

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 27807

DAVID KNIGGE,

Plaintiff/Appellant,

Vs.

B & L FOOD STORES, INC. and
ESTATE OF ROBERT KNIGGE,

Defendants/Appellees.

Appeal from the Circuit Court
Fifth Judicial Circuit
Spink County, South Dakota

The Honorable Tony L. Portra, Presiding Judge

APPELLANT'S BRIEF

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JURISDICTIONAL STATEMENT

Plaintiff/Appellant David Knigge (“David”) appeals from the Fifth Judicial Circuit Court’s February 16, 2016 Memorandum Decision (“Decision”) and Order for Summary Judgment. R. 254, 255.¹ The Honorable Tony L. Portra entered and filed the Order for Summary Judgment on March 2, 2016, dismissing David’s action in its entirety. R. 254. Counsel for Defendant/Appellee B&L Food Stores, Inc. and the Estate of Robert Knigge (jointly referred to as “The Estate”) served its Notice of Entry for the Court’s Order for Summary Judgment on March 11, 2016. R. 259. David filed his timely Notice of Appeal on March 24, 2016. R. 261.

ISSUES PRESENTED ON APPEAL

I. Did the Trial Court err when it viewed the evidence in the light most favorable to the moving party and failed to address David’s testimony about an event that could terminate his employment contract immediately?

The Trial Court concluded that David Knigge’s oral contract was intended to continue until David’s retirement or Robert’s minor children’s majority. Because both are events that would take place in several years, the Trial Court concluded that the statute of frauds applied to David’s contract, and it granted summary judgment against David’s claims.

Relevant Cases & Statutes:

- SDCL 15-6-56(c)
-*Harri man v. United Dominion Industries*, 2005 SD 18
-*Wilson v. Great Northern Railway Co.*, 157 N.W.2d 19 (1968)

¹ The settled record used in drafting this brief is cited as “R.” followed by the page number(s) assigned by the Clerk of Courts. The transcript for the November hearing on the *Defendants’ Motion Summary Judgment* is cited by “T.” followed by the page numbers, and when appropriate, the line number(s).

-*Hamilton v. Sommers, et al.*, 2014 SD 76,

II. Did the Trial Court err when it viewed the facts in the light most favorable to the moving party and concluded that David’s losses were not substantial in the context of his promissory estoppel claim?

Relevant Cases & Statutes:

- SDCL 15-6-56(c)
-*Wilson v. Great Northern Railway Co.*, 157 N.W.2d 19 (1968)
-*Garrett v. BankWest, Inc.*, 459 N.W.2d 833(S.D. 1990)

STATEMENT OF THE CASE

Plaintiff David Knigge (“David”) and his brother Robert Knigge (“Robert”) negotiated an oral employment contract that included a severance payment after David agreed to accept a job managing a store owned by Robert’s company, B&L Food Stores, Inc. (“B&L”). Robert had asked David to “scrap” his own career plans because Robert was dying of cancer and needed a manager at his store. The brothers were close, and helping Robert was a natural choice for David so he changed his own career plans, relocated to Robert’s community and went to work at the store that was most important to Robert. Three months later, Robert died and two months after that, Robert’s widow summarily terminated David. She then refused to pay the severance payment that Robert had promised because she thought it a lot of money and that David didn’t deserve the payment.

David initiated the present lawsuit against B&L as his former employer and against Robert’s Estate because of Robert’s representations, alleging that he is owed the severance payment that he and Robert agreed upon. R. 2: Complaint, ¶¶ 15, 16. B&L and the Estate asserted a statute of frauds defense because it is undisputed that David’s employment

agreement was never reduced to writing. R. : Answer, ¶ 15. B&L and the Estate filed a joint summary judgment motion on the statute of frauds defense. R. 13: Motion for Summary Judgment. After a hearing on the matter, the Trial Court granted summary judgment on all issues. R. 255: Memorandum Opinion. This appeal timely followed. R. 261: Notice of Appeal.

STATEMENT OF MATERIAL FACTS

Robert and David were brothers who enjoyed a close relationship with each other. Robert lived in Redfield, South Dakota, where he had successfully started and operated three grocery stores in rural communities. Robert was a smart businessperson who was “always in charge,” and a forceful, hard negotiator. R. 49: L. Knigge Depo at 13, 14, 117; D. Knigge Depo at 27; D. Bruns Depo at 6. Tragically, in October 2011, Robert was diagnosed with Stage 4 glioblastoma, a form of brain cancer. R. 49: L. Knigge Depo at 12. Robert’s prognosis was a grim one, giving him approximately eighteen months to live. R. 49: L. Knigge Depo at 15, 25. His doctors talked to him about his terminal condition and recommended that he should do the things that were important to him. R. 49: L. Knigge Depo at 25. Initially, Robert hoped for a miracle or the discovery of a misdiagnosis. R. 49: D. Knigge Depo at 5-6. After chemotherapy and two surgeries in early 2013, Robert’s doctors could offer him no further treatment. R. 49: L. Knigge Depo at 12; D. Knigge at 5, 6; L. Knigge Depo at 23, 85. Robert ultimately died of cancer in June 2013. R. 49: D. Knigge Depo at 30.

Robert and David’s relationship only became closer after Robert’s terminal diagnosis. R. 49: Exhibit A: L. Knigge Depo at 13. While Robert was a retailer, David had established a career in state government in Pierre, South Dakota. He successfully

worked as a CPA for more than 30 years. R. 49: D. Knigge Depo at 3, 4. When Robert was diagnosed, David was serving as the Assistant Director of Finance for the State of South Dakota's Department of Transportation; in this role, he supervised fourteen employees and had responsibility to establish policies and procedures for accounting processing in that critical governmental department.²

Between 1996 until his death, Robert was married to Lynnette Knigge; Robert and Lynnette had four children together, and all four of them were still minors at the time of Robert's death. Robert and Lynnette also each had adult children from prior relationships. Robert has an adult son, Jason; Lynnette has four other adult children.³

Robert and Lynnette started their first grocery business in Redfield, their home community. R. 49: L. Knigge Depo at 29. The Redfield store was owned and operated through a corporation that they established as B&L Food Stores, Inc.⁴ Robert and Lynnette were the only two shareholders of B&L. The B&L store was a successful store.

In approximately 2005, Robert and Lynnette bought another grocery store in Oakes, North Dakota. R. 49: L. Knigge Depo at 29. This store was operated through K&J Inc., another corporation that Robert set up. R. 49: L. Knigge Depo at 57. As an example of Robert's business style, a third grocery business was purchased in Linton, North Dakota, after Robert and Lynnette met David and Lisa Bruns, a married couple who were working in another grocery store, while the four of them were on a cruise.

² Since Robert's death and the termination that led to the present lawsuit about his severance payment, David has been re-employed by the State of South Dakota in its Bureau of Finance and Management. R. 49: Exhibit B: D. Knigge Depo at 3.

³ R. 49: Exhibit A: L. Knigge Depo at 51. Robert had included his son Jason and two of Lynnette's adult children in their grocery businesses in managerial positions. *Id.* at 44, 45, 47-48, 49-50.

⁴ R. 49: L. Knigge Depo at 29, 57. In 2009, B&L also purchased a competitor's store in Redfield, and Robert and Lynnette began to merge their grocery store into the competitor's building, under the name Redfield Food Center. R. 49: L. Knigge Depo at 60.

Robert then formed a corporation and hired the Bruns' to move to operate the Linton store via an oral contract. R. 49: L. Bruns Depo at 4; D. Bruns Depo at 5, 7.

Although Robert and Lynnette were both shareholders in all three of their corporate entities, Lynnette had little involvement with their businesses. She had worked for B&L at the Redfield store as a bookkeeper for a brief period until she became a full-time homemaker for their young family in 2000. R. 49: L. Knigge Depo at 18-19, 35, 86, 91, 121; D. Knigge Depo at 15, 16. After Lynnette dedicated herself to their family in 2000, she had very little involvement in the businesses and admittedly did not know the details of Robert's business dealings for the stores. R. 49: L. Knigge Depo 35, 36.

Robert was authorized to make decisions for B&L as well as the other corporate entities without Lynnette's approval or involvement. R. 49: L. Bruns Depo at 7. He was authorized to hire, negotiate salaries and benefits, and to terminate managers at the store without Lynnette's involvement. R. 49: L. Knigge Depo at 39. In comparison, Lynnette did not know who the officers of B&L were. R. 49: L. Knigge Depo at 29. Robert took out a \$400,000 loan for B&L and bought a \$60,000 boat and several cars without considering Lynnette's input or objections.

Robert incorporated his son Jason and Lynnette's adult children Kalie and Keith into their grocery businesses. Kalie was managing the Oakes store in 2012, until she abruptly announced she was leaving the store in December 2012. Robert did not advertise for a manager. R. 49: L. Knigge Depo at 74. Instead, in late 2012, Robert talked to David about managing the Oakes store: Robert proposed that David should consider managing that store, with an oral agreement that David would ultimately purchase the Oakes store. R. 49: D. Knigge Depo at 4.

David was interested in this idea: he and Robert reviewed the financial statements from that store, and David accepted the offer of managing the Oakes store without a set salary in exchange for the option to purchase the business for \$200,000 over ten years. R. 49: D. Knigge Depo at 4, 6. David agreed to work at the Oakes store as its manager on a flexible salary because of cash flow issues at the store; there was no severance agreement because David planned to buy the store. R. 49: D. Knigge Depo at 9. David and Robert did not immediately reduce their agreement about the Oakes store to writing, but intended to do so in the future. R. 49: D. Knigge Depo at 7-9. Lynnette did not know the terms of David's employment contract at the Oakes store because Robert had negotiated it. R. 49: L. Knigge Depo at 74.

David gave notice, resigned from his job with the state of South Dakota, and began to work at the Oakes store on weekends while he used up his accrued state leave. R. 49: D. Knigge Depo at 7. David put his house up for quick sale, and Robert's business paid for David to live in a motel room while David worked in Oakes. R. 49: L. Knigge Depo at 75. David started working weekends at the Oakes store in November of 2012, but the parties' plans changed entirely when Robert's January 2013 medical treatments indicated that there were no further treatment options for him, and he resigned himself to the fact that he had a short time to live. R. 49: D. Knigge Depo at 9, 11, 14.

Because Robert wanted to maintain the Redfield grocery store for his children, he convinced David that it made more sense for David to help him at his store in Redfield. R. 49: D. Knigge Depo at 9, 12, 14. To help his dying brother, David agreed to "scrap" the agreement about the Oakes store, close the Oakes and move to Redfield to manage the B&L store until Robert's children were able to manage it, he retired or until Lynnette

fired him. R. 49: D. Knigge Depo at 9, 12. David accepted Robert's employment offer, which included a \$100,000 severance payment, closed the Oakes store and moved to Redfield in the months just prior to Robert's death. R. 49: L. Knigge Depo at 88.

Robert and David expressly talked about the fact that Robert's wife Lynnette might not want David to manage the store after Robert died. R. 49: D. Knigge Depo at 19, 20, 22. At the time, Robert and David were aware of three facts: Robert was dying, Lynnette and David had a "strained" relationship, and Lynnette had argued with Robert about hiring David because she wanted Robert to hire the Bruns' to manage the Redfield store. R. 49: L. Knigge Depo at 76, 77, 62, 89; D. Knigge Depo at 10-11, 14, 19.

Neither Robert nor David wanted to force Lynnette to employ David after Robert died. R. 49: D. Knigge Depo at 10, 12, 20, 22. Because Robert and David could both foresee that Lynnette may not want to work with David after Robert's death, they agreed that in addition to his salary and benefits, David would have a severance agreement where he would be paid \$100,000 if he was terminated for any reason. R. 49: D. Knigge Depo at 10, 20, 22. David's testimony was that he would have a job until he retired or until one of two things happened: 1) Robert's children took over the management of the store; 2) or Lynnette fired him. R. 49: D. Knigge Depo at 12-13, 19, 20. The severance payment was intended to compensate David for leaving his profession, giving up the chance to own the Oakes store and moving to Redfield to manage the Redfield store. R. 49: D. Knigge Depo at 20. David accepted these terms, and in March of 2013, David closed the Oakes store and moved to Redfield to manage the B&L store.

Lynnette concedes that she does not know exactly how, why or on what terms David negotiated to buy the Oakes store or to manage the Redfield store because she did

not participate in the negotiation on his employment terms. R. 49: L. Knigge Depo at 63. David did not negotiate with Lynnette because Robert was clearly in charge of the store businesses. R. 49: D. Knigge Depo at 15. However, Lynnette was aware that before David agreed to move to Redfield, Robert had also tried to hire Dave and Lisa Bruns to leave the Linton store to come manage the Redfield store when he got sick: he had offered them a lot or to build them a home if they took the job and left the Linton store. R. 49: L. Knigge Depo at 65; D. Bruns Depo at 15. Lynnette would have preferred to have the Bruns' managing the Redfield store, but she did overhear Robert talking to David on the phone about a \$70,200 annual salary and a bonus based on how the store did. R. 49: L. Knigge Depo at 69-70. This was how she first learned that Robert had hired his brother David instead of the Bruns family. R. 49: L. Knigge Depo at 70. When she asked Robert about his conversation, he told her that he wanted his brother David in the store. R. 49: L. Knigge Depo at 69. Lynnette told Robert that she preferred to have the Bruns' run the Redfield store. R. 49: L. Knigge Depo at 77. Robert did not like it when she said that, and they had an argument about it.⁵ Lynnette was surprised and upset by Robert's choice, but she knew that Robert had made up his mind to have David manage the Redfield store. R. 49: L. Knigge Depo at 76.

Lynnette does not dispute that Robert offered the store manager job to David, or that David accepted and performed on that offer. R. 49: L. Knigge Depo at 84. She does not dispute that the salary offered was \$70,200 a year, which she thinks is too high. R. 49: L. Knigge Depo at 76, 78, 85. And although Lynnette disputed David's testimony that he and Robert agreed upon a \$100,000 severance because she did not overhear

⁵ R. 49: L. Knigge Depo at 77. At the end of his life, Robert had developed some trust issues with Lisa and David Bruns. R. 49: L. Knigge Depo at 89. He thought they were stealing from him. R. 49: L. Knigge Depo at 89.

Robert discussing that term with David on the phone, she agrees it is possible that they had further negotiations of which she was not aware. R. 49: L. Knigge Depo at 86.

Lynnette acknowledges that Robert felt very kindly toward David for David's willingness to help him in the business. Lynnette also acknowledges that Robert knew he had limited time to live when he made this deal with David. R. 49: L. Knigge Depo at 85, 86.

It is also not disputed Robert had the authority to make this employment offer to David. The testimony established that Robert generally made major business decisions and entered into contracts without consulting Lynette or without heeding her objections. R. 49: L. Knigge Depo at 90, 91. Thus Lynnette did not know if David and Robert had a written contract: moreover, she has admitted that she did not care. R. 49: L. Knigge Depo at 78.

At the time David took over management of the Redfield store, it was a significant undertaking because the store was in a chaotic state as it was being moved into a new location in Redfield. R. 49: D. Knigge Depo at 16. David performed the management of the Redfield store's day-to-day operations, including managing personnel, maintaining the store, monitoring sales and costs, and managing risk and liability exposure. R. 49: D. Knigge Depo at 16, 17. David knew he was going to have to work with Lynnette after Robert died, so he tried to be honest and up-front with her. R. 49: D. Knigge Depo at 27. Nonetheless, both parties agree that their relationship remained a strained one. R. 49: L. Knigge Depo at 82.

Notably, Robert's adult son Jason had been managing the B&L store in 2012: Lynnette's adult son Keith left the B&L manager's job in 2012, and Robert promoted Jason to be the manager in Keith's place. R. 49: L. Knigge Depo at 51, 53. Jason had

only been in the position for a short time and voluntarily stepped down from the manager position at Robert's request when David agreed to come to Redfield to manage the store; after that, Jason continued to work there after David took his place as the manager. R. 49: L. Knigge Depo at 54. The testimony was that Jason was not ready to run the store and needed to learn to be a manager. R. 49: D. Bruns Depo at 13. David had been working at the B&L Redfield store for three months when Robert died in June 2013; he continued to manage the store for two months after Robert died. R. 49: L. Knigge Depo at 87. In July 2013, Lynnette began to feel like David wasn't being honest about the finances for the Oakes store that had closed some months before because she felt his answers were vague and that he was defensive. R. 49: L. Knigge Depo at 88, 94. As a result, Lynnette began searching for a replacement for David without discussing it with him. R. 49: L. Knigge Depo at 98.

Lynnette knew about a week before the termination in August of 2013 that David claimed he had a severance agreement. R. 49: L. Knigge Depo at 101, 102. Lynnette did not ask if there was a contract with David when she terminated him. She did not ask her lawyer for advice before the termination. R. 49: L. Knigge Depo at 104, 105.

In August 2013, Lynnette announced to David that she was terminating his employment. R. 49: D. Knigge Depo at 23. David was simply informed that it wasn't working and Lynnette was going to replace him. R. 49: L. Bruns Depo at 11. Lisa and David Bruns were at this meeting to support Lynnette, and they heard David say there would be no hard feelings and asserted the severance payment of \$100,000. R. 49: L. Bruns Depo at 11. Specifically, David said that Robert had told him if anything happened he would get a \$100,000. R. 49: L. Bruns Depo at 13; L. Knigge Depo at 103.

Lynnette said that she had to talk to her attorney, and that she thought it was a lot of money. R. 49: L. Knigge Depo at 104.

After David's termination, Lynnette and David had another meeting in August 2013 to try to settle the severance payment dispute. Lynnette told David that she thought he didn't deserve a severance payment. R. 49: L. Knigge Depo at 108. David told her he was only seeking the \$100,000 severance payment even though he could calculate his actual losses in the range of \$310,000. R. 49: L. Knigge Depo at 109. David gave Lynnette a sheet that illustrated his calculation of his financial losses as a result of his efforts to help Robert by managing the store. R. 49: D. Knigge Depo at 34. This litigation started when Lynnette refused to pay the severance payment.

STANDARD OF REVIEW

This Court's scope of review on appeal from a granted summary judgment motion relies upon a well-established standard:

Summary judgment is authorized if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. [This Court] will affirm only when there are no genuine issues of material fact and the legal questions have been correctly decided. All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. Summary judgment will be affirmed if there exists any basis which would support the circuit court's ruling.

Hamilton v. Sommers, et al., 2014 SD 76, ¶ 17. The Trial Court's findings of fact are reviewed under the clearly erroneous standard; its conclusions of law are review *de novo*. *Id.*, at ¶ 17.

ARGUMENTS AND AUTHORITIES

I. Did the Trial Court err when it viewed the evidence in the light most favorable to the moving party and failed to address David's testimony about an event that could terminate his employment contract immediately?

A. The Summary Judgment Standard

The summary judgment standard under SDCL § 15-6-56(c) is so familiar that it can often be cut and pasted into an argument as a matter of rote recitation by civil practitioners and courts alike. However, because the questions in this appeal revolve around the Trial Court's application of this standard, a more thorough review of the purposes and limitations of the summary judgment standard is useful here.

Perhaps one of the most accessible summaries of the summary judgment standard is set forth in *Wilson v. Great Northern Railway Co.*, a prolifically cited case favored by civil practitioners because of its straightforward explanation of the purposes and standards applicable to summary judgment motions. It boils down the six guiding principles for summary judgment consideration as follows:

- (1) Evidence must be viewed most favorable to the nonmoving party;
- (2) The burden of proof is on the movant to show clearly that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law;
- (3) Summary judgment is not a substitute for a court trial or for trial by jury where any genuine issue of material fact exists;
- (4) Surmise that a party will not prevail upon trial is not sufficient basis to grant summary judgment on issues which are not shown to be sham, frivolous or so unsubstantial that it is obvious that it would be futile to try them;
- (5) Summary judgment is an extreme remedy which should be awarded only when the truth is clear and reasonable doubts touching the existence of a genuine issue as to material fact should be resolved against the movant; and

- (6) When no genuine issue of fact exists, summary judgment is looked upon with favor and is particularly adaptable to expose sham claims and defenses.

Wilson v. Great Northern Railway Co., 157 N.W.2d 19, 21 (1968). Summary judgment is not the proper method to dispose of factual questions. *Bozied v. City of Brookings*, 2001 S.D. 150, ¶ 8, 638 N.W.2d 264, 268. Thus, actions involving state of mind, including cases about intent, are not usually suited for summary disposition. *Tolle v. Lev*, 2011 SD 65, ¶ 11. This is because at summary judgment, “[t]he trial court is not to decide the issues of fact, just determine if any such issues exist.” *Paint Brush Corp. v. Neu*, 1999 SD 120, 599 N.W.2d 384.

David was not required to establish and prove every element of his contract claim so long as he is able to offer specific and probative admissible evidence about a genuine issue. It is not appropriate for a trial court to weigh the credibility of his testimony at this point because there is a conflict on material facts: to do so would be to substitute the opportunity to offer live testimony and evidence at trial. The opportunity to have credibility on a factual dispute at trial cannot be undervalued: the ability to observe the demeanor, tone and tics of a live witness can often add critical context to the testimony excerpted from a deposition relied upon at the summary judgment stage. This is precisely why summary judgment is not to be used as a substitute for trial.

B. The Statute of Frauds and David’s Evidence of Short Time Expectations

South Dakota law at SDCL § 53-8-1 states: “All contracts may be oral except such as are specially required by statute to be in writing.” In contrast, SDCL § 53-8-2, more commonly understood as the Statute of Frauds, identifies the kinds of contracts that must be in writing under South Dakota law. That statute provides, in relevant part:

The following contracts are not enforceable by action unless the contract or some memorandum thereof is in writing and subscribed by the party to be charged or his agent, as authorized in writing:

(1) An agreement that by its terms is not to be performed within a year from the making thereof . . .

SDCL § 53-8-2.

It is not disputed that an oral contract existed between David and B&L through Robert's authorized representation. B&L and the Estate have conceded that there was an offer, acceptance and consideration: in fact, there is verification of the terms of David's version of the oral contract because both parties actually performed under the contract five months, both before and after Robert's death.

Yet because this is an oral contract, David had to provide evidence that supports his claim that his oral employment contract could have been performed within one year. The Trial Court accepted the moving parties' claim that David intended to work until his retirement or until Robert's youngest set of minor children reached ages where they could take over management of the store. If the parties agreed that these were the only two contingencies applied to David's term of employment, the summary judgment question would be closer here.

In *Harriman v. United Dominion Industries*, the South Dakota Supreme Court analyzed the statute of fraud's application to an oral employment contract that the parties both testified was intended to last for an unspecified term of years:

Because the contract was intended to be more than one year in duration, that is until [the employer] or [the employee] no longer liked the arrangement, or [the employee] elected to retire, it falls within the statute of frauds.

Harriman v. United Dominion Industries, 2005 SD 18, ¶ 20. The issue could not be decided on summary judgment in *Harriman* because of the existence of a dispute of material facts.

Interestingly, the plaintiff employee in *Harriman* was asserting himself that the contract was intended to be for lifetime or permanent employment; the defendant employer took the position that it was a lesser period of time. *Id.* Both parties, however, agreed that some term of years was intended, leaving this oral agreement within the bounds of the statute of frauds regardless of which party's testimony was believed. *Id.* A further distinction with this case is that the *Harriman* plaintiff voluntarily quit before a year was up. *Id.*

In both *Harriman* and *Troverse v. O'Meara*, where the South Dakota Supreme Court was analyzing the statute of frauds application to employment contracts, the contract claims arose after the employees involved in those cases had each voluntarily terminated their employment contracts before a year was up. *Troverse*, 493 N.W.2d 22; *Harriman*, 2005 SD 18. In *Troverse*, the employee had an employment term of a year and a month; in *Harriman*, the employee had either permanent employment or employment for period of years. The employers' testimony about intended employment beyond one year was not challenged in either case because even the employees agreed that the parties intended employment beyond one year. With the parties in agreement about that material fact, the statute of frauds applied in both cases.

In contrast, David disputes that a contract for years was intended. It is not disputed that at the time David and Robert negotiated his employment contract, they both knew that Robert's health was seriously declining and Robert was facing impending

death. They also both knew that Lynnette was going to be in charge of the businesses after Robert's death. This is not an immaterial fact in this case because Robert and David both recognized that there was a strained relationship between Lynnette and David: Robert and Lynnette had argued because Lynnette objected to David's employment, and she openly preferred a different management hire.

In fact, David testified that he and Robert negotiated the severance payment because they both knew that Lynnette might not continue to employ David after Robert's impending death. Indeed, neither party intended to have her do so. The fact that Robert's days were measured in months and that he actually died shortly after hiring David raise factual inferences to be drawn in support of David's claim that employment of less than a year was contemplated between these parties at the contract's making.

Lynnette does not really refute David's testimony that Robert discussed that David could be fired as soon as Lynnette took over running the businesses after his impending death. In fact, Lynnette clearly believed she had the right to terminate David's employment five months after he started work: it is undisputed that she did because of general dissatisfaction. B&L and the Estate can claim no better version of the facts than its own witnesses' testimony.

In its Statement of Material Facts, B&L and the Estate made the following representations about the undisputed material facts:

19. Plaintiff testified that his employment position with B&L Foods Stores, Inc., was to continue until i) Plaintiff's retirement or ii) Decedent Robert Knigge's children chose to take over the business operations of the Redfield Food Store. D. Knigge Dep. 19, 32.

20. Decedent Robert Knigge's natural children with Lynette Knigge were born in the years 1998, 1999, and 2000. L. Knigge Dep. 10.

R. 16: B&L and Estate's Statement of Material Facts # 19, # 20. B&L and the Estate do not explain how, then, Lynnette was authorized to terminate David's employment summarily for general satisfaction prior to either of these events.

The Trial Court adopted B&L and the Estate's version of the facts in this regard. The Trial Court relied upon the following excerpt from David's deposition to reach the following conclusion:

The terms of the agreement were basically that I now – I give up Oakes because we are going to scrap that, that was the initial agreement, and he wanted me to move down to Redfield and manage that store and get him into the new store and then just manage the store until his kids, if one of them wanted to take over. That was the terms. (DK at 19-20)

R. 255: Memorandum Opinion. p. 4. This analysis makes no reference to the testimony that David offered about the third (and more likely) factor that could terminate his employment: Lynnette's wishes. David specified that he had testified that there was a third contingency – Lynnette's termination of David at any time after Robert's death. R. 37: Plaintiff's Responsive Statement of Material Facts, #19. Robert's death was an imminent fact to everyone at that point: he had outlived his prognosis, exhausted his treatment options and deteriorating to the point that he needed David's help.

The Trial Court did not address David's testimony about a third, more concerning contingency that could affect the term of his employment, Lynnette's wish to replace him. R. 21: Plaintiff's Statement of Material Fact # 59, 60. In fact, a review of the testimony that the Trial Court found determinative to conclude that

there were only two contingencies for David's contract termination provides the following more complete explanation about how David and Robert reached an agreement about the severance payment:

Q. [Mr. Gillette] Can you tell me generally speaking what you and Robert actually discussed as to the terms of your employment versus what you believe your understanding was in your head with regard to the severance package?

A. [D. Knigge] The terms of the agreement were basically that I now – I give up Oakes because we are going to scrap that, that was the initial agreement, and he wanted me to move down to Redfield and manage that store and get him into the new store and then just manage the store until his kids, if one of them wanted to take over. That was the terms.

Q. Specifically narrow down to the severance promise. What specifically did he say when he made that promise?

A. Basically, he asked me – he asked the question, what if Lynnette would let you go. My response to that was, I want – if she let me go, basically I want \$100,000, if she's going to let me go for any reason, and he agreed to that. We had further discussions about salary and stuff, but basically we agreed to both of that; so that's why we even discussed the severance.

R. 49: D. Knigge Depo at 19-20; R. 21: Plaintiff's Statement of Material Fact #60

This was not the only testimony that David offered to support his position that his employment could be terminated by Lynnette at any time, a fairly likely outcome. David offered the following testimony about the reason for the severance payment and his reason for accepting employment that had a very uncertain future after his brother's death:

A. [D. Knigge]. . . and then [Robert] actually talked to me about Lynnette, and he said, what if Lynnette would not want you to continue on with the store in Redfield, and that's when I told him – that's when I said, then I'll need a severance. I said, I don't want to force myself on Lynnette and have her – require her to work with me.

I said, if she doesn't want me, I'm okay with that. But I want the severance of \$100,000 should she discharge me for any reason.

R. 49: D. Knigge Depo at 10; R. 21: Plaintiff's Statement of Material Fact #60.

A. [D. Knigge] The promise was pretty absolute, it was pretty simple. It was just, you know, for any reason if I'm fired from Lynnette, I want \$100,000, I don't want to force myself on Lynnette.

Q. [Mr. Gillette] If you exposed the store to legal liability and you got fired for that, would you still get paid the \$100,000?

A. If I exposed the store, you know, I would say yes, but would I expect it? I don't know if I would expect it.

Q. And you believe that Robert had that exact same understanding?

A. Yes.

R. 49: D. Knigge Depo at 22; R. 21: Plaintiff's Statement of Material Fact # 62.

In summary, evidence of Robert's knowledge that he was going to soon die from cancer and Lynnette's animosity toward David as an employee must be considered, along with David's testimony about the fact that both he and Robert anticipated that Lynnette could terminate David at any time. But for that concern, the severance payment would not have been a term of David's employment. Drawing the reasonable factual inferences in the light most favorable to the non-moving party, this evidence here requires an opportunity to present it to the fact finder.

There is a further factual determination about the duration of the contract beyond a year that should have been determined at by the fact finder at trial. The Trial Court also rejected David's testimony that his job could have terminated immediately even though it is not disputed that Robert has an adult son, Jason, *who*

had already been hired by Robert as the manager of the Redfield store. R. 21:
Plaintiff's Statement of Material Fact #6.

The Trial Court recognized David's assertion of this fact, but adopted the moving party's view of the facts when it concluded that Robert could have only meant his younger children's ability to take over the store. The Trial Court had to overlook undisputed evidence to draw this factual inference against David.

It is not disputed that Robert hired his own adult son as well as two of Lynnette's adult children to work as managers of his grocery stores. Both his son Jason and her son Keith had been hired to manage the Redfield store. Though Jason had voluntarily stepped down from the position in order to gain some time and experience under David's management, there is no evidence that either Jason or Robert ruled out Jason's ability to resume managing the Redfield store within the period of a year after David's hire. A reasonable inference is that even Lynnette's other adult children may have been able to oust David at any time after Robert's death. And because of the sad timing and Robert's quick demise, this places the contract performance within a period of a year.

Viewing all the facts in the light most favorable to David's position, the fact finder should make a determination on which parties' testimony is credible at a trial, David should have the opportunity to present actual testimony so that the Trial Court can make a fair assessment of the credibility of the witnesses' respective positions in this case.

II. Did the Trial Court err when it viewed the facts in the light most favorable to the moving party and concluded that David's losses were not substantial in the context of his promissory estoppel claim?

South Dakota also recognizes a promissory estoppel exception to the statute of frauds. *Durkee v. Van Well*, 2002 SD 150, ¶ 21, 654 N.W.2d 807, 814-15.

Specifically, the South Dakota Supreme Court has held that “[w]here the contract is one of employment and the employee has fully performed the contract on his part and there is nothing left for the other party to do but to pay the agreed compensation, the statute does not apply.” *Lampert Lumber Co. v. Pexa*, 184 NW 207, 44 SD 382, 384 (1921). The elements of promissory estoppel in this case first require a promise by Robert and then additionally:

- 1) a showing that the detriment David suffered is “substantial in an economic sense;”
- 2) that the loss to David was foreseeable to Robert; and
- 3) that David acted reasonably in justifiable reliance on the promise Robert made.

Durkee, 2002 SD 150, ¶ 23, 654 N.W.2d at 815 (citing *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 848 (S.D. 1990)).

In summary, David's reliance upon and performance under the contract may be a sufficient substitute evidence for a written agreement. There is undisputed evidence that Robert made David a promise of employment, and that David accepted that offer. David has testified that he suffered substantial economic loss in relying on Robert's promise: he scrapped an agreement where he was purchasing his own business in Oakes on terms that he had negotiated.

Yet the Trial Court determined that his loss was not substantial. Part of its reasoning is that it concluded that the Oakes store purchase contract was a losing

proposition. This conclusion is disputed by David's testimony that he quit his job and offered to pay \$200,000 for the Oakes store, after reviewing its books with Robert. As an experienced CPA, it seems unlikely that David would not have recognized a financial failure when he made this substantial offer.

David had only been at the Oakes store for two months and left not because he asked to renegotiate, but because a beloved brother asked for help. He then moved to Redfield and took on another store. The Trial Court's conclusion that David's salary and benefits in Redfield—where he was living in Robert's house with Lynnette instead of enjoying his own chosen career—is not a full consideration of the facts in the record. David gave up or "scrapped" his opportunity to buy the store he was investing his time into in order to instead help his brother.

The Trial Court's view of the facts in the light most favorable to the moving party to determine that David did have facts to support a claim that he suffered a substantial economic loss ignores the realities of David being unemployed for the first time in thirty years – without a plan, without a concrete plan for re-employment in a rural community and while he was living in a rural community that he had just moved to.

David also offered evidence that Robert knew that David's loss was foreseeable: David testified that compensation for his losses was the basis for the severance payment. Finally, David offered evidence that his actions were reasonable under the circumstances. His beloved brother had terminal brain cancer: Robert needed help and David knew it. Robert wanted David to try to save the Redfield store—his first store—so it would be preserved for his family after he was gone even though Robert knew that his spouse wanted him to hire someone else. In fact, nothing suggests that the business agreements

negotiated between two successful business people would be anything but fair and reasonable, as these two brothers had special affinity for each other.

CONCLUSION

Robert's prediction about one of three probable outcomes about David's employment after his death was not wrong: Lynnette's tolerance for employing David lasted only two months and was terminated for vague dissatisfaction with the assistance of her preferred managerial employees. Thus David's tenure at the store terminated without any particular cause within five months after the contract was initiated.

The reasonable factual inferences should have been considered in favor of David as the nonmoving party. Summary judgment is not intended to be a substitute for trial, and because there are disputes about the material facts, the credibility determination about which parties' version is correct should be determined at trial. Therefore, David respectfully requests that the Court reverse and remand this matter for a trial upon the merits.

Dated this 23rd day of June 2016.

JOHNSON POCHOP & BARTLING

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REQUEST FOR ORAL ARGUMENT

Appellant David Knigge respectfully requests the opportunity to present twenty (20) minutes of oral argument pursuant to SDCL § 15-26A-83.

Dated this 23rd day of June 2016.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the type volume limitation of SDCL § 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this brief, the body of the brief contains 6,688 words and 31,927 characters (not including spaces), exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Addendum Materials, and Certificate of Counsel.

Dated this 23rd day of June 2016.

JOHNSON POCHOP & BARTLING

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CERTIFICATE OF SERVICE

Stephanie E. Pochop, one of the attorneys for Appellant David Knigge, pursuant to SDCL Chapter 15-26C (Supreme Court Electronic Filing Rules), hereby certifies that on this 23rd day of June 2016, she caused the following documents:

- Appellant's Brief (PDF Format)
- Appellant's Appendix (PDF Format)

to be filed electronically with the Clerk of the South Dakota Supreme Court via email, and that the original and two hardcopies of these documents were mailed by U.S. Mail, postage prepaid, to:

Shirley Jameson-Fergel
Clerk, South Dakota Supreme Court
500 East Capitol
Pierre, SD 57501
SCClerkBriefs@ujs.state.sd.us

The undersigned further certifies that the above documents were also emailed to the following attorneys:

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Dated this 23rd day of June 2016.

JOHNSON POCHOP & BARTLING

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STATE OF SOUTH DAKOTA
FIFTH JUDICIAL CIRCUIT



PRESIDING JUDGE

Scott P. Myren

CIRCUIT JUDGES

Jon S. Flemmer

Tony L. Portra

Richard A. Sommers

MAGISTRATE JUDGE

Mark A. Anderson

TONY L. PORTRA

Circuit Judge

Michelle Gaikowski

Official Court Reporter

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February 16, 2016

FILED

FEB 16 2016

**SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
5TH CIRCUIT CLERK OF COURT**

By _____

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Kelsea K. Sutton

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Gregory, SD 57533

Paul J. Gillette

Kristen M. Kochejian

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Redfield, SD 57469

Re: Knigge v. B & L Food Stores, Inc. and Estate of Robert Knigge
Spink County File CIV 13-83

Dear Counsel:

I have now had time to consider Defendants' Motion For Summary Judgment. The following is my decision on that motion.

Plaintiff has brought this suit against Defendants alleging that he is owed compensation pursuant to an oral employment contract that he made with Robert Knigge. Complaint at 2. It is undisputed that the employment agreement was never reduced to writing. Deposition of David Knigge (hereinafter "DK"), pp. 31-32. Certain basic facts are also undisputed: that Plaintiff began working for B & L Food Stores, Inc. in Redfield on February 20, 2013, that Robert Knigge died on June 23, 2013, and that Plaintiff was terminated from his employment on August 16, 2013.

Plaintiff alleges that the terms of the contract included: a) an annual salary of \$70,200 plus performance bonuses; b) a reimbursement of one-half of Plaintiff's annual health insurance costs; c) free housing with Robert and Lynette Knigge until he could find a suitable home to purchase; d) a \$100,000 cash severance payment in the event he was terminated for any reason; and e) the opportunity to invest in a future grocery store business with Robert and/or B & L Food Stores, Inc. Complaint at 3.

EXHIBIT

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Defendants claim that they are entitled to summary judgment because Plaintiff's claim for the breach of the oral employment agreement is barred by SDCL 53-8-2, commonly known as the statute of frauds. That statute provides, in relevant part:

The following contracts are not enforceable by action unless the contract or some memorandum thereof is in writing and subscribed by the party to be charged or his agent, as authorized in writing:

- (1) An agreement that by its terms is not to be performed within a year from the making thereof[.]

Defendants argue that the duration of the agreement was tied to Plaintiff retiring or one of Robert and Lynette Knigge's children reaching the age of majority and taking over the business. Since neither thing would occur within one year, the contract could not be performed within one year and is therefore subject to the statute of frauds.

Plaintiff first claims that this oral agreement is outside of the statute of frauds as there was no definite term in the contract. Therefore, the so called death contingency would apply. However, I find this case to be similar to *Harriman v. United Dominion Industries*, 2005 SD 18, 693 N.W.2d 44. In that case:

Harriman argued that because it was possible for Harriman to have died prior to the end of the first year of the contract, it was possible for the contract to be completed within one year of its making. Therefore, the contract would not fall within the statute of frauds.

Id. at ¶ 18, 693 N.W.2d at 49. However, the Court did not find that argument persuasive. Rather, the Court found that:

...it is clear from the record that the parties did not intend a permanent or lifetime contract. Rather, the parties intended a contract of some unspecified term of years tied to contingencies other than Harriman's lifetime. Because the contract was intended to be more than one year in duration, that is until Feterl Manufacturing or Harriman no longer liked the arrangement, or Harriman elected to retire, it falls within the statute of frauds.

Id. at ¶ 20, 693 N.W.2d at 49.

Similarly, Plaintiff's testimony regarding the duration of the agreement in this matter was that he would remain employed until he was ready to retire in 10-15 years or until one of the children were ready to take over. The contract was intended for an unspecified term of years tied to contingencies other than Plaintiff's lifetime, 1) his retirement or 2) the children taking over. Therefore, the death contingency does not apply to take this contract outside of the statute of frauds.

Plaintiff also argues that it was possible for the contract to have been performed within one year because Robert has an adult child from another relationship that could have stepped in to take

over the store within a year. However, Plaintiff can claim no better version of the facts than his own testimony, and that claim is not supported by the evidence. Plaintiff testified that the deal was all negotiated in one sitting. DK at 20. Regarding this issue, he testified:

The terms of the agreement were basically that I now -- I give up Oakes because we are going to scrap that, that was the initial agreement, and he wanted me to move down to Redfield and manage that store and get him into the new store and then just manage the store until his kids, if one of them wanted to take over. That was the terms.

DK at 19-20.

He further testified, "You know, it was he wanted to get into the new location. It was a legacy for his kids, that I basically could work for about 10, 15 years and his kids would be about the age they could take over." DK at 12.

Clearly, by his own testimony, he and Robert were speaking of the minor children since they were agreeing that Plaintiff would manage the store until the kids were old enough to take over. Given the ages of the minor children, it would be impossible for him to perform the agreement, as he described it, within one year. Therefore, the oral agreement is unenforceable under the statute of frauds.

Plaintiff also argues that even if the statute of frauds applies, Defendants are still not entitled to summary judgment because of the doctrine of promissory estoppel. The South Dakota Supreme Court explained promissory estoppel in relation to the statute of frauds in *Durkee v. Van Well*:

To apply the doctrine of promissory estoppel, the trial court must find: 1) the detriment suffered in reliance must be substantial in an economic sense; 2) the loss to the promisee must have been foreseeable by the promisor; and 3) the promisee must have acted reasonably in justifiable reliance on the promise made.

2002 SD 150, ¶ 23, 654 N.W.2d 807, 815.

Regarding the first element of substantial detriment, Plaintiff asserts that: 1) he left a good job (working for the State in Pierre) and additional benefits at that job by leaving early; 2) he sold his house in Pierre for under market value; 3) he moved to Redfield and lived with his brother to manage a store in a chaotic time; and 4) he scrapped an agreement where he was purchasing his own business in Oakes on terms that he had negotiated. Plaintiff's Brief at 18. However, Plaintiff's testimony does not support those assertions.

Concerning items one and two, those things happened as a result of his decision to move to Oakes to manage the store there, not due to the oral agreement whereby he moved to Redfield. DK at 13-14. As to item four, that is supported by his testimony. However, it does not appear that giving up the opportunity was a substantial financial detriment. His agreement with Robert was to purchase the store in Oakes for \$200,000. DK at 6. Although part of the decision to

abandon the agreement as to the Oakes Store was the fact that Robert's cancer came back, it was also based upon the condition of the Oakes store. DK at 9-10. Plaintiff testified on this point:

He said the cancer had come back and it made more sense for me to be in Redfield, and we took a look at the Oakes store and we decided that it was run down, the equipment was bad, you know, 40 percent of the inventory was outdated, the parking lot needed to be replaced and it would just take too much in resources to have to continue on with the Oakes store.

DK at 9-10. The loss of the opportunity to buy the Oakes store for \$200,000 does not appear to be a substantial economic loss given the number of problems that Plaintiff identified with that store. According to Plaintiff's own testimony, the Oakes store was abandoned because he and Robert determined there were enough problems with the store to make running it not feasible.

Item number three is also a true statement as Plaintiff did move to Redfield to manage that store. However, it again does not appear that it created a substantial economic loss for him. While working in Redfield, he was paid at the rate of a \$70,200 annual salary. DK at 12. By comparison, he was making a salary of \$68,000 while he was working for the State. DK at 8. While he also received benefits while working for the State, he received free housing while in Redfield because he lived with Robert and Lynette. Deposition of Lynette Knigge, p. 78.

Considering all of those facts, I do not find that Plaintiff suffered a substantial economic detriment in reliance on the promise. Therefore, he cannot meet the first element of promissory estoppel, and the doctrine does not apply to these facts.

In conclusion, I find that the oral agreement at issue herein was not capable of being performed within one year, therefore the agreement is unenforceable pursuant to SDCL 53-8-2. Further, I do not find that the doctrine of promissory estoppel applies because Plaintiff is not able to show a substantial economic detriment in reliance on the promise. Therefore, Defendants' Motion For Summary Judgment is granted.

Sincerely,



TONY L. PORTRA
Circuit Judge

✓Cc: File

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF SPINK)

IN CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT

DAVID KNIGGE,

Plaintiff,

vs.

B & L FOOD STORES, INC. and
ESTATE OF ROBERT ALLEN
KNIGGE,

Defendants.

Civ. No. 13-083

ORDER FOR
SUMMARY JUDGMENT

This matter came before the undersigned on Defendants' Motion for Summary Judgment.

Based upon all of the files, records and proceedings herein, the Court granted Defendant's Motion for Summary Judgment on all Counts and provided the basis for such ruling in the memorandum dated February 16, 2016, attached hereto and incorporated by reference.

IT IS HEREBY ORDERED:

Defendants' Motion for summary judgment is **GRANTED** in its entirety.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Attest:
Elisha Kuhfeld/tcp
Clerk/Deputy



(SEAL)

CLERK

BY THE COURT:

Signed: 3/2/2016 4:16:35 PM


JUDGE

Filed on: 03-02-2016 Spink

County, South Dakota 71CIV13-000083

EXHIBIT

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STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF SPINK)

IN CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT

DAVID KNIGGE,

Plaintiff,

vs.

B & L FOOD STORES, INC. and
ESTATE OF ROBERT ALLEN
KNIGGE,

Defendants.

Civ. No. 13-083

SUPPLEMENTAL STATEMENT OF
MATERIAL FACTS IN SUPPORT OF
BRIEF FOR SUMMARY JUDGMENT

1. Decedent, Robert Knigge, was the brother of Plaintiff, David Knigge. Complaint ¶6.
2. Prior to February 2013, K&J Foods, Inc., operated a grocery business in Oakes, North Dakota. Complaint ¶ 15; L. Knigge Dep. 42-43.
3. At all times relevant to the Complaint, Decedent, Robert Knigge, was an agent of K&J Foods, Inc. Complaint ¶ 12; L. Knigge Dep. 42.
4. At all times relevant to the Complaint, B&L Food Stores, Inc., operated a grocery business in Redfield, South Dakota. Complaint ¶3.
5. At all times relevant to the Complaint, Decedent, Robert Knigge, was an agent of B&L Food Stores, Inc. Complaint ¶5.
6. In October 2012, Decedent, Robert Knigge, and Plaintiff David Knigge entered into an employment agreement to hire Plaintiff as the manager of K&J Foods, Inc, grocery store in Oakes, North Dakota. D. Knigge Dep. 4-5, 7-8, 12.
7. Based upon the employment agreement with K&J Foods, Inc., Plaintiff resigned from employment as an accountant in Pierre, South Dakota. D. Knigge Dep. 10, 13-14.
8. Based upon the employment agreement with K&J Foods, Inc., Plaintiff listed his home in Pierre, South Dakota for sale in November 2012. D. Knigge Dep. 13.
9. Based upon the employment agreement with K&J Foods, Inc., Plaintiff sold his home in Pierre, South Dakota. D. Knigge Dep. 10, 13-14.
10. Based upon the employment agreement with K&J Foods, Inc., Plaintiff relocated to Oakes, North Dakota. D. Knigge Dep. 13-14.
11. The terms of the K&J Foods, Inc., employment agreement were never fully developed or reduced to writing. D. Knigge Dep. 6-7, 13-14, 31-32.

EXHIBIT


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12. At the time Plaintiff accepted employment with K&J Foods, Inc., Plaintiff envisioned he would work for the company for 10 years. D. Knigge Dep. 9.
13. Plaintiff served as manager for the K&J Foods, Inc., Oakes, North Dakota Store from December, 2012 to February, 2013. Complaint ¶14.
14. In or around January, 2013, Robert Knigge decided to close the K&J Foods, Inc., Oakes, North Dakota Store. D. Knigge Dep. 9; Complaint ¶15.
15. Between January and February, 2013, Decedent, Robert Knigge, made an employment offer to Plaintiff to serve as manager of the B&L Food Stores, Inc., grocery store located in Redfield, South Dakota. Complaint ¶15.
16. In February 2013, Plaintiff's employment with K&J Foods, Inc., ended. Complaint ¶14.
17. On February 20, 2013, Decedent, Robert Knigge, employed Plaintiff to serve as manager of the B&L Food Stores, Inc., grocery store located in Redfield, South Dakota. Complaint ¶7.
18. No part of the B&L Foods Stores, Inc., employment agreement was ever put in writing. D. Knigge Dep. 31-32.
19. Plaintiff testified that his employment position with B&L Foods Stores, Inc., was to continue until i) Plaintiff's retirement or ii) Decedent Robert Knigge's children chose to take over the business operations of the Redfield Food Store. D. Knigge Dep. 19, 32.
20. Decedent Robert Knigge's natural children with Lynette Knigge were born in the years 1998, 1999, and 2000. L. Knigge Dep. 10.
21. Plaintiff did not inform Lynette Knigge, wife of the Decedent, of the alleged severance package provision until the August 2013 meeting whereupon Plaintiff was advised that he was to be terminated. D. Knigge Dep. 22-23.
22. In August 2013, Plaintiff's employment with B&L Foods Stores, Inc. was terminated. Complaint ¶26.

Dated this 22nd day of January, 2016.

GILLETTE LAW OFFICE, PC


Paul J. Gillette
Attorneys for Defendants
701 Main Street
P.O. Box 60
Redfield, South Dakota 57469
605-472-1210

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January, 2016, I served by Odyssey, a true and correct copy of Supplemental Statement of Material Facts in Support of Brief for Summary Judgment to the following:

Stephanie E. Pochop
Johnson Pochop Law Office
Attorneys at Law
PO Box 149
Gregory, SD 57533



Paul J. Gillette

1 Q Okay. Did you participate in the management of Redfield,
2 Inc. - or Redfield Food Center during Bob's life?

3 A No.

4 Q And was Bob the person that was overseeing the managers of
5 your store until his death?

6 A Yes.

7 Q And then there's also K&J, Inc.?

8 A Yes.

9 Q And that's the corporation that was created to own and
10 manage the Oakes store --

11 A Oakes store.

12 Q Oakes, North Dakota?

13 A Right.

14 Q And that is at - I understand that started in, like, 2005?

15 A I believe that's when it was.

16 Q Okay, how did you guys - how did you get into the grocery
17 business up in Oakes, North Dakota, in 2005?

18 A There was a grocery store for sale and Robert wanted another
19 store, so we bought it. And my son had been working here
20 managing here part-time, and so Robert moved him up there to
21 run that store.

22 Q Okay. When Keith was here managing the store part-time in
23 Redfield before he moved up to Oakes, did he have a salary?

24 A I don't know.

25 Q Did he have a written contract?

1 A For when he was here?

2 Q When he was the manager here.

3 A No.

4 Q So then when he went up to Oakes, do you know what the terms
5 of his employment were in Oakes? And we're talking about
6 Keith, right?

7 A I know he was salary.

8 Q Okay.

9 A And then there was a contract that, if we ever sold the
10 store, then Keith would get a certain percentage of the
11 store.

12 Q He had a severance agreement upon the sale of the store.

13 A Yes.

14 Q And did he claim that he was - when the sole - the store did
15 close up in Oakes?

16 Right.

17 Q And that closed in January of '13 or December of '12; do you
18 know?

19 No. It was still open - I believe in February it was still
20 open.

21 And what happened with Keith's contract about what would
22 happen if the store closed? Was he to be paid \$75,000?

23 Yes.

24 And he get paid --

through a corporation that Robert formed called K&J Foods Inc. (which stood for Knigge and Jatón, an unrelated third party in this case). (L. Knigge Depo at 29, 57) Robert was authorized and generally made the business decisions about the Oakes store without Lynnette's input. (L. Knigge Depo at 88)

After Robert's cancer diagnosis in 2011, Robert actively tried to incorporate his adult step-children Keith and Kalie into the family grocery businesses. (L. Knigge Depo at 44) In 2012, Robert offered Lynnette's adult daughter Kalie the opportunity to manage and buy the Oakes store. (L. Knigge Depo at 45) Kalie accepted the position, moved to Oakes and took over management of the store there, though Lynnette does not know the specific terms of Kalie's agreement with Robert. (L. Knigge Depo at 46) By the end of the year in 2012, Kalie had decided that she did not want to buy the Oakes store and she left that business. (L. Knigge Depo at 47, 48, 52, 75) At approximately the same time, Robert also offered his adult step-son Keith a job in Redfield at the B&L Inc.'s Redfield store, which included an agreement that Keith would have a share of \$60,000 from the proceeds from a sale of the Oakes store. (L. Knigge Depo at 44, 49) Finally, after Kalie announced she was leaving the Oakes store, Robert offered his brother David Knigge the opportunity to manage and purchase the Oakes store over time. (D. Knigge Depo at 6-9) In approximately November 2011, David accepted his offer, resigned from his job and began traveling to Oakes on weekends to manage the Oakes store and begin working toward ownership of the Oakes store through labor. (D. Knigge Depo at 10, 81-82)

3. At all times relevant to the Complaint, Decedent, Robert Knigge, was an agent of K&J Foods Inc. Complaint 12; L. Knigge Dep. 42.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 3 but disputes that it is materially complete. At all times relevant to the Complaint, Decedent Robert Knigge was an agent of K&J Foods, Inc. (L. Bruns Depo at 7; L. Knigge Depo at 39) He was

authorized to hire, negotiate salaries and benefits and to terminate managers at the stores without Lynnette's involvement. (L. Knigge Depo at 39)

4. At all times relevant to the Complaint, B&L Food Stores, Inc., operated a grocery business in Redfield, South Dakota. Complaint ¶ 3.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 4. At all times relevant to the Complaint, B&L Food Stores Inc. operated a grocery business in Redfield, South Dakota. (L. Knigge Depo at 29, 57) Robert and Lynnette were the only shareholders of this business. (L. Knigge Depo at 97)

5. At all times relevant to the Complaint, Decedent, Robert Knigge, was an agent of B&L Food Stores, Inc. Complaint ¶ 5.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 5. At all times relevant to the Complaint, Decedent, Robert Knigge, was an agent of B&L Food Stores Inc. Robert was authorized to hire, negotiate salaries and benefits and to terminate managers at the stores without Lynnette's involvement. (L. Knigge Depo at 39)

6. In October 2012, Decedent, Robert Knigge, and Plaintiff David Knigge entered into an employment agreement to hire Plaintiff as the manager of K&J Foods, Inc. grocery store in Oakes, North Dakota. D. Knigge Dep. 4-5, 7-8, 12.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 6. At the end of the year in October of November of 2012, Robert Knigge and David Knigge entered into an employment agreement whereby David was hired as the manager of K&J Foods Inc. grocery store in Oakes, North Dakota, with the opportunity to purchase the store from K&J, Inc. for \$200,000 to be paid off over ten (10) years. (D. Knigge Depo at 4, 6, 8, 9)

7. Based upon the employment wit K&J Foods, Inc., Plaintiff resigned from employment as an accountant in Pierre, South Dakota. D. Knigge Dep. 10, 13-14.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 7 but disputes that it is materially complete. Based upon the employment offer with K&J Foods Inc.

that included the ability to purchase the Oakes store, David gave notice and resigned from his job with the state of South Dakota, effective in January 2013. (D. Knigge Depo at 10) David started work in December. He was not paid a set salary for working at the Oakes store and was using up his leave from his state employment until the store started to have a better cash flow. (D. Knigge Depo at 7-9) Had he continued to work for the state for another six months, he would have gotten an additional compensation for half of his sick pay. (D. Knigge Depo at 35)

8. Based upon the employment agreement with K&J Foods Inc., Plaintiff listed his home in Pierre, South Dakota for sale in November 2012. D. Knigge Dep. 13.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 8. Plaintiff listed his home in Pierre, South Dakota, for sale in November 2012 with the idea that he would be moving to Oakes and buying the Oakes store from K&J Inc. (D. Knigge Depo at 13).

9. Based upon the employment agreement with K&I Foods Inc., Plaintiff sold his home in Pierre, South Dakota. D. Knigge Dep. 10, 13-14.

Plaintiff disputes the statement of fact in Defendants' numbered paragraph 9 is material. While Plaintiff originally listed his home in Pierre for sale in November 2012, his employment plans changed in January of 2013 because of Robert's terminal cancer. (D. Knigge Depo at 7, 9, 10, 13)

10. Based upon the employment agreement with K&J Foods Inc., Plaintiff relocated to Oakes, North Dakota. D. Knigge Dep. 13-14.

Plaintiff disputes the statement of fact in Defendants' numbered paragraph 10, and disputes that it is material. When he was working in the Oakes store in 2012, David lived in a motel in Oakes, and the motel and all his expenses were paid for by the store. (L. Knigge Depo at 81-82; D. Knigge Depo at 7)

11. The terms of the K&J Foods, Inc., employment agreement were never fully developed or reduced to writing. D. Knigge Dep. 6-7, 13-14, 31-32.

Plaintiff disputes the statement of fact in Defendants' numbered paragraph 11. The terms of the K&J Foods Inc. employment agreement were not reduced to writing but were fully developed, and David acted in reliance upon them by giving notice to his prior employer and going to work in Oakes. (D. Knigge Depo at 7-9)

12. At the time Plaintiff accepted employment with K&J Foods, Inc., Plaintiff envisioned he would work for the company for 10 years. D. Knigge Dep. 9.

Plaintiff disputes the statement of fact in Defendants' numbered paragraph 12. At the time Plaintiff accepted employment with K&J Foods Inc., Plaintiff envisioned he would have bought and owned the Oakes store within ten (10) years. (D. Knigge Depo at 9) Their agreement materially changed in January of 2013 when Robert accepted that he was terminally ill. (D. Knigge Depo at 7, 9, 10-11, 14)

13. Plaintiff served as manager for the K&J Foods Inc. Oakes, North Dakota Store from December, 2012 to February, 2013. Complaint ¶ 14.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 13, but disputes that it is materially complete. In March 2013, David Knigge closed the Oakes store and moved to Redfield, where he lived with Robert and Lynnette, and managed the Redfield store pursuant to his agreement with Robert. (L. Knigge Depo at 53; D. Knigge Depo at 12-13, 16)

14. In or around January, 2013, Robert Knigge decided to close the K&J Foods, Inc., Oakes North Dakota Store. D. Knigge Dep. 9; Complaint ¶15.

Plaintiff disputes that the statement of fact in Defendants' numbered paragraph 14. After Robert accepted that his cancer was terminal, he asked David to close the Oakes store and move to Redfield to manage the Redfield store. (D. Knigge Depo at 7, 9, 10-11, 12) Specifically, the terms of Robert and David Knigge's agreement were that David would scrap his plans for the

Oakes store, it would not be sold, and that David would move to Redfield and become the manager of the Redfield store until Robert's children could take over or until Lynnette terminated David. (D. Knigge Depo at 9, 10, 19, 20, 22)

15. Between January and February, 2013, Decedent, Robert Knigge, made an employment offer to Plaintiff to serve as manager of the B&L Food Stores, Inc., grocery store located in Redfield, South Dakota. Complaint ¶ 15.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 15. After Robert accepted that his cancer was terminal, he asked David to close the Oakes store and move to Redfield to manage the Redfield store. (D. Knigge Depo at 7, 9, 10-11, 12) Specifically, the terms of Robert and David Knigge's employment agreement were if David would give up his plans and close the Oakes store, David would move to Redfield and that would manage the Redfield store for a set salary, benefits and severance payment until Robert's children could do it or until Lynnette terminated David. (D. Knigge Depo at 19-20, 22) Robert knew he was dying at the time; he also knew that Lynnette and David did not get along well, and that Lynnette had argued with him about hiring David. (L. Knigge Depo at 76, 77, 89 ; D. Knigge Depo at 10-11, 14, 19) Robert knew what David had given up in terms of work and opportunity to help him in Redfield. (D. Knigge Depo at 12, 18, 20) Robert and David agreed that they did not want Lynnette to have to continue employing David after Robert's impending death and that she might terminate David. (D. Knigge Depo at 10, 12, 19, 22) They agreed to an annual salary and an annual benefits package, but they also agreed to a severance payment of \$100,000 if David was terminated for any reason because they recognized that Lynnette should not have to employ him for any period and because Robert knew what David had given up to accept the position. (D. Knigge Depo at 12-13, 18, 19, 20, 22)

16. In February 2013, Plaintiff's employment with K&J Foods, Inc., ended. Complaint ¶ 14.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 16, but adds that it is materially incomplete. David accepted Robert's offer of employment at the Redfield store for a salary, benefits and \$100,000 severance agreement in January of 2013. (D. Knigge Depo at 12-13, 18, 19, 20, 22) As a result, David agreed to give up his plans to purchase the Oakes store. (D. Knigge Depo at 19) By March 2013, David Knigge had closed the Oakes store and moved to Redfield, where he lived with Robert and Lynnette, in order to perform his employment agreement with Robert at the Redfield store pursuant to his agreement with Robert. (L. Knigge Depo at 53; D. Knigge Depo at 16)

17. On February 20, 2013, Decedent, Robert Knigge, employed Plaintiff to serve as manager of the B&L Food Stores, Inc., grocery store located in Redfield, South Dakota. Complaint ¶ 1.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 17, but disputes that it is materially complete. By March 2013, David Knigge had closed the Oakes store and moved to Redfield, where he lived with Robert and Lynnette, in order to manage the Redfield store under the salary, benefits and severance agreement he had negotiated with Robert. (L. Knigge Depo at 53; D. Knigge Depo at 16, 18, 19, 20, 22)

18. No part of the B&L Foods Stores, Inc., employment agreement was ever put in writing. D. Knigge Dep. 31-32.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 18. No part of the B&L Foods Stores Inc. employment agreement was put in writing. (D. Knigge Depo at 31-32)

19. Plaintiff testified that his employment position with B&L Foods Stores, Inc., was to continue until i) Plaintiff's retirement or ii) Decedent Robert Knigge's children chose to take over the business operations of the Redfield Food Store. D. Knigge Dep. 19, 32.

Plaintiff disputes that the statement of fact in Defendants' numbered paragraph 19. The terms of Robert and David Knigge's agreement were that David would give up the plans to buy the Oakes store, would close the Oakes store, would move to Redfield and would manage the Redfield store for a set salary, benefits and a severance payment "until his kids, if one of them wanted to take over" or until Lynnette terminated David. (D. Knigge Depo at 10, 11-12, 20, 22). They did not want Lynnette to have to continue employing David after Robert's impending death. (D. Knigge Depo at 10, 12, 22) Robert knew he was dying at the time; he also knew that Lynnette and David did not get along well and that Lynnette had argued with him about hiring David because she wanted him to hire the Bruns'. (L. Knigge Depo at 76, 77, 89; D. Knigge Depo at 10-11, 14, 19) Further, Robert knew what David had given up in terms of work and opportunity to help him in Redfield. (D. Knigge Depo at 12, 18, 20)

20. Decedent Robert Knigge's natural children with Lynette Knigge were born in the years 1998, 1999, and 2000. L. Knigge Dep. 10.

Plaintiff disputes that statement of fact in Defendants' numbered paragraph 20 is materially complete. Decedent Robert Knigge's natural children with Lynette Knigge were born in the years 1998, 1999 and 2000. (L. Knigge Depo at 10) However, Robert also had his own adult son Jason who worked in the Redfield grocery store even before David Knigge was hired there. (L. Knigge Depo at 51-53) After Robert's diagnosis, Robert also actively offered his adult step-children jobs in the family grocery businesses, including hiring his step-son Keith to manage the store before he hired his son Jason or David Knigge. (L. Knigge Depo at 44, 45, 49, 50, 51, 52) When Keith left in 2012, Robert hired his adult son Jason to manage the store. (L.

Knigge Depo at 51) Jason had already been working at the Redfield store so this amounted to him being promoted to manager. (L. Knigge Depo at 53) Lynnette does not know what Jason's employment terms were. (L. Knigge Depo at 52) Robert's son Jason continued to work at the Redfield store, but stepped down from the manager position at Robert's request when David came to Redfield to manage the store. (L. Knigge Depo at 54) Jason was not ready to run the store and just needed to learn to be a manager. (D. Bruns Depo at 13) Jason stepped down from the management position when David was hired because the new store was so much bigger, and Jason felt more comfortable having someone who knew what they were doing to make it work. (L. Knigge Depo at 67) There is no evidence that Jason was angry about the demotion. (L. Knigge Depo at 67)

21. Plaintiff did not inform Lynette Knigge, wife of the Decedent, of the alleged severance payment provision until the August 2013 meeting whereupon Plaintiff was advised that he was to be terminated. D. Knigge Dep. 22-23.

Plaintiff disputes that the statement of fact in Defendants' numbered paragraph 21 is a complete statement of the material facts. Lynnette knew that Robert had negotiated some employment agreement with David because she overheard Robert talking about it, and then David moved to Redfield and lived with him while he managed the Redfield store. (L. Knigge Depo at 53, 69) Two months after Robert's death in June of 2013, as Lynnette was preparing to terminate David Knigge, David Bruns told her that David Knigge said he had a severance agreement. (L. Knigge Depo at 101, 102) David Bruns had earlier recommended to David Knigge that he should negotiate a severance agreement with Robert and Lynnette. (D. Bruns Depo at 25)

22. In August 2013, Plaintiff's employment with B&L Foods Stores, Inc. was terminated. Complaint ¶ 1.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 22, but disputes that it is a complete statement of the material facts. Lynnette continued to employ David for two months after Robert died in June of 2013. (L. Knigge Depo at 87) Lynnette began searching for a replacement for David without discussing it with him. (L. Knigge Depo at 98) Lynnette knew about a week before the termination that David claimed he had severance agreement. (L. Knigge Depo at 101, 102) However, Lynnette did not ask if there was a contract with David when she terminated him. (L. Knigge Depo at 100) She did not ask her lawyer for advice before the termination. (L. Knigge Depo at 104, 105)

In August 2013, Lynnette told David that she was terminating his employment. (D. Knigge Depo at 23) David was told it wasn't working and Lynnette was going to replace him. (L. Bruns Depo at 11) At the termination meeting, David Knigge said there would be no hard feelings, but he brought up the \$100,000 severance payment. (L. Bruns Depo at 11) David said that Robert had told him if anything happened he would get a \$100,000. (L. Bruns Depo at 13; L. Knigge Depo at 103) Lynnette said that she had to talk to her attorney, and that she thought it was a lot of money. (L. Knigge Depo at 104) After the termination, Lynnette and David had another meeting in August of 2013 to try to settle the severance payment. Lynnette told David that she thought he didn't deserve a severance payment. (L. Knigge Depo at 108) David told her he was only asking for the \$100,000 severance payment even though he calculated his actual losses in the range of \$315,000. (L. Knigge Depo at 109) At that meeting, David gave Lynnette a sheet that calculated his view of his losses at \$310,000. (D. Knigge Depo at 34) Lynnette has never intended to pay David any severance payment. (L. Knigge Depo at 109) After she fired

David, Lynnette hired a person from Nebraska as David's replacement for less compensation for the period of one year. (L. Knigge Depo at 99, 100, 107)

Dated this 26th day of January 2016.

JOHNSON POCHOP & BARTLING

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 26th day of January 2016, she served a true and correct copy of the foregoing **Plaintiff's Responsive Statement of Material Facts** by Odyssey e-filing upon the following:

Paul J. Gillette
Gillette Law Office, PC
701 Main St. | PO Box 60
Redfield, SD 57469

/s/Stephanie E. Pochop
Stephanie E. Pochop

IN CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT

Civ. No. 13-83

**PLAINTIFF'S STATEMENT OF
MATERIAL FACTS IN
OPPOSITION TO
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT**

B & L FOOD STORES, INC., and
ESTATE OF ROBERT ALLEN KNIGGE,
Defendants.

PLAINTIFF'S STATEMENT OF THE MATERIAL FACTS

1. Plaintiff David Knigge (“David”) has worked as a CPA for more than 30 years. (D. Knigge Depo at 3, 4) He served as the Assistant Director of Finance for the State of South Dakota’s Department of Transportation, where he supervised fourteen (14) employees and had extensive experience in establishing policy and procedure for accounting processing in that department. (D. Knigge Depo at 3) He is currently employed by the State of South Dakota in its Bureau of Finance and Management. (D. Knigge Depo at 3)

2. Robert Knigge was David's brother. Robert died in June of 2013. (L. Knigge Depo at 11, 42-43)

3. Robert enjoyed a close relationship with David, especially after Robert was ill following his brain cancer diagnosis in October of 2011. (L. Knigge Depo at 11, 12, 73)

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EXHIBIT

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4. At the time of his death, Robert was married to Lynnette Knigge. They married in 1996 and had children during their marriage; all four of those children were minors at the time of Robert's death. (L. Knigge Depo at 10)

5. Lynnette has three adult children, Jason, Kalie and Keith, from a previous marriage, and Robert included his step-children in the management of the family grocery businesses before his death. (L. Knigge Depo at 9, 44, 45, 47-48, 49-50)

6. Robert has an adult son Jason whom he employed as the manager of the Redfield store in 2013, immediately before he hired David Knigge as the manager of that store. (L. Knigge Depo at 51)

7. Robert and Lynnette owned and operated grocery stores as their business. At the height of their business, they formed three corporations that operated three different grocery stores. (L. Knigge Depo at 29, 55, 57, 97)

8. Specifically, in 1996, they started in the grocery business in Redfield where they lived. (L. Knigge Depo at 29) The Redfield Food Center store was owned and operated through a corporation that they established known as B&L Inc., which stands for Bob and Lynnette. (L. Knigge Depo at 29, 57) Robert and Lynnette are the only two shareholders of this business. (L. Knigge Depo at 97) This is the store involved in the present case.

9. In approximately 2005, they bought a grocery store in Oakes, North Dakota. (L. Knigge Depo at 29) This store was operated through a corporation that Robert set up called K&J Inc. (standing for Knigge and Jason, an unrelated third party in this case). (L. Knigge Depo at 57) Robert was going to sell the Oakes store to David but asked David to close it and come work in the B&L Inc. Redfield store instead. (L. Knigge Depo at 88)

10. In approximately 2008 or 2009, Robert and Lynnete bought a grocery store in Linton, North Dakota. (L. Knigge Depo at 55) This was owned and operated by a corporation that Robert established called K&B, Inc., which stands for Knigge and Bruns. (L. Knigge Depo at 55)

11. Robert and Lynnette met David and Lisa Bruns, a married couple who were working in another grocery store, on a trip. Robert then formed a corporation and hired the Bruns' to move to Linton to operate the store via an oral contract. (L. Bruns Depo at 4; D. Bruns Depo at 5, 7) The oral agreement with the Bruns' was that they would work at the Linton store for five years, and their labor would be considered as their investment into twenty-five percent (25%) ownership of the K&B Inc. corporation. (L. Bruns Depo at 4) They also received a vehicle and insurance on that vehicle. (D. Bruns Depo at 32)

12. In 2009, B&L Inc. purchased a competitor's store in Redfield, and began to merge their existing grocery store into the competitor's building, under the name Redfield Food Center. (L. Knigge Depo at 60) Robert was still completing the merger into the new store building in 2012 and 2013. (L. Knigge Depo at 60)

Robert's way of doing business.

13. Lynnette described that Robert was an "in charge" type of guy who focused on money and was a rather hard negotiator, to the point Lynette described that he could be controlling. (L. Knigge Depo at 13, 117; D. Knigge Depo at 27; *see also* D. Bruns Depo at 6 (Robert was a "forceful" person))

14. While Robert and Lynnette were both shareholders in all of their corporate entities, Lynnette had little involvement with their businesses. She worked for B&L Inc. at the Redfield store as a bookkeeper for a brief period until approximately 2000, when she became a full-time

homemaker for their young family. (L. Knigge Depo 35; D. Knigge Depo at 15, 16) After that, she generally consulted about store decorating and issues between employees who didn't get along. (L. Knigge Depo at 36)

15. Lynnette did not know the details of Robert's business dealings for the stores. For example, Lynnette did not know who the officers of B&L Inc. were. (L. Knigge Depo at 29)

16. Robert was authorized to make decisions for B&L Inc. (and his other corporate entities) without Lynnette's approval or involvement. (L. Bruns Depo at 7; L. Knigge Depo at 42) He was authorized to hire, negotiate salaries and benefits and to terminate managers at the store without Lynnette's involvement. (L. Knigge Depo at 39, 79, 80)

17. For example, without Lynnette's approval in December 2012, Robert took out a \$400,000 loan for B&L Inc., and he bought a \$60,000 boat and several cars without considering Lynnette's input. (L. Knigge Depo at 18-19, 86, 90, 91, 121)

Time becomes "of the essence" in a real way for Robert because of a devastating diagnosis.

18. In October of 2011, Robert was diagnosed with Stage 4 glioblastoma, a form of brain cancer. (L. Knigge Depo at 12)

19. When he was diagnosed, Robert was told he had a prognosis of eighteen (18) months to live. (L. Knigge Depo at 15, 25)

20. From the beginning, Robert's doctors talked to him about his terminal condition and recommended that he should do the things that were important to him. (L. Knigge Depo at 25, 118)

21. Robert did chemo, radiation and had three surgeries after his diagnosis to try to extend his life. (L. Knigge Depo at 12, 23; D. Knigge at 5, 6)

22. After his surgery in January of 2013, Robert's doctors told him that there was nothing else they could do and he resigned himself to dying. (L. Knigge Depo at 22, 23, 85; D. Knigge Depo at 7, 9, 11, 12)

23. Robert died from his disease in June of 2013. (D. Knigge Depo at 30; L. Knigge Depo at 30)

Managing the stores becomes an issue for Robert because of his disease.

24. Robert was the Redfield store manager until he got sick in 2011. (L. Knigge Depo at 62)

25. After Robert's diagnosis, he actively tried to incorporate his adult step-children Keith, Kalie, and his adult biological son, Jason, into the family grocery businesses. (L. Knigge Depo at 44)

26. In 2012, Robert had Lynnette's daughter Kalie move to Oakes to manage the Oakes store. (L. Knigge Depo at 45) Kalie was supposed to have an opportunity to buy the store; however, Lynnette does not know the terms of Kalie's agreement with Robert. (L. Knigge Depo at 46)

27. At approximately the same time, Robert asked Lynnette's adult son Keith to move to Redfield to run the Redfield store. (L. Knigge Depo at 44) Keith agreed and became the manager of the Redfield store, but Lynnette did not know what Robert had agreed to pay her son as salary or benefits. (L. Knigge Depo at 49) She did know that Robert had a written agreement to pay Keith \$60,000 upon the sale of the Oakes store. (L. Knigge Depo at 44)

28. Keith was doing Robert a favor by coming to Redfield to manage the Redfield store. (L. Knigge Depo at 51)

29. Keith and Robert got into a disagreement, and Keith left the Redfield store in August of 2012. (L. Knigge Depo at 50, 52) Robert was not capable of managing the store at that point. (L. Knigge Depo at 50)

30. When Keith left in August of 2012, Robert hired his adult son Jason to manage the store. (L. Knigge Depo at 51) Jason was already working at the Redfield store, so this amounted to him being promoted to manager. (L. Knigge Depo at 53) Lynnette does not know what Jason's employment terms were. (L. Knigge Depo at 52)

31. Kalie decided that she did not want to buy the Oakes store and left that location in 2012. (L. Knigge Depo at 47, 48, 52, 75)

32. Some of their contracts with their children were in writing; other contracts were oral. (L. Knigge Depo at 62)

Robert negotiates with David about joining the family businesses.

33. Even prior to Robert's illness, Robert and David had talked about getting into the grocery store business together in a store in Custer, South Dakota; David was going to manage a store there. (L. Knigge Depo at 71, 72)

34. According to Lynnette, David and Robert were close, and David was a person that Robert trusted. (L. Knigge Depo at 73)

35. When Kalie announced she was leaving the Oakes store, Robert did not advertise for a manager. (L. Knigge Depo at 74)

36. Instead, in late 2012, Robert talked to his brother David and said that Kalie was leaving employment in the Oakes store in December 2012. Robert proposed that David consider managing that store for Robert, with an agreement that David would ultimately purchase the Oakes store from Robert. (D. Knigge Depo at 6, 7, 8, 9)

37. David and Robert reviewed the financial statements from that store, and David accepted the offer of managing the Oakes store with the understanding that he would have an option to purchase the business for \$200,000 within a ten (10) year period. (D. Knigge Depo at 6, 8, 9)

38. David agreed to work at the Oakes store as its manager on a flexible salary because of cash flow issues at the store. (D. Knigge Depo at 8) There was no severance agreement. (D. Knigge Depo at 9)

39. David and Robert did not immediately reduce their agreement about the Oakes store to writing but planned to do so in the future. (D. Knigge Depo at 7)

40. David Bruns did not know what David Knigge's agreement with Robert was, but David Bruns advised David Knigge to negotiate a severance package with Robert and Lynnette. (D. Bruns Depo at 25)

41. David gave notice and resigned from his job with the state of South Dakota to go to work at the Oakes store. (D. Knigge Depo at 10) Had he continued to work for the state for another six (6) months, he would have gotten an additional compensation for half of his sick pay.

42. When he was working in the Oakes store, David lived in a motel in Oakes, and the motel and all his expenses were paid for by the store. (L. Knigge Depo at 81-82) Robert negotiated that deal with David. (L. Knigge Depo at 82)

43. Lynnette did not know what David's employment contract was because Robert negotiated it. (L. Knigge Depo at 74)

44. Lynnette did not ever work at the stores while Robert was sick. (L. Knigge Depo at 84)

Things take a turn for the worse between Robert and Lynnette.

45. After Robert's diagnosis, Lynnette became upset with Robert about his decision-making, particularly his borrowing and spending. (L. Knigge Depo at 17)

46. Robert had negotiated a \$400,000 loan for an expansion of the Redfield store that she opposed. (L. Knigge Depo at 91)

47. Robert bought his step-son Jason a car. (L. Knigge Depo at 16) He also bought his fourteen (14) year old daughter a Camero. (L. Knigge Depo at 18)

48. Lynnette was also upset because Robert bought himself a \$60,000 boat that he "was never going to drive." (L. Knigge Depo at 121)

49. In December of 2012, Lynnette hired a lawyer and initiated a divorce action by filing it, but she did not have him served. (L. Knigge Depo at 18, 28, 116, 120)

50. Robert was very angry with her about the divorce. (L. Knigge Depo at 19, 28)

51. Lynnette described that they were "partially" separated. (L. Knigge Depo at 21)

52. However, Lynnette did not proceed with the divorce: it just faded away. (L. Knigge Depo at 21)

Robert's plans change again because of cancer's cruelty.

53. David started working at the Oakes store on weekends in November 2012, but the parties' plans changed entirely when Robert's diagnosis became more serious, especially after a January 2013 medical appointment indicated that Robert's cancer was progressing. (D. Knigge Depo at 8, 9, 11)

54. In January 2013, Robert had a surgery to try to prolong his life, and at that time, his physician asked him if there was anything important he still had to do. (L. Knigge Depo at 22) Robert began to think about his family after he resigned himself to the fact that his cancer was terminal and he was going to die. (D. Knigge Depo at 14)

55. Because of the seriousness of his cancer, Robert and David discussed a number of options. (D. Knigge Depo at 11) Because Robert wanted to maintain his Redfield grocery store

for his children, he said that it made more sense for David to help him by managing the B&L Inc. store in Redfield, South Dakota. (D. Knigge Depo at 9, 12, 14)

56. David and Robert ultimately agreed that David would "scrap" his plans about purchasing the Oakes store, close the Oakes store and move to Redfield to manage the Redfield store until Robert's children could manage it or until Lynnette fired him. (D. Knigge Depo at 9, 12, 19, 20, 22)

57. David and Robert negotiated David's salary and benefits at the Redfield store, as well as a severance payment of \$100,000 if David would agree to move to Redfield to manage the Redfield store. (D. Knigge Depo at 12-13, 18, 19, 20)

58. Robert and Lynnette knew what David had given up in terms of work and opportunity to help him in Redfield. (D. Knigge Depo at 12, 18, 20; L. Knigge Depo at 80-81)

59. At a time when Robert's health was seriously deteriorating, Robert and David talked about the fact that Robert's wife Lynnette might not want David to manage the store when Robert was gone. (D. Knigge Depo at 19, 20, 22)

60. Robert knew he was dying at the time; he also knew that Lynnette and David had a very strained relationship and that Lynnette had argued with him about hiring David. (L. Knigge Depo at 76, 77, 62, 89; D. Knigge Depo at 10-11, 14, 19) Robert and David agreed that they did not want Lynnette to have to continue employing David after Robert's impending death and that she might terminate David. (D. Knigge Depo at 10, 12, 19, 22) Because they both could foresee that Lynnette may not want to work with David, they agreed that David would have a severance agreement where he would be paid \$100,000 for termination for any reason. (D. Knigge Depo at 10, 20, 22)

61. Robert and David did not want to force Lynnette to employ David after Robert died. (D. Knigge Depo at 10, 12, 20, 22)

62. The promise Robert made was absolute and simple: if David was fired for any reason, he would receive \$100,000 as a severance package. (D. Knigge Depo at 22, 32)

63. The severance package was to compensate David for scrapping the plan to buy the Oakes store and leaving his profession to move to Redfield to help Robert out. (D. Knigge Depo at 20, 32)

64. David agreed to sell his house in Pierre to move to Redfield to help Robert with the Redfield store. (D. Knigge Depo at 13)

65. In March 2013, David Knigge closed the Oakes store and moved to Redfield, where he lived with Robert and Lynnette when he took over as manager of the B&L Inc. Redfield store. (L. Knigge Depo at 53)

Lynnette's knowledge of David's employment terms.

66. Lynnette does not know why David Knigge was hired as the manager. (L. Knigge Depo at 63) She did not participate in the negotiation on his employment terms. (L. Knigge Depo at 63)

67. David did not negotiate with Lynnette because he did not even know if Lynnette owned stock in the stores, but mainly because Robert was clearly in charge of store business. (D. Knigge Depo at 15)

68. Lynnette knew that Robert had also tried to hire Dave and Lisa Bruns to come manage the Redfield store when he got sick. (L. Knigge Depo at 65; D. Bruns Depo at 15) She was aware that Robert had offered to help the Bruns' with a house if they took the position, but their salary and the house budget had not been decided. (L. Knigge Depo at 65; D. Bruns Depo at 15)

69. Lynette found out abruptly that David Knigge was going to run the Redfield store instead of the Bruns'. (L. Knigge Depo at 65)

70. Lynette overheard Robert talking to David Knigge on the phone about a \$70,200 annual salary and a bonus based on how the store did; when she asked him about the Bruns', Robert told her that he wanted his brother David in the store. (L. Knigge Depo at 69) This was how she learned that Robert had hired David Knigge to manage the Redfield store. (L. Knigge Depo at 70)

71. Based on what she had heard, Lynette believed that David's salary was to be \$70,200 plus a bonus based on store performance. (L. Knigge Depo at 70)

72. Lynette was surprised by this, but when she talked to Robert, she knew he had made up his mind to have David manage the Redfield store. (L. Knigge Depo at 76)

73. Lynette preferred to have the Bruns' run the Redfield store and told Robert that. (L. Knigge Depo at 77)

74. Lynette has a close friendship with the Bruns'. (L. Knigge Depo at 92)

75. Robert did not like it when she said that, and they had a little bit of an argument about it. (L. Knigge Depo at 77)

76. At the end of his life, Robert had developed some trust issues with Lisa and David Bruns. (L. Knigge Depo at 89) He believed they were stealing from him. (L. Knigge Depo at 89)

77. Robert's decision ultimately stuck: David Knigge came to Redfield to run the store as store manager. (L. Knigge Depo at 78)

78. Lynnette does not dispute that Robert offered the store manager job to David, and she is well-aware that he performed that job. (L. Knigge Depo at 84) She does not dispute that the salary offered was \$70,200 a year. (L. Knigge Depo at 76, 78, 85)

79. Although Lynnette disputes David's testimony that he and Robert agreed upon a \$100,000 severance payment, she does so because she did not overhear Robert discuss that with David on the phone when she heard them talking about his salary. She agrees, however, that it is possible they had further negotiations of which she was not aware. (L. Knigge Depo at 85, 86)

80. Lynnette acknowledges that Robert felt very kindly toward David for David's willingness to help him in the business. (L. Knigge Depo at 85)

81. Lynnette also acknowledges that Robert knew he had limited time to live. (L. Knigge Depo at 85)

82. Robert had the authority to make this offer to David. (L. Knigge Depo at 80) Robert made major business decisions and entered into contracts without consulting her. (L. Knigge Depo at 90, 91)

83. She did not know if David and Robert had a written contract. (L. Knigge Depo at 78)

David manages the Redfield store.

84. Lynnette knew that David had closed the Oakes store and moved to Redfield to take the manager position because of Robert's employment offer. (L. Knigge Depo at 81)

85. David took over management of the Redfield store in early 2013, which was a significant task because the store was being moved into a new location in Redfield. (D. Knigge Depo at 16) David also was in charge of the day-to-day operations at the Redfield store, including managing personnel, maintaining the store, monitoring sales and costs and managing risk and liability exposure. (D. Knigge Depo at 16, 17)

86. David knew he was going to have to work with Lynnette after Robert died, so he tried to be honest and up-front with her. (D. Knigge Depo at 27)

87. The relationship became strained between David and Lynnette while they lived together. (L. Knigge Depo at 82)

88. Robert's son Jason continued to work at the Redfield store, but stepped down from the manager position at Robert's request when David came to Redfield to manage the store. (L. Knigge Depo at 54)

89. Jason was not ready to run the store and just needed to learn to be a manager. (D. Bruns Depo at 13)

90. Jason stepped down from the management position when David was hired because the new store was so much bigger and Jason felt more comfortable having someone who knew what they were doing to make it work. (L. Knigge Depo at 67)

91. There is no evidence that Jason was angry about the demotion. (L. Knigge Depo at 67)

Robert dies in June of 2013, and Lynnette takes the reins.

92. In August of 2013, Lynnette told David that she was terminating his employment. (D. Knigge Depo at 23)

93. David was told it wasn't working, and Lynnette was going to replace him. (L. Bruns Depo at 11) David had been working at the store for three months when Robert died; he continued to manage the store for two more months after Robert died. (L. Knigge Depo at 87)

94. In July of 2013, Lynnette began to feel like David wasn't being honest about the finances for the Oakes store that had closed some months before because she felt his answers were vague and that he was defensive. (L. Knigge Depo at 88, 94)

95. Lynnette acknowledged that this was a chaotic time in the Redfield store because the move and grand opening of the new store site was happening then. (L. Knigge Depo at 95)

96. Lynnette began searching for a replacement for David without discussing it with him. (L. Knigge Depo at 98)

Lynnette terminates David because it isn't working out.

97. Lynnette knew about a week before the termination that David claimed he had severance payment agreement. (L. Knigge Depo at 101, 102) David Bruns told her that David Knigge said he had a severance agreement about a week before the termination was accomplished. (L. Knigge Depo at 101)

98. Lynnette did not ask if there was a contract with David when she terminated him. (L. Knigge Depo at 100)

99. She did not ask her lawyer for advice before the termination. (L. Knigge Depo at 104, 105)

100. Lisa and David Bruns were at this meeting to support Lynnette. At the meeting, David Knigge said there would be no hard feelings, but brought up the severance payment agreement. (L. Bruns Depo at 11) David said that Robert had told him if anything happened he would get a \$100,000. (L. Bruns Depo at 13; L. Knigge Depo at 103)

101. Lynnette said that she had to talk to her attorney, and that she thought it was a lot of money. (L. Knigge Depo at 104)

102. After the termination, Lynnette and David had another meeting in August of 2013 to try to settle the severance package: at that meeting, Lynnette told David that she thought he didn't deserve a severance. (L. Knigge Depo at 108)

103. David told her he was only asking for the \$100,000 severance payment even though he showed her a calculation of his actual losses in the range of \$310,000. (L. Knigge Depo at 109; D. Knigge Depo at 34)

104. Lynnette has never intended to pay David any severance package. (L. Knigge Depo at 109)

105. After David's termination, Lynnette hired a person from Nebraska as David's replacement for the period of one year. (L. Knigge Depo at 99, 100, 105)

Dated this 26th day of January 2016.

JOHNSON POCHOP & BARTLING

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 26th day of January 2016, she served a true and correct copy of the foregoing **Plaintiff's Statement of Material Facts** by Odyssey e-filing upon the following:

Paul J. Gillette
Gillette Law Office, PC
701 Main St. | PO Box 60
Redfield, SD 57469

/s/Stephanie E. Pochop
Stephanie E. Pochop

Deposition of David Knigge

1

1 STATE OF SOUTH DAKOTA IN CIRCUIT COURT
2 COUNTY OF SPINK FIFTH JUDICIAL CIRCUIT
3
4 =====
5 DAVID KNIGGE,
6 Plaintiff,
7 vs.
8 B&L FOOD STORES, INC., and
9 ESTATE OF ROBERT ALLEN KNIGGE,
10 Defendants.
11 =====

Deposition of: David Knigge

Date: Thursday, April 23, 2015

Time: 1:00 p.m.

Place: 206 West Missouri Avenue
Pierre, SD 57501

15
16 APPEARANCES

17 STEPHANIE E. POCHOP, JOHNSON POCHOP LAW OFFICE,
18 PO Box 149, Gregory, SD 57533,
19 appearing on behalf of the Plaintiff.

20 PAUL J. GILLETTE, GILLETTE LAW OFFICE, PO Box 60,
21 Redfield, SD 57469,
22 appearing on behalf of the Defendant.

23
24 Reported by Carla A. Bachand, RMR, CRR, Capital Reporting
25 Services, P.O. Box 903, Pierre, SD 57501 (605) 224-7611.

COPY



Deposition of David Knigge

<p>1 THURSDAY, APRIL 23, 2015</p> <p>2 Thereupon,</p> <p>3 DAVID KNIGGE,</p> <p>4 called as a witness, being first duly sworn as hereinafter</p> <p>5 certified, testified as follows:</p> <p>6 EXAMINATION</p> <p>7 BY MR. GILLETTE:</p> <p>8 Q. David, could you just state your name and where you</p> <p>9 live?</p> <p>10 A. David Ray Knigge, I live in Pierre, South Dakota.</p> <p>11 Q. And where do you work?</p> <p>12 A. I work with the State of South Dakota in the Bureau of</p> <p>13 Finance and Management.</p> <p>14 Q. And what was the job that you had at the time that you</p> <p>15 decided to move from Pierre to Oakes, North Dakota, to take the</p> <p>16 management position there?</p> <p>17 A. I had the assistant director of finance position with</p> <p>18 the Department of Transportation.</p> <p>19 Q. And what kind of training does it take to do that job?</p> <p>20 A. To do the assistant director position? It was a</p> <p>21 management position supervising 14 personnel. Also you need a</p> <p>22 lot of technical experience, accounting experience, because it</p> <p>23 was a position that established policies and procedures for</p> <p>24 accounting processing within the department.</p> <p>25 Q. And that's your background, an accountant?</p>	<p>5</p> <p>1 that you and Robert had prior to your taking the job? I</p> <p>2 understand that you just said that it involved an option to buy</p> <p>3 the store.</p> <p>4 A. Right. There really wasn't that many conversations.</p> <p>5 He basically said, you know, there is an opportunity here to</p> <p>6 work with him, he was in good health at the time, and you know,</p> <p>7 he showed me the financial statements of the store. I looked</p> <p>8 at those and looked at what I was giving up for the state, and</p> <p>9 basically the first time he got cancer, he was diagnosed with</p> <p>10 cancer, I really couldn't do anything for him at that time and</p> <p>11 so when the opportunity came up to work with him again, you</p> <p>12 know, I jumped at it basically. I said I'd do it.</p> <p>13 Q. When you say -- when was the first time that he was</p> <p>14 diagnosed with cancer?</p> <p>15 A. That would have been about September of 2011.</p> <p>16 Q. And the timing of the conversation that you had with</p> <p>17 him about going to Oakes, that was in October of 2012?</p> <p>18 A. Yeah.</p> <p>19 Q. You said he was in good health. Did you see him as</p> <p>20 having been cured of the cancer?</p> <p>21 A. Yes. I was hoping so. We had went out to west river</p> <p>22 and did some hunting, deer hunting too, and this was another</p> <p>23 time besides the October event, and we came up on a farmer who</p> <p>24 had been cancer free and basically had the exact same thing as</p> <p>25 him, he had the scar, everything, you know, and the MRI, and I</p>
<p>4</p> <p>1 A. Yes.</p> <p>2 Q. Where were you educated as an accountant?</p> <p>3 A. At Northern State in Aberdeen.</p> <p>4 Q. Are you a certified public accountant?</p> <p>5 A. Yes, I am.</p> <p>6 Q. And how long have you been doing that?</p> <p>7 A. Over 30 years.</p> <p>8 Q. You graduated from Northern about?</p> <p>9 A. 1981.</p> <p>10 Q. Tell me how it came to be that you went to work for</p> <p>11 Robert in Oakes.</p> <p>12 A. Well, it was about October when he approached me with</p> <p>13 it and I think we were out hunting and he said that his -- the</p> <p>14 Oakes store was going to become available and he said that his</p> <p>15 daughter-in-law, yeah, his stepdaughter I guess it would be,</p> <p>16 was leaving the Oakes store in December, at the end of</p> <p>17 December.</p> <p>18 Q. That would have been two thousand --</p> <p>19 A. 2012.</p> <p>20 Q. And did you take that job?</p> <p>21 A. I did. What it was, the structure of the agreement</p> <p>22 was it would be basically I would have the opportunity to</p> <p>23 purchase it and then pay him back as the store's cash flow</p> <p>24 became positive.</p> <p>25 Q. Can you tell me a little bit about the conversations</p>	<p>6</p> <p>1 was thinking, well, maybe he's the one in a million.</p> <p>2 Q. But he had told you prior to your going to Oakes that</p> <p>3 the doctors had told him that he had glioblastoma?</p> <p>4 A. Yep.</p> <p>5 Q. And he had had surgery for that?</p> <p>6 A. Yep.</p> <p>7 Q. And did he reveal to you at that time that they had</p> <p>8 given him only 18 months to live?</p> <p>9 A. Yes. He said that was just the standard, you know,</p> <p>10 diagnosis and prognosis of his illness.</p> <p>11 Q. And the position that you took in Oakes, that was the</p> <p>12 manager position?</p> <p>13 A. In Oakes, yeah, it was owner/manager position.</p> <p>14 Q. Why do you say owner/manager?</p> <p>15 A. Because it was with the intent that -- he wanted</p> <p>16 200,000 for it and he was trying to sell it too, and the best</p> <p>17 that he could do in the limited amount of time was to get a</p> <p>18 buyout offer on it, and basically he felt that was just giving</p> <p>19 the store away. So that's when he offered me the position in</p> <p>20 Oakes and he said I'd have the option to buy it, and basically</p> <p>21 I would pay back, pay him 200,000 for it, and that would be for</p> <p>22 inventory and equipment and everything, and basically at the</p> <p>23 end of two years, the lease would be up on that building. Then</p> <p>24 he said we could reevaluate the situation then.</p> <p>25 Q. Did you guys actually enter into any type of written</p>

Deposition of David Knigge

<p style="text-align: right;">7</p> <p>1 agreement with regard to your buying the property or the store</p> <p>2 from him?</p> <p>3 A. No.</p> <p>4 Q. Did he transfer any stock to you in that corporation?</p> <p>5 A. No.</p> <p>6 Q. So that was something that was going to happen down</p> <p>7 the road in the future?</p> <p>8 A. It was -- right, and he just expected me to pay the</p> <p>9 200,000 as I could, as the operations. . . He knew I had a</p> <p>10 bunch of expenses with alimony and stuff like that, personal</p> <p>11 expenses, and so he just wanted to be paid back when I could</p> <p>12 pay him back.</p> <p>13 Q. Was there any specific time period at which he was</p> <p>14 actually going to make the transfer of the store to you?</p> <p>15 A. Well, we really hadn't gotten that far, yeah.</p> <p>16 Q. You hadn't gotten that far because you decided to do</p> <p>17 something different prior to doing that?</p> <p>18 A. Yes. Because the decision to -- I started going up to</p> <p>19 Oakes in November on weekends because I was still working for</p> <p>20 the state, and then Kayley had left prematurely, she left at</p> <p>21 the end of November; so then I decided to take annual leave at</p> <p>22 the state and leave early basically. So then I started at the</p> <p>23 beginning of December time frame, and then we made this</p> <p>24 decision about early January right after his cancer was</p> <p>25 diagnosed that it had come back.</p>	<p style="text-align: right;">9</p> <p>1 with the Oakes store.</p> <p>2 A. No.</p> <p>3 Q. Any length of term as to how long you would be working</p> <p>4 at the Oakes store?</p> <p>5 A. Initially, 10 years, I figured I'd have it paid off in</p> <p>6 10 years.</p> <p>7 Q. Were you paid any salary at all?</p> <p>8 A. No. Because at the time I was getting paid by the</p> <p>9 state through vacation.</p> <p>10 Q. So give me a time line of how long a period were you</p> <p>11 at the Oakes store as the manager before you decided to close</p> <p>12 it?</p> <p>13 A. It would have been starting at the beginning of</p> <p>14 December through the middle of January.</p> <p>15 Q. So December of 2012 to January of 2013?</p> <p>16 A. Yes. So a month and a half.</p> <p>17 Q. And why did you and Robert decide to close the Oakes</p> <p>18 store?</p> <p>19 A. We decided that -- he wanted me to come back to</p> <p>20 Redfield at that point. He said the cancer had come back and</p> <p>21 it made more sense to me to be in Redfield, and we took a look</p> <p>22 at the Oakes store and we decided that it was run down, the</p> <p>23 equipment was bad, you know, 40 percent of the inventory was</p> <p>24 outdated, the parking lot needed to be replaced and it would</p> <p>25 just take too much in the resources to have to continue on with</p>
<p style="text-align: right;">8</p> <p>1 Q. So negotiation to go up there and become the manager</p> <p>2 of the store took place in November of 2012 and before?</p> <p>3 A. Say that again, please.</p> <p>4 Q. The negotiation that you and Robert had with regard to</p> <p>5 your taking over as the manager took place in October or</p> <p>6 November of 2012?</p> <p>7 A. Yes.</p> <p>8 Q. What kind of salary were you earning with the state?</p> <p>9 A. \$68,000.</p> <p>10 Q. And then your benefits that you received from the</p> <p>11 state?</p> <p>12 A. Three weeks vacation, pension, health, dental, life</p> <p>13 insurance, sick pay.</p> <p>14 Q. And when you negotiated your salary with Robert for</p> <p>15 being the manager of the Oakes store, what did that look like?</p> <p>16 A. Well, see, that's where the cash flow came in. When</p> <p>17 we ran the numbers, basically it would net out at a loss, but</p> <p>18 because of depreciation and the noncash items, I'd basically</p> <p>19 get paid that way and then we expected it to grow, the</p> <p>20 business, the weekly sales, and I would just get paid as I</p> <p>21 could; so that was the risk.</p> <p>22 Q. So you didn't actually have a salary, a set amount of</p> <p>23 salary while working at the Oakes store as the manager?</p> <p>24 A. That's right.</p> <p>25 Q. And at that time there was no severance arrangement</p>	<p style="text-align: right;">10</p> <p>1 the Oakes store.</p> <p>2 And then he actually talked to me about Lynette and he</p> <p>3 said, what if Lynette would not want you to continue on with</p> <p>4 the store in Redfield, and that's when I told him -- that's</p> <p>5 when I said, then I'll need a severance. I said, I don't want</p> <p>6 to force myself on Lynette and have her -- require her to work</p> <p>7 with me. I said, if she doesn't want me, I'm okay with that.</p> <p>8 But I want the severance of \$100,000 should she discharge me</p> <p>9 for any reason.</p> <p>10 Q. Let's go back a step first. At the point that you</p> <p>11 decided to start managing the store in Oakes, had you actually</p> <p>12 quit your state job?</p> <p>13 A. Yes. Let me clarify that. I quit -- my termination</p> <p>14 date was when I was finished being paid, which was end of</p> <p>15 January, because I was being paid vacation, the rest of my</p> <p>16 vacation. But I had given notice and everything and they knew</p> <p>17 the intent.</p> <p>18 Q. So the intent was to quit your job to go and get the</p> <p>19 store in Oakes?</p> <p>20 A. Yes.</p> <p>21 Q. Tell me about when you first started having</p> <p>22 conversations with Robert about moving to Redfield to manage</p> <p>23 the store in Redfield.</p> <p>24 A. Well, it had to be like either the end of December or</p> <p>25 the beginning of -- it was after his appointment, and he knew</p>

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<p style="text-align: center;">11</p> <p>1 that there was another spot, okay, and that's when we started</p> <p>2 talking about it. And it was on our trips up to Oakes is</p> <p>3 usually when we talked.</p> <p>4 Q. So the conversations took place in the pickup as you</p> <p>5 drove back and forth?</p> <p>6 A. Usually in the pickup or the hotel.</p> <p>7 Q. How many of these conversations were there, just</p> <p>8 ballpark me?</p> <p>9 A. On the severance?</p> <p>10 Q. No, on the decision to hire you as the manager in</p> <p>11 Redfield.</p> <p>12 A. He bounced around quite a bit, meaning I think he had</p> <p>13 a lot of things going on at the time and I was one of the</p> <p>14 options, because he was looking at trying to sell the three</p> <p>15 stores. You know, he was trying to sell the Oakes store; so</p> <p>16 ballpark in all those discussions, I'd say 10.</p> <p>17 Q. During those conversations, did he tell you that he</p> <p>18 was contemplating hiring David Bruns as the manager in</p> <p>19 Redfield?</p> <p>20 A. No.</p> <p>21 Q. At what point did you actually make the decision that</p> <p>22 you were going to take the management job in Redfield, South</p> <p>23 Dakota?</p> <p>24 A. In Redfield? Well, it was that one conversation where</p> <p>25 he said his cancer was back, and we walked through the whole</p>	<p style="text-align: center;">13</p> <p>1 A. Their regular payroll periods.</p> <p>2 Q. How often was that?</p> <p>3 A. I think it was every two weeks.</p> <p>4 Q. In your complaint, you talk about the sale of your</p> <p>5 house --</p> <p>6 A. Uh-huh.</p> <p>7 Q. -- as something that you did in reliance upon Robert's</p> <p>8 promise to pay you and hire you to be the manager in Redfield.</p> <p>9 Can you tell me why that's important here?</p> <p>10 A. The Pierre market is very -- the housing market in</p> <p>11 Pierre is crazy high, and I priced it so that I could sell it</p> <p>12 within -- I sold it in a month; so I had to price it because I</p> <p>13 was leaving Pierre, you know, and I was fully committed to</p> <p>14 doing that, to helping him with the store.</p> <p>15 Q. Do you remember when you listed it?</p> <p>16 A. Oh, I had to have listed it at the end of November.</p> <p>17 Q. Of 2012?</p> <p>18 A. Yes.</p> <p>19 Q. Was that after you had made the decision to come to</p> <p>20 Redfield or before the decision to come to Redfield?</p> <p>21 A. It was after the decision -- well, it was before the</p> <p>22 decision to come to Redfield because initially what I was going</p> <p>23 to do was go to Oakes.</p> <p>24 Q. So what induced you to quit your job in Pierre was the</p> <p>25 job and the opportunity in Oakes, North Dakota, right?</p>
<p style="text-align: center;">12</p> <p>1 Oakes store and all the reasons for not going ahead with that,</p> <p>2 and we looked at the Redfield store and all the reasons for</p> <p>3 going ahead with that. You know, it was he wanted to get into</p> <p>4 the new location. It was a legacy for his kids, that I</p> <p>5 basically could work for about 10, 15 years and his kids would</p> <p>6 be about the age that they could take over. You know, then he</p> <p>7 asked the question about Lynette and then the conversation</p> <p>8 switched over to that and just discussed, you know, Lynette,</p> <p>9 and at that point I asked him if she was okay with it and he</p> <p>10 said she was. Then we started talking about the possibility of</p> <p>11 her letting me go, and then I talked about the severance and</p> <p>12 then we talked about the salary that I would make.</p> <p>13 Q. This is all in the same conversation?</p> <p>14 A. Yes.</p> <p>15 Q. In the Oakes store?</p> <p>16 A. No, this was -- I want to say it was either on the way</p> <p>17 to Oakes or in the hotel. When we were at Oakes, we were</p> <p>18 working in the store.</p> <p>19 Q. And specifically what did he tell you you were going</p> <p>20 to be paid for a salary?</p> <p>21 A. He said -- he asked me how much I was making and then</p> <p>22 he said 70,000.</p> <p>23 Q. And how were you to be paid?</p> <p>24 A. Through the Redfield store.</p> <p>25 Q. On an annual basis, biweekly?</p>	<p style="text-align: center;">14</p> <p>1 A. Yes.</p> <p>2 Q. And the same would apply to the house?</p> <p>3 A. Yes.</p> <p>4 Q. After Bob was diagnosed with cancer and resigned</p> <p>5 himself to the fact that he was going to die, what were his</p> <p>6 thoughts as to what was important in his life at that</p> <p>7 particular point?</p> <p>8 A. Being with family was important to him.</p> <p>9 Q. And did that play a role in why he hired you to be the</p> <p>10 manager in Redfield?</p> <p>11 A. I think it did, but I think it was because he could</p> <p>12 trust me, you know, as a brother.</p> <p>13 Q. And what was he entrusting to you?</p> <p>14 A. A lot. He was entrusting his store to me and, you</p> <p>15 know, that's his legacy.</p> <p>16 Q. And he wanted you to protect his legacy for who?</p> <p>17 A. For his kids. He really hoped that one of those kids</p> <p>18 would have taken it over.</p> <p>19 Q. Did you and Bob ever talk about Lynette with regard to</p> <p>20 her abilities to manage the store?</p> <p>21 A. No, not with regard to her managing the store.</p> <p>22 Q. Did you ever talk about her role inside the store?</p> <p>23 A. No, not much.</p> <p>24 Q. In your observation, did you see much of Lynette in</p> <p>25 the business?</p>

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<p>15</p> <p>1 A. Not at all.</p> <p>2 Q. So she wasn't taking an active role?</p> <p>3 A. No. I encouraged it when Bobby was getting really,</p> <p>4 you know, towards the end, I wanted to meet with her weekly and</p> <p>5 she didn't.</p> <p>6 Q. You don't know whether she and Bob had any formal</p> <p>7 meetings with regard to the corporations that they owned?</p> <p>8 A. No.</p> <p>9 Q. You don't know if she even owned any shares in the</p> <p>10 various entities?</p> <p>11 A. I didn't know for sure.</p> <p>12 Q. And would it surprise you at all to find out that</p> <p>13 Lynette owned no stock in the various store entities until</p> <p>14 after Bob was told he had a terminal condition?</p> <p>15 A. No.</p> <p>16 Q. Why wouldn't it surprise you?</p> <p>17 A. Because she was totally out of it. She wasn't</p> <p>18 involved in it at all.</p> <p>19 Q. She was reliant on Bob to manage the businesses?</p> <p>20 A. Yes.</p> <p>21 Q. And her role was homemaker, right?</p> <p>22 A. Yep.</p> <p>23 Q. As a manager, what did you see as your duties?</p> <p>24 A. In Redfield?</p> <p>25 Q. In the Redfield store, yes.</p>	<p>17</p> <p>1 Q. What about exposing the store to liability?</p> <p>2 A. I would definitely think that you would want to</p> <p>3 minimize your risk and liability, yes.</p> <p>4 Q. If you were hiring a manager and creating a contract</p> <p>5 for that manager, what would you see as important terms to put</p> <p>6 in it?</p> <p>7 A. Performance indicators, basically the things I just</p> <p>8 mentioned, because I think you would want to rely on certain</p> <p>9 benchmarks to make sure that you are hitting those and moving</p> <p>10 in the right direction.</p> <p>11 Q. Try to create objective standards?</p> <p>12 A. Yes. But that's me.</p> <p>13 Q. What about the basics, what else would you think was</p> <p>14 important to put in there?</p> <p>15 A. In addition to what I mentioned? I guess I'm not. . .</p> <p>16 Q. Like the salary amount?</p> <p>17 A. In my contract?</p> <p>18 Q. No, in general, if you were hiring the manager, what</p> <p>19 would you want to put in the contract?</p> <p>20 A. The salary and the increases based on the performance</p> <p>21 and consequences for termination.</p> <p>22 Q. Would benefits be important?</p> <p>23 A. Benefits would be very important, but they didn't have</p> <p>24 much for benefits.</p> <p>25 Q. Why didn't they have much for benefits?</p>
<p>18</p> <p>1 A. I was closing down the Oakes store; so I was trying to</p> <p>2 sell all the inventory and close that business down. We had</p> <p>3 that store that we were trying to renovate and move into, that</p> <p>4 was another big part of my responsibilities. And then just</p> <p>5 running the store in Redfield, you know, managing the staff,</p> <p>6 the sales, weekly sales, you know, just planning for the annual</p> <p>7 events that were happening.</p> <p>8 Q. Did the sales increase during the time that you were</p> <p>9 working in Redfield, the weekly sales?</p> <p>10 A. Yes. Initially they were at a decline and that was a</p> <p>11 continuing trend or a previous trend that I came into. And</p> <p>12 about six months into it, not even, around June, we were</p> <p>13 beating year over year sales, week over week, comparing the</p> <p>14 same week last year to this year, we were beating those on a</p> <p>15 consistent basis, and at the end we were doing at least 10</p> <p>16 percent more in sales when I left.</p> <p>17 Q. So basically you were in charge of all the day-to-day</p> <p>18 operations?</p> <p>19 A. Yes.</p> <p>20 Q. Can you give me a list of reasons that you would have</p> <p>21 seen that a manager of a store should be terminated for?</p> <p>22 A. Managing the personnel, if there were a lot of</p> <p>23 personnel issues; the condition of the store; maintaining a</p> <p>24 nice, presentable store; the sales are a big factor in that too</p> <p>25 and controlling costs.</p>	<p>18</p> <p>1 A. I think that was a previous management decision by</p> <p>2 Bobby. He surveyed the store and they preferred to have the</p> <p>3 money versus any benefits is I think what I recalled. But that</p> <p>4 was one of the things that I had negotiated with Bob, is the</p> <p>5 benefits, he would pay half my insurance or actually my whole</p> <p>6 insurance.</p> <p>7 Q. As a manager, what limitations would you put in place</p> <p>8 in a contract that contained a promise to pay \$100,000</p> <p>9 severance to your manager if he was terminated?</p> <p>10 A. So now we are talking specifically me?</p> <p>11 Q. No, generally.</p> <p>12 A. Just in general? I would have very specific</p> <p>13 performance or very -- I would outline specifically what it</p> <p>14 would take to get that 100,000.</p> <p>15 Q. You would want maybe a just cause provision in there,</p> <p>16 that if you were terminated for cause and that was justifiable,</p> <p>17 the person wouldn't get their severance?</p> <p>18 A. That would make sense, yes.</p> <p>19 Q. Now, in your contracts that you negotiated with Bob</p> <p>20 with regard to the severance, neither of those items were in</p> <p>21 there?</p> <p>22 A. He knew what I was giving up for this, and he knew I</p> <p>23 was committed to -- I wasn't going to fall on this store, you</p> <p>24 know, that's the attitude that we went into this, and I would</p> <p>25 have done anything for him; so that's something we didn't even</p>

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<p style="text-align: right;">19</p> <p>1 discuss. It was more what if Lynette let me go. It wasn't</p> <p>2 him, he had no question about me being there.</p> <p>3 Q. When lawyers talk about contracts, they often use the</p> <p>4 term "meeting of the minds." Have you ever heard that term?</p> <p>5 A. Meeting of the minds? Yeah.</p> <p>6 Q. What's your understanding of that term?</p> <p>7 A. My understanding would be just discussing issues and,</p> <p>8 you know, bringing out all the pros and cons and having that</p> <p>9 discussion and having a common or coming to an agreement.</p> <p>10 Q. Would it be that point at which the parties have the</p> <p>11 same understanding as to the terms of your promises or</p> <p>12 contract?</p> <p>13 A. Yep.</p> <p>14 Q. Can you tell me generally speaking what you and Robert</p> <p>15 actually discussed as to the terms of your employment versus</p> <p>16 what you believe your understanding was in your head with</p> <p>17 regard to the severance package?</p> <p>18 A. The terms of the agreement were basically that I</p> <p>19 now -- I give up Oakes because we are going to scrap that, that</p> <p>20 was the initial agreement, and he wanted me to move down to</p> <p>21 Redfield and manage that store and get him into the new store</p> <p>22 and then just manage the store until his kids, if one of them</p> <p>23 wanted to take over. That was the terms.</p> <p>24 Q. Specifically narrow down to the severance promise.</p> <p>25 What specifically did he say when he made that promise?</p>	<p style="text-align: right;">21</p> <p>1 you believe may exist in the contract where Robert may have not</p> <p>2 had the same understanding as you?</p> <p>3 A. No.</p> <p>4 Q. So there were no limitations on the promise to pay the</p> <p>5 severance?</p> <p>6 A. No.</p> <p>7 Q. If you stole from the store and got fired, you would</p> <p>8 get paid 100,000?</p> <p>9 A. I guess. But I wouldn't steal from the store, and he</p> <p>10 knew that.</p> <p>11 Q. I'm not saying you would. If you didn't show up for</p> <p>12 work and got fired for it, would you get 100,000?</p> <p>13 A. I guess, but again, I was there seven days a week most</p> <p>14 of the time.</p> <p>15 Q. If the store --</p> <p>16 A. He knew --</p> <p>17 Q. -- didn't do well under your management --</p> <p>18 A. If the store didn't do well under my management.</p> <p>19 Q. -- and you got fired for that, you would still get</p> <p>20 paid the 100,000?</p> <p>21 A. Knowing Bobby, what he would do is he would say, okay,</p> <p>22 it's not going well, basically you need to find another job,</p> <p>23 and he would have let me transition out, he wouldn't have fired</p> <p>24 me.</p> <p>25 Q. But I'm talking about the promise that Bob made to you</p>
<p style="text-align: right;">20</p> <p>1 A. Basically he asked me -- he asked the question, what</p> <p>2 if Lynette would let you go. My response to that was, I</p> <p>3 want -- if she let's me go, basically I want \$100,000, if she's</p> <p>4 going to let me go for any reason, and he agreed to that. We</p> <p>5 had further discussions about salary and stuff, but basically</p> <p>6 we agreed to both of that; so that's why we even discussed the</p> <p>7 severance.</p> <p>8 Q. If Robert had fired you, would there have been any</p> <p>9 severance paid?</p> <p>10 A. At that point, yes. If I were to move down to</p> <p>11 Redfield, he would have paid me severance, because part of the</p> <p>12 reason for the severance too was to get me back on my feet, you</p> <p>13 know, I had left my accounting profession, and basically it was</p> <p>14 to help me transition back into my profession or whatever I</p> <p>15 chose to be.</p> <p>16 Q. Following the conversation that you had wherein the</p> <p>17 promise was made to you that you would have \$100,000 severance</p> <p>18 if you were fired for any reason --</p> <p>19 A. Right.</p> <p>20 Q. -- were there any subsequent conversations between you</p> <p>21 and Robert about that issue?</p> <p>22 A. No.</p> <p>23 Q. So the deal was negotiated all in one sitting?</p> <p>24 A. Yes.</p> <p>25 Q. Are there any terms in the severance agreement that</p>	<p style="text-align: right;">22</p> <p>1 rather than what Bob would have done. The promise that he made</p> <p>2 to you --</p> <p>3 A. The promise was pretty absolute, it was pretty simple,</p> <p>4 it was just, you know, for any reason if I'm fired from</p> <p>5 Lynette, I want \$100,000, I don't want to force myself on</p> <p>6 Lynette.</p> <p>7 Q. If you exposed the store to legal liability and you</p> <p>8 got fired for that, would you still get paid the \$100,000?</p> <p>9 A. If I exposed the store, you know, I would say yes, but</p> <p>10 would I expect it? I don't know if I would expect it.</p> <p>11 Q. And you believe that Robert had that exact same</p> <p>12 understanding?</p> <p>13 A. Yes.</p> <p>14 Q. Did he say those specific kind of things to you?</p> <p>15 A. We didn't go into it as much detail as you are saying.</p> <p>16 It was just a conversation about what if Lynette were to let</p> <p>17 you go, and I thought about it and I need a severance.</p> <p>18 Q. And what I'm asking you is are you interpreting the</p> <p>19 word "any reason" in a way that might be different than the way</p> <p>20 Robert would have interpreted it?</p> <p>21 A. No. Any means any.</p> <p>22 Q. Prior to your termination, you know, did you tell</p> <p>23 Lynette that this provision existed?</p> <p>24 A. Yes.</p> <p>25 Q. At what point?</p>

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<p style="text-align: right;">27</p> <p>1 there was nothing important about that to me.</p> <p>2 It was just right there, it's all on the same monthly</p> <p>3 statement; so it was like this revelation for her when this</p> <p>4 money was found or something, it's like, no, it's always been</p> <p>5 there, you just had to look. One thing about this whole thing</p> <p>6 with Lynette is I knew I was going to have to work with her</p> <p>7 after Bobby was passed away; so I was trying to be as honest</p> <p>8 with her as I could and up front with her.</p> <p>9 Q. Have you heard of ERISA?</p> <p>10 A. ERISA? Yes.</p> <p>11 Q. And are you familiar with what happens if an employer</p> <p>12 pays benefits to an employee with regard to how that affects</p> <p>13 the other employees' rights to benefits?</p> <p>14 A. Yes.</p> <p>15 Q. You say Robert promised to reimburse you for your</p> <p>16 health insurance; is that correct?</p> <p>17 A. Yes.</p> <p>18 Q. Now, you would agree with me that Robert is a pretty</p> <p>19 good store manager, right?</p> <p>20 A. Yes.</p> <p>21 Q. That he knew the rules with regard to paying employee</p> <p>22 benefits, didn't he?</p> <p>23 A. I know that he would get around it and do it legally,</p> <p>24 meaning he would up my salary or do whatever it would take to</p> <p>25 make sure that I'm compensated for it, whether that be in a</p>	<p style="text-align: right;">29</p> <p>1 A. I mean he would talk slower, it seemed like his -- he</p> <p>2 just had to really think about what he was saying, but he</p> <p>3 was -- Lynette had him admitted to the behavioral hospital in</p> <p>4 Sioux Falls.</p> <p>5 Q. When was that?</p> <p>6 A. I don't know, sometime in January.</p> <p>7 Q. After you were hired to come to Redfield?</p> <p>8 A. Yes.</p> <p>9 MS. POCHOP: If I can interrupt, can we put some dates</p> <p>10 on not just January but even a year? I'm just trying to get</p> <p>11 the time frame myself. So the first surgery would have been</p> <p>12 approximately?</p> <p>13 A. It would have been like in the fall of 2011.</p> <p>14 MS. POCHOP: And then the surgery where they didn't</p> <p>15 put the disk in that you were just talking about.</p> <p>16 A. That would have been in January of 2013.</p> <p>17 MS. POCHOP: Then the hospitalization.</p> <p>18 A. Would have been in January of 2013.</p> <p>19 MS. POCHOP: Thank you, sorry. I didn't mean to</p> <p>20 interrupt.</p> <p>21 MR. GILLETTE: No, I appreciate that.</p> <p>22 Q. (BY MR. GILLETTE) Was there a point at which his</p> <p>23 decisions started to become irrational?</p> <p>24 A. Yes. Well, irrational, I think there was a point in</p> <p>25 time where he just sort of -- it almost seemed like he was so</p>
<p style="text-align: right;">28</p> <p>1 bonus or whatever.</p> <p>2 Q. I mean, as a manager, is that something you would have</p> <p>3 done?</p> <p>4 A. As a manager, yeah, sure.</p> <p>5 Q. You would pick out one employee and give them a</p> <p>6 benefit that was different than the other employees?</p> <p>7 A. I would treat somebody differently based on their</p> <p>8 performance, yes, and in fact I do.</p> <p>9 Q. Even if that might trigger a liability that would</p> <p>10 require you to pay for health insurance for all of the</p> <p>11 employees of the store?</p> <p>12 A. Well, like I said, I think he would have structured it</p> <p>13 so that it wouldn't affect -- there wouldn't be that liability.</p> <p>14 Q. Tell me about the effect that the glioblastoma had on</p> <p>15 Bob's ability to think, from the time that you started</p> <p>16 negotiating with him in Oakes through the time of his death.</p> <p>17 A. Well, the first episode when he was first diagnosed,</p> <p>18 you know, I was in Pierre and I just remembered after the</p> <p>19 surgery and everything and when he was doing radiation</p> <p>20 treatments, he was just very -- always tired and just you</p> <p>21 hardly ever saw him. And then the second time it happened,</p> <p>22 they had the surgery, but they didn't put that radiation disk</p> <p>23 in, and he seemed a little slower that time, but he seemed to</p> <p>24 be pretty with it.</p> <p>25 Q. When you say slower, what do you mean?</p>	<p style="text-align: right;">30</p> <p>1 drugged up, and that was later on in the whole process, and it</p> <p>2 was really just right before he died, you know, in June of</p> <p>3 2013. But up to that point, to finish the story on the Sioux</p> <p>4 Falls, my point was is that he was in that psychiatric hospital</p> <p>5 and he basically asked to be discharged, and me, I really</p> <p>6 didn't know why he was in there and everything, but they said</p> <p>7 that he had some problems.</p> <p>8 Q. Who is they?</p> <p>9 A. Lynette said that he had some problems, some issues;</p> <p>10 so they wanted to keep him there, and Lynette was supposed to</p> <p>11 come there that night and say goodbye basically, and she never</p> <p>12 showed; so then he asked to be discharged and I thought that</p> <p>13 was part of -- really said a lot about his thinking, that he</p> <p>14 was aware enough to say, hey, you can't keep me here. So he</p> <p>15 was always very -- it seemed like he was very thoughtful in</p> <p>16 what he was doing.</p> <p>17 Q. Was there a point at which you thought he needed a</p> <p>18 conservatorship or guardianship, that kind of help?</p> <p>19 A. You know, he like took off and just ran up to Oakes to</p> <p>20 help me out one time, and I thought this is crazy, you know,</p> <p>21 but was that irrational? To him and to me, it's like he wanted</p> <p>22 to help me; so I told him, the next time you do this, just make</p> <p>23 sure you have somebody drive you, but in all this what I'm</p> <p>24 starting to understand is he was trying to get away, you know,</p> <p>25 and be free to do what he wanted to, and he couldn't stand the</p>

Deposition of David Knigge

<p style="text-align: center;">31</p> <p>1 fact that people were telling him not to do those things, and 2 so from that perspective, I totally understand why he did what 3 he did. He went down to see his daughter in Yankton and it was 4 just to be with her. 5 MS. POCHOP: Could you put a time frame on the Oakes 6 trip and the daughter trip? Just an approximate is good. 7 A. It would have been in like latter part of January of 8 2013, and his daughter I think was the same thing, it was just 9 right after the surgery in January of 2013. 10 Q. (BY MR. GILLETTE) That was prior to making an 11 agreement to come to Redfield or after? 12 A. That was after. But he was making decisions for the 13 store, for the Redfield store, clear into like March and April. 14 Q. What I'm trying to get at, is there a point at which 15 you thought he shouldn't be doing that any more? 16 A. No, because we couldn't go to Lynette, and Lynette 17 would always point to Bobby, and so we needed one of them to 18 make a decision and Bobby was the one. And I would have said 19 something if I thought his decision would have been a bad 20 decision. 21 Q. Going back to the original contract that you have with 22 regard to the severance package and moving to Redfield and your 23 salary, your insurance, all of that, you have already told me 24 that that contract was never reduced to writing; is that 25 correct?</p>	<p style="text-align: center;">33</p> <p>1 Q. For any reason? 2 A. For any reason, yeah. And I did stress that with him, 3 and I think that's why I'm so confident that he understood 4 that, I said, you realize any reason. 5 MR. GILLETTE: That's all I have. 6 MS. POCHOP: Do you want to step out? 7 A. Yeah. 8 (Whereupon, the deposition was in recess at 2:03 p.m., 9 and subsequently reconvened at 2:05 p.m., and the following 10 proceedings were had and entered of record:) 11 MS. POCHOP: Unless you have anything else, Paul, we 12 will read and sign. 13 MR. GILLETTE: I did think of one other thing, is that 14 okay? 15 Q. (BY MR. GILLETTE) The move from Pierre to Redfield, 16 okay, and the quitting of the job, you said that that caused 17 you a detriment. Is that detriment a financial detriment? 18 A. Yes. I had a good paying job and what I was doing, 19 basically I sold my house for, you know, what I feel is under 20 market. 21 Q. And how much did that cost you? 22 A. Well, I think about 10,000, plus realtor fees, another 23 8,000. Even though he was paying me 70,000, that's still less 24 than what I would have made for the state in benefits and 25 everything, because basically my pension stopped with the</p>
<p style="text-align: center;">32</p> <p>1 A. That's correct, yeah. 2 Q. And that you don't have any type of recordings or 3 anything like that with regard to Robert having said those 4 things that you say that he said in making those promises. 5 A. Nope. 6 Q. Do you have any letters or e-mails or texts that would 7 evidence the severance promise? 8 A. No. 9 Q. And this contract was a contract that lasted 10 indefinitely until the kids came to take over or until you 11 retired? 12 A. If I would have gotten terminated for any reason, yes, 13 because at that point, you know, I think he understood all the 14 sacrifices that I was making, leaving Pierre, my 30 years in 15 accounting, to help him out. 16 Q. If you had worked there for five years and she had 17 fired you, you would get \$100,000? 18 A. I would have expected it if it was -- to me I would 19 have pursued it if I didn't feel it was just in her -- if her 20 reasons were not just. 21 Q. But that's the contract that you and Bob made, right? 22 A. What was the contract? 23 Q. That five years down the road, if she fired you, you 24 got \$100,000? 25 A. Yep.</p>	<p style="text-align: center;">34</p> <p>1 state, you know, I wasn't getting all the different benefits 2 that I had. 3 Q. Have you put a number to that? 4 A. No. You know, I gave Lynette that one sheet, I think 5 you should be aware of that, what I outlined the severance and 6 everything. 7 Q. Is that the sheet that said that you thought you were 8 owed about \$310,000? 9 A. No, I said this is what I gave up. 10 Q. About \$310,000? 11 A. Yeah, something like that. 12 Q. Is that a ballpark? 13 A. Yeah. 14 Q. And that's the number that comes to your mind? 15 A. Yep. 16 Q. How have you recovered now in terms of your current 17 position? 18 A. Well, I'm renting a house. Basically the housing 19 market is very difficult to get into. The exact same home that 20 I would be looking at about 165,000 buying it now. 21 Q. How about the salary of the new job? 22 A. New job I'm making 10,000 less. 23 Q. Than the old job? 24 A. Than the old job. 25 Q. You were in Sioux Falls for a while?</p>

Deposition of David Knigge

<p style="text-align: right;">35</p> <p>1 A. In Sioux Falls. It took me from August, I got the job</p> <p>2 In February, the end of February with the state again. Then I</p> <p>3 was doing odd jobs in Sioux Falls, but that was very stressful,</p> <p>4 to not be given any notice like she did.</p> <p>5 Q. Any other financial damages that you can think of?</p> <p>6 A. You know, hindsight being 20-20, had I worked for the</p> <p>7 state a little bit longer, six months, I would have gotten a</p> <p>8 quarter of my sick pay paid out. I had so much sick pay built</p> <p>9 up, it would have been between 5 and 7,000. I had to pay for</p> <p>10 health insurance during that period of time, and that was about</p> <p>11 5, 600 bucks a month. Yeah, I'm still not to where I want to</p> <p>12 be because I'm renting now, and having to move two times has</p> <p>13 been not fun; so I think that's all I can think of.</p> <p>14 MR. GILLETTE: Now I don't have anything else.</p> <p>15 MS. POCHOP: We will read and sign.</p> <p>16 (Deposition concluded at 2:10 p.m.; witness excused;</p> <p>17 signature reserved.)</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 style="text-align: right;">37</p> <p>1 <u>CERTIFICATE</u></p> <p>2</p> <p>3 STATE OF SOUTH DAKOTA)</p> <p>4) ss.</p> <p>5 COUNTY OF HUGHES)</p> <p>6</p> <p>7 I, Carla A. Bachand, RMR, CRR, Freelance Court</p> <p>8 Reporter for the State of South Dakota, residing in Pierre,</p> <p>9 South Dakota, do hereby certify:</p> <p>10 That I was duly authorized to and did report the</p> <p>11 deposition of DAVID KNIGGE in the above-entitled cause;</p> <p>12 That the reading and signing of the deposition by the</p> <p>13 witness have been expressly reserved;</p> <p>14 That the foregoing pages of this deposition</p> <p>15 constitute a true and accurate transcription of my stenotype</p> <p>16 notes of the testimony of said witness.</p> <p>17 I further certify that I am not an attorney nor</p> <p>18 counsel of any of the parties; nor a relative or employee of</p> <p>19 any attorney or counsel connected with the action, nor</p> <p>20 financially interested in the action.</p> <p>21 Dated this 23rd day of April 2015.</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p> <p>26</p> <p>27</p> <p>28</p> <p>29</p> <p>30</p> <p>31</p> <p>32</p> <p>33</p> <p>34</p> <p>35</p> <p>36</p> 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IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 27807

DAVID KNIGGE,

Plaintiff/Appellant,

vs.

B & L FOOD STORES, INC. and
ESTATE OF ROBERT KNIGGE,

Defendants/Appellees.

Appeal from the Circuit court
Fifth Judicial Circuit
Spink County, South Dakota
The Honorable Tony L. Portra, Presiding Judge

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Notice of Appeal filed March 24, 2016

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JURIDICTIONAL STATEMENT

This is an appeal from an Order granting a motion for summary judgment in its entirety to Defendants / Appellees B & L Food Store, Inc. (hereinafter “Redfield Food Store”) and the Estate of Robert Knigge (hereinafter “The Estate”).¹ A memorandum ruling was entered by the Honorable Tony L. Portra, Fifth Judicial Circuit, on February 16, 2016. The Order for Summary Judgment was thereafter entered on March 2, 2016. R. 254. Notice of Entry of Judgment was served on Plaintiff / Appellant David Knigge (hereinafter “Knigge”) on March 11, 2016. R. 259. Notice of Appeal was filed by Knigge on March 24, 2016. R. 261.

ISSUES PRESENTED ON APPEAL

I. WHETHER THE TRIAL COURT PROPERLY HELD THE ORAL EMPLOYMENT AGREEMENT WAS BARRED BY THE STATUTE OF FRAUDS BECAUSE IT COULD NOT BE PERFORMED WITHIN ONE YEAR OF ITS MAKING?

The trial court held that the oral employment agreement at issue was unenforceable pursuant to the Statute of Frauds as it was not capable of being performed within one year. The Court relied upon Knigge’s own testimony that the agreement was never reduced to writing and intended for an unspecified term of years.

Relevant Cases and Statutes:

- Harriman v. United Dominion Industries, Inc., 2005 SD 18
- Marrero v. McDonnell Douglas Capital Corp., 505 N.W.2d 275 (Mich.App. 1993)
- Troverse v. O’Meara, 493 N.W.2d 221 (S.D 1992)

II. IS THERE A QUESTION OF MATERIAL FACT AS TO KNIGGE’S INABILITY TO PROVE DETRIMENTAL RELIANCE, AS AN ELEMENT OF PROMISSORY ESTOPPEL?

¹ The settled record used in drafting Appellee’s Brief is cited as “R” with corresponding page number(s) as assigned by the Clerk of Courts.

The Trial court held that Knigge could not meet the first element of promissory estoppel, detrimental reliance; thus, the doctrine did not apply to the record as presented. The Court relied upon Knigge's testimony that i) he quit his job with the State of South Dakota and sold his home in Pierre in order to move to an employment venture in Oakes, North Dakota; ii) he chose to abandon the Oakes, North Dakota venture because the property was in substantial disrepair and was not worth the investment to continue; iii) he was offered employment with the Redfield Food Store thereafter at a higher rate of salary than his original job with the State, thus his claim of detrimental reliance was unsubstantiated.

Relevant Cases:

- Durkee v. Van Well, 2002 SD 150
- Marrero v. McDonnell Douglas Capital Corp., 505 N.W.2d 275 (Mich.App. 1993)

STATEMENT OF THE CASE

This matter was heard on February 2, 2016, at the Spink County Courthouse, Redfield, South Dakota, before the Honorable Tony L. Portra. The initial pleading was filed by Knigge against Appellees, alleging causes of action for breach of an oral employment contract and promissory estoppel. R. 2. Appellees filed a motion for summary judgment alleging no material questions of fact were presented and were entitled to judgment as a matter of law. Issues presented at the summary judgment hearing included i) whether the Statute of Frauds barred enforcement of the oral employment agreement and ii) whether the record supported the elements necessary for Knigge to assert a claim of promissory estoppel. The trial court granted Appellees' motion for summary judgment in its entirety. A Memorandum Ruling was entered on

February 16, 2016. R. 255. The Order for Summary Judgment was filed on March 2, 2016. R. 254.

STATEMENT OF MATERIAL FACTS

Decedent, Robert Knigge, was an agent of Redfield Food Store until his passing on June 23, 2013. R. 37: Plaintiff's Responsive Statement, #5; R.177: L. Knigge Depo. at 15. In October 2012, brothers Robert Knigge (hereinafter "Robert") and Knigge entered into an oral employment agreement to hire Knigge as the manager of K&J Foods, Inc, an Oakes, North Dakota grocery store, (hereinafter referred to as "Oakes store") owned by Robert. 'R.177: D. Knigge Depo. at 5. At that time, the Oakes store was not performing well financially and Knigge understood he would have the opportunity to secure a purchase agreement for the Oakes store, with repayment to begin once business became profitable. R.177: D. Knigge Depo. at 4. The terms of the Oakes store offer provided Knigge would resign from employment as an accountant in Pierre, South Dakota; sell his home in Pierre; and relocate to Oakes, North Dakota. R.177: D. Knigge Depo. at 13-14. In accordance with the Oakes Store agreement, Knigge finalized his relocation to North Dakota. R.177: L. Knigge Depo. at 82; D. Knigge Depo. at 10. Knigge served as manager for the Oakes Store from December, 2012 to February, 2013. 'R. 2: Compl. ¶14.

In January, 2013, Robert decided to close the Oakes store. R. 2: Compl. ¶15. The decision to close the store was attributed to Robert's recent medical diagnosis of Stage 4 glioblastoma, which carried an eighteen month survival prognosis. R.177: D. Knigge Depo. at 6, 9-11. The decision was also based on the significant amount of work and resources which would need to be expended in order to address the deteriorating

condition of the Oakes store premises and inventory. R.177: D. Knigge Depo. at 7, 9-10. During the course of winding up the Oakes store, Knigge and Robert discussed a new employment proposition where Knigge could serve as manager of the Redfield Food Store owned by Robert, in Redfield, South Dakota. R.177: D. Knigge Depo. at 10-11. The new employment agreement was all negotiated in one sitting. R.177: D. Knigge Depo. at 20. Knigge testified that his employment was to continue until i) Knigge's retirement or ii) Robert's children reached the age that they could take over the business operations of the Redfield Food Store. R.177: D. Knigge Depo. at 12, 19. Knigge began to work as the on-site manager of the Redfield Food Store in March, 2013. 'R.177: L. Knigge Depo. at 53.

Prior to Robert's death, Knigge's lack of experience in the grocery industry became readily apparent at the Redfield Food Store and caused Robert great concern. R.177: D. Bruns Depo. at 19-20; L. Knigge Depo. at 84. Of particular concern was the fact that the perishable food inventory was not kept up to date and was often left out after its expiration date or in a spoiled condition. R.177: D. Bruns Depo. at 18-19. After Robert's death, his wife Lynette Knigge (hereinafter "Lynette") became increasingly concerned with Knigge's conduct and honesty while performing his job. R.177: D. Bruns Depo. at 22-23; L. Knigge Depo. at 96. In particular, Knigge failed to provide accurate and complete financial reports and store updates. R.177: L. Knigge Depo. at 97-98. While under Knigge's supervision, the Redfield Food Store also experienced a significant theft of cash from a locked cabinet of which Knigge was charged with the safekeeping. R.177: D. Bruns Depo. at 22-23. Knigge also began a romantic relationship with a

subordinate employee, against store policy, which turned sour and resulted in a serious conflict during store hours. R.177: L. Knigge Depo. at 96-97.

Lynette became increasingly distrustful of the information supplied by Knigge, as the answers given were vague, evasive, and couched in defensiveness. R. 21: Plaintiff's Statement of Material Fact #94; R. 37: L. Knigge Depo. at 94². Such behavior rang true particularly when financial matters were discussed. R.177: L Knigge Depo. at 94. Notably, Lynette testified to an instance whereupon she directly requested Knigge to identify any financial accounts for the Oakes Store. Knigge replied that no such accounts existed and only confirmed the existence of an Oakes Store savings account after Lynette stated her intention to speak with her attorney. R.177: L Knigge Depo. at 94.

Approximately one week prior to Knigge's termination a business associate advised Lynette that Knigge claimed a severance payment of \$100,000 would be due to him in the event of termination. R.177: L Knigge Depo. at 101-102. Conversely, within the week after Knigge's termination, a second individual informed Lynette that Knigge directly told him that a severance payment was due in the amount of \$90,000. R.177: L Knigge Depo. at 102-103. To Lynette, the new mention of a severance payment and the inconsistency regarding of the amount claimed caused great concern regarding truthfulness and credibility.

On August 16, 2013, Knigge was terminated due to poor performance and lack of trustworthiness in the completion of his managerial duties. R.177: L. Knigge Depo. at 94, 96-97. Knigge demanded, and was denied, immediate cash payment of \$100,000

² Lynette Knigge testified that examples of Knigge's work excuses for failure to provide timely financial information included, "Oh, I had the – the statements at home or, you know, I can't get to them." L. Knigge Depo. at 94.

based upon a severance package of which there was no written record. R.177: L. Knigge Depo. at 103; L. Bruns Depo. at 10-11. On August 25, 2013, Knigge met with Ernest Stratmeyer and Lynette to discuss the severance package, whereupon Lynette refused to pay the \$100,000. R.177: L. Knigge Depo. at 109. In the period between Knigge's termination and the August 25th meeting, Knigge presented Lynette with a document showing \$315,324 in expenses. R. 21: Plaintiff's Statement of Material Facts #103; R.177: L. Knigge Depo. at 108-109; D. Knigge Depo. at 34; R. Ex. A. Knigge informed Lynette, "this is what I should be getting. You should be thankful. I'm only asking for a hundred thousand." R.177: L. Knigge Depo. at 109; D. Knigge Depo. at 34. Knigge filed a lawsuit against the Redfield Food Store and the Estate alleging a cause of action for breach of oral employment contract and promissory estoppel.

At the time the lawsuit was filed, Knigge alleged the Redfield Food Store employment terms were as follows:

- a. An annual salary of \$70,200.00 plus the possibility of bonuses based on the store's *annual* performance;
- b. A reimbursement agreement to pay for one-half of David's *annual* health insurance costs;
- c. Free housing at Robert and Lynette's home until David could locate a *suitable home in Redfield to purchase*;
- d. \$100,000 cash severance package in the event that David's employment was terminated by Redfield Food Store for any reason and
- e. The opportunity to invest in a *future* grocery store business with Robert and/or Redfield Food Store

R. 2: Compl. ¶3 (emphasis added).

When discussing the veracity of the foregoing allegations in deposition, Lynette testified that she first became aware of the Redfield Food Store employment agreement when she overheard a telephone conversation between Robert and Knigge. R.177: L. Knigge Depo. at 69. She further testified that, during the telephone conversation, Robert

only discussed two employment terms: (i) a salary of \$70,200 and (ii) a bonus to be awarded based on how well the store performed. R.177: L. Knigge Depo. at 69, 78-79, 85.

When Robert and Lynette discussed Knigge's employment, Robert never mentioned a severance package or health insurance benefits were part of the agreement. R.177: L. Knigge Depo. at 112, 115. Moreover, in speaking with business associates, separately, regarding Knigge's salary and employment, Robert never reported the existence of a severance package. R.177: D. Bruns Depo. at 25, 33. It is undisputed that Knigge did not inform Lynette of the severance package provision until the day he was terminated. R.177: D. Knigge Depo. at 22-23; L. Knigge Depo. at 103.

A final red flag was raised by the alleged contractual terms in that, to date, no employee of the Redfield Food Store receives health insurance benefits. R.177: L. Knigge Depo. at 72. As a result, Knigge's contention that he was to receive be given preferential health insurance coverage would have meant Robert Knigge intended to knowingly subject the Redfield Food Store to liability for an Employee Retirement Income Security Act (ERISA) violation. R. : Answer, ¶8.

It is undisputed that no part of the Redfield Food Store agreement was ever put in writing. R. 37: Plaintiff's Responsive Statement #18; R.177: D. Knigge Depo. at 31-32. Knigge admitted, in deposition, that he failed to secure a written employment agreement between himself and Decedent Robert Knigge in spite of direct acknowledgment of the following:

1. Robert was terminally ill at the time of contract formation; R. 21: Plaintiff's Statement of Material Fact #60
2. Knigge is a learned man with extensive financial and managerial experience; R. 21: Plaintiff's Statement of Material Fact #1

3. The only people present during the contract formation were Knigge and Robert; Plaintiff's Statement of Material Fact #57, 67
4. Knigge was cautioned by a third party to seek a written contract, with particular reference to the alleged severance provision; R. 177: D Bruns Dep. Pg. 25-26
5. Knigge characterizes his relationship with sister-in-law, Lynette Knigge, as so strained and distrustful that he allegedly required a severance payment of \$100,000 based upon his intuition that his employment would be terminated when Lynette took over, prior to the contract's intended and natural termination date; R. 21: Plaintiff's Statement of Material Fact #59-60

In spite of the foregoing, Knigge now asks this Court to step in and correct this failure by enforcing an oral employment agreement of which there is no record and of which he is the only surviving party.

STANDARD OF REVIEW

Summary Judgment is proper where the moving party has demonstrated that there is no genuine issue of material fact, and that it is entitled to judgment on the merits as a matter of law. SDCL §15-6-56(c). Review is limited to "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits."

Northstream Investments, Inc. v. 1804 Country Store Co., 2005 SD 61, ¶11, 697 N.W.2d 762, 765 (quoting SDCL 15-6-56(c)).

A trial court's ruling of summary judgment will be upheld, "when any basis exists to support" the decision. Tolle v. Lev., 2011 S.D. 65, 804 N.W.2d 440. Interestingly, this Court has held that if a "trial court reaches the right conclusion for the wrong reason, we will nonetheless affirm." Horne v. Crozier, 1997 S.D. 65, ¶5, 565 N.W.2d 50.

Thus, the legal mechanism of summary judgment is the "preferred process to dispose of meritless claims". 1997 S.D. at ¶5. Thus, the Supreme Court regarded it, "not as a disfavored procedure shortcut, but rather as an integral part of the Federal Rules as a

whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’” Id. at ¶5.

As a result, a party who provides testimony on the facts will not be allowed to “claim a material issue of fact which assumes a conclusion contrary to his own testimony.” Troverse v. O’Meara, 493 N.W.2d 221 n.2. Likewise a party opposing the entry of summary judgment “cannot claim a version of the facts more favorable to his position than testified to by him.” Peterson v. Spink Electric Cooperative, Inc., 1998 S.D. 60, ¶10, 578 N.W.2d 589.

Opposition to the motion must set forth specific facts establishing a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). No such issue will be found without sufficient evidence that a jury verdict would return in favor of the non-moving party. Id. at 249. Likewise, the “mere existence” of an alleged factual dispute will not defeat a properly supported summary judgment motion. Id. at 247. If the evidence of record is “merely colorable” or “not significantly probative,” the summary judgment motion will be granted. Id. at 249.

A disputed fact is material if it, “affect[s] the outcome of the suit under the governing substantive law.” SD State Cement Plant Comm’n v. Wausau Underwriters Ins. Co., 2000 SD 116, ¶ 9, 616 N.W.2d 397, 400-01. A burden is placed on the challenger to “substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy.” Tolle v. Lev., 2011 S.D. 65, 804 N.W.2d 440. Knigge, as the challenger in the case at bar, cannot overcome this burden.

ARGUMENTS AND AUTHORITIES

I. THE TRIAL COURT PROPERLY HELD THE ORAL EMPLOYMENT AGREEMENT WAS BARRED BY THE STATUTE OF FRAUDS BECAUSE IT COULD NOT BE PERFORMED WITHIN ONE YEAR OF ITS MAKING.

The statute of frauds, as codified by SDCL §53–8–2(1), prohibits enforcement of an oral agreement “that by its terms is not to be performed within a year from the making thereof.” If an oral agreement is found to extend beyond a term of one year it will be held *unenforceable*, “unless the contract or some memorandum thereof is in writing and subscribed by the party to be charged.” SDCL §53–8–2(1).

The statute serves an evidentiary role “to remove uncertainty by requiring ‘written evidence of an enforceable obligation.’” Harriman v. United Dominion Industries, Inc., 2005 SD 18, ¶15, 693 N.W.2d 44, 48. Thus, historical analysis traces the basis for its enactment combat “widespread perjury” associated with oral contracts. Id. at ¶15 n.5.³

This Court has reasoned that SDCL §53-8-2(1) does not “prohibit the making of a contract that by its terms is not to be performed within one year, but merely makes such contract *invalid* unless reduced to writing.” Troverse, 493 N.W.2d at 222 (emphasis added). Thus, the import of placing a contract within the confines of the statute of frauds is that, by holding the contract to be unenforceable, all terms therein shall also be rendered void.⁴

³ The Harriman court noted three justifications for use of the Statute of Frauds in today’s society:

(1) as an evidentiary function to combat perjury, (2) for its cautionary effect impressing upon the parties the significance of their agreement, and (3) as a channeling device that distinguishes enforceable contracts from unenforceable contracts. 2005 S.D. 18, n.5.

⁴ Restatement (Second) of Contracts §130(1) (1981): Contract Not To Be Performed Within A Year.

In Harriman v. United Dominion Industries, this Court held an oral employment agreement was barred by the statute of frauds. 2005 SD 18, 693 N.W.2d 44. The pertinent facts of Harriman’s agreement included: i) the contract terms “were never fully developed or reduced to writing;” ii) no writings were presented showing the duration of the contract; iii) the parties intended the contract to continue until either party was no longer satisfied with the arrangement or the employee elected to retire; and iv) the employee asserted that his retirement would occur at age 65, thereby intending a duration term of seventeen to twenty-seven years. Id. at §16-19. In rendering the decision, this Court focused on the parties intended term of duration. It held that, while the crucial term of duration was never discussed in the initial employment negotiation, it was clear that the parties “intended a contract of some unspecified term of years tied to contingencies other than [employee’s] lifetime.” Id. at ¶20. Thus, the agreement was barred by the Statute of Frauds as it was intended to be more than one year in duration. Id.

Importantly, a concurring opinion by Justice Zinter, concluded the contract was unenforceable under the Statute of Frauds based solely on employee’s “own admission, the oral agreement was to be performed over a period of time exceeding one year.” Id. at ¶29 (Zinter, J., concurring). Justice Zinter rejected the employee’s assertion the contract “could be performed in less than one year if death or some other contingency arose,” as such an event was not part of the employee’s claim. Id. at ¶30. The employee was held accountable for the record he created including i) his testimony, that the contract would

Where any promise in a contract cannot be fully performed within a year from the time the contract is made, all promises in the contract are within the Statute of Frauds until one party to the contract completes his performance.

continue until retirement, and ii) his expert witness computations of on-going damages for a period of twenty-nine years. Id. Finally, Justice Zinter relied upon the premise that enforcing an oral service agreement “intended to span a long period of time,” but which could be cut short based upon an intervening event, would “seriously undermine the Statute of Frauds efficacy in encouraging written contracts and preventing fraud and perjury.” Id. at ¶32.

A. Knigge testified that the oral agreement could only be performed upon two triggering events, neither of which could occur within one year of its making.

It is undisputed that the employment contract was strictly of an oral nature, the terms or substance of which were never reduced to writing or signed by a party to be charged. R. 177: D. Knigge Depo. at 31-32. Furthermore, Knigge testified that two events could render his performance complete: a) his retirement or b) Robert Knigge’s children reaching the age where they chose to take over the family business.

In deposition, Knigge sought to clarify his duty of performance as intended under the first triggering event, retirement. R. 177: D. Knigge Depo. at 32. He testified that he and Robert understood he would work for a term of “10, 15 years.” R. 177: D. Knigge Depo. at 12. This admission of a ten to fifteen year contractual duration would place the oral agreement strictly within the statute of frauds and render the agreement unenforceable and void as a matter of law.

Knigge also testified fully as to the second triggering event. He stated his duty of performance could also be rendered complete in the event that Robert Knigge’s children chose to take over the family business. R. 177: D. Knigge Depo. at 12, 19. Knigge provided clear and unequivocal statements as to the specific people intended when using

the term “children”. Knigge testified that Robert viewed the store as a “legacy for his kids, that I basically could work for about 10, 15 years and his kids *would be about the age that they could take over*” the business operations. R. 177: D. Knigge Depo. at 12. Knigge cannot escape the import of his own testimony which narrowed the realm of “children,” intended at the time of contract, to the minor children.

The record provides further support for this specific and limited definition of “children.” Testimony on record provides that, in preparing for his death, Robert was concerned for the wellbeing of his four young children with Lynette. R. 177: L. Knigge Depo. at 85-86, 122; D. Knigge Depp. at 12. Lynette Knigge corroborated Robert’s specific concern for the minor children after his death when she testified as follows:

Lynette:	“[Robert] just said ‘make sure you take care of the kids.’”
Pochop:	“Just knowing the type of relationship they had and the type of person that Bob was, would it make sense to you that Bob would want to take care of Dave after his death?”
Lynette:	“No”
Pochop:	“Okay, why not?”
Lynette:	“Because Robert’s concerned with his four kids.”
Pochop:	“But he actually demoted one of his kids to hire David.”
Lynette:	“Now I’m talking about the four little kids, our kids together”.

R. 177: L Knigge Depo. at 85-86.

In the case at bar, Lynette and Robert shared four children, born in the years: 1998, 1999, and 2000. R. 177: L. Knigge Depo. at 10. Thus, in the year 2013, when Knigge began his employment as manager of the Redfield Food Store, the children would be fifteen, fourteen, and thirteen years old, respectively. As a matter of law, the children could not assume business making authority until they reached the age of majority, thereby attaining the capacity to contract. South Dakota defines the age of majority as eighteen.

SDCL §26-1-1⁵. Thus, the earliest period in time in which the eldest child could reach the age of majority would provide Knigge with a contract a term of three years. Likewise, the youngest child attaining majority would provide Knigge with a contract term of five years.

Accordingly, Knigge's second condition of performance is directly linked the lifetime event of Robert's children reaching the age of majority. The trial court held that this duration of the contract would place the contract squarely outside of the one year statute of frauds provision and render the oral employment agreement void as a matter of law. R. 255: Memorandum Opinion p. 3.

On appeal, Knigge attempts to expand the definition of contemplated "children" to include both Robert's adult and minor children and those of whom were natural born as well as marital. Knigge dedicates considerable attention to the fact that the Decedent had one adult child and two adult step-children who could have taken over the business within the first year of his employment contract. The trial court however held this speculation was in direct contravention to his clear testimony as to the specific children intended at the time of contractual negotiation. R. 255: Memorandum Opinion p. 3. The Court found Knigge was "clearly" speaking of the minor children when testifying as to the contingency of the children taken over.

Knigge, as the challenger to a summary judgment ruling, is limited to the facts on record. He cannot argue a material issue of fact which assumes a conclusion contrary to his own testimony. Likewise he cannot claim a version of the facts more favorable to his

⁵ SDCL §26-1-1 Age of minority--Calculation of age.

Minors are natural male persons and natural female persons under eighteen years of age. The periods thus specified must be calculated from the first minute of the day on which persons are born, to the same minute of the corresponding day completing the period of minority.

position then as testified to by him. Any attempt by Knigge to inject speculation or conjecture into the term “children” after the record was completed, must fail as it lies in violation of the summary judgment standard of review.

B. Knigge testified that termination by Lynette was a “possibility” that would only serve to cut short his duty of performance.

A critical issue for this Court’s consideration is the duration of performance within the employment agreement, as presented by the record, versus the picture of conjecture and speculation painted by Knigge on appeal. Here, the record establishes a contract of a term of years tied to contingencies of retirement or the children coming of age to take over. Whatsmore, Knigge testified that he considered termination by Lynette to be a “possibility” that could cut short his performance. R. 177: D. Knigge Depo. at 12.

This Court, in Harriman, rejected the view that a possibility of termination, where one “no longer liked the arrangement,” placed the agreement outside the Statute of Frauds. Harriman, 2005 S.D. at ¶17, 20. Instead the Court held, where the parties intended a contract for some unspecified term of years, subsequent questions of possibility or contingencies, that the agreement *could* be performed in less than one year, were not allowed as they were not the nature of the plaintiff’s claim. Id. at ¶30.

Thus, the sole focal point in a statute of frauds’ inquiry is the performance required of the employee. Marrero v. McDonnell Douglas Capital Corp., 505 N.W.2d 275, 278 (Mich.App. 1993). A Michigan Appellate Court has found a “plaintiff’s own deposition testimony” to be instrumental in defining a contract’s term of duration beyond one year. Id. at 278. It noted:

[t]he *possibilities* of breach of contract, or termination by agreement, or dissolution in some other way in less than one year [did] not make the contract

one that ‘by its terms’ could have been performed within one year from being made. Id. (emphasis added)

As a result, the court ultimately rejected the plaintiff’s “attempts to avoid the effect of the statute of frauds...[by alleging]... he could have been fired within one year.”

Importantly, Knigge’s testimony confirms that, in his mind, the possibility of termination could have occurred five years after the employment agreement was formed. This line of thought cements the fact that he understood the agreement was intended to continue beyond one year.

Q: [Mr. Gillette] *If you had worked there for five years and she had fired you, you would get \$100,000?*

A: [Knigge] I would have expected it if it was – to me I would have pursued it if I didn’t feel it was just in her – if her reasons were not just.

Q: [Mr. Gillette] but that’s the contract that you and Bob made, right?

A: [Knigge] What was the contract

Q: [Mr. Gillette] That five years down the road, if she fired you, you got \$100,000?

A: [Knigge] *Yep.*

R. 177: D. Knigge Depo. at 32

On appeal, Knigge attempts to defeat the summary judgment ruling by twisting the record and testimony to create a perceived issue of material fact regarding possibility of Knigge’s termination. He asserts the contract could be performed in less than one year if he was fired by Lynette; however, this is a new interpretation of his claim that was not set forth in his initial pleading or reflected in his testimony.

Arguments of possibility, alternate meanings, or substantive changes to the record will not be allowed. As noted in Wilson v. Great Northern Railway Company, summary

judgment is a critical tool used to expose sham, frivolous, or unsubstantial claims that are so obvious it would be futile to try them. Wilson v. Great Northern Railway Company, 83 S.D. 207, 212.

Based upon the case law cited herein, the possibility of termination does not remove the agreement from the Statute of Frauds. Moreover, the plain meaning of the Statute requires limited inquiry into the preserved record for the intended term(s) of performance. Knigge is prevented from claiming a material issue which assumes a conclusion contrary to his own testimony. His attempts to inject mere speculation or conjecture of a third performance event are not supported by sufficient probative evidence to create an issue of material fact.

C. Knigge’s testimony and self-issued documentation support the trial court’s ruling that the oral agreement could not be performed within one year from its making.

The record at bar is replete with evidence that the alleged employment contract was intended to continue for a term of years, far exceeding the one-year statutory requirement. Once such instance is the damages calculation Knigge provided to Lynette totaling \$315,324. R. 37. Plaintiff’s Responsive Statement #22; R. 177: L. Knigge Depo. at 109; R. Ex. A. Knigge testified that the calculations were based upon a “ballpark” of what he “gave up” by quitting his job with the state, thus losing benefits and pension, as well as selling his house below market in order to move to Oakes. R. 177: D. Knigge Depo. at 33-34. The language of said document specifically noted that calculations were based on a retirement age of sixty-five.

Knigge was born in the year 1959, thus a retirement age of 65 would infer a contractual duration of eleven years from the year 2013. Similar to the employee in

Harriman, Knigge cannot escape his own computations showing on-going damages for a period of eleven years and the resulting inference that he intended to work for the Redfield Food Store for such a period, well exceeding the one year statutory requirement.

D. Examination into the totality of the contract provisions, as alleged by Knigge, supports the trial court ruling that the contract set forth term duration, to exceed one year.

Knigge's initial pleading asserts the "*specific terms* of employment" as follows:

- a. An *annual* salary of \$70,200.00 plus the possibility of bonuses based on the store's *annual* performance;
- b. A reimbursement agreement to pay for one-half of David's *annual* health insurance costs;
- c. Free housing at Robert and Lynette's home *until* David could *locate* a suitable *home in Redfield to purchase*;
- d. \$100,000 cash severance package in the event that David's employment was terminated by Redfield Food Store for any reason; and
- e. The *opportunity to invest* in a *future* grocery store business with Robert and/or Redfield Food Store R. 2:

Compl. ¶19 (emphasis added).

Review of the contract terms, as asserted by Knigge and in a light most favorable to Knigge, establishes the contract was clearly intended to exceed one year.

1. The employment terms, individually and as a whole, demonstrate the employment agreement was intended to continue beyond one year from its making.

The compensation terms as noted in (a) and (b) were to occur on an annual basis.

R. 2: Compl. ¶19. Likewise, subsection (c) provides Knigge with support until he could find and purchase a suitable home in Redfield, SD. Id. This provision infers a considerable length of time was imagined by the parties, as Knigge could search for

suitable housing, negotiate the purchase agreement, close on the property and effectuate relocation, all at his leisure. The purchase of a home is rarely undertaken if one plans to leave the area within twelve months. Finally, subsection (e) affords Knigge the opportunity to participate in future grocery store ventures. *Id.* This provision may be inferred to allow time for location scouting, as well as the negotiation of purchase agreements and financing, all of which could easily require an investment of time in excess of one year.

Based upon Knigge's own characterization of the agreement's terms, he is not able to withstand the scrutiny of summary judgment review. Knigge cannot cherry pick individual facts as creating a genuine issue of material fact. In rendering a *de novo* review, the record, as a whole, must be considered and statements viewed in their entirety. Thus, the contractual terms, taken together as asserted by Knigge, serve as direct evidence of the parties' mutual intent that Knigge's duty of performance would continue beyond one year.

2. Knigge identifies the alleged severance term as a “specific term of employment” and thereby holds it separate and apart from a contingency of duration.

Knigge's appeal brief dedicates considerable attention to the alleged severance term of the oral agreement and attempts to morph this term into a contingency of duration. However, his Complaint describes the severance payment as a “specific term[] of employment” and further lists the term alongside provisions for salary, health insurance, free housing, and future investment opportunities. R. 2: Compl. ¶19(d). Moreover, Knigge's testimony unequivocally differentiates between the contingencies tied to the contract's intended duration and the separate term of severance.

Q: [Mr. Gillette] At which point did you actually make the decision that you were going to take the management job in Redfield, South Dakota?

A: [Knigge] In Redfield? Well, it was that one conversation where he said his cancer was back, and we walked through the whole Oakes store and all the reasons for not going ahead with that, and we looked at the Redfield store and all the reasons for going ahead with that. You know, it was he wanted to get into the new location. It was a legacy for his kids, that *I basically could work for about 10, 15 years and his kids would be about the age that they could take over*. You know, then he asked the question about Lynette and then the conversation switched over to that and just discussed, you know, Lynette, and at that point I asked him if she was okay with it and he said she was. *Then we started talking about the possibility of her letting me go, and then I talked about the severance and then we talked about the salary that I would make.*”

R. 177: D. Knigge Depo. at 11-12.

Soon thereafter, the deposition testimony further delineated the difference between the contingencies of duration and the employment term of severance:

Q. [Mr. Gillette] Can you tell me generally speaking what you and Robert actually discussed as to the *terms of your employment versus* what you believe your understanding was in your head with regard to *the severance package*?

A: [Knigge] *The terms of the agreement were* basically that I now – I give up Oakes because we are going to scrap that, that was the initial agreement, and he wanted me to move down to Redfield and manage that store and get him into the new store and then *just manage the store until his kids, if one of them wanted to take over. That was the terms.*

Q: [Mr. Gillette] Specifically narrow down to the severance promise. What specifically did he say when he made that promise?

A: [Knigge] Basically he asked me- he asked me the question, what if Lynette would let you go. My response to that was, I want – *if she let's me go, basically I want \$100,000*, if she's going to let me go for any reason, and he agreed to that. *We had further discussion about salary and stuff*, but basically we agreed to both of that; *so that's why we even discussed the severance.*

Q: [Mr. Gillette] If Robert had fired you, would there have been any severance paid?

A: [Knigge] At that point, yes. If I were to move down to Redfield, he would have paid me severance, because part of the reason for the severance too was to get me back on my feet, you know, if I had left my accounting profession, and

basically it was to help me transition back into my profession or whatever I chose to be.

Q: [Mr. Gillette] Following the conversation that you had wherein the promise was made to you that you would have \$100,000 severance if you were fired for any reason-

A: [Knigge] Right

R. 177: D. Knigge Depo. at 19-20.

The foregoing testimony plainly demonstrates that the severance payment was directly linked to the possibility of premature release from his duties. The possibility was in no way intended to be part of the performance objectives. Instead, it was characterized as an intervening event. As in Harrimon, the mere possibility of termination has no impact on the contract's intended duration.

Knigge's initial pleading alleged that the oral employment agreement included a provision whereby a severance payment would be due to Knigge in the event he was terminated, for any reason. R. 2: Compl. ¶19. The "for any reason" language included in the alleged severance term is analogous to the Harriman contract, which provided that the contract could be cut short at any time, in the event that either party did not like the arrangement. In examining the parameters of Knigge's duty of performance, it is clear that Knigge has never characterized this oral employment agreement as anything other than a contract for a term-of-years. Thus, Knigge cannot escape the proscription of the Statute of Frauds by hiding behind the potentiality that it could have been cut short by an event of termination, even when such an event could occur at any time or for any reason.

E. A ruling affirming Summary Judgment in the case is just and proper to combat the risk of perjury.

1. Discrepancies in the record prove the case at bar present a risk of perjury.

As previously noted, oral agreements are a ripe opportunity for perjury. Here too the risk is real and present. The complete record demonstrates multiple discrepancies within Knigge's claims. Once such discrepancy is the basis of the promissory estoppel claim. Specifically, Knigge's Complaint stated that he moved from Pierre, South Dakota, directly to his employment position with the Redfield Food Store. However, upon further examination in deposition he testified that, in fact, he moved from Pierre to Oakes, North Dakota so that he could work at the Oakes Store. Only after the venture in Oakes was abandoned did he choose to move to Redfield, South Dakota.

Additionally, the record includes a discrepancy with regards to the severance payment alleged by Mr. Knigge. The record provides that two individuals spoke with Knigge separately regarding the amount of severance he alleged was owed to him. In one instance Knigge reported the severance amount was \$90,000. R. 177: L. Knigge Depo. at 102-103. In another instance, he reported a severance amount of \$100,000. R. 177: L. Knigge Depo. at 101-102. The import of such discrepancies within the Statute of Frauds inquiry is sobering and inescapable, especially where Knigge is the only surviving party to the agreement who is available to testify as to the original contractual discussion.

2. The record at bar is well developed and proves there is no need for further litigation on mere factual disputes which are immaterial to the substantive question of law.

On appeal Knigge attempts to detract from the Harriman decision by stating that it does not support a ruling of summary judgment in this case as the Harriman Court found questions of fact were present for consideration by a jury. However, Knigge's framing of the Harriman decision purposefully neglects critical facts which are distinguishable and as a result render this case ripe for summary judgment.

First, the Harriman decision describes an initial record limited to various documents provided by the parties, none of which spoke to contractual duration. Thus, the Harriman case required testimony to flesh out the contract terms, whereas this case does not. Here, critical discovery was completed. Prior to The Estate and the Redfield Food Store seeking summary judgment, four depositions were taken. One such deposition was taken from Knigge. As a consequence of this well developed record, Knigge's testimony on the critical issues of contractual performance and duration are available for review by the Court.

The second distinguishing fact which renders this case appropriate for summary judgment is that only one party to the original contract negotiations is available to testify and such testimony is on record. In Harriman the litigants were all available to testify under oath, thus significantly limiting the occasion for perjury on critical matters of import. Here the surviving party, Knigge, provided explicit and clear statements under oath. In more than one portion of the testimony he acknowledges that the agreement at bar could not be performed within one year of its making. Knigge now proposes the facts in testimony are disputed. He argues that he should be afforded the ability to flesh out this perceived "conflict on material facts" and further "live" testimony is required to provide "critical context" to his claims. However, this argument is fatally flawed. Appellant's Brief, p. 13.

Knigge ignores the fact that such a ruling would lie in direct contravention to the sole purpose upon which the Statute of Frauds was constructed. The second party to this oral agreement is not available to testify as to discrepancies between Knigge's deposition and the requested "live testimony." It is undisputed that Knigge is the sole surviving

party that was privy to the formation of this agreement. It is undisputed that he is the only person to whom Robert ever mentioned the severance term he seeks to enforce. It is undisputed that no portion of the agreement he seeks to enforce was ever reduced to writing. It is undisputed that Knigge, alone, benefits significantly from such enforcement. Thus, any perceived benefit to Knigge of “live testimony”, whereupon he is afforded the opportunity to bend his deposition testimony and provide clarification to otherwise clear and unequivocal statements under oath, is outweighed by the risk of perjury.

II. THERE IS NO QUESTION OF MATERIAL FACT AS TO KNIGGE’S INABILITY TO PROVE DETRIMENTAL RELIANCE, AS AN ELEMENT OF PROMISSORY ESTOPPEL.

To be successful in a claim for promissory estoppel, the plaintiff must prove:

1) the detriment suffered in reliance must be substantial in an economic sense; 2) the loss to the promisee must have been foreseeable by the promisor; and 3) the promisee must have acted reasonably in justifiable reliance on the promise made.

Durkee v. Van Well, 2002 SD 150, ¶23, 654 N.W.2d 807, 815,

Knigge’s claim of detrimental reliance is without merit and is based upon a sequence of events that has been taken out of context in an effort to suit Knigge’s own goals. Knigge asserts that Redfield Food Store and The Estate are estopped from denying the alleged contract terms, as he detrimentally relied upon the promise of employment at the Redfield Food Store. As a basis for this allegation, Knigge recites all the incidental and necessary steps he took in order to work at the Oakes Store owned by K&J Foods, Inc., as well as the Redfield Food Store.

In the case of, Marrero v. McDonnell Douglas Capital Corp., an employee attempted to circumvent the statute of frauds by alleging a claim of detrimental reliance

as he had resigned from a former job and relocated to Michigan in order to perform his employment duties. 505 N.W.2d 275 (1993). The employee claimed he quit his former job based on a promise that he “would be taken care of.” Id. at 278. The court rejected the employee’s claim for promissory estoppel on the basis that the “doctrine must be cautiously applied.” Id. The court noted that, “[t]he sine qua non of promissory estoppel is a promise that is definite and clear.” Id. Accordingly, a claim for promissory estoppel could not be supported based on “[a] prior relationship between parties alone.” Id. Instead the doctrine would be applied, “only where the facts are unquestionable and the wrong to be prevented undoubted.” Id. at 279. Importantly, the court held that “resignation from one position to assume another and relocation of family would be customary and necessary incidents of changing jobs rather than consideration to support a promissory estoppel claim.” Id. at 278.

The Marrero court plainly refused the employee’s attempt to “invert[] the sequence of events necessary to establish promissory estoppel.” Id. Instead the court examined the record and found that the employee’s “resignation from [his former employer] and the decision to move his family, *preceded*, by at least six months, the meeting at which the alleged promise of a three-year contract was made.” Id. Therefore, the court found that, based upon the length of time separating the relocation and contractual negotiation, the plaintiff could not believably argue detrimental reliance. Id.

As in the Marrero case, Knigge has inverted the sequence of events at issue and gone to great lengths to tie his original Oakes Store relocation efforts to the separate, and subsequent, employment agreement with the Redfield Food Store. It is crucial to note that Knigge has provided conflicting statements and testimony regarding the catalyst for

the Redfield relocation. In particular, Knigge's Complaint states that he "*moved from Pierre to Redfield* and began employment at [Redfield Food Store]." R. 2: Compl. ¶22

(emphasis added). The Complaint further alleges that Knigge:

altered his position to his financial detriment by selling a home in Pierre, terminating a good-paying State job with benefits in Pierre, giving up a State pension plan, agreeing to terminate any potential ownership interest in the Oakes, ND store, moving to Redfield, purchasing a home and dedicating his time to develop the Redfield Food Store, business in reliance upon his promises of employment with a set salary, a severance package and health insurance reimbursement.

R. 2: Compl. ¶27; See also R. 21: Plaintiff's Statement of Material Facts #64.

Conversely, Knigge's own testimony established the proper sequence of events as follows:

1. The Oakes store employment negotiations took place during a period of time from October to November, 2012. R. 177: D. Knigge Depo. at 4-5, 8.
2. Knigge was induced to quit his job and sell the home in Pierre based on the job opportunity in Oakes, North Dakota. R. 177: D. Knigge Depo. at 13-14.
3. Knigge's home in Pierre was placed on the market in November, 2012, in order to move to Oakes and such event occurred "before the decision to come to Redfield." R. 177: D. Knigge Depo. at 10, 13.
4. Knigge gave his former employer notice of intent to quit before he began to work at the Oakes store; however, the formal termination date was not effective until the "end of January," the last day of his paid vacation. R. 177: D. Knigge Depo. at 10.
5. Prior to the decision to close the Oakes store, Knigge worked there from December, 2012 – January, 2013. 2012. R. 177: D. Knigge Depo. at 9.
6. The decision to close the Oakes store was made in January, 2013. 2012. R. 177: D. Knigge Depo. at 9.
7. Knigge's on-site employment at the Redfield Store began in March, 2013. R. 37: Plaintiff's Responsive Statement #13, 17

Knigge's own testimony proves he relocated from Pierre to Oakes, North Dakota based upon the employment offer by K&J Foods, Inc., which was separate and apart from the subsequent move to Redfield, South Dakota for Redfield Food Store. As a result, the trial court found Knigge's testimony did not support his assertions. The Court found Knigge's choice to sell his home and quit his job with the State were based upon his decision to move from Pierre to Oakes, North Dakota, to manage the store there. Thus, the record did support his claim of detrimental reliance. R. 255: Memorandum Opinion p. 3-4.

Additionally, the trial court did not find substantial financial detriment in Knigge's choice to forgo the Oakes' store opportunity for employment with the Redfield Food Store. R. 255: Memorandum Opinion 3-4. Critically, Knigge was again held accountable for testimony on the condition of Oakes' Store and the basis for the decision to close the store. As to this point, Knigge testified as follows:

[Robert] said the cancer had come back and it made more sense for me to be in Redfield, and we took a look at the Oakes store and we decided that it was *run down*, the equipment was *bad*, you know, 40 percent of the inventory was *outdated*, the parking lot *needed to be replaced* and *it would just take too much in resources to have to continue* on with the Oakes store.

R. 177: D. Knigge Depo. at 9-10 (emphasis added).

The trial court relied upon the foregoing testimony, holding the loss of opportunity to purchase the Oakes store was not a substantial economic loss. The Court also cited Knigge's own testimony as support that i) running the store was not feasible and ii) a significant number of problems in the property led to the business decision to withdraw from the venture. R. 255: Memorandum Opinion p. 4.

The trial court gave further consideration to Knigge's testimony regarding the difference in salaries and benefits provided by the State of South Dakota and The Redfield Food Store. The trial court compared the value and benefits conferred by both positions and found the record demonstrated no substantial economic loss existed to support the claim for promissory estoppel. R. 255: Memorandum Opinion p. 4.

Knigge was prevented from blurring the contractual boundaries and benchmarks in order to suit his own goals. He was also prevented from inverting the sequence of events to recover for his own voluntary actions now that he regrets the consequences. Thus, Knigge is not able to present a material question of fact as to the claim of promissory estoppel. Summary judgment should be affirmed as the record provides a clear basis to support the trial court's decision. It would be unjust and unduly burdensome to require the Redfield Food Store and The Estate to fully litigate this matter.

CONCLUSION

Knigge provided extensive testimony that his employment with the Redfield Food Store was to continue for an indefinite term of years, well beyond one year of its making. Furthermore, the record and testimony provided by Knigge demonstrate he is not able to prove detrimental reliance; thus, he fails to present a question of material fact regarding his claim for promissory estoppel. Knigge attempts to recreate the record in his favor do not conform to the summary judgment standard of review. Knigge is not able to claim a material issue of fact which assumes a conclusion contrary to his own testimony. Likewise he cannot claim a version of facts that is more favorable to his position than as testified to by him.

Accordingly, The Estate and the Redfield Food Store, respectfully request this Court affirm the trial court's order granting summary judgment as to Knigge's claim of promissory estoppel and breach of oral employment contract.

Dated this 2nd day of September, 2016.

GILLETTE LAW OFFICE, PC

/s/ Kristen M. Kochejian

Kristen M. Kochejian

Attorney for Appellees

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REQUEST FOR ORAL ARGUMENT

Appellees B&L Food Stores, Inc and representatives for the Estate of Robert Knigge respectfully requests the opportunity to present twenty (20) minutes of oral argument pursuant to SDCL § 15-26A-83.

Dated this 2nd day of September, 2016.

GILLETTE LAW OFFICE, PC

/s/ Kristen M. Kochejian

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the type volume limitation of SDCL § 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this brief, the body of the brief contains 8,535 words and 42,959 characters (not including spaces), exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Addendum Materials, and Certificate of Counsel.

Dated this 2nd day of September, 2016.

GILLETTE LAW OFFICE, PC

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CERTIFICATE OF SERVICE

Kristen M. Kochejian, one of the attorneys for Appellees B&L Food Stores, Inc., and the Estate of Robert Knigge, pursuant to SDCL Chapter 15-26C (Supreme Court Electronic Filing Rules), hereby certifies that on this 2nd day of September, 2016, she caused the following documents:

- Appellees Brief (PDF Format)
- Appellees Appendix (PDF Format)

to be filed electronically with the Clerk of the South Dakota Supreme Court via email, and that the original and two hardcopies of these documents were mailed by U.S. Mail, postage prepaid, to:

Shirley Jameson-Fergel
Clerk, South Dakota Supreme Court
500 East Capitol
Pierre, SD 57501
SCClerkBriefs@ujs.state.sd.us

The undersigned further certifies that the above documents were also emailed to the following attorneys:

Stephanie E. Pochop
405 Main Street
PO Box 149
Gregory, SD 57533
Stephanie@rosebudlaw.com
Attorney for Appellant David Knigge

Dated this 2nd day of September, 2016.

GILLETTE LAW OFFICE, PC

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Attorney for Appellees



STATE OF SOUTH DAKOTA
FIFTH JUDICIAL CIRCUIT



PRESIDING JUDGE

Scott P. Myren

CIRCUIT JUDGES

Jon S. Flemmet

Tony L. Portra

Richard A. Summers

MAGISTRATE JUDGE

Mark A. Anderson

TONY L. PORTRA

Circuit Judge

Michelle Galkowski
Official Court Reporter

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P. O. Box 1087

Aberdeen, SD 57402-1087

Phone: 605-626-2450

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February 16, 2016

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Re: Knigge v. B & L Food Stores, Inc. and Estate of Robert Knigge
Spink County File CIV 13-83

Dear Counsel:

I have now had time to consider Defendants' Motion For Summary Judgment. The following is my decision on that motion.

Plaintiff has brought this suit against Defendants alleging that he is owed compensation pursuant to an oral employment contract that he made with Robert Knigge. Complaint at 2. It is undisputed that the employment agreement was never reduced to writing. Deposition of David Knigge (hereinafter "DK"), pp. 31-32. Certain basic facts are also undisputed: that Plaintiff began working for B & L Food Stores, Inc. in Redfield on February 20, 2013, that Robert Knigge died on June 23, 2013, and that Plaintiff was terminated from his employment on August 16, 2013.

Plaintiff alleges that the terms of the contract included: a) an annual salary of \$70,200 plus performance bonuses; b) a reimbursement of one-half of Plaintiff's annual health insurance costs; c) free housing with Robert and Lynette Knigge until he could find a suitable home to purchase; d) a \$100,000 cash severance payment in the event he was terminated for any reason; and e) the opportunity to invest in a future grocery store business with Robert and/or B & L Food Stores, Inc. Complaint at 3.

Filed on: 03/02/2016 SPINK

County, South Dakota 71CIV13-000083

Defendants claim that they are entitled to summary judgment because Plaintiff's claim for the breach of the oral employment agreement is barred by SDCL 53-8-2, commonly known as the statute of frauds. That statute provides, in relevant part:

The following contracts are not enforceable by action unless the contract or some memorandum thereof is in writing and subscribed by the party to be charged or his agent, as authorized in writing:

- (1) An agreement that by its terms is not to be performed within a year from the making thereof[.]

Defendants argue that the duration of the agreement was tied to Plaintiff retiring or one of Robert and Lynette Knigge's children reaching the age of majority and taking over the business. Since neither thing would occur within one year, the contract could not be performed within one year and is therefore subject to the statute of frauds.

Plaintiff first claims that this oral agreement is outside of the statute of frauds as there was no definite term in the contract. Therefore, the so called death contingency would apply. However, I find this case to be similar to *Harriman v. United Dominion Industries*, 2005 SD 18, 693 N.W.2d 44. In that case:

Harriman argued that because it was possible for Harriman to have died prior to the end of the first year of the contract, it was possible for the contract to be completed within one year of its making. Therefore, the contract would not fall within the statute of frauds.

Id. at ¶ 18, 693 N.W.2d at 49. However, the Court did not find that argument persuasive. Rather, the Court found that:

...it is clear from the record that the parties did not intend a permanent or lifetime contract. Rather, the parties intended a contract of some unspecified term of years tied to contingencies other than Harriman's lifetime. Because the contract was intended to be more than one year in duration, that is until Feterl Manufacturing or Harriman no longer liked the arrangement, or Harriman elected to retire, it falls within the statute of frauds.

Id. at ¶ 20, 693 N.W.2d at 49.

Similarly, Plaintiff's testimony regarding the duration of the agreement in this matter was that he would remain employed until he was ready to retire in 10-15 years or until one the children were ready to take over. The contract was intended for an unspecified term of years tied to contingencies other than Plaintiff's lifetime, 1) his retirement or 2) the children taking over. Therefore, the death contingency does not apply to take this contract outside of the statute of frauds.

Plaintiff also argues that it was possible for the contract to have been performed within one year because Robert has an adult child from another relationship that could have stepped in to take

over the store within a year. However, Plaintiff can claim no better version of the facts than his own testimony, and that claim is not supported by the evidence. Plaintiff testified that the deal was all negotiated in one sitting. DK at 20. Regarding this issue, he testified:

The terms of the agreement were basically that I now - I give up Oakes because we are going to scrap that, that was the initial agreement, and he wanted me to move down to Redfield and manage that store and get him into the new store and then just manage the store until his kids, if one of them wanted to take over. That was the terms.

DK at 19-20.

He further testified, "You know, it was he wanted to get into the new location. It was a legacy for his kids, that I basically could work for about 10, 15 years and his kids would be about the age they could take over." DK at 12.

Clearly, by his own testimony, he and Robert were speaking of the minor children since they were agreeing that Plaintiff would manage the store until the kids were old enough to take over. Given the ages of the minor children, it would be impossible for him to perform the agreement, as he described it, within one year. Therefore, the oral agreement is unenforceable under the statute of frauds.

Plaintiff also argues that even if the statute of frauds applies, Defendants are still not entitled to summary judgment because of the doctrine of promissory estoppel. The South Dakota Supreme Court explained promissory estoppel in relation to the statute of frauds in *Durkee v. Van Wall*:

To apply the doctrine of promissory estoppel, the trial court must find: 1) the detriment suffered in reliance must be substantial in an economic sense; 2) the loss to the promisee must have been foreseeable by the promisor; and 3) the promisee must have acted reasonably in justifiable reliance on the promise made.

2002 SD 150, ¶ 23, 654 N.W.2d 807, 815.

Regarding the first element of substantial detriment, Plaintiff asserts that: 1) he left a good job (working for the State in Pierre) and additional benefits at that job by leaving early; 2) he sold his house in Pierre for under market value; 3) he moved to Redfield and lived with his brother to manage a store in a chaotic time; and 4) he scrapped an agreement where he was purchasing his own business in Oakes on terms that he had negotiated. Plaintiff's Brief at 18. However, Plaintiff's testimony does not support those assertions.

Concerning items one and two, those things happened as a result of his decision to move to Oakes to manage the store there, not due to the oral agreement whereby he moved to Redfield. DK at 13-14. As to item four, that is supported by his testimony. However, it does not appear that giving up the opportunity was a substantial financial detriment. His agreement with Robert was to purchase the store in Oakes for \$200,000. DK at 6. Although part of the decision to

abandon the agreement as to the Oakes Store was the fact that Robert's cancer came back, it was also based upon the condition of the Oakes store. DK at 9-10. Plaintiff testified on this point:

He said the cancer had come back and it made more sense for me to be in Redfield, and we took a look at the Oakes store and we decided that it was run down, the equipment was bad, you know, 40 percent of the inventory was outdated, the parking lot needed to be replaced and it would just take too much in resources to have to continue on with the Oakes store.

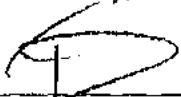
DK at 9-10. The loss of the opportunity to buy the Oakes store for \$200,000 does not appear to be a substantial economic loss given the number of problems that Plaintiff identified with that store. According to Plaintiff's own testimony, the Oakes store was abandoned because he and Robert determined there were enough problems with the store to make running it not feasible.

Item number three is also a true statement as Plaintiff did move to Redfield to manage that store. However, it again does not appear that it created a substantial economic loss for him. While working in Redfield, he was paid at the rate of a \$70,200 annual salary. DK at 12. By comparison, he was making a salary of \$68,000 while he was working for the State. DK at 8. While he also received benefits while working for the State, he received free housing while in Redfield because he lived with Robert and Lynette. Deposition of Lynette Knigge, p. 78.

Considering all of those facts, I do not find that Plaintiff suffered a substantial economic detriment in reliance on the promise. Therefore, he cannot meet the first element of promissory estoppel, and the doctrine does not apply to these facts.

In conclusion, I find that the oral agreement at issue herein was not capable of being performed within one year, therefore the agreement is unenforceable pursuant to SDCL 53-8-2. Further, I do not find that the doctrine of promissory estoppel applies because Plaintiff is not able to show a substantial economic detriment in reliance on the promise. Therefore, Defendants' Motion For Summary Judgment is granted.

Sincerely,



TONY L. FORTRA
Circuit Judge

Cc: File

Pension difference	1600	If retired at age 65	
	650		
Monthly difference	950	240 20 years life expectancy	228,000 gave up this benefit

Discussed that it would take a huge time commitment:

Oakes - worked 7 days a week until store closed for weekends

Redfield - worked 6 days a week on a regular basis, especially for the move to the new store.

Hours	40	33	1320	Reg	
	65	33	2145	Total	
add'l hours			825		27,844 OT not compensated
Moving expense					2,500
sale house	135000		120000		
	6%		6%		
	8,100		7,200		15,300 est
Break DirectTV contract					480
Hook up fees - elect, gas, water, tv					250
Lost wages - to find an equivalent job; estimate it takes 1 month per \$10K	70,200	33.75			
	5,850	7 months			40,950
Total					<u>315,324</u>

Note: 1/2 of health care costs were supposed to be paid; which would increase the total.

Exhibit A

FILED
 STATE OF SOUTH DAKOTA)
 COUNTY OF SPINK)
 SOUTH DAKOTA JUDICIAL SYSTEM FIFTH JUDICIAL CIRCUIT
 5TH CIRCUIT CLERK OF COURT

DAVID KNIGGE, <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> B & L FOOD STORES, INC., and ESTATE OF ROBERT ALLEN KNIGGE, <p style="text-align: center;">Defendants.</p>	By _____ <p style="text-align: right;">CIV No. 13-____</p> <p style="text-align: center;">COMPLAINT</p>
--	--

Comes now David Knigge, the Plaintiff, and for his Complaint, states and alleges as follows:

JURISDICTION

- 1) The Plaintiff David Knigge is an adult resident of Sioux Falls, South Dakota.
- 2) The Estate of Robert Allen Knigge, filed upon the death of David Knigge's brother Robert Knigge, is pending as Probate file # 13-23 in the Fifth Judicial Circuit, Spink County, South Dakota.
- 3) B & L Food Stores, Inc. is a South Dakota corporation that operates a grocery store business in Redfield, South Dakota.
- 4) Robert Knigge and his spouse Lynette Knigge were shareholders in B & L Food Stores, Inc. at all times relevant to this Complaint.
- 5) Robert Knigge was an agent who was authorized to make binding representations on behalf of B & L Food Stores, Inc.
- 6) David Knigge and Robert Knigge are brothers and shared a close relationship with each other during Robert's lifetime.
- 7) On February 20, 2013, David Knigge was employed as a manager by B & L Food

Stores, Inc. at its Redfield store.

8) Robert Knigge died on June 23, 2013.

9) On October 25, 2013, David Knigge filed a claim against the Estate of Robert Allen Knigge in the amount of \$102,045.35 in relation to the present claim.

10) On October 31, 2013, the Estate of Robert Allen Knigge disallowed David Knigge's claim.

11) This Court has personal and subject matter jurisdiction in this case.

BREACH OF ORAL EMPLOYMENT CONTRACT

12) In October 2012, Robert made an offer to David to manage a grocery store in Oakes, North Dakota that Robert owned through an entity called K&J Foods, Inc.

13) The terms of the agreement reflected the brother's close relationship and included an option for David to purchase the store. David accepted the terms.

14) Between December 2012 and February 2013, David worked with Robert in managing the Oakes, North Dakota grocery store with the intent that David would receive Robert's ownership interest in the store.

15) Between January and February 2013, on behalf of B & L Food Stores, Inc., Robert negotiated with David to close the Oakes, North Dakota store and to have David move permanently to Redfield, South Dakota to manage the Redfield store.

16) Robert explained to David that Robert had been diagnosed with a serious cancer and was also experiencing marital discord. Robert expressed that he required his brother's assistance under these circumstances in order to be able to maintain his grocery business.

17) In 2013, B & L Food Stores, Inc. was in the process of remodeling and moving

the Redfield store into a new location on the Redfield Main Street. This was a time-consuming and difficult process, especially because of Robert's health and emotional situation.

18) In 2012, B & L Food Stores, Inc. had unsuccessfully tried to hire other managers for the Redfield store. Robert had even offered to buy or build a home for one potential managerial candidate.

19) To induce David to move to Redfield to manage the grocery store, B & L Food Stores, Inc., through Robert Knigge as an agent, offered David the following specific terms of employment:

- a) an annual salary of \$70,200.00, plus the possibility of bonuses based on the store's annual performance;
- b) a reimbursement agreement to pay for one-half of David's annual health insurance costs;
- c) free housing at Robert and Lynette's home until David could locate a suitable home in Redfield to purchase;
- d) \$100,000 cash severance package in the event that David's employment was terminated by B & L Food Stores, Inc. for any reason; and
- e) the opportunity to invest in a future grocery store business with Robert and/or B & L Food Stores, Inc.

20) Robert had apparent authority and capacity to contract on behalf of B & L Food Stores, Inc.

21) Robert represented to David that he was authorized to make this offer on behalf of B&L Food Stores, Inc. and represented that Lynette was in agreement with the offer.

22) Based upon Robert's representations, David accepted the offer of employment. David moved from Pierre to Redfield and began employment at B & L Food Stores, Inc.'s in the Redfield store based on the \$70,200 salary agreed upon.

23) During Robert's lifetime, Lynette never expressed any disagreement with the terms and conditions of David's employment as the B & L Food Stores, Inc.'s Redfield store manager.

24) David performed on all material aspects of the employment agreement and successfully managed the B & L Food Stores, Inc.'s Redfield store between February 2013 and August 2013.

25) Several months after Robert's death, Lynette approached David at work in August and told him that she needed to have a meeting with him on behalf of B&L Food Stores, Inc.

26) On August 14, 2013, David met with Lynette, David Bruns and Lisa Bruns. At the meeting Lynette told David that he was being terminated by her on behalf of B & L Food Stores, Inc. They agreed upon a termination date of August 16 because Lynette had hired a replacement manager to begin employment on August 19.

24) When David addressed the \$100,000 severance agreement with B & L Food Stores, Inc., Lynette asked how David and Robert had reached that figure as a severance amount. Lynette admitted that she knew that a severance agreement had been reached but stated that she thought that the \$100,000 severance agreement was "too high."

25) Lynette asked David to come up with detail supporting the severance proposal amount.

26) Since Robert's death, B & L Food Stores, Inc. has terminated David's

employment but refused to pay David the \$100,000 severance pay and the reimbursement of one half of his health insurance premiums during the time of his employment.

27) B & L Food Stores, Inc. is estopped from denying the terms of the employment contract with David Knigge because he has altered his position to his financial detriment by selling a home in Pierre, terminating a good-paying State job with benefits in Pierre, giving up a State pension plan, agreeing to terminate any potential ownership interest in the Oakes, ND store, moving to Redfield, purchasing a home and dedicating his time to develop the B & L Food Stores, Inc. business in reliance upon its promises of employment with a set salary, a severance package and health insurance reimbursement.

28) B & L Food Stores, Inc. ratified the representations of Robert in extending the offer of employment to David under the terms accepted by him.

29) Alternatively, if Robert did not have actual authority to extend an offer of employment to David, Robert's Estate is liable for Robert's representations that David relied upon to his detriment.

30) Because the contract was capable of performance, David is entitled to specific performance of the contractual terms.

31) David is entitled to be reimbursed for his pecuniary losses resulting from the breach of his employment contract terms.

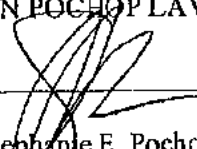
WHEREFORE, Plaintiff demands Judgment against B & L Food Stores, Inc. or, alternatively the Estate of Robert Knigge, as follows:

- 1) That the Court require specific performance of the contract pursuant to SDCL § 21-9-1;

- 2) That the Court award David Knigge all pecuniary compensation necessary to put him in the position he would have been in but for the breach of contract;
- 3) That the Court award David Knigge any other legal or equitable relief which the Court deems just and necessary under the circumstances.

Dated this 12th day of December, 2013.

JOHNSON POCHOP LAW OFFICE



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Attorney for the Plaintiff

STATE OF SOUTH DAKOTA)
) SS.
COUNTY OF SPINK)

IN CIRCUIT COURT

FIFTH JUDICIAL CIRCUIT

DAVID KNIGGE,

Plaintiff,

vs.

B & L FOOD STORES, INC. and
ESTATE OF ROBERT ALLEN
KNIGGE,

Defendants.

Civ. No. _____

ANSWER

Comes now the Defendants and for their Answer to Plaintiff's Complaint state as follows:

1. That the Defendants deny each and every allegation, matter and thing contained in said Complaint unless otherwise expressly admitted or qualified.

2. Defendants admit Paragraphs 1, 2, 3, 4, 5, 8, 9, 10, 11, 12, 17, 19a, 19c, 25, 26, 28 and 29 of Plaintiff's Complaint.

3. In regard to paragraph 6 of Plaintiff's Complaint, Defendants do not have sufficient information to admit that Robert Knigge and Plaintiff shared a close relationship during Robert's entire lifetime. Defendants do admit that Robert Knigge and David Knigge did have what appeared to be a typical sibling relationship.

4. In regard to paragraph 7 of Plaintiff's Complaint, Defendant, B & L Food Stores, Inc.'s employment records show that David Knigge's date of employment was January 28, 2013.

5. In regard to paragraph 15 of Plaintiff's Complaint, Defendants state that this paragraph was denied because there was no negotiation with Plaintiff, Robert decided to close the store in Oakes, North Dakota.

6. In regard to paragraph 16 of Plaintiff's Complaint, Defendants state that they are without sufficient knowledge to admit or deny what Robert Knigge told David Knigge between January and February of 2013 as to his health, marriage or need for assistance at the grocery store he owned in Redfield, South Dakota. Defendants affirmatively state that David Knigge had knowledge of the seriousness and terminal nature of Robert Knigge's brain cancer in October 2011.

7. In regard to paragraph 18, Defendants deny being unsuccessful in attempting to hire other managers for the Redfield Store, but admit that Robert did offer to build a home for David Bruns if he would move to Redfield and manage the grocery store.

8. In regard to paragraph 19b, Defendants affirmatively state that Robert Knigge was well aware that such an offer would have been a violation of ERISA and would have caused Defendant B & L Food Stores, Inc. to have to offer the same benefit to each employee of the store.

9. In regard to paragraph 20, Defendants affirmatively allege that David Knigge was aware of Robert Knigge's brain cancer and knew that Robert Knigge was mentally incapacitated by his medical condition.

10. In regard to paragraphs 21 and 23, Defendants affirmatively allege that Lynette Knigge was opposed to hiring David Knigge to manage the store and expressed her opposition to his being hired to Robert Knigge and David Knigge.

11. In regard to paragraph 22, Defendants admit Plaintiff's annual salary was \$70,200.

12. In regard to paragraph 27 [sic], Defendants affirmatively allege that Plaintiff voluntarily left his job for the sole purpose of taking a job managing the grocery store in Oakes, North Dakota.

Affirmative Defenses

13. Defendants incorporate paragraphs 1 – 12 of this Answer.

14. Plaintiff was an "at will" employee as that term is defined in SDCL 60-4-4.

15. Plaintiff's claim is barred by the Statute of Frauds SDCL 53-8-2(1).

16. Plaintiff has not stated a claim upon which relief can be granted.

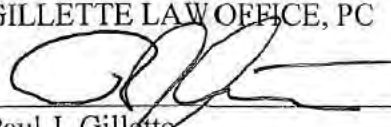
WHEREFORE, Defendant prays as follows:

1. Plaintiff's Complaint be dismissed upon merits; and

2. For such other and further relief as the Court deems just and equitable.

Dated this 7th day of January, 2014.

GILLETTE LAW OFFICE, PC




Paul J. Gillette
Attorney for Defendants
701 Main Street
P.O. Box 60
Redfield, South Dakota 57469

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of January, 2014, I sent by first class mail, postage prepaid, a true and correct copy of Answer to the following:

Stephanie E. Pochop
Johnson Pochop Law Office
Attorneys at Law
PO Box 149
Gregory, SD 57533



Paul J. Gillette

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF SPINK	)	FIFTH JUDICIAL CIRCUIT

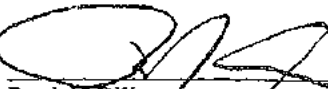
DAVID KNIGGE,	)	Civ. No. 13-083
)	
Plaintiff,)	
vs.	)	SUPPLEMENTAL STATEMENT OF
	)	MATERIAL FACTS IN SUPPORT OF
B & L FOOD STORES, INC. and	)	BRIEF FOR SUMMARY JUDGMENT
ESTATE OF ROBERT ALLEN)	
KNIGGE,)	
)	
Defendants.)	

1. Decedent, Robert Knigge, was the brother of Plaintiff, David Knigge. Complaint ¶6.
2. Prior to February 2013, K&J Foods, Inc., operated a grocery business in Oakes, North Dakota. Complaint ¶ 15; L. Knigge Dep. 42-43.
3. At all times relevant to the Complaint, Decedent, Robert Knigge, was an agent of K&J Foods, Inc. Complaint ¶ 12; L. Knigge Dep. 42.
4. At all times relevant to the Complaint, B&L Food Stores, Inc., operated a grocery business in Redfield, South Dakota. Complaint ¶3.
5. At all times relevant to the Complaint, Decedent, Robert Knigge, was an agent of B&L Food Stores, Inc. Complaint ¶5.
6. In October 2012, Decedent, Robert Knigge, and Plaintiff David Knigge entered into an employment agreement to hire Plaintiff as the manager of K&J Foods, Inc, grocery store in Oakes, North Dakota. D. Knigge Dep. 4-5, 7-8, 12.
7. Based upon the employment agreement with K&J Foods, Inc., Plaintiff resigned from employment as an accountant in Pierre, South Dakota. D. Knigge Dep. 10, 13-14.
8. Based upon the employment agreement with K&J Foods, Inc., Plaintiff listed his home in Pierre, South Dakota for sale in November 2012. D. Knigge Dep.13.
9. Based upon the employment agreement with K&J Foods, Inc., Plaintiff sold his home in Pierre, South Dakota. D. Knigge Dep.10, 13-14.
10. Based upon the employment agreement with K&J Foods, Inc., Plaintiff relocated to Oakes, North Dakota. D. Knigge Dep. 13-14.
11. The terms of the K&J Foods, Inc., employment agreement were never fully developed or reduced to writing. D. Knigge Dep. 6-7, 13-14, 31-32.

12. At the time Plaintiff accepted employment with K&J Foods, Inc., Plaintiff envisioned he would work for the company for 10 years. D. Knigge Dep. 9.
13. Plaintiff served as manager for the K&J Foods, Inc., Oakes, North Dakota Store from December, 2012 to February, 2013. Complaint ¶14.
14. In or around January, 2013, Robert Knigge decided to close the K&J Foods, Inc., Oakes, North Dakota Store. D. Knigge Dep. 9; Complaint ¶15.
15. Between January and February, 2013, Decedent, Robert Knigge, made an employment offer to Plaintiff to serve as manager of the B&L Food Stores, Inc., grocery store located in Redfield, South Dakota. Complaint ¶15.
16. In February 2013, Plaintiff's employment with K&J Foods, Inc., ended. Complaint ¶14.
17. On February 20, 2013, Decedent, Robert Knigge, employed Plaintiff to serve as manager of the B&L Food Stores, Inc., grocery store located in Redfield, South Dakota. Complaint ¶7.
18. No part of the B&L Foods Stores, Inc., employment agreement was ever put in writing. D. Knigge Dep. 31-32.
19. Plaintiff testified that his employment position with B&L Foods Stores, Inc., was to continue until i) Plaintiff's retirement or ii) Decedent Robert Knigge's children chose to take over the business operations of the Redfield Food Store. D. Knigge Dep. 19, 32.
20. Decedent Robert Knigge's natural children with Lynette Knigge were born in the years 1998, 1999, and 2000. L. Knigge Dep. 10.
21. Plaintiff did not inform Lynette Knigge, wife of the Decedent, of the alleged severance package provision until the August 2013 meeting whereupon Plaintiff was advised that he was to be terminated. D. Knigge Dep. 22-23.
22. In August 2013, Plaintiff's employment with B&L Foods Stores, Inc. was terminated. Complaint ¶26.

Dated this 22nd day of January, 2016.

GILLETTE LAW OFFICE, PC



Paul J. Gillette
Attorneys for Defendants
701 Main Street
P.O. Box 60
Redfield, South Dakota 57469
605-472-1210

CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January, 2016, I served by Odyssey, a true and correct copy of Supplemental Statement of Material Facts in Support of Brief for Summary Judgment to the following:

Stephanie E. Pochop
Johnson Pochop Law Office
Attorneys at Law
PO Box 149
Gregory, SD 57533



Paul J. Gillette

KNIGGE BY POCHOP

1 Q Okay. Did you participate in the management of Redfield,
2 Inc. - or Redfield Food Center during Bob's life?

3 A No.

4 Q And was Bob the person that was overseeing the managers of
5 your store until his death?

6 A Yes.

7 Q And then there's also K&J, Inc.?

8 A Yes.

9 Q And that's the corporation that was created to own and
10 manage the Oakes store --

11 A Oakes store.

12 Q Oakes, North Dakota?

13 A Right.

14 Q And that is at - I understand that started in, like, 2005?

15 A I believe that's when it was.

16 Q Okay, how did you guys - how did you get into the grocery
17 business up in Oakes, North Dakota, in 2005?

18 A There was a grocery store for sale and Robert wanted another
19 store, so we bought it. And my son had been working here
20 managing here part-time, and so Robert moved him up there to
21 run that store.

22 Q Okay. When Keith was here managing the store part-time in
23 Redfield before he moved up to Oakes, did he have a salary?
24 I don't know.

25 Q Did he have a written contract?

KNIGGE BY POCHOP

1 A For when he was here?

2 Q When he was the manager here.

3 A No.

4 Q So then when he went up to Oakes, do you know what the terms
5 of his employment were in Oakes? And we're talking about
6 Keith, right?

7 A I know he was salary.

8 Q Okay.

9 A And then there was a contract that, if we ever sold the
10 store, then Keith would get a certain percentage of the
11 store.

12 Q He had a severance agreement upon the sale of the store.

13 A Yes.

14 Q And did he claim that he was - when the sole - the store did
close up in Oakes?

Right.

And that closed in January of '13 or December of '12; do you
know?

No. It was still open - I believe in February it was still
open.

And what happened with Keith's contract about what would
happen if the store closed? Was he to be paid \$75,000?

Yes.

Did he get paid --

Stephanie Moen & Assoc. (605) 995-0955

43

20

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	§	
COUNTY OF SPINK	)	FIFTH JUDICIAL CIRCUIT
DAVID KNIGGE,)	
)	
Plaintiff,	)	Civ. No. 13-83
)	
vs.)	
)	
B & L FOOD STORES, INC., and	)	PLAINTIFF'S RESPONSIVE
ESTATE OF ROBERT ALLEN KNIGGE,	)	STATEMENT OF MATERIAL
	)	FACTS IN OPPOSITION TO
Defendants.	)	DEFENDANTS' MOTION FOR
	)	SUMMARY JUDGMENT
)	

COMES NOW Plaintiff David Knigge, and in response to the Defendants' Supplemental Statement of Material Facts, makes the following responsive statements pursuant to SDCL § 15-6-56(c)(2).

RESPONSES TO DEFENDANTS' STATEMENT OF MATERIAL FACTS

1. *Decedent, Robert Knigge, was the brother of Plaintiff, David Knigge. Complaint ¶15; L. Knigge Dep. 42-43.*

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 1. David Knigge and Robert Knigge were brothers, and they shared a close relationship especially after Robert was diagnosed with a brain cancer in October 2011 and given an 18-month prognosis. (L. Knigge Depo at 11, 12, 73)

2. *Prior to February 2013, K&J Foods, Inc., operated a grocery business in Oakes, North Dakota. Complaint ¶15; L. Knigge Dep. 42-43.*

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 2, but disputes that it is a complete statement of the material facts. Prior to February 2013, K&J Foods Inc. operated a grocery business in Oakes, North Dakota. (L. Knigge Depo at 42-43) In approximately 2005, Robert and Lynnette bought a grocery store in Oakes, North Dakota,

through a corporation that Robert formed called K&J Foods Inc. (which stood for Knigge and Jaton, an unrelated third party in this case). (L. Knigge Depo at 29, 57) Robert was authorized and generally made the business decisions about the Oakes store without Lynnette's input. (L. Knigge Depo at 88)

After Robert's cancer diagnosis in 2011, Robert actively tried to incorporate his adult step-children Keith and Kalie into the family grocery businesses. (L. Knigge Depo at 44) In 2012, Robert offered Lynnette's adult daughter Kalie the opportunity to manage and buy the Oakes store. (L. Knigge Depo at 45) Kalie accepted the position, moved to Oakes and took over management of the store there, though Lynnette does not know the specific terms of Kalie's agreement with Robert. (L. Knigge Depo at 46) By the end of the year in 2012, Kalie had decided that she did not want to buy the Oakes store and she left that business. (L. Knigge Depo at 47, 48, 52, 75) At approximately the same time, Robert also offered his adult step-son Keith a job in Redfield at the B&L Inc.'s Redfield store, which included an agreement that Keith would have a share of \$60,000 from the proceeds from a sale of the Oakes store. (L. Knigge Depo at 44, 49) Finally, after Kalie announced she was leaving the Oakes store, Robert offered his brother David Knigge the opportunity to manage and purchase the Oakes store over time. (D. Knigge Depo at 6-9) In approximately November 2011, David accepted his offer, resigned from his job and began traveling to Oakes on weekends to manage the Oakes store and begin working toward ownership of the Oakes store through labor. (D. Knigge Depo at 10, 81-82)

3. At all times relevant to the Complaint, Decedent, Robert Knigge, was an agent of K&J Foods Inc. Complaint 12; L. Knigge Dep. 42.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 3 but disputes that it is materially complete. At all times relevant to the Complaint, Decedent Robert Knigge was an agent of K&J Foods, Inc. (L. Bruns Depo at 7; L. Knigge Depo at 39) He was

authorized to hire, negotiate salaries and benefits and to terminate managers at the stores without Lynnette's involvement. (L. Knigge Depo at 39)

4. At all times relevant to the Complaint, B&L Food Stores, Inc., operated a grocery business in Redfield, South Dakota. Complaint ¶ 3.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 4. At all times relevant to the Complaint, B&L Food Stores Inc. operated a grocery business in Redfield, South Dakota. (L. Knigge Depo at 29, 57) Robert and Lynnette were the only shareholders of this business. (L. Knigge Depo at 97)

5. At all times relevant to the Complaint, Decedent, Robert Knigge, was an agent of B&L Food Stores, Inc. Complaint ¶ 5.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 5. At all times relevant to the Complaint, Decedent, Robert Knigge, was an agent of B&L Food Stores Inc. Robert was authorized to hire, negotiate salaries and benefits and to terminate managers at the stores without Lynnette's involvement. (L. Knigge Depo at 39)

6. In October 2012, Decedent, Robert Knigge, and Plaintiff David Knigge entered into an employment agreement to hire Plaintiff as the manager of K&J Foods, Inc. grocery store in Oakes, North Dakota. D. Knigge Dep. 4-5, 7-8, 12.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 6. At the end of the year in October of November of 2012, Robert Knigge and David Knigge entered into an employment agreement whereby David was hired as the manager of K&J Foods Inc. grocery store in Oakes, North Dakota, with the opportunity to purchase the store from K&J, Inc. for \$200,000 to be paid off over ten (10) years. (D. Knigge Depo at 4, 6, 8, 9)

7. Based upon the employment with K&J Foods, Inc., Plaintiff resigned from employment as an accountant in Pierre, South Dakota. D. Knigge Dep. 10, 13-14.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 7 but disputes that it is materially complete. Based upon the employment offer with K&J Foods Inc.

that included the ability to purchase the Oakes store, David gave notice and resigned from his job with the state of South Dakota, effective in January 2013. (D. Knigge Depo at 10) David started work in December. He was not paid a set salary for working at the Oakes store and was using up his leave from his state employment until the store started to have a better cash flow. (D. Knigge Depo at 7-9) Had he continued to work for the state for another six months, he would have gotten an additional compensation for half of his sick pay. (D. Knigge Depo at 35)

8. Based upon the employment agreement with K&J Foods Inc., Plaintiff listed his home in Pierre, South Dakota for sale in November 2012. D. Knigge Dep. 13.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 8. Plaintiff listed his home in Pierre, South Dakota, for sale in November 2012 with the idea that he would be moving to Oakes and buying the Oakes store from K&J Inc. (D. Knigge Depo at 13).

9. Based upon the employment agreement with K&I Foods Inc., Plaintiff sold his home in Pierre, South Dakota. D. Knigge Dep. 10, 13-14.

Plaintiff disputes the statement of fact in Defendants' numbered paragraph 9 is material. While Plaintiff originally listed his home in Pierre for sale in November 2012, his employment plans changed in January of 2013 because of Robert's terminal cancer. (D. Knigge Depo at 7, 9, 10, 13)

10. Based upon the employment agreement with K&J Foods Inc., Plaintiff relocated to Oakes, North Dakota. D. Knigge Dep. 13-14.

Plaintiff disputes the statement of fact in Defendants' numbered paragraph 10, and disputes that it is material. When he was working in the Oakes store in 2012, David lived in a motel in Oakes, and the motel and all his expenses were paid for by the store. (L. Knigge Depo at 81-82; D. Knigge Depo at 7)

11. The terms of the K&J Foods, Inc., employment agreement were never fully developed or reduced to writing. D. Knigge Dep. 6-7, 13-14, 31-32.

Plaintiff disputes the statement of fact in Defendants' numbered paragraph 11. The terms of the K&J Foods Inc. employment agreement were not reduced to writing but were fully developed, and David acted in reliance upon them by giving notice to his prior employer and going to work in Oakes. (D. Knigge Depo at 7-9)

12. At the time Plaintiff accepted employment with K&J Foods, Inc., Plaintiff envisioned he would work for the company for 10 years. D. Knigge Dep. 9.

Plaintiff disputes the statement of fact in Defendants' numbered paragraph 12. At the time Plaintiff accepted employment with K&J Foods Inc., Plaintiff envisioned he would have bought and owned the Oakes store within ten (10) years. (D. Knigge Depo at 9) Their agreement materially changed in January of 2013 when Robert accepted that he was terminally ill. (D. Knigge Depo at 7, 9, 10-11, 14)

13. Plaintiff served as manager for the K&J Foods Inc. Oakes, North Dakota Store from December, 2012 to February, 2013. Complaint ¶ 14.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 13, but disputes that it is materially complete. In March 2013, David Knigge closed the Oakes store and moved to Redfield, where he lived with Robert and Lynnette, and managed the Redfield store pursuant to his agreement with Robert. (L. Knigge Depo at 53; D. Knigge Depo at 12-13, 16)

14. In or around January, 2013, Robert Knigge decided to close the K&J Foods, Inc., Oakes North Dakota Store. D. Knigge Dep. 9; Complaint ¶15.

Plaintiff disputes that the statement of fact in Defendants' numbered paragraph 14. After Robert accepted that his cancer was terminal, he asked David to close the Oakes store and move to Redfield to manage the Redfield store. (D. Knigge Depo at 7, 9, 10-11, 12) Specifically, the terms of Robert and David Knigge's agreement were that David would scrap his plans for the

Oakes store, it would not be sold, and that David would move to Redfield and become the manager of the Redfield store until Robert's children could take over or until Lynnette terminated David. (D. Knigge Depo at 9, 10, 19, 20, 22)

15. Between January and February, 2013, Decedent, Robert Knigge, made an employment offer to Plaintiff to serve as manager of the B&L Food Stores, Inc., grocery store located in Redfield, South Dakota. Complaint ¶ 15.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 15. After Robert accepted that his cancer was terminal, he asked David to close the Oakes store and move to Redfield to manage the Redfield store. (D. Knigge Depo at 7, 9, 10-11, 12) Specifically, the terms of Robert and David Knigge's employment agreement were if David would give up his plans and close the Oakes store, David would move to Redfield and that would manage the Redfield store for a set salary, benefits and severance payment until Robert's children could do it or until Lynnette terminated David. (D. Knigge Depo at 19-20, 22) Robert knew he was dying at the time; he also knew that Lynnette and David did not get along well, and that Lynnette had argued with him about hiring David. (L. Knigge Depo at 76, 77, 89; D. Knigge Depo at 10-11, 14, 19) Robert knew what David had given up in terms of work and opportunity to help him in Redfield. (D. Knigge Depo at 12, 18, 20) Robert and David agreed that they did not want Lynnette to have to continue employing David after Robert's impending death and that she might terminate David. (D. Knigge Depo at 10, 12, 19, 22) They agreed to an annual salary and an annual benefits package, but they also agreed to a severance payment of \$100,000 if David was terminated for any reason because they recognized that Lynnette should not have to employ him for any period and because Robert knew what David had given up to accept the position. (D. Knigge Depo at 12-13, 18, 19, 20, 22)

16. In February 2013, Plaintiff's employment with K&J Foods, Inc., ended. Complaint ¶ 14.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 16, but adds that it is materially incomplete. David accepted Robert's offer of employment at the Redfield store for a salary, benefits and \$100,000 severance agreement in January of 2013. (D. Knigge Depo at 12-13, 18, 19, 20, 22) As a result, David agreed to give up his plans to purchase the Oakes store. (D. Knigge Depo at 19) By March 2013, David Knigge had closed the Oakes store and moved to Redfield, where he lived with Robert and Lynnette, in order to perform his employment agreement with Robert at the Redfield store pursuant to his agreement with Robert. (L. Knigge Depo at 53; D. Knigge Depo at 16)

17. On February 20, 2013, Decedent, Robert Knigge, employed Plaintiff to serve as manager of the B&L Food Stores, Inc., grocery store located in Redfield, South Dakota. Complaint ¶ 1.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 17, but disputes that it is materially complete. By March 2013, David Knigge had closed the Oakes store and moved to Redfield, where he lived with Robert and Lynnette, in order to manage the Redfield store under the salary, benefits and severance agreement he had negotiated with Robert. (L. Knigge Depo at 53; D. Knigge Depo at 16, 18, 19, 20, 22)

18. No part of the B&L Foods Stores, Inc., employment agreement was ever put in writing. D. Knigge Dep. 31-32.

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 18. No part of the B&L Foods Stores Inc. employment agreement was put in writing. (D. Knigge Depo at 31-32)

19. Plaintiff testified that his employment position with B&L Foods Stores, Inc., was to continue until i) Plaintiff's retirement or ii) Decedent Robert Knigge's children chose to take over the business operations of the Redfield Food Store. D. Knigge Dep. 19, 32.

Plaintiff disputes that the statement of fact in Defendants' numbered paragraph 19. The terms of Robert and David Knigge's agreement were that David would give up the plans to buy the Oakes store, would close the Oakes store, would move to Redfield and would manage the Redfield store for a set salary, benefits and a severance payment "until his kids, if one of them wanted to take over" or until Lynnette terminated David. (D. Knigge Depo at 10, 11-12, 20, 22). They did not want Lynnette to have to continue employing David after Robert's impending death. (D. Knigge Depo at 10, 12, 22) Robert knew he was dying at the time; he also knew that Lynnette and David did not get along well and that Lynnette had argued with him about hiring David because she wanted him to hire the Bruns'. (L. Knigge Depo at 76, 77, 89; D. Knigge Depo at 10-11, 14, 19) Further, Robert knew what David had given up in terms of work and opportunity to help him in Redfield. (D. Knigge Depo at 12, 18, 20)

20. Decedent Robert Knigge's natural children with Lynette Knigge were born in the years 1998, 1999, and 2000. L. Knigge Dep. 10.

Plaintiff disputes that statement of fact in Defendants' numbered paragraph 20 is materially complete. Decedent Robert Knigge's natural children with Lynette Knigge were born in the years 1998, 1999 and 2000. (L. Knigge Depo at 10) However, Robert also had his own adult son Jason who worked in the Redfield grocery store even before David Knigge was hired there. (L. Knigge Depo at 51-53) After Robert's diagnosis, Robert also actively offered his adult step-children jobs in the family grocery businesses, including hiring his step-son Keith to manage the store before he hired his son Jason or David Knigge. (L. Knigge Depo at 44, 45, 49, 50, 51, 52) When Keith left in 2012, Robert hired his adult son Jason to manage the store. (L.

Knigge Depo at 51) Jason had already been working at the Redfield store so this amounted to him being promoted to manager. (L. Knigge Depo at 53) Lynnette does not know what Jason's employment terms were. (L. Knigge Depo at 52) Robert's son Jason continued to work at the Redfield store, but stepped down from the manager position at Robert's request when David came to Redfield to manage the store. (L. Knigge Depo at 54) Jason was not ready to run the store and just needed to learn to be a manager. (D. Bruns Depo at 13) Jason stepped down from the management position when David was hired because the new store was so much bigger, and Jason felt more comfortable having someone who knew what they were doing to make it work. (L. Knigge Depo at 67) There is no evidence that Jason was angry about the demotion. (L. Knigge Depo at 67)

21. Plaintiff did not inform Lynette Knigge, wife of the Decedent, of the alleged severance payment provision until the August 2013 meeting whereupon Plaintiff was advised that he was to be terminated. D. Knigge Dep. 22-23.

Plaintiff disputes that the statement of fact in Defendants' numbered paragraph 21 is a complete statement of the material facts. Lynnette knew that Robert had negotiated some employment agreement with David because she overheard Robert talking about it, and then David moved to Redfield and lived with him while he managed the Redfield store. (L. Knigge Depo at 53, 69) Two months after Robert's death in June of 2013, as Lynnette was preparing to terminate David Knigge, David Bruns told her that David Knigge said he had a severance agreement. (L. Knigge Depo at 101, 102) David Bruns had earlier recommended to David Knigge that he should negotiate a severance agreement with Robert and Lynnette. (D. Bruns Depo at 25)

*22. In August 2013, Plaintiff's employment with B&L Foods Stores, Inc. was terminated.
Complaint ¶ 1.*

Plaintiff concurs with the statement of fact in Defendants' numbered paragraph 22, but disputes that it is a complete statement of the material facts. Lynnette continued to employ David for two months after Robert died in June of 2013. (L. Knigge Depo at 87) Lynnette began searching for a replacement for David without discussing it with him. (L. Knigge Depo at 98) Lynnette knew about a week before the termination that David claimed he had severance agreement. (L. Knigge Depo at 101, 102) However, Lynnette did not ask if there was a contract with David when she terminated him. (L. Knigge Depo at 100) She did not ask her lawyer for advice before the termination. (L. Knigge Depo at 104, 105)

In August 2013, Lynnette told David that she was terminating his employment. (D. Knigge Depo at 23) David was told it wasn't working and Lynnette was going to replace him. (L. Bruns Depo at 11) At the termination meeting, David Knigge said there would be no hard feelings, but he brought up the \$100,000 severance payment. (L. Bruns Depo at 11) David said that Robert had told him if anything happened he would get a \$100,000. (L. Bruns Depo at 13; L. Knigge Depo at 103) Lynnette said that she had to talk to her attorney, and that she thought it was a lot of money. (L. Knigge Depo at 104) After the termination, Lynnette and David had another meeting in August of 2013 to try to settle the severance payment. Lynnette told David that she thought he didn't deserve a severance payment. (L. Knigge Depo at 108) David told her he was only asking for the \$100,000 severance payment even though he calculated his actual losses in the range of \$315,000. (L. Knigge Depo at 109) At that meeting, David gave Lynnette a sheet that calculated his view of his losses at \$310,000. (D. Knigge Depo at 34) Lynnette has never intended to pay David any severance payment. (L. Knigge Depo at 109) After she fired

David, Lynnette hired a person from Nebraska as David's replacement for less compensation for
the period of one year. (L. Knigge Depo at 99, 100, 107)

Dated this 26th day of January 2016.

JOHNSON POCHOP & BARTLING

/s/Stephanie E. Pochop
Stephanie E. Pochop
405 Main St. | PO Box 149
Gregory, SD 57533
(605) 835-8391
stephanie@rosebudlaw.com
Attorney for Plaintiff David Knigge

CERTIFICATE OF SERVICE

The undersigned certifies that on the 26th day of January 2016, she served a true and correct copy of the foregoing **Plaintiff's Responsive Statement of Material Facts** by Odyssey e-filing upon the following:

Paul J. Gillette
Gillette Law Office, PC
701 Main St. | PO Box 60
Redfield, SD 57469

/s/Stephanie E. Pochop
Stephanie E. Pochop

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	§	
COUNTY OF SPINK	)	FIFTH JUDICIAL CIRCUIT
<hr/>		
DAVID KNIGGE,)	
)	
Plaintiff,	)	Civ. No. 13-83
)	
vs.	)	PLAINTIFF'S STATEMENT OF
	)	MATERIAL FACTS IN
	)	OPPOSITION TO
B & L FOOD STORES, INC., and	)	DEFENDANTS' MOTION FOR
ESTATE OF ROBERT ALLEN KNIGGE,	)	SUMMARY JUDGMENT
)	
Defendants.)	
)	
<hr/>		

COMES NOW Plaintiff David Knigge and respectfully submits Plaintiff's Statement of Material Facts in Opposition to Defendants' Motion for Summary Judgment pursuant to SDCL § 15-6-56(c)(2).

PLAINTIFF'S STATEMENT OF THE MATERIAL FACTS

Relevant Parties and Entities

1. Plaintiff David Knigge ("David") has worked as a CPA for more than 30 years. (D. Knigge Depo at 3, 4) He served as the Assistant Director of Finance for the State of South Dakota's Department of Transportation, where he supervised fourteen (14) employees and had extensive experience in establishing policy and procedure for accounting processing in that department. (D. Knigge Depo at 3) He is currently employed by the State of South Dakota in its Bureau of Finance and Management. (D. Knigge Depo at 3)
2. Robert Knigge was David's brother. Robert died in June of 2013. (L. Knigge Depo at 11, 42-43)
3. Robert enjoyed a close relationship with David, especially after Robert was ill following his brain cancer diagnosis in October of 2011. (L. Knigge Depo at 11, 12, 73)

4. At the time of his death, Robert was married to Lynnette Knigge. They married in 1996 and had children during their marriage; all four of those children were minors at the time of Robert's death. (L. Knigge Depo at 10)

5. Lynnette has three adult children, Jason, Kalie and Keith, from a previous marriage, and Robert included his step-children in the management of the family grocery businesses before his death. (L. Knigge Depo at 9, 44, 45, 47-48, 49-50)

6. Robert has an adult son Jason whom he employed as the manager of the Redfield store in 2013, immediately before he hired David Knigge as the manager of that store. (L. Knigge Depo at 51)

7. Robert and Lynnette owned and operated grocery stores as their business. At the height of their business, they formed three corporations that operated three different grocery stores. (L. Knigge Depo at 29, 55, 57, 97)

8. Specifically, in 1996, they started in the grocery business in Redfield where they lived. (L. Knigge Depo at 29) The Redfield Food Center store was owned and operated through a corporation that they established known as B&L Inc., which stands for Bob and Lynnette. (L. Knigge Depo at 29, 57) Robert and Lynnette are the only two shareholders of this business. (L. Knigge Depo at 97) This is the store involved in the present case.

9. In approximately 2005, they bought a grocery store in Oakes, North Dakota. (L. Knigge Depo at 29) This store was operated through a corporation that Robert set up called K&J Inc. (standing for Knigge and Jason, an unrelated third party in this case). (L. Knigge Depo at 57) Robert was going to sell the Oakes store to David but asked David to close it and come work in the B&L Inc. Redfield store instead. (L. Knigge Depo at 88)

10. In approximately 2008 or 2009, Robert and Lynnete bought a grocery store in Linton, North Dakota. (L. Knigge Depo at 55) This was owned and operated by a corporation that Robert established called K&B, Inc., which stands for Knigge and Bruns. (L. Knigge Depo at 55)

11. Robert and Lynnette met David and Lisa Bruns, a married couple who were working in another grocery store, on a trip. Robert then formed a corporation and hired the Bruns' to move to Linton to operate the store via an oral contract. (L. Bruns Depo at 4; D. Bruns Depo at 5, 7) The oral agreement with the Bruns' was that they would work at the Linton store for five years, and their labor would be considered as their investment into twenty-five percent (25%) ownership of the K&B Inc. corporation. (L. Bruns Depo at 4) They also received a vehicle and insurance on that vehicle. (D. Bruns Depo at 32)

12. In 2009, B&L Inc. purchased a competitor's store in Redfield, and began to merge their existing grocery store into the competitor's building, under the name Redfield Food Center. (L. Knigge Depo at 60) Robert was still completing the merger into the new store building in 2012 and 2013. (L. Knigge Depo at 60)

Robert's way of doing business.

13. Lynnette described that Robert was an "in charge" type of guy who focused on money and was a rather hard negotiator, to the point Lynnette described that he could be controlling. (L. Knigge Depo at 13, 117; D. Knigge Depo at 27; *see also* D. Bruns Depo at 6 (Robert was a "forceful" person))

14. While Robert and Lynnette were both shareholders in all of their corporate entities, Lynnette had little involvement with their businesses. She worked for B&L Inc. at the Redfield store as a bookkeeper for a brief period until approximately 2000, when she became a full-time

homemaker for their young family. (L. Knigge Depo 35; D. Knigge Depo at 15, 16) After that, she generally consulted about store decorating and issues between employees who didn't get along. (L. Knigge Depo at 36)

15. Lynnette did not know the details of Robert's business dealings for the stores. For example, Lynnette did not know who the officers of B&L Inc. were. (L. Knigge Depo at 29)

16. Robert was authorized to make decisions for B&L Inc. (and his other corporate entities) without Lynnette's approval or involvement. (L. Bruns Depo at 7; L. Knigge Depo at 42) He was authorized to hire, negotiate salaries and benefits and to terminate managers at the store without Lynnette's involvement. (L. Knigge Depo at 39, 79, 80)

17. For example, without Lynnette's approval in December 2012, Robert took out a \$400,000 loan for B&L Inc., and he bought a \$60,000 boat and several cars without considering Lynnette's input. (L. Knigge Depo at 18-19, 86, 90, 91, 121)

Time becomes "of the essence" in a real way for Robert because of a devastating diagnosis.

18. In October of 2011, Robert was diagnosed with Stage 4 glioblastigoma, a form of brain cancer. (L. Knigge Depo at 12)

19. When he was diagnosed, Robert was told he had a prognosis of eighteen (18) months to live. (L. Knigge Depo at 15, 25)

20. From the beginning, Robert's doctors talked to him about his terminal condition and recommended that he should do the things that were important to him. (L. Knigge Depo at 25, 118)

21. Robert did chemo, radiation and had three surgeries after his diagnosis to try to extend his life. (L. Knigge Depo at 12, 23; D. Knigge at 5, 6)

22. After his surgery in January of 2013, Robert's doctors told him that there was nothing else they could do and he resigned himself to dying. (L. Knigge Depo at 22, 23, 85; D. Knigge Depo at 7, 9, 11, 12)

23. Robert died from his disease in June of 2013. (D. Knigge Depo at 30; L. Knigge Depo at 30)

Managing the stores becomes an issue for Robert because of his disease.

24. Robert was the Redfield store manager until he got sick in 2011. (L. Knigge Depo at 62)

25. After Robert's diagnosis, he actively tried to incorporate his adult step-children Keith, Kalie, and his adult biological son, Jason, into the family grocery businesses. (L. Knigge Depo at 44)

26. In 2012, Robert had Lynnette's daughter Kalie move to Oakes to manage the Oakes store. (L. Knigge Depo at 45) Kalie was supposed to have an opportunity to buy the store; however, Lynnette does not know the terms of Kalie's agreement with Robert. (L. Knigge Depo at 46)

27. At approximately the same time, Robert asked Lynnette's adult son Keith to move to Redfield to run the Redfield store. (L. Knigge Depo at 44) Keith agreed and became the manager of the Redfield store, but Lynnette did not know what Robert had agreed to pay her son as salary or benefits. (L. Knigge Depo at 49) She did know that Robert had a written agreement to pay Keith \$60,000 upon the sale of the Oakes store. (L. Knigge Depo at 44)

28. Keith was doing Robert a favor by coming to Redfield to manage the Redfield store. (L. Knigge Depo at 51)

29. Keith and Robert got into a disagreement, and Keith left the Redfield store in August of 2012. (L. Knigge Depo at 50, 52) Robert was not capable of managing the store at that point.

(L. Knigge Depo at 50)

30. When Keith left in August of 2012, Robert hired his adult son Jason to manage the store. (L. Knigge Depo at 51) Jason was already working at the Redfield store, so this amounted to him being promoted to manager. (L. Knigge Depo at 53) Lynnette does not know what Jason's employment terms were. (L. Knigge Depo at 52)

31. Kalie decided that she did not want to buy the Oakes store and left that location in 2012. (L. Knigge Depo at 47, 48, 52, 75)

32. Some of their contracts with their children were in writing; other contracts were oral. (L. Knigge Depo at 62)

Robert negotiates with David about joining the family businesses.

33. Even prior to Robert's illness, Robert and David had talked about getting into the grocery store business together in a store in Custer, South Dakota; David was going to manage a store there. (L. Knigge Depo at 71, 72)

34. According to Lynnette, David and Robert were close, and David was a person that Robert trusted. (L. Knigge Depo at 73)

35. When Kalie announced she was leaving the Oakes store, Robert did not advertise for a manager. (L. Knigge Depo at 74)

36. Instead, in late 2012, Robert talked to his brother David and said that Kalie was leaving employment in the Oakes store in December 2012. Robert proposed that David consider managing that store for Robert, with an agreement that David would ultimately purchase the Oakes store from Robert. (D. Knigge Depo at 6, 7, 8, 9)

37. David and Robert reviewed the financial statements from that store, and David accepted the offer of managing the Oakes store with the understanding that he would have an option to purchase the business for \$200,000 within a ten (10) year period. (D. Knigge Depo at 6, 8, 9)

38. David agreed to work at the Oakes store as its manager on a flexible salary because of cash flow issues at the store. (D. Knigge Depo at 8) There was no severance agreement. (D. Knigge Depo at 9)

39. David and Robert did not immediately reduce their agreement about the Oakes store to writing but planned to do so in the future. (D. Knigge Depo at 7)

40. David Bruns did not know what David Knigge's agreement with Robert was, but David Bruns advised David Knigge to negotiate a severance package with Robert and Lynnette. (D. Bruns Depo at 25)

41. David gave notice and resigned from his job with the state of South Dakota to go to work at the Oakes store. (D. Knigge Depo at 10) Had he continued to work for the state for another six (6) months, he would have gotten an additional compensation for half of his sick pay.

42. When he was working in the Oakes store, David lived in a motel in Oakes, and the motel and all his expenses were paid for by the store. (L. Knigge Depo at 81-82) Robert negotiated that deal with David. (L. Knigge Depo at 82)

43. Lynnette did not know what David's employment contract was because Robert negotiated it. (L. Knigge Depo at 74)

44. Lynnette did not ever work at the stores while Robert was sick. (L. Knigge Depo at 84)

Things take a turn for the worse between Robert and Lynnette.

45. After Robert's diagnosis, Lynnette became upset with Robert about his decision-making, particularly his borrowing and spending. (L. Knigge Depo at 17)

46. Robert had negotiated a \$400,000 loan for an expansion of the Redfield store that she opposed. (L. Knigge Depo at 91)

47. Robert bought his step-son Jason a car. (L. Knigge Depo at 16) He also bought his fourteen (14) year old daughter a Camero. (L. Knigge Depo at 18)

48. Lynnette was also upset because Robert bought himself a \$60,000 boat that he "was never going to drive." (L. Knigge Depo at 121)

49. In December of 2012, Lynnette hired a lawyer and initiated a divorce action by filing it, but she did not have him served. (L. Knigge Depo at 18, 28, 116, 120)

50. Robert was very angry with her about the divorce. (L. Knigge Depo at 19, 28)

51. Lynnette described that they were "partially" separated. (L. Knigge Depo at 21)

52. However, Lynnette did not proceed with the divorce: it just faded away. (L. Knigge Depo at 21)

Robert's plans change again because of cancer's cruelty.

53. David started working at the Oakes store on weekends in November 2012, but the parties' plans changed entirely when Robert's diagnosis became more serious, especially after a January 2013 medical appointment indicated that Robert's cancer was progressing. (D. Knigge Depo at 8, 9, 11)

54. In January 2013, Robert had a surgery to try to prolong his life, and at that time, his physician asked him if there was anything important he still had to do. (L. Knigge Depo at 22) Robert began to think about his family after he resigned himself to the fact that his cancer was terminal and he was going to die. (D. Knigge Depo at 14)

55. Because of the seriousness of his cancer, Robert and David discussed a number of options. (D. Knigge Depo at 11) Because Robert wanted to maintain his Redfield grocery store

for his children, he said that it made more sense for David to help him by managing the B&L Inc. store in Redfield, South Dakota. (D. Knigge Depo at 9, 12, 14)

56. David and Robert ultimately agreed that David would "scrap" his plans about purchasing the Oakes store, close the Oakes store and move to Redfield to manage the Redfield store until Robert's children could manage it or until Lynnette fired him. (D. Knigge Depo at 9, 12, 19, 20, 22)

57. David and Robert negotiated David's salary and benefits at the Redfield store, as well as a severance payment of \$100,000 if David would agree to move to Redfield to manage the Redfield store. (D. Knigge Depo at 12-13, 18, 19, 20)

58. Robert and Lynnette knew what David had given up in terms of work and opportunity to help him in Redfield. (D. Knigge Depo at 12, 18, 20; L. Knigge Depo at 80-81)

59. At a time when Robert's health was seriously deteriorating, Robert and David talked about the fact that Robert's wife Lynnette might not want David to manage the store when Robert was gone. (D. Knigge Depo at 19, 20, 22)

60. Robert knew he was dying at the time; he also knew that Lynnette and David had a very strained relationship and that Lynnette had argued with him about hiring David. (L. Knigge Depo at 76, 77, 62, 89; D. Knigge Depo at 10-11, 14, 19) Robert and David agreed that they did not want Lynnette to have to continue employing David after Robert's impending death and that she might terminate David. (D. Knigge Depo at 10, 12, 19, 22) Because they both could foresee that Lynnette may not want to work with David, they agreed that David would have a severance agreement where he would be paid \$100,000 for termination for any reason. (D. Knigge Depo at 10, 20, 22)

61. Robert and David did not want to force Lynnette to employ David after Robert died. (D. Knigge Depo at 10, 12, 20, 22)

62. The promise Robert made was absolute and simple: if David was fired for any reason, he would receive \$100,000 as a severance package. (D. Knigge Depo at 22, 32)

63. The severance package was to compensate David for scrapping the plan to buy the Oakes store and leaving his profession to move to Redfield to help Robert out. (D. Knigge Depo at 20, 32)

64. David agreed to sell his house in Pierre to move to Redfield to help Robert with the Redfield store. (D. Knigge Depo at 13)

65. In March 2013, David Knigge closed the Oakes store and moved to Redfield, where he lived with Robert and Lynnette when he took over as manager of the B&L Inc. Redfield store. (L. Knigge Depo at 53)

Lynnette's knowledge of David's employment terms.

66. Lynnette does not know why David Knigge was hired as the manager. (L. Knigge Depo at 63) She did not participate in the negotiation on his employment terms. (L. Knigge Depo at 63)

67. David did not negotiate with Lynnette because he did not even know if Lynnette owned stock in the stores, but mainly because Robert was clearly in charge of store business. (D. Knigge Depo at 15)

68. Lynnette knew that Robert had also tried to hire Dave and Lisa Bruns to come manage the Redfield store when he got sick. (L. Knigge Depo at 65; D. Bruns Depo at 15) She was aware that Robert had offered to help the Bruns' with a house if they took the position, but their salary and the house budget had not been decided. (L. Knigge Depo at 65; D. Bruns Depo at 15)

69. Lynette found out abruptly that David Knigge was going to run the Redfield store instead of the Bruns'. (L. Knigge Depo at 65)

70. Lynette overheard Robert talking to David Knigge on the phone about a \$70,200 annual salary and a bonus based on how the store did; when she asked him about the Bruns', Robert told her that he wanted his brother David in the store. (L. Knigge Depo at 69) This was how she learned that Robert had hired David Knigge to manage the Redfield store. (L. Knigge Depo at 70)

71. Based on what she had heard, Lynette believed that David's salary was to be \$70,200 plus a bonus based on store performance. (L. Knigge Depo at 70)

72. Lynette was surprised by this, but when she talked to Robert, she knew he had made up his mind to have David manage the Redfield store. (L. Knigge Depo at 76)

73. Lynette preferred to have the Bruns' run the Redfield store and told Robert that. (L. Knigge Depo at 77)

74. Lynette has a close friendship with the Bruns'. (L. Knigge Depo at 92)

75. Robert did not like it when she said that, and they had a little bit of an argument about it. (L. Knigge Depo at 77)

76. At the end of his life, Robert had developed some trust issues with Lisa and David Bruns. (L. Knigge Depo at 89) He believed they were stealing from him. (L. Knigge Depo at 89)

77. Robert's decision ultimately stuck: David Knigge came to Redfield to run the store as store manager. (L. Knigge Depo at 78)

78. Lynnette does not dispute that Robert offered the store manager job to David, and she is well-aware that he performed that job. (L. Knigge Depo at 84) She does not dispute that the salary offered was \$70,200 a year. (L. Knigge Depo at 76, 78, 85)

79. Although Lynnette disputes David's testimony that he and Robert agreed upon a \$100,000 severance payment, she does so because she did not overhear Robert discuss that with David on the phone when she heard them talking about his salary. She agrees, however, that it is possible they had further negotiations of which she was not aware. (L. Knigge Depo at 85, 86)

80. Lynnette acknowledges that Robert felt very kindly toward David for David's willingness to help him in the business. (L. Knigge Depo at 85)

81. Lynnette also acknowledges that Robert knew he had limited time to live. (L. Knigge Depo at 85)

82. Robert had the authority to make this offer to David. (L. Knigge Depo at 80) Robert made major business decisions and entered into contracts without consulting her. (L. Knigge Depo at 90, 91)

83. She did not know if David and Robert had a written contract. (L. Knigge Depo at 78)

David manages the Redfield store.

84. Lynnette knew that David had closed the Oakes store and moved to Redfield to take the manager position because of Robert's employment offer. (L. Knigge Depo at 81)

85. David took over management of the Redfield store in early 2013, which was a significant task because the store was being moved into a new location in Redfield. (D. Knigge Depo at 16) David also was in charge of the day-to-day operations at the Redfield store, including managing personnel, maintaining the store, monitoring sales and costs and managing risk and liability exposure. (D. Knigge Depo at 16, 17)

86. David knew he was going to have to work with Lynnette after Robert died, so he tried to be honest and up-front with her. (D. Knigge Depo at 27)

87. The relationship became strained between David and Lynnette while they lived together. (L. Knigge Depo at 82)

88. Robert's son Jason continued to work at the Redfield store, but stepped down from the manager position at Robert's request when David came to Redfield to manage the store. (L. Knigge Depo at 54)

89. Jason was not ready to run the store and just needed to learn to be a manager. (D. Bruns Depo at 13)

90. Jason stepped down from the management position when David was hired because the new store was so much bigger and Jason felt more comfortable having someone who knew what they were doing to make it work. (L. Knigge Depo at 67)

91. There is no evidence that Jason was angry about the demotion. (L. Knigge Depo at 67)

Robert dies in June of 2013, and Lynnette takes the reins.

92. In August of 2013, Lynnette told David that she was terminating his employment. (D. Knigge Depo at 23)

93. David was told it wasn't working, and Lynnette was going to replace him. (L. Bruns Depo at 11) David had been working at the store for three months when Robert died; he continued to manage the store for two more months after Robert died. (L. Knigge Depo at 87)

94. In July of 2013, Lynnette began to feel like David wasn't being honest about the finances for the Oakes store that had closed some months before because she felt his answers were vague and that he was defensive. (L. Knigge Depo at 88, 94)

95. Lynnette acknowledged that this was a chaotic time in the Redfield store because the move and grand opening of the new store site was happening then. (L. Knigge Depo at 95)

96. Lynnette began searching for a replacement for David without discussing it with him. (L. Knigge Depo at 98)

Lynnette terminates David because it isn't working out.

97. Lynnette knew about a week before the termination that David claimed he had severance payment agreement. (L. Knigge Depo at 101, 102) David Bruns told her that David Knigge said he had a severance agreement about a week before the termination was accomplished. (L. Knigge Depo at 101)

98. Lynnette did not ask if there was a contract with David when she terminated him. (L. Knigge Depo at 100)

99. She did not ask her lawyer for advice before the termination. (L. Knigge Depo at 104, 105)

100. Lisa and David Bruns were at this meeting to support Lynnette. At the meeting, David Knigge said there would be no hard feelings, but brought up the severance payment agreement. (L. Bruns Depo at 11) David said that Robert had told him if anything happened he would get a \$100,000. (L. Bruns Depo at 13; L. Knigge Depo at 103)

101. Lynnette said that she had to talk to her attorney, and that she thought it was a lot of money. (L. Knigge Depo at 104)

102. After the termination, Lynnette and David had another meeting in August of 2013 to try to settle the severance package: at that meeting, Lynnette told David that she thought he didn't deserve a severance. (L. Knigge Depo at 108)

103. David told her he was only asking for the \$100,000 severance payment even though he showed her a calculation of his actual losses in the range of \$310,000. (L. Knigge Depo at 109; D. Knigge Depo at 34)

104. Lynnette has never intended to pay David any severance package. (L. Knigge Depo at 109)

105. After David's termination, Lynnette hired a person from Nebraska as David's replacement for the period of one year. (L. Knigge Depo at 99, 100, 105)

Dated this 26th day of January 2016.

JOHNSON POCHOP & BARTLING

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CERTIFICATE OF SERVICE

The undersigned certifies that on the 26th day of January 2016, she served a true and correct copy of the foregoing **Plaintiff's Statement of Material Facts** by Odyssey e-filing upon the following:

Paul J. Gillette
Gillette Law Office, PC
701 Main St. | PO Box 60
Redfield, SD 57469

/s/Stephanie E. Pochop
Stephanie E. Pochop

STATE OF SOUTH DAKOTA COUNTY OF SPINK		IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT	
<p>DAVID KNIGGE, Plaintiff, vs. B & L FOOD STORES, INC., and the Estate of ROBERT ALLEN KNIGGE, Defendants.</p>	No. 13-		
DEPOSITION OF LISA BRUNS			
APPEARANCES:			
For the Plaintiff:	STEPHANIE E. POCHOP JOHNSON POCHOP LAW OFFICE P.O. Box 149 Gregory, SD 57533		
For the Defendants:	PAUL J. GILLETTE GILLETTE LAW OFFICE P.O. Box 60 Redfield, SD 57469		
ALSO PRESENT:	DAVID KNIGGE LYNETTE KNIGGE DAVID BRUNS		
May 28, 2014 Redfield, South Dakota			

Stephanie Moen & Assoc. (605) 995-0955
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L. BRUNS BY POCHOP

BE IT REMEMBERED that on Wednesday, the 28th day of May 2014 at 1:50 p.m., at the law offices of the Gillette Law Office, 701 South Main Street, Redfield, South Dakota, before STEPHANIE L. MOEN, RFR, a Freelance Court Reporter and Notary Public in and for the State of South Dakota, appeared LISA BRUNS, the witness herein:

WHEREUPON, the following proceedings were had, to-wit:

LISA BRUNS called as a witness, having been first duly sworn testified as follows:

EXAMINATION BY MS. POCHOP:

Q Lisa, you are so lucky --

A I am.

Q -- because everybody else has done the heavy lifting for you today, --

A Okay.

Q -- but if you could introduce yourself on the record.

A Okay, I'm Lisa Bruns.

Q And your employment history, Lisa?

A For the last 6 years, I've been kind of bookkeeper at Linton Food Center.

Q And before you went to Linton Food Center, can you tell me your employment history, just a thumbnail sketch.

A I worked at Radio Shack for my brother in Burke.

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Q And your current employment?
A Linton Food Center.
Q And what is your job title there?
A I am probably bookkeeper, head gopher.
Q What is your salary?
A I make \$10 an hour.
Q So you're a W-2 employee?
A Um-hmm.
Q And who was your employer?
A Linton Food Center.
Q Is it K --
A K&B Foods, Incorporated, yep.
Q And are you a shareholder of K&B, Inc.?
A Um-hmm.
Q And can you tell me just generally what your interest - your financial interest in K&B Foods, Inc., is?
A Just that we're 25 percent.
Q And you are at the point where you are 25 percent --
A Yes.
Q -- owners?
A Um-hmm.
Q And it sounds like for - you had an agreement that you would work for 5 years and your work would be your contribution to the buy-in?
A Yes, um-hmm.

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L. BRUNS BY POCHOP	L. BRUNS BY POCHOP
<p>1 Q How about personal?</p> <p>2 A Other than my David going up and helping him, no.</p> <p>3 Q Did you go out, like, to the Angry Beaver in Oakes and participate in any of the discussions that --</p> <p>4 A No.</p> <p>6 Q -- your Dave and that Dave had?</p> <p>7 A Nope.</p> <p>8 Q And did your David ever talk to you about recommending to David Knigge that he should have a severance package in his contract?</p> <p>11 A Yes. He visited with me about it.</p> <p>12 Q Tell me what you can recall about that.</p> <p>13 A Just that he always told him that he should get together with Lynette and Bob and have something worked out.</p> <p>14 Q Kind of for the same reason that you guys --</p> <p>15 A Yep.</p> <p>17 Q -- wanted your contract in writing?</p> <p>18 A Um-hmm.</p> <p>19 Q Is that a way of kind of -- I don't know -- protecting your own investment --</p> <p>21 A Yes.</p> <p>22 Q -- of time?</p> <p>23 A Um-hmm.</p> <p>24 Q What did he -- did your Dave relate to you whether David Knigge was open to -- or agreed with him about the importance</p>	<p>1 working and that we would probably replace him.</p> <p>2 Q When you say "we," who was doing that talking?</p> <p>3 A Mostly David and Lynette. David probably.</p> <p>4 Q Because who was -- how was it a "we" if you guys aren't tied in with that store businesswise?</p> <p>5 A Because -- like I said, we were just there to help Lynette and to support her. And since she's probably not really dealt with that, we just kind of jumped in and led -- I did -- not even "we." David led the conversation.</p> <p>10 Q And at -- what was David Knigge's response?</p> <p>11 A I remember him saying there would be no hard feelings --</p> <p>12 Q Okay.</p> <p>13 A -- and that we had to do what we had to do.</p> <p>14 Q Okay. Did the subject of the severance agreement come up?</p> <p>15 A Yes.</p> <p>16 Q Okay, tell me what you remember about that.</p> <p>17 A Oh, I don't really remember much, I guess, just that he brought it up. And I think somebody asked -- I don't remember who -- if there was anything wrote down and the answer was "no."</p> <p>21 Q At that meeting or before that, had you found out what Bob was paying his brother as a manager?</p> <p>22 A No.</p> <p>24 Q Did you know any of those details?</p> <p>25 A Nope.</p>
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L. BRUNS BY POCHOP	L. BRUNS BY POCHOP
<p>1 of a severance agreement?</p> <p>2 A No.</p> <p>3 Q Was there any -- did you and David have any -- your David have any understanding about Bob and Lynette having marital problems or their divorce issue?</p> <p>4 A I guess I don't remember.</p> <p>7 Q Okay. Tell me how you became involved in David Knigge's termination.</p> <p>9 A We went up that day and sat down with Lynette for a support for Lynette, and our warehouse kind of told us that we should go and be there.</p> <p>12 Q Before that, had you had any part of --</p> <p>13 A No, nope.</p> <p>14 Q You just literally --</p> <p>15 A Yes.</p> <p>16 Q -- were there to --</p> <p>17 A Yes.</p> <p>18 Q -- witness the --</p> <p>19 A Um-hmm.</p> <p>20 Q -- meeting.</p> <p>21 A Yes.</p> <p>22 Q And so as a part of witnessing the meeting, if you could just tell me, Lisa, what you can remember happening at that meeting, which I believe was in August 14th of 2013.</p> <p>24 A We just sat down and told him that we didn't think it was</p>	<p>1 Q It sounds like there really weren't things that you were too engaged with?</p> <p>2 A No, nope. I was in Linton while everything was going on.</p> <p>4 Q Okay. If David Knigge did have a severance agreement as part of his employment package with Bob, that would be consistent with what you and David had recommended for him -- or David.</p> <p>8 A I don't think David ever recommended a severance package. He just wanted them to get together and visit.</p> <p>10 Q And neither -- has David -- your David ever told you that he knew whether they did or didn't?</p> <p>12 A No.</p> <p>13 Q When you found out that David Knigge was saying that he did have a severance agreement, did you and David -- your David talk about whether that was consistent with --</p> <p>16 A No.</p> <p>17 Q Just kind of not your business?</p> <p>18 A Not my business, yep.</p> <p>19 Q Okay. Do you have any sort of employment agreement with the Redfield store now?</p> <p>21 A No.</p> <p>22 Q Do you do any work there?</p> <p>23 A No.</p> <p>24 Q And have you had any other discussions with Lynette or anybody on her behalf about the termination and the contract</p> <p>25</p>
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STATE OF SOUTH DAKOTA		IN CIRCUIT COURT	
COUNTY OF SPINK		FIFTH JUDICIAL CIRCUIT	
DAVID KNIGGE,			
Plaintiff,			
vs.		No. 13-	
B & L FOOD STORES, INC., and the Estate of ROBERT ALLEN KNIGGE,			
Defendants.			
DEPOSITION OF DAVID BRUNS			
APPEARANCES:			
For the Plaintiff:	STEPHANIE E. POCHOP JOHNSON POCHOP LAW OFFICE P.O. Box 149 Gregory, SD 57533		
For the Defendants:	PAUL J. GILLETTE GILLETTE LAW OFFICE P.O. Box 60 Redfield, SD 57459		
ALSO PRESENT:	DAVID KNIGGE		
May 28, 2014 Redfield, South Dakota			

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D. BRUNS BY POCHOP

BE IT REMEMBERED that on Wednesday, the 28th day of May 2014 at 1:07 p.m., at the law offices of the Gillette Law Office, 701 South Main Street, Redfield, South Dakota, before STEPHANIE L. MOEN, RFR, a Freelance Court Reporter and Notary Public in and for the State of South Dakota, appeared DAVID BRUNS, the witness herein:

WHEREUPON, the following proceedings were had, to-wit:

* * * * *

DAVID BRUNS called as a witness, having been first duly sworn testified as follows:

EXAMINATION BY MS. POCHOP:

Q David, could you introduce yourself for the record and spell your last name.

A David Bruns, B-r-u-n-s.

Q And your current address.

A Linton, North Dakota, P.O. Box 101.

Q And how long have you been in Linton?

A 5 and a half years.

Q And how did you get to Linton?

A Through Bob and Lynette purchasing a store together.

Q And if I understand correctly, you guys were on a cruise together one time?

A Yes, we were.

Q Talking about - it was the Affiliated cruise or --

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D. BRUNS BY POCHOP

A Yep.

Q And just for a little background, Dave, if you could just tell me your employment history in the grocery business.

A Okay. Well, you go back to when I grew up in high school. My dad owned two small stores. And then I went to Mitchell Voc-tech for meat cutting school, and at that time, I was also employed by Connty Fair Food Store as - at first, as a carry-out and then overnight manager and then meat cutter and then meat department manager and then went to work for Buche Foods as a meat department manager becoming a store manager --

Q And --

A -- and then we met Bob and Lynette, and that's how --

Q And how long were you at Buche Foods in Gregory?

A 9 to 10 years.

Q And did you have a written contract with R.F.?

A We - there was a contract, I suppose. I don't know if you have a written contract.

Q What was the - what were your major terms and conditions of your employment as a store manager of Buche Foods?

A Just manager in charge of everything.

Q Did you have a salary set?

A Salary, yeah.

Q Did you have benefits?

A Not a lot. Just a 10 percent bonus.

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D. BRUNS BY POKKEP	D. BRUNS BY POKKEP
<p>1 with Bob's --</p> <p>2 A Yeah. It scared me. That's why we pushed even harder,</p> <p>3 because he said one thing and didn't follow through.</p> <p>4 Q Was Bob kind of a difficult bargainer that way even before</p> <p>5 he was sick?</p> <p>6 A I felt Bob always looked out for Bob.</p> <p>7 Q Did Bob also look out for his family?</p> <p>8 A I don't know. I think Bob looked out for Bob first.</p> <p>9 Q Okay. Did you and Bob ever have any discussions about</p> <p>10 whether or not he appreciated David Knigge's willingness to</p> <p>11 come help him in Oakes?</p> <p>12 A No.</p> <p>13 Q Was the Oakes store kind of a disaster?</p> <p>14 A It was in tough shape, yeah.</p> <p>15 Q And how did it get in tough shape?</p> <p>16 A I don't think Bob was involved enough.</p> <p>17 Q And --</p> <p>18 A It was his store, but he didn't go there.</p> <p>19 Q Who made the decision about closing it?</p> <p>20 A He did, as far as I know. He never talked to me about it.</p> <p>21 Q You just heard that one through kind of the grapevine?</p> <p>22 A Well, it was his store, so I think he should have made the</p> <p>23 decision.</p> <p>24 Q Do you know what Lynette's involvement would have been in</p> <p>25 that?</p>	<p>1 A A lot of times I'd come and the produce would have outdated</p> <p>2 lettuce. It - consistently that way.</p> <p>3 Q Did you talk to David about that?</p> <p>4 A Yes.</p> <p>5 Q And what did you tell him? Give him advice or...?</p> <p>6 A Yeah, tried to.</p> <p>7 Q And how was your relationship with him?</p> <p>8 A With David?</p> <p>9 Q Um-hmm.</p> <p>10 A I thought we always had a good relationship.</p> <p>11 Q Okay. I mean, did you talk to Bob about how you thought</p> <p>12 David's --</p> <p>13 A Yes.</p> <p>14 Q -- performance was?</p> <p>15 A Yeah. He was very disappointed with certain things within</p> <p>16 the store. I would come to the store and go home and tell</p> <p>17 him what I thought, and he was very disappointed, yes.</p> <p>18 Q And so when was that?</p> <p>19 A On and off through his cancer. Jason, David, it didn't</p> <p>20 matter; it just never got better.</p> <p>21 Q Okay. Well, I'm talking specifically about David.</p> <p>22 A Okay. When I'd come here, I'd always go out and see Bob.</p> <p>23 He'd ask me how the store was. I'd tell him.</p> <p>24 Q What did you tell him?</p> <p>25 A Just what I saw. I don't remember exactly.</p>
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D. BRUNS BY POKKEP	D. BRUNS BY POKKEP
<p>1 A When he closed the store, probably nothing.</p> <p>2 Q When you were having your partnership agreement negotiated,</p> <p>3 did you negotiate that with Lynette or was that with Bob?</p> <p>4 A Partnership for Linton?</p> <p>5 Q Yeah.</p> <p>6 A Was just Bob.</p> <p>7 Q Okay.</p> <p>8 A I don't know if he talked to her any or not, but it was -</p> <p>9 who I talked to always was Bob.</p> <p>10 Q Did you ever talk to Lynette - would you have ever gone to</p> <p>11 her and say, "Hey, I got this written agreement and it's</p> <p>12 missing a material term?"</p> <p>13 A I mean, she had to sign the contract also, so she knew and</p> <p>14 she understood it just like we did.</p> <p>15 Q But did you negotiate any of it with her or would you have?</p> <p>16 A If I needed to. I mean, we always sat together. That's one</p> <p>17 thing with the four of us, it was always me, Lisa, Lynette,</p> <p>18 and Bob, and we talked about a lot of things.</p> <p>19 Q So after Bob passed away, did - well, after David Knigge was</p> <p>20 hired, did you keep any sort of monitoring of the Redfield</p> <p>21 store to see how that was going?</p> <p>22 A I would just come and look in, see what I thought</p> <p>23 Q Okay. How was it doing?</p> <p>24 A Needed a lot of improvements in certain areas.</p> <p>25 Q Like what?</p>	<p>1 Q Okay. And what did - did he talk to you about David</p> <p>2 Knigge's employment there?</p> <p>3 A Not much, no.</p> <p>4 Q Okay. What can you remember him talking to you about it?</p> <p>5 A He would say that he wanted me to help him teach him because</p> <p>6 he didn't have a lot of knowledge with the grocery business.</p> <p>7 Q He expressed that he wanted David Knigge to be able to get</p> <p>8 better and stay in the store?</p> <p>9 A I think from a brother's perspective, yeah, he would have,</p> <p>10 but the relationship wasn't - it just wasn't there. They</p> <p>11 needed to talk.</p> <p>12 Q Okay. And tell me what you mean by that, Dave.</p> <p>13 A I don't know. I just think there's lack of communication, I</p> <p>14 guess.</p> <p>15 Q And how did you conclude that?</p> <p>16 A Just my opinion.</p> <p>17 Q Kind of feeling that you got by --</p> <p>18 A Yeah.</p> <p>19 Q Did you ever talk to Lynette about it before Bob died?</p> <p>20 A Very little. It was usually always with Bob.</p> <p>21 Q Okay, can you tell me what you talked to Lynette about David</p> <p>22 Knigge's employment.</p> <p>23 A Not - I don't remember. Like I say, it was very little. It</p> <p>24 was always with Bob.</p> <p>25 Q Did Bob ever talk to you about the terms of David Knigge's</p>
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D. BRUNS BY POCHOP	D. BRUNS BY POCHOP
<p>1 hire?</p> <p>2 A Never, no.</p> <p>3 Q Did - were you aware of, for example, David's salary of</p> <p>4 72,000?</p> <p>5 A No, not until he - after Bob passed.</p> <p>6 Q Okay. Would - does it surprise you that that's what Bob</p> <p>7 agreed to pay him?</p> <p>8 A Yes, it did.</p> <p>9 Q And why is that?</p> <p>10 A Just compared to myself and all the years of experience I</p> <p>11 had and I was making a lot less.</p> <p>12 THE COURT REPORTER: Wait a minute, please.</p> <p>13 (Short recess.)</p> <p>14 Q (By Ms. Pochop) Has anybody suggested to you that Bob did</p> <p>15 not, in fact, offer to pay David Knigge \$72,000 as a salary?</p> <p>16 A Repeat it.</p> <p>17 Q Did - have - has anybody suggested to you that Bob didn't</p> <p>18 actually offer to pay David \$72,000?</p> <p>19 A No. Nobody's ever talked to me about how much. . .</p> <p>20 Q Okay. Before Bob passed away, you never spoke with him</p> <p>21 about the terms or --</p> <p>22 A Never.</p> <p>23 Q -- salary --</p> <p>24 A Never, no.</p> <p>25 Q And after Bob passed away, did you talk to Lynette about</p>	<p>1 and it was all of a sudden gone. Just the trust thing, you</p> <p>2 know.</p> <p>3 Q And I know it's not pleasant to talk about when the person</p> <p>4 is in the room, but can you just tell us what your input was</p> <p>5 when she would say she had trust issues.</p> <p>6 A Well, I look at as is if I owned the store and I didn't</p> <p>7 trust somebody, it's tough to keep them as a manager.</p> <p>8 Q Did you guys talk about how she could accomplish a</p> <p>9 termination?</p> <p>10 A Very little. I think she talked with Affiliated a little</p> <p>11 bit, and that's why we were there, because they wanted us to</p> <p>12 be present.</p> <p>13 Q As like witnesses?</p> <p>14 A Um-hmm.</p> <p>15 Q So did she call you and say "I'm going to terminate him. I</p> <p>16 need you to come down"?</p> <p>17 A We all visited together and Affiliated.</p> <p>18 Q With Duane Schwartz; is that who?</p> <p>19 A Duane and then the rep was Leo Hamling. And he felt that</p> <p>20 the store needed to have a better manager too.</p> <p>21 Q And when was that meeting?</p> <p>22 A 2 to 3 weeks probably before we did it.</p> <p>23 Q And was that when - did you help her try to find a new</p> <p>24 manager?</p> <p>25 A Yes. We interviewed the guy together. We talked to</p>
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D. BRUNS BY POCHOP	D. BRUNS BY POCHOP
<p>1 David's salary or David's contract before he was terminated?</p> <p>2 A The only thing I ever talked about was how much he was</p> <p>3 making. I - there was never anything about a contract or</p> <p>4 nothing.</p> <p>5 Q How would it come up that you and Lynette were talking about</p> <p>6 how much he was making?</p> <p>7 A Just business, come to the store trying to make things</p> <p>8 better.</p> <p>9 Q Was she upset that he said his - that Bob had set David's</p> <p>10 salary that high?</p> <p>11 A Yes.</p> <p>12 Q And how did she express that to you?</p> <p>13 A Just seemed that - she just thought it was high because she</p> <p>14 knew what I was making.</p> <p>15 Q Did she talk to you about terminating his employment?</p> <p>16 A As time went on, because we were all together that day.</p> <p>17 Q Okay. But before the day that you met to announce that he</p> <p>18 was going to be terminated, did Lynette consult with you</p> <p>19 about whether she should terminate David?</p> <p>20 A Some, yes.</p> <p>21 Q And tell me how that worked, Dave.</p> <p>22 A We just talked. You know, there's things that were going</p> <p>23 on, bag of money.</p> <p>24 Q What do you mean "bag of money"?</p> <p>25 A There was a bag of money that David told her that was there</p>	<p>1 Affiliated about trying to locate somebody.</p> <p>2 Q Did you help negotiate Kent Erickson's salary or contract?</p> <p>3 A Yes.</p> <p>4 Q Okay. And tell me what - tell me what kind of a contract</p> <p>5 Kent Erickson has.</p> <p>6 A I think it's 50,000 and then a bonus also.</p> <p>7 Q And what's his bonus; do you know?</p> <p>8 A I think it's 5 percent.</p> <p>9 Q Did - was he given a guarantee of any term of employment?</p> <p>10 A No.</p> <p>11 Q If he has - if he's guaranteed a year of employment, is that</p> <p>12 something Lynette would have negotiated with him?</p> <p>13 A Yes. I - we didn't talk about that.</p> <p>14 Q Did you tell him to get his contract in writing or. . . ?</p> <p>15 A No.</p> <p>16 Q Do you know if that was an oral or a written contract?</p> <p>17 A The part I was with was just oral.</p> <p>18 Q Okay. And is that uncommon in the grocery business?</p> <p>19 A I don't know, I guess. You know, with Buche's I had</p> <p>20 written. Bob, though, I never did. So I don't know, I</p> <p>21 guess.</p> <p>22 Q So just automatically by hiring Kent, it sounds like, the</p> <p>23 store is going to save about \$20,000.</p> <p>24 A Yes.</p> <p>25 Q So was there a financial component to the reason that David</p>
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D. BRUNS BY POCHEP	D. BRUNS BY POCHEP
<p>1 Knigge was terminated?</p> <p>2 A No.</p> <p>3 Q At anytime when you guys were talking about terminating</p> <p>4 David Knigge, did any of you say "I wonder what other deals</p> <p>5 he might have with Bob"?</p> <p>6 A I think we were curious if there was anything that he had</p> <p>7 with Bob, but we never knew.</p> <p>8 Q Did you talk to David Knigge yourself about whether he had</p> <p>9 any other deals with Bob?</p> <p>10 A I remember talking and asking, and he said that one time</p> <p>11 "yes," but that's all I knew, --</p> <p>12 Q Okay.</p> <p>13 A -- but I never heard a thing from Bob that they had any kind</p> <p>14 of agreement, just the salary part. He never, ever</p> <p>15 mentioned anything to me.</p> <p>16 Q And you never - did Bob tell you what his salary was?</p> <p>17 A No. He didn't want me to know because - I don't think he</p> <p>18 wanted me to know because --</p> <p>19 Q Okay. Didn't want you coming negotiating with him for</p> <p>20 more --</p> <p>21 A Right, right.</p> <p>22 Q So you and Lynette were trying to figure out if there were</p> <p>23 some other deals and then you talked to David Knigge just to</p> <p>24 try to find out? Is that how that worked or...?</p> <p>25 A I just - when he first left Pierre, I was - me and a friend</p>	<p>1 never anymore to it, you know.</p> <p>2 Q When you were talking to David Knigge about going from a</p> <p>3 good job to a poor store and "you'd better figure it out,"</p> <p>4 did he express concern to you about wanting to be - wanting</p> <p>5 to make a good investment with his time and money?</p> <p>6 A I don't think he was investing any money or nothing. He was</p> <p>7 just --</p> <p>8 Q Leaving a --</p> <p>9 A -- leaving one job to go to another job.</p> <p>10 Q Did you folks talk about what he would do to protect his</p> <p>11 ability to have an income?</p> <p>12 A I just told him he needed to sit with this family and talk</p> <p>13 it out.</p> <p>14 Q Under the circumstances, do you think that negotiating a -</p> <p>15 some sort of severance package if it didn't work out would</p> <p>16 have been a good idea?</p> <p>17 A I think so.</p> <p>18 Q Would there have been a valid - I mean, it sounds like two</p> <p>19 other family members had not sustained in the position of</p> <p>20 manager at the Redfield store.</p> <p>21 A Two of them were there, but I don't know what kind of a</p> <p>22 contract or what they had. I don't know.</p> <p>23 Q Okay, after - so tell me about what you can remember, David,</p> <p>24 about August 14th, 2013. It sounds like you met with</p> <p>25 Lynette, you and Lisa, at Affiliated's request to do the</p>
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D. BRUNS BY POCHEP	D. BRUNS BY POCHEP
<p>1 was concerned that it wasn't probably the best decision.</p> <p>2 Q Why?</p> <p>3 A Because he's going from a good job to a poor store.</p> <p>4 Q Up in Oakes or...?</p> <p>5 A Um-hmm.</p> <p>6 Q So did you kind of try to warn him or --</p> <p>7 A I just told him I think he needed to sit down and figure out</p> <p>8 what everything was going to do, and if he did or not - he</p> <p>9 said yes, but I don't know if anything ever happened.</p> <p>10 Q When we're talking about "he," we're talking about that --</p> <p>11 A Yeah, --</p> <p>12 Q -- was your advice to David?</p> <p>13 A -- David.</p> <p>14 Q Did he ever tell you that he had a severance agreement?</p> <p>15 A No. I mean, he said he - he told me "yes," but I don't know</p> <p>16 what he meant --</p> <p>17 Q Okay.</p> <p>18 A -- so --</p> <p>19 Q And you didn't ask "what is your severance agreement" or</p> <p>20 anything?</p> <p>21 A No, no.</p> <p>22 Q Just not --</p> <p>23 A I just asked and he said "yes" and that's all I heard about.</p> <p>24 Q Did you tell that to Lynette?</p> <p>25 A No. Well, I probably told her that he said yes, but there's</p>	<p>1 termination.</p> <p>2 A Okay.</p> <p>3 Q And if you can just walk me through that meeting and what</p> <p>4 you can remember was said. And, in particular, I'm</p> <p>5 interested in what was said about the severance package, if</p> <p>6 there was anything you can recall. You meet at the store?</p> <p>7 A We met at the store. This must be the day that David was</p> <p>8 released?</p> <p>9 Q I think so.</p> <p>10 A We asked if there was anything, and he said "yes," but we</p> <p>11 had no - nobody had ever told us anything. And then he was</p> <p>12 persistent wanting the hundred thousand and Lynette said</p> <p>13 that she just wanted to know and she was going to talk to</p> <p>14 her lawyer.</p> <p>15 Q Did she say it was too high?</p> <p>16 A I don't know exactly what she said. I just know she wanted</p> <p>17 to talk to Paul.</p> <p>18 Q Okay. And did - do you know if she did go do that?</p> <p>19 A I think she did, --</p> <p>20 Q Did she tell you --</p> <p>21 A -- but I don't know for sure if she did or not. I don't</p> <p>22 know what happened after that.</p> <p>23 Q Any other discussions that you can - did somebody tell David</p> <p>24 Knigge he was being too nice at the Redfield store and that</p> <p>25 was one of the performance issues that they - that Lynette</p>
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D. ERINS BY POCHOP

1 Q Did you ever recommend that he should try to get a severance
2 agreement in case --
3 A That's where I said he needed to sit down with them when he
4 was moving here to --
5 Q Okay.
6 A -- figure out what was going to happen.
7 Q And do you recall a time in the - in the Angry Beaver in
8 Oakes talking to him about getting a severance agreement?
9 A Probably. We talked about it a few times where I thought he
10 should sit down with him, Bob and Lynette, and work things
11 out --
12 Q Okay.
13 A -- as a family should.
14 Q So when he said that he actually had a severance agreement,
15 that would be consistent with the advice that you gave him.
16 A Yes.
17 Q But he doesn't --
18 A But I don't know if they had one or not.
19 Q Just not anything that you and Bob or you and David ever
20 talked about before Bob was gone?
21 A No. Just that, and that was it. Bob never said anything to
22 me about it.
23 MS. POCHOP: All right. I don't have any further
24 questions, David. Thank you for your patience with me.
25 MR. GILLETTE: I don't have any questions.

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D. ERINS BY POCHOP

C E R T I F I C A T E

1 I, STEPHANIE L. MOEN, RPR, Freelance Court Reporter
2 and duly authorized Notary Public in and for the state of
3 South Dakota residing in Mitchell, South Dakota, do hereby
4 certify:
5
6 That the foregoing deposition of DAVID ERINS was taken
7 by me and completed on the 28th day of May 2014 and
8 thereafter transcribed by me by means of computer-aided
9 transcription; that the deposition is a full, true, and
10 complete transcript of the testimony of said witness;
11
12 That the witness, before examination, was by me duly
13 sworn to testify the truth, the whole truth, and nothing but
14 the truth; that the witness waived signature;
15
16 That I am not a relative, employee, attorney, or
17 counsel of any party to this action or relative or employee
18 of any such attorney or counsel and I am not financially
19 interested in the said action or the outcome thereof;
20
21 That I am herewith securely sealing the deposition of
22 DAVID ERINS and promptly mailing the same to Stephanie E.
23 Pochop, Attorney at Law.
24
25 IN WITNESS WHEREOF, I have hereto set my hand this
17th day of June 2014.

Stephanie L. Moen, RPR
Freelance Court Reporter

Stephanie Moen & Assoc. (605) 995-0955

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D. ERINS BY POCHOP

1 MS. POCHOP: David, you do have the right to read
2 and sign your deposition to make sure it's accurately
3 transcribed. Our court reporter is a very experienced court
4 reporter, but some people just like to go - you don't get to
5 change your answers and say, "Oh, I wish I would have put
6 this," but you do get to go through it and make sure that
7 the answers that are on the page are what you actually
8 gave, --
9 THE WITNESS: Okay.
10 MS. POCHOP: -- and that's up to you. If you want
11 to do that, we just need to make sure that Stephanie gets
12 your mailing address so she can get the transcript to you.
13 THE WITNESS: It's P.O. Box 101, Linton 58552,
14 North Dakota.
15 MR. GILLETTE: You can waive it if you want to.
16 THE WITNESS: Okay.
17 MR. GILLETTE: Lots of people do.
18 THE WITNESS: Okay. I don't think I need it, I
19 guess.
20 MS. POCHOP: Do you want to waive it?
21 THE WITNESS: Yeah.
22 MS. POCHOP: We just need to make sure --
23 THE WITNESS: Yes, that's fine.
24 (Deposition concluded at 1:48 p.m.)
25 (Signature waived.)

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STATE OF SOUTH DAKOTA		IN CIRCUIT COURT	
COUNTY OF SPINK		FIFTH JUDICIAL CIRCUIT	
DAVID KNIGGE,			
Plaintiff,		No. 13-	
vs.			
B & L FOOD STORES, INC., and the			
Estate of ROBERT ALLEN KNIGGE,			
Defendants.			
DEPOSITION OF LYNETTE KNIGGE			
APPEARANCES:			
For the Plaintiff:	STEPHANIE E. POCHOP JOHNSON POCHOP LAW OFFICE P.O. Box 149 Gregory, SD 57533		
For the Defendants:	PAUL J. GILLETTE GILLETTE LAW OFFICE P.O. Box 60 Redfield, SD 57469		
ALSO PRESENT:	DAVID KNIGGE		
May 28, 2014 Redfield, South Dakota			

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KNIGGE BY POCHOP

BE IT REMEMBERED that on Wednesday, the 28th day of May 2014 at 10:08 a.m., at the law offices of the Gillette Law Office, 701 South Main Street, Redfield, South Dakota, before STEPHANIE L. MOEN, RFR, a Freelance Court Reporter and Notary Public in and for the State of South Dakota, appeared LYNETTE KNIGGE, the witness herein:

WHEREUPON, the following proceedings were had, to-wit:

LYNETTE KNIGGE called as a witness, having been first duly sworn testified as follows:

EXAMINATION BY MS. POCHOP:

Q Lynette, can you start out by just introducing yourself on the record and spelling your name so we have that correctly.

A My name is Lynette Knigge, L-y-n-e-t-t-e K-n-i-g-g-e.

Q And your address?

A 17301 383rd Avenue in Redfield, South Dakota.

Q And how long have you lived there?

A Since '96. Oh, at that residence? Since 2000.

Q How long have you lived in Redfield?

A Since '96.

Q Where do you hail from?

A Mitchell.

Q So how did you guys end up here in Redfield?

A Robert and I bought a store here in Redfield.

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INDEX OF EXAMINATIONS			
NAME	PAGE LINE		
By Ms. Pochop	3 13	Q Okay, when was that?	
By Mr. Gillette	115 6	A In '96.	
By Ms. Pochop	118 24	Q And so you moved up from Mitchell; is that where you --	
INDEX OF EXHIBITS		A Yes.	
NO. DESCRIPTION	PAGE LINE	Q -- lived before? Have you resided any other place than	
NONE		Mitchell and Redfield?	
		A Yeah, Ethan and Watertown and California.	
		Q Can you give me a little thumbnail sketch of where - when	
		you resided in those places.	
		A Okay. I was born in - excuse me - born in Watertown, moved	
		to California when I was 1; moved to Ethan, South Dakota,	
		when I was a 10th grader, and then from Ethan, then I moved	
		to Mitchell in --	
		Q An approximation is fine.	
		A Probably in the - '89, somewhere in there.	
		Q Okay. And as far as your educational background, can you	
		just kind of give me a general overview of your education.	
		A I graduated high school.	
		Q In Mitchell?	
		A No, in Ethan.	
		Q In Ethan, okay.	
		A Um-hmm.	
		Q How about your work history?	
		A The places I worked?	
		Q Just - I don't need you to start from baby-sitting, but	

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KNIGGE BY POCHOP	KNIGGE BY POCHOP
<p>1 A Yes.</p> <p>2 Q How old are your kids? How old is Jason?</p> <p>3 A Jason was born in '83; Keith is '85, Kalie is '87; Wesley is</p> <p>4 '90.</p> <p>5 Q Wow, you're busy.</p> <p>6 A Um-hmm.</p> <p>7 Q And as far as your kids, where do they - let's start with</p> <p>8 Jason. Just tell me where he lives and what he does.</p> <p>9 A He lives here in Redfield, and he works for Wheat Growers.</p> <p>10 Q How about Keith?</p> <p>11 A Keith is here in Redfield also, and right now he is actually</p> <p>12 working at the old store cleaning it out.</p> <p>13 Q And he's had some other involvement with your grocery</p> <p>14 businesses?</p> <p>15 A Yes. He managed the store in Redfield, and then he managed</p> <p>16 the store in Oakes also.</p> <p>17 Q We'll come back to Keith's involvement later then. And how</p> <p>18 about Kalie? Where is she at now?</p> <p>19 A Kalie's in Aberdeen.</p> <p>20 Q And what does she do?</p> <p>21 A She stays at home with her kids.</p> <p>22 Q And did she have some involvement in --</p> <p>23 A Yep. She managed the store in Oakes, yep.</p> <p>24 Q And how about Wesley?</p> <p>25 A Wesley right now, he has his own trucking company. It's</p>	<p>1 Q Okay. As far as your relationship with Bob's family, being</p> <p>2 married as long as you were, how would you describe his</p> <p>3 relationship with his siblings and his parents?</p> <p>4 A He was very close to his mom.</p> <p>5 Q Okay.</p> <p>6 A His dad, he was close but it was a little strained I think</p> <p>7 because of past history; Kevin, he has a brother Kevin who</p> <p>8 lives in Vegas which we don't see often, but he's close to</p> <p>9 him. He gets along with him really well; Don he gets along</p> <p>10 okay with. We don't see each other that often, more often</p> <p>11 when Robert got sick. Then we would see him; David, they</p> <p>12 got along, but I think more so when Robert got really ill.</p> <p>13 Then they had a better relationship than what they had</p> <p>14 prior.</p> <p>15 Q Okay. How was your relationship with Dave?</p> <p>16 A Okay.</p> <p>17 Q Have you ever had a falling-out with any of the - any of</p> <p>18 Bob's family members?</p> <p>19 A Since Robert's been sick?</p> <p>20 Q Yeah.</p> <p>21 A No.</p> <p>22 Q And your relationship with him, when was - am I right; Bob</p> <p>23 was diagnosed with cancer in October of 2011?</p> <p>24 A Yes.</p> <p>25 Q How had his health been before that?</p>
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KNIGGE BY POCHOP	KNIGGE BY POCHOP
<p>1 small.</p> <p>2 Q Okay.</p> <p>3 A But he does that, and then he also works for Wheat Growers</p> <p>4 on the side.</p> <p>5 Q Is he --</p> <p>6 A Here in Redfield, yep, um-hmm.</p> <p>7 Q That's nice you got your whole family here.</p> <p>8 A Um-hmm.</p> <p>9 Q And how about Bob? When did you and Bob get married?</p> <p>10 A In '96.</p> <p>11 Q And do you folks have any children together?</p> <p>12 A Yes.</p> <p>13 Q Okay.</p> <p>14 A We have Cami; she was born in '98. Then we had Bryce,</p> <p>15 Q Is that a boy or girl name?</p> <p>16 A A boy. And he was born in '99. And then his twin is Bryce,</p> <p>17 '99. And then we had Preston, and he's born in 2000.</p> <p>18 Q Wow, you were really a busy mom. I can see why you were not</p> <p>19 working --</p> <p>20 A Right.</p> <p>21 Q -- outside of your home --</p> <p>22 A Right.</p> <p>23 Q -- with all those kids to handle. So as far as Cami, let's</p> <p>24 do the same thing. Just tell me where she's at.</p> <p>25 A They're all at home, all at home in Redfield with me.</p>	<p>1 A Good.</p> <p>2 Q And can you just give me an overview of how his health</p> <p>3 progressed after his diagnosis. Was he having symptoms or</p> <p>4 was this kind of one of those things where you go to the</p> <p>5 doctor and you find out you've got a very serious diagnosis?</p> <p>6 A He had actually had a seizure in Omaha that took him to</p> <p>7 the - they took him to the hospital, and they thought he was</p> <p>8 having a stroke. Well, then we had got ahold of his doctor</p> <p>9 when we got back home from the food show, and he thought</p> <p>10 "well, let's do an MRI just to see" and then something</p> <p>11 showed up. So then the beginning of October, we went - we</p> <p>12 went over to Sioux Falls, and then he had an MRI, and it</p> <p>13 showed that he had cancer.</p> <p>14 Q Okay.</p> <p>15 A Stage 4 glioblastoma.</p> <p>16 Q What was his treatment path?</p> <p>17 A He did --</p> <p>18 MS. POCHOP: Do you have some tissues?</p> <p>19 A -- chemotherapy; he did radiation; he did the Avastin. That</p> <p>20 was it. He had three surgeries.</p> <p>21 Q (By Ms. Pochop) And how did - how did he do with his</p> <p>22 surgeries? I mean, he --</p> <p>23 A The first one went okay. I mean, he had a little - you</p> <p>24 know, he would have moments where he would be okay and then</p> <p>25 he wouldn't be okay. He got very depressed, which is</p>
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KNIGGE BY FOCHP	KNIGGE BY FOCHP
<p>1 understandable, and then as it progressed, naturally he got</p> <p>2 worse.</p> <p>3 Q Sure. Did he have a lot of pain? What were --</p> <p>4 A No, not so much. He had headaches but not real bad. They</p> <p>5 gave him medication for that.</p> <p>6 Q And as far as your participation, did you have to help him a</p> <p>7 lot or was he able to function pretty well on his own even</p> <p>8 after the treatment started?</p> <p>9 A After treatment started, he was - he was - he was good. He</p> <p>10 was pretty good. He would have moments where, you know, he</p> <p>11 would still see things, which they said was normal, have</p> <p>12 like hallucinations, things coming out of the wall.</p> <p>13 Q Bodies or something like that?</p> <p>14 A Yeah, or something coming out of the ceiling, you know,</p> <p>15 just - but not real often, but his mood really changed. I</p> <p>16 mean, he was so depressed and he was on medications because</p> <p>17 he was so depressed, and he couldn't believe it was him.</p> <p>18 You know, for a time there, he thought, well, maybe they had</p> <p>19 his - his test messed up with somebody else's. He was</p> <p>20 hoping.</p> <p>21 Q Sure. Maybe we should start, if you could, just tell me:</p> <p>22 before Bob's diagnosis, what kind of a guy was he?</p> <p>23 A Fun, very fun. He liked to laugh. He liked to joke around</p> <p>24 Q Was he kind of an in-charge type of guy?</p> <p>25 A Oh, yes, yes.</p>	<p>1 A Um-hum, yep.</p> <p>2 Q And did he ultimately have to go into a hospice type of</p> <p>3 facility?</p> <p>4 A Yes, hospice came.</p> <p>5 Q And did they do that at your home or --</p> <p>6 A Yes.</p> <p>7 Q Was he able to pass away --</p> <p>8 A Yes.</p> <p>9 Q -- at home?</p> <p>10 A Yep.</p> <p>11 Q And he passed away, then, was it June?</p> <p>12 A June 23rd.</p> <p>13 Q Of 2013.</p> <p>14 A Yes.</p> <p>15 Q And you thought he was pretty much incapacitated in a</p> <p>16 medical sense as far as making decisions for himself at what</p> <p>17 point?</p> <p>18 A Well, already back in October, he was - well, even in July,</p> <p>19 he had in his mind he wanted to buy a campground out in the</p> <p>20 Hills. And we were in the midst of remodeling the new store</p> <p>21 that we were going to go into, and this campground was</p> <p>22 \$665,000, and so he wanted to go take a loan out and buy</p> <p>23 that, and I said absolutely not. When Robert was diagnosed,</p> <p>24 they gave him 18 months, and so I didn't see the reason to</p> <p>25 have this campground if he wasn't going to be there. And</p>
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KNIGGE BY FOCHP	KNIGGE BY FOCHP
<p>1 Q I kind of got a sense of that, but I was wondering --</p> <p>2 A Yes. Yes, Robert was always in charge.</p> <p>3 Q And as - did he stay doctoring in Sioux Falls?</p> <p>4 A Yes.</p> <p>5 Q Who was his doc over there?</p> <p>6 A Which one?</p> <p>7 Q His main doctor for oncology or --</p> <p>8 A Dr. Elson.</p> <p>9 Q Did he get to a point where he was medically incapacitated</p> <p>10 and not able to function for himself ever?</p> <p>11 A Yes.</p> <p>12 Q And at what point was that, Lynette?</p> <p>13 A Completely?</p> <p>14 Q Yeah.</p> <p>15 A I would say probably into March. When he left the hospital</p> <p>16 in February, they wanted me to put him in the nursing home,</p> <p>17 but I promised Robert over Christmas I wouldn't do that.</p> <p>18 Q What was going on with him healthwise? Was it just</p> <p>19 headaches or...?</p> <p>20 A Paranoid where he wanted to - anybody that he thought was</p> <p>21 after him, he wanted to kill them. He - yeah, just -</p> <p>22 there's so much.</p> <p>23 Q Yeah, I'm sorry to be bringing this up. I know it's very --</p> <p>24 A Losing his - his function.</p> <p>25 Q As far as "his function" is his bodily function?</p>	<p>1 the way his mind was thinking, he - he said, "Well, we don't</p> <p>2 have to be there all the time. We could have somebody come</p> <p>3 run it."</p> <p>4 And I said, "Who are you going to have come run it?"</p> <p>5 "Anybody that comes for the weekend. If they want to</p> <p>6 come and stay at the campground for free, they could just</p> <p>7 take and run the store," because it had a store and it had a</p> <p>8 cafe in it so you had to cook and everything else.</p> <p>9 And I said, "It doesn't make sense. You cannot trust</p> <p>10 somebody to just come in and run something they know nothing</p> <p>11 about. And you're there with the cash register with money</p> <p>12 and trying to - you" - that didn't make sense with me and -</p> <p>13 so he didn't do it, and he was angry about that, which the</p> <p>14 psychiatrist said that's totally foolish of your thinking.</p> <p>15 Q Um-hmm.</p> <p>16 A You know, but - but things like that - okay, that was in - I</p> <p>17 believe that was in, like, June or July --</p> <p>18 Q Of...?</p> <p>19 A -- just kind of - of '12.</p> <p>20 Q Okay.</p> <p>21 A Yes. Just his - I don't - just thinking like that.</p> <p>22 In October, he went to help his son buy a car. And</p> <p>23 Robert had bought many, many cars, so he knows how all</p> <p>24 that works.</p> <p>25 Q Which boy?</p>
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KNIGGE BY POCHOP	KNIGGE BY POCHOP
<p>1 Q Did she ever work here at - and manage - as a manager of --</p> <p>2 A No.</p> <p>3 Q So Keith leaves around August of 2012, and did the store go</p> <p>4 without a manager for awhile or --</p> <p>5 A No.</p> <p>6 Q Okay, so Jason's --</p> <p>7 A Jason's already --</p> <p>8 Q -- right there.</p> <p>9 A -- employed there.</p> <p>10 Q Okay. And so was he promoted to be the manager?</p> <p>11 A Yes.</p> <p>12 Q Okay, did he have a written contract?</p> <p>13 A I'm not sure.</p> <p>14 Q And I think I might have asked you this, but do you know of</p> <p>15 any of the terms of his employment?</p> <p>16 A Of Jason's?</p> <p>17 Q Right.</p> <p>18 A No.</p> <p>19 Q So beginning in August of '12, Jason is the manager until</p> <p>20 approximately when?</p> <p>21 A I believe maybe March when David got there.</p> <p>22 Q March of '13?</p> <p>23 A Yes.</p> <p>24 Q Okay. And why did Jason leave management of your store?</p> <p>25 A Because David came.</p>	<p>1 Q Did he get paid \$10,000?</p> <p>2 A We did not sell the store.</p> <p>3 Q Okay. He had no --</p> <p>4 A They - they closed the store.</p> <p>5 Q He had no other compensation but his salary.</p> <p>6 A No.</p> <p>7 Q And if he would have, that would be reflected in K&J?</p> <p>8 A Right.</p> <p>9 Q Other stores that you have...?</p> <p>10 A The Linton Food Center.</p> <p>11 Q Okay. And when did Linton open up? And again approximate</p> <p>12 is fine.</p> <p>13 A Oh, let's see. Maybe 2008-2009 somewhere.</p> <p>14 Q And how did the Linton store come to be in existence?</p> <p>15 A Robert went up, heard there was a store for sale, and we</p> <p>16 ended up buying it.</p> <p>17 Q Okay. And is - what - and is the Linton store operated or</p> <p>18 owned by corporate entity?</p> <p>19 A Yes.</p> <p>20 Q And what is the name of that?</p> <p>21 A K&J - or --</p> <p>22 Q And did --</p> <p>23 A -- K&B.</p> <p>24 Q And what do the K&B stand store?</p> <p>25 A Knigge and Bruns.</p>
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KNIGGE BY POCHOP	KNIGGE BY POCHOP
<p>1 Q Okay. So was he terminated?</p> <p>2 A No.</p> <p>3 Q He voluntarily left?</p> <p>4 A No. He still worked there.</p> <p>5 Q Okay. He was kind of demoted --</p> <p>6 A Yes.</p> <p>7 Q -- or moved to a different position? How did that go with</p> <p>8 him?</p> <p>9 A I don't know how Jason was.</p> <p>10 Q Okay. Was that something that Bob also did?</p> <p>11 A Yes.</p> <p>12 Q He didn't have to do any of the "Jason, you're going to be</p> <p>13 stepping down"?</p> <p>14 A Nope.</p> <p>15 Q Okay. And then I think that brings us up to - up to my next</p> <p>16 questions about the Redfield store and about David's</p> <p>17 involvement there.</p> <p>18 MS. POCHOP: But do you folks mind if we take a</p> <p>19 little break?</p> <p>20 MR. GILLETTE: Nope.</p> <p>21 (Recess.)</p> <p>22 Q (By Ms. Pochop) All right, I did want to ask you, just</p> <p>23 before we move on to Redfield store management, as far as</p> <p>24 Keith, did he get paid anything after the store closed?</p> <p>25 A No. We did --</p>	<p>1 Q That's with David Bruns.</p> <p>2 A Yes, David and Lisa.</p> <p>3 Q And how did you folks get hooked up with Brunses?</p> <p>4 A Years ago when he worked at County Fair, he worked with</p> <p>5 David. David was a meat cutter, and we were really good</p> <p>6 friends. And they moved away and then ended up on a cruise</p> <p>7 together to Mexico and hooked up, and he said he was</p> <p>8 interested in managing a store, eventually having a store,</p> <p>9 and one thing led to another, and this store came for sale,</p> <p>10 and...</p> <p>11 Q What was - what were Dave and Lisa's contribution to the</p> <p>12 purchase of the store?</p> <p>13 A Money upfront you mean?</p> <p>14 Q Yeah.</p> <p>15 A They did not have to come up with anything.</p> <p>16 Q Okay. What was --</p> <p>17 A They worked for their - they are part owners and they're</p> <p>18 working towards that ownership --</p> <p>19 Q How much --</p> <p>20 A 25 percent.</p> <p>21 Q And have they worked off their 25 percent?</p> <p>22 A Pretty close.</p> <p>23 Q Okay. Do you have a written contract with them?</p> <p>24 A Yes.</p> <p>25 Q And when was that entered into?</p>
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KNIGGE BY POCHOP	KNIGGE BY POCHOP
<p>1 A At that point, I don't think he cared.</p> <p>2 Q Okay, well, why was it important for him to have David and</p> <p>3 Lisa come then?</p> <p>4 A That's what I mean. At one time, he would make one</p> <p>5 decision; next time it would be another decision.</p> <p>6 Q Were they actually getting ready to move here?</p> <p>7 A Yes.</p> <p>8 Q And did they talk to you about why they weren't coming?</p> <p>9 A All of a sudden, we just heard that David was coming, and I</p> <p>10 was there when Robert was talking on the phone with David</p> <p>11 discussing that he would - his salary would be \$70,200 and a</p> <p>12 bonus based on how the store did. And so Robert got off the</p> <p>13 phone, and I called Dave and Lisa, and I said, "Well, aren't</p> <p>14 you guys - what's wrong? Aren't you coming?"</p> <p>15 "Well, yeah." They were coming after Jake graduated.</p> <p>16 He graduated in May.</p> <p>17 And I said, "Well, Robert just said - he was on the</p> <p>18 phone with David, and he just said David's coming now</p> <p>19 instead of you guys."</p> <p>20 Q So then what happened?</p> <p>21 A So then David came.</p> <p>22 Q Did you talk to Bob and say, "What about David and" -</p> <p>23 A Yes.</p> <p>24 Q And what did Bob say?</p> <p>25 A Yes. He wanted David there.</p>	<p>1 A No.</p> <p>2 Q And did you know what Dave did before he came to Redfield?</p> <p>3 A Before Oakes you mean?</p> <p>4 Q Yeah.</p> <p>5 A Yeah, he worked for the State.</p> <p>6 Q Okay, was that a good job as far as you know?</p> <p>7 A Is - I don't know. I don't work for the State.</p> <p>8 Q Until - had you ever heard that he was dissatisfied with his</p> <p>9 State job or didn't want to do that?</p> <p>10 A I've never heard anything.</p> <p>11 Q Until Bob got sick and asked Dave for help, did Dave ever</p> <p>12 talk about getting into the grocery business with you folks?</p> <p>13 A Yes.</p> <p>14 Q Okay. When was that?</p> <p>15 A Oh, goll, right before he got divorced.</p> <p>16 Q Okay. What was the plan?</p> <p>17 A We were looking at a store in Custer.</p> <p>18 Q And was that a going affair? I mean, was that a business</p> <p>19 deal that you were seriously thinking about doing and having</p> <p>20 Dave be the manager there?</p> <p>21 A Well, we kind of looked at it.</p> <p>22 Q And what happened to that plan?</p> <p>23 A It didn't go through.</p> <p>24 Q Okay. At least the plan at the time was for Dave to be a</p> <p>25 co-owner --</p>
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KNIGGE BY POCHOP	KNIGGE BY POCHOP
<p>1 Q And so you were aware - you at least heard him</p> <p>2 negotiating --</p> <p>3 A Yes.</p> <p>4 Q -- somewhat with David. You knew he was hiring David?</p> <p>5 A Um-hmm.</p> <p>6 Q You knew that David was going to be the manager.</p> <p>7 A Yes.</p> <p>8 Q And you knew that Lisa and her husband weren't going to be</p> <p>9 the managers?</p> <p>10 A Well, yes and no, because the way Robert changed his</p> <p>11 mind. . .</p> <p>12 Q Okay. Then if I understand correctly, then Dave actually</p> <p>13 came and he was living with you when he began his job as the</p> <p>14 manager of the Redfield store.</p> <p>15 A Yes.</p> <p>16 Q And he lived in your home for --</p> <p>17 A I don't know.</p> <p>18 Q -- several months? And during that time, did you ever talk</p> <p>19 with - first of all, with Bob about what his salary and what</p> <p>20 his contract for employment looked like?</p> <p>21 A I knew what it was.</p> <p>22 Q Okay. And tell me what you knew about it.</p> <p>23 A He was going to get \$70,200, and then he would get a bonus</p> <p>24 based on how well the store did.</p> <p>25 Q Okay. Did he have any insurance benefits?</p>	<p>1 A No.</p> <p>2 Q -- and manager? Just a manager.</p> <p>3 A Um-hmm.</p> <p>4 Q And as far as - as far as your store management in Redfield,</p> <p>5 who does over - who does the job of overseeing your ERISA</p> <p>6 compliance?</p> <p>7 A ERISA?</p> <p>8 Q Yeah, the Federal law about employee benefits.</p> <p>9 A That would be probably Kent.</p> <p>10 Q Okay.</p> <p>11 A Plus we go through Affiliated.</p> <p>12 Q Okay. Before Bob died, who did it?</p> <p>13 A I don't understand.</p> <p>14 Q Who would decide what employee benefits --</p> <p>15 A We - we didn't have employee benefits.</p> <p>16 Q And you did have a lawyer at the time when Dave was fired to</p> <p>17 come down here.</p> <p>18 A Did I have a lawyer?</p> <p>19 Q Yeah. The store did, right? Is that Mr. Gillette?</p> <p>20 A He has always been my attorney.</p> <p>21 Q And was he also representing the store; do you know?</p> <p>22 A As in to - I don't understand.</p> <p>23 Q The Redfield store, who - did it have a lawyer for your</p> <p>24 corporation?</p> <p>25 A Yes. He's - he's my attorney for everything.</p>
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KNIGGE BY POCHOP	KNIGGE BY POCHOP
<p>1 whacked out that he wasn't able to make decisions, why would</p> <p>2 he be negotiating with Lisa and David Bruns?</p> <p>3 A And why would he also be negotiating with him --</p> <p>4 Q Right.</p> <p>5 A -- and being negotiating with everybody else in the</p> <p>6 meantime?</p> <p>7 Q Right. I mean, apparently you thought he had the capacities</p> <p>8 to make a deal with David and Lisa?</p> <p>9 A I thought David and Lisa were the best decisions --</p> <p>10 Q Okay.</p> <p>11 A -- just because they have been in the grocery business</p> <p>12 for --</p> <p>13 Q Right.</p> <p>14 A -- how many years. David has managed a store himself.</p> <p>15 Q So you thought that was a good decision he made.</p> <p>16 A Yes. They know what they're doing.</p> <p>17 Q And then when you - what did Bob say when you told him that</p> <p>18 you were opposed to hiring Dave to come here and be the</p> <p>19 manager?</p> <p>20 A He didn't like it.</p> <p>21 Q Did you folks get into an argument about it?</p> <p>22 A A little bit.</p> <p>23 Q And did Bob ever ask you to reinstate the divorce?</p> <p>24 A No.</p> <p>25 Q And so he didn't like it, but what happened?</p>	<p>1 and conditions of Dave's employment at the Redfield store</p> <p>2 were that he and Bob agreed upon?</p> <p>3 A That I know of?</p> <p>4 Q That you know of.</p> <p>5 A He was to get \$70,200 salary, and he was to get a bonus</p> <p>6 based on how well the store did, but Robert never said on</p> <p>7 the phone what that bonus would be, --</p> <p>8 Q Okay.</p> <p>9 A -- what percentage or anything.</p> <p>10 Q Okay. And you knew it wasn't --</p> <p>11 A And it was salary.</p> <p>12 Q It was salary. So you knew he wasn't just going to be a</p> <p>13 regular W-2 employee. Or did you know that?</p> <p>14 A What do you mean a regular W-2 --</p> <p>15 Q Well, why don't you tell me. Did you think he had an</p> <p>16 employment contract with the store, or what did you think</p> <p>17 his employment status was, or did you know?</p> <p>18 A I don't understand.</p> <p>19 Q Did you have any idea whether they had a contract, a verbal</p> <p>20 agreement, or...?</p> <p>21 A On the phone, that's...</p> <p>22 Q Okay. And it sounds like that that is how Bob did business</p> <p>23 even with your own children.</p> <p>24 A At times.</p> <p>25 Q Okay. And he was, at the time, authorized to make an offer</p>
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KNIGGE BY POCHOP	KNIGGE BY POCHOP
<p>1 A But David came.</p> <p>2 Q And you knew that he was employed at the store as the</p> <p>3 manager?</p> <p>4 A Yes.</p> <p>5 Q And, in fact, he lived under your roof while he was</p> <p>6 employed.</p> <p>7 A Yes.</p> <p>8 Q Do you know if they had a written contract?</p> <p>9 A No.</p> <p>10 Q Do you know if they ever talked about it?</p> <p>11 A No.</p> <p>12 Q Did you ever talk to Dave about what his benefits or his</p> <p>13 salary was going to be?</p> <p>14 A No.</p> <p>15 Q Did you --</p> <p>16 A All I know is what - when Robert was on the phone.</p> <p>17 Q Just you overheard part of a conversation --</p> <p>18 A Yeah, I was sitting there when Robert was talking to him.</p> <p>19 Q And how long was that conversation before David actually</p> <p>20 showed up?</p> <p>21 A They were in the midst of moving stuff from Oakes to</p> <p>22 Redfield.</p> <p>23 Q Time frame.</p> <p>24 A Oh, gosh. I'm saying - I don't know. March maybe.</p> <p>25 Q As we sit here today, can you testify about what the terms</p>	<p>1 on behalf of your business to hire a manager.</p> <p>2 A Robert?</p> <p>3 Q Yeah.</p> <p>4 A He was authorized, but the doctor said he - he shouldn't be.</p> <p>5 Q Okay. And he was also authorized to fire people or demote</p> <p>6 people.</p> <p>7 A Yes.</p> <p>8 Q And if you would - just hypothetically, if he would - for</p> <p>9 example, with Lisa and David, if he had said "all right,</p> <p>10 I'll build you a house or I'll help you build a house for" -</p> <p>11 I mean, did you guys ever even talk about what your</p> <p>12 contribution to that would be?</p> <p>13 A No.</p> <p>14 Q If he had said "I'll contribute \$50,000 to the construction</p> <p>15 of your house," would he have been able to make that</p> <p>16 representation to David and Lisa?</p> <p>17 A Would he be able to say that?</p> <p>18 Q Yeah.</p> <p>19 A Robert could say anything.</p> <p>20 Q Well, I mean, if he said it, would that be - you guys would</p> <p>21 have had to help them to the tune of \$50,000 to build a</p> <p>22 house just based on Bob's word?</p> <p>23 A In his state of mind, no. I don't believe so.</p> <p>24 Q And you knew that Dave specifically moved to Redfield</p> <p>25 because of this job?</p>
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KNIGGE BY POCHOP	KNIGGE BY POCHOP
<p>1 A Yes.</p> <p>2 Q And he gave up his house in Pierre?</p> <p>3 A Yes.</p> <p>4 Q Sold his house, right?</p> <p>5 A Yes.</p> <p>6 Q You knew that he moved his family here from Pierre?</p> <p>7 A "His family here from Pierre?"</p> <p>8 Q Yeah. Did he move his family to Redfield?</p> <p>9 A Knigge?</p> <p>10 Q Yeah.</p> <p>11 A No. His family is not here.</p> <p>12 Q Did he have difficulty finding housing here?</p> <p>13 A You would have to ask him that.</p> <p>14 Q You knew that he had changed his position, at least in terms</p> <p>15 of his job and his housing and where he lived, to come here</p> <p>16 for this job.</p> <p>17 A To--</p> <p>18 Q You knew that --</p> <p>19 A To - to go to Oakes.</p> <p>20 Q Okay, and how about to Redfield?</p> <p>21 A Well, when he was in Oakes, he stayed in a motel, --</p> <p>22 Q Okay.</p> <p>23 A -- which was paid for by the store.</p> <p>24 Q Okay.</p> <p>25 A All his expenses were paid. He - he didn't have to pay for</p>	<p>1 A Just the store in general. I mean, trying - Ernie trying to</p> <p>2 build the store, get it going, and Robert would change his</p> <p>3 mind and David would always agree with him right or wrong.</p> <p>4 It's like, "Well, if this is what Robert wants." Well,</p> <p>5 Robert was not capable at that time of making good</p> <p>6 decisions.</p> <p>7 Q So then what happened with you and Dave living in the same</p> <p>8 house? I mean, just - did you guys communicate ever</p> <p>9 or...?</p> <p>10 A Not hardly.</p> <p>11 Q Were you doing any part of the payroll so you knew what he</p> <p>12 was getting paid?</p> <p>13 A No.</p> <p>14 Q Did you and Dave - did you ever come and talk to him and say</p> <p>15 "just exactly what is your job"?</p> <p>16 A No. I was taking care of Robert.</p> <p>17 Q Okay. Did Dave ever ask you to come help with the store?</p> <p>18 A No.</p> <p>19 Q Did he ever ask you to come in and do even - just chip in</p> <p>20 with any little bit --</p> <p>21 A No.</p> <p>22 Q -- at all while Robert was sick?</p> <p>23 A No. And then it was --</p> <p>24 Q How about afterwards?</p> <p>25 A No.</p>
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KNIGGE BY POCHOP	KNIGGE BY POCHOP
<p>1 anything when he lived in Oakes. That was all taken care</p> <p>2 of.</p> <p>3 Q And did you negotiate that with Dave or was that something</p> <p>4 that Bob --</p> <p>5 A No, that was Robert.</p> <p>6 Q And then when he came here, you knew that he sold his house</p> <p>7 in Pierre to come here?</p> <p>8 A To go to Oakes, yes.</p> <p>9 Q But how about when he came here to Redfield?</p> <p>10 A He - he didn't have a house there.</p> <p>11 Q He came here - he did spend the money to buy a house</p> <p>12 eventually?</p> <p>13 A Yes.</p> <p>14 Q And before that, he actually had lived with you folks?</p> <p>15 A Yes.</p> <p>16 Q And did you have a good relationship with him while he was</p> <p>17 living here working with you in your store?</p> <p>18 A No.</p> <p>19 Q All right. And tell me about what your relationship was</p> <p>20 like then.</p> <p>21 A Very strained because I felt that he was letting Robert make</p> <p>22 decisions that he shouldn't make.</p> <p>23 Q Like what?</p> <p>24 A Like the driving.</p> <p>25 Q Okay. Anything else?</p>	<p>1 Q Did you ever work at the store physically at anytime during</p> <p>2 Bob's illness?</p> <p>3 A No.</p> <p>4 Q And so how - if - this is - I'm trying to imagine how</p> <p>5 uncomfortable this would be to have your brother-in-law that</p> <p>6 you're kind of mad about being your store manager living in</p> <p>7 your house and you're kind of mad at your husband about it.</p> <p>8 Tell me what you and Bob would have - did you guys ever</p> <p>9 resolve that issue?</p> <p>10 A Yeah.</p> <p>11 Q Okay, how?</p> <p>12 A We talked.</p> <p>13 Q Tell me what you - how did you figure - what did you decide?</p> <p>14 A As - as to what? As to David --</p> <p>15 Q Right.</p> <p>16 A -- you mean? Just that's - we're going to see how he works</p> <p>17 out.</p> <p>18 Q And what was Bob's position on it?</p> <p>19 A Well, what - depending on what day. You know, some days</p> <p>20 it's - David was green. He - he didn't have a lot of the</p> <p>21 experience, so that kind of worried Robert.</p> <p>22 Q Okay. So as we sit here today under oath, you don't dispute</p> <p>23 that you know Bob offered Dave the job as the store manager</p> <p>24 in Redfield?</p> <p>25 A Right.</p>
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KNIGGE BY POCHOP	KNIGGE BY POCHOP
<p>1 Q And you don't dispute that Bob offered Dave a salary of</p> <p>2 \$70,200 a year?</p> <p>3 A Right.</p> <p>4 Q And you - do you dispute that Bob offered Dave a severance</p> <p>5 agreement?</p> <p>6 A On the phone, there was nothing.</p> <p>7 Q Okay, well, I want to know what your position is.</p> <p>8 A To my knowledge, no.</p> <p>9 Q You don't dispute that Bob and Dave both knew that you were</p> <p>10 upset about the decision to hire Dave?</p> <p>11 A Right.</p> <p>12 Q And you don't dispute that Bob felt very kindly and</p> <p>13 appreciative of his brother for being willing to help him in</p> <p>14 the business?</p> <p>15 A Sure, as with anybody.</p> <p>16 Q And Bob knew he had limited time.</p> <p>17 A Yes.</p> <p>18 Q Did you and Bob discuss whether Dave would be able to</p> <p>19 continue at his job once Bob passed away?</p> <p>20 A No.</p> <p>21 Q Okay.</p> <p>22 A He just said "make sure you take care of the kids."</p> <p>23 Q Just knowing the type of relationship they had and the type</p> <p>24 of person that Bob was, would it make sense to you that Bob</p> <p>25 would want to take care of Dave after his death?</p>	<p>1 Q And, nonetheless, B&L, Inc., or the Redfield Food Center</p> <p>2 contracted for the loan.</p> <p>3 A Yes.</p> <p>4 Q And has that loan been paid? Are you honoring that</p> <p>5 contract?</p> <p>6 A We're continuing.</p> <p>7 Q It is continuing?</p> <p>8 A Yep.</p> <p>9 Q So, then, Bob passes away and tell me, in your perception,</p> <p>10 what happened with the management to the Redfield store.</p> <p>11 A As to...?</p> <p>12 Q Dave's employment.</p> <p>13 A How he did?</p> <p>14 Q Yeah. Because he was there for a couple more months, right?</p> <p>15 A Right, until August.</p> <p>16 Q And were you the person - I mean, it sounds like you would</p> <p>17 have had a lot going on recovering from the death of your</p> <p>18 husband and having kids at home. Were you the person that</p> <p>19 was running the Redfield Food Store management or who was?</p> <p>20 A No. He was. David was.</p> <p>21 Q How about the corporation that owns the store? Who was</p> <p>22 running that?</p> <p>23 A It just went.</p> <p>24 Q Okay. And so at what point did you decide that you were</p> <p>25 going to make a change in management?</p>
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KNIGGE BY POCHOP	KNIGGE BY POCHOP
<p>1 A No.</p> <p>2 Q Okay, why not?</p> <p>3 A Because Robert's concerned with his four kids.</p> <p>4 Q But he had actually demoted one of his kids to hire David.</p> <p>5 A Now I'm talking about the four little kids, our kids</p> <p>6 together, --</p> <p>7 Q Okay.</p> <p>8 A -- yes.</p> <p>9 Q And you don't dispute that Bob and Dave could have had other</p> <p>10 discussions about the terms of David's employment that you</p> <p>11 weren't a party to.</p> <p>12 A It's possible.</p> <p>13 Q Okay. Tell me about this - Bob took out a 400,000-dollar</p> <p>14 loan?</p> <p>15 A Yes.</p> <p>16 Q And when was that?</p> <p>17 A Oh, goll. I'm not sure. It might have been October of '12.</p> <p>18 Q And you disagreed with it?</p> <p>19 A Yes.</p> <p>20 Q And he did it anyway?</p> <p>21 A (Witness nods head.)</p> <p>22 Q And I assume that's a written contract with Affiliated?</p> <p>23 A Yes.</p> <p>24 Q And they permitted him to sign - you refused to sign.</p> <p>25 A Right.</p>	<p>1 A Well, that was ongoing, because already - must have been in</p> <p>2 July, I felt like David wasn't being honest.</p> <p>3 Q Okay.</p> <p>4 A They had closed the Oakes store, and I wanted to know about</p> <p>5 the finances. There were things in there that weren't</p> <p>6 right, and I wanted to know about the finances. He couldn't</p> <p>7 give me answers.</p> <p>8 Q Okay. Who closed the Oakes store?</p> <p>9 A David and Robert did.</p> <p>10 Q Okay. And when did they do that?</p> <p>11 A You'd have to ask David. I believe February.</p> <p>12 Q And so in July you started talking to him about the</p> <p>13 finances?</p> <p>14 A For the Oakes store.</p> <p>15 Q Right. Did you not get that sorted out with Bob or...?</p> <p>16 A No. Robert - no. He wasn't....</p> <p>17 Q Did Dave have some ability to contract on behalf of K&J,</p> <p>18 Inc., or why would the closing of the Oakes store - if he</p> <p>19 didn't have any ownership in it, why would that be his</p> <p>20 responsibility, David's?</p> <p>21 A I think they decided together, because what David told me</p> <p>22 was that he could make more money coming to Redfield than</p> <p>23 staying in Oakes, --</p> <p>24 Q Okay.</p> <p>25 A -- so then they decided to close the Oakes store.</p>
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<p>1 the management of the Redfield store?</p> <p>2 A No.</p> <p>3 Q Do they participate in the management of any K&J store?</p> <p>4 A No.</p> <p>5 Q Just K&B?</p> <p>6 A Yes.</p> <p>7 Q Do they - who manages the K&B business now that Bob is gone?</p> <p>8 A I do --</p> <p>9 Q Okay, and so --</p> <p>10 A -- and Dave and Lisa.</p> <p>11 Q Okay.</p> <p>12 A It's a partnership.</p> <p>13 Q Okay. And do you folks hire - do you participate in hiring</p> <p>14 for K&B, Inc.?</p> <p>15 A No.</p> <p>16 Q Do you know who - who is your current manager? Is that</p> <p>17 David?</p> <p>18 A David.</p> <p>19 Q Does he have a written contract for you --</p> <p>20 A Yes.</p> <p>21 Q -- for that, management of the Linton store?</p> <p>22 A Yes.</p> <p>23 Q Okay, and we talked about that before. Tell me about how</p> <p>24 you determine to end Dave's employment at the - Dave</p> <p>25 Knigge's employment at the Redfield store.</p>	<p>1 "No, I need to know now what" --</p> <p>2 Q Was it a particularly busy time at the store when you guys</p> <p>3 were completing that move?</p> <p>4 A Was it busy? The store is always busy.</p> <p>5 Q Was it more chaotic than normal because of the move to the</p> <p>6 new store at the time that Dave was the manager, if you</p> <p>7 know?</p> <p>8 A I - we had enough help. We had enough employees. It - and</p> <p>9 I'm sure it probably was chaotic for him because he's new</p> <p>10 coming into this.</p> <p>11 Q Did you do anything to assist him with --</p> <p>12 A No.</p> <p>13 Q -- management of the store? So --</p> <p>14 A No. My husband just died.</p> <p>15 Q So when did you decide - and it's also his brother.</p> <p>16 A Yeah, well, it's my husband and my dad of my four kids.</p> <p>17 Q Were you guys able to - because of the loss that you were</p> <p>18 having, were you able to have any sort of family</p> <p>19 communication --</p> <p>20 A No.</p> <p>21 Q -- or was this down to a business thing?</p> <p>22 A Business.</p> <p>23 Q Tell me when you decided - when you decided to terminate</p> <p>24 Dave as the manager.</p> <p>25 A Let's see. It was probably like the - sometime in August.</p>
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KNIGGE BY POCHOP	KNIGGE BY POCHOP
<p>1 A How I came about --</p> <p>2 Q Yeah.</p> <p>3 A -- terminating him? Because I would go - I would go to the</p> <p>4 store, and I would ask him questions that he could not give</p> <p>5 me answers for and he would get very defensive. Like</p> <p>6 closing of the Oakes store, I needed to know what all was</p> <p>7 there, what happened when they closed the store. He was</p> <p>8 very vague on any questions, especially when it come to</p> <p>9 finances. I asked him about the finances on the - the - the</p> <p>10 bank up there, --</p> <p>11 Q Okay.</p> <p>12 A -- and he was very vague. And I asked him, "Is there any</p> <p>13 accounts up there, anything else that I should know about?"</p> <p>14 "No."</p> <p>15 I said, "Okay, then I'm going to take this to my</p> <p>16 attorney, Paul."</p> <p>17 Then - and then right away he says, "Well, there's a</p> <p>18 savings account up there for \$7,000, okay?"</p> <p>19 Which kind of, "All right."</p> <p>20 Going through the finances at the Redfield Food Store,</p> <p>21 the checkbook - he - he's smart. Evidently he must be</p> <p>22 smart. He works for the State with numbers. He could not</p> <p>23 tell me anything at the store here. I would ask him</p> <p>24 questions. "Oh, I had the - the statements at home" or, you</p> <p>25 know, "I can't get to them."</p>	<p>1 Q And the reasons were the concerns over the Oakes store,</p> <p>2 finances, and he --</p> <p>3 A All the finances, everything, --</p> <p>4 Q Okay.</p> <p>5 A -- and not telling me anything that was going on in the</p> <p>6 store.</p> <p>7 Q Were you getting any of the monthly reports for the store</p> <p>8 or --</p> <p>9 A No.</p> <p>10 Q Did you ask for them?</p> <p>11 A No. At that time they - we were going through a - a system</p> <p>12 called Quatro, and so you don't get monthly reports. It</p> <p>13 comes like twice a year.</p> <p>14 Q And then any other things that led to your termination</p> <p>15 decision with regard to Dave's employment?</p> <p>16 A Besides the trust?</p> <p>17 Q Yeah, just your trust levels. I think we can put that stuff</p> <p>18 under the trust level category?</p> <p>19 A Um-hmm, --</p> <p>20 Q Any other reports?</p> <p>21 A -- like the finances. Actually, there was - one of Robert's</p> <p>22 deals was like when you're management, you do not have</p> <p>23 anything to do with regular - regular employees, --</p> <p>24 Q Okay.</p> <p>25 A -- and so David and Jackie from the store started going out</p>
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<p>1 seeing each other, which was - which caused major</p> <p>2 conflict, --</p> <p>3 Q Okay.</p> <p>4 A -- because then she found out that he was seeing somebody</p> <p>5 else, and that caused a lot of conflict through the store</p> <p>6 itself.</p> <p>7 Q So did you tell him - at that point, were you the only</p> <p>8 person that had any management control over the corporation</p> <p>9 that owned the store?</p> <p>10 A While this was going on? This had been going on since - oh,</p> <p>11 goll.</p> <p>12 Q I'm just asking: Was there anybody else besides you who had</p> <p>13 any ownership interest in the corporation that owned the</p> <p>14 store after Bob died?</p> <p>15 A No.</p> <p>16 Q Do your kids have any interest?</p> <p>17 A No.</p> <p>18 Q Any other third parties?</p> <p>19 A No.</p> <p>20 Q Okay. So tell me about what you - did you even consider</p> <p>21 really keeping Dave, or, in your mind, he was - he just had</p> <p>22 to go?</p> <p>23 A After the deal with the finances, him not being able to give</p> <p>24 me any answers that I think he should have and I should know</p> <p>25 what was going on in the store, I - I had trust issues; I</p>	<p>1 A Yep.</p> <p>2 Q -- for him?</p> <p>3 A Yep.</p> <p>4 Q And what's his name?</p> <p>5 A Kent Erickson.</p> <p>6 Q And what's his experience?</p> <p>7 A He has 18 years' experience with Affiliated.</p> <p>8 Q And what was Kent's salary package at the store?</p> <p>9 A 50,000.</p> <p>10 Q Any benefits?</p> <p>11 A 5,000-dollar bonus - or 5 percent bonus depending on how</p> <p>12 well the store does.</p> <p>13 Q And has he earned a bonus?</p> <p>14 A Not yet. He hasn't been there a year.</p> <p>15 Q Does he have a written contract with you?</p> <p>16 A Yes.</p> <p>17 Q And who drafted that contract?</p> <p>18 A I did.</p> <p>19 Q Did you have a lawyer --</p> <p>20 A I have a contract and he has a contract.</p> <p>21 Q Is that something that you wrote down together --</p> <p>22 A Yes.</p> <p>23 Q -- or that you had your lawyer do?</p> <p>24 A Together.</p> <p>25 Q Was there a lawyer involved in your contract?</p>
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<p>1 did.</p> <p>2 And the - he - I know he put in a lot of hours and he</p> <p>3 would complain about that, but when you're a manager, you're</p> <p>4 expected to work 6 days a week. That's - that's just - but</p> <p>5 he just - he didn't perform up to what I thought - I needed</p> <p>6 somebody in there that knew what they were doing.</p> <p>7 Q So what did you do about that?</p> <p>8 A I called John Clark who owns grocery stores in Mitchell, and</p> <p>9 I visited with him.</p> <p>10 Q Tell me about what you asked him.</p> <p>11 A I just asked him, "What do I do?"</p> <p>12 And he said, "Call Affiliated, and they will find you</p> <p>13 somebody." And even - honestly, Duane Schwartz, which is</p> <p>14 one of the head guys from Affiliated, thought David should</p> <p>15 be replaced because a store our size needed to have somebody</p> <p>16 that was experienced, and that's what John Clark said also.</p> <p>17 Q So they helped you make this decision that you were going to</p> <p>18 terminate him.</p> <p>19 A Yes.</p> <p>20 Q And had you actually been looking for a replacement for him</p> <p>21 before you notified him that he was terminated?</p> <p>22 A Yes, --</p> <p>23 Q Okay.</p> <p>24 A -- after I talked to John Clark.</p> <p>25 Q And did you find a replacement --</p>	<p>1 A No.</p> <p>2 Q Why --</p> <p>3 A Not yet.</p> <p>4 Q Why didn't you have a lawyer involved in your contract if</p> <p>5 you had Mr. Gillette?</p> <p>6 A Because we agreed that he will stay a year. His wife isn't</p> <p>7 here yet.</p> <p>8 Q Okay.</p> <p>9 A He's from Norfolk. So we would do it for a year and see how</p> <p>10 it - how it pans out.</p> <p>11 Q Okay. So that will be up in August?</p> <p>12 A Yep.</p> <p>13 Q Did he have any - you guaranteed him a year of employment</p> <p>14 then.</p> <p>15 A Yes.</p> <p>16 Q When you were talking about terminating Dave, did any of</p> <p>17 these folks ask you if you had a contract with him, John</p> <p>18 Clark or Duane?</p> <p>19 A No.</p> <p>20 Q Did you call Mr. Gillette to find out if there was a</p> <p>21 contract with Dave?</p> <p>22 A No.</p> <p>23 Q Did you ask Dave?</p> <p>24 A No.</p> <p>25 Q Was the first time that you found out that Dave thought that</p>
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KNIGGE BY POCHOP	KNIGGE BY POCHOP
<p>1 he had a contract that had a severance agreement to it at</p> <p>2 the meeting when you told him you were going to terminate</p> <p>3 him?</p> <p>4 A No. Actually, must have - I'm not sure. Like a week or so</p> <p>5 before, --</p> <p>6 Q Okay.</p> <p>7 A -- David Bruns had mentioned something that David Knigge</p> <p>8 said that if he's let go, he gets a hundred thousand</p> <p>9 dollars.</p> <p>10 Q Okay. And how - what did you and David say? I mean, how</p> <p>11 did that come up with the two of you?</p> <p>12 A It didn't until. . .</p> <p>13 Q Okay, but you just told me, a week before you terminated</p> <p>14 Dave, David Bruns told you that David Knigge had said he's</p> <p>15 got a --</p> <p>16 A David had talked to him, and then I found out.</p> <p>17 Q Okay. And what did David Bruns have to say about that to</p> <p>18 you when he told you about his conversation with David</p> <p>19 Knigge? This is just in passing "oh, by the way" or what's</p> <p>20 the context for --</p> <p>21 A I don't know. You'd have to ask David.</p> <p>22 MR. GILLETTE: Excuse me. I'm unclear as to the</p> <p>23 time at which David Bruns told you about the conversation</p> <p>24 with David about the hundred thousand.</p> <p>25 Q (By Ms. Pochop) Yeah, please, let's go ahead and clarify it</p>	<p>1 of the corporation that owned the Redfield store?</p> <p>2 A No.</p> <p>3 Q And tell me when your conversation with Ernie about the</p> <p>4 90,000-dollar severance package was.</p> <p>5 A It was in that time period of - because I had talked to</p> <p>6 David.</p> <p>7 Q After Bob's death?</p> <p>8 A Yes.</p> <p>9 Q Before David's termination?</p> <p>10 A (Witness nods head.)</p> <p>11 Q Okay. So did you yourself then ever talk to David to say</p> <p>12 "what was your contract with the Redfield store"?</p> <p>13 A Huh-uh.</p> <p>14 Q When --</p> <p>15 A No, he just brought it up at the meeting when we terminated</p> <p>16 him that there was - that he was supposed to get a hundred</p> <p>17 thousand.</p> <p>18 Q And what did you say?</p> <p>19 A I said I had to talk to my attorney.</p> <p>20 Q Did you tell him it was too high?</p> <p>21 A Well, we had discussed - he said a hundred thousand, and I</p> <p>22 said, "What? That - you're already getting paid \$70,000</p> <p>23 which is almost - way more than what an experienced manager</p> <p>24 would get."</p> <p>25 Q So did you tell him that his severance package of a hundred</p>
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KNIGGE BY POCHOP	KNIGGE BY POCHOP
<p>1 because I do want that to be clear for both of us. Is that</p> <p>2 a week before the meeting with David Knigge to tell him he</p> <p>3 was terminated or. . . ?</p> <p>4 A Yeah, I believe so.</p> <p>5 Q Approximately.</p> <p>6 A Yes.</p> <p>7 Q This was before you had told David he - David Knigge he was</p> <p>8 going to be losing his job.</p> <p>9 A Yes, I believe so.</p> <p>10 Q And at least one person before that had told you that there</p> <p>11 was a - apparently a contract that had a severance agreement</p> <p>12 in it.</p> <p>13 A You mean David Bruns?</p> <p>14 Q Yes.</p> <p>15 A Yes.</p> <p>16 Q Did anybody else tell you that there was - that David Knigge</p> <p>17 had a contract that had a severance --</p> <p>18 A Then I talked to Ernie.</p> <p>19 Q Okay. And what did Ernie say?</p> <p>20 A And Ernie said that David had told him that there was but it</p> <p>21 was 90,000.</p> <p>22 Q And why did you talk to Ernie?</p> <p>23 A Because at that time, Ernie was helping me go through all my</p> <p>24 finances trying to figure everything out.</p> <p>25 Q Okay. So was Ernie kind of helping you with the management</p>	<p>1 thousand dollars was too high?</p> <p>2 A I thought it was a lot.</p> <p>3 Q Did you tell him that?</p> <p>4 A Yes, --</p> <p>5 Q And --</p> <p>6 A -- and I didn't know there was a severance.</p> <p>7 Q Okay. Well, when you had talked to David Bruns and you had</p> <p>8 talked to Ernie and both of them had told you that David</p> <p>9 Knigge was saying that there was a severance package, did</p> <p>10 you call your lawyer then to ask about that contract?</p> <p>11 A No.</p> <p>12 Q Did you consult with your lawyer at all before you proceeded</p> <p>13 to terminate David Knigge?</p> <p>14 A Yes. I believe --</p> <p>15 THE WITNESS: Didn't I?</p> <p>16 A I don't know. Really?</p> <p>17 Q (By Ms. Pochop) I don't want to know what he said. I want</p> <p>18 to know --</p> <p>19 A I know --</p> <p>20 Q -- if you came in here and had an appointment with him</p> <p>21 before you terminated David Knigge.</p> <p>22 A Before I terminated? No.</p> <p>23 Q And so the first time you would have talked to your lawyer</p> <p>24 about terminating David Knigge was after you already had</p> <p>25 done it.</p>
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KNIGGE BY POCHOP

1 A Yes.

2 Q And that would have been after David Bruns, Ernie Schwartz

3 (sic), and David Knigge all said that there was a severance

4 agreement as a part of his employment contract.

5 A Well, I didn't hear it from David Knigge.

6 Q At the meeting where you terminated --

7 A Oh, at the meeting, yes. I thought you meant prior.

8 Q Had you -- did you talk to John Clark about the severance

9 package?

10 A No.

11 Q Did you talk to anybody other than Ernie and David Bruns

12 about the severance package?

13 A No.

14 Q Did you talk to Duane Schwartz about it --

15 A No.

16 Q -- at Affiliated? How about Kent Erickson when he was

17 coming up here?

18 A Have we discussed it in the meantime?

19 Q Yes.

20 A Yes.

21 Q And what's Kent's input on the severance package?

22 A He thought it was ridiculous.

23 Q Of course, he negotiated a full year of employment

24 regardless of his performance too, right?

25 A He is an excellent manager.

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KNIGGE BY POCHOP

1 A About --?

2 Q His employment contract with you.

3 A No. We're --

4 Q So to date, even though you had this other employment

5 contract issue in your store, you haven't talked to your

6 own attorney about your new employment contract with your

7 manager.

8 A No.

9 Q Okay. Why not?

10 A For one thing, we didn't know -- okay, Kent is from Norfolk,

11 which is how far away? Okay. His wife is still in Norfolk

12 because she has a teaching contract.

13 Q I don't mean to interrupt, but I don't want to get too far

14 afield. Why didn't you talk to your longtime attorney about

15 drafting up an employment agreement with Kent Erickson? How

16 did you decide to go it on your own?

17 A It's just what me and Kent decided on.

18 Q And that is kind of the way your business has been run even

19 when Bob was doing it.

20 A Is to write things down?

21 Q Just kind of have a handshake type of agreement without

22 necessarily getting a lawyer involved.

23 A If it's business, it's usually written.

24 Q Okay. And then there was another meeting that you had with

25 Dave after the August 14th, 2013, meeting with Ernie and you

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KNIGGE BY POCHOP

1 Q What if he wouldn't have been?

2 A He is.

3 Q But just because you have a -- you have a contract -- a verbal

4 contract with him or you have it in your own writing.

5 A Um-hmm.

6 Q And let's say that you -- that Kent ended up being a poor

7 performer. You would still have to pay him the \$50,000 that

8 you promised him for a full year of employment, right?

9 A \$50,000 comes in where?

10 Q Salary. Let me make sure I understand. You have a -- an

11 agreement with Kent that he will be paid \$50,000 for a year

12 of employment as a salary, right?

13 A Um-hmm.

14 Q And he's guaranteed a full year of employment regardless of

15 his employment performance.

16 A He will be there.

17 Q And so --

18 A He already signed the contract he will be there.

19 Q And you would agree with me that, because it is a contract,

20 no matter what kind of manager he ends up being, a good one

21 or bad one, you owe him the money because it's a contract.

22 A I don't know how to answer that.

23 Q Well, answer it however you think. I mean, do you know?

24 A If -- I think it depends on how he's terminated.

25 Q Have you talked to your attorney about that?

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KNIGGE BY POCHOP

1 and Dave?

2 A Yes.

3 Q Okay. And tell me what was the purpose of that meeting.

4 A The severance.

5 Q And why are we having a meeting about severance?

6 A About everything in general. Ernie thought to get David and

7 I together and to get something settled.

8 Q Before you had this meeting set up, did you talk to your

9 attorney about your legal obligations if there was a

10 contract?

11 A I don't recall.

12 Q So Ernie kind of was mediating this?

13 A Yes.

14 Q And during that meeting, did you tell David that the

15 severance package was too high?

16 A I don't -- I said I didn't think he deserved one.

17 Q Okay. And what was his position?

18 A He thought he should get -- he should get a severance.

19 Q Did he tell you that that is what Bob promised him?

20 A That's what he said. And I asked him, "When?"

21 And he said, well, they were driving in the vehicle

22 from Oakes to Redfield and they had that conversation.

23 Q Okay. And then did David also provide you with the

24 calculation of how he and --

25 A Yes.

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KNIGGE BY POCHOP	KNIGGE BY POCHOP
<p>1 Q -- Bob had reached that --</p> <p>2 A How he had reached his numbers?</p> <p>3 Q Um-hmm.</p> <p>4 A Yes.</p> <p>5 Q And did you calculate those numbers yourself?</p> <p>6 A Nope.</p> <p>7 Q Have you ever - did you ever run the calculations on them?</p> <p>8 A Nope.</p> <p>9 Q Do you even really care?</p> <p>10 A Nope.</p> <p>11 Q Because at that point you had decided you weren't going to</p> <p>12 pay the severance package.</p> <p>13 A Because I asked him - he showed me that number, that</p> <p>14 315,000, and said, "This is what I should be getting. You</p> <p>15 should be thankful. I'm only asking for a hundred</p> <p>16 thousand." Those were his exact words. --</p> <p>17 Q When you went --</p> <p>18 A -- yes.</p> <p>19 Q -- to the meeting with Ernie, had you already decided that</p> <p>20 you weren't going to pay any severance to your</p> <p>21 brother-in-law?</p> <p>22 A Yes.</p> <p>23 Q You've never intended to.</p> <p>24 A No.</p> <p>25 Q So what was the purpose of the meeting then?</p>	<p>1 A I think, towards the end, he kind of got frustrated with how</p> <p>2 David was answering things too, and he just said "forget</p> <p>3 it"</p> <p>4 Q Did Ernie recommend that you should change your position?</p> <p>5 A No.</p> <p>6 Q So then what happened after that meeting in terms of your</p> <p>7 relationship with David? Was he out of the store by then?</p> <p>8 A Yes.</p> <p>9 Q And did you - have you had any further contact --</p> <p>10 A No.</p> <p>11 Q -- with him? No communication at all?</p> <p>12 A (Witness shakes head.)</p> <p>13 Q Have you looked - go ahead.</p> <p>14 A By e-mail.</p> <p>15 Q Okay. Tell me what your e-mails have been.</p> <p>16 A He e-mailed one of my boys on the school website, and I</p> <p>17 asked him not to do that; the school website is private.</p> <p>18 Q What was the e-mail about, just - was it about your dispute</p> <p>19 or just --</p> <p>20 A No.</p> <p>21 Q -- a family contact?</p> <p>22 A Just contact.</p> <p>23 Q But not your preference to have him use that --</p> <p>24 A I don't want - that's how - I do not want Bryer - the school</p> <p>25 website is supposed to be used for school purposes and not</p>
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KNIGGE BY POCHOP	KNIGGE BY POCHOP
<p>1 A To kind of sort things out to see where everybody stood.</p> <p>2 MR. GILLETTE: Which meeting are we talking about?</p> <p>3 Q (By Ms. Pochop) I'm talking about the meeting on August</p> <p>4 25th, 2013.</p> <p>5 A That we had - me and Ernie and Dave had in the old store</p> <p>6 building.</p> <p>7 MR. GILLETTE: Which David?</p> <p>8 Q (By Ms. Pochop) Knigge?</p> <p>9 A Knigge.</p> <p>10 Q I think you and I know.</p> <p>11 MS. POCHOP: Is it clear to you?</p> <p>12 MR. GILLETTE: Now it is.</p> <p>13 Q (By Ms. Pochop) So how did that meeting end?</p> <p>14 A Bad.</p> <p>15 Q As in - what's "bad" look like?</p> <p>16 A He was angry; I was angry; Ernie was angry.</p> <p>17 Q Was Ernie trying to get him to give up the severance</p> <p>18 package?</p> <p>19 A No. Ernie was just trying to be a mediator.</p> <p>20 Q Did Ernie recommend that you should pay the severance</p> <p>21 package --</p> <p>22 A No.</p> <p>23 Q -- or some part of the severance package?</p> <p>24 A No.</p> <p>25 Q So what was he mediating then?</p>	<p>1 any other - and for him to actually contact him on that</p> <p>2 website, that scares me.</p> <p>3 Q Is there anything else about David's employment at the</p> <p>4 Redfield store that you think is important for me to know</p> <p>5 and understand?</p> <p>6 A I don't think so.</p> <p>7 Q Have we covered all of the important - any important - like</p> <p>8 I don't want to show up at a trial and then have you say</p> <p>9 "oh, then there's this other time." Have I covered all of</p> <p>10 the information that you would have about Bob's agreement</p> <p>11 with David?</p> <p>12 A Just that I - I don't know of an agreement.</p> <p>13 Q Have I missed any important discussions that you and Bob</p> <p>14 would have had, any material discussions that you and Bob</p> <p>15 had about David's employment at the store?</p> <p>16 A No, just that - the 70,200 and then a bonus. That was it.</p> <p>17 Q Did you think that the salary that Bob was paying his</p> <p>18 brother was too high?</p> <p>19 A Yes.</p> <p>20 Q And nonetheless it was paid.</p> <p>21 A Yes.</p> <p>22 MS. POCHOP: I think I'm just about done, Lynette</p> <p>23 and Paul.</p> <p>24 MR. GILLETTE: Need a little break?</p> <p>25 MS. POCHOP: Yeah, let's just - we'll step out and</p>
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KNIGGE BY POCHOP	KNIGGE BY GILLETTE
<p>1 visit for a minute.</p> <p>2 (Recess.)</p> <p>3 Q (By Ms. Pochop) All right, I just have a couple more</p> <p>4 questions, Lynette. After Bob died and you have the</p> <p>5 management of the Redfield store going on with David Knigge,</p> <p>6 did David Knigge ask you to come have a weekly sales meeting</p> <p>7 with him at the store?</p> <p>8 A No.</p> <p>9 Q Did he ever talk to - go ahead. It looks like you were</p> <p>10 going to say something.</p> <p>11 A When he was doing the grand opening, I came in.</p> <p>12 Q When was that?</p> <p>13 A At the beginning of August maybe.</p> <p>14 Q As far as the current sales performances, you said Kent</p> <p>15 hasn't earned his bonus yet?</p> <p>16 A After a year.</p> <p>17 Q How was - how was his bonus going to be calculated?</p> <p>18 A By percent of what the store makes.</p> <p>19 Q If it - does he have to reach a certain point or is it</p> <p>20 just --</p> <p>21 A Yes.</p> <p>22 Q And what's the point that he has to reach?</p> <p>23 A We have - he has to have improved over last year's sale.</p> <p>24 Q So what was the 5 percent calculated on?</p> <p>25 A That's just what we agreed to.</p>	<p>1 MS. POCHOP: I know this was an emotional topic,</p> <p>2 and I appreciate you sitting through it.</p> <p>3 MR. GILLETTE: I just have a few questions to</p> <p>4 follow up.</p> <p>5 MS. POCHOP: Okay.</p> <p>6 EXAMINATION BY MR. GILLETTE:</p> <p>7 Q Did your husband Bob ever tell you that he offered David</p> <p>8 Knigge health insurance?</p> <p>9 A No.</p> <p>10 Q Did he ever tell you that he offered David Knigge a hundred</p> <p>11 thousand dollar severance package?</p> <p>12 A No.</p> <p>13 Q Prior to Bob's death, did you ever contemplate firing David</p> <p>14 Knigge as the manager of the store?</p> <p>15 A Prior to his death?</p> <p>16 Q Prior to Bob dying.</p> <p>17 A No.</p> <p>18 Q Tell me about how Robert was prior to getting sick in regard</p> <p>19 to his decision-making?</p> <p>20 A When it come to money? Or just --</p> <p>21 Q Business decisions.</p> <p>22 A Before he got sick?</p> <p>23 Q Yeah.</p> <p>24 A He was smart as smart can be. He was top of the line.</p> <p>25 Q Was he controlling?</p>
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KNIGGE BY POCHOP	KNIGGE BY GILLETTE
<p>1 Q Is the 5 percent calculated on what the store makes net or</p> <p>2 just the - what the store makes --</p> <p>3 A The profit.</p> <p>4 Q Is it the profit total or is it the profit that it makes in</p> <p>5 addition to where it was last year?</p> <p>6 A The profit total.</p> <p>7 Q Okay. And is that defined in your agreement, or is that --</p> <p>8 A Yes.</p> <p>9 Q And how are Kent's - how is Kent's performance as far as --</p> <p>10 A Excellent.</p> <p>11 Q -- is he on track?</p> <p>12 A Yes.</p> <p>13 Q Is he going to get a bonus?</p> <p>14 A Yes.</p> <p>15 Q How much is his bonus going to be?</p> <p>16 A I don't know yet. We have to figure that out.</p> <p>17 Q What's it looking like? I mean, if it's 5 percent --</p> <p>18 A I - I couldn't tell you.</p> <p>19 Q Because his contract is in August, right?</p> <p>20 A Right. We'll figure that out when it comes.</p> <p>21 Q As you sit here today, you have no estimate even?</p> <p>22 A No.</p> <p>23 MS. POCHOP: All right, Lynette, I don't have any</p> <p>24 further questions, and I thank you for your patience.</p> <p>25 THE WITNESS: Okay.</p>	<p>1 A Very. Money was everything to him.</p> <p>2 Q Was he cheap or generous?</p> <p>3 A Cheap. Very cheap.</p> <p>4 Q When you went to Sioux Falls to talk to Rhonda Lockwood, did</p> <p>5 you suggest to her that you wanted a divorce?</p> <p>6 A No.</p> <p>7 Q It was her idea?</p> <p>8 A Yes.</p> <p>9 Q Did you really want a divorce?</p> <p>10 A No. I wanted Robert to quit making bad decisions and</p> <p>11 spending money, and - and she said that was the way to do</p> <p>12 it. You file for divorce and it freezes your assets.</p> <p>13 Q Why couldn't you just go to Bob and tell him that you</p> <p>14 thought he was making bad decisions?</p> <p>15 A He would have been very upset and at his - he was dying.</p> <p>16 Q So how did you guys deal with him?</p> <p>17 A With Robert?</p> <p>18 Q Yeah, you and Ernie and --</p> <p>19 A It was hard. You just try to let him be, try to look out</p> <p>20 for him when you could, but like with the driving, try to</p> <p>21 stop him. But if he had his mind set to it, he was going to</p> <p>22 do it, you know.</p> <p>23 Q Did you feel like you had the ability to control his</p> <p>24 decision-making?</p> <p>25 A No. There was no way to control it. Everybody thought</p>
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KNIGGE BY POCHOP	KNIGGE BY POCHOP
<p>1 Q Did you talk to anybody - talk to anybody about a 2 guardianship? 3 A No, about - the thing Rhonda said was doing a divorce and I 4 didn't want to do it. 5 Q So you decided not to do that then. 6 A (Witness nods head.) 7 Q Because that would have been effective if you didn't want 8 him to go enter into contracts? 9 A That I was going to divorce him? No. 10 Q Even like buying your daughter a Camaro. I mean, if you - 11 you knew he went out and made a deal that you thought was a 12 really bad deal, right? 13 A Yes. 14 Q That was a contract. 15 A I didn't know about that until it was done. Or going and 16 buying a 60,000-dollar boat that he's never going to drive. 17 Who does that? 18 Q Right. And those were contracts. 19 A Um-hmm. 20 Q And they're enforceable. 21 A Those are written contracts, yes. 22 Q You think there's a difference between whether a written and 23 oral contract is enforceable? 24 A Yes. 25 Q What is it?</p>	<p>1 2 CERTIFICATE 3 I, STEPHANIE L. MOEN, RPR, Freelance Court Reporter 4 and duly authorized Notary Public in and for the state of 5 South Dakota residing in Mitchell, South Dakota, do hereby 6 certify: 7 That the foregoing deposition of LYNETTE KNIGGE was 8 taken by me and completed on the 28th day of May 2014 and 9 thereafter transcribed by me by means of computer-aided 10 transcription; that the deposition is a full, true, and 11 complete transcript of the testimony of said witness; 12 That the witness, before examination, was by me duly 13 sworn to testify the truth, the whole truth, and nothing but 14 the truth; that the witness waived signature; 15 That I am not a relative, employee, attorney, or 16 counsel of any party to this action or relative or employee 17 of any such attorney or counsel and I am not financially 18 interested in the said action or the outcome thereof; 19 That I am herewith securely sealing the deposition of 20 LYNETTE KNIGGE and promptly mailing the same to Stephanie 21 Pochop, Attorney at Law. 22 IN WITNESS WHEREOF, I have hereunto set my hand this 23 17th day of June 2014. 24 25 Stephanie L. Moen, RPR Freelance Court Reporter</p>

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KNIGGE BY POCHOP
<p>1 A Because anybody can say anything 2 Q And I also wanted to ask you: did Bob make any changes to 3 his estate plan after he got cancer? 4 MR. GILLETTE: Who are we asking? 5 MS. POCHOP: I'm asking her. I want to know if she 6 knows. 7 A I don't know. 8 Q (By Ms. Pochop) Did he discuss his estate plan with you at 9 all? 10 A Just that me and the kids would be taken care of - 11 Q He does have a will? 12 A -- and make sure that - yeah, he did have a will. 13 Q Do you know if he made any changes to his will in the year 14 or two before he died? 15 A I don't believe so. No. I know he didn't. 16 MS. POCHOP: Okay, all right. Thank you. I 17 don't - I don't have anything further now. 18 THE WITNESS: Okay, are you done? 19 MR. GILLETTE: I'm done. 20 You have the right to read the deposition over after 21 it's all printed up or you can waive the right and I'd 22 recommend you waive. 23 THE WITNESS: Waive it. 24 (Deposition concluded at 1 p.m.) 25 (Signature waived.)</p>

Stephanie Moen & Assoc. (605) 995-0955

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Deposition of David Knigge

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1 STATE OF SOUTH DAKOTA IN CIRCUIT COURT

2 COUNTY OF SPINK FIFTH JUDICIAL CIRCUIT

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5 DAVID KNIGGE,

6 Plaintiff,

7 vs.

8 B&L FOOD STORES, INC., and
9 ESTATE OF ROBERT ALLEN KNIGGE,

10 Defendants.

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Deposition of: David Knigge

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Date: Thursday, April 23, 2015

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Time: 1:00 p.m.

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Place: 206 West Missouri Avenue

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Pierre, SD 57501

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APPEARANCES

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STEPHANIE E. POCHOP, JOHNSON POCHOP LAW OFFICE,
21 PO Box 149, Gregory, SD 57533,
22 appearing on behalf of the Plaintiff.

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PAUL J. GILLETTE, GILLETTE LAW OFFICE, PO Box 60,
25 Redfield, SD 57469,
appearing on behalf of the Defendant.

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Reported by Carla A. Bachand, RMR, CRR, Capital Reporting
Services, P.O. Box 903, Pierre, SD 57501 (605) 224-7611.

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COPY

Deposition of David Knigge

<p>1 THURSDAY, APRIL 23, 2015</p> <p>2 Thereupon,</p> <p>3 DAVID KNIGGE,</p> <p>4 called as a witness, being first duly sworn as hereinafter</p> <p>5 certified, testified as follows:</p> <p>6 EXAMINATION</p> <p>7 BY MR. GILLETTE:</p> <p>8 Q. David, could you just state your name and where you</p> <p>9 live?</p> <p>10 A. David Ray Knigge, I live in Pierre, South Dakota.</p> <p>11 Q. And where do you work?</p> <p>12 A. I work with the State of South Dakota in the Bureau of</p> <p>13 Finance and Management.</p> <p>14 Q. And what was the job that you had at the time that you</p> <p>15 decided to move from Pierre to Oakes, North Dakota, to take the</p> <p>16 management position there?</p> <p>17 A. I had the assistant director of finance position with</p> <p>18 the Department of Transportation.</p> <p>19 Q. And what kind of training does it take to do that job?</p> <p>20 A. To do the assistant director position? It was a</p> <p>21 management position supervising 14 personnel. Also you need a</p> <p>22 lot of technical experience, accounting experience, because it</p> <p>23 was a position that established policies and procedures for</p> <p>24 accounting processing within the department.</p> <p>25 Q. And that's your background, an accountant?</p>	<p>5</p> <p>1 that you and Robert had prior to your taking the job? I</p> <p>2 understand that you just said that it involved an option to buy</p> <p>3 the store.</p> <p>4 A. Right. There really wasn't that many conversations.</p> <p>5 He basically said, you know, there is an opportunity here to</p> <p>6 work with him, he was in good health at the time, and you know,</p> <p>7 he showed me the financial statements of the store. I looked</p> <p>8 at those and looked at what I was giving up for the state, and</p> <p>9 basically the first time he got cancer, he was diagnosed with</p> <p>10 cancer, I really couldn't do anything for him at that time and</p> <p>11 so when the opportunity came up to work with him again, you</p> <p>12 know, I jumped at it basically. I said I'd do it.</p> <p>13 Q. When you say -- when was the first time that he was</p> <p>14 diagnosed with cancer?</p> <p>15 A. That would have been about September of 2011.</p> <p>16 Q. And the timing of the conversation that you had with</p> <p>17 him about going to Oakes, that was in October of 2012?</p> <p>18 A. Yeah.</p> <p>19 Q. You said he was in good health. Did you see him as</p> <p>20 having been cured of the cancer?</p> <p>21 A. Yes. I was hoping so. We had went out to west river</p> <p>22 and did some hunting, deer hunting too, and this was another</p> <p>23 time besides the October event, and we came up on a farmer who</p> <p>24 had been cancer free and basically had the exact same thing as</p> <p>25 him, he had the scar, everything, you know, and the MRI, and I</p>
<p>4</p> <p>1 A. Yes.</p> <p>2 Q. Where were you educated as an accountant?</p> <p>3 A. At Northern State in Aberdeen.</p> <p>4 Q. Are you a certified public accountant?</p> <p>5 A. Yes, I am.</p> <p>6 Q. And how long have you been doing that?</p> <p>7 A. Over 30 years.</p> <p>8 Q. You graduated from Northern about?</p> <p>9 A. 1981.</p> <p>10 Q. Tell me how it came to be that you went to work for</p> <p>11 Robert in Oakes.</p> <p>12 A. Well, it was about October when he approached me with</p> <p>13 it and I think we were out hunting and he said that his -- the</p> <p>14 Oakes store was going to become available and he said that his</p> <p>15 daughter-in-law, yeah, his stepdaughter I guess it would be,</p> <p>16 was leaving the Oakes store in December, at the end of</p> <p>17 December.</p> <p>18 Q. That would have been two thousand --</p> <p>19 A. 2012.</p> <p>20 Q. And did you take that job?</p> <p>21 A. I did. What it was, the structure of the agreement</p> <p>22 was it would be basically I would have the opportunity to</p> <p>23 purchase it and then pay him back as the store's cash flow</p> <p>24 became positive.</p> <p>25 Q. Can you tell me a little bit about the conversations</p>	<p>6</p> <p>1 was thinking, well, maybe he's the one in a million.</p> <p>2 Q. But he had told you prior to your going to Oakes that</p> <p>3 the doctors had told him that he had glioblastoma?</p> <p>4 A. Yep.</p> <p>5 Q. And he had had surgery for that?</p> <p>6 A. Yep.</p> <p>7 Q. And did he reveal to you at that time that they had</p> <p>8 given him only 18 months to live?</p> <p>9 A. Yes. He said that was just the standard, you know,</p> <p>10 diagnosis and prognosis of his illness.</p> <p>11 Q. And the position that you took in Oakes, that was the</p> <p>12 manager position?</p> <p>13 A. In Oakes, yeah, it was owner/manager position.</p> <p>14 Q. Why do you say owner/manager?</p> <p>15 A. Because it was with the intent that -- he wanted</p> <p>16 200,000 for it and he was trying to sell it too, and the best</p> <p>17 that he could do in the limited amount of time was to get a</p> <p>18 buyout offer on it, and basically he felt that was just giving</p> <p>19 the store away. So that's when he offered me the position in</p> <p>20 Oakes and he said I'd have the option to buy it, and basically</p> <p>21 I would pay back, pay him 200,000 for it, and that would be for</p> <p>22 inventory and equipment and everything, and basically at the</p> <p>23 end of two years, the lease would be up on that building. Then</p> <p>24 he said we could reevaluate the situation then.</p> <p>25 Q. Did you guys actually enter into any type of written</p>

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<p>7</p> <p>1 agreement with regard to your buying the property or the store</p> <p>2 from him?</p> <p>3 A. No.</p> <p>4 Q. Did he transfer any stock to you in that corporation?</p> <p>5 A. No.</p> <p>6 Q. So that was something that was going to happen down</p> <p>7 the road in the future?</p> <p>8 A. It was -- right, and he just expected me to pay the</p> <p>9 200,000 as I could, as the operations. . . He knew I had a</p> <p>10 bunch of expenses with alimony and stuff like that, personal</p> <p>11 expenses, and so he just wanted to be paid back when I could</p> <p>12 pay him back.</p> <p>13 Q. Was there any specific time period at which he was</p> <p>14 actually going to make the transfer of the store to you?</p> <p>15 A. Well, we really hadn't gotten that far, yeah.</p> <p>16 Q. You hadn't gotten that far because you decided to do</p> <p>17 something different prior to doing that?</p> <p>18 A. Yes. Because the decision to -- I started going up to</p> <p>19 Oakes in November on weekends because I was still working for</p> <p>20 the state, and then Kayley had left prematurely, she left at</p> <p>21 the end of November; so then I decided to take annual leave at</p> <p>22 the state and leave early basically. So then I started at the</p> <p>23 beginning of December time frame, and then we made this</p> <p>24 decision about early January right after his cancer was</p> <p>25 diagnosed that it had come back.</p>	<p>8</p> <p>1 with the Oakes store.</p> <p>2 A. No.</p> <p>3 Q. Any length of term as to how long you would be working</p> <p>4 at the Oakes store?</p> <p>5 A. Initially, 10 years, I figured I'd have it paid off in</p> <p>6 10 years.</p> <p>7 Q. Were you paid any salary at all?</p> <p>8 A. No. Because at the time I was getting paid by the</p> <p>9 state through vacation.</p> <p>10 Q. So give me a time line of how long a period were you</p> <p>11 at the Oakes store as the manager before you decided to close</p> <p>12 it?</p> <p>13 A. It would have been starting at the beginning of</p> <p>14 December through the middle of January.</p> <p>15 Q. So December of 2012 to January of 2013?</p> <p>16 A. Yes. So a month and a half.</p> <p>17 Q. And why did you and Robert decide to close the Oakes</p> <p>18 store?</p> <p>19 A. We decided that -- he wanted me to come back to</p> <p>20 Redfield at that point. He said the cancer had come back and</p> <p>21 it made more sense to me to be in Redfield, and we took a look</p> <p>22 at the Oakes store and we decided that it was run down, the</p> <p>23 equipment was bad, you know, 40 percent of the inventory was</p> <p>24 outdated, the parking lot needed to be replaced and it would</p> <p>25 just take too much in the resources to have to continue on with</p>
<p>8</p> <p>1 Q. So negotiation to go up there and become the manager</p> <p>2 of the store took place in November of 2012 and before?</p> <p>3 A. Say that again, please.</p> <p>4 Q. The negotiation that you and Robert had with regard to</p> <p>5 your taking over as the manager took place in October or</p> <p>6 November of 2012?</p> <p>7 A. Yes.</p> <p>8 Q. What kind of salary were you earning with the state?</p> <p>9 A. \$68,000.</p> <p>10 Q. And then your benefits that you received from the</p> <p>11 state?</p> <p>12 A. Three weeks vacation, pension, health, dental, life</p> <p>13 insurance, sick pay.</p> <p>14 Q. And when you negotiated your salary with Robert for</p> <p>15 being the manager of the Oakes store, what did that look like?</p> <p>16 A. Well, see, that's where the cash flow came in. When</p> <p>17 we ran the numbers, basically it would net out at a loss, but</p> <p>18 because of depreciation and the noncash items, I'd basically</p> <p>19 get paid that way and then we expected it to grow, the</p> <p>20 business, the weekly sales, and I would just get paid as I</p> <p>21 could; so that was the risk.</p> <p>22 Q. So you didn't actually have a salary, a set amount of</p> <p>23 salary while working at the Oakes store as the manager?</p> <p>24 A. That's right.</p> <p>25 Q. And at that time there was no severance arrangement</p>	<p>10</p> <p>1 the Oakes store.</p> <p>2 And then he actually talked to me about Lynette and he</p> <p>3 said, what if Lynette would not want you to continue on with</p> <p>4 the store in Redfield, and that's when I told him -- that's</p> <p>5 when I said, then I'll need a severance. I said, I don't want</p> <p>6 to force myself on Lynette and have her -- require her to work</p> <p>7 with me. I said, if she doesn't want me, I'm okay with that.</p> <p>8 But I want the severance of \$100,000 should she discharge me</p> <p>9 for any reason.</p> <p>10 Q. Let's go back a step first. At the point that you</p> <p>11 decided to start managing the store in Oakes, had you actually</p> <p>12 quit your state job?</p> <p>13 A. Yes. Let me clarify that. I quit -- my termination</p> <p>14 date was when I was finished being paid, which was end of</p> <p>15 January, because I was being paid vacation, the rest of my</p> <p>16 vacation. But I had given notice and everything and they knew</p> <p>17 the intent.</p> <p>18 Q. So the intent was to quit your job to go and get the</p> <p>19 store in Oakes?</p> <p>20 A. Yes.</p> <p>21 Q. Tell me about when you first started having</p> <p>22 conversations with Robert about moving to Redfield to manage</p> <p>23 the store in Redfield.</p> <p>24 A. Well, it had to be like either the end of December or</p> <p>25 the beginning of -- it was after his appointment, and he knew</p>

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<p style="text-align: right;">11</p> <p>1 that there was another spot, okay, and that's when we started</p> <p>2 talking about it. And it was on our trips up to Oakes is</p> <p>3 usually when we talked.</p> <p>4 Q. So the conversations took place in the pickup as you</p> <p>5 drove back and forth?</p> <p>6 A. Usually in the pickup or the hotel.</p> <p>7 Q. How many of these conversations were there, just</p> <p>8 ballpark me?</p> <p>9 A. On the severance?</p> <p>10 Q. No, on the decision to hire you as the manager in</p> <p>11 Redfield.</p> <p>12 A. He bounced around quite a bit, meaning I think he had</p> <p>13 a lot of things going on at the time and I was one of the</p> <p>14 options, because he was looking at trying to sell the three</p> <p>15 stores. You know, he was trying to sell the Oakes store; so</p> <p>16 ballpark in all those discussions, I'd say 10.</p> <p>17 Q. During those conversations, did he tell you that he</p> <p>18 was contemplating hiring David Bruns as the manager in</p> <p>19 Redfield?</p> <p>20 A. No.</p> <p>21 Q. At what point did you actually make the decision that</p> <p>22 you were going to take the management job in Redfield, South</p> <p>23 Dakota?</p> <p>24 A. In Redfield? Well, it was that one conversation where</p> <p>25 he said his cancer was back, and we walked through the whole</p>	<p style="text-align: right;">13</p> <p>1 A. Their regular payroll periods.</p> <p>2 Q. How often was that?</p> <p>3 A. I think it was every two weeks.</p> <p>4 Q. In your complaint, you talk about the sale of your</p> <p>5 house --</p> <p>6 A. Uh-huh.</p> <p>7 Q. -- as something that you did in reliance upon Robert's</p> <p>8 promise to pay you and hire you to be the manager in Redfield.</p> <p>9 Can you tell me why that's important here?</p> <p>10 A. The Pierre market is very -- the housing market in</p> <p>11 Pierre is crazy high, and I priced it so that I could sell it</p> <p>12 within -- I sold it in a month; so I had to price it because I</p> <p>13 was leaving Pierre, you know, and I was fully committed to</p> <p>14 doing that, to helping him with the store.</p> <p>15 Q. Do you remember when you listed it?</p> <p>16 A. Oh, I had to have listed it at the end of November.</p> <p>17 Q. Of 2012?</p> <p>18 A. Yes.</p> <p>19 Q. Was that after you had made the decision to come to</p> <p>20 Redfield or before the decision to come to Redfield?</p> <p>21 A. It was after the decision -- well, it was before the</p> <p>22 decision to come to Redfield because initially what I was going</p> <p>23 to do was go to Oakes.</p> <p>24 Q. So what induced you to quit your job in Pierre was the</p> <p>25 job and the opportunity in Oakes, North Dakota, right?</p>
<p style="text-align: right;">12</p> <p>1 Oakes store and all the reasons for not going ahead with that,</p> <p>2 and we looked at the Redfield store and all the reasons for</p> <p>3 going ahead with that. You know, it was he wanted to get into</p> <p>4 the new location. It was a legacy for his kids, that I</p> <p>5 basically could work for about 10, 15 years and his kids would</p> <p>6 be about the age that they could take over. You know, then he</p> <p>7 asked the question about Lynette and then the conversation</p> <p>8 switched over to that and just discussed, you know, Lynette,</p> <p>9 and at that point I asked him if she was okay with it and he</p> <p>10 said she was. Then we started talking about the possibility of</p> <p>11 her letting me go, and then I talked about the severance and</p> <p>12 then we talked about the salary that I would make.</p> <p>13 Q. This is all in the same conversation?</p> <p>14 A. Yes.</p> <p>15 Q. In the Oakes store?</p> <p>16 A. No, this was -- I want to say it was either on the way</p> <p>17 to Oakes or in the hotel. When we were at Oakes, we were</p> <p>18 working in the store.</p> <p>19 Q. And specifically what did he tell you you were going</p> <p>20 to be paid for a salary?</p> <p>21 A. He said -- he asked me how much I was making and then</p> <p>22 he said 70,000.</p> <p>23 Q. And how were you to be paid?</p> <p>24 A. Through the Redfield store.</p> <p>25 Q. On an annual basis, biweekly?</p>	<p style="text-align: right;">14</p> <p>1 A. Yes.</p> <p>2 Q. And the same would apply to the house?</p> <p>3 A. Yes.</p> <p>4 Q. After Bob was diagnosed with cancer and resigned</p> <p>5 himself to the fact that he was going to die, what were his</p> <p>6 thoughts as to what was important in his life at that</p> <p>7 particular point?</p> <p>8 A. Being with family was important to him.</p> <p>9 Q. And did that play a role in why he hired you to be the</p> <p>10 manager in Redfield?</p> <p>11 A. I think it did, but I think it was because he could</p> <p>12 trust me, you know, as a brother.</p> <p>13 Q. And what was he entrusting to you?</p> <p>14 A. A lot. He was entrusting his store to me and, you</p> <p>15 know, that's his legacy.</p> <p>16 Q. And he wanted you to protect his legacy for who?</p> <p>17 A. For his kids. He really hoped that one of those kids</p> <p>18 would have taken it over.</p> <p>19 Q. Did you and Bob ever talk about Lynette with regard to</p> <p>20 her abilities to manage the store?</p> <p>21 A. No, not with regard to her managing the store.</p> <p>22 Q. Did you ever talk about her role inside the store?</p> <p>23 A. No, not much.</p> <p>24 Q. In your observation, did you see much of Lynette in</p> <p>25 the business?</p>

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<p>19</p> <p>1 discuss. It was more what if Lynette let me go. It wasn't</p> <p>2 him, he had no question about me being there.</p> <p>3 Q. When lawyers talk about contracts, they often use the</p> <p>4 term "meeting of the minds." Have you ever heard that term?</p> <p>5 A. Meeting of the minds? Yeah.</p> <p>6 Q. What's your understanding of that term?</p> <p>7 A. My understanding would be just discussing issues and,</p> <p>8 you know, bringing out all the pros and cons and having that</p> <p>9 discussion and having a common or coming to an agreement.</p> <p>10 Q. Would it be that point at which the parties have the</p> <p>11 same understanding as to the terms of your promises or</p> <p>12 contract?</p> <p>13 A. Yep.</p> <p>14 Q. Can you tell me generally speaking what you and Robert</p> <p>15 actually discussed as to the terms of your employment versus</p> <p>16 what you believe your understanding was in your head with</p> <p>17 regard to the severance package?</p> <p>18 A. The terms of the agreement were basically that I</p> <p>19 now -- I give up Oakes because we are going to scrap that, that</p> <p>20 was the initial agreement, and he wanted me to move down to</p> <p>21 Redfield and manage that store and get him into the new store</p> <p>22 and then just manage the store until his kids, if one of them</p> <p>23 wanted to take over. That was the terms.</p> <p>24 Q. Specifically narrow down to the severance promise,</p> <p>25 What specifically did he say when he made that promise?</p>	<p>21</p> <p>1 you believe may exist in the contract where Robert may have not</p> <p>2 had the same understanding as you?</p> <p>3 A. No.</p> <p>4 Q. So there were no limitations on the promise to pay the</p> <p>5 severance?</p> <p>6 A. No.</p> <p>7 Q. If you stole from the store and got fired, you would</p> <p>8 get paid 100,000?</p> <p>9 A. I guess. But I wouldn't steal from the store, and he</p> <p>10 knew that.</p> <p>11 Q. I'm not saying you would. If you didn't show up for</p> <p>12 work and got fired for it, would you get 100,000?</p> <p>13 A. I guess, but again, I was there seven days a week most</p> <p>14 of the time.</p> <p>15 Q. If the store --</p> <p>16 A. He knew --</p> <p>17 Q. -- didn't do well under your management --</p> <p>18 A. If the store didn't do well under my management.</p> <p>19 Q. -- and you got fired for that, you would still get</p> <p>20 paid the 100,000?</p> <p>21 A. Knowing Bobby, what he would do is he would say, okay,</p> <p>22 it's not going well, basically you need to find another job,</p> <p>23 and he would have let me transition out, he wouldn't have fired</p> <p>24 me.</p> <p>25 Q. But I'm talking about the promise that Bob made to you</p>
<p>20</p> <p>1 A. Basically he asked me -- he asked the question, what</p> <p>2 if Lynette would let you go. My response to that was, I</p> <p>3 want -- if she let's me go, basically I want \$100,000, if she's</p> <p>4 going to let me go for any reason, and he agreed to that. We</p> <p>5 had further discussions about salary and stuff, but basically</p> <p>6 we agreed to both of that; so that's why we even discussed the</p> <p>7 severance.</p> <p>8 Q. If Robert had fired you, would there have been any</p> <p>9 severance paid?</p> <p>10 A. At that point, yes. If I were to move down to</p> <p>11 Redfield, he would have paid me severance, because part of the</p> <p>12 reason for the severance too was to get me back on my feet, you</p> <p>13 know, I had left my accounting profession, and basically it was</p> <p>14 to help me transition back into my profession or whatever I</p> <p>15 chose to be.</p> <p>16 Q. Following the conversation that you had wherein the</p> <p>17 promise was made to you that you would have \$100,000 severance</p> <p>18 if you were fired for any reason --</p> <p>19 A. Right.</p> <p>20 Q. -- were there any subsequent conversations between you</p> <p>21 and Robert about that issue?</p> <p>22 A. No.</p> <p>23 Q. So the deal was negotiated all in one sitting?</p> <p>24 A. Yes.</p> <p>25 Q. Are there any terms in the severance agreement that</p>	<p>22</p> <p>1 rather than what Bob would have done. The promise that he made</p> <p>2 to you --</p> <p>3 A. The promise was pretty absolute, it was pretty simple,</p> <p>4 it was just, you know, for any reason if I'm fired from</p> <p>5 Lynette, I want \$100,000, I don't want to force myself on</p> <p>6 Lynette.</p> <p>7 Q. If you exposed the store to legal liability and you</p> <p>8 got fired for that, would you still get paid the \$100,000?</p> <p>9 A. If I exposed the store, you know, I would say yes, but</p> <p>10 would I expect it? I don't know if I would expect it.</p> <p>11 Q. And you believe that Robert had that exact same</p> <p>12 understanding?</p> <p>13 A. Yes.</p> <p>14 Q. Did he say those specific kind of things to you?</p> <p>15 A. We didn't go into it as much detail as you are saying.</p> <p>16 It was just a conversation about what if Lynette were to let</p> <p>17 you go, and I thought about it and I need a severance.</p> <p>18 Q. And what I'm asking you is are you interpreting the</p> <p>19 word "any reason" in a way that might be different than the way</p> <p>20 Robert would have interpreted it?</p> <p>21 A. No. Any means any.</p> <p>22 Q. Prior to your termination, you know, did you tell</p> <p>23 Lynette that this provision existed?</p> <p>24 A. Yes.</p> <p>25 Q. At what point?</p>

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<p>23</p> <p>1 A. When she -- she brought me in to the meeting that they</p> <p>2 were going to terminate me at and she asked me.</p> <p>3 Q. In August.</p> <p>4 A. In August, yeah.</p> <p>5 Q. And so you told her the day she was going to terminate</p> <p>6 you that this \$100,000 provision existed?</p> <p>7 A. Yes.</p> <p>8 Q. Why didn't you tell her earlier than that?</p> <p>9 A. Why didn't I tell her any earlier? I guess I was just</p> <p>10 more focused on like the store.</p> <p>11 Q. Prior to that day, did you sense that your job was in</p> <p>12 jeopardy?</p> <p>13 A. She didn't talk to me much, but I could sense</p> <p>14 something, like the last couple of weeks, I could sense there</p> <p>15 was something going on.</p> <p>16 Q. Did you tell anyone else that worked in the store</p> <p>17 about the \$100,000 severance package prior to your termination?</p> <p>18 A. Oh, yeah, I spoke with Dave Bruns.</p> <p>19 Q. Why did you tell Dave Bruns?</p> <p>20 A. Well, we were working in Oakes and we were concerned</p> <p>21 about Bobby, and he said that he had this agreement with Bobby,</p> <p>22 a partnership and there was no contract, and then also when we</p> <p>23 were out hunting, it came up at that time too, that's probably</p> <p>24 the first time it came up, and we just had those discussions.</p> <p>25 Q. Didn't David tell you you should get it put into</p>	<p>25</p> <p>1 going to be too high.</p> <p>2 You know, I would test drive a few because I have a</p> <p>3 motorcycle and I was test driving some, and we were killing</p> <p>4 time, and then we started negotiating, and you know, basically</p> <p>5 he looked at the salesman and he says, we want your best offer,</p> <p>6 we don't have much time, you know, I want your best offer. And</p> <p>7 he came back with their best offer and I looked at Bobby and I</p> <p>8 said, no, I said, it's too high. And he says, how much too</p> <p>9 high? I says, about \$1,000 too high, and he looks at the guy</p> <p>10 and he goes, sold. He said, I'm not going to waste any more</p> <p>11 time bickering over \$1,000, and you know, that's it. He paid</p> <p>12 for it, had the money transferred to him, he had bought that</p> <p>13 motorcycle, put it in my name.</p> <p>14 Q. Was it a loan?</p> <p>15 A. No, it was a gift.</p> <p>16 Q. Did the two of you tell Lynette it was a loan?</p> <p>17 A. Well, he wanted me not to tell her, and you know, that</p> <p>18 just didn't seem right to me and I told him that, but I figured</p> <p>19 it was between him and her.</p> <p>20 Q. Wasn't there a \$5,000 check that you gave him?</p> <p>21 A. There was a \$5,000 check because basically he</p> <p>22 wanted -- I had a motorcycle already and he wanted me to give</p> <p>23 him that part back, you know, and so I wrote him -- I think I</p> <p>24 wrote him out a check for that.</p> <p>25 Q. But you weren't involved in telling Lynette that that</p>
<p>24</p> <p>1 writing?</p> <p>2 A. He did.</p> <p>3 Q. And you didn't do that?</p> <p>4 A. No.</p> <p>5 Q. Would Lynette have any reason not to trust you?</p> <p>6 A. I think through Bobby, yes.</p> <p>7 Q. Can you think of anything that you intentionally did</p> <p>8 that would have given her reason not to trust you?</p> <p>9 A. No.</p> <p>10 Q. Have you ever told her something that wasn't true</p> <p>11 prior to your termination?</p> <p>12 A. No.</p> <p>13 Q. Tell me about the motorcycle transaction between you</p> <p>14 and Bob.</p> <p>15 A. That was in April of 2011 when my daughter was getting</p> <p>16 married in Denver, Colorado, and he seemed to be in pretty good</p> <p>17 spirits at the time. He had just gone through the whole</p> <p>18 surgery with his cancer and stuff and he was getting better and</p> <p>19 stronger, and he was very adamant about going down and buying</p> <p>20 me a motorcycle. And I was like, Bobby, this is not the time,</p> <p>21 my daughter is getting married, and he just would not give it</p> <p>22 up, he said, let's go, we have got a couple hours here, and I</p> <p>23 thought, okay, I'm going to, you know, go with him and just</p> <p>24 kind of see how it goes. In my mind, I wasn't going to buy one</p> <p>25 because I was always going to be the -- the price was always</p>	<p>26</p> <p>1 \$5,000 was a loan repayment?</p> <p>2 A. Later on, he just tore it up.</p> <p>3 Q. And you weren't involved in any of the conversations</p> <p>4 or didn't know about any of the conversations between he and</p> <p>5 Lynette?</p> <p>6 A. No. That was his baby, you know, if he wanted to keep</p> <p>7 it from his wife, the reason I took the bike was he really</p> <p>8 wanted to gift something to me, and you know, part of me said</p> <p>9 it wasn't right, but the better part of me said I'm not going</p> <p>10 to deny him of this, so I took it.</p> <p>11 Q. And how much was the bike worth?</p> <p>12 A. I think 19.</p> <p>13 Q. Why didn't you tell her about the \$7500 account in</p> <p>14 Oakes when she asked you?</p> <p>15 A. What \$7500?</p> <p>16 Q. She says she asked you about the bank accounts in</p> <p>17 Oakes and that you didn't tell her that there was a \$7500</p> <p>18 savings account there.</p> <p>19 A. Savings account. Because I didn't touch it.</p> <p>20 Basically I operated on the checking account and it was right</p> <p>21 there on the same statement as the checking account. It was</p> <p>22 not relevant to me. Here is the checking account, that's what</p> <p>23 I had responsibility for, and where all the money was coming</p> <p>24 out of and the transactions were happening. The \$7500, I'm</p> <p>25 trying to think of, that's about what it was, there were no --</p>

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Deposition of David Knigge

<p>31</p> <p>1 fact that people were telling him not to do those things, and</p> <p>2 so from that perspective, I totally understand why he did what</p> <p>3 he did. He went down to see his daughter in Yankton and it was</p> <p>4 just to be with her.</p> <p>5 MS. POCHOP: Could you put a time frame on the Oakes</p> <p>6 trip and the daughter trip? Just an approximate is good.</p> <p>7 A. It would have been in like latter part of January of</p> <p>8 2013, and his daughter I think was the same thing, it was just</p> <p>9 right after the surgery in January of 2013.</p> <p>10 Q. (BY MR. GILLETTE) That was prior to making an</p> <p>11 agreement to come to Redfield or after?</p> <p>12 A. That was after. But he was making decisions for the</p> <p>13 store, for the Redfield store, clear into like March and April.</p> <p>14 Q. What I'm trying to get at, is there a point at which</p> <p>15 you thought he shouldn't be doing that any more?</p> <p>16 A. No, because we couldn't go to Lynette, and Lynette</p> <p>17 would always point to Bobby, and so we needed one of them to</p> <p>18 make a decision and Bobby was the one. And I would have said</p> <p>19 something if I thought his decision would have been a bad</p> <p>20 decision.</p> <p>21 Q. Going back to the original contract that you have with</p> <p>22 regard to the severance package and moving to Redfield and your</p> <p>23 salary, your insurance, all of that, you have already told me</p> <p>24 that that contract was never reduced to writing; is that</p> <p>25 correct?</p>	<p>33</p> <p>1 Q. For any reason?</p> <p>2 A. For any reason, yeah. And I did stress that with him,</p> <p>3 and I think that's why I'm so confident that he understood</p> <p>4 that, I said, you realize any reason.</p> <p>5 MR. GILLETTE: That's all I have.</p> <p>6 MS. POCHOP: Do you want to step out?</p> <p>7 A. Yeah.</p> <p>8 (Whereupon, the deposition was in recess at 2:03 p.m.,</p> <p>9 and subsequently reconvened at 2:05 p.m., and the following</p> <p>10 proceedings were had and entered of record:)</p> <p>11 MS. POCHOP: Unless you have anything else, Paul, we</p> <p>12 will read and sign.</p> <p>13 MR. GILLETTE: I did think of one other thing, is that</p> <p>14 okay?</p> <p>15 Q. (BY MR. GILLETTE) The move from Pierre to Redfield,</p> <p>16 okay, and the quitting of the job, you said that that caused</p> <p>17 you a detriment. Is that detriment a financial detriment?</p> <p>18 A. Yes. I had a good paying job and what I was doing,</p> <p>19 basically I sold my house for, you know, what I feel is under</p> <p>20 market.</p> <p>21 Q. And how much did that cost you?</p> <p>22 A. Well, I think about 10,000, plus realtor fees, another</p> <p>23 8,000. Even though he was paying me 70,000, that's still less</p> <p>24 than what I would have made for the state in benefits and</p> <p>25 everything, because basically my pension stopped with the</p>
<p>32</p> <p>1 A. That's correct, yeah.</p> <p>2 Q. And that you don't have any type of recordings or</p> <p>3 anything like that with regard to Robert having said those</p> <p>4 things that you say that he said in making those promises.</p> <p>5 A. Nope.</p> <p>6 Q. Do you have any letters or e-mails or texts that would</p> <p>7 evidence the severance promise?</p> <p>8 A. No.</p> <p>9 Q. And this contract was a contract that lasted</p> <p>10 indefinitely until the kids came to take over or until you</p> <p>11 retired?</p> <p>12 A. If I would have gotten terminated for any reason, yes,</p> <p>13 because at that point, you know, I think he understood all the</p> <p>14 sacrifices that I was making, leaving Pierre, my 30 years in</p> <p>15 accounting, to help him out.</p> <p>16 Q. If you had worked there for five years and she had</p> <p>17 fired you, you would get \$100,000?</p> <p>18 A. I would have expected it if it was -- to me I would</p> <p>19 have pursued it if I didn't feel it was just in her -- if her</p> <p>20 reasons were not just.</p> <p>21 Q. But that's the contract that you and Bob made, right?</p> <p>22 A. What was the contract?</p> <p>23 Q. That five years down the road, if she fired you, you</p> <p>24 got \$100,000?</p> <p>25 A. Yep.</p>	<p>34</p> <p>1 state, you know, I wasn't getting all the different benefits</p> <p>2 that I had.</p> <p>3 Q. Have you put a number to that?</p> <p>4 A. No. You know, I gave Lynette that one sheet, I think</p> <p>5 you should be aware of that, what I outlined the severance and</p> <p>6 everything.</p> <p>7 Q. Is that the sheet that said that you thought you were</p> <p>8 owed about \$310,000?</p> <p>9 A. No, I said this is what I gave up.</p> <p>10 Q. About \$310,000?</p> <p>11 A. Yeah, something like that.</p> <p>12 Q. Is that a ballpark?</p> <p>13 A. Yeah.</p> <p>14 Q. And that's the number that comes to your mind?</p> <p>15 A. Yep.</p> <p>16 Q. How have you recovered now in terms of your current</p> <p>17 position?</p> <p>18 A. Well, I'm renting a house. Basically the housing</p> <p>19 market is very difficult to get into. The exact same home that</p> <p>20 I would be looking at about 165,000 buying it now.</p> <p>21 Q. How about the salary of the new job?</p> <p>22 A. New job I'm making 10,000 less.</p> <p>23 Q. Than the old job?</p> <p>24 A. Than the old job.</p> <p>25 Q. You were in Sioux Falls for a while?</p>

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 27807

DAVID KNIGGE,

Plaintiff & Appellant,

v.

B&L FOOD STORES, INC. and
ESTATE OF ROBERT KNIGGE

Defendants & Appellants.

Appeal from the Circuit Court
Fifth Judicial Circuit
Spink County, South Dakota

The Honorable Tony L. Portra, Presiding Judge

APPELLANT'S REPLY BRIEF

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I. ARGUMENT

A. The Circuit Court erred when it failed to view the evidence in the light most favorable to David, the non-moving party, and found the oral contract could not be performed within one year.

1. Contingencies upon which the contract could be fully performed.

Although it is undisputed that a valid oral contract existed in this case, and that almost all of the contract terms as presented by David are true and accurate, there are factual disputes over the severance package agreed upon by the brothers. The subject of this appeal revolves around whether the facts make the oral contract subject to the statute of frauds defense or not.

The most clear difference between the application of facts to law in the respective parties' briefs is the dispute over the contingencies that applied to the oral contract. The parties agree that contemplated contingencies that would complete the contract within one year are sufficient to bring the oral contract outside the statute of frauds. What they disagree on are the events the contract was contingent upon. In Section IA of Appellee's Brief, B&L Foods argues that performance of the contract was only contingent upon two triggering events: 1) David's retirement; or 2) Robert's children taking over the business. Appellee relies on David's deposition testimony in asserting these are the only two contingencies. Of course, there was another potential contingency that David also testified would trigger his full performance of the contract: Lynette terminating him. R. 177: David Knigge Depo at 10, 12-13, 19-20, 22.

In many employment contract cases, the possibility of termination is not a sufficient contingency. For example, in *Marrero v. McDonnell Douglas Capital Corporation*, the employee testified that his contract was for a three-year term. 505

N.W.2d 175 (Mich. App. 1993). In that case, the court held that the potential for termination within one year cannot transform a three-year contract into a less-than-one-year contract. *Id.* at 278.

This case is different. The contract was not for any definite period of years, which makes the clearly premeditated contingency for termination completely different. Appellee's attempt to classify the third contingency as a mere "'possibility' that would only serve to cut short [David's] performance of duty" is a mischaracterization of the record.¹ *Appellee's Brief* at 15, Section IB. Nowhere in the record is there an allegation that David failed to perform his duties under the terms of the contract. Nowhere in the record does David claim that Lynette did not have the ability to terminate him under the contract. Rather, there is evidence that Robert expected David to manage the store until David wanted to retire *or* until Robert's children wanted to take over *or* until Lynette terminated him. There is evidence that Robert and David anticipated Lynette would terminate David after Robert's death, and that they provided for completion of the contract in that event by including a severance agreement.

To say this explicit contemplation of performance under the contract was a passing reference to a "possibility" would serve to also undermine the other two contingencies, too. Then wasn't it also just a "possibility" that David would retire someday at all? Or that any of Robert's children would ever seek to manage the store? None of these events create a specific duration for the length of the contract, and it is clear from the record that it could have been fully performed in five months or five years. What's important is that *because David was able to—and in fact did—fully perform the*

¹ To distinguish between what is David's actual deposition testimony and what is simply questioning language used by B&L Food's attorney, Mr. Gillette, and then cited in their Appellee brief as testimony, is difficult and confusing.

contract in less than one year, it did not need to be reduced to writing to make it enforceable under the statute of frauds.

2. Evidence of fraud.

B&L Foods contends that “[d]iscrepancies in the record prove the case at bar present[s] a risk of perjury.” *Appellee’s Brief* at 22. First, all cases that involve testimony are at a hypothetical risk for perjury. That does not amount to a good reason for preventing a jury from hearing the case. Second, as much as the statute of frauds is important to help courts avoid an unfair result by requiring written terms, members of this Court have also cautioned against allowing the doctrine to *cause* an unfair result: “We must not be blinded by the technicalities of the statute of frauds, and permit them to produce a fraud.”²

Third, the discrepancies noted on page 22 of the Appellees’ brief are highly suspect. The record at all times accurately reflects that David moved from Pierre to Redfield. Although he put his Pierre house up for sale before he went to work in Oakes, North Dakota, he had not formally left his job in Pierre and still considered Pierre his place of residency until he took the position in Redfield. He was regularly commuting to Oakes and living out of a hotel. Additionally, David never testified to two different severance amounts. The fact that Lynette heard from a third party that David had said it was two different amounts is unreliable hearsay.

Putting aside the complicated position B&L Foods places itself in by using David’s testimony to support their legal theories on the one hand, and accuse him of lying

² *Harriman v. United Dominion Industries*, 2005 SD 18, ¶ 36, 693 N.W.2d 44, 52 (citing *Jacobsen v. Gulbranson*, 2001 SD 33, ¶ 26, 623 N.W.2d 84, 90 (“The statute of frauds will not, however, be used to work an injustice.”)).

under oath on the other, the only thing any discrepancies in the record show are genuine disputes of material fact that should be determined by a jury.

B. The Circuit Court erred when it failed to view the evidence in the light most favorable to David, the non-moving party, and found that his detrimental reliance was not economically substantial.

The trial court held that David did not prove that his reliance caused him to suffer a “substantial economic loss,” and that he could therefore not meet his burden under the test for promissory estoppel. R. 255: Memorandum Opinion, 4. B&L Foods cites the Michigan case *Marrero v. McDonnell* as factually similar to this case. In *Marrero*, however, the court was concerned with whether or not there was a clear promise. In this case, the trial court only reached the first element of promissory estoppel: substantial economic loss.

David submitted evidence of hundreds of thousands of dollars in economic loss. In *Minor v. Sully Buttes School District*, this Court found there was substantial economic loss because the damages amounted to just “hundreds of dollars of expense.” 345 N.W.2d 48, 51 (S.D. 1983). In *Durkee v. Van Well*, the Court held that because Van Well had relied upon and partially performed under the oral contract by starting to relocate a fence along a section line, Durkee was estopped from asserting the statute of frauds defense. 2002 SD 150, ¶ 22, 654 N.W.2d 807, 815. The Court found that paying property taxes and maintaining the fence on the 35-foot strip of land was a substantial economic loss. *Id.* at ¶ 25.

David submitted evidence of foregoing the opportunity to own a store he valued at least at \$200,000 in order to help his brother in Redfield. He presented evidence regarding his reduced economic circumstances in Redfield, and he also testified that the

severance package was intended to compensate him for leaving his profession, giving up the chance to own the Oakes store and moving to Redfield to manage the Redfield store.

R. 49: D. Knigge Depo at 20. Viewing this evidence in the light most favorable to David, it creates a genuine dispute of material facts that should be submitted to a jury.

CONCLUSION

For the foregoing reasons, David respectfully urges the Court to reverse the decision of the Circuit Court and remand the case for a trial by jury.

Submitted this 17th day of October 2016.

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REQUEST FOR ORAL ARGUMENT

Plaintiff/Appellant David Knigge respectfully requests the opportunity to present oral argument.

Dated this 17th day of October 2016.

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CERTIFICATE OF COMPLIANCE

The undersigned attorney hereby certifies that this brief complies with the type volume limitation of SDCL § 15-26A-66(2). Based upon the word and character count of the word processing program used to prepare this brief, the body of the brief contains 1,300 words and 6,508 characters (not including spaces), exclusive of the Table of Contents, Table of Authorities, and Certificate of Counsel.

Dated this 17th day of October 2016.

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CERTIFICATE OF SERVICE

Stephanie E. Pochop, attorney for Plaintiff and Appellant David Knigge, and pursuant to SDCL Chapter 15-26C (Supreme Court Electronic Filing Rules), hereby certifies that on this 17th day of October 2016, I caused the following documents:

- Appellant's Reply Brief (word & PDF format)

to be filed electronically with the Clerk of the South Dakota Supreme Court via email, and that the original and two hardcopies of these documents were mailed by U.S. Mail, postage prepaid, to:

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The undersigned further certifies that the above documents were also emailed to the following attorneys:

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