p style="text-align: right;">12</p> <p>1 do cremation for the financial point of it. And</p> <p>2 like I said, I don't know any family finances.</p> <p>3 I don't know any of his personal finances. But</p> <p>4 I know at that point I believe they decided just</p> <p>5 to go with cremation for the simplicity and they</p> <p>6 also have the, just the ease of what they were</p> <p>7 dealing with, you know, not being able to</p> <p>8 contact family. I think they did talk to</p> <p>9 somebody. Like I said, I don't know records of</p> <p>10 what they were doing.</p> <p>11 Q. Okay. Now you also mentioned something about</p> <p>12 the county paying for a portion of this. Can</p> <p>13 you please elaborate on that?</p> <p>14 A. Yep. What happens is if the individual does not</p> <p>15 have enough funds to pay for a funeral, be it</p> <p>16 full or cremation, they can apply for a county</p> <p>17 service, and what that means is if they're</p> <p>18 currently getting any type of state aid, then</p> <p>19 they're probably going to qualify for a</p> <p>20 county-assisted funeral. And when I say county</p> <p>21 assisted, \$1,900 is what they pay. They're not</p> <p>22 assisting; that's what they pay.</p> <p>23 Q. I see.</p> <p>24 A. So with consideration of SESDAC and what we put</p> <p>25 in and all the help we give them over there,</p>
<p style="text-align: right;">11</p> <p>1 Q. Was there anything special about that container?</p> <p>2 A. No.</p> <p>3 Q. Did that container have to be separately</p> <p>4 purchased?</p> <p>5 A. No. It's included in the package.</p> <p>6 Q. Okay.</p> <p>7 A. They call it a temporary urn or a temporary</p> <p>8 container but it's very suitable for burial.</p> <p>9 Most people use that for burial.</p> <p>10 Q. Was that used?</p> <p>11 A. Yep.</p> <p>12 Q. And I'm assuming you were in attendance at the</p> <p>13 service on January 9?</p> <p>14 A. Yep.</p> <p>15 Q. Now when you spoke earlier about this discussion</p> <p>16 with somebody from SESDAC talking about the</p> <p>17 cremation itself, I think you made a comment</p> <p>18 about there was a discussion about financial</p> <p>19 considerations. Would you elaborate on that?</p> <p>20 A. If I remember right, like I said, I don't know</p> <p>21 anything about the finances of the family, but I</p> <p>22 think what they were doing is having trouble</p> <p>23 getting ahold of the family. And at that point</p> <p>24 they realized he didn't have enough money to do</p> <p>25 anything, and they just decided to go ahead and</p>	<p style="text-align: right;">13</p> <p>1 they do a lot of business with us and stuff,</p> <p>2 they just decided they didn't want to try to</p> <p>3 financially burden us or the family in having,</p> <p>4 you know, to pay for a full service, I'm</p> <p>5 assuming.</p> <p>6 Q. Okay.</p> <p>7 A. I don't know that for sure. But in doing the</p> <p>8 county service, they pay \$1,900 if the</p> <p>9 individual qualifies.</p> <p>10 Q. Okay.</p> <p>11 A. Then that's used for the funeral.</p> <p>12 Q. And that's a flat fee?</p> <p>13 A. Yep. And every county has that funding but it's</p> <p>14 all different in all the counties.</p> <p>15 Q. So was it your understanding that SESDAC, did</p> <p>16 SESDAC pay any part of the cost of this?</p> <p>17 A. I think they paid for the, I think it's in here,</p> <p>18 I think they paid for the opening and closing of</p> <p>19 the grave just because I told them, I said, you</p> <p>20 know, I've got to pay this out and they ended up</p> <p>21 paying a little bit of that, I believe. That</p> <p>22 might have been out of his fund. I don't know</p> <p>23 where that came from.</p> <p>24 Q. Now was that on the original interment?</p> <p>25 A. No. Our original package that is in 17, you can</p>

14

1 see on -- what page is this -- the sixth page of
 2 Exhibit 17 our minimum cremation is \$1,695 and
 3 then the cremation container and all that stuff
 4 was built into there. And then newspaper
 5 notices, we put an obituary in the paper. So
 6 when it came up to it, it was \$1,755 and then
 7 the sales tax and the \$40 for the obit. So I
 8 mean, it's all broken down right there, but we
 9 did it for \$1,900.

10 Q. I'm just a little bit confused. You said that
 11 you thought SESDAC may have paid for the opening
 12 and reclosing?

13 A. Yes. The page right before that, open and close
 14 grave, tent setup and all that is in the \$300
 15 there.

16 Q. Oh, I see. Okay.

17 A. And I believe that either came out of his, I
 18 don't know where the funding came from, but I
 19 did send a bill for that because it was over and
 20 above what we were doing.

21 Q. Yeah, I was confused because it doesn't say who
 22 paid that.

23 A. Yep.

24 Q. You think it was SESDAC?

25 A. I'd have to look back in my records. I'm not

15

1 sure where that -- I don't think I have anything
 2 in there, either.

3 Q. Mr. Hansen, were you aware then that the
 4 harvesting team came down from Sioux Falls to do
 5 the harvesting at the hospital here in
 6 Vermillion?

7 A. Was I aware?

8 Q. Yes.

9 A. Yes.

10 Q. That's what happened?

11 A. Yep. Yes, I believe that's what happened,
 12 because I think I picked him up from the
 13 hospital and I knew they were contacted.

14 Q. So you really did nothing to the body yourself
 15 once it was turned back over to you except take
 16 him down for cremation?

17 A. Yep.

18 Q. Okay. When you later spoke with Albert
 19 Red Bear, his brother, and, you know, you had
 20 the process done out at the cemetery in April,
 21 do you know at that time whether there was any
 22 SESDAC people involved in that transaction at
 23 all?

24 A. I do not know.

25 Q. Did Mr. Red Bear perform any type of a ceremony

16

1 when that process was done?

2 A. Do you mean at disinterment?

3 Q. Yes.

4 A. I don't remember if he did or not. I know -- I
 5 remember the funeral service very well. It was
 6 very nice, you know, drums, all that stuff. So
 7 the ceremony was done at the service, but I
 8 don't remember if there was anything done for
 9 the disinterment.

10 Q. He had indicated that he did do a short thing.

11 A. Okay.

12 Q. All right. Those are the only questions I had.
 13 Jennifer may have some questions for you now.

14 A. Okay.

15 EXAMINATION BY MS. FERRIS:

16 Q. Mr. Hansen, can you just tell me based on this
 17 documentation and this Exhibit 17 what would
 18 confirm that disinterment was actually done and
 19 completed?

20 A. Whether it was actually done, you mean?

21 Q. Yes. And maybe I'll just ask you do you
 22 specifically remember that disinterment was
 23 done?

24 A. I do not -- I mean -- let me see here. I think
 25 there was paperwork that got sent back from the

17

1 state so it was filed and done. I personally do
 2 not remember the service at the cemetery for the
 3 disinterment but it does not mean it was not
 4 done. But the form, which is -- I don't
 5 remember what this particular one was. It looks
 6 like this one was sent back from the state.

7 Q. And then do you have any documentation that the
 8 disinterment was paid for?

9 A. No. There wasn't anything charged for the
 10 disinterment that I remember.

11 Q. And maybe just let me draw your attention to
 12 this. There is a Hansen Funeral Home document
 13 and it says, "Disinterment for Darelle "Billy"
 14 Red Bear, \$275."

15 A. Yep. That would have been the disinterment
 16 charge.

17 Q. Okay. And then at the bottom there are some
 18 handwritten notes. Do you know whose those
 19 handwritten notes are?

20 A. That is me.

21 Q. And it says faxed twice to that number. Do you
 22 know, did it every go through then?

23 A. I don't think I got a response from that. And
 24 like I said -- if I can find that. I know I
 25 have a copy of it. Which one was that?

1 STATE OF SOUTH DAKOTA IN CIRCUIT COURT
2 COUNTY OF CLAY FIRST JUDICIAL CIRCUIT
3

4 * * * * *
5 BERNADINE RED BEAR, a/k/a Civil No. 11-377
6 BERNADINE SHIELDS, as
7 Administrator of the Estate of
8 DARELLE RED BEAR, Deceased,
9 Plaintiff,
10 - vs -
11 SESDAC, Inc.,
12 Defendant.
13 Clay County Crthse.
14 Vermillion, SD
15 June 10, 2014
16 8:15 a.m.
17 * * * * *

18 D E P O S I T I O N O F
19 ROBIN HOWER
20

21 * * * * *
22 APPEARANCES:
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28 Mr. R. Alan Peterson
29 -and-
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35 ALSO PRESENT: Gerald E. Tracy II, SESDAC
36 Nick Peterson, Intern
37 Lynn, Jackson, Shultz & Lebrun

<p style="text-align: right;">22</p> <p>1 about whether he was attempting to communicate</p> <p>2 at all, like he was having trouble speaking or</p> <p>3 anything of that nature?</p> <p>4 A. No.</p> <p>5 Q. Did this appear to be somebody who was in big</p> <p>6 trouble when you got there?</p> <p>7 A. He was definitely in I guess big trouble, yes.</p> <p>8 Q. When you say that he was blue, could you</p> <p>9 describe that in more detail?</p> <p>10 A. I mean, if we all look at our faces, we're all</p> <p>11 kind of, you know, normal color. Blue, to me,</p> <p>12 there is a lack of oxygen. He's not breathing;</p> <p>13 so then the person becomes blue or a bluish</p> <p>14 color and that's what I saw when I got inside</p> <p>15 that room.</p> <p>16 Q. You mean beyond his lips, the rest of his face</p> <p>17 was blue, too?</p> <p>18 A. I believe it was his face, yes.</p> <p>19 Q. Do you remember noticing his lips in particular,</p> <p>20 you know, what color they were?</p> <p>21 A. I do not recall.</p> <p>22 Q. You said that there was -- well, were his eyes</p> <p>23 open at all?</p> <p>24 A. I don't recall if they were open when I got</p> <p>25 there. I don't recall for sure.</p>	<p style="text-align: right;">24</p> <p>1 anything of that nature?</p> <p>2 A. Having reviewed my report, I did note there in</p> <p>3 my report that Mr. Miranda appeared to be upset</p> <p>4 and distraught, I believe, about what happened.</p> <p>5 Q. Do you remember whether he was crying at all?</p> <p>6 A. All I put in my report is that, I mean, he was</p> <p>7 shaken up. I noticed there was trembling in his</p> <p>8 voice, but I don't recall if he was crying.</p> <p>9 Q. Okay. Let's go to your narrative there, which</p> <p>10 you have in your hand, which is part of Exhibit</p> <p>11 37. In the third paragraph about halfway down</p> <p>12 there is a sentence that starts, Matthew</p> <p>13 explained that he checked for a pulse and did</p> <p>14 not find one?</p> <p>15 A. Yes, sir.</p> <p>16 Q. If you could, Detective, from that point forward</p> <p>17 for the rest of that paragraph, could you read</p> <p>18 that out loud into the record?</p> <p>19 A. He then tried shaking Mr. Red Bear, but again</p> <p>20 received no response. His final attempt to get</p> <p>21 Mr. Red Bear to respond to him was to pinch him</p> <p>22 between his toes, but again Mr. Red Bear did not</p> <p>23 respond. According to Matthew, after all</p> <p>24 attempts to get Mr. Red Bear to respond, he</p> <p>25 first tried contacting his supervisor.</p>
<p style="text-align: right;">23</p> <p>1 Q. Did you make any attempt to try to roust him or</p> <p>2 shake him to get his attention?</p> <p>3 A. I don't recall doing that, yeah.</p> <p>4 Q. Can you recall the conversation that you had</p> <p>5 with Mr. Miranda there at the scene?</p> <p>6 A. I did have a conversation with Miranda, yes.</p> <p>7 Q. Okay. Let's talk about that for a moment. I</p> <p>8 know that you put some of that in your report,</p> <p>9 your narrative report. Well, let me ask you</p> <p>10 this, Detective: Based upon your conversation</p> <p>11 with Mr. Miranda, the information that you put</p> <p>12 in your report, was that accurate, to the best</p> <p>13 of your recollection, as far as the way that the</p> <p>14 conversation went and what was said?</p> <p>15 A. Yes.</p> <p>16 Q. And obviously you've had a chance to go back</p> <p>17 through that. Having seen your report and</p> <p>18 thought about this situation, do you recall</p> <p>19 independently anything about the conversation</p> <p>20 you had with Mr. Miranda that goes beyond what</p> <p>21 you've put in the report?</p> <p>22 A. Not that I can recall, no.</p> <p>23 Q. Now having responded to these type of things in</p> <p>24 the past, did Mr. Miranda appear to be somebody</p> <p>25 who was I guess emotional or upset or excited,</p>	<p style="text-align: right;">25</p> <p>1 Receiving no response from his supervisor, he</p> <p>2 then dialed 911 and requested an ambulance. I</p> <p>3 asked Matthew when someone last saw Mr. Red Bear</p> <p>4 alive, to which he stated he did not know.</p> <p>5 Matthew explained that Ms. Nesselhuf was the</p> <p>6 worker on duty prior to him and is now unable to</p> <p>7 get in touch with her. Matthew did explain that</p> <p>8 Ms. Nesselhuf had shown up while we were in</p> <p>9 Mr. Red Bear's room working on him but just</p> <p>10 recently left. During my conversation with</p> <p>11 Matthew, I could clearly see he was shaken up</p> <p>12 about the situation as I noted he was shaking as</p> <p>13 he spoke, and as he spoke. I noticed trembling</p> <p>14 in his voice. Matthew did indicate he would be</p> <p>15 fine and was going to continue to try and</p> <p>16 contact his supervisor.</p> <p>17 Q. Okay. Do you know -- well, actually thank you</p> <p>18 for reading that. But it does say in the part</p> <p>19 that you read that Matthew Miranda first tried</p> <p>20 contacting his supervisor, correct?</p> <p>21 A. Yes.</p> <p>22 Q. And that would have been before he called 911,</p> <p>23 right?</p> <p>24 A. That is what I have written, yes.</p> <p>25 Q. And since it's written that day, Detective, that</p>

<p style="text-align: right;">34</p> <p>1 EMTs that were there that could tell you better</p> <p>2 what was wrong.</p> <p>3 Q. Were you there when they were trying to shock</p> <p>4 him? By "him," I mean Bill.</p> <p>5 A. I believe at that time when the EMTs got there,</p> <p>6 if I remember correctly, I actually started</p> <p>7 talking with Mr. Miranda; so I'm not sure that I</p> <p>8 was in the room the whole time that the EMTs</p> <p>9 were there.</p> <p>10 Q. Okay. Do you have any recollection how many</p> <p>11 minutes after your arrival that the EMTs</p> <p>12 actually arrived?</p> <p>13 A. I believe there was some times on some documents</p> <p>14 that you sent to me that have the time, but I</p> <p>15 don't know how long it took.</p> <p>16 Q. We're going to mark those.</p> <p>17 (Hower Deposition Exhibit 38 marked for</p> <p>18 identification)</p> <p>19 Q. Detective, we've provided a new exhibit there.</p> <p>20 We'll call it Exhibit 38. It's a four-page</p> <p>21 document. Are these the ambulance records that</p> <p>22 you're referring to?</p> <p>23 A. This is the Vermillion Clay County EMS trip</p> <p>24 report, yes.</p> <p>25 Q. Is there a time there that you can note their</p>	<p style="text-align: right;">36</p> <p>1 Trowbridge was doing chest compressions when the</p> <p>2 EMTs arrived or if he stopped once they showed</p> <p>3 up and they took over.</p> <p>4 Q. Okay. There was a reference in your narrative</p> <p>5 report to Mr. Miranda being or trying to call</p> <p>6 his supervisor?</p> <p>7 A. Yes.</p> <p>8 Q. Did you ever figure out who that person was that</p> <p>9 he was trying to get in touch with?</p> <p>10 A. No.</p> <p>11 Q. Did you ever interview any supervisors of</p> <p>12 Matthew Miranda at all in the investigation of</p> <p>13 this case?</p> <p>14 A. I did not interview any supervisors. The only</p> <p>15 two I interviewed was Matthew Miranda and</p> <p>16 Ana Nesselhuf.</p> <p>17 Q. Do you know if anybody else from the police</p> <p>18 department interviewed anybody else from SESDAC</p> <p>19 other than those two?</p> <p>20 A. Not that I'm aware of.</p> <p>21 Q. You were looking for what type of issues, you</p> <p>22 know, as far as the investigation in this case</p> <p>23 was concerned, what type of issues were you</p> <p>24 looking for?</p> <p>25 A. Just to see if there was any, I believe in my</p>
<p style="text-align: right;">35</p> <p>1 arrival there at the 208 South Yale?</p> <p>2 A. Their arrival time, according to this document,</p> <p>3 shows that they arrived at 208 South Yale at</p> <p>4 16:17, which would be 4:17 p.m.</p> <p>5 Q. Now in relation to what time you got there,</p> <p>6 Detective, looking at your records in relation</p> <p>7 to the time of the ambulance arrival, can you</p> <p>8 determine how much time elapsed between your</p> <p>9 arrival and their arrival?</p> <p>10 A. According to the Vermillion Police Department's</p> <p>11 records, it shows that I arrived onscene at</p> <p>12 16:14 p.m., which would be 4:14 p.m. And again,</p> <p>13 the Vermillion Clay County EMS trip report shows</p> <p>14 that they arrived at 16:17, which would be 4:17</p> <p>15 p.m. So roughly three minutes had passed.</p> <p>16 Q. Were you administering CPR then by the time they</p> <p>17 rolled in?</p> <p>18 A. Yes. We had started CPR.</p> <p>19 Q. Then what happened? Did you just hand it off to</p> <p>20 them to start working on him?</p> <p>21 A. Basically what happens is we would continue</p> <p>22 doing the chest compressions or an EMT would</p> <p>23 come in and continue doing chest compressions</p> <p>24 while they get their equipment set up. I don't</p> <p>25 recall for sure whether or not Officer</p>	<p style="text-align: right;">37</p> <p>1 report I said any signs of foul play, you know,</p> <p>2 to suspect anything other than medical issues,</p> <p>3 and I did not see anything.</p> <p>4 Q. Actually the case was closed as a result of</p> <p>5 that, wasn't it?</p> <p>6 A. I believe so, yes.</p> <p>7 Q. Did you go to the hospital?</p> <p>8 A. It says in my report I went to the hospital,</p> <p>9 yes.</p> <p>10 Q. Do you remember being at the hospital?</p> <p>11 A. I don't recall. We're talking five years ago.</p> <p>12 Q. Right. Did you have, and again, you know, I'm</p> <p>13 testing your memory here, but do you recall</p> <p>14 taking part in any conversations about an</p> <p>15 autopsy?</p> <p>16 A. I don't recall taking part of any autopsies or</p> <p>17 conversations.</p> <p>18 Q. Was an autopsy ever mentioned in your presence</p> <p>19 at the hospital?</p> <p>20 A. Again, I don't recall.</p> <p>21 Q. Do you know who Nikki Clark is?</p> <p>22 A. I'm better with faces than I am with names. I</p> <p>23 don't recognize the name.</p> <p>24 Q. Did you have any recollection of conversations</p> <p>25 about donating his body parts in your presence</p>

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- VS -

Clay County Crthse.
Vermillion, SD
January 9, 2014
8:30 a.m.

* * * * *

MATTHEW MIRANDA

* * * * *

Counsel for Plaintiff;

Counsel for Defendant.

ALSO PRESENT: Gerald E. Tracy II, SESDAC

54

1 Q. And then you came back?

2 A. **Correct.**

3 Q. Was it within a day or two after Christmas?

4 A. **Yeah. It would probably have been like the 26th**

5 **or 27th probably that I would have came back. I**

6 **don't remember the exact day I came back.**

7 Q. I was just curious why you weren't set to work

8 until the 1st.

9 A. **Well, again, I was limited. I was part time.**

10 **Like I stated earlier, I didn't work a ton of**

11 **hours.**

12 Q. While we're at it here looking at this document,

13 there's a number of names on here. I want to

14 just ask you if I can, it looks like the name

15 above yours on Thursday, January 1st of '09 is

16 Paizli Palmrose?

17 A. **Yeah. Now that I see her, I do remember her**

18 **vaguely. I don't recall how long she worked**

19 **there or not, but I do remember Paizli.**

20 Q. Do you have any contact with her?

21 A. **No.**

22 Q. Have you discussed anything with her about this

23 case?

24 A. **No.**

25 Q. Do you have any idea where that person is now?

55

1 A. **I have no idea.**

2 Q. Was that person just an acquaintance of yours

3 during this period?

4 A. **Yeah. That would be all -- like I said earlier,**

5 **I didn't even remember her name until I see this**

6 **schedule.**

7 Q. Was she a student, too?

8 A. **Not that I -- no.**

9 Q. What about Joseph Barth?

10 A. **I believe he was going to school at the time.**

11 Q. Ana Nesselhuf?

12 A. **I don't think she was going to school. She**

13 **might have been. I know she at some point did**

14 **go to school. I don't know if she was going at**

15 **that time.**

16 Q. Have you talked with Ana Nesselhuf about this

17 case?

18 A. **I haven't talked to anyone, other than the**

19 **lawyers, about this case.**

20 Q. Not even Deb Maes?

21 A. **No.**

22 Q. Do you know if Ana had a relative working for

23 SESDAC when she was working there?

24 A. **I do not know if she had a relative working.**

25 Q. What about Danielle Schlect, which her name

56

1 appears on December 29?

2 A. **That name doesn't -- I don't even recall that**

3 **name. I don't even know who that was.**

4 Q. Again on that first page, too, it says the

5 Paperwork Schedule and Debra Maes is listed

6 twice there. Do you know what that means, that

7 information there?

8 A. **She was a primary at the house, the head direct**

9 **support, whatever her title was, so she did do**

10 **paperwork for the individuals. I would assume**

11 **that was when she did it was during those**

12 **scheduled times. I don't remember exactly.**

13 Q. Do you know why it's two days instead of one?

14 A. **I don't.**

15 Q. Do you know why the first day is one hour and

16 the second day is five hours?

17 A. **I don't. I mean, that would be a good question**

18 **for Deb herself.**

19 Q. That will be a good question for her.

20 A. **Yeah.**

21 Q. Okay. Looking down at the Weekly Summary at the

22 bottom, do you see a number of entries there?

23 A. **Yes.**

24 Q. Do you have any idea what that data means?

25 A. **Well, just judging by the titles, Total Direct**

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1 **would be probably the total direct hours.**

2 **Supported Employees under Total, that would**

3 **probably add up to what is here. I don't know**

4 **exactly. The Grand Total would be the number of**

5 **hours scheduled on there.**

6 Q. That would be the number of hours that somebody

7 was there at the house?

8 A. **Yes. That would be a fair assumption, I would**

9 **assume.**

10 Q. Well, you said that somebody was supposed to be

11 at the house at all times, correct?

12 A. **Correct.**

13 Q. Did you ever know a situation during your tenure

14 with SESDAC where it happened where that didn't

15 occur?

16 A. **Not that I know of.**

17 Q. Let's look at the second page then.

18 A. **Okay.**

19 Q. Which is page 413. Now here we're getting into

20 Saturday, January 3rd of '09 and Sunday,

21 January 4th of '09. You're on both of those

22 days. Do you see that?

23 A. **Yep.**

24 Q. So basically you had worked on Thursday,

25 January 1 and then again on Saturday, January 3

<p>58</p> <p>1 and then again on Sunday, January 4?</p> <p>2 A. Correct.</p> <p>3 Q. So you worked three out of those four days over</p> <p>4 that holiday, right?</p> <p>5 A. Correct.</p> <p>6 Q. And Matt, I may be assuming something that</p> <p>7 wasn't correct, but I'm assuming that there was</p> <p>8 no college courses or classes during this</p> <p>9 period, right?</p> <p>10 A. That would be correct.</p> <p>11 Q. You didn't have any course work or classes that</p> <p>12 you had to attend or devote to --</p> <p>13 A. I probably had some class work to do over the</p> <p>14 break. I mean, I don't remember if there was</p> <p>15 any courses that went for a year. I don't</p> <p>16 recall.</p> <p>17 Q. Okay.</p> <p>18 A. I really don't see what that would have to do</p> <p>19 with this, though.</p> <p>20 Q. Well, it's over the holiday?</p> <p>21 A. Yeah. But I mean, if there was a yearlong</p> <p>22 course, professors are known to assign something</p> <p>23 during breaks.</p> <p>24 Q. Okay. Well, it looks like on the 1st you come</p> <p>25 in at 7:00 in the morning. Was that unusual for</p>	<p>60</p> <p>1 p.m.?</p> <p>2 A. Uh-huh. That's correct.</p> <p>3 Q. And do you recall specifically that date having</p> <p>4 any discussions or contact with Bill Red Bear?</p> <p>5 A. I don't remember any specific contact,</p> <p>6 conversations, anything like that. We're</p> <p>7 speaking about five years ago.</p> <p>8 Q. Yeah, I know. I was just wondering because, you</p> <p>9 know, the way that things turned out that it</p> <p>10 might have hit home more consciously.</p> <p>11 A. I don't remember those days prior. I remember</p> <p>12 consciously the day of obviously but --</p> <p>13 Q. Well, focusing on Saturday, January 3, on the</p> <p>14 second page there, they've got you working</p> <p>15 almost a seven-hour shift there. Is that</p> <p>16 unusual?</p> <p>17 A. I think that was, as I recall, that was my</p> <p>18 fairly normal shift.</p> <p>19 Q. Seven hours?</p> <p>20 A. 3:30 to 10:15, 3:45 to 10:15. I think the only</p> <p>21 reason I came in earlier, if I recall, is I did</p> <p>22 grocery shopping on Saturdays.</p> <p>23 Q. Oh. Okay.</p> <p>24 A. That's why I came in a little bit earlier.</p> <p>25 Q. Okay. So January 4 rolls around now. Your</p>
<p>59</p> <p>1 you to come in in the morning?</p> <p>2 A. It was unusual -- I mean, I didn't do that too</p> <p>3 often. I was primarily the evening. But I did</p> <p>4 fairly, every once in awhile I worked the day</p> <p>5 shift if I didn't have classes or anything like</p> <p>6 that. It wasn't my normal time frame that I</p> <p>7 worked, though.</p> <p>8 Q. Well, the records indicate that Bill started</p> <p>9 getting sick toward the end of December.</p> <p>10 A. Okay.</p> <p>11 Q. And it doesn't look like you worked any of that</p> <p>12 week prior to January 1. Is that the way you</p> <p>13 recall?</p> <p>14 A. Yeah.</p> <p>15 Q. So you come in on the morning of January 1,</p> <p>16 which is New Year's Day, and do you at that time</p> <p>17 have any independent recollection of speaking</p> <p>18 with Bill or noticing his condition? This is</p> <p>19 three days before he died.</p> <p>20 A. Yeah. I don't remember any specific, well, I</p> <p>21 know I would have talked with him if he was at</p> <p>22 the house, but I don't remember any specific</p> <p>23 instances.</p> <p>24 Q. Okay. What about on January 3, it looks like</p> <p>25 your shift was 3:30 to 10:15, 3:30 p.m. to 10:15</p>	<p>61</p> <p>1 shift begins at 3:45 and was supposed to last</p> <p>2 until 10:15. It looks like the two persons</p> <p>3 there that day at Yale House prior to your shift</p> <p>4 were Leonard Rasmussen from midnight to 9:15</p> <p>5 a.m. and Kelsey Wickre?</p> <p>6 A. I think that's why there's a note in there,</p> <p>7 because it was Ana that was working that</p> <p>8 morning. If I recall right, I don't remember</p> <p>9 exactly, but I think they might have switched</p> <p>10 shifts.</p> <p>11 Q. Oh. Okay. So Ana appears on this page at the</p> <p>12 shift after you?</p> <p>13 A. Uh-huh. Yeah. I believe they had switched that</p> <p>14 day.</p> <p>15 Q. So are you certain that it was Ana?</p> <p>16 A. It was Ana that worked before me.</p> <p>17 Q. All right. Let's talk about that day then.</p> <p>18 Okay.</p> <p>19 MR. PETERSON: Robin, the next witness is</p> <p>20 here, but I'm guessing you have quite a bit more</p> <p>21 to cover.</p> <p>22 MR. ZEPHIER: Yeah. She's early.</p> <p>23 MR. PETERSON: Do you have any sense of how</p> <p>24 much longer you might be with this witness?</p> <p>25 MR. ZEPHIER: Well, it's about ten to right</p>

<p style="text-align: right;">62</p> <p>1 now. We'll probably go at least until twenty</p> <p>2 after.</p> <p>3 MR. PETERSON: Okay. That's fine. I just</p> <p>4 thought if you thought you were going to be, you</p> <p>5 know, a couple more hours, then --</p> <p>6 MR. ZEPHIER: No.</p> <p>7 MR. PETERSON: I'll tell her. Thanks,</p> <p>8 Robin. Sorry to interrupt.</p> <p>9 MR. ZEPHIER: Oh, no problem.</p> <p>10 (A break was taken)</p> <p>11 Q. (By Mr. Zephier) So anyway, let's talk about</p> <p>12 that date. This is not only a holiday, but it's</p> <p>13 a weekend on the holiday?</p> <p>14 A. Correct.</p> <p>15 Q. And had you worked there over the Christmas</p> <p>16 holiday before?</p> <p>17 A. No.</p> <p>18 Q. This was the first experience with that?</p> <p>19 A. Yes.</p> <p>20 Q. I'm assuming that there's not really much going</p> <p>21 on in Vermillion during that time?</p> <p>22 A. That's correct.</p> <p>23 Q. And do you know if the SESDAC office itself was</p> <p>24 even open?</p> <p>25 A. On a Sunday, no.</p>	<p style="text-align: right;">64</p> <p>1 check on all the residents. And I recall Ana</p> <p>2 said that he hadn't had much to, Bill hadn't had</p> <p>3 much to drink that day, so I went to bring him a</p> <p>4 glass of water. And when I went in there, he</p> <p>5 was nonresponsive, and I tried shaking him. He</p> <p>6 was not responsive. And then I tried, I believe</p> <p>7 I tried even pinching him and he was</p> <p>8 nonresponsive.</p> <p>9 Q. Can I stop you there a second?</p> <p>10 A. Yes.</p> <p>11 Q. Now do you remember the timing of this? You</p> <p>12 said that the shift started at 3:45 and Ana was</p> <p>13 there and then you checked the meds in the book,</p> <p>14 right?</p> <p>15 A. Uh-huh. I would say the shift change was about</p> <p>16 10, 15 minutes.</p> <p>17 Q. Did she say to you at all when the last time she</p> <p>18 had checked on Bill?</p> <p>19 A. She might have. I don't recall.</p> <p>20 Q. You don't recall?</p> <p>21 A. I don't recall.</p> <p>22 Q. Would that have been in the book?</p> <p>23 A. It would have been because he was sick, so I</p> <p>24 believe that was one of the things that needed</p> <p>25 to be documented.</p>
<p style="text-align: right;">63</p> <p>1 Q. Is it ever open on a Sunday?</p> <p>2 A. Not that I recall, no.</p> <p>3 Q. Is it ever open on a Saturday?</p> <p>4 A. Not that I recall, no.</p> <p>5 Q. Did you ever recall it to be open over the</p> <p>6 Christmas holiday?</p> <p>7 A. That was the only Christmas holiday I ever</p> <p>8 really worked.</p> <p>9 Q. Right. Do you know whether it was open?</p> <p>10 A. I don't remember. I would assume Christmas Day</p> <p>11 it probably wasn't. But again, I'm assuming at</p> <p>12 this point. I don't know.</p> <p>13 Q. Okay. So take us through it then. You get to</p> <p>14 the shift?</p> <p>15 A. Uh-huh.</p> <p>16 Q. It's a Sunday afternoon. Go ahead and explain</p> <p>17 what you encountered.</p> <p>18 A. I showed up for my shift. I remember Ana saying</p> <p>19 that Bill was still sick, and I went through the</p> <p>20 med book. Made sure all the meds were</p> <p>21 administered, everything like that. I believe</p> <p>22 that's all I recall of the shift changes, just</p> <p>23 doing the normal checking, making sure she did</p> <p>24 everything.</p> <p>25 And then after she had left, I went to go</p>	<p style="text-align: right;">65</p> <p>1 Q. Okay. Do you know whether Bill had been given</p> <p>2 any type of cold or flu medication during that</p> <p>3 period of time?</p> <p>4 A. I want to say he was taking something for being</p> <p>5 sick. I can't remember what exactly it was that</p> <p>6 he was taking at the time, but I want to say he</p> <p>7 was on something.</p> <p>8 Q. Was it cough medicine?</p> <p>9 A. Could have been. That actually looks really</p> <p>10 familiar.</p> <p>11 MR. ZEPHIER: We can probably mark this,</p> <p>12 too.</p> <p>13 (Miranda Deposition Exhibit 25 marked for</p> <p>14 identification)</p> <p>15 Q. Matt, I'm showing you a bottle of a substance</p> <p>16 there.</p> <p>17 A. Uh-huh.</p> <p>18 Q. We've marked it as Exhibit 25. Now I don't want</p> <p>19 to put words in your mouth and I don't want to</p> <p>20 suggest anything to you, but there has been an</p> <p>21 indication in the records that he had been</p> <p>22 administered cough syrup.</p> <p>23 A. That looks very familiar. I recall that bottle.</p> <p>24 I don't know if it's the brand, if it's the</p> <p>25 actual exact bottle, but that looks familiar.</p>

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1 Q. Okay. Do you recall giving him cough syrup
2 yourself?

3 A. **I don't recall if I did or not. I don't know.**

4 Q. Just do the best you can. We know that you may
5 not remember everything. But do you remember
6 anybody else telling you oh yeah, we've been
7 giving him cough syrup or we've been giving him
8 Tylenol or we've been giving him anything
9 concerning cold or flu medicine?

10 A. **I don't remember specifics of that. Like I
11 said, this looks really familiar. I think that
12 that's what we were giving, administering him.
13 I don't know when the last time would have been
14 that he would have been given some.**

15 Q. Okay. And I'm going to ask you if you're
16 certain, okay? You yourself, are you certain
17 that you did not ever give him any cough syrup
18 or cold or flu medicine yourself?

19 A. **I am not certain, no.**

20 Q. You're not certain?

21 A. **No.**

22 Q. Okay. The reason I'm asking that question is
23 because apparently he was exhibiting symptoms,
24 you know, of coughing, tired, sleeping, not
25 drinking water, not eating, and those sometimes

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1 can be construed to be cold or flu symptoms.
2 Would your agree?

3 A. **Correct.**

4 Q. I'm just trying to follow through with that. Do
5 you believe that that is why the people at Yale
6 House may have been giving him over-the-counter
7 type of flu medicine?

8 A. **Correct.**

9 Q. Again, the medication certification that you
10 went through with SESDAC, do you recall anything
11 being specifically talked about during that
12 training process where you had to be cognizant
13 or cautious about intermixing over-the-counter
14 drugs with psychotropic or other types of
15 prescribed medication?

16 A. **I don't remember specifically. It may or may
17 not have been covered in that. I don't remember
18 specifics in the training, the med
19 certification.**

20 Q. Do you remember ever hearing any training
21 discussion or protocol about don't interject any
22 over-the-counter medication when a person is
23 receiving prescribed medication, anything like
24 that?

25 A. **I remember something to the effect of that**

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1 **certain drugs can affect other drugs when mixed
2 together; in that sense, I do remember that. I
3 don't remember specifics, if it was
4 over-the-counter stuff or what the specifics
5 were.**

6 Q. Would you take a look closely at Exhibit 25
7 there and it's partially pulled off, the label
8 on the back. There is a ton of information on
9 there about warnings and ingredients and all
10 that, isn't there?

11 A. **There is.**

12 Q. I know commonly -- well, you've taken cough
13 syrup in the past, haven't you?

14 A. **Yes, I have.**

15 Q. You don't sit there and read everything on the
16 label, do you?

17 A. **No, I do not.**

18 Q. And I'm assuming that you or anybody else there
19 at Yale House, during the period of time Bill
20 got sick prior to his death, wouldn't
21 necessarily take the time to read over a label
22 on a cough syrup bottle, would they?

23 A. **I can't tell you what other people would do. I
24 mean, I personally did not read that, no.**

25 Q. Okay.

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1 A. **Whether or not the person that actually decided
2 to start giving him this read it, I can't tell
3 you.**

4 Q. All right. Now I apologize for interrupting the
5 chain of events there, but I wanted to get to
6 that while it was on our minds. Okay. So you
7 said that you went and he was unresponsive?

8 A. **Correct.**

9 Q. Do you remember what position his body was in?

10 A. **I believe he was laying on his back.**

11 Q. Was the head of his bed against the wall?

12 A. **Yes, it was.**

13 Q. In what position was his head in?

14 A. **His head was on a pillow so it was propped up,
15 you know, like if you have a pillow under your
16 head.**

17 Q. Was it at a strange angle, or was it more or
18 less flat?

19 A. **It was not flat, that I recall.**

20 Q. It was leaning forward?

21 A. **Yeah.**

22 Q. And you're sure that he was flat on his back?

23 A. **I don't want to say a hundred percent. I'm like
24 95 percent sure.**

25 Q. You saw Bill asleep before?

70

1 A. Yeah. And that's how he slept.

2 Q. He slept on his back?

3 A. Yes.

4 Q. Did he ever have any trouble with snoring or

5 just waking up all of a sudden because he's not

6 breathing?

7 A. I don't know. As I stated earlier, I never

8 worked the overnight shift.

9 Q. Right. But you might have been there during

10 times he was taking a nap and you came in on

11 him, right?

12 A. Yes, but I don't remember anything like that.

13 Q. Nothing peculiar sticks out then?

14 A. No.

15 Q. All right. So he's laying there. And what did

16 you do, call his name?

17 A. Yeah. I shook him like Bill, Bill. And then I

18 think I pinched him, I can't remember, to try

19 and rouse him.

20 Q. Would this have been around 4 o'clock?

21 A. Yes. Just because of the time frame it would

22 have been about 4 o'clock, because I showed up

23 for my shift, did the checks. And then after

24 she left, I went and filled a glass of water and

25 walked in there with him. So I'm assuming that

71

1 series of events would be about 15 minutes after

2 I showed up.

3 Q. Did you check on any of the other residents

4 before you checked on Bill?

5 A. Yes, because one of them was in the living room,

6 one or two of them were in the living room, I

7 can't remember, so you would see them when you

8 would walk into the house. I can't remember if

9 I checked on a fourth resident before I checked

10 on Bill. I don't recall that I did, because he

11 had a locked door that he lived in.

12 Q. Bill did?

13 A. No. The fourth resident.

14 Q. Oh.

15 A. He lived upstairs.

16 Q. Okay. Bill's door wasn't locked?

17 A. No.

18 Q. Was there a door on Bill's room?

19 A. Yes.

20 MR. ZEPHIER: I'm going to ask Alan this

21 question. I know with the HIPAA concerns that

22 we've got to be careful with names here, but at

23 some point maybe could you and I have a

24 discussion about who these other residents were?

25 MR. PETERSON: Yeah. I think we can do

72

1 that.

2 MR. ZEPHIER: Because I don't know whether

3 they were competent to know anything or if they

4 heard something, okay?

5 MR. PETERSON: Yes. Let's have that

6 conversation.

7 Q. (By Mr. Zephier) So I don't want you to --

8 A. Okay.

9 Q. All right. Matt, you're there. Do you remember

10 approximately how many times you said Bill,

11 Bill, Bill? Did you say Bill and leave the room

12 and then come back?

13 A. No, I did not leave the room.

14 Q. Okay.

15 A. I don't recall the number of times I would have

16 said his name.

17 Q. Was it dark?

18 A. No.

19 Q. This was in January?

20 A. Yeah.

21 Q. It gets dark early.

22 A. I don't think it was dark by 4 o'clock.

23 Q. Okay.

24 A. I don't recall it being dark. I remember it

25 being somewhat light out at least.

73

1 Q. Okay.

2 A. Because I remember seeing the ambulance show up

3 a few minutes later, or the police officer

4 followed by the ambulance.

5 Q. Okay. So you said that you thought you may have

6 gone over and pinched him?

7 A. I don't want to say a hundred percent that I did

8 do that. I can't remember.

9 Q. How close did you get to him when he was

10 unresponsive?

11 A. I actually touched him.

12 Q. What part of his body?

13 A. Shoulder.

14 Q. Was it a bare shoulder, or did he have his shirt

15 on?

16 A. I don't think he had his shirt on because he

17 didn't sleep with his shirt on, Bill did not.

18 He slept in his underwear.

19 Q. You're talking about shorts, short underwear,

20 shorts?

21 A. Yeah. I believe he had a blanket covering him,

22 and that's what I recall touching was the

23 blanket.

24 Q. And you would have touched his left shoulder?

25 A. Yes.

74

1 Q. And do you remember at that point whether the
 2 blanket was pulled up all the way to his neck?
 3 A. Yes. That's how Bill would pull it up, right up
 4 to his neck.
 5 Q. Was he wrapped up tightly in that blanket?
 6 A. I don't think it was tightly around him.
 7 Q. Did it appear at all to you that he had been
 8 struggling, like you know, he was in a half off
 9 the bed or --
 10 A. No. He was laying right in the middle of the
 11 bed.
 12 Q. All right. So what did you do then, touch his
 13 shoulder?
 14 A. Uh-huh.
 15 Q. Then what happened?
 16 A. He was nonresponsive, and I tried shaking him
 17 and nonresponsive.
 18 Q. How did you do that? How did you shake him?
 19 A. You know, shoulder and pushed.
 20 Q. Just pushed down?
 21 A. Yeah, sideways.
 22 Q. Okay. And did you use a lot of pressure or just
 23 some --
 24 A. Enough that would rouse someone.
 25 Q. Did his head move?

75

1 A. No.
 2 Q. Did you notice anything, any type of reaction at
 3 all?
 4 A. No.
 5 Q. What did you do then?
 6 A. It was at that point I called 911.
 7 Q. Did you check to see if there was anything
 8 around his mouth at that time?
 9 A. I don't. I remember his lips were not looking
 10 the normal color, which is also what roused me
 11 to call 911 right away.
 12 Q. Did he appear cold at all to the touch?
 13 A. I remember at some point, I can't remember if it
 14 was before or after I called or during, it might
 15 have been during my call that I actually felt
 16 his, I don't remember if it would have been his
 17 face or if it would have been his shoulder, but
 18 yes, I remember he was not normal temperature.
 19 I wouldn't say cold. He wasn't his normal
 20 temperature.
 21 Q. He wasn't warm?
 22 A. No.
 23 Q. Okay. So if you had to do your best
 24 approximation, how much time elapsed from when
 25 you stepped into the room and called his name

76

1 until you realized hey, I better call 911?
 2 A. Less than five minutes. I would say, I don't
 3 know, three or four minutes, three minutes, four
 4 minutes. I don't know.
 5 Q. Well, Matt --
 6 A. At this point I'm not --
 7 Q. Let me just do something here. If you want to
 8 get kind of an understanding of the passage of
 9 time, listen to me and I'm going to count off
 10 ten seconds, okay?
 11 A. Uh-huh.
 12 Q. One thousand one, one thousand two, one thousand
 13 three, one thousand four, one thousand five, one
 14 thousand six, one thousand seven, one thousand
 15 eight, one thousand nine, one thousand ten.
 16 Okay. Do you understand what I'm doing now?
 17 A. Yes.
 18 Q. I'm trying to put it in your mind in the sense
 19 of how much time in realistic sense really went
 20 by, okay? And when you say three minutes,
 21 that's a long time. Can you give it another
 22 shot?
 23 A. I don't know. I guess I really don't know.
 24 Q. Okay.
 25 A. I mean, again, this is like five years ago.

77

1 Q. I know.
 2 A. That you're asking a matter of five minutes
 3 right now. Like I don't know if it would be --
 4 I shook him and then I called, so I don't know
 5 if that's what the passage of time would be. In
 6 your sense, it would probably be like 30 seconds
 7 maybe then, I guess. I don't know.
 8 Q. Would it be fair to say that you were shook up
 9 yourself at that point?
 10 A. Yes.
 11 Q. You believed that there was something wrong?
 12 A. Yes.
 13 Q. When you called 911, did they answer right away?
 14 A. Yes.
 15 Q. Was it a woman or a man?
 16 A. I believe it was a woman.
 17 Q. What did you say?
 18 A. I said I am at, I can't remember the exact
 19 address of the Yale House, but I said the
 20 address. I'm at this house working and I have a
 21 client here that's nonresponsive, could you
 22 please get someone out here as soon as you can.
 23 I recall her asking me a series of questions
 24 over the phone. I don't remember what those
 25 were.

78

1 To be honest, my next recollection is a
 2 police officer showing up before I even got off
 3 the phone. And at that point I left the room,
 4 because there was a police officer in there. I
 5 let him -- he didn't have a huge room. There
 6 wasn't a ton of room in there for multiple
 7 people to be in that room.

8 Q. Do you remember the officer at all?

9 A. Like name you mean?

10 Q. Or appearance?

11 A. I don't remember, no.

12 Q. Was it a young guy?

13 A. Yes, I think. I don't remember.

14 Q. Do you remember that it was just one officer
 15 that showed up first?

16 A. First, yes. And then I remember at that point I
 17 called the on-call, and then she told me to get
 18 Ana back so I called Ana to have her come back.
 19 And before she even got back, I think the
 20 ambulance was there. I remember multiple people
 21 coming in with the ambulance, because they
 22 brought a stretcher and everything like that.

23 Q. Did you see anybody working on Bill?

24 A. No. I don't recall actually seeing them.

25 Q. And what I mean by working on him is like

79

1 resuscitation.

2 A. Yeah.

3 Q. You don't remember seeing that?

4 A. I don't remember seeing that. I would imagine
 5 the police officer was the one that was doing
 6 that. And by the time I actually went in there,
 7 he was already on the floor and that was when
 8 the ambulance was there putting him on the board
 9 and everything.

10 Q. And by that point you had already called --

11 A. Yes.

12 MR. PETERSON: I'm sorry. You guys are
 13 talking over each other and I'm not hearing the
 14 answer, so one at a time.

15 A. I'm sorry. Go ahead.

16 Q. (By Mr. Zephier) No. That was my fault. When
 17 you said you called the on-call, was that Deb?

18 A. That was not Deb.

19 Q. Who was it?

20 A. I don't remember who the on-call was that day.

21 Q. Do you remember having any trouble getting the
 22 on-call?

23 A. I can't remember if I called it twice. That
 24 does sound familiar that I called the number
 25 twice.

80

1 Q. It was a holiday weekend?

2 A. Uh-huh. I don't know what that would have to do
 3 with it. I think I remember calling the number
 4 twice. The fact that it was a holiday weekend I
 5 don't think had anything to do with the fact
 6 that I called it twice.

7 Q. Well, it might have had something to do with not
 8 reaching somebody right away.

9 A. Well, when you're on-call, I mean, you have to
 10 be by that phone. So whether it's a holiday,
 11 it's the middle of the night, it doesn't matter.

12 Q. Okay. But anyway, you didn't get that person on
 13 the first try?

14 A. No.

15 Q. Do you remember now who that was?

16 A. I don't remember.

17 Q. Was it a female?

18 A. Yes, I think so. I don't remember.

19 Q. Well, whoever it was told you to call Ana?

20 A. Yes.

21 Q. And get her back there?

22 A. Correct.

23 Q. Do you know why?

24 A. Well, she was the staff before me. She would
 25 have been the one that would have been taking

81

1 care of him before, and she would need to speak
 2 with the police officer and everything, too.

3 Q. Was that what the person on the phone advised
 4 you?

5 A. To call her back, yes.

6 Q. No. I mean that Ana would have to speak with
 7 the police?

8 A. She said that you should call Ana to come back
 9 to the house. I don't recall her saying that
 10 she would need to speak to the police officer or
 11 anything like that. That was what I remember
 12 and that's what my assumption of it was. I
 13 don't recall her actually saying that, though.

14 Q. Do you remember what you said to Ana?

15 A. No. I don't remember the exact words.

16 Q. You were pretty excited at that point, weren't
 17 you?

18 A. I wouldn't say excited. But yes, I was not -- I
 19 was shaken up would probably be a better term.

20 Q. Scared?

21 A. Yeah.

22 Q. Feeling a lot of stress?

23 A. Yeah.

24 Q. Did the police interview you there right at the
 25 house or did that happen later?

82

1 A. I think it happened right at the house. To be
 2 completely honest, the rest of the day is kind
 3 of blurry to me.
 4 Q. Because you were shook up?
 5 A. Yeah.
 6 Q. Did you have trouble sleeping that night?
 7 A. I don't even really remember a whole lot about
 8 that night even.
 9 Q. What can you remember after the police and the
 10 ambulance personnel got there and they wheel
 11 Bill out and take him away, what do you remember
 12 then?
 13 A. To be honest, I don't even remember if I worked
 14 the rest of my shift. I mean, it's really that
 15 much of a blur to me.
 16 Q. You continued to work for SESDAC, though, beyond
 17 that date?
 18 A. Yes.
 19 Q. And when did you leave the employment of SESDAC?
 20 A. I wouldn't remember the exact date. I want to
 21 say it was in 2009.
 22 Q. Was it shortly after this thing?
 23 A. I want to say March, April, but it wasn't
 24 because of this. It was because I got a job at
 25 Wells Fargo, which is actually in my field of

83

1 study.
 2 Q. Now were you present when Ana was interviewed by
 3 the police?
 4 A. I want to say yes.
 5 Q. You don't know for sure?
 6 A. I don't know for sure. That was after. I mean,
 7 like I said, the rest of the day was kind of a
 8 blur to me.
 9 Q. Did it cause you any concern that when you
 10 touched Bill, he appeared to be cold?
 11 A. Yes.
 12 Q. I mean, did that cause anything to trigger in
 13 your own mind that hey, he's been here for a
 14 while?
 15 A. To be honest, I don't know what the time frame
 16 is, if someone is choking how long it takes
 17 before your lips start turning purple or blue or
 18 whatever. I don't even know the time frame of
 19 what it would take for that, but I assume that
 20 it probably wasn't like that moment, which is
 21 why I called.
 22 Q. Were you assuming that he maybe died, that he
 23 was dead?
 24 A. I remember it passing through my mind that that
 25 could be, that he might have been already, but I

84

1 don't know if he was or not.
 2 Q. But you yourself, Matt, didn't do any type of
 3 resuscitation, correct?
 4 A. No, I did not.
 5 Q. No CPR?
 6 A. No.
 7 Q. No clearing of the mouth?
 8 A. No.
 9 Q. Didn't check his pupils?
 10 A. No.
 11 Q. Didn't check his pulse?
 12 A. No.
 13 Q. Okay. So were you advised that day, I
 14 understand that you say that you don't recall a
 15 lot, but were you advised that day that he
 16 passed away at the hospital?
 17 A. That was what I thought. That's what I remember
 18 is that he actually passed away at the hospital,
 19 but I don't know the actual time of death or
 20 anything.
 21 Q. Were you advised of that later?
 22 A. Yes. I think so, because I remember there was a
 23 lot of things that we talked about, like when
 24 the funeral was and I remember there was grief
 25 counseling. There was an option if I wanted, I

85

1 don't even remember what it would have been, but
 2 I remember somebody bringing up that, but I
 3 chose not to do any of that stuff.
 4 Q. You didn't attend the funeral, right?
 5 A. I did not, no.
 6 Q. Was there any particular reason why you didn't?
 7 A. Not really. I mean, I was busy.
 8 Q. Okay. We're getting to the end here, but I want
 9 to make sure I cover these things with you. Has
 10 anyone involved in the Bill Red Bear incident
 11 from December 27, 2008 through January 4, 2009
 12 been reprimanded in any way?
 13 A. Not that I know of.
 14 Q. You weren't, were you?
 15 A. No.
 16 Q. You weren't suspended?
 17 A. No.
 18 Q. You weren't disciplined?
 19 A. No.
 20 Q. You weren't terminated for this, right?
 21 A. No.
 22 Q. Were you put on any type of leave as a result of
 23 this?
 24 A. No.
 25 Q. Were you transferred or forced to go work at

<p style="text-align: right;">90</p> <p>1 Q. Of course you only worked for them two months 2 after this happened, right?</p> <p>3 A. Yes.</p> <p>4 Q. Do you believe that you could have acted in a 5 more responsible manner if there was better 6 staffing, training or management oversight in 7 this situation?</p> <p>8 MR. PETERSON: Object as speculative, but 9 you can go ahead and answer.</p> <p>10 A. Yeah. I kind of agree with that actually, too. 11 I mean, you could have someone, unless you're 12 going to have someone watching someone 24 hours 13 a day, personally one person 24 hours a day, 14 you're not going to catch something like that. 15 I mean, that's personal feelings, though.</p> <p>16 Q. (By Mr. Zephier) Right. That's your personal 17 opinion?</p> <p>18 A. Yeah. And that's kind of what you're asking 19 there so --</p> <p>20 Q. Well, he actually was required to have 24-hour 21 supervision. Were you aware of that?</p> <p>22 A. Which he did. There was someone there 24 hours 23 a day.</p> <p>24 Q. Well, Matt, he was sick for almost a week prior 25 to him passing away. And you yourself have</p>	<p style="text-align: right;">92</p> <p>1 remember. I think he was cremated, I think. I 2 don't remember exactly.</p> <p>3 Q. He was.</p> <p>4 A. Okay. And then from what I recall, again I 5 wasn't actually at the funeral, but they tried 6 to make it as Native American as possible as 7 they could. Again, I wasn't there.</p> <p>8 Q. You're just hearing this secondhand, right?</p> <p>9 A. Yes, correct. Even if I was there, I've never 10 been to an authentic funeral, Native American 11 funeral. I don't know what the -- I mean, every 12 culture does burials different.</p> <p>13 Q. Were you aware that there was no autopsy done on 14 his body?</p> <p>15 A. I was not aware of that.</p> <p>16 Q. Were you aware that within two hours after his 17 death the decision was made to cremate his body 18 and donate his organs?</p> <p>19 A. I was not aware.</p> <p>20 Q. Did you have any conversation with Bill Red Bear 21 during the time that you knew him before his 22 death where he discussed any details about how 23 he wanted to be buried or cremated or anything 24 of that nature?</p> <p>25 A. No, I did not.</p>
<p style="text-align: right;">91</p> <p>1 already said that nobody ever thought about 2 taking him to the doctor or getting him 3 examined?</p> <p>4 A. I did not say that. I said that I did not see 5 anyone take him in there. But as you stated 6 also, I did not work for a lot of those days.</p> <p>7 Q. Right. Did you yourself think about taking him 8 to the doctor during that time?</p> <p>9 A. I did not.</p> <p>10 Q. Anyway, it's clear that nobody did?</p> <p>11 A. I wouldn't say that it's clear. Again, I didn't 12 work those days before. I don't remember if 13 someone did or did not. I don't know. I wasn't 14 -- I can't say. I wasn't there.</p> <p>15 Q. Isn't it true Bill Red Bear was in the care, 16 custody and control of SESDAC when he died?</p> <p>17 A. Correct.</p> <p>18 Q. And he was in the care, custody and control of 19 SESDAC during the time he was sick before he 20 died?</p> <p>21 A. Correct.</p> <p>22 Q. Do you have any knowledge about what happened to 23 his body afterward?</p> <p>24 A. I remember what they were saying, like how he 25 was buried and everything like that. I don't</p>	<p style="text-align: right;">93</p> <p>1 Q. Okay. Those are the only questions I have. 2 Thank you.</p> <p>3 MR. PETERSON: Thank you. I don't have any 4 questions. I'm not acting as your lawyer today, 5 but the court reporter is going to make a 6 transcript of this. If you would like to review 7 it for its accuracy before she files it you can 8 or you can waive that right and trust that she 9 produces an accurate transcript.</p> <p>10 THE WITNESS: I don't need to read it. 11 (Witness excused)</p> <p>12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>

BERNADINE RED BEAR, a/k/a Civil No. 11-377
BERNADINE SHIELDS, as
Administrator of the Estate of
DARELLE RED BEAR, Deceased.

Plaintiff,

- V S -

SESDAC, Inc.,

Defendant.

Clay County Crthse.
Vermillion, SD
June 10, 2014
9:30 a.m.

* * * * *

DEPOSITION OF

ANA NESSELHUF

* * * * *

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- and -

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ALSO PRESENT: Gerald E. Tracy II, SESDAC

Nick Peterson, Intern
Lynn, Jackson, Shultz & Lebrun

<p style="text-align: right;">46</p> <p>1 Q. Her last name, Schlecht.</p> <p>2 A. I would probably remember the first time but not</p> <p>3 the last name.</p> <p>4 MR. ZEPHIER: What's her first name again?</p> <p>5 MR. PETERSON: Danielle, I believe.</p> <p>6 Q. (By Mr. Zephier) Danielle?</p> <p>7 A. Oh yeah, I know who she is.</p> <p>8 Q. Okay. You know who that is?</p> <p>9 A. Yep.</p> <p>10 Q. I'm sorry, I couldn't remember her first name.</p> <p>11 Have you had any conversations with her since</p> <p>12 Bill passed away, to your knowledge?</p> <p>13 A. I have ran into her at Dakota Gardens, but we</p> <p>14 didn't talk about the situation. I just saw her</p> <p>15 at Dakota Gardens, which is by the hospital.</p> <p>16 Q. Okay. What have you gone through to prepare for</p> <p>17 your deposition today? Have you looked at any</p> <p>18 documents?</p> <p>19 A. No.</p> <p>20 Q. Have you given any previous statements about</p> <p>21 Bill's death?</p> <p>22 A. When we had that meeting and when I talked to</p> <p>23 the cop was the only --</p> <p>24 Q. There's an exhibit in front of you there. It's</p> <p>25 Number 37. It's about a four-page document.</p>	<p style="text-align: right;">48</p> <p>1 drop in Mr. Red Bear's temperature and the fact</p> <p>2 that Ms. Nesselhuf was unable to obtain a blood</p> <p>3 pressure. Okay. I want to stop there. Page</p> <p>4 back to the last page of that report. Do you</p> <p>5 see that? Do you recognize what that is?</p> <p>6 A. Yes.</p> <p>7 Q. It's called SESDAC, Inc. Medication Comment</p> <p>8 Sheet, right?</p> <p>9 A. Yes.</p> <p>10 Q. And it's dated January 2009 and it looks like</p> <p>11 there's several entries there attributed to you,</p> <p>12 right?</p> <p>13 A. Uh-huh.</p> <p>14 Q. Particularly on January 4th of '09 starting,</p> <p>15 well, it looks like the first entry on that date</p> <p>16 attributed to you is 1:30 p.m., isn't it?</p> <p>17 A. Yes.</p> <p>18 Q. It says, Bill's temperature 93.5, still not</p> <p>19 feeling well. Do you remember recording these</p> <p>20 things on this sheet?</p> <p>21 A. I could say it's my handwriting. Obviously I</p> <p>22 did, to my knowledge, yeah.</p> <p>23 Q. Would you have made notations on a sheet like</p> <p>24 this just as standard operating protocol?</p> <p>25 A. Yep.</p>
<p style="text-align: right;">47</p> <p>1 Would you take a look at that? I'm going to ask</p> <p>2 a couple of questions about that. I'm going to</p> <p>3 interrupt you a second here. There is a</p> <p>4 narrative report that was done by Robin Hower,</p> <p>5 who is the police officer, and he responded to</p> <p>6 the call this on January 4th of '09. He's</p> <p>7 already given testimony here just before you</p> <p>8 came in, but he made a report here and he</p> <p>9 actually described his contact with you, okay?</p> <p>10 So what I'm going to do is I'm going to read</p> <p>11 this. We need to talk about this, whether you</p> <p>12 recall that or not, okay?</p> <p>13 A. Okay.</p> <p>14 Q. I'm actually going on the first page of that</p> <p>15 narrative. You're on there right there. It's</p> <p>16 the fourth paragraph.</p> <p>17 A. Okay.</p> <p>18 Q. And about halfway through that paragraph, well,</p> <p>19 actually let me just starting reading here. It</p> <p>20 says, As I spoke with Matthew in the kitchen, I</p> <p>21 noticed he had a book with dates and times as to</p> <p>22 Red Bear's care. I asked and was granted</p> <p>23 permission to look over the book. In looking at</p> <p>24 the sheet, some of the entries I observed I felt</p> <p>25 I needed more clarification on, especially the</p>	<p style="text-align: right;">49</p> <p>1 Q. So are we to assume then based upon this entry</p> <p>2 on January 4 it says '08, but it should be '09,</p> <p>3 right?</p> <p>4 A. Yeah. Okay.</p> <p>5 Q. At 1:30 and that would be 1:30 p.m., wouldn't</p> <p>6 it?</p> <p>7 A. No. It would be a.m. No. It would be a.m.</p> <p>8 Q. It was a.m.?</p> <p>9 A. Yeah.</p> <p>10 Q. Okay. This is what I had the question about.</p> <p>11 It looks like there are several entries here for</p> <p>12 January 4th of '08. You see how it goes back in</p> <p>13 time from 1:30 to 12 o'clock?</p> <p>14 A. Yeah.</p> <p>15 Q. Then it jumps from 12:30 and then goes to 1:30.</p> <p>16 Do you see that?</p> <p>17 A. Yeah.</p> <p>18 Q. Can you explain why that is?</p> <p>19 A. I can't. The one with the 1:30 I wonder if it</p> <p>20 was supposed to be 11:30 instead of --</p> <p>21 Q. That would make sense, wouldn't it?</p> <p>22 A. Yeah.</p> <p>23 Q. Okay. Because then the rest of them would be in</p> <p>24 sequence, wouldn't it?</p> <p>25 A. Correct.</p>

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1 Q. All right. So anyway, let's just call that one
 2 11:30, if that makes sense to you, okay?
 3 A. **Yep.**
 4 Q. So it says, in that entry it says, Bill's temp
 5 93.5, still not feeling well.
 6 A. **Uh-huh.**
 7 Q. Ana, I know this was five and a half years ago
 8 and I know that you might not remember
 9 everything.
 10 A. **Uh-huh.**
 11 Q. But the fact that Bill ended up dying that day,
 12 I mean, does that make things more vivid to you
 13 in your memory?
 14 A. **A little bit, yeah.**
 15 Q. When you look at this entry, and we've already
 16 thought that it was probably 11:30 in the
 17 morning that day that he died, it says Bill's
 18 temp 93.5, now specifically do you remember
 19 writing that?
 20 A. **I can't say. I don't remember writing it but --**
 21 Q. But does it look like your handwriting?
 22 A. **Yes.**
 23 Q. Is there any reason that anybody might suggest
 24 or think or should think that somebody forged
 25 that in your name?

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1 A. **No.**
 2 Q. Okay.
 3 A. **It is my handwriting.**
 4 Q. Now thinking back to January of '09, were you
 5 familiar with the normal human body temperature?
 6 A. **Yes.**
 7 Q. And that entry that you made there on that line
 8 says 93.5, doesn't it?
 9 A. **Uh-huh. Yep.**
 10 Q. Do you see the entry above that?
 11 A. **Yep.**
 12 Q. It says Bill's temp, 97.6?
 13 A. **Yes.**
 14 Q. Again, I'm asking this question trying to tap
 15 into what you can recollect about that day, but
 16 do you see the great discrepancy between 97.6
 17 and 93.5 over a period of about three and a half
 18 hours?
 19 A. **Yes.**
 20 Q. Thinking back again, did that cause you any
 21 alarm or excitement?
 22 A. **Yep.**
 23 Q. What did you do about it?
 24 A. **I ended up calling Deb Maes just to see, because**
 25 **she worked more than I did, and I always, in the**

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1 past I had always talked to her. So I kind of
 2 told her about it. I ended up calling the
 3 nurse, Gwen, I believe it was Gwen that was the
 4 on-call nurse, and I told her that, you know --
 5 because I remember that week or before he had
 6 passed away he was sick the week before, and I
 7 worked a couple days and I took off a couple
 8 days and I came back. I noticed he still wasn't
 9 feeling well; so I took his vitals and all that
 10 kind of stuff. That's when we fill out that
 11 form. Then the next step is to call the
 12 on-call. I believe it was Gwen, the nurse, was
 13 on call. I told her everything, what was going
 14 on, that he wasn't eating very well. And I
 15 remember getting frustrated because I felt she
 16 wasn't listening to me, saying this is a red
 17 flag, like obviously you can tell on the
 18 documentation he hasn't been feeling well for a
 19 while. She said, oh, we'll just, I don't know
 20 what her exact words were, but she's like well,
 21 we'll deal with it when the clinic is open, to
 22 the best of my knowledge, and just to keep
 23 pushing fluids with him and keep checking on
 24 him.
 25 And so after I got off the phone with her,

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1 I was still not satisfied; so I called my
 2 manager, Kristyn Berg, and told her what was
 3 going on, saying that once again Bill is still
 4 not feeling well. Like I felt like I was not
 5 being heard by the people that we needed to
 6 contact when there was an emergency.
 7 Q. What did Kristyn say?
 8 A. **I don't recall, but I remember telling her about**
 9 **it. I'm not sure what she said, but I remember**
 10 **contacting her.**
 11 Q. Were you still frustrated after speaking with
 12 her?
 13 A. **Yes.**
 14 Q. Because this had been going on six days when he
 15 was sick, wasn't it?
 16 A. **Yep.**
 17 Q. And he hadn't seen a doctor during that time?
 18 A. **Nope. And I remember telling the nurse this is**
 19 **a red flag, like we need to do something. I**
 20 **believe I'm a good advocate for the residents.**
 21 **I've advocated for other people. And once**
 22 **again, sometimes I feel like the management**
 23 **would just kind of push it off and just like**
 24 **well, we'll deal with it later. That's how I**
 25 **felt when I worked at SESDAC.**

<p style="text-align: right;">54</p> <p>1 Q. Well, Ana, you were doing a job where you were 2 actually concerned about the people you were 3 taking care of?</p> <p>4 A. Yep.</p> <p>5 Q. And you wouldn't turn your back on people that 6 were in need of help, would you?</p> <p>7 A. Huh-uh.</p> <p>8 Q. And when you were working with SESDAC, did you 9 find that there was some type of ongoing 10 pressure to save money?</p> <p>11 A. I can't say. I don't think so. I don't know. 12 You know, I can say the organization has a good 13 philosophy and all that kind of stuff, but I 14 think the management part can be a little 15 tighter, you know. It's hard to describe. Like 16 every organization has their whatever, revenues. 17 One of it is not being heard I think from staff 18 when they know something is right or wrong. It 19 was always kind of like, oh, you know, and 20 that's how I felt.</p> <p>21 Q. Well, looking back at what was going through 22 your mind at this point, getting told these 23 things in response to your, you referred to it 24 as a red flag?</p> <p>25 A. Uh-huh.</p>	<p style="text-align: right;">56</p> <p>1 giving to him?</p> <p>2 A. I think that's when I talked, after I talked 3 with a nurse is to kind of push fluids. And any 4 extra like liquids maybe we would write in the 5 documentation saying that he got that.</p> <p>6 Q. Now by this point, what were you doing with 7 Bill? What was your decision making about, you 8 know, watching him or checking on him and those 9 kind of things?</p> <p>10 A. We would do 15-minute checks, I believe. I 11 would check up on him. And there was another 12 resident there who was also concerned for her 13 friend. She would also go in there and make 14 sure he was doing okay. As a visual, if you did 15 see Bill, you knew he wasn't feeling well. And 16 he stayed in bed that day, throughout that day 17 when I was there. He would come out to go to 18 the restroom or get his meds or maybe get 19 something to eat.</p> <p>20 Q. Do you know if he was having diarrhea that day?</p> <p>21 A. Not that I recall.</p> <p>22 Q. Did you specifically check for that at all?</p> <p>23 A. No.</p> <p>24 Q. Was he taking cough syrup?</p> <p>25 A. Not that I know of.</p>
<p style="text-align: right;">55</p> <p>1 Q. Did you feel helpless?</p> <p>2 A. Yeah. I felt like I wasn't getting the support 3 I needed from the on-call and Kristyn.</p> <p>4 Q. Was there some protocol in the company that 5 prohibited you from contacting the doctor or an 6 ambulance yourself?</p> <p>7 A. I think we had to go through a protocol first 8 before we could do anything like emergency, like 9 call 911, because it was up to the on-call 10 person. That's who we would get the orders 11 from.</p> <p>12 Q. And that's why you called Gwen?</p> <p>13 A. That's why I called Gwen. And then when I 14 didn't get what I wanted, I called Kristyn, 15 because I believe that she could have maybe 16 called, do something more about it.</p> <p>17 Q. But in any event, neither one of those ladies 18 took action in a timely response to your call?</p> <p>19 A. No.</p> <p>20 Q. Let's go on to the next entry, which is about a 21 half hour later. Do you see that?</p> <p>22 A. Yep.</p> <p>23 Q. It says Bill had a glass of orange juice.</p> <p>24 A. Uh-huh.</p> <p>25 Q. And was that something that you were used to</p>	<p style="text-align: right;">57</p> <p>1 Q. Did you recognize any of his individual 2 symptoms, like coughing or gagging or gasping or 3 losing his breath, anything like that that was 4 out of the ordinary?</p> <p>5 A. Not that I recall, huh-uh.</p> <p>6 Q. Did you check his, like put your hand on his 7 head to check his fever or anything?</p> <p>8 A. I can't recall, but I might have. Obviously I 9 took his temp.</p> <p>10 Q. But you yourself back at 11:30 knew that there 11 was something wrong because his temperature was 12 so off, right?</p> <p>13 A. Yep.</p> <p>14 Q. Do you remember if you took his temperature 15 again when you went to see him at noon and then 16 12:30?</p> <p>17 A. I can't recall. I might have but --</p> <p>18 Q. It's just not recorded here?</p> <p>19 A. Yeah. I don't remember. I remember doing the 20 vitals, but I don't remember if I went back and 21 did it again.</p> <p>22 Q. When you say "vitals," are you talking like 23 blood pressure?</p> <p>24 A. Blood pressure, temperature, yeah.</p> <p>25 Q. Was he speaking with you?</p>

<p style="text-align: right;">58</p> <p>1 A. Yeah. Not like the conversation that we're 2 having but just like little words. And I 3 believe I was there are you doing okay, and he 4 was like uh-huh or you know. 5 Q. Did you have a chance to actually look into his 6 eyes and see whether he had a blank stare or 7 whether he was showing, you know, his normal 8 self through his eyes? 9 A. I can't recall. 10 Q. All right. So going down there's another entry 11 at 1:30. It says, Bill had another glass of 12 orange juice and another one at 1:35. It says X 13 equals wasn't able to get Bill's blood pressure, 14 wasn't reading correctly. What does that mean? 15 A. There would be times maybe the blood pressure 16 might not be working. It would just say an 17 error. X means that you're not getting -- we'd 18 always have to put an X if something wasn't -- 19 the X means like if he refuses meds or if 20 something is not going -- it's kind of a code 21 type thing, I believe. I can't remember. But 22 if it was an error, it would have a blank. 23 Q. Okay. Then it says, Doctor tomorrow or, I'm 24 sorry, called SC and said to push fluids and 25 will call doctor tomorrow?</p>	<p style="text-align: right;">60</p> <p>1 do what they say, pretty much. So I guess 2 pushing the boundaries was probably -- 3 Q. You know, when we earlier were going through the 4 point scale and if you deviated here or there, 5 then you got assessed and then you had to face 6 the consequences, right? 7 A. Correct. 8 Q. Would going outside of protocol, to your 9 knowledge, fit that as being, you know, possibly 10 have consequences? 11 A. Yeah. Maybe. It just depends on -- yeah. I 12 guess I could say yeah. 13 Q. And the last entry on that page says 1-4-08. 14 And again, this is '09 that we've already 15 established? 16 A. Yes. 17 Q. Gave pain relief two tabs to Bill due to not 18 feeling well. Now there is no time entry on 19 that? 20 A. Uh-huh. 21 Q. Is that a part of the earlier one? Do you 22 remember when that activity would have taken 23 place, because it's not specific to the time? 24 A. I can't recall. I might have been, but it could 25 have been later.</p>
<p style="text-align: right;">59</p> <p>1 A. Yes. 2 Q. Service Coordinator, is that SC? 3 A. Yes. So that would have been Kristyn. 4 Q. Kristyn. Okay. And this was at 1:35 p.m.? 5 A. Yes. 6 Q. And at that point they say we're going to either 7 what, take him to the doctor? 8 A. I think it was more calling the doctor to see 9 what we need do, if he needs to come in. 10 Q. Oh, call the doctor? 11 A. Uh-huh. 12 Q. Did anybody ever suggest taking him to the ER 13 that day? 14 A. No. 15 Q. Did you think about it? 16 A. I honestly can't remember, but you know, working 17 with the elder I would. 18 Q. And you were only like three or four blocks away 19 from the hospital, right? 20 A. Uh-huh. Yep. 21 Q. Was there something that you feared about making 22 that decision on your own that there might be 23 repercussion? 24 A. Probably, because, you know, once again, the 25 protocol is to call the on-call and you have to</p>	<p style="text-align: right;">61</p> <p>1 Q. Because do you remember what pain medication was 2 being given? 3 A. I would say probably Tylenol. 4 Q. Was that like the most common one that was used? 5 A. Yeah. 6 Q. But you don't know anything whether he was being 7 fed cough syrup or anything like that? 8 A. Not that I know of. 9 Q. Now your shift lasted until about, what was it, 10 4 o'clock that day? 11 A. Usually normally it was like 7:30 to 3:00. 12 Q. To 3:00? 13 A. Yeah. 14 Q. Okay. So Matt would have come on then at 3:00? 15 A. At 3:00, yep. 16 Q. And do you remember that day the time when you 17 guys were changing shifts? 18 A. Uh-huh. 19 Q. Let's talk about that. 20 A. He came in. And usually when we do a shift 21 exchange, we would do it in the kitchen at the 22 table and we would go through the whole day. I 23 remember doing that. And I remember Heather 24 checking on Bill. I think she had a glass of 25 orange juice in her hand. But we would just go</p>

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1 over the day, the day of the shift about Bill.
 2 That was our typical routine. We have to sit
 3 down with each other and talk about his day or
 4 everybody's day.
 5 Q. So Bill was an issue at that meeting?
 6 A. Yep. Yep. And I believe I told her my
 7 concerns, too. Like I'm pretty -- it was
 8 probably done like oh my gosh, you know, like
 9 they're not listening. I called this person.
 10 So keep an eye, you know, just do the whole
 11 walk-through with him.
 12 Q. Do you remember what Matthew's reaction to that
 13 was when you were telling him about that?
 14 A. I don't.
 15 Q. Because you don't remember, is it fair to assume
 16 that he didn't have a strong reaction to what
 17 you told him or not?
 18 A. I think he might have had a concern but it
 19 wasn't showing. He knew the knowledge what I
 20 told him but --
 21 Q. Did he react at all and say well, what can we do
 22 or anything of that nature?
 23 A. I think it was pretty much like okay, like I've
 24 got your feet, you know. I don't think he did.
 25 He might have been like oh wow, okay, we'll keep

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1 an eye on him. I could see him doing that.
 2 Q. By there was some other person there, you said,
 3 Heather?
 4 A. Heather was a resident there.
 5 Q. Oh, a resident?
 6 A. Uh-huh.
 7 Q. All right. So let's get back to the discussion
 8 that Officer Hower had with you, and I'm just
 9 going to read this real quick here. Going back
 10 on the second page or, I'm sorry, the paragraph
 11 right at the bottom of the page. It says,
 12 According to Ms. Nesselhuf, Mr. Red Bear had not
 13 been feeling very well the last few days and has
 14 not been eating. Is that correct?
 15 A. Yes.
 16 Q. She stated at approximately 12:00 noon she went
 17 into Mr. Red Bear's room, where she gave him a
 18 glass of orange juice. At approximately 12:30
 19 she went back in to see if Mr. Red Bear was
 20 going to eat, which he stated, he told her he
 21 was not hungry. Is that correct?
 22 A. Correct.
 23 MR. PETERSON: Is the question whether
 24 you're reading it correctly or whether she
 25 remembers that?

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1 MR. ZEPHIER: Oh.
 2 Q. (By Mr. Zephier) Do you remember that as being
 3 correct?
 4 A. Yeah. I would say that was correct, yeah.
 5 Q. At around 1:30 she went back into Mr. Red Bear's
 6 room, where she checked on him and took his
 7 temperature, receiving a reading of 93.5 under
 8 his arm. Do you remember it that way?
 9 A. I can't recall, but it's stated on this, yeah,
 10 under his arm.
 11 Q. Is that where you would have taken his
 12 temperature?
 13 A. Normally we do it in his mouth, but I think -- I
 14 can't remember why I did it under the arm,
 15 because you can do it in the mouth or under the
 16 arm. I think it might have been a lot easier
 17 for him maybe at that time. I can't recall.
 18 Q. Did it have anything to do with he had something
 19 in his mouth?
 20 A. I don't know.
 21 Q. That would have stuck out to you, wouldn't it?
 22 A. Correct, yep.
 23 Q. Approximately five minutes later she tried
 24 taking Mr. Red Bear's blood pressure but was
 25 unable to get due to the machine acting up. Do

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1 you remember that?
 2 A. Uh-huh.
 3 Q. And what was wrong with the machine?
 4 A. Sometimes you would get errors, because he was a
 5 bigger person so we had to have a bigger cuff.
 6 Sometimes if you didn't have it on correctly, it
 7 wouldn't read correctly; so I would do it a
 8 couple times. If that wasn't, then you would
 9 have to write in the book saying incorrect and
 10 maybe try it again later.
 11 Q. Did you get a reading then?
 12 A. Not to my knowledge.
 13 Q. Did that cause you more concern?
 14 A. No, just because it's happened in the past with
 15 him, getting some not readings.
 16 Q. It goes on and it says, Ms. Nesselhuf stated she
 17 attempted a second time and was able to receive
 18 a blood pressure.
 19 A. Okay.
 20 Q. Do you remember that?
 21 A. No.
 22 Q. You don't?
 23 A. No.
 24 Q. Okay. According to Ms. Nesselhuf, she went back
 25 in Mr. Red Bear's room at about 2:00 p.m. to get

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1 him to get up and take a shower. Do you

2 remember that?

3 A. Yes.

4 Q. She stated Mr. Red Bear did not immediately get

5 up, but after a second prompting he did get up.

6 Do you remember that?

7 A. Yep.

8 Q. According to Ms. Nesselhuf, Mr. Red Bear first

9 tried to use the upstairs shower but was unable

10 to get it to work properly. Do you remember

11 that?

12 A. Yep.

13 Q. She explained that Mr. Red Bear then went

14 downstairs and used his shower. Is that

15 correct?

16 A. Uh-huh.

17 Q. Ms. Nesselhuf went on to say she noticed it was

18 taking Mr. Red Bear a long time to finish his

19 shower so she went downstairs to check on him,

20 at which time she found him sitting on the

21 toilet. Do you remember that?

22 A. Yeah.

23 Q. Ms. Nesselhuf stated she believes Mr. Red Bear

24 remained seated on the toilet for about a half

25 hour or so, but he eventually did come back

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1 upstairs and stood in the kitchen. Do you

2 remember that?

3 A. Yep.

4 Q. During this time she believes Mr. Red Bear had

5 consumed three to four glasses of water. Do you

6 recall that?

7 A. I'm not sure about that one.

8 Q. You don't know if that's a correct statement or

9 not? You just don't remember?

10 A. I don't remember. I believe this is a correct

11 statement. But to my knowledge, I don't

12 remember him --

13 Q. According to Ms. Nesselhuf, at approximately

14 3:15 p.m. Mr. Red Bear returned to his room to

15 lay down. Do you recall that being true?

16 A. Uh-huh.

17 Q. She stated this was the last time she had seen

18 or spoke to him.

19 A. Yep.

20 Q. Would that be true?

21 A. Yep.

22 Q. Okay. So let's go on to the next paragraph just

23 to finish this up. It says, Based on the time

24 frame authored by Ms. Nesselhuf and the fact

25 that Mr. Red Bear felt warm when I first arrived

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1 on the scene, it appears he had only been down

2 for at the most 45 minutes. So if that's true,

3 what the officer said on that statement, you

4 would have last seen Bill alive or, I'm sorry,

5 you know, when you saw him before he came

6 unresponsive at 3:15?

7 A. Correct.

8 Q. Was he responsive?

9 A. Yeah, because he was going into his bedroom to

10 go lay down after the shower, yep.

11 Q. Okay. Do you know if anybody checked in on him

12 during that period between 3:15 and around 4:00

13 or 4:05, when he was unresponsive?

14 A. I can't recall. I just remember the other

15 resident would go and check up on him, because

16 she was concerned of him so --

17 Q. Okay. Are you aware of Matthew going in there

18 to check on him at all during that time?

19 A. I can't recall and I don't know.

20 Q. Because you left the house, right?

21 A. I had left the house, and I received a phone

22 call within five to ten minutes.

23 Q. Were you on your way home?

24 A. I was on my way home, yep.

25 Q. Was it a cell phone?

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1 A. Yep.

2 Q. Would you authorize us to get your cell phone

3 records if we needed to?

4 A. Uh-huh.

5 Q. All right. So who called you and what was said?

6 A. Matt had called saying that, I believe he had

7 said that Bill wasn't responsive or something

8 along that line, and then I told him I would

9 come straight back. So I turned around and

10 helped with the other residents. Like the house

11 is pretty small; so we all went into the living

12 room. The ambulance just arrived there, I

13 believe, when I got there and they were going

14 in. They were doing CPR and stuff like that

15 with him.

16 Q. So the police officers were already there?

17 A. Yep. Before I got there.

18 Q. How did Matt sound when he called you?

19 A. I think scared and nervous at the same time.

20 Obviously anybody doesn't want to be in that

21 situation. I think frantic and he didn't know

22 what to do; so that's why I decided to come

23 back.

24 Q. Did he say anything about trying to reach

25 Kristyn or Gwen or Deb or anybody?

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1 A. I can't recall, but I remember going back to
 2 talk with Kristyn to tell her what was going on
 3 at the time, and I believe she came to the house
 4 afterwards.
 5 Q. Ana, did you go to the hospital?
 6 A. Yes.
 7 Q. Were you there when he was pronounced dead?
 8 A. Yes. I believe so. I remember talking with the
 9 cop, and he had told me that he had passed away.
 10 Q. How did you feel at that time?
 11 A. Sad, you know, just kind of I could have done
 12 something better, I guess, you know, calling --
 13 yeah.
 14 Q. You think maybe somebody should have taken him
 15 into the hospital at some point?
 16 A. Yeah.
 17 Q. Were you present during any conversations that
 18 were had at the hospital between any of the
 19 SESDAC people and his personal representative
 20 about what to do with his body?
 21 A. Huh-uh. I just remember leaving the hospital
 22 and Rennae O'Connor was outside. She had said
 23 something, and I had said that he had passed
 24 away. And she said well, how do you know that?
 25 And I'm like well, because the officer told me.

71

1 That's the last conversation I had with her that
 2 day. Then she had called me maybe later on that
 3 night or the next morning to see how I was
 4 doing. So then I took a couple days off of
 5 work.
 6 Q. Did it get to you?
 7 A. Yeah. After working there with him for so long
 8 and after he passed away, because he lived
 9 downstairs for the longest time and then he
 10 ended up moving upstairs. And so he had a few
 11 things I believe downstairs, and I would never
 12 go downstairs after he passed away just because
 13 of all the stuff we did down there with him
 14 so --
 15 Q. Did he ever share with you what he wanted to
 16 have done with his body when he passed away
 17 himself?
 18 A. Huh-uh. Not to my knowledge, I don't think so.
 19 We never really went in depth with that.
 20 Q. Do you think his family would have liked to have
 21 known?
 22 A. Yeah.
 23 Q. I mean, you have family, right?
 24 A. Uh-huh.
 25 Q. It's just human nature --

72

1 A. Uh-huh.
 2 Q. -- to want to know about your loved ones, isn't
 3 it?
 4 A. Yep.
 5 Q. Did you leave the hospital then after he was
 6 pronounced dead?
 7 A. Yes.
 8 Q. How did the other residents take it when they
 9 learned that he died?
 10 A. I believe two of the residents, they're more,
 11 they know what's going on and they were sad.
 12 The other person that was living with him, he
 13 didn't speak very much. Like he knew something
 14 was going on. I think it was a sad house for a
 15 while, you know.
 16 Q. Listen, those are all the questions I had. I
 17 want to thank you for coming today and talking
 18 about this. I know some of these things can be
 19 really hard to talk about.
 20 A. Uh-huh.
 21 Q. Mr. Peterson has some questions for you, though,
 22 okay?
 23 A. Okay.
 24 MR. PETERSON: Thank you. We don't have
 25 any questions for you today.

73

1 THE WITNESS: Okay.
 2 MR. PETERSON: Our court reporter is going
 3 to prepare a word-for-word transcript of what
 4 has happened today, and you have an opportunity
 5 to read it to make sure it's accurate before
 6 it's filed or you can waive that right and
 7 assume that she will prepare it correctly. In
 8 either case, we'll get you a copy of the
 9 deposition, but you need to tell Lisa whether
 10 you want to review it before it's finalized or
 11 whether you just want a copy afterwards.
 12 MR. ZEPHIER: If you do review it, you have
 13 a certain number of days to do that.
 14 THE WITNESS: Okay.
 15 MR. ZEPHIER: It's no problem if you want
 16 to do that. It's totally up to you.
 17 THE WITNESS: I'll probably just review it.
 18 (Witness excused)
 19
 20
 21
 22
 23
 24
 25

1 STATE OF SOUTH DAKOTA IN CIRCUIT COURT
 2 COUNTY OF CLAY FIRST JUDICIAL CIRCUIT

3
 4 * * * * *
 5 BERNADINE RED BEAR, a/k/a Civil No. 11-377
 6 BERNADINE SHIELDS, as
 7 Administrator of the Estate of
 8 DARELLE RED BEAR, Deceased,

9 Plaintiff,

10 -vs-

11 SESDAC, Inc.,

12 Defendant.

13 USD Law School
 14 Vermillion, SD
 15 July 9, 2013
 16 1:00 p.m.
 17 * * * * *

18 D E P O S I T I O N O F

19 RENNAE O'CONNOR

20 * * * * *

21 APPEARANCES:

22 Mr. Robin L. Zephier
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 25 Rapid City, South Dakota 57702

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ALSO PRESENT: Gerald E. Tracy II, SESDAC
 Beau Barrett, Intern
 Lynn, Jackson, Shultz & Lebrun

<p>1 INDEX TO WITNESS</p> <p>2</p> <p>3 Examination</p> <p>4</p> <p>5 By Mr. Zephier: Page 3, 61</p> <p>6</p> <p>7 By Ms. Ferris: Page 59</p> <p>8</p> <p>9</p> <p>10 INDEX TO EXHIBITS</p> <p>11</p> <p>12 Marked</p> <p>13</p> <p>14</p> <p>15 (No exhibits marked)</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>4</p> <p>1 A. No, I have not.</p> <p>2 Q. Well, the court reporter is taking everything</p> <p>3 down as we speak. If you need to take a break,</p> <p>4 that's fine.</p> <p>5 A. Okay.</p> <p>6 Q. Just say so.</p> <p>7 A. Okay.</p> <p>8 Q. We're scheduled for an hour and a half, but we</p> <p>9 may get done sooner.</p> <p>10 A. Okay.</p> <p>11 Q. If you have a question about a question I ask</p> <p>12 you that you don't understand, please tell me.</p> <p>13 A. Okay.</p> <p>14 Q. So I can rephrase it. And I'm going to be</p> <p>15 showing you some documents here that we've</p> <p>16 marked as exhibits so if you need to reference</p> <p>17 something in relation to your answer, by all</p> <p>18 means feel free to do so.</p> <p>19 A. Okay.</p> <p>20 Q. I would like to start out with do you remember</p> <p>21 Bill Red Bear?</p> <p>22 A. Yes, I do.</p> <p>23 Q. Do you remember approximately when it was when</p> <p>24 you first met him?</p> <p>25 A. I met him in 2000 when he came to our agency</p>
<p>3</p> <p>1 The Deposition of Rennae O'Connor was taken</p> <p>2 at the offices of the USD Law School, 414 East</p> <p>3 Clark Street, State Bar Room, Room 133,</p> <p>4 Vermillion, South Dakota, on the 9th day of July</p> <p>5 2013, commencing at the hour of 1:00 p.m.,</p> <p>6 before Lisa Griffin Wiederrich, Court Reporter</p> <p>7 and Notary Public within and for the State of</p> <p>8 South Dakota, Pursuant to Notice.</p> <p>9 RENNAE O'CONNOR</p> <p>10 called as a witness, having been first duly</p> <p>11 sworn, testified as follows:</p> <p>12 EXAMINATION BY MR. ZEPHIER:</p> <p>13 Q. Ma'am, would you please state your full name?</p> <p>14 A. Rennae O'Connor.</p> <p>15 Q. And how do you spell O'Connor?</p> <p>16 A. O--C-O-N-N-O-R.</p> <p>17 Q. O-R. My name is Robin Zephier and I'm the</p> <p>18 attorney from Rapid City and I'm representing</p> <p>19 the Estate of William Red Bear, Bill Red Bear.</p> <p>20 A. Okay.</p> <p>21 Q. And I'm going to be asking you some questions</p> <p>22 here. This is a deposition and I'm just</p> <p>23 wondering if you've ever partaken in any type of</p> <p>24 a process like this before, had your deposition</p> <p>25 taken?</p>	<p>5</p> <p>1 from HSC in Yankton.</p> <p>2 Q. And was that in the context of your working for</p> <p>3 SESDAC?</p> <p>4 A. Yes.</p> <p>5 Q. When did you first go to work for SESDAC?</p> <p>6 A. January of 1984.</p> <p>7 Q. And what was your initial position with them?</p> <p>8 A. My initial position was actually as a work study</p> <p>9 student in the Service Coordination Department</p> <p>10 while I was a student at the University of South</p> <p>11 Dakota. I've held a variety of positions over</p> <p>12 my time there.</p> <p>13 Q. What about your educational background, can you</p> <p>14 fill me in on that?</p> <p>15 A. I have a bachelor's in social work from USD.</p> <p>16 Q. Anything beyond that?</p> <p>17 A. No, other than 30 years of training.</p> <p>18 Q. Why did you choose to go into this field?</p> <p>19 A. Well, there's a lot of personal reasons for</p> <p>20 that. I guess my desire to be in a helping</p> <p>21 profession.</p> <p>22 Q. Do you have anybody in your family or your</p> <p>23 relatives that are developmentally disabled?</p> <p>24 MS. FERRIS: I'm going to object as to</p> <p>25 relevance.</p>

<p style="text-align: right;">10</p> <p>1 A. Slattery.</p> <p>2 Q. Slattery?</p> <p>3 A. Slattery.</p> <p>4 Q. And that changed over around 2007. Is that</p> <p>5 right?</p> <p>6 A. Yes. Yes. Mike was Gerry's predecessor.</p> <p>7 Q. Did Mike change positions with SEDDAC after he</p> <p>8 was executive officer?</p> <p>9 A. No.</p> <p>10 Q. Do you know where he is now?</p> <p>11 A. Where Mike Slattery is? He's retired and he</p> <p>12 lives in this area.</p> <p>13 Q. Was Mike involved with SEDDAC at all back in</p> <p>14 late 2008, early 2009?</p> <p>15 A. No.</p> <p>16 Q. Not at all?</p> <p>17 A. No.</p> <p>18 Q. When Bill was at the Yale House, was there only</p> <p>19 one direct support professional on duty at any</p> <p>20 given time?</p> <p>21 A. Yes. In a home of four people, there would be</p> <p>22 one staff.</p> <p>23 Q. Did that change at all where they would put two</p> <p>24 on at any given time or was it just always one?</p> <p>25 A. The standard practice would have been one.</p>	<p style="text-align: right;">12</p> <p>1 A. It's a woman.</p> <p>2 Q. Out of those individuals you just named, are any</p> <p>3 of those people still working for SEDDAC?</p> <p>4 A. None of those people that I named, no.</p> <p>5 Q. None of them?</p> <p>6 A. No.</p> <p>7 Q. Do you know where those people went?</p> <p>8 A. Not in particular.</p> <p>9 Q. Do you know Nikki Clark?</p> <p>10 A. I do.</p> <p>11 Q. Do you still have dealings with her in her</p> <p>12 position as a representative of people who need</p> <p>13 guardians?</p> <p>14 A. Yes, I do.</p> <p>15 Q. Does she still represent individuals that are</p> <p>16 SEDDAC residents today?</p> <p>17 A. Yes, she does. Did you say does she supervise</p> <p>18 them?</p> <p>19 Q. No. Represent them.</p> <p>20 A. Yes. She is a guardian representative for</p> <p>21 people we support.</p> <p>22 Q. And she was Bill Red Bear's representative back</p> <p>23 in, well, up until the point he died, right?</p> <p>24 A. Correct.</p> <p>25 Q. What is an ISP?</p>
<p style="text-align: right;">11</p> <p>1 Certainly if one person had an activity or</p> <p>2 something, there might be another staff person</p> <p>3 scheduled to go with that person but the typical</p> <p>4 staffing pattern would have been one to four.</p> <p>5 Q. Okay. Are you familiar with a person named</p> <p>6 Matt Miranda?</p> <p>7 A. Yes.</p> <p>8 Q. He worked there at the Yale House for a period</p> <p>9 of time back in 2008, 2009, didn't he?</p> <p>10 A. Yes.</p> <p>11 Q. And did you observe him have personal contact</p> <p>12 with Bill Red Bear when Bill was there?</p> <p>13 A. Yes.</p> <p>14 Q. Who were the other direct support professionals</p> <p>15 at the Yale House back in December of 2008 to</p> <p>16 January of 2009?</p> <p>17 A. Without a list, I don't know that I could</p> <p>18 necessarily name those people. I mean,</p> <p>19 Ana Nesselhuf was working that day. Kelsey</p> <p>20 Wickre was a staff person then, Paizli Palmrose,</p> <p>21 Leonard Rasmussen. Those are the first names</p> <p>22 that come to my mind.</p> <p>23 Q. Paizli?</p> <p>24 A. Palmrose.</p> <p>25 Q. Is that a man or a woman?</p>	<p style="text-align: right;">13</p> <p>1 A. Individual Support Plan.</p> <p>2 Q. Do you take part in those things?</p> <p>3 A. Occasionally. Not every single one.</p> <p>4 Q. Did you ever take part in any of the ISPs for</p> <p>5 Bill Red Bear, to your knowledge?</p> <p>6 A. Yes.</p> <p>7 Q. Can you tell me what you can recall about</p> <p>8 discussions or plans that were developed</p> <p>9 concerning Bill's Native American heritage as it</p> <p>10 relates to ISPs?</p> <p>11 A. Bill's Native American heritage was very</p> <p>12 important to him. It was something that he</p> <p>13 wanted to participate in, and we made that a big</p> <p>14 part of his plan in terms of particularly the</p> <p>15 Native American Center on the University campus,</p> <p>16 the drum group in particular. The drum group</p> <p>17 would occasionally have other social events,</p> <p>18 taco feeds, things like that that we would also</p> <p>19 assist Bill to attend. He really liked archery,</p> <p>20 not that that's a Native American thing, but it</p> <p>21 was something that Bill said he grew up doing</p> <p>22 and so in that context it was part of who he was</p> <p>23 as a person. So we did have those things built</p> <p>24 into his plan for him to participate in</p> <p>25 regularly.</p>

14

1 Q. When you talk about these ISPs, is there ever
 2 any discussion with the resident about what they
 3 would want to do in the event that they died?

4 A. Yes, there is.

5 Q. Can you take me through that, what that
 6 discussion entails and how that comes about?

7 A. It's an area that is certainly a difficult
 8 conversation to have and it's something that
 9 probably around the 2008 time period it was an
 10 area that was becoming something that we were
 11 focusing more on and I guess it's different for
 12 each person, but we try to walk through, you
 13 know, the different obvious decisions that would
 14 need to be made; you know, where do you want to
 15 be buried, what kind of a funeral do you want to
 16 have, do you want a funeral where there's a
 17 casket or do you want to be cremated, you know,
 18 organ donation, where do you want to be buried,
 19 all of those things that are things that we all
 20 need to address.

21 Q. Now in a situation like Bill where he has a
 22 representative of a guardian, would those
 23 discussions be had directly with him or with the
 24 guardian or, excuse me, the representative of
 25 the guardian?

15

1 A. Well, the ISP is made up of a team of people and
 2 that team always includes the person, in this
 3 case Bill, and their guardian or their guardian
 4 representative along with identified staff
 5 within our agency, potentially other personal
 6 friends or family members of that person.

7 Q. I know at one point in 2002 Bill indicated he
 8 was asked a question about what he wanted to do
 9 about burial and he basically had no plan. Do
 10 you recall him ever having a specific plan as to
 11 his own burial?

12 A. I was not at his meeting in the fall of 2008,
 13 but through the process of working through his
 14 death and working with Nikki Clark, Velda
 15 Bartel, Secretary Jerry Hofer from the
 16 Department of Human Services as well as Jenna
 17 Gobel, Kris Berg and Deb Maes, people who were
 18 at his team meeting, they all spoke that the
 19 conversation had been that he wanted to be
 20 buried by his friend, who was a person that we
 21 had supported as well, and that person is buried
 22 in Vermillion.

23 Q. Okay.

24 A. And they had broached that conversation at his
 25 meeting in the fall of 2008.

16

1 Q. Who is his friend?

2 A. I am not really comfortable giving names of
 3 other people we support.

4 Q. All right.

5 A. It was a person that we supported in our agency.

6 Q. All right. You mentioned that he wanted to be
 7 buried by his friend?

8 A. Correct.

9 Q. Is this documented somewhere, to your knowledge?

10 A. I don't know if it is or not.

11 Q. Do you have an idea when this conversation
 12 occurred or relative time period?

13 A. It occurred at his ISP meeting in the fall of
 14 2008.

15 Q. Oh, just the year before he died?

16 A. Four months before he died, four or five months
 17 before he died.

18 Q. So while these individuals were in attendance at
 19 that meeting, should there be something in
 20 writing to document such an important matter as
 21 this?

22 A. Yes.

23 Q. In fact, you're under requirements to keep
 24 accurate records, aren't you?

25 A. Yes.

17

1 Q. Do you know where such a document would be
 2 found, what it would be called, the context of
 3 where this information would be found if we were
 4 looking for it?

5 A. In his ISP. It would called the Personal
 6 Support Plan document.

7 Q. So there would be an ISP from 2008 that should
 8 have that in there?

9 A. Correct.

10 Q. Okay. Now absent naming this friend of his who
 11 he wanted to be buried by, what is the extent of
 12 your recollection as to how he chose to be
 13 buried?

14 A. What do you mean by "how he chose"?

15 Q. Casket in the ground, body placed without a
 16 casket above the ground, cremation.

17 A. I'm not aware that Bill had been talked with
 18 about that particular issue.

19 Q. And yet this was about four months before his
 20 death?

21 A. The team had broached the subject and that was
 22 as far as it had gone at that point.

23 Q. But you clearly remember him saying I want to be
 24 buried?

25 A. I was not present at the meeting. What I

18

1 clearly remember is the night of his death,
 2 Nikki Clark was with me at the emergency room.
 3 She had been at that meeting. Jenna Wiepen at
 4 that time, she's Jenna Gobel now, talked to her
 5 on the phone. Deb Maes talked to her on the
 6 phone. Kristyn Berg talked to her on the phone.
 7 They were all present at that meeting. They all
 8 unequivocally stated that Bill had said he
 9 wanted to be buried by his friend.

10 Q. And you just don't specifically remember
 11 anything about cremation being discussed?

12 A. I was not at the meeting. My understanding is
 13 that they did not discuss further than they
 14 brought up the subject and Bill's statement was
 15 I want to be buried by my friend, and they
 16 didn't take it further at that time.

17 Q. Do you know whether his ashes were, in fact,
 18 buried by his friend?

19 A. They were. I was present at his funeral.

20 Q. Yeah, I saw your name in the book. Do you know
 21 whether there was any discussion about Bill
 22 donating any of his organs or tissue after he
 23 died in that 2008 meeting?

24 A. My understanding is there were not discussions
 25 about that.

19

1 Q. Yet that would be something that would
 2 ordinarily be discussed when talking about means
 3 of burial or preferences, wouldn't it?

4 A. It would, but there is no rule that you have to
 5 have that all lined out every year at every
 6 meeting. It was something that as an
 7 organization as people we supported got older
 8 and as a system we were identifying that it was
 9 an area that we needed to address more than we
 10 had been and so we were starting to broach that
 11 topic with people.

12 Q. Was there some reason why that became more of a
 13 focus for SESDAC during that time?

14 A. No, other than the field in general was talking
 15 about people with disabilities needing to be
 16 involved in those decisions and there needing to
 17 be planning.

18 Q. When you say "the field," what do you mean?

19 A. The field of development disabilities.

20 Q. Okay. Nationwide you're talking about?

21 A. Sure, and statewide. There were statewide
 22 trainings and things like that that staff were
 23 going to that were giving formats and teaching
 24 and talking about how to work through that.

25 Q. Bill's death was unexpected, wasn't it?

20

1 A. Yes.

2 Q. In fact, he was only 49. Other than his
 3 sickness at the time and during the holidays of
 4 2008 and 2009 he was relatively healthy beyond
 5 that, wasn't he?

6 A. Yes. Which is another reason his team didn't
 7 feel a need to have a full-blown conversation at
 8 that meeting. They were starting to broach that
 9 topic and think about that.

10 Q. Do you know whether he had a will or had started
 11 a will or discussed a will?

12 A. No. I have no reason to believe that there was
 13 anything like that.

14 Q. Out of all the years that you knew Bill Red Bear
 15 and had personal contact with him as a resident,
 16 did you ever get a chance to speak with or meet
 17 with any of his next of kin or his immediate
 18 family or relatives?

19 A. No.

20 Q. Were you aware that they had called him and
 21 visited him on occasion over the years?

22 A. I am aware that they had called him on the
 23 phone. I have no reason to believe that they
 24 ever physically came to Vermillion.

25 Q. You say that "I have no reason to believe." Are

21

1 you basing that upon reviewing records or from
 2 discussion with staff, or how is that based?

3 A. All of those things plus my memory. I take our
 4 relationships with the families of people we
 5 support very seriously, and I would know if I
 6 had met Bill's family or if they had been here
 7 to visit.

8 Q. Is there any type of policy or procedure in
 9 place or protocol at SESDAC concerning recording
 10 contact information of next of kin or immediate
 11 family of relatives of residents?

12 A. No. Not particularly. We don't necessarily
 13 document every family visit.

14 Q. Why not?

15 A. I guess because we don't.

16 Q. What I'm getting at here, Ms. O'Connor, is that
 17 if your policy at SESDAC was not to document
 18 every visit or contact, it's possible that
 19 contacts were occurring that weren't documented.
 20 Would you agree?

21 A. Yes.

22 Q. What were your duties as a services director?

23 A. Generally my responsibility is to run the
 24 day-to-day operations of the organization and
 25 assure that the ISPs are implemented.

<p style="text-align: right;">22</p> <p>1 Q. Is the ISP your main focus?</p> <p>2 A. Well, it is the foundation of the services we</p> <p>3 provide. We certainly have many other</p> <p>4 requirements that we need to assure are</p> <p>5 implemented as well.</p> <p>6 Q. Are those other requirements to see after the</p> <p>7 medical needs of the residents?</p> <p>8 A. Yes, as outlined in their ISP.</p> <p>9 Q. Does your requirements in your position with</p> <p>10 SEDDAC also require you to be concerned about</p> <p>11 the individual human dignity of the residents?</p> <p>12 A. It certainly is one of our values.</p> <p>13 Q. Their personal preferences and lifestyle?</p> <p>14 A. The Individual Support Plan is based on their</p> <p>15 individual preferences.</p> <p>16 Q. Their choices on important affairs dealing with</p> <p>17 their lives?</p> <p>18 A. Yes.</p> <p>19 Q. What is a working file, to your knowledge?</p> <p>20 A. A working file?</p> <p>21 Q. Yeah.</p> <p>22 A. A working file is a small three-ring binder that</p> <p>23 is at the residence where a person supported</p> <p>24 lives that has their ISP, the basic client</p> <p>25 information sheet, those kinds of documents.</p>	<p style="text-align: right;">24</p> <p>1 have all been put in what we call the dead files</p> <p>2 or the purged files.</p> <p>3 Q. Do you know whether Bill Red Bear's working file</p> <p>4 was completely turned over to the main office?</p> <p>5 A. I really have no specific memory of that.</p> <p>6 Q. Do you have to have any specific license or</p> <p>7 certification as a services director for SEDDAC?</p> <p>8 A. No.</p> <p>9 Q. Have you looked at your own personnel file</p> <p>10 lately?</p> <p>11 A. Yes. Actually I have looked at my personnel</p> <p>12 file recently. I was looking to see if there</p> <p>13 was a certificate from something.</p> <p>14 Q. Is that at the main office?</p> <p>15 A. Yes.</p> <p>16 Q. To your knowledge, have there been any changes</p> <p>17 in any policies and procedures regarding</p> <p>18 emergency situations concerning the health,</p> <p>19 safety and welfare of SEDDAC residents since</p> <p>20 Bill Red Bear died?</p> <p>21 A. Have there been changes in policies?</p> <p>22 Q. Yes.</p> <p>23 A. Policies are updated on a regular basis, but no,</p> <p>24 not significant changes that I would be aware</p> <p>25 of.</p>
<p style="text-align: right;">23</p> <p>1 Q. Are those shared with the headquarters on Cherry</p> <p>2 Street?</p> <p>3 A. They would be based, that information would come</p> <p>4 from the main office.</p> <p>5 Q. Well, I mean, is the working file integrated</p> <p>6 with whatever file is on file at the main</p> <p>7 office?</p> <p>8 A. Yes. I mean, integrated in the sense at that</p> <p>9 time there was not as much technology as there</p> <p>10 is today, but the documents in that working file</p> <p>11 would come from the original documents in our</p> <p>12 administrative building.</p> <p>13 Q. Suppose there is contact information recorded at</p> <p>14 the Yale House in the working file, does that</p> <p>15 end up getting into the regular file at the main</p> <p>16 office?</p> <p>17 A. Ultimately, yes.</p> <p>18 Q. I'm just trying to figure out if there's any</p> <p>19 separation where some of the stuff that's in the</p> <p>20 working file never ends up in the file at the</p> <p>21 main office or not.</p> <p>22 A. That wouldn't be our practice. Our practice</p> <p>23 would be that annually or certainly at the time</p> <p>24 of Bill's death his working file would have been</p> <p>25 brought to the agency and that information would</p>	<p style="text-align: right;">25</p> <p>1 Q. Do you feel anything was done wrong in Bill's</p> <p>2 care leading up to his death?</p> <p>3 A. No.</p> <p>4 Q. You would react or you would have your staff at</p> <p>5 SEDDAC react the same way presented the same</p> <p>6 problem today?</p> <p>7 A. Yes.</p> <p>8 Q. Your name came up as one of the people that was</p> <p>9 contacted by the funeral director for handling</p> <p>10 the remains of Bill Red Bear once he died. Do</p> <p>11 you remember having any discussion with Bob</p> <p>12 Hansen, the funeral director?</p> <p>13 A. Yes. I was the one who called Bob Hansen,</p> <p>14 actually.</p> <p>15 Q. Why did you call him?</p> <p>16 A. Because when a person we support passes away,</p> <p>17 arrangements need to be made and one of our</p> <p>18 resources is the funeral homes.</p> <p>19 Q. But do you remember why you contacted Hansen</p> <p>20 Funeral Home versus another one?</p> <p>21 A. We had had positive experiences working with</p> <p>22 Hansen Funeral Home in the past.</p> <p>23 Q. As much as you can recall, can you tell me what</p> <p>24 your conversation was like with Mr. Hansen?</p> <p>25 A. I don't recall it exactly but it would have</p>

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1 essentially been around, you know, we have a
 2 person we support who has passed away, you know,
 3 it's a Sunday evening, we need to figure this
 4 out, how does this work, and then together we
 5 kind of walk through those steps of figuring out
 6 what decisions need to be made, you know, at
 7 what point does the body need to be taken from
 8 the hospital and those kinds of things.

9 Q. Was there any discussion of next of kin?

10 A. Certainly I personally tried to call the names
 11 that we had on our contact sheet. Two of the
 12 numbers that I called, no one of those names
 13 were known by those people and the other number
 14 had been disconnected. I also recall that the
 15 next day we Googled the Pine Ridge Police
 16 Department, possibly another town, I don't
 17 remember exactly, and called that police
 18 department, explained the situation, and I
 19 distinctly remember the response being do you
 20 know how many Red Bears there are. That's what
 21 I remember.

22 Q. So you made those calls yourself?

23 A. I did.

24 Q. And do you recall specifically calling the Pine
 25 Ridge Police Department or could it have been

27

1 the Rosebud Police Department?

2 A. The information in Bill's records said Pine
 3 Ridge so I would say that I called Pine Ridge.

4 Q. I'm assuming that SESDAC keeps phone records
 5 over the years, don't they?

6 A. I would assume. I guess I don't really know
 7 about -- agency phone records? I guess only if
 8 it would show up on the agency bill, but I can't
 9 really speak to that.

10 Q. Well, there should be a phone statement for
 11 calls, long-distance calls, right?

12 A. Yeah.

13 Q. Should be?

14 A. Should be, yeah.

15 Q. So if you were making these long-distance calls
 16 on or around January 4th or 5th of 2009, they
 17 should show up on a statement, wouldn't you
 18 think?

19 A. Possibly, yeah.

20 MR. ZEPHIER: Okay. I'll make a request
 21 formally for those records.

22 Q. (By Mr. Zephier) You did a Google search, you
 23 said, and what information did you input on that
 24 Google search?

25 A. Probably Pine Ridge Police Department.

28

1 Q. Could you have possibly inputted the name of
 2 Bill's deceased mother?

3 A. I don't have any memory of doing that.

4 Q. But you specifically recall Pine Ridge?

5 A. I do.

6 Q. Not Rosebud?

7 A. No. Not Rosebud.

8 Q. Did you have any discussions with Dr. Wayne
 9 Evans about what should be done with Bill's
 10 body?

11 A. Yes.

12 Q. And take me through that; what was the
 13 discussion, when did that occur.

14 A. The evening of Bill's death, we called Wayne
 15 Evans. Over the years we had established a
 16 relationship with Dr. Evans. And to be
 17 perfectly honest, we used him as a resource in
 18 terms of supporting the people that are Native
 19 American. And we called him. He was personal
 20 friends with Bill, as well, through the Native
 21 American Center. So you know, I distinctly
 22 remember having conversations with him about if,
 23 you know, what was appropriate from a cultural
 24 standpoint.

25 Q. And what did Dr. Evans say?

29

1 A. He said that both cremation and a traditional
 2 casket type funeral were both appropriate.
 3 Ashes could be buried or sprinkled at a place
 4 that was important to that person. And also
 5 asked about if organ donation was something that
 6 was appropriate to the Native American culture.

7 Q. When you were having this conversation with
 8 Dr. Evans, you were aware that he's not next of
 9 kin of Bill Red Bear, right?

10 A. Yes. I understood that.

11 Q. And that he served in no guardian capacity over
 12 Bill Red Bear, right?

13 A. Right. I was using him solely as a cultural
 14 resource. Obviously he had no decision-making
 15 ability in that.

16 Q. And you were not aware of any specific directive
 17 from Bill Red Bear himself that he wanted to be
 18 cremated, right?

19 A. Correct.

20 Q. Or that he wanted to donate his body parts to
 21 anybody, right?

22 A. We knew that those discussions had not occurred
 23 with Bill.

24 Q. Why were those discussions happening between you
 25 and Dr. Evans the day after Bill died then?

30

1 A. **Because those decisions needed to be made.**
 2 Q. Quickly, right?
 3 A. **Timely.**
 4 Q. Because if his body parts are going to be
 5 donated, they need to be taken right away,
 6 right?
 7 A. **Yes. There are some time lines for that.**
 8 Q. Did you have an understanding of that based upon
 9 past experience prior to that date?
 10 A. **In a general sense, but certainly the medical**
 11 **professionals help us work through those things**
 12 **at the time. It oftentimes depends on the**
 13 **situation with any given death.**
 14 Q. Right. Well, as a healthy individual, otherwise
 15 healthy individual, Bill Red Bear in your eyes,
 16 didn't he appear to be a prime candidate for
 17 donation of certain body parts?
 18 A. **I guess I wouldn't agree with "prime candidate."**
 19 **It was an option.**
 20 Q. Because of his youth and his health, right?
 21 A. **Right.**
 22 Q. I mean, you wouldn't want to have a 94-year-old
 23 cancer patient that passed away from cancer
 24 donating, right?
 25 A. **Right. But we rely on the medical professionals**

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1 **at the time of death to tell us whether or not**
 2 **that's something that's an option.**
 3 Q. Did you consider Dr. Evans a medical
 4 professional?
 5 A. **No. I wasn't using Dr. Evans' information as**
 6 **medical information. I was accessing Dr. Evans**
 7 **for cultural feedback.**
 8 Q. Did Dr. Evans ever indicate to you, one way or
 9 another, what you should do?
 10 A. **No.**
 11 Q. Did Dr. Evans ever inquire of you during your
 12 discussion about these things whether this is
 13 really a matter that should be decided by his
 14 next of kin?
 15 A. **I believe that our conversation would have been**
 16 **around the fact that we can't get ahold of**
 17 **anybody. We don't have regular contact with his**
 18 **family. We want to make sure that we're careful**
 19 **about Native American traditions and cultural**
 20 **beliefs and what could he tell us about that.**
 21 **That would have been how we would have**
 22 **established what we were talking about.**
 23 Q. Ms. O'Connor, do you think the decision to
 24 cremate Bill's body was partly rushed because of
 25 I guess the desire to have him serve as a donor?

32

1 A. **No.**
 2 Q. No? Not at all?
 3 A. **Ask the question again, please.**
 4 Q. Yeah. Let me lay some more foundation for it,
 5 though, first. Obviously if we're talking about
 6 a person's body being used for donation of body
 7 parts, tissue or organs, that has to be done
 8 quickly. Would you agree with that?
 9 A. **There's a time frame for that, yes.**
 10 Q. I mean, you can't embalm that person, can you?
 11 MS. FERRIS: I'm going to object here. Are
 12 you asking from a medical standpoint or what she
 13 may know?
 14 MR. ZEPHIER: What she knows.
 15 A. **I guess I don't know that process.**
 16 Q. (By Mr. Zephier) Well, you know enough about it,
 17 though, in a general sense, don't you?
 18 A. **In a general sense, yes.**
 19 Q. **In the case of Bill Red Bear, there was no**
 20 **autopsy, was there?**
 21 A. **No, there was not.**
 22 Q. Did you have anything to do with that decision
 23 to not have an autopsy done on him?
 24 A. **No, I did not. That decision was made by the**
 25 **medical professionals and the police department**

33

1 **who were present in the ER with me at the time.**
 2 Q. They decided there should not be an autopsy?
 3 A. **Yes. They decided that they would not order**
 4 **one.**
 5 Q. Isn't it an option for the surviving next of kin
 6 or family to have an option of asking for an
 7 autopsy, to your knowledge?
 8 A. **Yes.**
 9 Q. And yet you didn't have any next of kin or
 10 immediate family to ask at that point, right?
 11 A. **No, I did not have any -- I couldn't get ahold**
 12 **of anybody.**
 13 Q. There were only two days before he was cremated,
 14 though, right?
 15 A. **I guess I don't know exactly when he was**
 16 **cremated.**
 17 Q. Actually it was two days.
 18 A. **Okay.**
 19 Q. So you really only had a very small window to
 20 try to find his next of kin, correct, before he
 21 was cremated?
 22 A. **Yes.**
 23 Q. Do you know whether he would have been cremated
 24 that quickly but for the fact that he was
 25 donating parts of his body?

<p style="text-align: right;">34</p> <p>1 A. I guess I have no reason to believe that the</p> <p>2 organ donation and the cremation, the timing of</p> <p>3 those two, I mean, the organ donation obviously</p> <p>4 has to happen before the cremation, but the</p> <p>5 cremation didn't occur, I mean, it occurred</p> <p>6 because we needed to work through the process</p> <p>7 and —</p> <p>8 Q. It's puzzling, isn't it?</p> <p>9 A. I mean, it happened in the natural flow of how a</p> <p>10 typical process would occur.</p> <p>11 Q. Well, actually couldn't his body have been kept</p> <p>12 at the funeral home for even a week or two,</p> <p>13 maybe even a month or two to find a next of kin,</p> <p>14 to your knowledge?</p> <p>15 A. I guess I don't know that and I've never been</p> <p>16 involved in a situation like that so I can't</p> <p>17 answer that question.</p> <p>18 Q. So you didn't have any part in the discussion</p> <p>19 about whether there should or should not be an</p> <p>20 autopsy. Is that right?</p> <p>21 A. That decision is not made by me or by our</p> <p>22 agency.</p> <p>23 Q. That's not the question I asked, though.</p> <p>24 A. Okay.</p> <p>25 Q. Were you a part of any of the discussion about</p>	<p style="text-align: right;">36</p> <p>1 medical and police decision. That's how that</p> <p>2 decision is always made in my experience with</p> <p>3 the people that we support. So yes, they were</p> <p>4 informed of that, but again, they weren't part</p> <p>5 of that decision.</p> <p>6 Q. Did you think Bill's death was mysterious in any</p> <p>7 way?</p> <p>8 A. Not mysterious.</p> <p>9 Q. It was unexpected, wasn't it?</p> <p>10 A. Unexpected.</p> <p>11 Q. He was sick for six or seven days leading up to</p> <p>12 his death, right?</p> <p>13 MS. FERRIS: I'm going to object to that as</p> <p>14 to the facts that you're laying there. I mean,</p> <p>15 if you're going to say six to seven days, I'd</p> <p>16 like you to point to some documentation that</p> <p>17 shows six to seven days.</p> <p>18 MR. ZEPHIER: Let me just ask if she knows.</p> <p>19 MS. FERRIS: Thank you.</p> <p>20 Q. (By Mr. Zephier) Do you know how long he was</p> <p>21 sick?</p> <p>22 A. He had been sick for about five days off and on,</p> <p>23 had had a temperature, not had a temperature,</p> <p>24 had some diarrhea.</p> <p>25 Q. And then he ends up choking on his own vomit?</p>
<p style="text-align: right;">35</p> <p>1 that decision?</p> <p>2 A. I was present at the emergency room with the PA</p> <p>3 who had pronounced Bill dead and the police</p> <p>4 officer. I recall them talking about that they</p> <p>5 would not be ordering an autopsy. It would not</p> <p>6 be fair for me to say that I was a part of that</p> <p>7 discussion.</p> <p>8 Q. But you heard it?</p> <p>9 A. I heard it.</p> <p>10 Q. So those two gentlemen, who are not relatives of</p> <p>11 Bill Red Bear, made a decision that they weren't</p> <p>12 going to ask for an autopsy in your presence?</p> <p>13 A. Yes.</p> <p>14 Q. Did you have any discussion or were you a part</p> <p>15 of any discussion with Nikki Clark about that</p> <p>16 very issue, about whether there should be an</p> <p>17 autopsy done or request one?</p> <p>18 A. Nikki was present with me.</p> <p>19 Q. At the hospital?</p> <p>20 A. At the hospital. I believe that Nikki probably</p> <p>21 heard the same things that I heard. I know that</p> <p>22 Nikki and I were on the phone following that</p> <p>23 discussion with Velda Bartel, who was then</p> <p>24 subsequently on the phone with Secretary Hofer,</p> <p>25 and we informed them of that decision that's a</p>	<p style="text-align: right;">37</p> <p>1 A. The Death Certificate says "natural causes."</p> <p>2 Q. But I mean, do you know how he died?</p> <p>3 MS. FERRIS: Objection. That's a medical</p> <p>4 question.</p> <p>5 A. That's not my decision to make.</p> <p>6 Q. (By Mr. Zephier) Did you take part in any</p> <p>7 debriefing after his death?</p> <p>8 A. Tell me what you mean by debriefing.</p> <p>9 Q. A meeting where the circumstances of his death</p> <p>10 were discussed?</p> <p>11 A. I guess I don't recall a formal meeting.</p> <p>12 Q. You really don't? You don't?</p> <p>13 A. Huh-uh.</p> <p>14 Q. It puzzles me why there wouldn't be a debriefing</p> <p>15 after such an unusual event. Wouldn't there be</p> <p>16 a debriefing after somebody dies in your care?</p> <p>17 A. Well, certainly we would have had numerous</p> <p>18 discussions about that and tried to understand,</p> <p>19 you know, what steps were taken, you know, what</p> <p>20 happened. It wasn't like, you know, Monday at</p> <p>21 10 o'clock there was a meeting. There would</p> <p>22 have been a variety of discussions, yes.</p> <p>23 Q. Yeah, I never said, you know, immediately after</p> <p>24 he died. I just said after his death. So there</p> <p>25 was such a meeting?</p>

<p style="text-align: right;">38</p> <p>1 A. There would have been a variety of</p> <p>2 conversations.</p> <p>3 Q. Okay. And who would have taken part in those</p> <p>4 conversations?</p> <p>5 A. His team members, on-call staff, myself.</p> <p>6 Q. Secretary Hofer?</p> <p>7 A. Not that I'm aware of.</p> <p>8 Q. Nikki Clark?</p> <p>9 A. No. Not that I'm aware of.</p> <p>10 Q. Absent the presence or input from next of kin</p> <p>11 and immediate family or relatives, Nikki Clark</p> <p>12 actually had the legal capacity to make</p> <p>13 decisions of this nature on Bill's behalf at</p> <p>14 that time, didn't she, to your knowledge?</p> <p>15 A. My memory is that Nikki came to the emergency</p> <p>16 room after we learned that Bill had been</p> <p>17 pronounced dead. We called Velda Bartel, who</p> <p>18 subsequently called Secretary Hofer. We</p> <p>19 discussed the fact that there wasn't regular</p> <p>20 family contact and we could not get ahold of any</p> <p>21 family. Velda Bartel and Secretary Hofer</p> <p>22 acknowledged that they believed the guardianship</p> <p>23 actually ended at the time of death, but in the</p> <p>24 absence of anyone else they would participate</p> <p>25 with our agency in doing what needed to be done.</p>	<p style="text-align: right;">40</p> <p>1 I'm not a medical professional.</p> <p>2 Q. I understand. Where was Gwen Orr during this</p> <p>3 time period?</p> <p>4 A. While we were at the emergency room?</p> <p>5 Q. Yeah. The day of his death and the days after.</p> <p>6 A. Well, Gwen is our agency RN. She happened to be</p> <p>7 the on-call person that day. She was at her</p> <p>8 personal home. She got that call. She called</p> <p>9 me because the on-call person would call the</p> <p>10 administrator in a situation like that. I met</p> <p>11 Gwen at the emergency room. We were present</p> <p>12 there with Nikki Clark and worked through that</p> <p>13 situation.</p> <p>14 Q. So she was actually around Vermillion somewhere</p> <p>15 that day when Bill died?</p> <p>16 A. Yes.</p> <p>17 Q. Do you know Matt Miranda was trying to reach her</p> <p>18 before Bill actually died?</p> <p>19 A. I understand that Matt tried to call some</p> <p>20 people, yes.</p> <p>21 Q. Did Matt try to call you?</p> <p>22 A. No. Not that I'm aware of.</p> <p>23 Q. Who are the other people that you are aware of</p> <p>24 that he tried to call before Bill died?</p> <p>25 A. I believe the person he tried to call was</p>
<p style="text-align: right;">39</p> <p>1 Q. That's interesting. Do you know whether that</p> <p>2 conversation was recorded or documented at all?</p> <p>3 A. No, I don't.</p> <p>4 Q. But you heard it, right?</p> <p>5 A. Yes.</p> <p>6 Q. Did Nikki hear it?</p> <p>7 A. Yes. I mean, understand Nikki and I were</p> <p>8 standing beside each other in the emergency</p> <p>9 room. Probably one of us was on a cell phone,</p> <p>10 you know.</p> <p>11 Q. Sure.</p> <p>12 A. I mean, we were sharing those conversations back</p> <p>13 and forth. So in that context.</p> <p>14 Q. All right. Were you under the understanding</p> <p>15 that the police didn't think there was any foul</p> <p>16 play leading to Bill's death?</p> <p>17 A. Yes. That was my understanding.</p> <p>18 Q. Do you know whose decision it was to put</p> <p>19 "natural causes" as the reason for his death on</p> <p>20 the Death Certificate?</p> <p>21 A. No, I don't.</p> <p>22 Q. Were you aware that he actually choked on his</p> <p>23 own vomit?</p> <p>24 A. I understood that that was one of the things</p> <p>25 that was talked about as a presenting problem.</p>	<p style="text-align: right;">41</p> <p>1 Kristyn Berg and when she didn't answer, then he</p> <p>2 called 911.</p> <p>3 Q. Do you know why he called Kristyn Berg before he</p> <p>4 dialed 911?</p> <p>5 A. I would imagine it was a scary situation.</p> <p>6 Q. Sure.</p> <p>7 A. I can't speak for Matt.</p> <p>8 Q. Do you think that that was anything based on</p> <p>9 policy or protocol?</p> <p>10 A. No.</p> <p>11 Q. Do you know if Matt knew how to do CPR?</p> <p>12 A. All of our staff are trained on CPR.</p> <p>13 Q. But did Matt know how to do CPR back on January</p> <p>14 4, 2009?</p> <p>15 A. If he was working, he was trained in CPR.</p> <p>16 Q. But do you know if he knew how to do it? You</p> <p>17 don't know?</p> <p>18 A. I didn't train him. I mean --</p> <p>19 Q. You don't know, do you?</p> <p>20 A. Other than I know that he is trained in CPR.</p> <p>21 Q. Were you aware that he did not do CPR on</p> <p>22 Bill Red Bear that day?</p> <p>23 A. I am aware of that because my understanding is</p> <p>24 that the police officer arrived before Matt was</p> <p>25 off the phone.</p>

<p style="text-align: right;">42</p> <p>1 Q. Do you know what aspiration means?</p> <p>2 A. Yes, in a general sense.</p> <p>3 Q. What's your understanding of what that means?</p> <p>4 A. It means that fluid of some form goes into your</p> <p>5 lungs.</p> <p>6 Q. You can choke on it?</p> <p>7 A. Correct.</p> <p>8 Q. Do you consider that a natural cause of death?</p> <p>9 MS. FERRIS: Objection. This question has</p> <p>10 to do with a medical professional expert's</p> <p>11 opinion, and she's already said she's not a</p> <p>12 medical expert.</p> <p>13 Q. (By Mr. Zephier) Based upon your life</p> <p>14 experiences, your experiences in the position</p> <p>15 that you are in, any prior experiences you've</p> <p>16 had with health issues yourself or with others,</p> <p>17 do you in your personal opinion, not as an</p> <p>18 expert medical person but in your own opinion,</p> <p>19 consider a person choking on their own vomit as</p> <p>20 a natural cause of death?</p> <p>21 A. I don't know. I don't know if that would be</p> <p>22 considered a natural cause of death. I think</p> <p>23 that would have to be -- that's a medical</p> <p>24 question.</p> <p>25 Q. Would you agree with me it's somewhat of an</p>	<p style="text-align: right;">44</p> <p>1 position. She was not the on-call supervisor</p> <p>2 that day.</p> <p>3 Q. Who was?</p> <p>4 A. Jennifer Palsma.</p> <p>5 Q. Palsma?</p> <p>6 A. Palsma.</p> <p>7 Q. Can you spell that?</p> <p>8 A. P-A-L-S-M-A.</p> <p>9 Q. Does Jennifer still work for SESDAC?</p> <p>10 A. No.</p> <p>11 Q. Do you know why not?</p> <p>12 A. She moved on to another profession.</p> <p>13 Q. Do you know relatively when?</p> <p>14 A. No, I don't, but I know that she actually still</p> <p>15 does some p.r.n. shifts for our agency. I don't</p> <p>16 know, I may have just given inconsistent</p> <p>17 information there. Jennifer Palsma does still</p> <p>18 work for our agency on occasion as a direct</p> <p>19 support staff. So if I gave incorrect</p> <p>20 information, I apologize.</p> <p>21 Q. But she was a supervisor back then?</p> <p>22 A. Correct.</p> <p>23 Q. And now she's basically a direct support</p> <p>24 professional?</p> <p>25 A. On a very p.r.n. basis</p>
<p style="text-align: right;">43</p> <p>1 unusual way for a person 49 years old, otherwise</p> <p>2 healthy, to die?</p> <p>3 A. I don't know if it is or not.</p> <p>4 Q. Honestly?</p> <p>5 A. I don't know. I would -- I don't know. You'd</p> <p>6 have to ask a doctor if that happen on a</p> <p>7 regular basis. I don't know.</p> <p>8 Q. Were you aware whether Bill Red Bear had a heart</p> <p>9 attack?</p> <p>10 A. At the time, I didn't know what he had.</p> <p>11 Q. All right. Do you know where Kristyn Berg was</p> <p>12 on the afternoon and evening of Bill's death on</p> <p>13 January 4, 2009?</p> <p>14 A. I don't know exactly where she was. I know that</p> <p>15 she was available by phone.</p> <p>16 Q. Was she out of the state?</p> <p>17 A. I honestly don't know where she was. I mean,</p> <p>18 she could have been in Sioux City, Iowa and been</p> <p>19 out of the state but still been available by</p> <p>20 phone. I don't know where Kristyn was.</p> <p>21 Q. But she was the on-call contact to make. Is</p> <p>22 that what you're saying?</p> <p>23 A. My understanding is she actually was not the</p> <p>24 on-call person. She was the supervisor of Yale</p> <p>25 and her staff certainly can call her in that</p>	<p style="text-align: right;">45</p> <p>1 Q. Is that a demotion?</p> <p>2 A. No. Not for her it wasn't. It was a personal</p> <p>3 life choice. She took another full-time job.</p> <p>4 Went on to have some children and do some other</p> <p>5 things with her life.</p> <p>6 Q. Where were you on that afternoon and evening of</p> <p>7 January 4, 2009?</p> <p>8 A. I was at my home.</p> <p>9 Q. And who was the first person that contacted you</p> <p>10 about this event?</p> <p>11 A. Gwen On.</p> <p>12 Q. And was that after Bill had already been</p> <p>13 declared dead?</p> <p>14 A. No. It was about 30 minutes prior to that. I</p> <p>15 was at the ER when the medical professional came</p> <p>16 out of the exam room and notified us that Bill</p> <p>17 had passed away.</p> <p>18 Q. How closely were you involved in the transport</p> <p>19 of Bill's body after he was declared dead at the</p> <p>20 hospital?</p> <p>21 A. I was involved in the context that I made</p> <p>22 arrangements with Bob Hansen for him to</p> <p>23 transport Bill's body after the organ donation</p> <p>24 team had done what they were going to do.</p> <p>25 Q. Okay. Well, let's get to that. Was the</p>

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1 decision to donate his organs made before his

2 body even left the hospital?

3 A. Yes.

4 Q. And who decided that?

5 A. That was a collective decision between everybody

6 that I named before; myself, Nikki Clark,

7 Velda Bartel, and Secretary Jerry Hofer were on

8 the phone from Pierre. We consulted via phone

9 with Kristyn Berg, Deb Maes, Jenna Wiepen Gobel

10 as Bill's team and collectively we decided that.

11 Q. It was a pretty important decision, wasn't it?

12 A. Yes.

13 Q. And no input from his next of kin at that point,

14 right?

15 A. Correct.

16 Q. So there was what, a span of maybe minutes after

17 Bill was declared dead at the hospital until the

18 decision to donate his body parts was made?

19 A. I would say more like probably a couple of

20 hours, but I guess without, you know, without

21 some pieces of paper --

22 Q. But it was before you made any attempts to try

23 to call Pine Ridge Police Department or Google

24 anybody. Is that right?

25 A. Yes. Those decisions were made after trying to

47

1 get ahold of the family and not having any

2 success at all based on the information we had.

3 Q. Well, how much effort could you make in two

4 hours prior to the decision to donate his body

5 parts after he was declared dead at the

6 hospital?

7 A. We had called the contact numbers that we have.

8 We did not have a relationship with his family.

9 Q. That's your assumption, though, isn't it?

10 A. We had no relationship with his family. I don't

11 believe that's an assumption; I believe that's a

12 statement.

13 Q. Do you feel any animosity toward his family as a

14 result of that?

15 A. I can't have animosity toward his family; I

16 don't know them.

17 Q. Did you think that they abandoned Bill?

18 A. I don't know their story. What I know is that

19 they had not had regular contact with him and

20 had not visited him in the eight years he had

21 been at SESDAC.

22 Q. Do you feel they had a right to even make any

23 type of a claim to make a decision on body part

24 donation?

25 A. If we would have been able to get ahold of them,

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1 I certainly would have involved them in that.

2 Q. Now what's your personal knowledge about how

3 Bill's body was moved from point A to point B to

4 point C to point D? What's your knowledge of

5 that?

6 A. My knowledge would be that his body was kept at

7 Sanford Vermillion until after the organ

8 donation team came and did their process.

9 Bob Hansen came to Sanford Vermillion and took

10 Bill's body at that time. I believe that his

11 body was then transferred to Sioux City, Iowa,

12 which is where they actually do the cremation

13 process, and then brought back to Vermillion for

14 the services. My understanding and my belief is

15 that Bill's body was either in the care of

16 Sanford Vermillion Hospital or in the care of

17 Hansen Funeral Home from the time of him being

18 taken to the emergency room in the ambulance to

19 the time that we buried his ashes.

20 Q. So you think at all times it was in the custody

21 of the funeral home during those periods?

22 A. Yes.

23 Q. We'll ask Bob Hansen that.

24 A. Okay.

25 Q. There is a document there right in front of you.

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1 The title is the Eye Bank. What is the Exhibit

2 Number?

3 A. 14.

4 Q. 14. Let's take a look at that. Were you aware

5 that they took his corneas from both eyes?

6 A. Yes.

7 Q. Were you aware that they took bones out of his

8 arm?

9 A. Yes.

10 Q. They took vertebrae out of his back?

11 A. Yes.

12 Q. That they took heart valves?

13 A. Yeah.

14 Q. That they took nerves from his body?

15 A. Yes. Yes, I'm familiar with this document of

16 anatomical gift.

17 Q. Have you seen this before?

18 A. Yes.

19 Q. Were you there when the donation documents were

20 filled out and Nikki Clark was asked to sign it?

21 A. I was on the phone with Nikki when we did this

22 information where it says "phone recorded

23 consent" under both of our names. I'm not

24 familiar with the document that Nikki physically

25 signed.

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1 Q. Were you present during the time when the
2 harvesting unit arrived at the hospital?

3 A. **I was not.**

4 Q. Were you present during any of those procedures?

5 A. **No.**

6 Q. Are you certain that they didn't transport his
7 body to Sioux Falls?

8 A. **That is not my understanding. My understanding
9 is that the organ donation team came to
10 Vermillion.**

11 Q. Did you have any understanding that once his
12 body was dissected for donation purposes that an
13 autopsy might actually be inconsequential?

14 A. **The determination that there wouldn't be an
15 autopsy was already made.**

16 Q. But not by anybody with any legal authority,
17 right?

18 A. **The police department and the medical staff were
19 present at the emergency room and made that
20 determination.**

21 Q. I'm just going to ask you a personal question,
22 ma'am. If you had a relative that died
23 mysteriously, would you want to know how they
24 died?

25 A. **That's not a decision that I get to**

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1 **professionally make.**

2 Q. No. I'm asking on a personal level.

3 MS. FERRIS: I'm going to object as to
4 relevance. You don't need to answer that.

5 MR. ZEPHIER: I think she does.

6 MS. FERRIS: I don't think she does.

7 MR. ZEPHIER: Are you advising her not to
8 answer that?

9 MS. FERRIS: Yeah. I'm advising her not to
10 answer that.

11 MR. ZEPHIER: Okay. Exception noted.

12 Q. (By Mr. Zephier) Does the name Albert Red Bear,
13 Jr. ring any bells for you?

14 A. **I recognize that name as one of Bill's brother's
15 names from records.**

16 Q. Do you recognize that from records that existed
17 before Bill's death?

18 A. **Yes.**

19 Q. In fact, Albert had come to see Bill on
20 occasions. Were you aware of that?

21 A. **I'm not aware that any of Bill's family ever
22 came to Vermillion. I'm not aware of that.**

23 Q. Did you see Bill Red Bear at all personally
24 between the dates of December 30, 2008 and
25 January 4, 2009 prior to his being at the

52

1 hospital in Vermillion?

2 A. **I honestly can't recall the last time I had seen
3 Bill. I saw him on a regular basis, but I can't
4 tell you when the last time I had seen him. I
5 just don't have a memory of that.**

6 Q. Were you involved in any of the so-called
7 medical care that was rendered to him between
8 December 30th and January 4th of 2009 -- or
9 December 30th of 2008 and January 4th of 2009?

10 A. **I believe that there are medical comments that
11 say that I was the on-call service coordinator
12 on December 30 and that I received a call around
13 10 o'clock p.m. stating that Bill had a
14 temperature. I have no recollection of that
15 call, but I understand it's documented. I don't
16 deny that. I have no memory of it four and a
17 half years ago. I've been on call a couple
18 hundred times since then but --**

19 Q. Sure. What you're saying then is if the
20 documents say that you were a part of that
21 discussion, then it must be true?

22 A. **Yeah. I will not deny that I would have gotten
23 that call. I have no memory of it.**

24 Q. In everything that you know about this case,
25 were you aware of Bill Red Bear having any

53

1 contact with a medical professional, whether
2 that be a nurse or a doctor or a physician's
3 assistant, during the time period of December
4 30, 2008 through January 4, 2009?

5 A. **I know that the nurse called the following day
6 per the document to follow up on Bill's, on the
7 call that I had gotten and that at that time
8 there was not enough indication to believe that
9 he needed to be seen medically.**

10 Q. So he wasn't seen ever until he died, right?

11 A. **Not that I'm aware of.**

12 Q. The hospital is blocks away from the Yale House,
13 right?

14 A. **Yes. But a person having a temperature and not
15 feeling well and maybe a bout of diarrhea is not
16 necessarily an indication of needing to be seen
17 medically.**

18 Q. Exactly, and then he ends up dead. Does that
19 suggest natural causes?

20 A. **That's not my decision to make.**

21 Q. Do you remember the name of the police officer
22 that had the discussion with the PA at the
23 hospital about not wanting to order an autopsy?

24 A. **My memory is that it was Officer Detective --
25 well, he's a detective now. It was Officer**

1 STATE OF SOUTH DAKOTA IN CIRCUIT COURT
2 COUNTY OF CLAY FIRST JUDICIAL CIRCUIT

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4 *****
5 BERNADINE RED BEAR, a/k/a Civil No. 11-377
6 BERNADINE SHIELDS, as
7 Administrator of the Estate of
8 DARELLE RED BEAR, Deceased,
9 Plaintiff,
10 - vs -
11 SESDAC, Inc.,
12 Defendant.
13 Clay County Crthse.
14 Vermillion, SD
15 January 9, 2014
16 1:15 p.m.
17 *****

18 D E P O S I T I O N O F
19 GWEN ORR

20 *****
21 APPEARANCES:
22 Mr. Robin L. Zephier
23 Abourezk & Zephier
24 2020 W. Omaha Street
25 Rapid City, South Dakota 57702
 Counsel for Plaintiff;

26 Mr. R. Alan Peterson
27 Lynn, Jackson, Shultz & Lebrun
28 110 N. Minnesota Avenue, Suite 400
29 Sioux Falls, South Dakota 57104
30 Counsel for Defendant.

31 ALSO PRESENT: Gerald E. Tracy II, SESDAC

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1 Q. It says, Have privacy, dignity, confidentiality,
2 and humane care. What's your definition of
3 dignity in this context?
4 MR. PETERSON: Object to the question.
5 It's asking for a legal opinion. And again,
6 answer if you have an answer.
7 A. **I don't have an answer.**
8 Q. (By Mr. Zephier) You don't, honestly?
9 A. **I don't understand what you're saying. I know**
10 **what dignity means.**
11 Q. What does it mean to you?
12 A. **It means to be, to have every right that any**
13 **other person would have to be treated in a**
14 **dignified manner just as you or I would be.**
15 Q. Do you think it has anything to do with respect?
16 A. **Yes.**
17 Q. Respect for life?
18 A. **Yes.**
19 Q. Respect for culture?
20 A. **Yes.**
21 Q. Respect for self-determination?
22 A. **Yes.**
23 Q. Respect for individual identity?
24 A. **Yes.**
25 Q. What about humane care, do you think that the

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1 definition of humane care should include or
2 would include necessary medical care to sustain
3 life?
4 A. **Yes.**
5 Q. In fact, to deny medical care to sustain life
6 would be inhumane, wouldn't it?
7 A. **Yes.**
8 Q. Okay. Is Jenna Gobel, am I pronouncing that
9 right?
10 A. **Yes.**
11 Q. Is she still a service coordinator?
12 A. **Yes.**
13 Q. So she's actually serving as service coordinator
14 for other people even now?
15 A. **Yes.**
16 (Orr Deposition Exhibit 33 marked for
17 identification)
18 Q. I don't have a copy of that. I'm sorry. Ma'am,
19 would you please look at that and let me know if
20 you have seen that before.
21 A. **No.**
22 Q. Do you know what that is?
23 A. **It looks like the board of directors maybe.**
24 Q. Do you recognize the names?
25 A. **Yes.**

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1 Q. Are those the board of directors then?
2 A. **To my knowledge, they are or were.**
3 Q. Okay. But you don't recognize that document, in
4 and of itself, what it's meant to depict?
5 A. **No, I don't.**
6 Q. Okay. You just set that aside.
7 Have you seen any of the documents that
8 were obtained concerning the donation of his
9 body parts?
10 A. **Have I seen -- say that again, please.**
11 Q. Have you seen any of the documents that have
12 been obtained as a result of Bill's donation of
13 his body parts?
14 A. **No.**
15 Q. I asked you a question. I'm sorry if I'm going
16 back over something that I asked you before, but
17 maybe I didn't catch your answer clearly. Do
18 you know of other instances where somebody has
19 died in the custody of SESDAC where their organs
20 have been donated?
21 A. **Yes.**
22 Q. Is that something that has frequently happened
23 over the time that you have been a SESDAC
24 employee?
25 A. **Occasionally, yes.**

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1 Q. Are those individuals that you can recall, and I
2 don't want to know their names at this point,
3 but what you think when you think back about
4 these other individuals that had body parts
5 donated, were they without families?
6 A. **Not to my recollection.**
7 Q. Do you know whether those individuals had signed
8 living wills or had living wills signed on their
9 behalf by a guardian?
10 A. **I do not believe so.**
11 Q. So is it a potential that the decision-making
12 was done by SESDAC's teams again for those
13 individuals whether to donate those body parts
14 when they passed away?
15 A. **Yes.**
16 Q. Were you aware of any conversation that occurred
17 between Jenna and Bill where she may have asked
18 him a question about where he wanted to be
19 buried?
20 A. **I did not have privilege to that conversation.**
21 **I knew that conversation had occurred at his**
22 **team meeting.**
23 Q. And did you know that by reading the transcript
24 of her deposition?
25 A. **I knew that by reading his team, his SPM, his**

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1 support plan what the decision was from his team

2 meeting. That's where I read it.

3 Q. He said he wanted to be buried by his friend?

4 A. Right.

5 Q. That said nothing about cremation, did it?

6 A. I don't believe so.

7 Q. It said nothing about donating his body to

8 anything, did it?

9 A. No.

10 Q. Do you feel bad about any of this?

11 A. I feel sad that Bill died, but I feel it was,

12 everything was done that could be done.

13 Q. Okay. Those are all the questions I have.

14 Thank you.

15 A. Okay.

16 MR. PETERSON: Just on the record, if you

17 would give me a copy of Exhibit 23 and 33, I

18 need those. And then also as to the cold

19 product, if you could do your best to copy the

20 label and copy the product insert, too.

21 MR. ZEPHIER: We might want to seal that

22 up, too, and maybe if we put like some really

23 tough tape around the cap.

24 MR. PETERSON: Sure. Yeah, just to make

25 sure it doesn't get opened by accident or

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1 something.

2 MR. ZEPHIER: Yeah, or a crack or

3 something, yeah.

4 MR. PETERSON: I'm trying to think. I

5 guess you're going to end up getting it back

6 with the original. But if you could copy

7 whatever you can copy on here so I have it.

8 And then you can e-mail the last three

9 transcripts to me, and I'll arrange for the

10 reading and signing. Thank you very much.

11 (Witness excused)

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1 I, Gwen Orr, do certify that I have read

2 the foregoing transcript of my deposition taken

3 on January 9, 2014, and it is a true and correct

4 record of my testimony given at that time except

5 as to any corrections I have listed below:

6

7

8 PAGE LINE CHANGE/CORRECTION REASON

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18 I, Gwen Orr, do certify that I have read

19 the foregoing transcript of my deposition taken

20 on January 9, 2014, and it is a true and correct

21 record of my testimony given at that time except

22 as to any corrections I have listed.

23

24

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GWEN ORR

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1 STATE OF SOUTH DAKOTA)

2 CERTIFICATE

3 COUNTY OF MINNEHAHA)

4 I, Lisa Griffin Wiederrich, Court Reporter

5 and Notary Public within and for the State of

6 South Dakota:

7 DO HEREBY CERTIFY that the witness was

8 first duly sworn by me to testify to the truth,

9 the whole truth, and nothing but the truth

10 relative to the matter under consideration, and

11 that the foregoing pages 1-64, inclusive, are a

12 true and correct transcript of my stenotype

13 notes made during the time of the taking of the

14 deposition of this witness.

15 I FURTHER CERTIFY that I am not an attorney

16 for, nor related to the parties to this action,

17 and that I am in no way interested in the

18 outcome of this action.

19 In testimony whereof, I have hereto set my

20 hand and official seal this 21st day of January

21 2014.

22

23

24 Lisa Griffin Wiederrich, Notary Public

25 My Commission Expires: 11-9-2015

STATE OF SOUTH DAKOTA)
)§§
COUNTY OF CLAY)

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

BERNADINE RED BEAR AKA,)
BERNADINE SHIELDS, as Administrator)
of the Estate of DARELLE RED BEAR,)
Deceased,)

FILE NO.: Civ. No.: 11-377

Plaintiff,)

v.)

**AFFIDAVIT OF
BERNADINE RED BEAR**

SESDAC FOUNDATION, INC., and)
JOHN DOES NOS. ONE THROUGH SIX,)
in their personal and representative)
capacities, individually, and jointly)
and severally,)

Defendants.)

State of South Dakota)
) ss.
County of Pennington)

I, Bernadine Red Bear, being hereby sworn under oath, states as follows:

1. I live in Rapid City, South Dakota;
2. That I, and my brother Darrelle "Billy" Red Bear are duly enrolled members of the Oglala Sioux Tribe;
3. I am the Special Administrator of the Estate and the older natural sister of the decedent Darelle "Billy" Red Bear;
4. That while my brother Decedent Darrelle "Billy" Red Bear, was a resident at the Human Services Center in Yankton, and also later at the disabled group home SESDAC in Vermillion, I was committed, loyal and supportive of my brother



Decedent Darrelle "Billy" Red Bear;

5. That upon learning of the news of my brother's death and upon learning of the disrespectfulness of the handling of his remains, and after thinking about it all since, I became nauseous, had problems sleeping, nightmares, tightness in the chest, sadness, some anger, trembling, shakiness, tingling in the fingers, lack of concentration, loss of appetite, rapid heart rate, and had shortness of breath;
6. That I was never notified by anyone from SESDAC that Bill was sick in late December 2008 and/or early January 2009, or that he had suddenly died, what he died from, or what was planned to do with this remains, until I was advised in April 2009 by others (non SESDAC) of Bill's death, cremation and burial;
7. That our mother, Christine Red Bear, and many of Bill's nuclear family, still lived in Allen, South Dakota on the Pine Ridge Indian Reservation for many years since the 1990's through 2009;
8. That SESDAC and its staff were clearly informed of Bill's mother's and family's residence in Allen, South Dakota, and many family members left their names and addresses with SESDAC staff for contact and emergency purposes while Bill was alive and prior to this death on January 4, 2009.
9. That Bill frequently, at least once every two to three months, called for one of his brothers or sisters (mostly Albert Red Bear, Kenneth Red Bear, etc.) and his mother Christine Red Bear (she died in 2005), and therefore SESDAC should have reasonably known of some family members to call/contact when Bill got sick, when he died and before his remains were disposed of.

10. That Bill had expressed his desire to return home to Allen on the reservation to live with his family, when he was at Yankton HSC and later, when he was at SESDAC.
11. That the Native American and Lakota spiritual beliefs held by Bill and our family, are strong and we would never have allowed or consented for any person or entity (including SESDAC) to cremate Bill's remains, or to harvest and distribute his body parts, which occurred with SESDAC's knowledge, acquiescence, prompting, approval and motivation, at the time of his death and in early July 2009.
12. That a decision was made to not reveal his mother's passing (Christine died on March 11, 2005) to Bill, by his brothers and sisters, so as not to cause a mental breakdown/emotional devastation for Bill while he was in SESDAC's care, custody and control.
13. All of Bill's family, including his mother Christine before she died, and his brothers and sisters, put their human trust in SESDAC and their staff to take care of Bill who was in their care, custody and control from 2000 to January 2009, and trusted that SESDAC would not do or allow anyone or anything, to harm, endanger, and/or kill their son and brother.
14. That it was first learned in April 2009, that Bill had died, when Kenneth Red Bear called SESDAC's Yale House to speak with his brother Bill.
15. That Kenneth was advised by the Yale House Staff (SESDAC) that Bill had died on January 4, 2009 and that he had been cremated and buried already.
16. That SESDAC staff advised other family members who called in April 2009 about

Bill's death, that SESDAC and its staff "had tried" to contact Bill's family after he had suddenly died, and before he was cremated and had his body parts harvested. However, that decision to quickly dispose of his remains in that fashion, was made with SESDAC officials' knowledge, acquiescence, prompting, and approval, within three (3) hours of Bill's death in the later afternoon of January 4, 2009.

17. That Christine Red Bear's name and address, and Albert Red Bear's phone contact numbers were available in the Yankton HSC and/or SESDAC records on Bill, with SESDAC's records, as of January 4, 2009 and well before. This is especially true in that Christine and Rachel Red Bear's address of Box 452, Allen, South Dakota, is prominently referenced in the 2007 Circuit Court Order as an addressee for purposes of official service of the documents. So SESDAC had that information in their records in order to reasonably, quickly, efficiently and humanely, contact Bill's next of kin when he was getting seriously ill, when he died and certainly before disposing of his remains. They surely could have called the Pine Ridge and/or BIA police department to get word to the family in Allen, South Dakota. Instead, we learned, that SESDAC was allegedly "googling" "Red Bear" names from the Rosebud Sioux reservation (not Pine Ridge, or Allen, S.D.).
18. That Bill had called his brothers and sisters and mother, throughout the years, to their homes and home phone numbers, from SESDAC facilities and/or his "residence" at the Yale House.
19. When Albert Red Bear would speak with Bill on the phone every several months,

Albert always left his contact number with SESDAC staff before or after speaking with Bill.

20. Someone at SESDAC became aware of Bill's mother Christine Red Bear's death, at some point prior to Bill's funeral in Vermillion, because his funeral notice indicated that Bill's parents preceded him in death. It is not known if SESDAC advised Bill that his mother had passed away in 2005.
21. When Bernadine Red Bear was trying to make arrangements to have the personal property from Bill's room at the Yale House returned to her in September 2009, she did speak with a SESDAC employee to have it sent to her (Bernadine). The SESDAC employee asked for Bernadine's address and phone number (605-454-0350). SESDAC's employee told her they would send it directly to her. In late September 2009, Bernadine called SESDAC again to check on the status of the personal belongings being sent to her. She was told that the items had been sent to her. (Sept. 28, 2009). Sometime within the next few days, Bernadine received an anonymous call to her cell phone at about 12:30 a.m., whereby an unknown male voice from a "restricted -unavailable" source, stated. "I know where you live, I'm gonna get you". It is unknown at this time who that caller was or where the call came from.
22. It is known that Bill's mother Christine Red Bear had gone to Vermillion to visit Bill at SESDAC and/or Yale House over the years before Christine died in 2005. Bill's sister Wilma Red Bear often accompanied Christine on those trips to Vermillion.

23. That most of Bill's family members including his mother Christine, and sisters Bernadine, Rachel, Sharon, Gloria, Wilma, and brothers Kenneth, Cleo, Albert and Ben, all wanted to visit Bill more frequently, but all were financially unable to make the trip to Vermillion to visit with Bill physically, as often as the family members wished to.
24. When Bernandine called SESDAC and/or Yale House in April 2009 after learning of Bill's death, on one occasion a female answered and said "what do you want to know?" "I will have to have someone else talk to you." And a male came on the phone and said that there was nothing they could do.
25. Bill had written a letter to his mother Christine Red Bear, addressed to Christine at her Allen, South Dakota residence, from SESDAC in Vermillion, dated March 8, 2005. (Ex. 3). Unfortunately Christine passed away on March 11, 2005, so she did not see Bill's March 8, 2005 letter.

Dated this 15 day of January, 2015.

By: Bernadine Red Bear
Bernadine Red Bear
Affidavit

Subscribed and sworn to before me, the undersigned officer, this 15 day of January, 2015.



Brenna Jackson
Notary Public, South Dakota

Commission Expires:

7/18/18

STATE OF SOUTH DAKOTA)
) §§
COUNTY OF CLAY)

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

FILE NO.: Civ. No.: 11-377

BERNADINE RED BEAR AKA,)
BERNADINE SHIELDS, as Administrator)
of the Estate of DARELLE RED BEAR,)
Deceased,)

Plaintiff,)

v.)

SESDAC FOUNDATION, INC., and)
JOHN DOES NOS. ONE THROUGH SIX,)
in their personal and representative)
capacities, individually, and jointly)
and severally,)

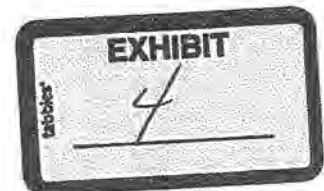
Defendants.)

**AFFIDAVIT OF
KENNETH RED BEAR**

State of Indiana)
) ss.
County of Marion)

I, Kenneth Red Bear, being hereby sworn under oath, states as follows:

1. I live in Indianapolis, Indiana;
2. That I, and my brother Darrelle "Billy" Red Bear are duly enrolled members of the Oglala Sioux Tribe;
3. I am the natural brother of the decedent Darelle "Billy" Red Bear;
4. That while my brother Decedent Darrelle "Billy" Red Bear, was a resident at the Human Services Center in Yankton, and also later at the disabled group home SESDAC in Vermillion, I was committed, loyal and supportive of my brother Decedent Darrelle "Billy" Red Bear;



5. That upon learning of the news of my brother's death and upon learning of the disrespectfulness of the handling of his remains, and after thinking about it since then, I became queasy, had problems sleeping, nightmares, tightness in the chest, sadness, some anger, trembling, shakiness, lack of concentration, shock, loss of appetite, rapid heart rate, and had shortness of breath;
6. That I was never notified by anyone from SESDAC that Bill was sick in late December 2008 and/or early January 2009, or that he had suddenly died, what he died from, or what was planned to do with this remains, until I was advised in April 2009 by others (non SESDAC) of Bill's death, cremation and burial;
7. That our mother, Christina Red Bear, and many of Bill's nuclear family, still lived in Allen, South Dakota on the Pine Ridge Indian Reservation for many years since the 1990's through 2009;
8. That SESDAC and its staff were clearly informed of Bill's mother's and family's residence in Allen, South Dakota, and many family members left their names and addresses with SESDAC staff for contact and emergency purposes while Bill was alive and prior to this death on January 4, 2009.
9. That Bill frequently, at least once every two to three months, called for me or one of his other brothers or sisters (Albert Red Bear,) and his mother Christine Red Bear (she died in 2005), and therefore SESDAC should have known of some family members to call/contact when Bill got sick, when he died and before his remains were disposed of.
10. That Bill had expressed his desire to return home to Allen on the reservation to


live with his family, when he was at Yankton HSC and later, when he was at SESDAC.

11. That the Native American and Lakota spiritual beliefs held by Bill and our family, are strong and we would never have allowed or consented for any person or entity (including SESDAC) to cremate Bill's remains, or to harvest and distribute his body parts, which occurred with SESDAC's knowledge, acquiescence, prompting, approval and motivation, in early July 2009.
12. That a decision was made to not reveal his mother's passing (Christine died on March 11, 2005) to Bill, by his brothers and sisters, so as not to cause a mental breakdown/emotional devastation for Bill while he was in SESDAC's care, custody and control.
13. All of Bill's family, including his mother Christine before she died, and his brothers and sisters, put their trust in SESDAC and their staff to take care of Bill who was in their care, custody and control from 2000 to January 2009, and trusted that SESDAC would not do or allow anyone or anything, to harm, endanger, and/or kill their son and brother.
14. That it was first learned in April 2009, that Bill had died, when I called SESDAC's Yale House to speak with my brother Bill.
15. That I was advised by the Yale House Staff (SESDAC) that Bill had died on January 4, 2009 and that he had been cremated and buried already.
16. That SESDAC staff advised other family members who called in April 2009 about Bill's death, that SESDAC and its staff "had tried" to contact Bill's family after he

had suddenly died, and before he was cremated and had his body parts harvested. However, that decision to dispose of his remains in that fashion, was made with SESDAC officials' knowledge, acquiescence, prompting, and approval, within three (3) hours of Bill's death in the later afternoon of January 4, 2009.

17. That Christine Red Bear's name and address, and Albert Red Bear's phone contact numbers were available in the Yankton HSC and/or SESDAC records for Bill, with SESDAC's records, as of January 4, 2009 and well before. So SESDAC had that information in their records in order to reasonably, quickly, efficiently and humanely, contact Bill's next of kin when he was getting seriously ill, when he died and certainly before disposing of his remains.
18. That Bill had called his brothers and sisters and mother, throughout the years, to their homes and home phone numbers, from SESDAC facilities and/or his "residence" at the Yale House.
19. When Albert Red Bear would speak with Bill on the phone every two to three months, Albert always left his contact number with SESDAC staff before or after speaking with Bill.
20. Someone became aware of Bill's mother Christine Red Bear's death, at some point prior to Bill's funeral in Vermillion, because his funeral notice indicated that Bill's parents preceded him in death.

Dated this 14th day of January, 2015.

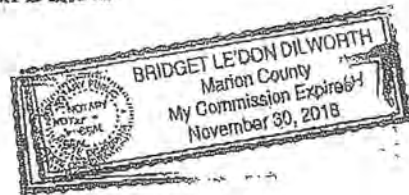
By: 
Kenneth Red Bear
Affidavit

Subscribed and sworn to before me, the undersigned officer, this 14th day of January, 2015.

Bridget Dylworth
Notary Public, South Dakota

(SEAL)

My Commission Expires: November 30, 2018



TRANSCRIPTION OF RECORDING BETWEEN NIKKI CLARK AND SESDAC SERVICES
DIRECTOR RENAE O'CONNOR AND SD EYE BANK, DATED JANUARY 4, 2009 AT
1858 HOURS, CST

Nikki Clark [hereinafter "Nikki"]: This is Nikki

Dawn Anderson [hereinafter "Dawn"]: Hi Nikki, my name is Dawn, I'm calling from the SD
Lions Eye Bank Spirit of the North tissue services

Nikki: Mmm hmm

Dawn: Um I went over most of the information that I had to go through with Renae, I do just
have a legal consent form here to go over with you

Nikki: Ok

Dawn: We are on a recorded line...I told Renae that we would get a copy of the consent form
either to...to you or her or whoever would want it

Nikki: Okay

Dawn: Im just going to go through here..I explained to Renae, once this consent form is
complete um I'm going to go ahead and contact our team, we're located here in Sioux Falls and
then they would drive there to Vermillion and normally we would do the recovery right there at
the hospital. So much like a surgical procedure we put prosthetics back in place for any bones
that we take...um so that there is no change of appearance. Um do you know, will there be a
viewing or will it be a direct cremation or do you know the funeral arrangements yet?

Nikki [to Renae]: Is there going to be a funeral or will it be a cremation...?

Renae: (Muffled..., inaudible).

Nikki: Funeral, we believe

Dawn: Ok yeah then we would make sure to put all the prosthetics back in place so that there is
no change of appearance

Nikki: Okay

Dawn: Um we'll come there to the hospital and the recovery itself will take anywhere from 5 to 8
hours then we'll contact the funeral home as soon as we're done Do you know who the funeral

home will be?

Nikki: Uh..we..I believe its going to be Hansen Funeral Home

Dawn: There in Vermillion?

Nikki: Yes

Dawn: Ok. What I'm going to do then is to just go ahead and read over this consent form,.... um.. For legal reasons. Is your name Nicole or is it Nikki?

Nikki: It's Nikki, N-I-K-K-I

Dawn: And Clark, common spelling?

Nikki: C-L-A-R-K

Dawn: And then I have down the name as D-A-R-E-L-L-E and then two words Red and then Bear. Is that correct?

Nikki: That is correct.

Dawn: Ok. So for humanitarian reasons, I Nikki Clark make the following anatomical gift from Darelle Red Bear after his death for the purposes of transplantation and or therapy, I am the legal next of kin in the highest kinship to the donor in relationship as follows...and I have you marked as kins guardian or conservator of person. Is that correct?

Nikki: Say that again

Dawn: I have you marked as his guardian or conservator of person is what it says

Nikki: I am guardian representative for the State, of South Dakota

Dawn: Ok. Um now what he would...meet criteria would be is the corneas which is the front part of the eye where contact lenses fit and we would always try to use those for transplantation and then they put a contact lens thing back in place so that there is no change of appearance.

Nikki: Mmm hmm

Dawn: Will that be ok?

Nikki [to Renae]: Do you want them to put something back to replace the cornea with a prosthetic devise so that he looks normal?

Nikki [to Dawn]: Yes

Dawn: Ok. The next thing that he would meet criteria for would be heart valves..now they do make a U shape incision um in the chest and they do remove the whole heart pericardium and everything and then once they we send the heart to the heart processors then they remove the heart valves at that time and use the valves for transplantation and don't actual use the heart. Would that be something you would be ok with?

Nikki [to Renae]: Heart transplant..heart re..remove the heart too, for donation?

Dawn: for Valves

Nikki [to Renae]: They'll take out the valves...

Nikki [to Dawn]: Yes

Dawn: Ok. And then the bone in the associated connective tissue of the lower extremities and pelvis..now that's the leg bones from the hip to the knees and the knees to the ankle um they will actually take the bone and put a prosthetic back in place so that there is no change of appearance they use those bones in different type of orthopedic surgeries and then there also some connective tissue that they can take as well and they use those um that connective tissue in mainly in different types of sports injury repairs.

Nikki: Ok

Dawn: Ok. The next..

Nikki [to Renae]: do you want some kind of prosthetic device in place so they look normal too?

Dawn: Right

Nikki [to Dawn]: Ok

Dawn: The next thing then would be upper arm bone from the shoulder to the elbow and it would be done just like the leg bone um the only thing is that we would recommend that he have a long sleeved shirt on if there is going to be viewing because you would be able to see that incision to the elbow.

Nikki: Long sleeved shirt would be normal for him

Dawn: Ok. Um, the blood vessels then they can take the back end femoral and femoral blood vessels um they use those mostly in with diabetic patients they use them for people who are looking at amputation and to increase blood flow. Would that be something that would be ok?

Nikki [to Renae]: blood vessels?

Dawn: it would be taken from the same incision but we make them the length of the leg

Nikki [to Renae]: Same incision

Nikki [to Dawn]: Yes

Dawn: Ok. The spine. Then they do take the whole spine from the neck all the way down to the tailbone

Nikki [to Renae]: So, Isn't it all he said was the eyes and bones?

Dawn: Um they remove all the bone marrow..the bone marrow regrowth and again we do have a prosthetic

Nikki [to Dawn]: Ok..just, just a minute

Dawn: Sorry.

Nikki [to Dawn]: the only thing we were told was that he was eligible for eye and bones

Dawn: Yep...well and if any of these things that you are uncomfortable with we can certainly say no..its not an all or nothing. I'm just gonna go on through with what he would meet criteria for

Nikki : we're just having to discuss whether this is all going to be ok.

Renae: Its all okay

Nikki [to Renae & Dawn]: Okay, alright, ok, now continue [laughing]

Dawn: Yeah and we only make the one incision its not like we are going to make a different incision for everything that we are taking and and

Nikki [to Renae]: It all comes from the same incision when they remove the bone they remove everything

Dawn: right, everything is done much like a surgical procedure

Nikki [to Renae]: so not several different ..I mean...you know...

Nikki [to Dawn]: Okay. .okay

Dawn: Ok the last thing then would be the nerves. Um, they take the nerves again from the extremities from the same incisions that they make and they do actually use it as a nerve graft for a transplantation purposes for people with paralysis

Nikki: Okay

Dawn: Alright

Nikki: Im learning a lot

Dawn: Yeah, well yeah its very interesting what we're able to do now

Nikki: Mmm hmm

Dawn: Um every effort will be made to insure your gifts are intended for transplant um reasons

Nikki: I didn't understand that ...repeat that?

Dawn: Oh, I'm sorry yeah every effort will be made to insure your gifts intended for transplant are transplanted. If these gifts are not suitable for transplantation may the tissue or eyes be used for medical education or research purposes?

Nikki [to Renae]: I need to ask what if..what... if what they remove is not usable for transplanting can they use it for research purposes?

Nikki [to Dawn]: Is that what you said?

Dawn: Right

Nikki: (pause) yes that's fine

Dawn: Okay. Now I have five paragraphs here that I need to go through with you. I can read each paragraph word for word or I can just highlight it. Which would you prefer?

Nikki: Highlight

Dawn: Okay. The first paragraph...if you have any questions, please interrupt me and stop me otherwise I'm just going to go ahead read this here..its says the first paragraph talks about how we will need information from his medical records from that hospital and doctors office. If there will be an autopsy we will need a copy. We will also need remove a blood sample to test for any infectious diseases and a tissue biopsy as well. If certain tests are confirmed positive the legal next of kin maybe notified and the test results will be reported to the appropriate state agency. After reviewing this information we will determine if the gifts will be able to be used for

transplantation. These gifts will be used for life enhancement or life saving purposes. We are a nonprofit organization but we do work with for profit organizations as well. The gifts may be used nationally or internationally. With cornea donations there are typically no changes in the appearance to the body. With bone and tissue donation there should also be no change of the appearance of the body. All the incisions will be covered by clothing and every effort will be made to minimize any visual changes however, there is always that risk with any donation. There is no cost for donation. For bone and tissue donation we do reimburse the funeral home for any extra restoration expenses so that there is no added charges to the family. The funeral home will present um you with a crystal teardrop that we leave for the donor's family. It might be necessary for the body to transported to a funeral home or a different hospital so the recovery can take place. This will be done at our expense. Um we will get a copy of this consent form sent out to you for your records. Do you want this to go to the same address as Renae or do you want it go to a different address?

Nikki [to Dawn]: The same address as Renae

Dawn: Ok. And then should I just use her phone number as a contact phone number as well?

Nikki: Yes

Dawn: Ok. Are there any specific limitations or requests that you have of us? That is just kind of a general question that we ask everybody

Nikki [to Renae]: are there any questions or limit....?

Nikki [to Dawn]: Limitations you said?

Dawn: right..some people like a joke said, a prayer said or a bible verse read

Nikki [to Dawn]: No

Nikki [to Dawn]: whats that?

Dawn: Ok. You have any questions or concerns that I can answer for you?

Nikki [to Renae]: Any questions?

Nikki [to Dawn]: No

Dawn: Ok. Just to finish up here then it states that the donation process has been explained to me and I understand it. I have been provided the opportunity to ask questions and if any have received satisfactory answers. Therefore I freely give my consent with full knowledge and understanding if I have further questions about theses gifts I may contact the recovery

organization. Do you agree with that statement?

Nikki [to Dawn]: Yes

Dawn: Ok. Now that is everything that I need from you and like I said we'll get a copy of this sent out and I told Renae and I can't remember if I told you or not, but we will get a letter sent out that kinda states if we were able to use , able to use the tissue and where they went. They don't usually release names but they'll give kinda um the age and the sex of the person so its kind of interesting and rewarding to get that kind of stuff. But we will get that information out to you and if you have any questions or concerns in the meantime, please feel free to call me at anytime. Would you like my number now or it will be on the paperwork..I'm sure the nurse has it

Nikki [to Dawn]: Why don't you give it to me right now

Dawn: Its 800-245-7846. My name is Dawn. Thats directly into our office

Nikki: Mmm hmmm

Dawn: and you...um that phone number is answered 24 hours a day 7 days a week so please feel free call us if anything comes up

Nikki: Ok

Dawn: Thank you so much for your time and your help in this, I appreciate you making the effort to allow him to be a donor, so thank you so much.

Nikki [to Dawn]: Thank you.

Dawn: Ok goodbye

Nikki [to Dawn]: Bye bye.

STATE OF SOUTH DAKOTA)
)§§
COUNTY OF CLAY)

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

BERNADINE RED BEAR AKA,)
BERNADINE SHIELDS, as Administrator)
of the Estate of DARELLE RED BEAR,)
Deceased,)

FILE NO.: Civil No.:11-377

Plaintiff,)

v.)

SESDAC INC.,)

Defendants.)

**PLAINTIFF'S STATEMENT OF
UNDISPUTED MATERIAL FACTS**

COMES NOW, Plaintiff Bernadine Red Bear, by and through legal counsel, Robin L. Zephier, and makes and files her Plaintiff's Statement of Undisputed Material Facts, which are intended to support Plaintiff's Response in Objection to Defendant's Motion for Partial Summary Judgment, dated September 30, 2014:

1. Darelle "Bill" ("Billy") Red Bear, was a 49 year old Lakota Sioux man who was the natural son of Christine Red Bear (mother) and the brother of Bernadine Red Bear, Sharon Fool Bull, Gloria Red Bear, Wilma Red Bear (sisters), Albert Red Bear, Cleo Red Bear, Kenneth Red Bear, and Ben Red Bear (brothers). (Affidavit of Bernadine Red Bear ¶ 23).
2. That Bill Red Bear was a member of the Oglala Sioux Tribe of the Pine Ridge Indian Reservation in southwest South Dakota, where he grew up and resided with his family in Allen, South Dakota. (Affidavit of Bernadine Red Bear ¶ 2).
3. That in the late 1980's, Bill Red Bear suffered a head injury of some nature by

unknown circumstances, which caused him to suffer some mental disability conditions which resulted in an initial temporary involuntary commitment to the Yankton Human Services Center as a ward of the State. (Ex. 2, p.6).

4. That as a result of his confinement and treatment at the Yankton Human Services Center up through 1999 and 2000, Bill progressed to the point where the State Department of Human Services contracted out with a private corporation called SESDAC, to take over the care, custody and control of Bill Red Bear. (Ex. 2, p. 5).
5. Although Bill was a ward of the State, by virtue of the independent contract between South Dakota and SESDAC (Southeast South Dakota Activity Center), Bill was transferred to Vermillion, S. D. in 2000, to begin living in one of SESDAC's privately owned and operated group homes as a resident of SESDAC's community support providers. (Ex. 2, p. 5; Ex. 10, 11-20, 30-37).
6. The Contract between SESDAC and the State of South Dakota created a contractual relationship between the State and the private SESDAC corporation which involved the fact that SESDAC agreed to obtain and continue the care, custody and control of Bill Red Bear, as long as he was adjudged by a Court to be incapable of caring for his own needs. (Ex. 10, 11-20, 30-37, 38-41).
7. That as a result of the contract between SESDAC and the State, SESDAC maintained priority care, custody and control over all aspects of Bill Red Bear's life, health, safety and welfare while he was in their custody and a resident within their system. (Ex. 11-20, 42-44).

8. That as a Community support provider, SESDAC must follow state, local and federal laws, regulations, and administrative rules. (Ex. 2, p. 4; Ex. 10, 11-29, 30-41).
9. That amongst the rules and regulations SESDAC must follow and comply, are in accordance with the Residents Rights Doctrine recognized under State and Federal law, and includes the right to be safe, protected and be allowed reasonable medical care and to be secure in one's health. (See Resident's Right, Ex. 30-41).
10. That SESDAC, routinely hired part time employees, mostly students at the University, to serve as direct support representatives, to work at the individual SESDAC group homes in Vermillion, such as the Yale House, of which Bill was a resident at the time of his death at the time of his death. (Miranda depo. 15-16).
11. The "Spell of Illness" Timeline of Darelle "Billy" Red Bear at the SESDAC - Yale Group Home (SESDAC) from December 30, 2008 to January 4, 2009, is as follows:
 - a. **Tue 12/30/08:**
@10:00 a.m. Complained of stomach ache and stated he was sick. Temperature: 101.7 F. Called on-call SC R. O'Connor who instructed staff to give Tylenol and transport to hospital in morning. SESDAC Medication Comment Sheet.
 - b. **Wed 12/31/08:**
@7:30 a.m. Temperature 101.6 F. SESDAC Medication Comment Sheet.
@ 8:30 a.m. Called K. Berg who instructed staff to give Tylenol and monitor temperature every (2) hours. SESDAC Medication Comment Sheet.
@9:00 a.m. (2) Tylenol given. SESDAC Medication Comment Sheet.
@9:30 a.m. Temperature 101.6 F. SESDAC Medication Comment Sheet.
@12.30 a.m. Temperature 99.2 F. SESDAC Medication Comment Sheet.
@ 3:00 p.m. RN called for update and instructed staff to offer pain relief, Acetaminophen, and encourage fluids and rest. SESDAC Medication Comment Sheet.
@ 3:30 p.m. (2) Acetaminophen given. SESDAC Medication Comment Sheet.
 - c. **Thur 1/1/09:**

- @ 8:00 a.m. Not feeling well, remained in bed. SESDAC Medication Comment Sheet
- @ 5:00 p.m. Not feeling well, remained in bed. SESDAC Medication Comment Sheet.
- d. **Fri 1/2/09:**
- @ 8:00 a.m. Temperature 97.5 F. SESDAC Medication Comment Sheet.
- @ 11:30 a.m. Diarrhea symptoms, antidiarrheal medication given . SESDAC Medication Comment Sheet.
- @ 1:30 p.m. Received (2) Tylenol. SESDAC Medication Comment Sheet
- @ 5:00 p.m. Not feeling well, remained in bed. SESDAC Medication Comment Sheet.
- e. **Sat 1/3/09:**
- @ 8:00 a.m. Not feeling well, remained in bed. Temperature: 98.2 F SESDAC medication Comment Sheet.
- @ 12:00 p.m. Not feeling well, remained in bed. SESDAC Medication Comment Sheet.
- f. **Sun 1/4/09:**
- @ 8:00 a.m. Not feeling well. Temperature: 97.6 F SESDAC Medication Comment Sheet.
- @ 12:00 Noon Given a glass of orange juice. SESDAC Medication Comment Sheet.
- @ 12:30 p.m. Poor appetite at lunch. SESDAC Medication Comment Sheet.
- @ 1:30 p.m. Given a glass of orange juice. Not feeling well. Temperature: 93.5 F. SESDAC Medication Comment Sheet.
- @ 1:35 p.m. Blood pressure attempted by staff, but equipment was not registering properly. SC called and instructed staff to push fluids and call doctor in the morning. (2) Tylenol given. SESDAC Medication Comment Sheet.
- @ 2:00 p.m. Took shower downstairs. Sat on toilet for half hour. Vermillion Police Dept. Report.
- @ 3:00 p.m. Consumed 3-4 glasses of water. Vermillion Police Dept. Report
- @ 3:15 p.m. Conversing with staff in kitchen and returned to room. SESDAC Incident Report Form.
- @ 4:00 p.m. Found unresponsive in bedroom by staff with no pulse. Staff try to shake Mr. Red Bear and pinch him between toes, but there is no response. After failed attempts to revive Mr. Red Bear, staff first contact their supervisor, then call 911 and request an ambulance after they are unable to reach their supervisor. SESDAC Incident Report Form, Vermillion police Dept. Report, SESDAC Medication comment Sheet.
- @ 4:11 p.m. Staff call 911. Vermillion Police Department is notified. Vermillion Police Report.
- @ 4:14 p.m. Vermillion Police arrive. Mr. Red Bear was not breathing, did not have a pulse, and there was yellow-colored fluid coming from his nose/mouth. CPR is initiated by Police Officer(s). Paramedics arrived and take over the scene.
- @ 5:03 p.m Death at emergency room. Sanford Health Vermillion Hospital.

(Ex. 2, p.7).

12. Mr. Red Bear's stay at SESDAC was influenced by the following management and staff: Gerald Tracy, CEO; Jenna Wiepen, Services Coordinator (SC); Kari O'Connor, Services Coordinator; Debra Maes, Primary Community Supports Instructor (PCSI); Kristen Berg, Community Support Supervisor (CSS); Matthew Miranda, Community Supports instructor (CSI); Leonard Rasmussen, CSI; Kelsey Wickre, CSI; Ana Nesselhuf, CSI; Danielle Schlect (Title unknown); Joseph Barth (Title unknown); Paizli Palmrose (title unknown); Renae O. Connor [services directors] (Ex. 2, p.6).
13. Billy Red Bear was very dependent on SESDAC for a safe/structured environment, close supervision, timely assessment and medical treatment, and assistance with his activities of daily living (ADL) due to limitations imposed by the following diagnoses: Mental Retardation-Moderate, schizophrenia, history of substance abuse, history of brain damage secondary to inhalant use. (Ex. 2, p.6).
14. Mr. Red Bear is described as follows according to a 8/27/08 "Annual Support Plan" at SESDAC: "I need assistance in the areas of health and safety and financial aspects of my life." (Ex. 2, p. 6). "If staff observes me experience in an increase in the areas listed above, they will chart this information in medication comments. If an increase is charted for 4 days in a row, staff will notify either my services Coordinator or my Community Supports Supervisor." (Ex. 2, p. 6). "In order to be supported to remain safe in my community, I need staff support during all times that I am in my community." (Ex. 2, p. 6). "I am employed at Freedom

Gas Station in Vermillion.” (Ex. 2, p. 6).

15. Billy Red Bear is described as follows: According to a 1/4/09 “Emergency Physician Record” at Sanford Vermillion Medical Center: “Paramedics arrived at 4:00 p.m.” Initial Findings by Paramedics: “Unresponsive - no respirations.” General: “Patient upon arrive covered with vomitus.” Respiratory: “No spontaneous respirations.” Skin: “Mottled appearance with cyanosis.” Condition: “Deceased at 17:03.” “Patient brought in by EMS in full arrest. Per reports, he had been ill the last several days with flu-like symptoms, fever, poor appetite, abdominal pain. Temperature failing through the day. Last seen up and around at 15:15. Found unresponsive and EMS called at 4:07 Was still slightly warm to the touch by cyanotic when EMS arrived. CPR was started and patient was given 1 mg. Epi X 3 and Atropine X 3 before reaching the ED. On arrival he was asystole.” (Ex. 2, p. 8).
16. Billy Red Bear is described as follows according to a 1/5/09 “Case Summary” by the Vermillion Police Department: “With the care takers “(Mr. Matthew Miranda) assistance, we removed Mr. Red Bear from the bed to the floor at which time we began CPR.” (Ex. 2, p. 8; Hower depo. p. 14-15).
17. “According to Matthew, he showed up for work at around 3:45 p.m. and was briefed on the day’s events by his co-worker, (Ana Nesselhuf). At approximately 0400 hours, he walked into Mr. Red Bear’s room to check on him and to give him two pain reliever pills as he knew Mr. Red Bear was not feeling well and is par of his daily medication. When he walked in, he noticed Mr. Red bear was not

responding to him but his eyes were open. Matthew explained that he checked for a pulse and did not find one. He then tried shaking Mr. Red Bear, but again received no response. His final attempt to get Mr. Red Bear to respond to him was to pinch him between his toes but again Mr. Red Bear did not respond. According to Matthew after all attempts to get Mr. Red Bear to response, he first tried contacting his supervisor. Receiving no response from his supervisor, he then dialed 9-1-1 and requested ambulance." (Ex. 2, p. 11; Hower depo. p.14-20).

"As I spoke with Matthew in the kitchen, I noticed he had a book with dates and times as to Mr. Red Bear's care. I asked, was granted permission to look over the book. In looking at the sheet some of the entries I observed I felt I needed more clarification on, especially the drop in Mr. Red Bear's temperature and the fact that Ms. Nesselhuf was unable to obtain a blood pressure. These events occurred at around 1:30 p.m." (Ex. 2, p. 7).

18. "While CPR was being administered and when the EMT personnel intubated Mr. Red Bear, a large amount of fluid was observed emanating from his mouth and out his nose. Even though the EMT's attempted to suction this fluid, more and more kept coming out." (Ex. 2, p. 8; Robin Hower depo p.12-20).

19. Billy Red Bear is described as follows, according to a 1/4/09 "Incident Report Form" at SESDAC:

- Time of Death: "5:03 p.m." [2]
- Autopsy performed: "No." [2]
- Cause of Death: "Respiratory Disorder." [2]
- Place of Death: "Hospital." [2]
- DDD Office: "Notified." [2]
- Primary Reporter: "Matt Miranda, Community Supports instructor." [2]

Program Manager: "Kristyn Berg, Community Supports Supervisor." [2]
Additional information: "Darelle Billy Red Bear had not been feeling well.

He got up on Sunday, 1/4/09, and took a shower at 2 p.m. He stood in the kitchen at the group home and talked to staff at 3:15 p.m. He then went back to bed. Matt Miranda, CSI walked into the bathroom at 4:00 p.m. and found Darelle "Bill" unresponsive. He immediately called 911 and an officer arrived at the house before he was off the phone. The officer then took over the scene and resuscitation was started." (Ex. 2, p.8).

20. Billy Red Bear's remains were treated as an anatomical gift or cremated, and no autopsy was ordered despite compelling evidence of negligent care and treatment. Nikki Clark, despite her [alleged] authority as Mr. Red Bear's Guardian, [jointly with SESDAC officials] consciously disregarded his dignity and cultural traditions by failing to consult his next of kin before making these irresponsible and unnecessary decisions. Consequently, she violated his rights, and the rights of his estate and family. Note: These failures also apply to SESDAC officials and management. (Ex. 2, p.10); O'Connor depo. P.25-53 [Further evidence of SESDAC's negligence]:
21. [Further evidence of SESDAC's negligence]: Failure to keep him within line-of-sight despite his condition, i.e., remaining in bed for most of the day, chronic physical complaints, remaining on the toilet for a long period of time, poor appetite, excessive consumption of water, and aspiration symptoms; Attempting to first contact the SESDAC on-call Supervisor after he was found unresponsive before providing CPR; Attempting to first contact the SESDAC on-call Supervisor after he was found unresponsive before calling 911; Attempting to first contact the SESDAC on-call Supervisor after he was found unresponsive

before calling 911 and/or providing CPR, assuming Matthew Miranda was certified and able to provide CPR; Failure to comply with internal standards which presumably place the health and welfare of consumers above SESDAC/staff priorities. (Ex. 2, p.11).

22. The failure of Matthew Miranda to properly react to Mr. Red Bear's condition change on 1/4/09 at 4:00 p.m. was attributed to one of more of the following factors:

- Failure to comply with SESDAC training, and/or,
 - Failure to comply with SESDCA policies and procedures, and/or
 - Incompetent (not qualified to manage emergencies), and/or
 - Panic (unable to manage emergencies in a rational manner).
- Failures regarding adequate training, compliance with policies/procedures, and caregiver competency also apply to SESDAC staff who was assigned to Mr. Red Bear from 12/30/08 to 1/4/09.
- Mr. Miranda's critical decision on 1/4/09 to call his SESDAC Supervisor before starting CPR or calling 911 suggests that he did not possess the authority to hospitalize Mr. Red Bear, and is indicative of a SESDAC "cost saving policy" to prevent the use of additional staff to transport/follow Mr. Red Bear to the ER, uncovered ambulance transfers, uncovered medical expenses, etc. (Ex. 2, p. 11).

23. Billy Red Bear's mismanaged "spell of illness" [from December 30, 2008 through January 4, 2009] (28) or a similar life-threatening event was destined to occur at SESDAC based on the failures identified in this report. (Ex. 2, p.11).
24. The SESDAC failures identified in this case represent a "conscious disregard" of Mr. Red Bear's health, life, and dignity after death. (Ex. 2, p.11).
25. Mr. Red Bear's mismanaged "spell of Illness" is attributed to absentee SESDAC house management and an irresponsible Governing Body. (Ex. 2, p.11).

26. That while Decedent Darrelle "Billy" Red Bear, was a resident at the Human Services Center in Yankton, and also later at the disabled group home SESDAC in Vermillion, all of Bill's siblings were committed, loyal and supportive of their brother Decedent "Billy" Red Bear; (Affidavit of Bernadine Red Bear ¶ 4; Affidavit of Albert Red Bear ¶ 4:
27. That upon learning of the news of their brother's death and upon learning of the disrespectfulness of the handling of his remains, and after thinking about it all since, Bill's siblings, in varying degrees and instances, became nauseous, had problems sleeping, nightmares, tightness in the chest, sadness, some anger, trembling, shakiness, tingling in the fingers, shock, lack of concentration, loss of appetite, rapid heart rate, and had shortness of breath; (Affidavit of Bernadine Red Bear ¶ 5; Affidavit of Albert Red Bear ¶ 5)
28. That none of Bill's siblings were ever notified by anyone from SESDAC that Bill was sick in late December 2008 and/or early January 2009, or that he had suddenly died, what he died from, or what was planned to do with this remains, until Kenneth Red Bear was advised in April 2009 by others (non SESDAC) of Bill's death, cremation and burial; (Affidavit of Bernadine Red Bear ¶ 24, and Ex. #'s 26).
29. That Bill's and Plaintiff's mother, Christine Red Bear, and many of Bill's nuclear family, still lived in Allen, South Dakota on the Pine Ridge Indian Reservation for many years since the 1990's through 2009; (Ex. 11-20, 30-37; Affidavit of Bernadine Red Bear, ¶ 21 & 22). Christine Died in 2005.

30. That SESDAC and its staff were clearly informed of Bill's mother's and family's residence in Allen, South Dakota, and many family members left their names and addresses with SESDAC staff for contact and emergency purposes while Bill was alive and prior to this death on January 4, 2009. (Ex. 11-20, 30-37; Affidavit of Bernadine Red Bear ¶ 17-19; Affidavit of Albert Red Bear ¶ 17-18; Affidavit of Kenneth Red Bear ¶ 17-18).
31. That Bill frequently, at least once every two to three months, called for one of his brothers or sisters (mostly Albert Red Bear, Kenneth Red Bear, etc.) and his mother Christine Red Bear (she died in 2005), and therefore SESDAC should have reasonably known of some family members to call/contact when Bill got sick, when he died and before his remains were disposed of. (Affidavit of Bernadine Red Bear ¶ 18; Affidavit of Kenneth Red Bear ¶ 18).
32. That Bill had expressed his desire to return home to Allen on the reservation to live with his family, when he was at Yankton HSC and later, when he was at SESDAC. (Affidavit of Albert Red Bear ¶ 21); Ex. 3).
33. That the Native American and Lakota spiritual beliefs held by Bill and our family, are strong and his siblings including Plaintiff, would never have allowed or consented for any person or entity (including SESDAC) to cremate Bill's remains, or to harvest and distribute his body parts, which occurred with SESDAC's knowledge, acquiescence, prompting, approval and motivation, at the time of his death and in early July 2009. . (Affidavit of Bernadine Red Bear ¶ 11; Affidavit of Albert Red Bear ¶ 11; Affidavit of Sharon Fool Bull, ¶ 11).

34. That a decision was made to not reveal his mother's passing (Christine died on March 11, 2005) to Bill, by his brothers and sisters, so as not to cause a mental breakdown/emotional devastation for Bill while he was in SESDAC's care, custody and control. (Affidavit of Bernadine Red Bear ¶ 12; Affidavit of Albert Red Bear ¶ 12; Affidavit of Sharon Fool Bull, ¶ 12).
35. All of Bill's family, including his mother Christine before she died, and his brothers and sisters, put their human trust in SESDAC and their staff to take care of Bill who was in SESDAC's care, custody and control from 2000 to January 2009, and trusted that SESDAC would not do or allow anyone or anything, to harm, endanger, and/or kill their son and brother. (Affidavit of Bernadine Red Bear ¶ 13; Affidavit of Albert Red Bear ¶ 13; Affidavit of Cleo Red Bear, ¶ 13; Affidavit of Kenneth Red Bear ¶ 13).
36. That it was first learned in April 2009, that Bill had died, when Kenneth Red Bear called SESDAC's Yale House to speak with his brother Bill. (Affidavit of Kenneth Red Bear ¶ 14).
37. That Kenneth was advised by the Yale House Staff (SESDAC) that Bill had died on January 4, 2009 and that he had been cremated and buried already. (Affidavit of Kenneth Red Bear ¶ 15; Affidavit of Bernadine Red Bear ¶ 14).
38. That SESDAC staff advised other family members who called in April 2009 about Bill's death, that SESDAC and its staff "had tried" to contact Bill's family after he had suddenly died, and before he was cremated and had his body parts harvested. However, that decision to quickly dispose of his remains in that fashion, was

made with SESDAC officials' knowledge, acquiescence, influence, motivation, prompting, and approval, within two (2) hours of Bill's death in the later afternoon of January 4, 2009. (Affidavit of Bernadine Red Bear ¶ 16; O'Connor depo. P. 26-29, 46-49; 25-53; Orr depo. p. 29-47).

39. That Christine Red Bear's name and address, and Albert Red Bear's phone contact numbers were available in the Yankton HSC and/or SESDAC records on Bill, with SESDAC's records, as of January 4, 2009 and well before. This is especially true in that Christine and Rachel Red Bear's address of Box 452, Allen, South Dakota, is prominently referenced in the 2007 Circuit Court Order as an addressee for purposes of official service of the documents. (Ex. 3, 11-20, 30-37; Affidavit of Bernadine Red Bear ¶ 21; Affidavit of Albert Red Bear, ¶ 22). So SESDAC had that information in their records in order to reasonably, quickly, efficiently and humanely, contact Bill's next of kin when he was getting seriously ill, when he died and certainly before disposing of his remains. They surely could have called the Pine Ridge and/or BIA police department to get word to the family in Allen, South Dakota. Instead, Plaintiff and the siblings learned, that SESDAC was allegedly "googling" "Red Bear" names from the Rosebud Sioux reservation (not Pine Ridge, or Allen, S.D.). (O'Connor depo. p. 26-29, 46-49; Ex. 11-20; Weipen depo. p. 24-29).
40. That Bill had called his brothers and sisters and mother, throughout the years, to their homes and home phone numbers, from SESDAC facilities and/or his "residence" at the Yale House. (Affidavit of Bernadine Red Bear ¶ 17; Affidavit

of Kenneth Red Bear ¶ 17; Affidavit of Albert Red Bear, ¶ 17-22).

41. When Albert Red Bear would speak with Bill on the phone every several months, Albert always left his contact number with SESDAC staff before or after speaking with Bill. (Affidavit of Albert Red Bear ¶ 22).
42. Someone at SESDAC became aware of Bill's mother Christine Red Bear's death, at some point prior to Bill's funeral in Vermillion, because his funeral notice indicated that Bill's parents preceded him in death. It is not known if SESDAC advised Bill that his mother had passed away in 2005. (Ex. 3; Affidavit of Bernadine Red Bear ¶ 24); Ex. 26, Bill's funeral notice).
43. When Bernadine Red Bear was trying to make arrangements to have the personal property from Bill's room at the Yale House returned to her in September 2009, she did speak with a SESDAC employee to have it sent to her (Bernadine). The SESDAC employee asked for Bernadine's address and phone number (605-454-0350). SESDAC's employee told her they would send it directly to her. In late September 2009, Bernadine called SESDAC again to check on the status of the personal belongings being sent to her. She was told that the items had been sent to her. (Sept. 28, 2009). Sometime within the next few days, Bernadine received an anonymous call to her cell phone at about 12:30 a.m., whereby an unknown male voice from a "restricted -unavailable" source, stated. "I know where you live, I'm gonna get you". It is unknown at this time who that caller was or where the call came from. (Affidavit of Bernadine Red Bear ¶ 21).
44. It is known that Bill's mother Christine Red Bear had gone to Vermillion to visit

Bill at SESDAC and/or Yale House over the years before Christine died in 2005.

Bill's sister Wilma Red Bear often accompanied Christine on those trips to

Vermillion. (Affidavit of Bernadine Red Bear ¶22).

45. That most of Bill's family members including his mother Christine, and sisters Bernadine, Rachel, Sharon, Gloria, Wilma, and brothers Kenneth, Cleo, Albert and Ben, all wanted to visit Bill more frequently, but all were financially unable to make the trip to Vermillion to visit with Bill physically, as often as the family members wished to. (Affidavit of Bernadine Red Bear ¶ 23; Affidavit of Ben Red Bear, ¶ 9).

46. When Bernandine called SESDAC and/or Yale House in April 2009 after learning of Bill's death, on one occasion a female answered and said "what do you want to know?" "I will have to have someone else talk to you." And a male came on the phone and said that there was nothing they could do. (Affidavit of Bernadine Red Bear ¶ 24).

47. Bill had written a letter to his mother Christine Red Bear, addressed to Christine at her Allen, South Dakota residence, from SESDAC in Vermillion, dated March 8, 2005. (Ex. 3). Unfortunately Christine passed away on March 11, 2005, so she did not see Bill's March 8, 2005 letter. (Affidavit of Bernadine Red Bear ¶ 25).

48. Jenna Weipen (SESDAC employee), Renae O'Connor (SESDAC employee) and Nikki Clark (former SESDAC employee an independent Contractor of State), all conversed at the Sanford Vermillion Hospital to decide what was in the best

economic and public relations situation for SESDAC, when the decision to not have an autopsy was made. (Weipen depo. p.11-36; Orr depo. p. 29-47; O.Connor depo. p. 25-53; Hansen depo. P.6-19.).

49. Jenna Weipen (SESDAC employee), Renae O'Connor (SESDAC services director) and Nikki Clark (former SESDAC employee an independent Contractor of State), all conversed at the Sanford Vermillion Hospital to decide what was in the best economic and public relations situation for SESDAC, when the decision to cremate Bill's remains was made. (Weipen depo. p.11-36; Orr depo. p. 29-47; O.Connor depo. p. 25-53; Hansen depo. p.6-19).
50. Jenna Weipen (SESDAC employee), Renae O'Connor (SESDAC employee) and Nikki Clark (former SESDAC employee an independent Contractor of State), all conversed at the hospital to decide what was in the best economic and public relations situation for SESDAC, when the decision to allow the harvesting of Bill's body parts was made. ((Weipen depo. p.11-36; Orr depo. p. 29-47; O.Connor depo. p. 25-53; Hansen depo. p.6-17).
51. That SESDAC employees only had a very small window of time—less than 2 hours after Bill died at 5:03 p.m., to allegedly attempt to contact Bill's family or next of kin. (Weipen depo. p.11-36; Maes depo. p. 29-47; O.Connor depo. p. 26-29, 46-49; Affidavit of Bernadine Red Bear ¶ 16).
52. That SESDAC employee(s) did not use the names, addresses and phone numbers in Bill Red Bear's SESDAC file, when they allegedly attempted to "contact" Bill's next of kin after his death at 5:03 p.m. on January 4, 2009. (Weipen depo.

p.24-29; Maes depo. p. 26-27, 42-49; O.Connor depo. p. 26-29, 46-49; Affidavit of Bernadine Red Bear ¶ 16).

53. That SESDAC employees did not even search for the Red Bear next of kin in the correct city or reservation (Pine Ridge Reservation, Allen, S.D.), but instead, google searched for the name "Red Bear" on the Rosebud reservation. (Weipen depo. p.24-29; Maes depo. p. 26-27, 42-49; O.Connor depo. p. 26-29, 46-49; Affidavit of Bernadine Red Bear ¶ 17).
54. That SESDAC employee, Wiepen and O'Connor and others, used their influence to create a joint decision with Clark to agree to no autopsy, to cremation and to allow harvesting of the body parts. (Weipen depo. p. 24-29; Clark depo. p. 12-33; Hansen depo. p. 6-19; Affidavit of Bernadine Red Bear ¶ 16; Affidavit of Albert Red Bear ¶ 16); O'Connor depo. p. 25-53).
55. That the next of kin of Bill Red Bear, upon learning of his death (3 months after), of what was done to his remains, suffered physical manifestation of bodily injury/reaction in the form of nausea, stomach sickness, shakiness, shock, shortness of breath, rapid pulse, rapid heart rate, nightmares, sweating, tingling of fingers, loss of appetite, chest tightness, loss of sleep, anxiety, sadness and grief. (Affidavit of Bernadine Red Bear ¶ 11; Affidavit of Sharon Fool Bull ¶ 11; Affidavit of Cleo Red Bear, ¶ 11; Affidavit of Ben Red Bear ¶ 11).
56. That the decisions made jointly by the SESDAC officials and Clark (including Bartel) were made with reckless disregard for the well being or impact upon Bill's next of kin, and done with actual and/or constructive knowledge that such

shocking decisions affecting Bill's remains would likely cause the next of kin harm. (Affidavit of Bernadine Red Bear ¶ 17; Affidavit of Albert Red Bear ¶ 17); O'Connor depo. p. 25-53).

57. That the decisions made jointly by SESDAC's officials and Clark and Bartel, were made for purely economic/cost saving reasons, so that neither SESDAC nor the State would incur the extra expenses of having a regular embalming, funeral and burial for Bill Red Bear, after his actual next of kin were properly and adequately notified. (Hansen depo. p. 7-19; Ex. 26).
58. That Clark and the State's legal "guardianship" of the protected person Bill Red Bear, terminated immediately at the moment of Bill's physical death at 5:03 p.m. on January 4, 2009. (Ex. 21, SDCL 29A-5-507); Clark depo. p.11-33; O'Connor depo. p. 25-53).
59. That any acts undertaken by SESDAC or the State as to Bill's remains, after he died at 5:03 p.m., were in violation of State law in that Bill's next of kin held the rightful legal standing to make those decisions. (Ex. 21, SDCL § 29-5-507.; SDCL § 34-26-12(2)).
60. SESDAC Direct Support representative Ann Nesselhuff said that once she saw the low temperature reading of 93.5 F for Bill on January 4, 2009, she called her SESDAC supervisor and the SESDAC nurse, and both advised her that it would be best to wait and see how Bill was tomorrow [January 5th] before considering whether to take him to the hospital. (Nesselhuff depo. p.51-56). This proves Defendant's wanton, willful, intentional negligent behavior in ignoring Bill's

medical needs and basic human needs, and exhibits a reckless disregard for human life. (Ex. 10, 11-20, 30-37; Affidavit of Bernadine Red Bear ¶ 4; Ex. 1, p. 5; Ex. 2, p. 7-11).

61. Bill Red bear had no will, no living will, no organ donor card or certificate, no burial/cremation power of attorney, no life insurance, no financial assets, and had no end of life planning document in place at the time of his sudden and untimely death on January 4, 2009 (Depo of Weipen p. 11-36; Depo of Orr, p. 60, 61; Depo of O'Connor, p. 24-26).

62. SESDAC Services Director, Renae O'Connor stated that:

Q Absent the presence of input from next of kin and immediate family or relatives, Nikki Clark actually had the legal capacity to make decisions of this nature on Bill's behalf at that time, didn't she, to your knowledge?

A My memory is that Nikki came to the emergency room after we learned that Bill had been pronounced dead. We called Velda Bartel, who subsequently called Secretary Hofer. We discussed the fact that there wasn't regular family contact and we could not get a hold of any family. Velda Bartel and Secretary Hofer acknowledged that they believed the guardianship actually ended at the time of death, but in the absence of anyone else they would participate with our agency in doing what needed to be done. [emphasis added].

Q That's interesting. Do you know whether that conversation was recorded or documented at all?

A No, I don't.

Q But you heard it, right?

A Yes.

Q Did Nikki hear it?

A Yes. I mean, understand Nikki and I were standing beside each other in the emergency room. Probably one of us was on a cell phone, you know. (O'Connor depo. p. 38-39).

63. SESDAC Services Director, Renae O'Connor stated that:

Q Where were you on that afternoon and evening of January 4, 2009?

A I was at my house.

Q And who was the first person that contacted you about this event?

A Gwen Orr.

Q And was that after Bill had already been declared dead?

A No. It was about 30 minutes prior to that. I was at the ER when the medical professional came out of the exam room and notified us that Bill had passed away.

Q How closely were you involved in the transport of Bill's body after he was declared dead at the hospital?

A I was involved in the context that I made arrangements with Bob Hansen for him to transport Bill's body after the organ donation team had done what they were doing to do.

Q Okay. Well, let's get to that. Was the decision to donate his organs made before his body even left the hospital? (O'Connor depo. p. 46-47).

Q Was the decision to donate his organs made before his body even left the hospital?

A Yes.

Q And who decided that?

A That was a collective decision between everybody that I named before; myself, Nikki Clark, Velda Bartel, and Secretary Jerry Hofer were on the phone from Pierre. We consulted via phone with Kristyn Berg, Deb Maes, Jenna Wiepen Gobel as Bill's team and collectively we decided that. [emphasis added].

64. SESDAC Services Director, Renae O'Connor stated that:

Q Do you feel they had a right to even make any type of a claim to made a decision on body part donation?

A If we would have been able to get ahold of them, I certainly would have involved them in that.

Q Now what's our personal knowledge about how Bill's body was moved from point A to point B to point C to point D? What's your knowledge of that?

A My knowledge would be that his body was kept as Sanford Vermillion until after the organ donation team came and did their process. Bob Hansen came to Sanford Vermillion and took bill's body at that time. I believe that his body was then transferred to Sioux City, Iowa, which is where they actually do the cremation process, and then brought back to Vermillion for the services. My understanding and my belief is that Bill's body was either in the care of Sanford Vermillion Hospital or in the care of Hansen Funeral Home from the time of his being taken to the emergency room in the ambulance to the time that we buried his ashes.

Q So you think at all times it was in the custody of the funeral home during those

periods?

A Yes.

Q We'll ask Bob Hansen that.

A Okay.

Q There is a document there right in front of you. The title is th Eye Bank. What is the Exhibit Number?

A 14.

Q 14. Let's take a look a that. Were you aware that they took his corneas from both eyes?

A Yes.

Q Were you aware that they took bones out of his arm?

A Yes.

Q They took vertebrae our of his back?

A Yes.

Q That they took heart valves?

A Yeah.

Q That they took nerves form his body?

A Yes. Yes, I'm familiar with this document of anatomical gift.

Q Have you seen this before?

A Yes.

Q Were you there when the donation documents were filled out and Nikki Clark was asked to sign it?

A I was on the phone with Nikki when we did this information where it says "phone recorded consent" under both of our names. I'm not familiar with the document that Nikki physically signed.

Q Were you present during the time when the harvesting unit arrived at the hospital?

A I was not.

Q Were you present during any of those procedures?

A No.

Q are you certain that they didn't transport his body to Sioux Falls?

A That is not my understanding. My understanding is that the oargan donation team came to Vermillion.

Q. Did you have any understanding that once his body was dissected for donation purposes that an autopsy might actually be inconsequential?

A The determination that there wouldn't be an autopsy was already made.

Q But not by anybody with any legal authority, right?

A The police department and the medical staff were present at the emergency room and made that determination.

Q I'm just going to ask you a personal question, ma'am. If you had a relative that died mysteriously, would you want to know how they died?

A That's not a decision that I get to professionally make. (O'Connor depo. p. 47-51).

65. SESDAC Services Director, Renae O'Connor stated that:

Q To your knowledge, have there been any changes in any policies and procedures

regarding emergency situations concerning the health, safety and welfare of
SESDAC residents since Bill Red Bear died?

A Have there been changes in policies?

Q Yes.

A Policies are update on a regular basis, but no, not significant changes that I would
be aware of.

Q Do you feel anything was done wrong in Bill's care leading up to his death?

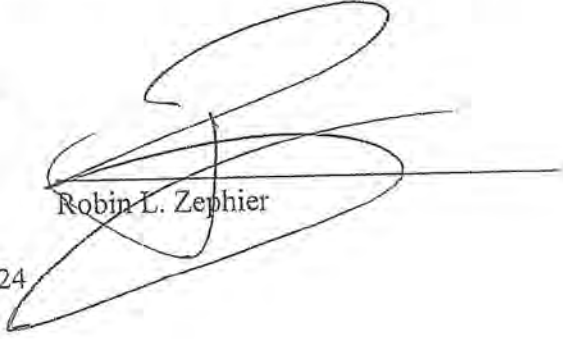
A No.

Q You would react or you would have your staff at SESDAC react the same way
presented the same problem today?

A Yes. (O'Connor depo. p. 24-25).

66. SESDAC officials, including but not limited to RN Gwen Orr, Renae O'Connor,
Jenna Weipen, Joe Barth, Deb Maes and CEO Gerry Tracy, indicated under oath,
that no SESDAC employee/official was reprimanded, suspended terminated or
otherwise as a result of the events leading up to and/or surrounding the death of
Bill Red Bear. (O'Connor depo. p. 25-63; 24-25; Tracy depo. p. 44; Weipen
depo. p. 11-36; Maes depo. p. 60-61; Orr depo. p. 59-50,62). The SESDAC
officials even indicated that they would not change anything, or do anything
differently in the future. (O'Connor depo. p. 24-25; Orr depo. p. 49-50; Maes
depo. p. 60-61).

Dated this 16th day of January, 2015.


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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27930

BERNADINE RED BEAR a/k/a
BERNADINE SHIELDS, as
Administrator of the
Estate of DARELLE RED BEAR, Deceased.

Appeal from the Circuit Court,
First Judicial Circuit
Clay County, South Dakota
The Honorable Steven R. Jensen, Presiding

BRIEF OF APPELLEE

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JURISDICTIONAL STATEMENT

Defendant/Appellee SESDAC, Inc. (“SESDAC”), agrees with the jurisdictional statement proffered by Plaintiff/Appellant Bernadine Mae Shields,¹ as Administrator of the Estate of Darelle Red Bear (“Red Bear”).

STATEMENT OF THE ISSUES

1. The circuit court properly granted SESDAC’s Motion for Summary Judgment on Count III.

Most apposite authorities:

SDCL § 29A-5-507

Clauson v. Kempffer, 477 N.W.2d 257, 258 (S.D. 1991)

Farmland Ins. Companies v. Heitmann, 498 N.W.2d 620, 622 (S.D. 1993)

2. The circuit court properly denied Red Bear’s motion for change of venue.

Most apposite authorities:

City of Sioux Falls v. Johnson, 1999 SD 16, ¶ 32, 588 N.W.2d 904, 911

Bland v. Davison County, 1997 SD 92, ¶ 5, 566 N.W.2d 452, 354-55

State v. Arguello, 502 N.W.2d 548, 551 (S.D. 1993)

3. The circuit court properly denied Red Bear’s request for a spoliation jury instruction.

Most apposite authorities:

State v. Engesser, 2003 SD 47, ¶ 15, 661 N.W.2d 739, 746

State v. Wright, 1999 SD 50, ¶ 12, 593 N.W.2d 792, 797

¹ Plaintiff/Appellant is identified as Bernadine Mae Shields a/k/a Bernadine Sheilds in the caption in this Court and the circuit court. However, Appellant is identified throughout Appellant’s appeal brief as Bernadine Red Bear. Accordingly, to avoid confusion, Appellee will also refer to Appellant as “Red Bear.”

4. The circuit court properly denied Red Bear's motion for new trial based on alleged incongruent and ambiguous verdict.

Most apposite authorities:

First Nat'l Bank v. Kehn Ranch, Inc., 394 N.W.2d 709, 720 (S.D. 1986)

Bridge v. Karl's Inc., 538 N.W.2d 521 (S.D. 1995)

Kleiss v. Cassida, 696 N.E.2d 1271, 1278 (Ill. Ct. App. 1998)

Gaston v. Viclo Realty Co., 626 N.Y.S.2d 131, 132 (N.Y. 1995)

STATEMENT OF THE CASE

Red Bear brought this action in her capacity as administrator of the estate of her brother, Darelle “Bill” Red Bear (hereafter “Bill”), who was mentally disabled. Bill was a Native American and was declared a “protected person” and the State of South Dakota was made his legal guardian. SESDAC is a private entity that assisted Bill with his personal, residential and vocational needs from September 2000 until Bill’s death in January 2009. During his time at SESDAC, Bill’s siblings, including Red Bear rarely, if ever, had contact with Bill.

In late December 2008, Bill became ill and on January 4, 2009, Bill was found unresponsive in his room, and was taken to the local hospital, where he was pronounced dead. The police and medical personnel determined that no autopsy was necessary and Bill’s guardian representative employed by the State of South Dakota authorized donation of Bill’s organs. A professor who was knowledgeable in Native American burial customs was consulted about Bill’s funeral, and the decision was made to have Bill’s body cremated. A funeral was held, during which many Native American customs were recognized.

Red Bear claimed SESDAC was negligent in its care of Bill when he became ill, resulting in his death. Red Bear asserted a survival claim for Bill’s alleged physical and emotional pain prior to his death, and a wrongful death claim for Red Bear’s own alleged loss of companionship, love, affection and solace from Bill. Red Bear also asserted that after Bill’s death, SESDAC failed to obtain

consent for handling Bill's remains and for cremation. Red Bear sought compensatory and punitive damages.

On SESDAC's Motion for Partial Summary Judgment, the circuit court, the Honorable Steven Jensen, presiding, concluded SESDAC owed no duty to obtain consent for anyone's handling of Bill's remains, as it did not have custody or control of Bill's body, and dismissed the claim relating to the handling of Bill's body. The circuit court also dismissed the claim for punitive damages. The remaining claim of negligence went to trial and the jury found that while SESDAC was negligent, such negligence was not the proximate cause of any injuries, and therefore, awarded no damages. Red Bear filed a Renewed Motion for Judgment as a Matter of Law or for New Trial, which the circuit court denied. Red Bear appeals from the circuit court's Orders granting partial summary judgment, denying motion for change of venue and denying motion for new trial.

STATEMENT OF THE FACTS

SESDAC is a private, nonprofit community support provider located in Vermillion, South Dakota. CR 492-93; 536.² SESDAC, a home and community based program, is a non-institutional organization unlike a nursing home, hospital, or immediate care facility. CR 537. SESDAC assists persons with developmental disabilities by providing support for independent living consistent with their abilities.

² Citations to the certified record are denoted "CR" followed by the appropriate page number supplied by the Clerk.

At the time of his death in 2009, Bill was a 49-year-old Native American male who had been diagnosed with schizophrenia and mild mental disability. CR 540-41. Bill also had a history of brain damage secondary to inhalant abuse, alcohol abuse, water intoxication, and threatening behavior. *Id.* In 1987, Bill was court ordered to reside at the Health and Human Services Center in Yankton, South Dakota, where stayed until 2000, when he became a resident of SESDAC. CR 553. In 2001, Bill was declared a person in need of protection by the court, and the Secretary for the Department of Human Services (“DHS”) for the State of South Dakota was appointed as his legal guardian. CR 562-63. In 2004, Nikki Clark (hereinafter “Clark”) became Bill’s guardianship representative for the State. CR 567. Clark was not an employee or agent of SESDAC when acting as Bill’s guardian representative. CR 566; 3162.

At the time of his death, Bill lived in one of SESDAC’s leased properties in Vermillion, commonly referred to as the “Yale House.” CR 211; 492-93. There was at least one SESDAC support staff present in the house at all times to assist the residents with making meals, taking medications, getting dressed and cleaned, and various other daily tasks needed. CR 555; 590. SESDAC arranged for employment and a job coach for Bill, and also provided community and social activities during non-working hours. CR 538.

While being supported by SESDAC at Yale House, Bill’s family had very little contact with Bill or SESDAC. CR 560. The last personal contact Red Bear had with Bill was in 1990 when he was still in Yankton. CR 546. Albert Red

Bear, Bill's older brother, allegedly called Bill every six months, but never personally visited Bill while he lived at Yale House. CR 596-96. Bernard "Ben" Red Bear, Bill's younger brother, testified that he never knew Bill moved to Vermillion, never talked with him on the phone, never visited him, and was not aware of any siblings visiting Bill in Vermillion. CR 599.

On January 4, 2009, Bill was found unresponsive by SESDAC employee Matthew Miranda. CR 591-92. Bill was taken by ambulance to the Sanford Vermillion Hospital where he was later pronounced dead. CR 558.

Rennae O'Connor, the services director for SESDAC, notified Clark of Bill's death, and the two went to the hospital. CR 558. Once at the hospital, Clark contacted DHS in Pierre to notify the DHS Secretary, as Bill's legal guardian, of Bill's passing. CR 558; 568. Clark had discussions with DHS Director Jerry Hofer and another DHS employee, Velda Bartel, about decisions needing to be made about organ donation and disposition of Bill's body. CR 568; 3183.

O'Connor tried to call Bill's family that night, but she was unable to reach any family members. CR 556. Neither Red Bear nor any other family member had provided any updated contact information to SESDAC, nor did she or other family members ever provide any contact information to DHS or the State. CR 550.

Bill's manner of death was noted as "Natural Causes" on his death certificate. CR 603. The medical professionals and police who were present in the emergency room did not request an autopsy. CR 557. O'Connor had no input

into the decision not to conduct an autopsy; the decision was made by the medical professionals, the police department and the State (via Clark and Bartel). CR 557. Clark, as representative of the State, and at the direction of Bartel and Hofer, declined an autopsy and gave the authorization to donate Bill's organs. CR 558; 605-06; CR 1511-13; 3174-75.

At trial, it was established that not one of SESDAC's employees made any decisions regarding the handling of Bill's care after he was removed from the Yale House by police and EMT officials, and specifically, not one of SESDAC's employees made the decision to forego an autopsy. CR 2639-40; 3061; 3071; 3073; 3081; 3093. It was further established that SESDAC had neither legal custody nor control over Bill; rather, the State of South Dakota was Bill's legal guardian and Nikki Clark was Bill's guardian representative on behalf of the State. CR 2842; 2852; 2886; 3048; 3063; 3161-62; 3174-75; 3181.

Although she had no legal obligation to do so, out of respect for Bill's Native American heritage, O'Connor contacted Dr. Wayne Evans ("Dr. Evans"), a retired professor of Indian Studies at the University of South Dakota, who had significant personal contact with Bill, to inquire what the appropriate course of action would be for the burial of Bill's body. CR 556; 609. Dr. Evans advised that either cremation or a traditional burial would be appropriate and acceptable to the Native American culture. CR 556; 610.

On January 5, 2009, the State-employed guardian representative, Nikki Clark, authorized the cremation of Bill's body. CR 614-15. Bill's funeral was

held on January 8, 2009, at Trinity Lutheran Church and his remains were interred at Bluff View Cemetery in Vermillion, South Dakota. CR 617-18. Dr. Evans assisted with Bill's funeral arrangements and brought the drum to conduct a traditional Native American funeral. CR 610. During the ceremony, Dr. Evans sang a prayer song during the service and did a wokiksuye, a remembrance song. *Id.* When Bill's remains were buried, Dr. Evans burned sage, said a prayer, offered tobacco, and released Bill's spirit to the Creator with an eagle feather. CR 612.

O'Connor made further attempts to contact Bill's next of kin on January 5, 2009, but was unsuccessful. CR 556. It was not until April 2009, when a family member finally called SESDAC to speak with Bill that Bill's family learned of his death. CR 547-49.

Plaintiff, solely "as Administrator of the Estate of Darelle Red Bear," and not in her individual capacity, filed this suit against SESDAC, alleging negligence in the care and handling of Bill both before and after his death. CR 9. In her Second Amended Complaint, Plaintiff alleged three counts: (1) a survival claim to recover damages for the alleged negligence in causing Bill's alleged pain and mental suffering prior to his death; (2) a wrongful death claim to recover damages for alleged negligence in causing Red Bear's alleged loss of companionship, society, love, affection and solace; and (3) a negligence claim for failure to seek consent for the handling of Bill's body and cremation. CR 220-225. Red Bear requested compensatory and exemplary damages. CR 225.

SESDAC timely answered, generally denying any negligence, as well as the nature and extent of the alleged damages. CR 227-234. SESDAC filed a Motion for Partial Summary Judgment, requesting the circuit court to find, *inter alia*, that as a matter of law, SESDAC owed no duty to Red Bear. CR 480-81. SESDAC asked the circuit court to dismiss count three of Red Bear's Second Amended Complaint – the claims based on a failure to seek consent for the handling of Bill's body and cremation – with prejudice. CR 480-81. After briefing, a hearing on the Motion for Partial Summary Judgment was held, during which the circuit court explained:

And there may be a duty that exists, but *I think that duty exists to the party that has custody and control of Mr. Red Bear*. And the court's – the court's view, as Mr. Red Bear died in the hospital, that the department was the entity as guardian that had actual legal custody of Mr. Red Bear's body. You know, the hospital and SESDAC were involved. But, you know, as I read 29A-5-507, it says that a guardianship terminates upon death of the protected person if jurisdiction is transferred to another state or if ordered by the court following a hearing. I don't read that that statute automatically terminates the guardianship. *And I think that the legal decisions in terms of Mr. Red Bear's – how Mr. Red Bear's body was going to be handled immediately fell upon the department.*

* * *

But I don't – I don't read that SESDAC was that party to do that even though they had ongoing – for several years it had ongoing responsibility for care of Mr. Red Bear. You know, the duties prior to Mr. Red Bear's death are – you know, are alleged in paragraphs one – or counts one and two, and those aren't at issue in this motion.

But I think upon death, as I read the guardianship statutes and as I read the *Chisum* case, that the court understands – and I recognize there's not a direct case on the issue – *but the court reads the law that the duty of handling the arrangements for death of Mr. Red*

Bear would have fallen on the state and not upon SESDAC. And I -- under the circumstances in viewing the light -- the facts in the light most favorable to the plaintiff, the court determines that there's not a duty owed. And because of that determination, the court would note that -- I think that that resolves both any negligence claim or any negligent infliction claim and as well as any intentional. . . .

*And so in viewing the light -- the facts in the light most favorable to the plaintiff, I don't think there's any intentional acts that SESDAC took even if the court found some duty separate because of an intentional act. The court doesn't find that the record supports any intentional or willful, wanton, malicious actions on the part of SESDAC, but I'm not sure that the court even needs to get there because *I don't think there's a duty that was owed by SESDAC after Mr. Red Bear's death. And therefore, I'm going to grant summary judgment as to count three of the complaint for the reasons stated.**

CR 951-54 (emphasis added).

The circuit court's findings were stated in the Order: "the law imposes no duty on the Defendant with respect to the claims made by the Plaintiff in Count Three of her Complaint" and "any duty that may have been owed to the Plaintiff with respect to the handling of the decedent's body would fall to the decedent's guardian, the State of South Dakota." CR 915. The circuit court further concluded there was "no evidence that Defendant engaged in any intentional conduct which would support a claim for infliction of emotional distress." CR 916. Accordingly, the circuit court dismissed Red Bear's third count by Order dated February 12, 2015. *Id.*

The remaining counts -- the survival action for negligence causing alleged pain and suffering to Bill and the wrongful death action for negligence causing alleged pain and suffering to Red Bear -- went to trial October 19, 2015, through

October 22, 2015. On the Friday before trial began, counsel for SESDAC produced a document to Red Bear's counsel that was inadvertently previously undisclosed. CR 2513. The circuit court allowed Red Bear leeway during questioning, which satisfied Red Bear. CR 2513-17; CR 2778-2798. Red Bear does not raise this as an issue on appeal.

During voir dire, Red Bear's attorney questioned the jury panel at length about any relationships to SESDAC or its employees. CR 2389- 2435; 2444-45. During this line of questioning, a number of jurors who had relationships to SESDAC or its employees were struck for cause. *Id.* Additionally, while none of the jurors spoke of any prejudicial feelings towards Native Americans, some of the jurors did speak of their relationships with Native Americans in a positive light. CR 2437-2458.

The jury rendered its verdict on October 23, 2015. CR 1721-22. On the Verdict Form, the jury found SESDAC negligent, but concluded SESDAC's negligence was not a legal cause of any damages. *Id.* Judgment on the Verdict was filed November 2, 2015, and Notice of Entry of Judgment was filed the next day. CR 1729; 1730.

On or about November 18, 2015, Red Bear filed Renewed Motion for Judgment as a Matter of Law and Motion for New Trial. CR 1734-1740. The matter was briefed and a hearing was held on the Renewed Motion for Judgment as a Matter of Law and Motion for New Trial. Red Bear presented several issues at the hearing, including: (1) the court's interpretation of SDCL § 29A-5-507; (2)

failure to give a spoliation instruction; (3) failure to grant the motion for change of venue; (4) the verdict was ambiguous; and (5) late disclosure of Exhibit 101. CR 3520-3545. While the first four of these issues are on appeal, the last issue – the late disclosure of Exhibit 101 – is not at issue in this appeal.

The circuit court addressed each of the issues in turn, noting that as to the guardianship statute issue, it “relied not only on the guardianship statute as asserted by the plaintiff, but also just a lack of duty. . . . The Court’s still convinced that there wasn’t a duty owed by SESDAC in that circumstance and I’m not going to reconsider that.” CR 3541. As to the spoliation instruction issue, the circuit court noted, “what I’ve not heard and what I don’t see in the record in this case is that there is any evidence of an intentional destruction or bad faith destruction on the part of SESDAC which is what case law clearly requires. . . . the bottom line is the law is clear that in the absence of an intentional or bad faith instruction that [spoliation] instruction is not appropriate, so I don’t believe there’s any grounds for a new trial on that.” CR 3541-42.

On the issue of change of venue, the circuit court noted the “jury was passed for cause. There were no issues raised with – either pretrial or during the jury selection as to issues of racial composition or the like.” CR 3542. The court also noted the issue of relationship to SESDAC was “thoroughly addressed and discussed with the jurors and there were several that were stricken for cause as a result of their relationship with SESDAC. And so I don’t believe there’s any grounds for new trial based on that request for change of venue.” CR 3543.

Regarding the issue of the jury's refusal to award damages, the circuit court noted:

[The jury] found negligence. I don't think they ever got to the question of damages because they didn't find causation. And the Court's understanding is that's what's required. You know, before there's any miscarriage of justice finding when there's no damages assessed, there's got to be a situation here the jury's found favorably for the plaintiff not only on negligence, but also on causation. That didn't occur here.

CR 3543.³

The Court entered an Order denying Red Bear's Renewed Motion for Judgment as a Matter of Law and Motion for New Trial on June 9, 2016, and Notice of Entry was filed the next day. CR 2355-56. Red Bear filed Notice of Appeal on July 8, 2016. CR 2359.

ARGUMENT

I. PARTIAL SUMMARY JUDGMENT WAS PROPERLY GRANTED

Red Bear's first argument on appeal is that the circuit court erroneously interpreted SDCL § 29A-5-507, and had the court correctly interpreted that statute to find "that no legal guardianship existed beyond . . . the minute of Bill's death," it would have concluded SESDAC could not "legally handle Decedent's remains." Appellant's Brief, p. 12. Red Bear argues the "erroneous statutory interpretation by the trial court led the trial court to grant SESDAC's motion for partial summary judgment as to the Count III claim. . . ." *Id.* at 15. The infirmities with this

³ The circuit court also fully addressed the issue of the late disclosure of Exhibit 101 at the hearing. CR 3543. This is not, however, an issue on appeal and need not be further addressed.

argument are (1) SESDAC was never Bill's legal guardian, making § 29A-5-507 completely inapplicable and irrelevant; and (2) the circuit court's grant of partial summary judgment was not based on this statute, but upon the fact that SESDAC owed no duty to Bill or his heirs following Bill's death.

A. SDCL 29A-5-507 is a Red Herring

SDCL § 29A-5-507 provides: "A guardianship or conservatorship of a protected person shall terminate upon the death of the protected person, if jurisdiction is transferred to another state, or if ordered by the Court following a hearing." Regardless of the interpretation of this statute, it has no application here since SESDAC was never Bill's legal guardian; rather, at all times, the State of South Dakota, which is not a party to this action,⁴ was Bill's legal guardian. While the circuit court briefly referenced SDCL § 29A-5-507 at the summary judgment hearing, it is clear that the decision was not based on this statute. Rather, the circuit court's decision to grant summary judgment on Count III was based on its conclusion that SESDAC owed no duty with respect to the handling of Bill's remains and any such duty fell upon the State, Bill's legal guardian. This is evident from the summary judgment hearing transcript, the Order granting summary judgment, in which SDCL § 29A-5-507 is not even referenced, and the motion for new trial hearing in which the court restated its conclusion that there was not a duty owed by SESDAC.

B. Partial Summary Judgment Was Proper Based on the Lack of Duty

⁴ The applicable statute of limitations has long since expired.

The Court's review of summary judgment is well-settled:

In reviewing a grant or a denial of summary judgment under SDCL 15-6-56(c), we must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the non-moving party and reasonable doubts should be resolved against the moving party. The non-moving party, however, must present specific facts which demonstrate a genuine, material issue for trial. When no genuine issue of fact exists, summary judgment is looked upon with favor and is particularly adaptable to expose sham claims and defenses. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of a trial court, affirmance of a summary judgment is proper.

Clauson v. Kempffer, 477 N.W.2d 257, 258 (S.D. 1991) (other citations omitted).

“[T]he determination of whether a defendant owes a duty to a plaintiff does not require an examination of the facts; it is a question of law and summary judgment is appropriate when the trial judge resolves the duty question in the defendant's favor.” *Id.* (citing *Erickson v. Lavielle*, 368 N.W.2d 624, 627 (S.D. 1985)).

Significantly, although the circuit court based its grant of summary judgment on its finding of no duty, Red Bear has not challenged that finding. Rather, Red Bear challenges only the circuit court's supposed interpretation of SDCL § 29A-5-507. As explained above, however, the circuit court's decision granting summary judgment was not based on that statute, but upon its determination that SESDAC owed no duty with respect to Bill's remains.

In any event, the Court can affirm the circuit court's conclusion on any basis supported in the record. *See Farmland Ins. Companies v. Heitmann*, 498

N.W.2d 620, 622 (S.D. 1993) (“Review of the trial court’s order granting summary judgment will be affirmed if any basis exists which supports the ruling.”). Therefore, even if the circuit court had partially based its decision on SDCL § 29A-5-507, which is explicitly denied, this Court can affirm based on the fact that the State, not SESDAC, had a duty to make the decisions regarding Bill’s remains.

The evidence produced at the summary judgment stage demonstrated that indisputably, the State, not SESDAC, was Bill’s legal guardian; that the State, along with the hospital and police, made the decision not to conduct an autopsy; and the State, via Bill’s guardian representative, Nikki Clark, made the decision to have Bill’s body cremated. SESDAC had no duty to make those decisions, nor did it actually make any such decisions. The circuit court properly concluded that SESDAC had no duty regarding decisions made after Bill’s death and it properly granted SESDAC’s Motion for Summary Judgment on Count III.⁵

II. THE MOTION FOR CHANGE OF VENUE WAS PROPERLY DENIED

The second issue on appeal is whether the circuit court erred in denying Red Bear’s motion for change of venue. Red Bear bases this argument on SESDAC’s “relationship” with the community in which the case was tried and the fact that no Native Americans were among the jury.

⁵ It is also significant that Red Bear brought this action only as the Administrator of Bill’s estate and not in her individual capacity. It is impossible for Bill to have suffered any injuries or damages from decisions made after his death. Further, Red Bear, having not sued in her individual capacity, could not recover for any alleged injury or damage resulting from decisions made regarding organ donation and cremation of Bill’s body.

The standard of review on the circuit court's ruling on a motion for change of venue is abuse of discretion. *See City of Sioux Falls v. Johnson*, 1999 S.D. 16, ¶ 32, 588 N.W.2d 904, 911; *Bland v. Davison County*, 1997 S.D. 92, ¶ 5, 566 N.W.2d 452, 354-55. "Abuse of discretion is 'discretion exercised to an end or purpose not justified by, and against, reason and evidence.'" *Id.* (other citations omitted).

There is a presumption that a fair trial can be had in the county in which it originates. *See State v. Arguello*, 502 N.W.2d 548, 551 (S.D. 1993). A change of venue is warranted only when there "is reason to believe a fair trial cannot be had in the county in which the case is set to be tried." *City of Sioux Falls*, 1999 S.D. 16, ¶ 33, 588 N.W.2d at 911. The burden was on Red Bear to establish that a fair and impartial trial could not be had in Clay County. *See id.*

A. Relationships to SESDAC

Red Bear argues that of the 65 potential jurors, many were "acquaintances, neighbors, affiliates, and/or business associates, of SESDAC or SESDAC officials or clients" and that due to this fact, "Red Bear was forced to weave her way through these sensitive areas. . . ." Appellant's Brief, p. 19. Without any support whatsoever, Red Bear jumps to the conclusion that the "fact that SESDAC was well known to almost every 35 potential juror [sic], proved that this venue would not provide an impartial jury willing to award damages against a fellow lock business, who 'did good' in the community." *Id.* In addition to the fact that there is simply no support for this bald assertion, the fact that Red Bear had the

opportunity, and in fact, did excuse or preempt jurors for their supposed prejudice or bias, belies Red Bear's assertion that she was denied an impartial jury. And, significantly, Red Bear's counsel passed the jury for cause. CR 3542.

The Court recognizes that "voir dire examination is the better forum for ascertaining" whether potential jurors harbor bias or prejudice. *Bland*, 1997 SD 92, ¶ 10, 566 N.W.2d at 456. Red Bear acknowledges that during voir dire, she struck, for cause or peremptorily, "at least 10 to 15" jurors for their relationship with SESDAC. *Id.* In fact, Red Bear's trial attorney questioned the jury panel at length about those relationships. *See* CR 2389- 2435; 2444-45.

If Red Bear had been unhappy with this method of screening out jurors with bias or prejudice, she could have asked to conduct voir dire in a variety of different ways. *See Bland*, 1997 SD 92, ¶ 10, 566 N.W.2d at 456. She did not, and in any event, was able to question the potential jurors about their relationship to SESDAC and screened out a significant number of jurors on that basis. And, as noted above, the jury was passed for cause, which results in a waiver of this argument. *See State v. Weatherford*, 416 N.W.2d 47, 52 (S.D. 1987) (in affirming denial of motion for change of venue, the court noted "none of the members of the jury had read the article, none of them were influenced by it, *and all were passed for cause by defendant.*") (emphasis added). There being no evidence that the remaining jurors could not judge the case impartially, Red Bear has not sustained her burden of proving that any potential bias or prejudice resulted in an unfair trial. *See id.*

B. Racial Discrimination/Diversity

Red Bear also argues that Native Americans were not represented on the jury and that one potential juror – a Native American woman – “was taken off by one of Defendant’s preemptive [sic] strikes” without a nondiscriminatory basis. Appellant’s Brief, p. 20. Counsel for SESDAC takes extreme offense at the accusation that his striking of this juror was in any way racially motivated.

This argument was not a basis for Red Bear’s Motion for Change of Venue. *See* Motion for Change of Venue (moving for change of venue “as a precautionary procedural device to avoid potential jurors with apparent and obvious conflicts of interest, not to be call into trial.”). Further, an argument regarding racial discrimination is not properly part of the motion for change of venue, but is a constitutional challenge to the make-up of the jury. *See* Appellant’s Brief, pp. 19-20.

Regardless of the nature of the issue, Red Bear has not preserved it for appeal, as neither the record nor the transcript reflects that she raised this issue with the circuit court. Red Bear never filed any formal objection to the make-up of the jury or to the peremptory strike of the one juror, nor does the transcript reflect that any such objections were made. On this basis alone, this argument should be rejected. *See State v. Arguello*, 502 N.W.2d 548, 554 n. 4. In *Arguello*, the defendant made the same claim as Red Bear – “Arguello argues that his right to a fair trial was denied under *Batson v. Kentucky*, 476 U.S. 79 (1986), by the State’s illegal removal of the only two Indians on the panel.” *Id.* (parallel citations

omitted). In addressing the claim, the Court held, “[b]ecause Arguello did not object to the removal of either of these individuals at trial, he has failed to preserve this issue for appeal.” *Id.* (citing *Smolnikar v. Robinson*, 479 N.W.2d 516, 518-19 (S.D.1992)).

Even if the Court were to consider the issue, Red Bear cannot sustain her burden of establishing a violation of her right to a fair trial. The burden is on Red Bear to establish a *Batson* violation, and to do so, she must show:

(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.

Arguello, 502 N.W.2d at 553. “Theoretically, a panel could be composed entirely of women, men, blacks, whites, American Indians, or any combination. Arguello has failed to show that the process was not random or that it was due to the systematic exclusion of the group from the jury-selection process.” *Id.* Similarly, in the present case, Red Bear has provided no facts upon which the Court could conclude that the make-up of the jury was due to the “systematic exclusion” of Native Americans.

Further, there is no evidence that the peremptory strike of one Native American juror was based on her race, and in any event, she was just one potential juror. There were a number of jurors who, during voir dire, spoke of their relationships with Native Americans in a positive light. In short, there is nothing

in the record to suggest that the peremptory strike of this one juror had any effect on the outcome of the case.

III. THE SPOILIATION INSTRUCTION WAS PROPERLY DENIED

A. Red Bear Failed to Cite Authority in Support of This Issue

Red Bear claims the circuit court erred in denying her proposed spoliation jury instruction. At trial, Red Bear argued for the spoliation instruction based on the argument that SESDAC had at least co-control over Bill's body after his death and failed to request an autopsy, which would have allowed Red Bear to prove the cause of Bill's death. *See* CR 3449-50. Red Bear fails to provide any argument and authorities regarding the Court's standard in reviewing the refusal to give this instruction or any argument or authorities regarding the proper circumstances under which a spoliation instruction should be given. *See* Appellant's Brief, pp. 20-24. Rather, Red Bear simply rehashes facts regarding Bill's death and the ensuing decisions, as well as unsupported arguments regarding the effect of the circuit court's refusal to instruct on spoliation. *See id.*

As such, this issue should be disregarded. *See Veith v. O'Brien*, 2007 S.D. 88, ¶ 50, 739 N.W.2d 15, 29 (noting appellant "failed to cite any authority in support of his argument on appeal with regard to this instruction. Veith therefore waives this issue on appeal, with respect to Instruction No. 25, for failure to cite authority in violation of SDCL 15-26A-60(6)) (citing *State v. Pellegrino*, 1998 S.D. 39, ¶ 22, 577 N.W.2d 590, 599 (citing *State v. Knoche*, 515 N.W.2d 834, 840 (S.D.1994); *State v. Dixon*, 419 N.W.2d 699, 701 (S.D.1988)) (failure to cite supporting authority on appeal is a violation of SDCL 15-26A-60(6) and the issue

is thereby waived)). In any event, this issue has no merit and provides no basis to reverse the jury's verdict.

B. Standard of Review

The standard of review for rulings on a request to give a proposed jury instruction is abuse of discretion. *See State v. Engesser*, 2003 SD 47, ¶ 15, 661 N.W.2d 739, 746 (citing *State v. Wright*, 1999 S.D. 50, ¶ 12, 593 N.W.2d 792, 797). “To establish reversible error from a trial court’s refusal to give a requested instruction, the party asserting error must show that (1) the tendered instruction was a correct statement of the law, (2) the instruction was warranted by the evidence, and (3) the error in not giving the instruction was prejudicial.” *Engesser*, 2003 SD 47, ¶ 43, 661 N.W.2d at 746. Red Bear can establish prejudice from the circuit court’s refusal to give the spoliation instruction only if she demonstrates the “jury would have returned a different verdict if the proposed instruction had been given.” *Id.*

C. The Spoliation Instruction was Not Warranted

The Court in *Engesser* explained that the “[i]ntentional destruction of evidence, a form of obstruction of justice, is called ‘spoliation.’” *Id.* at ¶ 43, 661 N.W.2d at 753 (emphasis added). “Spoliation is more than simply the loss of evidence.” *Id.* at ¶ 44, 661 N.W.2d at 753. Rather, the adverse inference drawn from this intentional destruction of evidence is “predicated on bad conduct.” *Id.* To be sure, “a showing of an intentional act of destruction” is required for the instruction to be warranted. *Id.* at ¶ 44, 661 N.W.2d at 754. In other words, only

“intentional destruction will sustain the rule’s rationale that the destruction amounts to an admission by conduct of the weakness of one’s case.” *Id.* Mere negligence is not enough. *Id.* at ¶ 47, 661 N.W.2d at 755. Rather, substantial evidence of four specific considerations must be met before giving a spoliation instruction:

An instruction on the inference that may be drawn from the spoliation of evidence is proper only when substantial evidence exists to support a conclusion that the evidence was in existence, *that it was in the possession or under the control of the party against whom the inference may be drawn*, that the evidence would have been admissible at trial, *and that the party responsible for destroying the evidence did so intentionally and in bad faith.*

Id. at ¶ 46, 661 N.W.2d at 755 (emphasis added).

In the present case, the circuit court correctly concluded the spoliation instruction was not warranted. After all the evidence in the trial was submitted, the circuit court concluded, “there’s not . . . sufficient evidence to show that SESDAC was in control of the decision over the body and as a result of that the Court doesn’t believe those [spoliation] instructions are appropriate under the evidence as submitted.” CR 3453. Far from an abuse of discretion, the circuit court’s conclusions are sound.

At trial, it was established that not one of SESDAC’s employees made any decisions regarding the handling of Bill’s body after his death, and specifically, not one of SESDAC’s employees made the decision to forego an autopsy. It was further established that SESDAC had neither legal custody nor control over Bill; rather, the State of South Dakota was Bill’s legal guardian and Nikki Clark was

Bill's guardian representative. The State of South Dakota, through its employees, Nikki Clark and Velda Bartel, made the decisions regarding Bill's remains.

Additionally and significantly, the record and trial transcript are completely void of any evidence that any decisions were made with an intent to destroy evidence.

On this evidence, the circuit court concluded the spoliation instruction was not warranted, specifically concluding there was insufficient evidence that SESDAC was in control of the decisions regarding Bill's body. Additionally, at the hearing on the motion for new trial, the circuit court noted there was no evidence that there was an intentional or bad faith destruction of the evidence. Red Bear has still not produced any evidence that SESDAC acted intentionally or in bad faith to destroy evidence, which is required for a spoliation instruction. *See Engesser*, 2003 SD 47, ¶ 46, 661 N.W.2d at 755.

In short, Red Bear failed to prove two of the elements to warrant a spoliation instruction – possession or control of the evidence and intentional or bad faith destruction of the evidence. The circuit court's ruling was not an abuse of discretion and does not warrant reversal.

**IV. THE MOTION FOR NEW TRIAL WAS PROPERLY DENIED,
AS THE VERDICT IS NOT INCONGRUENT OR AMBIGUOUS**

Red Bear's final argument is that the circuit court erred in refusing to grant a new trial, arguing the jury's verdict finding SESDAC negligent, but awarding no damages, was incongruent or ambiguous. In her motion for new trial, Red Bear made this same argument to the circuit court, which having the benefit of hearing

all the evidence, concluded “I don’t think the jury got to the damage question. They found negligence, but I don’t think they ever got to the question of damages because they didn’t find causation.” CR 3543. The court concluded: “before there’s any miscarriage of justice finding whether there’s no damages assessed, there’s got to be a situation where the jury’s found favorably for the plaintiff not only on negligence, but also on causation. That didn’t occur here.” *Id.* As reflected on the Verdict Form, that is precisely what the jury found and the circuit court’s conclusion was correct.

A. Standards of Review

The circuit court’s denial of a motion for new trial is reviewed for an abuse of discretion. *See Hossle v. Fountain*, 1999 S.D. 104, ¶ 5, 598 N.W.2d 877, 878. “‘The term abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence.’” *Id.* (quoting *Moore v. Moore*, 354 N.W.2d 732, 733 (S.D. 1984)). “Whether a new trial should be granted is left to the sound judicial discretion of the trial court, and this Court will not disturb the trial court’s decision absent a clear showing of abuse of discretion. If the trial court finds an injustice has been done by the jury’s verdict, the remedy lies in granting a new trial. We determine that an abuse of discretion occurred only if no judicial mind, in view of the law and the circumstances of the particular case, could reasonably have reached such a conclusion.” *Rogen v. Monson*, 2000 S.D. 51, ¶ 17, 609 N.W.2d 456, 460.

Further, “on appeal of a jury verdict, the Supreme Court is required to view the evidence and all reasonable inferences from the evidence in the light most favorable to the verdict winner and conflicting evidence is to be resolved in favor of the verdict.” *Nelson v. Nelson Cattle Co.*, 513 N.W.2d 900, 903 (S.D. 1994). “The Supreme Court reviews the record to determine whether there is substantial evidence to allow reasonable minds to differ; the court does not weigh evidence and substitute its judgment for that of the jury.” *Id.* In reviewing the sufficiency of the evidence to support a verdict, the court does not weigh conflicting evidence or pass upon the credibility of witnesses. *Id.* “These functions lie solely within the province of the jury as ultimate trier of fact.” *Id.* (other citations omitted).

“It is, of course, presumed that the jury understood and abided by [the jury] instructions.” *First Nat. Bank v. Kehn Ranch, Inc.*, 394 N.W.2d 709, 720 (S.D. 1986). Where a “verdict is susceptible of two constructions, the construction that sustains the verdict must be applied.” *Id.* In this case, the jury’s verdict can readily be explained and it is neither incongruent nor ambiguous.

B. The Jury’s Verdict of No Damages is Sound

The jury instructions in this case instructed, *inter alia*, that Red Bear had the burden of proving that “SESDAC was negligent in causing the death of Decedent, Darelle Red Bear, and SESDAC’s negligence was a direct cause of the injuries and damages claimed by Bernadine Red Bear in her representative capacity.” CR 1705. The instruction further explained to the jury the issues to be determined:

First, was the defendant negligent?

If your answer to that question is “no,” you will return a verdict for the defendant. If your answer is “yes,” you will have a second issue to determine, namely:

Was that negligence a legal cause of any injury to the plaintiff?

If your answer to that question is “no,” plaintiff is not entitled to recover; but if your answer is “yes,” you then will determine the amount of damages, if any, plaintiff is entitled to recover and return a verdict for the amount thereof.

You should first determine the questions of liability before you consider the question of damages.

CR 1654. The Verdict Form similarly asked those questions:

1. Was SESDAC negligent?
2. Was SESDAC’s negligence a legal cause of Plaintiff’s damages?

CR 1722.⁶

The jury concluded SESDAC was negligent; however, it also concluded SESDAC’s negligence was not a legal cause of Red Bear’s damages, as very specifically set forth in the Verdict Form. *See id.* The jury followed the instructions given by the Court and rendered its verdict in a manner specifically contemplated by the jury instructions and the Verdict Form. The jury’s verdict must, therefore, be upheld on this basis alone. *See Kehn Ranch, Inc.*, 394 N.W.2d at 720.

⁶ Red Bear does *not* take issue with these jury instructions or with the Verdict Form.

Further, Red Bear's authorities cited in support of this argument are readily distinguishable. In *Baker v. Holman*, 2011 WL 24114451 at *12 (N.D. Miss. 2011), the jury concluded the plaintiff suffered "reasonably foreseeable emotional harm, but should be awarded no damages." The distinction between the *Baker* case and the present is that in *Baker*, the jury found not only that the defendant was negligent, but also that such negligence was the proximate cause of plaintiff's harm. *See id.* (noting "the jury must have found that the Plaintiff proved 'substantial proof of an emotional harm' as well as 'emotional distress damages' stemming from that harm. *The jury must also have found that the Defendant caused such injuries.* However, the jury essentially negated the finding of an actual emotional injury by rendering a verdict of zero damages.") (emphasis added). In the present case, while the jury found negligence, it did not find that such negligence was the proximate cause of Red Bear's injuries. This is a significant distinction.

In *Hall v. Bergman*, 994 A.2d 666, 669 (Conn. 2010), the jury was given general verdict forms – one finding in favor of plaintiff and one finding in favor of defendant. Nevertheless, the jury in *Hall* returned two verdict forms with typewritten statements, requiring the trial court to send the jury back to deliberate. The court stated, the verdict forms "are not in compliance with the court's instructions, which require that . . . you are to return one verdict. . . . It's not clear as to what exactly your verdict is, so I'm going to send you back and give you [a

clean set of verdict forms].” *Id.* (other citations omitted). The jury later returned its verdict in favor of the plaintiff, but awarded plaintiff no damages. *See id.*

On appeal, the appeals court noted the jury was given and returned a *general* verdict form. *See id.* at 674. “[B]ecause multiple causes of action were submitted to the jury without interrogatories and the jury returned a general verdict for the plaintiff, the general verdict rule applies. As we have explained, *under that rule*, we presume that the jury resolved every issue in the plaintiff's favor. Thus, we presume that the plaintiff proved every element of each of her claims.” *Id.* (emphasis added). The court in *Hall* concluded, “[b]ecause we must presume that the plaintiff established actual injury under all three of her claims, we also must presume that the plaintiff established damages stemming from that injury. As the Appellate Court observed, however, this presumption is inconsistent with the jury's award of zero damages. Consequently, the jury verdict in favor of the plaintiff is insolubly ambiguous.” *Id.*

The circumstances under which the verdict was found to be ambiguous and warranting reversal in *Hall* are not present in this case. The parties did not provide the jury with a general verdict form, asking the jury to simply indicate whether it found in favor of Red Bear or SESDAC. Rather, the jury was given a special verdict form in which it was asked several questions that mirrored the jury instructions. Specifically, the jury was asked whether SESDAC was negligent and if so, whether such negligence was the proximate cause of Red Bear's damages. As to this second question, the jury answered “no.” The Court need not guess as

to the meaning of the jury's verdict as in *Hall*. It is clear that the jury found one of the essential elements to Red Bear's claims – proximate cause – was lacking. Proof of negligence but not proximate cause does not make the verdict ambiguous in any way – it simply indicates the jury's belief that Red Bear did not sustain her burden of establishing proximate cause.

Although details of the type of verdict are lacking in *Malmberg v. Lopez*, it appears that the same issue was present there as in *Hall*. See *Malmberg v. Lopez*, 546 A.2d 264 (Conn. 1988). The court in *Malmberg* noted, “the jury's intent in finding the issues for the plaintiff, but awarding zero damages, is known only to the jurors, and this court's endorsement of one plausible explanation of the verdict over another would amount merely to speculation. Such ambiguity requires a rehearing in full, on both liability and damages.” *Id.* at 268. As in *Hall* the jury in *Malmberg* apparently found in plaintiff's favor on all issues of liability – both negligence and proximate cause – yet inexplicably awarded no damages. Again, such a scenario is not the case here, as the jury here specifically concluded that Red Bear did not establish SESDAC's negligence was the proximate cause of injuries.

Even more ambiguity was present in *Henry v. Henry*, 2000 S.D. 4, ¶ 3, 604 N.W.2d 285, 287, where the plaintiff sued her former husband for intentional infliction of emotional distress and assault, and the former husband asserted a counterclaim for defamation. At trial, the “jury found for [plaintiff] on ‘all the issues under the Complaint’ and against [defendant] on his counterclaim.” The

jury awarded zero compensatory damages, but \$50,000 in punitive damages. *See id.* On appeal, this Court explained, “[p]atently, the jury believed Lois had been the victim of outrageous misconduct as evidenced by its punitive damage figure, but awarded no compensatory damages even though there was evidence in the record to support such an award. A new trial may be granted when damages appear inadequate or when a verdict contradicts the evidence.” *Id.* at ¶ 9, 604 N.W.2d at 289.

The present case is distinguishable from *Henry* because there is no indication in this case that the jury found for Red Bear “on all the issues under the complaint.” To the contrary, the jury specifically found against Red Bear on the issue of proximate cause. The jury’s verdict in this case does not contradict the evidence, as specifically concluded by the trial court.

Reinfeld v. Hutcheson and *Morrison v. Mineral Palace, Ltd.*, are also distinguishable, as the Court in both of those cases considered whether jury verdicts awarding damages for medical expenses, but for not pain and suffering, could be upheld, an issue not before the Court in this case. *See Reinfeld*, 2010 S.D. 42 ¶ 9, 783 N.W.2d 284, 287; *Morrison*, 1998 S.D. 33, ¶ 15, 576 N.W.2d 869, 873. In both cases, the Court found no evidence to contradict plaintiffs’

claims that their injuries were painful. *See Reinfeld*, 2010 SD 42, ¶ 14, 783 N.W.2d at 289; *Morrison*, 1998 S.D. 33, ¶ 12, 576 N.W.2d at 872.⁷

Where, as here, the jury fails to award damages because it has determined negligence was not the proximate cause of alleged injuries, a new trial is not warranted. *See e.g. Bridge v. Karl's Inc.*, 538 N.W.2d 521 (S.D. 1995). In *Bridge*, the plaintiff was injured in an automobile accident and the defendant admitted negligence. *See id.* at 523. After a jury trial, however, the jury returned a verdict for defendant, and plaintiff moved for judgment notwithstanding the verdict or new trial, both of which were denied. *See id.* On appeal, plaintiff argued that because the defendant admitted liability, there was nothing more for the jury to decide and it erroneously failed to award damages. *See id.* at 523-34.

The Court clarified that the defendant only admitted negligence, not liability, distinguishing it from a case in which a defendant admits both negligence and proximate cause, “leaving only the issue of the amount of damages for a jury determination.” *Id.* at 524. Thus, the “jury was called upon to make difficult choices as to proximate cause, and if established, the extent of damages, if any.” *Id.* “As the plaintiff, Mike had the burden of proof on causation and the extent of his injuries, if any. The jury found he failed in that burden.” *Id.* at 525.

⁷ *Welch v. Haase*, 2003 S.D. 141, 672 N.W.2d 689, is likewise inapposite, as the trial court in that case, “removed all defenses from the jury's consideration, and the jury was instructed to only determine Welch's damages,” which the jury failed to do.

In the present case, while negligence was not admitted by SESDAC, but was established by Red Bear, the jury was still called upon to determine both proximate cause and damages. Like the jury in *Bridge*, the jury in this case concluded that Red Bear failed to establish proximate cause.⁸ As has been long recognized and is codified in SDCL § 21-3-1, proximate cause is a required element of any tort action, and in this case, the jury concluded, after hearing all the evidence, that Red Bear failed to establish this requisite element.

The authorities from around the country are in agreement that a jury's failure to award damages where it finds that negligence, but not proximate cause has been established, is not grounds for a new trial. *See Kleiss v. Cassida*, 696 N.E.2d 1271, 1278 (Ill. Ct. App. 1998) ("The jury's verdict was not against the manifest weight of the evidence. There was sufficient evidence for the jury to reasonably infer that [defendant's] negligent spraying was not a proximate cause of plaintiffs' injury."); *Gaston v. Viclo Realty Co.*, 626 N.Y.S.2d 131, 132 (N.Y. 1995) (court affirmed denial of new trial where plaintiff claimed the verdict was "inconsistent and irreconcilable," where the "jury returned a verdict with interrogatories finding that defendant was negligent but that such negligence was not the proximate cause of plaintiff's injuries," holding, "[p]roximate cause is a matter generally to be resolved by the finder of fact . . . and a finding thereof does

⁸ Unlike in *Bridge*, Red Bear does not argue that there is no evidentiary basis to support the jury's finding that Red Bear failed to establish proximate cause. *See Bridge*, 538 N.W.2d at 524. Rather, Red Bear argues only that the jury's finding of negligence, without awarding damages is ambiguous, incongruent or irreconcilable.

not inevitably flow from a finding of culpable conduct.”) (internal and other citations omitted); *Cassibo v. Bodwin*, 386 N.W.2d 559, 561 (Mich. Ct. App. 1986) (denying motion for new trial and JNOV, noting, “[w]hile violation of a statute creates a rebuttable presumption of negligence, the plaintiff still must show that such negligence was the proximate cause of his injuries.”).

Here, too, there was sufficient evidence for the jury to conclude that any negligence by SESDAC was not the proximate cause of Bill’s death. While we do not know the jurors’ exact thoughts as to what negligence SESDAC committed, Plaintiff argued not getting Bill to the doctor earlier was the fault. SESDAC’s expert witness, Brad Randall, a forensic pathologist, testified that had Bill been seen by a physician in his last days, the result would have been the same, stating: “I think it’s very unlikely that, one, a doctor would have done anything different than was actually done at the home; and secondly, it’s very unlikely that a doctor, even had he more thoroughly examined Mr. Red Bear, would have found anything that would have signaled a disease that was imminently going to result in his death.” CR 3275. Dr. Randall opined: “I don’t think a physician would have done anything that would have altered the course of what happened and I then, of course, would not believe that a nurse would have either.” CR 3276.

Dr. Randall also opined that Matt Miranda’s actions the day of Bill’s death were not the proximate cause of Bill’s death either, explaining:

From what I read, the scene of when Mr. Red Bear was found unresponsive at the home, what he was -- what I saw in that was someone that had vomited in the course of dying. It’s an extremely

common thing that happens. It's part of the dying reflex, if you will, that people in the course of dying vomit. We see a large number of people that die with vomiting. People that die of vomiting is almost unheard of. And this is a reflex that happens almost at the last seconds of life. So when you arrive at someone that has vomited in a situation such as this, the chance of resuscitating them is almost zero.

CR 3276.

Dr. Randall also expressed that those with schizophrenia, such as Bill, have an increased risk of sudden death: "people that have a diagnosis of schizophrenia have an increased chance of dying suddenly and unexpectedly. And when we do the autopsies on these individuals, we don't find out why. There's just something inherently wrong that makes them more likely to die suddenly and unexpectedly than other people." CR 3277. In addition, Dr. Randall found no fault with the administration of Bill's medications, found that Bill had no significant abdominal issue, that the temperature of 93.5 was likely inaccurate, that a temperature of 101.7 was not significant. CR 3278-79.

It was for the jury to assess the evidence, including the experts' opinions, and to determine what weight to give that testimony. *See State v. Lybarger*, 497 N.W.2d 102, 106 (S.D. 1993) (concluding there was evidence to sustain the jury's verdict, holding "a jury is entitled to accept one witness' version of the facts and reject another's. . . . Black letter law would signify that the credibility of witnesses and weight to be accorded their testimony and weight of the evidence is for the jury.") (internal and other citations omitted). Viewing the evidence and all reasonable inferences from the evidence in the light most favorable to SESDAC,

as the Court must do, it is clear that sufficient evidence exists to support the jury's conclusion that Red Bear did not sustain her burden of establishing proximate cause. *See Nelson*, 513 N.W.2d at 903.

In short, the authorities relied upon by Red Bear are inapposite and distinguishable and offer no support to her appeal because in those cases the juries had found for the plaintiffs on the issue of negligence *and* proximate cause, yet awarded no damages. In this case, the jury specifically found *against* Red Bear on the issue of proximate cause. The jury here made a specific finding, as it was properly instructed to do, regarding whether Red Bear sustained her burden of proving both negligence and proximate cause. The jury concluded that while Red Bear proved SESDAC was negligent, she failed to prove that negligence was the proximate cause of any injuries. Accordingly, the jury did not assess any damages. Thus, the jury's verdict is readily explained and is not incongruent, ambiguous or irreconcilable. The circuit court properly denied Red Bear's motion for new trial on this issue.

CONCLUSION

For all these reasons, SESDAC respectfully requests that the Court affirm the circuit court's rulings and the jury's verdict in all respects and affirm.

Defendant/Appellant waives oral argument and believes the written submissions by the parties are sufficient for the Court to decide this appeal.

Dated December 30, 2016.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

By /s/ R. Alan Peterson

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), counsel for SESDAC states that the foregoing Brief is typed in proportionally spaced typeface in Times New Roman 13 point. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, SESDAC's Brief contains 9,401 words as counted by Microsoft Word.

By: /s/ Dana Van Beek Palmer
Dana Van Beek Palmer

CERTIFICATE OF SERVICE

Dana Van Beek Palmer, of Lynn, Jackson, Shultz & Lebrun, P.C. hereby certifies that on the 29rd day of December, 2016, she electronically filed the foregoing document with the Clerk of the Supreme Court via e-mail at SCClerkBriefs@uj.s.state.sd.us, and further certifies that the foregoing document was also e-mailed to:

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The undersigned further certifies that the original and two (2) copies of Brief of Appellee in the above-entitled action were mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

/s/ Dana Van Beek Palmer
Dana Van Beek Palmer

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STATE OF SOUTH DAKOTA
COUNTY OF CLAY

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

BERNADINE RED BEAR, a/k/a
BERNADINE SHIELDS, as Administrator
of the Estate of DARELLE RED BEAR,
Deceased,

Plaintiff,

vs.

SESDAC, INC.,

Defendant.

CIV. NO. 11-377

**ORDER GRANTING DEFENDANT'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT**

This matter having come before the Court for hearing on January 21, 2015 at the Clay County Courthouse on Defendant's Motion for Partial Summary Judgment; and the parties having appeared through counsel, Mr. Robin Zephier on behalf of Plaintiff and Ms. Michelle Randall on behalf of Defendant; and the Court having read and considered the written submissions of the parties, and having heard and considered the arguments and admissions of counsel for the respective parties in open court, the Court finds as follows:

1. That no genuine issues of material fact exist;
2. That the law imposes no duty on the Defendant with respect to the claims made by the Plaintiff in Count Three of her Complaint;
3. That any duty that may have been owed to the Plaintiff with respect to the handling of the decedent's body would fall to the decedent's guardian, the State of South Dakota;

4. That there is no evidence that Defendant engaged in any intentional conduct which would support a claim for infliction of emotional distress; and
5. That Defendant is entitled to judgment as a matter of law as to the Third Count of Plaintiff's Amended Complaint and all issues set forth therein.

NOW THEREFORE it is hereby **ORDERED**:

Summary Judgment should be and is hereby **GRANTED** in favor of Defendant SESDAC, Inc. as to the Third Count of Plaintiff's Amended Complaint and all of the issues pled therein. The reasons for the grant of summary judgment herein are set forth above and in, but not limited to, the transcript of the oral proceedings of January 21, 2015, ^{Court's oral ruling dated} which is ~~attached and incorporated by reference as though fully set forth herein.~~

Dated this 12th day of February, 2015.

BY THE COURT:



The Honorable Steven R. Jensen
Circuit Judge
First Judicial Circuit

ATTEST:

Jessica Bossee
Clerk of Court

By: Nadine Zimmerman
Deputy Clerk

(SEAL)

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF CLAY)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

BERNADINE RED BEAR, a/k/a
BERNADINE SHIELDS, as Administrator
of the Estate of DARELLE RED BEAR,
Deceased,

Plaintiff,

vs.

SESDAC, INC.,

Defendant.

CIV. NO. 11-377


JUDGMENT ON THE VERDICT

This matter having come on for trial on October 19-23, 2015, before this Court and a jury,
and the matter having been duly tried, and a jury having duly rendered its verdict in favor of
Defendant, SESDAC, Inc., on the 23rd day of October, 2015, it is hereby

ORDERED AND ADJUDGED that judgment be and is entered in favor of Defendant,
SESDAC, Inc., and that Defendant is entitled to recover from Plaintiff its cost and disbursements
in the amount of \$ _____ incurred in defense of this matter.

Dated this 27th of November, 2015.

BY THE COURT



Honorable Steven R. Jensen
Circuit Court Judge

ATTEST:
CLERK OF COURTS

By: _____
(SEAL)

STATE OF SOUTH DAKOTA

IN CIRCUIT COURT

COUNTY OF CLAY

FIRST JUDICIAL CIRCUIT

BERNADINE RED BEAR, a/k/a
BERNADINE SHIELDS, as Administrator
of the Estate of DARELLE RED BEAR,
Deceased,

Plaintiffs

vs.

SESDAC, Inc.,

Defendant.

Civ. 11-377

VERDICT FORM

FILED
OCT 23 2015
Jessica Basse
Clerk of Court
First Judicial Circuit Court of South Dakota

We, the jury, duly impaneled in the above-entitled action, and sworn to try the issues, find as follows:

1. Was SESDAC negligent? Yes: ☒ / No: ☐

(If your answer to Question No. 1 is "yes", then you must answer question No. 2. If your answer is "no" you are finished and the jury foreperson should date and sign the Verdict Form.)

2. Was SESDAC's negligence a legal cause of Plaintiff's damages? Yes: ☐ / No: ☒

(If your answer to Question No. 2 is "yes", then you must answer Question No. 3. If your answer is "no", you are finished and the jury foreperson should date and sign the Verdict Form.)

3. a. What amount of damages, if any, do you determine should be awarded for Darelle Red Bear's wrongful death? _____

- b. What amount of damages, if any, do you determine Bill Red Bear suffered prior to his death? _____

(After you have completed your answers to Question No. 3 you are finished and the foreperson should sign and date the Verdict Form.)

Dated this 23 day of October, 2015.


Foreperson

STATE OF SOUTH DAKOTA :
COUNTY OF CLAY :

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

BERNADINE RED BEAR, aka)
BERNADINE SHIELDS, as Administrator)
of the Estate of DARELLE RED BEAR,)
Deceased,)

Plaintiff,

vs.

SESDAC, INC.,

Defendant.

Civil No. 11-377

ORDER DENYING PLAINTIFF'S
RENEWED MOTION FOR JUDGMENT AS
A MATTER OF LAW AND MOTION FOR
NEW TRIAL

FILED

JUN 09 2016

Jessica Bosse
Clay County Clerk of Courts
1st Judicial Circuit Court of South Dakota

The parties having appeared before the Court on June 8, 2016, with Plaintiff represented by Robin L. Zephier and Defendant represented by R. Alan Peterson, and the Court having reviewed and considered the record on file and the written and oral arguments and authorities submitted by the parties, it is hereby ORDERED that the Plaintiff's Renewed Motion for Judgment as a Matter of Law and Motion for New Trial is denied.

Dated this 9th day of June, 2016.

BY THE COURT:

[Signature]
HONORABLE STEVEN R. JENSEN
Circuit Court Judge

ATTEST:

Jessica Bosse

By: _____
(SEAL)



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

APPEAL NO. 27930

BERNADINE MAE SHIELDS, AKA BERNADINE SHEILDS,
as Administrator of the Estate of DARELLE RED BEAR, Deceased,
Plaintiff and Appellant,

vs.

SESDAC, INC.,
Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT, FIRST JUDICIAL CIRCUIT
CLAY COUNTY, SOUTH DAKOTA

THE HONORABLE STEVEN JENSEN
CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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NOTICE OF APPEAL FILED JULY 8, 2016

PRELIMINARY STATEMENT

Appellant restates the Jurisdictional Statement, Statement of Legal Issues, Statement of the Case and Statement of the Facts as stated in the Appellant's Brief. Appellant submits this Reply Brief in order to clarify the issues, her position, and to the extent new material was introduced by the Appellees. All prior arguments made in Appellant's brief filed on October 28, 2016 are hereby incorporated.

Appellant will refer to Appellee's (SESDAC's Brief hereafter as "SB". References to Appellant's initial brief will be referred to as "AB". The Voir Dire transcript will be referred to as "VT".

DISPUTED MATERIAL FACTS:

Appellant disputes portions of the Appellees' Statement of the Facts and asserts the following: 1) Appellee incorrectly states that O'Connor had no input into the decision not to conduct an autopsy. SB 5. Exhibit 1 of the Clerk's Physical Exhibit List is a recording in which this Court will be able to clearly hear Rennae O'Connor in the background giving the direction to Clark throughout the telephone call and conversation where decisions were made about whether an autopsy should be conducted on Bill. There is no mistake that O'Connor is the one dictating those decisions. Additionally, O'Connor herself testified she had input in decisions involving Bill's body. AB Appendix, p. 100-104; O'Connor TT 136-140; O'Connor Depo pp. 25-53). 2) Appellee also incorrectly tells this Court that none of the potential jurors spoke of any prejudicial feelings toward Native Americans in Voir Dire. SB 9. When discussion was brought up about racism and impartiality, the discussion started with prejudicial feelings toward Native Americans. VT 63-71. First there was a prospective juror that discussed his

relatives' disputes with Native Americans due to land issues. VT 63-65. When asked whether such disputes had to do with a difference in race, the prospective juror indicated it did and that he is likely influenced by his relatives' thoughts at trial. *Id.* at 63. The prospective juror went further by stating he would be leaning in a negative way against the Appellant because of those experiences and it would be an "uphill" fight for him. *Id.* at 65. Shortly thereafter, another prospective juror who initially indicated that he had in fact had positive experiences with Native Americans in the past, described being jaded because he had recently been attacked by two Native Americans. VT 68-71. 3) Appellee gives contradictory facts about the reasoning the trial court gave for granting summary judgment on Count III of Plaintiff's Complaint. SB 10, 13. Appellee cited to the transcript from the trial court wherein the trial court stated that as to the guardianship statute issue, it "relied not only on the guardianship statutes as asserted by the plaintiff, but also just a lack of duty ..." SB 10, citing to CR 3541. Thus, the trial court made its decision in part on the interpretation of the guardianship statute. It did not exclude the statute from its consideration. Later at SB 13, the Appellee stated the decision was not based at all on the statute but only the alleged lack of duty. SB 13. Appellee cannot have it both ways. The citation to the record on Appellee's brief on page 10 is accurate. Its factual assertion on page 13 is not accurate.

ARGUMENT

I. WHETHER THE TRIAL COURT COMMITTED CLEAR ERROR, REVERSABLE ERROR AND ABUSED ITS DISCRETION BY INTERPRETATING SDCL § 29A-5-507 TO EXTEND LEGAL GUARDIANSHIP BEYOND DECEDENT'S DEATH?

The gist of Appellee's argument is that Appellant did not address the trial court's finding as to the lack of duty on the part of SESDAC and that the trial court did not rely upon an interpretation of the guardianship statute in granting partial summary judgment and its pretrial and post-trial rulings.

As stated in the above disputed facts, the Appellee is contrary when it first recites in its Statement of Facts that the trial court relied partially on SDCL 29A-5-507 in deciding on the guardianship issue and then later argues in its brief the trial court did not rely at all on an interpretation of the statute. SB 10, SB 13. Appellant asserts the trial court did in fact rely upon its interpretation of the statute and that is what precisely led to the erroneous ruling where the court found the statute had a *residual effect* beyond death. CR 3541. This ruling led to the partial granting of summary judgment in favor of SESDAC and led to the related pretrial and post-trial rulings.

The record is well preserved that Appellant strongly disagreed with the trial court's interpretation of the statute and in her brief cited numerous authorities on statutory construction, which are left unchallenged by Appellee. Accordingly, such argument should be deemed waived by Appellee.

Appellant did make arguments as to SESDAC's duty. The duty was that SESDAC failed in following its own policies to its clients. AB 12. The evidence was present that SESDAC is the one who had the information about how Bill wanted to be buried and where and yet disregarded those wishes. AB 17-18.

**II. WHETHER THE TRIAL COURT COMMITTED CLEAR ERROR,
REVERSABLE ERROR AND ABUSED ITS DISCRETION BY
DENYING RED BEAR’S MOTION FOR CHANGE OF VENUE?**

The record is replete with the potential jury pool’s relationship with SESDAC. In the record for the motions hearing, June 8, 2016, Appellant made clear that given the huge presence SESDAC had in the Clay County community --- which was evidenced by the voir dire examination --- the jury likely had an inclination to let them off the hook. The likely bias extended beyond direct contact with SESDAC. As stated by a few potential jurors, they had friends or family that were “long-term” employees of SESDAC. VT 12-14.

As stated above in Appellant’s Material Disputed Facts, Appellee wrongly asserted that there was no negative commentary on Native Americans. First there was a prospective juror that discussed his relatives’ disputes with Native Americans due to land issues. VT 63-65. When asked whether such disputes had to do with a difference in race, the prospective juror indicated it did and that he is likely influenced by his relatives’ thoughts at trial. *Id.* at 63. The prospective juror went further by stating he would be leaning in a negative way against the Appellant because of those experiences and it would be an “uphill” fight for him. *Id.* at 65. Shortly thereafter, another prospective juror who initially indicated that he had in fact had positive experiences with Native Americans in the past, described being jaded because he had recently been attacked by two Native Americans. VT 68-71. 3).

Appellee’s argument that Appellant could have tried another method during voir dire runs flat. The trial court already made its ruling and Appellant was stuck with the jury pool as was drawn.

III. WHETHER THE TRIAL COURT COMMITTED CLEAR ERROR, REVERSABLE ERROR AND ABUSED ITS DISCRETION BY DENYING RED BEAR'S REQUEST FOR A SPOILATION INSTRUCTION?

- A. Appellant properly cited legal authority in support of its argument that the trial court committed clear error by denying a spoliation instruction.

Appellee states that Appellant failed to cite any legal authority regarding this issue and therefore any argument should be disregarded. This is untrue. Appellee did spend a large amount of time in her brief providing this Court with facts that support why there should have been a spoliation instruction given in this case. But Appellee clearly cited to South Dakota Codified Law as to the basis for its argument.

In Appellant's brief, she argued that SESDAC had a legal responsibility under SDCL § 34-26-16(2) and §34-26-14 to use reasonable, due diligence to search for and find and contact Bill's next of kin about his prolonged illness, and then, immediately after he was declared dead. AB 24. Thereafter, Appellee cited to SDCL §29A-5-507, when arguing that Clark (on behalf of the State) and Bartel (on behalf of SESDAC) had no legal authority to act at all once Bill died. AB 24.

Appellee's argument that Appellee's argument should be waived since no legal authority cited is without basis or merit.

- B. The spoliation instruction was warranted because SESDAC destroyed the best evidence of their negligence.

The best evidence of SESDAC's negligence before and after Bill's death was Bill's body. TT 165-166. Appellant provided testimony at trial, through Dr. Robert Bux that if you have an autopsy:

Not only can you find a cause of death, that often times you can find contributing things and you can rule in or rule out. When you do an autopsy, particularly on someone who has died suddenly, you have about a 98% rate of coming up with a supportable specific cause of death.

TT 165-166. Appellee's own physician, Dr. Brad Randall agreed with this opinion albeit, Dr. Randall stated the rate is more like 95%. TT 800. Accordingly when SESDAC "destroyed" Bill's body, it destroyed the best evidence Appellant would have had to show negligence, causation and damages.

Appellee argues Appellant failed to produce evidence that SESDAC acted intentionally to destroy evidence. The entire thrust of Appellant's argument here is that when the trial court denied Appellant from presenting evidence on its Count III claims, which Appellant believes would have shown the lack of care that resulted in Bill's death and also provided evidence of the unauthorized decisions made regarding autopsy, cremation and the donation of body parts, it denied Appellant proof it needed to provide a causal link or nexus between SESDAC's conduct and the resulting damages.

Appellant made an offer of proof at trial on the issue. TT 406-410. The offer stated that in addition to witness testimony the audio recording of the discussions wherein it is clear that Rennae O'Connor (a SESDAC employee) was directing the decisions to be made about the autopsy, disposal of remains, etc. would provide such evidence of intent, control and possession *Id.* Appellant urges this Court cannot adequately scrutinize the error of the trial court's decision without listening to the audio and urges this Court to do so.

Ultimately when the trial court refused to allow the above-described evidence to come in, it also had the residual effect of leading the trial court to erroneously rule that Appellant was not allowed an instruction on spoliation. This had an absolutely prejudicial effect on Appellant's case.

IV. WHETHER THE TRIAL COURT COMMITTED CLEAR ERROR, REVERSABLE ERROR AND ABUSED ITS DISCRETION WHEN IT DENIED RED BEAR A NEW JURY TRIAL BASED UPON THE INCONGRUENT AND AMBIGUOUS JURY VERDICT?

CONCLUSION

For the foregoing reasons, Red Bear respectfully requests this Court reverse the trial court's decision and remand for a new trial.

REQUEST FOR ORAL ARGUMENT

Red Bear respectfully requests to present oral argument on these issues.

Dated this 2nd day of February, 2017.

Respectfully submitted,

/s/ Shiloh MacNally
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