WEDNESDAY, MARCH 25, 2009
10:00 A.M.

NO. 2

#24835

JAMES KLUTMAN, ROSE KLUTMAN
AND GAYLEN KLUTMAN,
Plaintiffs and Appellees,

vs.

SIOUX FALLS STORM, a/k/a K.T., LLC,
SIOUX FALLS ARENA, managed by SMG,
Defendants and Appellants.

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The Honorable Kathleen K. Caldwell **(CIV 04-428)**
Second Judicial Circuit
Minnehaha County

20-20-10

STATEMENT OF LEGAL ISSUES PRESENTED FOR REVIEW

I. **Whether a Motion to amend the pleadings made on the day of trial that results in adding additional parties as Plaintiffs, increasing the value of the Plaintiff' lawsuit and adding additional claims relates back to the original complaint, thereby avoiding application of the statute of limitations?**

The trial court permitted the Appellee to amend his complaint to include not only additional parties, but also additional claims mere hours before the commencement of trial.

- *Ferraro v. McCarthy-Pascuzzo*, 777 A.2d 1128 (Pa. Super. 2001).
- *West Volusia Hospital Authority v. Jones*, 668 So.2d 635 (Fla. App.1996).
- *Hedel-Ostrowski v. City Of Spearfish*, 2004 SD 55, 679 N.W.2d 491.
- *Lewis v. Moorehead*, 522 N.W.2d 1 (S.D. 1994).

II. **Whether a highly-regarded artificial turf expert who has specialized knowledge and skills regarding turf injuries should have been permitted to testify regarding the biomechanics of an ankle or knee injury on artificial turf.**

The trial court determined that the Appellant's turf expert was not qualified to testify on the mechanism of turf injuries on the grounds that the expert had not received specialized medical training despite the expert's extensive practical experience with respect to such injuries.

- *Burley v. Kytec Innovative Sports Equip., Inc.*, 2007 SD 82, 737 N.W.2d 397.

III. **Whether the trial court must submit an affirmative defense to the jury where the evidence is clearly sufficient to warrant such an instruction because the danger involved was open and obvious?**

The trial court refused to submit to the jury the affirmative defense of contributory negligence despite the fact that sufficient evidence was presented justifying such an instruction at trial.

- *Boomsma v. Dakota, Minnesota, & Eastern Railroad Corp.*, 2002 SD 106, 651 N.W.2d 238.
- *Parker v. Casa Del Rey*, 2002 SD 29, 641 N.W.2d 112.

IV. **Whether evidence of a subsequent remedial measure may be admitted into evidence following a witness's representation that a similar accident has not occurred since the Appellee's injury?**

The trial court allowed evidence of a subsequent remedial measure taken by the Appellant, despite having previously excluded the evidence in a motion in limine, due to the fact one of the Appellant's witnesses truthfully testified that an injury similar to the Appellee's had never occurred.

- *Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1567 (11th Cir. 1991).
- *Bland v. Davison County*, 566 N.W.2d 452, 459 (S.D. 1997).

V. **Whether newly discovered evidence, previously concealed from the Appellant, tending to show the Appellee's condition was not as serious as what he represented to the jury warrants a new trial?**

The trial court did not address this issue as the evidence was discovered after trial and the trial court did not rule on the Appellant's Motion for New Trial.

- *Bridgewater Quality Meats, L.L.C. v. Heim*, 2007 SD 23, 729 N.W.2d 387.
- *Brooks v. Maint. Serv. Res., Inc.*, 11 Misc.3d 1067(A), 816 N.Y.S.2d 694 (N.Y. Sup. 2006).
- *Sledge v. Richards*, 592 So.2d 316 (Fla. App. 1991).
- *Cohen v. Crimenti*, 262 N.Y.S.2d 364 (N.Y. Sup. 1965).

VI. **Whether sufficient evidence can support a verdict under a premises liability theory of recovery where there was no evidence that the Appellant failed to properly install or inspect the artificial turf and the injury-causing condition was open and obvious to anyone using the field, including the Appellee.**

The trial court held sufficient evidence existed to support the verdict despite the fact that no evidence was introduced indicating the Appellant was negligent.

- *Olson v. Judd*, 534 N.W.2d 850 (S.D. 1995).