

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28738

Timothy Stathis,

Plaintiff and Appellant,

vs.

Marty Indian School, a South Dakota non-profit corporation;
Elk Soldier; also known as Gary Drapeau, Sr;
Glenn Drapeau; Galena Drapeau;
Sarah W. Zephier; Sarah R. Zephier;
Stephanie Cournoyer; Julie Blackmoon-Wright;
and John and/or Jane Does One (1) through Five (5),

Defendants and Appellees.

Appeal from the 1st Judicial Circuit, Charles Mix County, South Dakota
The Honorable Bruce Anderson, Circuit Judge

BRIEF OF APPELLANT

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Notice of Appeal Filed on September 28, 2018

TABLE OF CONTENTS

Table of Authorities2

Preliminary Statement.....5

Jurisdictional Statement5

Statement of the Legal Issue6

Statement of the Case.....6

Statement of the Facts7

Standard of Review13

Argument14

Conclusion24

Certificate of Compliance25

Certificate of Service25

Appendix.....27

TABLE OF AUTHORITIES

CASES:

United States Supreme Court:

<u>Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc.</u> , 118 S. Ct. 1700 (1998)	16, 18, 20
<u>Lewis v. Clarke</u> , 137 S. Ct. 1285 (2017)	15, 20, 21, 22
<u>Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma</u> , 111 S. Ct. 905 (1991)	16
<u>Turner v. United States</u> , 248 U.S. 354 (1919)	14
<u>Upper Skagit Indian Tribe v. Lundgren</u> , 138 S. Ct. 1649 (2018)	16
<u>Williams v. Lee</u> , 358 U.S. 217 (1959)	15

South Dakota:

<u>Cheyenne River Sioux Tribe Tel. Auth. v. Pub. Utilities Comm'n of S.D.</u> , 1999 S.D. 60	18
<u>Cournoyer v. Montana</u> , 512 N.W. 2d 479 (S.D. 1994)	17
<u>Decker ex rel. Decker v. Tschetter Hutterian Brethren, Inc.</u> , 1999 S.D. 62	19
<u>Guthmiller v. Deloitte & Touche, LLP</u> , 2005 S.D. 77	7, 14
<u>Huterville Hutterian Brethren, Inc. v. Waldner</u> , 2010 S.D. 86	18
<u>Mordhorst v. Dakota Truck Underwriters & Risk Admin. Servs.</u> , 2016 S.D. 70	13
<u>Sage v. Sicangu Oyate Ho, Inc.</u> , 473 N.W. 2d 480 (S.D. 1991)	7, 23
<u>Wipf v. Huterville Hutterian Brethren, Inc.</u> , 2012 S.D. 4	19

Other Jurisdictions:

<u>Berry v. Time Ins. Co.</u> , 798 F. Supp. 2d 1015 (D.S.D. 2011)	21
<u>Churchill Fin. Mgmt. Corp. v. ClearNexus, Inc.</u> , 802 S.E. 2d 85 (Ga. Ct. App. 2017) ...	15
<u>Geidosh v. Little Wound School Board</u> , 995 F. Supp. 1052 (D.S.D. 1997)	7

<u>Gerken v. Marty Indian School</u> , 2001 NPICA 15 (N. Plains Intertribal Ct. App. May 16, 2003)	22
<u>Harrison v. PCI Gaming Auth.</u> , 251 So. 3d 24 (Ala. 2017)	17
<u>Rape v. Poarch Band of Creek Indians</u> , 250 So. 3d 547 (Ala. 2017)	17
<u>Seminole Tribe of Florida v. Schinneller</u> , 197 So. 3d 1216 (Fla. 4th DCA 2016)	15
<u>Wilkes v. PCI Gaming Auth.</u> , No. 1151312, 2017 WL 4385738 (Ala. Sept. 29, 2017)	17
<u>Young v. Duenas</u> , 262 P. 3d 527 (Wash. Ct. App. 2011)	15

STATUTES/CONSTITUTIONAL PROVISIONS:

S.D. Const. art. VI, § 20	19
SDCL 15-6-12(b)(1)	6, 7, 14
SDCL 15-6-12(b)(2)	6
SDCL 15-6-12(b)(5)	6
SDCL 15-6-12(b)(6)	7
SDCL 15-26A-3(2)	6
SDCL 15-26A-66(b)(2)	25
SDCL 15-26A-66(b)(4)	25
SDCL 15-26C-1	26
SDCL 47-22-73.....	20, 22

OTHER AUTHORITY:

13 <u>Williston on Contracts</u> § 39:29 4 th ed.	21
1982 S.D. Op. Att’y Gen. 190 (1982)	17
Black’s Law Dictionary (10th ed. 2014)	18
Seielstad, Andrea M., <u>The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on A Fundamental</u>	

Aspect of American Indian Sovereignty, 37 Tulsa L. Rev. 661 (2002) 14

PRELIMINARY STATEMENT

Appellant, Timothy Stathis, will be referred to as “Stathis”. Appellee, Marty Indian School, a South Dakota non-profit corporation will be referred to as “Marty Indian School” or simply “the school”. Appellees Elk Soldier, also known as Gary Drapeau Sr., Glenn Drapeau, Galena Drapeau, Sarah W. Zephier, Sarah R. Zephier, Stephanie Cournoyer, and Julie Blackmoon-Wright will be referred to collectively as the “named appellees” or individually by their respective full name. John and/or Jane Does One (1) through Five (5) will be referred to as “unnamed appellees”. As named appellees Sarah W. Zephier, Sarah R. Zephier, Stephanie Cournoyer, and Julie Blackmoon-Wright also comprise the Marty Indian School Board, they may also be referred to as same, or as “school board”. Any other references to specific persons will be by the individual’s name. Any references to the settled record will be designated by “SR” followed by the page number. Any references to materials reproduced in the Appendix will be designated by “AP” followed by the page number.

JURISDICTIONAL STATEMENT

This appeal arises from the order granting Appellees’ *Motion to Dismiss* which was entered by Circuit Judge Bruce Anderson, First Judicial Circuit, Charles Mix County, South Dakota, on August 14, 2018. (SR-176). A hearing was held on the motion on July 9, 2018, where Judge Anderson ruled in favor of appellees. Notice of Entry of such Order and Judgment was served upon Appellant’s counsel September 10, 2018. (SR-198). Appellants *Notice of Appeal* was filed on September 28, 2018. (SR-207). The granting of a motion to dismiss is a final order appealable as a matter of right pursuant to SDCL 15-26A-3 (2).

STATEMENT OF THE LEGAL ISSUE

Appellant Stathis states that the following legal issue is presented, to-wit:

ISSUE I

Whether the Trial Court erred by granting appellees' motion to dismiss on the basis of tribal sovereign immunity, immunity of tribal officials and employees, federal preemption, and infringement on tribal sovereignty under SDCL 15-6-12(b)(1), (2), and (5).

Relevant Authority:

1. *SDCL 15-6-12(b)(1)*
2. *SDCL 15-6-12(b)(2)*
3. *SDCL 15-6-12(b)(5)*

STATEMENT OF THE CASE AND FACTS

STATEMENT OF THE CASE

This is an action for breach of contract, breach of settlement agreement, wrongful termination, libel, slander, and punitive damages, all arising out of an employment contract that was entered into by Stathis and the Marty Indian School Board on or around May 8, 2017. The employment contract was terminated by the school on or around December 1, 2017. This action was commenced by service of a *Summons* and *Complaint* on all Appellees on or around March 29, 2018. (SR-1).

Appellees responded by filing a *Motion to Dismiss* May 16, 2018, where they argued that the *Complaint* be dismissed on the basis of tribal sovereign immunity, immunity of tribal officials and employees, federal preemption, infringement of tribal

sovereignty and inability to join a necessary and indispensable party, all under SDCL 15-6-12(b)(1), (2), (5), and (6). (SR-88).

Stathis objected to Appellees' *Motion to Dismiss* in its entirety (SR-129), and the trial court held a hearing on the motion on July 9, 2018, where the motion was ultimately granted on the basis of tribal sovereign immunity, immunity of tribal officials and employees, federal preemption, and infringement of tribal sovereignty under SDCL 15-6-12(b)(1), (2), and (5). However, the court declined to rule on the issue of failure to join a necessary and indispensable party under SDCL 15-6-12(b)(6).

The trial court relied heavily upon rulings by the United States District Court, District of South Dakota, in Geidosh v. Little Wound School Board, 995 F. Supp. 1052 (D.S.D. 1997) as well as by this Court in Sage v. Sicangu Oyate Ho, Inc., 473 N.W. 2d 480 (S.D. 1991). The trial court's analysis as laid out in its findings of fact and conclusions of law was relatively simple. The court saw the Marty Indian School board as a tribal entity, the named defendants as members of the tribe acting in a tribal capacity, and as a result that the sovereign immunity of the tribe applied and thus all parties to Stathis' claims were immune to suit. (SR-176).

STATEMENT OF FACTS

Timothy Stathis was formerly employed as a High School Principal by the Marty Indian School. (SR-1).¹ Pursuant to that employment he had entered into an "Administrator or Supervisor's Contract" (AP-A-21) with the school on or about May 8,

¹ All facts stated here were originally stated in the *Complaint*, a copy of which is included in the Appendix. As this is the appeal of a *Motion to Dismiss*, all facts properly pled within the *Complaint* must be treated as true, all factual inferences must be made in favor of the non-moving party, and all doubts must be resolved in favor of the pleader. Guthmiller v. Deloitte & Touche, LLP, 2005 S.D. 77.

2017. The contract specified many things, including that the term of employment for the contract was to run from August 1, 2017 through June 30, 2018, and that Stathis was required to maintain proper certification through the South Dakota Department of Education as a condition of employment. The contract claimed that the Marty Indian School was a South Dakota nonprofit corporation. At the same time the contract stated that the laws of the State of South Dakota were not binding on the School and that the terms of the Policies and Procedures Manual of the school would govern, however the contract also stated that any matter not controlled by the Manual would be controlled by the laws of the State of South Dakota.

While Stathis had many duties related to his role as principal, one of his key duties included the administration of school improvement grants issued by the Bureau of Indian Education. Part of this duty was to incentivize improvements in both faculty and student performance through the use of financial bonuses. To that end, Stathis developed a set of objective criteria to be used for awarding these bonuses. This was a role that Stathis was familiar with and had performed in the past, as he had previously served as high school principal during the previous school year. Unfortunately, over the course of Stathis' time at the school certain disputes and disagreements over the distribution of bonuses had begun to arise.

While these disputes and disagreements had been ongoing for quite some time, they began to reach critical mass on or around November 15, 2017. On this date Appellee Elk Soldier arranged for several students and others to gather in the library of the school for a "sit in" demonstration held for the purposes of publicly airing complaints about Stathis. This action taken by Elk Soldier was not in compliance with the professional

teaching expectations of Marty Indian School. In fact, Stathis on several previous occasions had expressed concerns to Elk Soldier over his lack of professionalism. As the gathering began to grow in both size and boisterousness several text messages had gone out to the public about the gathering. This resulted in the arrival on campus of Appellees Julia Blackmoon-Wright, Sarah W. Zephier, Stephanie Cournoyer, and other members of the School Board. Arriving first was Julia Blackmoon-Wright who promptly took a seat in the front row of the gathering and stated “I am a School Board Member, I am here to listen to what you want to say”. Shortly after this Appellee Sarah W. Zephier, who was president of School Board, took control of the gathering.

Upon taking control Sarah W. Zephier promptly requested that any students or staff members who had complaints about Stathis to speak up and let everybody know the particulars. This led to an impromptu open and public meeting about Stathis between students, the entire Marty Indian School Board, members of the public, and Appellees John and/or Jane Does One (1) though Five (5). This continued for approximately two (2) hours before the school’s public address system announced that there would be an emergency executive session of the Marty Indian School Board. After meeting in private for some time, the school board invited Stathis to join them behind closed doors where they posed several questions to Stathis to which he respectfully responded. At the conclusion of this questioning Stathis was excused and the board continued meeting and, presumably, deliberating.

While at home later that evening Stathis received an email from the school’s superintendent consisting of a forwarded message from Appellee Sarah W. Zephier. The forwarded message advised that Stathis had been suspended from his employment for ten

(10) working days, to commence immediately the next day on November 16, 2017. That following day on November 16, 2017, Stathis contacted the superintendent inquiring about the status of his pay during his suspension. While the superintendent initially advised that his suspension would be with pay, Stathis later received a memorandum from Sarah W. Zephier stating that his suspension was, in fact, unpaid.

It is important to note that the Policy and Procedures Manual of the school was very specific in that the authority for suspension rests with the School Superintendent and not the President of the School Board. (AP-A-24). The Manual further states that discretion as to if a suspension is with or without pay belongs to the Superintendent and that all suspensions must be accompanied by a statement specifying cause. (AP-A-51). Despite this, Stathis' suspension was an action taken unilaterally by the school board, with no direct involvement of the Superintendent, and without an accompanying statement as to cause.

Also, on November 16, 2017, Appellee Sarah W. Zephier sent a public letter to students, parents, staff, and faculty acknowledging the events of the previous day, and thanked all those involved for their comments. Also that day Appellees Elk Soldier, Galena Drapeau, and Glenn Drapeau organized and held a public gathering for students and the general public in the school gymnasium as a "victory dance" celebrating the previous days events and the suspension of Stathis. The "victory dance" generally continued the dissemination of false, unwarranted, and defamatory comments about the personal and professional reputation of Stathis. No actions were taken by the school, any of its administrators, or the school board to cancel, control, or curtail either the "victory

dance” celebration or the continued false, unwarranted, and defamatory comments being made about the personal and professional reputation of Stathis.

Incident to these events Stathis timely filed a written grievance with the school board as related to his suspension without pay and the entirety of the events of November 15, 2017, and November 16, 2017. (AP-A-64). Upon the receipt of this grievance and, after several discussions between Stathis, the school board, and respective legal counsel, eventually Stathis was advised on November 29, 2017, that he was reinstated and his previously withheld pay was to be repaid. Stathis returned to work on the morning of November 30, 2017.

On the next day, December 1, 2017, Elk Soldier called the Tribal Police Department claiming that there had been a physical fight on campus between a non-native staff member and a native staff member in the school office. In response to this call Tribal Police came out to the school and interviewed Stathis regarding what he knew of the incident in his capacity of High School Principal. Stathis had no knowledge of any fight and informed the responding officer of the same. Stathis would later be informed that the call to the police was made by Elk Soldier because he thought there had been a fight between Stathis and another staff member, despite that not in fact being the case. (AP-A-8). Later that day both Elk Soldier and Galena Drapeau submitted letters of resignation to the Superintendent and Appellee Sarah W. Zephier convened a meeting of the school board to discuss the termination of Stathis’ employment. This meeting would take place without the involvement of Stathis despite his making himself available to participate. At the end of the school board meeting Stathis was advised that his contract

had been terminated and that he would be paid out in full. He was directed to address any questions regarding his payout to the Superintendent's office. (AP-A-9).

As the Superintendent was unavailable to Stathis due to an illness and other personal matters, Stathis reached out to the school's payroll clerk with regards to his payout. Upon doing so he was advised that he could not be paid until the minutes from the December 1, 2017, school board meeting had been prepared and received. Eventually on December 12 Stathis was advised that his previously withheld and unpaid salary and benefits were available, as well as the balance of his annual contract, less appropriate tax and other withholdings. At that point Stathis was advised that all he needed to do was to turn in his school laptop computer and keys; that once he had done so he would be paid. Upon hearing this Stathis went to the school, delivered his keys and laptop to the Superintendent, and was given a check purporting to be the amount owed him for his for contract through its conclusion in 2018, less appropriate taxes and other withholdings. Upon receiving the check Stathis had questions about the total balance, and as such went to the payroll clerk. He was accompanied by the Superintendent. Upon arriving at the payroll clerk's office the payroll clerk was on the phone. The payroll clerk handed the phone to the Superintendent. At that point the Superintendent advised Stathis to surrender the check or a stop payment order would be entered at the payor bank. Shortly thereafter a Tribal Police Officer arrived at the school and escorted Stathis off the school grounds.

After the events of December 12, 2017, Stathis made repeated demands for payment of the balance of his contract. The school failed and refused to honor those requests. On December 20, 2017, the school board met again with a quorum comprised of Sarah W. Zephier, Sarah R. Zephier, Stephanie Cournoyer, and Julie Blackmoon-Wright.

The Superintendent was also present at the meeting. During this meeting action was taken to pay Stathis \$1,500.00 as complete settlement of the balance owed on Stathis' contract, as well as to pay him for the two (2) weeks of pay that had been withheld during his suspension. Eventually on January 12, 2018, Stathis would receive two (2) checks from the school – a check for \$1,500.00 purporting to be a full and final settlement and a check for \$2,916.00 to cover the two weeks of pay that was withheld during his suspension.

Stathis elected not to accept the \$1,500.00 check, tendered it back to the school and expected the school board to honor its previous agreement to pay out the remainder of his contract. After the school board continually refused to honor its previous agreement to pay out his contract in full, Stathis filed a separate grievance with the school board regarding that matter. (AP-A-11).

Neither grievance – the first filed nor the second filed – received any response from the school board.

The termination of Stathis in violation of both his contract and the Policies and Procedures Manual incorporated into said contract, the school board's breach of its promise to pay out his contract in full, and all the events and circumstances of November and December, 2017, have caused him both economic loss as well as damage to his professional reputation as a school administrator.

STANDARD OF REVIEW

When reviewing the rulings of a trial court on motions to dismiss, this Court's standard of review is *de novo*. Mordhorst v. Dakota Truck Underwriters & Risk Admin. Servs., 2016 S.D. 70. All facts properly pled in the initial complaint should be treated as true, and all reasonable inferences of fact must be drawn in favor of the non-moving

party. Guthmiller v. Deloitte & Touche, LLP, 2005 S.D. 77. No deference is to be given to the trial court's conclusions of law. Id.

ARGUMENT

ISSUE I

Whether the Trial Court erred by granting appellees' motion to dismiss on the basis of tribal sovereign immunity, immunity of tribal officials and employees, federal preemption, and infringement on tribal sovereignty under SDCL 15-6-12(b)(1), (2), and (5).

TRIBAL IMMUNITY AS A DOCTRINE SHOULD BE ABANDONED OR NARROWED

Tribal Immunity is a completely judicially created doctrine, one which has been “[d]eveloped without reference to or basis in the Constitution, [yet] emerges and is perpetuated in the precedent of the [United States] Supreme Court as a veritable truth or natural law of sovereignty”. Seielstad, Andrea M., The Recognition and Evolution of Tribal Sovereign Immunity Under Federal Law: Legal, Historical, and Normative Reflections on A Fundamental Aspect of American Indian Sovereignty, 37 Tulsa L. Rev. 661, 668 (2002). The doctrine made its first appearance in our country's jurisprudence nearly one hundred years ago, when the United States Supreme Court determined that as a result of the sovereign status of an Indian tribe and its members a landowner was without civil remedy in the courts for the destruction of his property by that tribe and its members. Turner v. United States, 248 U.S. 354 (1919). The doctrine has evolved and developed over time. At its core it remains centered around the belief that tribes and their members have a right to “make their own laws and be ruled by them”. Williams v. Lee, 358 U.S. 217 (1959).

As the doctrine is frequently applied today, nationwide, it often provides tribal defendants with a unique vehicle to avoid liability for their actions that is simply unavailable to other similarly situated defendants. It has protected defendants in Florida from liability in slip and fall cases. Seminole Tribe of Florida v. Schinneller, 197 So. 3d 1216 (Fla. 4th DCA 2016). It has protected defendants in Washington who were tribal police officers from wrongful death claims. Young v. Duenas, 262 P.3d 527 (Wash. Ct. App. 2011). It has even protected a Georgia Consumer Lending Company from liability under a breached contract with its call center provider. In that case the court went on the record saying “[t]his result may seem unfair, but that is the reality of [tribal] sovereign immunity.” Churchill Fin. Mgmt. Corp. v. ClearNexus, Inc., 802 S.E.2d 85 (Ga. Ct. App. 2017).

Despite the doctrine being a creation of the United States Supreme Court, members of the United States Supreme Court have increasingly gone on record questioning the wisdom of the doctrine. The Court even recently issued a decision which has served to place some limitations on the doctrine. It explicitly stated that an Indian tribe member who was sued in his individual capacity did not have tribal sovereign immunity in a negligence action brought by the driver and passenger of a motor vehicle allegedly rear-ended on an interstate highway by a tribal member driving a tribe-owned limousine carrying patrons of a tribe-owned casino, even though the tribal member was acting within the scope of his employment. The tribe member, and not the tribe, was the real party in interest in the action. Lewis v. Clarke, 137 S. Ct. 1285 (2017).

In considering the tribal immunity doctrine, Justice Stevens stated:

The doctrine of sovereign immunity is founded upon an anachronistic fiction. In my opinion all Governments – federal, state, and tribal – should generally be accountable for their illegal conduct.

Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma, 111 S. Ct. 905 (1991).

Some years later Justice Kennedy would state:

There are reasons to doubt the wisdom of perpetuating the doctrine. At one time, the doctrine of tribal immunity from suit might have been thought necessary to protect nascent tribal governments from encroachments by States. In our interdependent and mobile society, however, tribal immunity extends beyond what is needed to safeguard tribal self-governance. This is evident when tribes take part in the Nation’s commerce. Tribal enterprises now include ski resorts, gambling, and sales of cigarettes to non-Indians. In this economic context, immunity can harm those that are unaware they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims.

These considerations might suggest a need to abrogate tribal immunity, or at least as an overarching rule.

Kiowa Tribe of Oklahoma v. Mfg. Technologies, Inc., 118 S. Ct. 1700 (1998).

Perhaps however, the most biting critique of the doctrine comes from Chief Justice Roberts, who earlier this year stated:

There should be a means of resolving a mundane dispute over property ownership, even when one of the parties to the dispute – involving non-trust, non-reservation land – is an Indian tribe. The correct answer cannot be that the tribe always wins no matter what; otherwise a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a colorable claim of right.

Upper Skagit Indian Tribe v. Lundgren, 138 S. Ct. 1649 (2018).

In considering a trio of cases, the Supreme Court of Alabama recently began to reign in the doctrine of tribal immunity. In fact, the Alabama Supreme Court has gone on

to state that “the doctrine of tribal sovereign immunity affords no protection to tribes with regard to tort claims asserted against them by non-tribe members”. Wilkes v. PCI Gaming Auth., No. 1151312, 2017 WL 4385738 (Ala. Sept. 29, 2017).² The Alabama Supreme Court also ruled that tribal immunity does not apply in a suit that involved “negligent or wanton serving of alcohol to a visibly intoxicated patron”. Harrison v. PCI Gaming Auth., 251 So 3d 24 (Ala. 2017). The Alabama Supreme Court has even come close to granting state jurisdiction over a disputed jackpot win at an Indian operated casino. But, ultimately, it fell short of granting jurisdiction due to factual questions related to the particular type of casino game at issue and questions related to the status of the tribal land upon which the casino was located. Rape v. Poarch Band of Creek Indians, 250 So. 3d 547 (Ala. 2017).

There have also been some limits placed on the doctrine of tribal immunity within South Dakota. It has been determined that South Dakota’s election laws can be enforced against Indians voting at and staffing polling places located on Indian allotment land for election law violations taking place during local school board elections. 1982 S.D. Op. Att’y Gen. 190 (1982). South Dakota courts have been found to have jurisdiction to issue temporary restraining orders restricting a non-South Dakota licensed attorney from representing a tribe in its state courts. Cournoyer v. Montana, 512 N.W.2d 479 (S.D. 1994). The South Dakota Public Utilities Commission has been found to have jurisdiction to regulate and approve the sales of telephone exchanges located on Indian land, even

² The opinion in Wilkes has not yet been finalized for publication in the Southern Reporter, as it is currently the subject of an active, and currently proceeding, certiorari petition to the United States Supreme Court. That the United States Supreme Court is being asked yet again to weigh in on the issue of tribal immunity only serves to further emphasize the timeliness of the issues present in this appeal.

when parties to the sale are tribal subsidiaries. Cheyenne River Sioux Tribe Tel. Auth. v. Pub. Utilities Comm'n of S.D., 1999 S.D. 60, ¶ 23.

While the doctrine of tribal immunity has been curtailed somewhat in recent years, it is important to remember that even the United States Supreme Court – the very judicial body responsible for its creation – has admitted the doctrine has “developed almost by accident”. Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 118 S. Ct. 1700 (1998). In regard to “accidental development”, Black’s Law Dictionary (10th ed. 2014) defines an “accident” as “[a]n unintended and unforeseen injurious occurrence”. That definition seems quite appropriate. It is unlikely that tribal immunity was created with the intent that it would one day be deployed to protect tribal defendants from claims of everything from negligence to wrongful death to breach of contract. But that is exactly the result to which this almost accidental creation has led. This is not to suggest all claims against all tribal defendants where tribal immunity is invoked are meritorious. But *some* of them most certainly are. By virtue of a near blanket denial of meritorious claims the true impact and extent to which tribal immunity results in miscarriages of justice cannot be truly known.

There is certainly wisdom in precluding the state from interfering in matters of a purely tribal nature. A similar “non-interference” stance has been repeatedly taken by this Court in cases involving internal leadership and membership disputes amongst the Hutterites. A civil court is precluded from entertaining religious disputes over doctrine. Those issues are best left to adjudication by the ecclesiastical tribunals of the appropriate church. Hutterville Hutterian Brethren, Inc. v. Waldner, 2010 S.D. 86, ¶ 22. Likewise, it is improper for a secular court to evaluate conflicting testimony concerning internal

church procedures. Decker ex rel. Decker v. Tschetter Hutterian Brethren, Inc., 1999 S.D. 62, ¶ 16. Despite this, a civil court is not completely barred from addressing all claims touching on religious controversies, and in fact may do so if it is able to proceed in a completely secular manner. Wipf v. Hutterville Hutterian Brethren, Inc., 2012 S.D. 4, ¶ 12. If a contract dispute were to arise over a non-religious matter between a Hutterite party and a non-Hutterite party a state court would not be precluded adjudicating the dispute, and there is no reason for that analysis to change in the case of a contract dispute between a tribal party and a non-tribal party.

The same logic applies to tribal immunity in tribal/non-tribal member disputes. When a tribe or its members interact with or do business with non-tribal members, it is only fair that both tribal and non-tribal parties must play by, and be subject to, the same rules. Stathis and the Marty Indian School entered into a voluntary contractual relationship within the State of South Dakota. Had Stathis breached his duties under the contract there is no doubt that he would be subject to suit by the school in state court. Likewise, if Stathis had defamed either the school or the named appellees he would also be subject to suit in state court. S.D. Const. art. VI, § 20 states that “[a]ll courts shall be open, and every man for an injury done him in his property, person or reputation, shall have remedy by due course of law, and right and justice, administered without denial or delay”, but as long as the judicially created doctrine of tribal immunity exists in its current form, that can never truly be the case.

For that reason, the doctrine of tribal immunity should be abandoned, or if not abandoned, sufficiently narrowed to allow suits by non-Indians over contractual or

tortious matters to proceed so that they may be adjudicated on their merits in a state forum.

IF NOT ABANDONNED OR NARROWED, TRIBAL IMMUNITY SHOULD NOT APPLY TO THE SCHOOL, ITS BOARD, OR THE BOARD MEMBERS UNDER THE CIRCUMSTANCES OF THIS CASE

As the doctrine of tribal immunity exists today, it may be waived by a tribal defendant. Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc., 118 S. Ct. 1700 (1998). In addition to waiver, the United States Supreme Court has recently confirmed that when a suit is brought against a tribal employee in their individual capacity, the employee, not the tribe, is the real party in interest, and tribal immunity is not implicated. Lewis v. Clarke, 137 S. Ct. 1285 (2017).

At the time Stathis entered into contract with Marty Indian School, the contract he signed clearly stated that the school was “a South Dakota Non-Profit Corporation”. As it would turn out, the school’s charter had been administratively dissolved by the South Dakota Secretary of State at the time Stathis signed the contract. While Stathis would have had no reason to suspect or know the school’s South Dakota corporate status had been revoked, the school certainly was aware at the time the contract was signed and could have updated the contract to accurately reflect the school’s current status. For whatever reason, the school elected not to do so.

SDCL 47-22-73 states:

All persons who assume to act as a corporation without authority so to do shall be jointly and severally liable for all debts and liabilities incurred or arising as a result thereof.

As such, under South Dakota law, when the school presented itself as and acted as if it was a South Dakota non-profit corporation in its dealings with Stathis, the school

became liable for its conduct with Stathis – and others – as if it truly were a duly recognized South Dakota non-profit corporation.

In the alternative, the school’s actions in holding itself out to Stathis as a South Dakota non-profit corporation had the effect of waiving the school’s tribal immunity under the waiver by estoppel doctrine. The United States District Court for the District of South Dakota has confirmed (after looking to 13 Williston on Contracts § 39:29 4th ed. for guidance) that “[t]o prove waiver by estoppel one need only show that he or she was misled to his or her prejudice by the conduct of the other party into the honest and reasonable belief that the other party was not insisting upon some right”. Berry v. Time Ins. Co., 798 F. Supp. 2d 1015 (D.S.D. 2011). There may be various factual disputes if this case is later allowed to be adjudicated on the merits, but it is indisputable that Stathis was indeed (1) misled by the contract he signed with the school and (2) was subsequently prejudiced and damaged as a result.

Looking back to the named appellees – the school board members – clearly the counts in Stathis’ *Complaint* against them are in their individual capacities. That puts the individual defendants squarely within the ambit of the exception to tribal immunity created by the United States Supreme Court in its recent decision in Lewis. The only counterargument to this determination would be that the school board members were acting in their official capacities, but that would be tantamount to the school admitting that it was the official position and policy of the school to libel, slander, and otherwise defame Stathis, which only serves to make the conduct of this school even more egregious than originally alleged.

As such, even as the doctrine of tribal immunity exists today, it should not apply to the school, as the school is

- (a) Explicitly liable for its conduct associated with holding itself out as a South Dakota non-profit corporation by reason of SDCL 47-22-73; or in the alternative,
- (b) The school has waived tribal immunity pursuant to waiver by estoppel theory.

The named appellees remain liable for their conduct, as per Lewis they have been made parties to this action in their individual capacities.

EVEN IF TRIBAL IMMUNITY OTHERWISE APPLIES, IT SHOULD BE DEEMED WAIVED BY THE COURT IN THIS CASE IN THE INTEREST OF JUSTICE

It is important to note, that if tribal immunity is allowed to prevent Stathis from pursuing his case in state court, he will effectively be without any available remedy. Marty Indian School has been the subject of suit by other prospective plaintiffs, who rather than attempting to pursue their cases in state court have opted to pursue their cases within the tribal courts. Specifically, in the case of a teacher at Marty Indian School, Helen Gerken attempted to pursue a case against the school for wrongful termination in a scenario not entirely unlike that of Stathis. In that case both the Yankton Sioux Tribal Court and the Northern Plains Intertribal Court of Appeals ruled that Gerken could not proceed in her suit against Marty Indian School on the basis of tribal immunity. Gerken v. Marty Indian School., 2001 NPICA 15 (N. Plains Intertribal Ct. App., May 16, 2003). If Stathis were to attempt to bring his case to the tribal courts, there is little reason to expect his result would be any different than that of Gerken. In view of that harsh reality, the instant appeal here is his last, best, chance to pursue justice and to have his day in court.

It is also worth considering the stated purpose of the tribal immunity doctrine – “to protect the ability of tribes to make their own laws and be ruled by them”. Sage v. Sicangu Oyate Ho, Inc., 473 N.W. 2d 480 (S.D. 1991). Stathis is not attempting to interfere with tribal autonomy; he is not seeking reformation of the contract he entered into with the school; nor is he seeking to make changes to the Policy and Procedures Manual of the School. Stathis is simply seeking to have the terms of the contract he signed, the Policies and Procedures Manual associated with it, and the promises and settlement agreements of the school board to be interpreted, defined if necessary, and followed and enforced to the point that they actually mean something.

If tribal defendants such as Marty Indian School continue to be able to operate with impunity, and without regard to their own contractual obligations or policy manuals, all that does is imperil any non-tribal party that might choose to do business with them. The inevitable result of the affirmation of this strict immunity is the further isolation of tribes and their members from the rest of society. As society becomes more and more interconnected as technology and the states’, the tribes’, the nations’, and indeed, the world’s economies continue to evolve, that is a scenario both tribes and their advocates should seek to avoid.

In order to avoid the above scenario, it is important that when non-tribal parties do business with tribal parties that they able to do so on a level playing field where both parties may be held accountable for their actions if needed. If the Marty Indian School had a claim against Stathis in either contract or tort the courts of the State of South Dakota would be available to the school, and no less should be available to Stathis.

CONCLUSION

Based upon all of the foregoing, Stathis respectfully requests that this Court reverse the decision of the Trial Court's granting of appellees motion to dismiss and remand the entire case to be adjudicated on the merits.

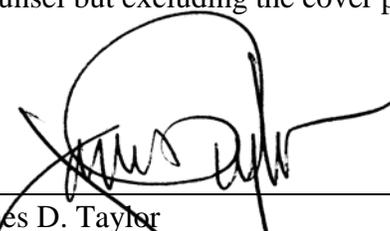
Dated at Mitchell, Davison County, South Dakota, this 28th day of November, 2018.

A handwritten signature in black ink, appearing to read 'James D. Taylor', is written over a horizontal line. The signature is stylized and somewhat cursive.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that he prepared the *Brief of Appellant* herein and pursuant to SDCL 15-26A-66(b)(2) and (4) he certifies it, complies with the statutory type volume limitation as calculated by Microsoft Word 365, exclusive of the Cover Sheet, Table of Contents, Table of Cases, Jurisdictional Statement, Statement of Legal Issues, Signatures and Certificates of Counsel, to wit: five thousand three hundred fifty five (5,355) words consisting of thirty two thousand four hundred forty nine (32,449) characters and spaces, and less than thirty two (32) pages, particularly, twenty six (26) pages, including all indices and certificates of counsel but excluding the cover page and appendices.

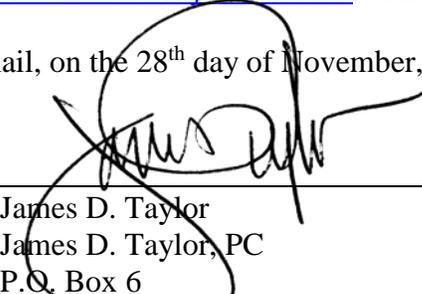


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CERTIFICATE OF SERVICE

The undersigned, James D. Taylor, hereby certifies that he served a true and correct copy of this *Brief of Appellant* on Rebecca L. Kidder, Fredericks Peebles & Morgan LLP, 520 Kansas City St., Suite 101, Rapid City, SD 57701 by emailing a copy to her at rkidder@ndnlaw.com as well as depositing a copy of same in a postage paid envelope and depositing the same at the United States Post Office in Mitchell, South Dakota, on the 28th day of November, 2018.

The undersigned further certifies that in compliance with SDCL 15-26C-1 he has submitted a copy of this brief by email to SCClerkBriefs@ujs.state.sd.us with the number of the case appearing in the subject of the email, on the 28th day of November, 2018.



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APPENDIX

TABLE OF CONTENTS

APPENDIX	PAGE NUMBER
A – Complaint with Original Exhibits	A-1 through A-73
B – Trial Court Findings of Fact, Conclusions of Law, and Order	B-1 through B-8

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF CHARLES MIX)

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

Timothy Stathis,

 Plaintiff,

 vs.

11CIV18-0000XX

COMPLAINT

Marty Indian School, a South Dakota non-profit corporation; Elk Soldier, also known as Gary Drapeau, Sr.; Glenn Drapeau; Galena Drapeau; Sarah W. Zephier; Sarah R. Zephier; Stephanie Cournoyer; Julie Blackmoon-Wright; and John and/or Jane Does One (1) through Five (5),

 Defendants.

Comes now Plaintiff, Timothy Stathis, and for his *Complaint* against Defendants states and alleges as follows:

JURISDICTION, VENUE & PARTIES

1. Plaintiff, Timothy Stathis, is a permanent resident and real property owner of Cooperstown, Griggs County, North Dakota, and is temporarily domiciled at a rental residence located in Wagner, Charles Mix County, South Dakota, for purposes of his employment with Defendant Marty Indian School.
2. Defendant Marty Indian School is a South Dakota non-profit corporation with its principal place of operation in Marty, Charles Mix County, South Dakota.
3. While Defendant Marty Indian School is funded, at least in part, under the provisions of 25 U.S.C. §2504 *et. seq.* relating to Bureau of Indian Education school grants, it holds

itself out as a South Dakota non-profit corporation governed by its own board and directors.

4. Defendant Marty Indian School contracted with Plaintiff as a South Dakota domestic corporation as particularly set forth in Exhibit A [Contract] attached hereto and made a part hereof by this reference.
5. Individual Defendants Elk Soldier, also known as Gary Drapeau, Sr.; Glenn Drapeau; Galena Drapeau; Sarah W. Zephier; Sarah R. Zephier; Stephanie Cournoyer; and Julie Blackmoon-Wright are residents of Charles Mix County, South Dakota.
6. The claims hereunder are made against individual Defendants Elk Soldier, also known as Gary Drapeau, Sr.; Glenn Drapeau; Galena Drapeau; Sarah W. Zephier; Sarah R. Zephier; Stephanie Cournoyer; and Julie Blackmoon-Wright for their grossly negligent, reckless, in some cases intentional, and unconscionable actions as described below; and, in the case of Sarah W. Zephier; Sarah R. Zephier; Stephanie Cournoyer; and Julie Blackmoon-Wright actions taken both as members of the board of directors of Defendant Marty Indian School, a South Dakota non-profit corporation and as individuals, and, in the case of Defendants Elk Soldier, also known as Gary Drapeau, Sr.; Glenn Drapeau; and Galena Drapeau; as individuals.
7. Defendants Doe One (1) through Five (5) are individuals who's identity is currently unknown but participated with all other defendants, both corporate and individual, in the causes of action arising on behalf of Plaintiff; all currently unknown Defendants are believed to be residents of Charles Mix County, South Dakota.

FACTUAL ALLEGATIONS

8. On or about May 8, 2017, Plaintiff entered into an “Administrator or Supervisor’s Contract” with Defendant Marty Indian School, hereafter “School”, as particularly set forth in Exhibit A, hereafter “Contract”, attached hereto and made a part hereof by this reference.
9. The term of employment under the Contract was from August 1, 2017, through June 30, 2018.
10. Plaintiff was required to maintain proper certification through the South Dakota Department of Education as a condition of employment under the Contract; at all times Plaintiff did maintain such certificate.
11. The By-laws and the Policies and Procedures Manual of School, hereafter “Procedures”, were an integral part of the Contract and applicable to both Plaintiff and School; a true copy of the Procedures is attached hereto as Exhibit B.
12. While the Contract states that the laws of the State of South Dakota are not binding on School, the Contract also states the Procedures are binding on School and any matter not controlled by the Procedures will be controlled by the laws of the State of South Dakota.
13. Among Plaintiff’s duties as an administrator of School was the administration of a certain School Improvement Grant from the Bureau of Indian Education.
14. Plaintiff understood that a specific expectation of his hiring was the appropriate administration of the School Improvement Grant in order to incentivize improvement in performance by both students and faculty and reward exemplary teaching with financial bonuses.

15. Because the purpose of the School Improvement Grant, and one of the expectations of Plaintiff's employment, was to improve the overall performance of School's teachers and reward exemplary improvement with financial bonuses, Plaintiff developed objective criteria for awarding financial bonuses.
16. Throughout the school year 2016-2017, Plaintiff being employed by School under a similar contract for school year 2016-2017, certain disputes and disagreements arose between Plaintiff and the specifically named individual Defendants regarding distribution of such grant funds.
17. The disputes and differences between Plaintiff and the specifically named individual Defendants and other staff were ongoing through the summer of 2017 and into the fall semester of school year 2017-2018.
18. On or about November 15, 2017, Defendant Elk Soldier, led certain students to the School library and invited other students to gather in the library for a "sit in" or other demonstration in order to publicly air complaints about Plaintiff.
19. Plaintiff was, and remains, aware of Defendant Elk Soldier's lack of compliance with professional teaching expectations as a member of Defendant Marty Indian School's Dakota Language Department; Plaintiff expressed such concerns to Defendant Ellksoldier on several occasions; Plaintiff expressed similar concerns to Defendant Galena Drapeau regarding her lack of compliance with professional teaching expectations as a member of Defendant Marty Indian School's "Dakota Language Department; Plaintiff is also aware of Defendant Galena Drapeau's role in obtaining incentive pay for herself and instigating attempts at obtaining it for others under the

aforesaid School Improvement Grant; Plaintiff objected to such claims and deemed them potentially fraudulent in his administrative role with Defendant Marty Indian School.

20. After Defendant Elk Soldier led the students to the library in orchestrated protest against the person and authority of Plaintiff, text messages were sent out to the public resulting in the arrival at the school campus of Defendants Julia Blackmoon-Wright, Sarah W. Zephier, and Sarah R. Zephier, Stephanie Cournoyer, and other members of the School's board of directors; of those arriving first was Julia Blackmoon-Wright who immediately took a seat in front of the students gathered in the Library and stated: "I am a School Board member, I am here to listen to what you want to say."; thereafter Defendant Sarah W. Zephier, as President of the board of directors of School, assumed control of the gathering.
21. Defendant Sarah W. Zephier asked for any students or staff members who had a complaint about Plaintiff to speak up and let everyone know the particulars; an open, public forum among students, all members of the board of directors of School, and members of the public, including Defendants John and/or Jane Does One (1) through Five (5), continued for nearly two (2) hours.
22. Following the public gathering an "Emergency Executive Session" of School's board of directors was announced over School's public address system; Defendants Sarah W. Zephier, Sarah R. Zephier; Stephanie Cournoyer, Cournoyer, Blackmoon-Wright, and other members of the School's board of directors, who are not named as parties Defendant to this action, remained in the Library; sometime after the meeting was convened Plaintiff was invited into the closed session and members of the School's board of directors posed questions to Plaintiff, to which he respectfully responded;

Plaintiff was excused from the closed session and the meeting continued as an executive session.

23. At about 9:00 p.m. on November 15, 2017, Plaintiff found an email on his home computer from School's superintendent; such email consisted of a forwarded message from Defendant Sarah W. Zephier advising that Plaintiff was suspended from employment for ten (10) working days commencing on November 16, 2017.
24. On November 16, 2017, Plaintiff contacted the superintendent regarding his pay during the suspension; the superintendent initially advised the suspension was with pay as there was nothing on the subject in the email from Defendant Sarah W. Zephier.
25. Also on November 16, 2017, a memorandum was circulated from Defendant Sarah W. Zephier stating Plaintiff's suspension was unpaid, a true copy of such memorandum being attached hereto as Exhibit C.
26. *Policy and Procedure* 3-311 makes it clear in its final section that the authority for suspension rests with the school superintendent and not with the School's board of directors.
27. *Policy and Procedure* 3-312 (B) provides suspension is only to be exercised by the School's superintendent.
28. *Policy and Procedure* Section 3-312 (B) (1) provides that suspension with or without pay is discretionary with the School's superintendent and in order to impose any suspension there must be a statement specifying cause.
29. No action against Plaintiff was undertaken by the superintendent; the superintendent gave no notice of suspension, took no action suspending Plaintiff, and made no

determination if such suspension was with or without pay; all actions were unilaterally undertaken by School's board of directors.

30. On or about November 16, 2017, Defendant Sarah W. Zephier sent a public letter to students, parents, staff, and faculty acknowledging the events of November 15, 2017, including the public forum conducted that day and thanking all involved for their public comments., a true copy of that letter being attached hereto as Exhibit D.
31. On or about November 16, 2017, Defendants Elk Soldier, Galena Drapeau, and Glenn Drapeau, purportedly on behalf of the School's Dakota Language Department, organized and held a public gathering for students and the general public in the School gymnasium as a "Victory Dance" celebrating the actions of the previous day, the ouster of Plaintiff, and continuing false, unwarranted, and defamatory comments about Plaintiff's personal and professional reputation.
32. Neither School, nor any of its then acting administrators nor its board of directors took any action to cancel, control, or otherwise stop the aforesaid "Victory Dance" or any of the false, unwarranted, and defamatory comments therein regarding Plaintiff's personal and professional reputation.
33. Plaintiff timely filed with School his written grievance to the suspension from employment, the suspension without pay, and the entirety of the events occurring on November 15 and November 16, 2017, a true copy of Plaintiff's grievance being attached hereto as Exhibit E.
34. Following receipt of Plaintiff's grievance and discussions between School and counsel for Plaintiff and School's then legal counsel, Defendants Sarah W. Zephier, Sarah R. Zephier; Cournoyer, and Blackmoon-Wright, individually and as part of School's board

of directors, met on November 29, 2017; later that day then legal counsel for School reported to Plaintiff's legal counsel that Plaintiff was reinstated and Plaintiff's withheld pay was to be paid.

35. The action of School's board of directors on November 29, 2017, reinstating Plaintiff is a tacit admission that any accusations of wrongdoing or improper conduct alleged against Plaintiff were unfounded and Plaintiff's suspension was wrongful and improper.
36. Plaintiff returned to work the morning of November 30, 2017.
37. In the late morning of December 1, 2017, Defendant Elk Soldier called the Tribal Police Department claiming there was a physical fight on campus between a non-native staff member and a native staff member in the school office; police came first to the school office and asked Plaintiff, as the School Principal, what he knew about the reported fight; Plaintiff truthfully stated that he knew nothing about it and there was, to his knowledge, no such fight; Plaintiff was informed by the police that the call came from Defendant Elk Soldier; officers spoke with Defendant Elk Soldier and thereafter informed Plaintiff that Defendant Elk Soldier *thought* there was a fight between Plaintiff and another staff member.
38. Later on December 1, 2017, Defendants Elk Soldier and Galena Drapeau submitted letters of resignation to the School Superintendent; still later on December 1, 2017, the School's board of directors was convened by Defendant Sarah W. Zephier to consider termination of Plaintiff.
39. At approximately 12:30 p.m. on December 1, 2017, School's board of directors met again; Plaintiff was not asked to participate though he was continuously available having returned to work at School.

40. After the School's board of director's meeting concluded, he was informed by the School's superintendent that his contract was terminated and would be paid out in full; Plaintiff was directed to deal with the superintendent regarding his payout and the conclusion of the matter.
41. The superintendent was absent for a few days due to illness and other matters so Plaintiff contacted School's payroll clerk and was told he could not be paid until the minutes of the School's board of directors meeting December 1, 2017, were prepared and received.
42. Unexecuted minutes of the School's board of directors meeting of December 1, 2017, are attached hereto as Exhibit F.
43. On December 12, 2017, Plaintiff was advised his previously withheld and unpaid salary and benefits were available and that the balance of his annual contract, less appropriate tax and other withholdings, was available; he was advised to turn in his School laptop computer and keys and he would be paid.
44. On December 12, 2017, Plaintiff arrived at the School, delivered his keys, delivered his laptop computer, all to the superintendent, and was given a check purporting to be the amount owed Plaintiff for his full contract through its conclusion in 2018, less appropriate taxes and other withholdings; Plaintiff had questions about the total balance of the check and he and the superintendent went to the office of the payroll clerk; upon arriving in the office of the payroll clerk she was on the phone; the payroll clerk handed the phone to the superintendent; the superintendent then informed Plaintiff to surrender the check or a stop payment order would be entered at the payor bank.

45. Shortly after the superintendent advised the check needed to be surrendered, and while seated in discussion with the superintendent, a Tribal Police Officer arrived and stated he had been directed to escort Plaintiff off the School grounds.
46. Despite repeated demands for payment of the balance of the Contract Defendant Marty Indian School has refused to so do.
47. The School's board of directors met on December 20, 2017, with a quorum of Defendants Sarah W. Zephier, Sarah R. Zephier, Stephanie Cournoyer, and Julia Blackmoon-Wright; the School's superintendent was also present.
48. At the meeting on December 20, 2017, action was taken to pay Plaintiff One Thousand Five Hundred Dollars (\$1,500.00) as complete settlement of the balance of Plaintiff's contract and to pay Plaintiff payment for the two (2) weeks salary wrongly withheld during Plaintiff's suspension from November 16 through November 29, 2017.
49. On January 12, 2018, Plaintiff was tendered a check in the sum of One Thousand Five Hundred Dollars (\$1,500.00) as full and complete, final, payment representing an alleged liquidated damages provision under his contract; Plaintiff was also tendered a check in the amount of Two Thousand Nine Hundred Sixteen Dollars (\$2,916.00) representing wrongfully withheld pay from November 16 through November 29, 2017.
50. Plaintiff rejected tender of the One Thousand Five Hundred Dollar (\$1,500.00) payment and stands ready, willing, and able to return the unnegotiated check as soon as direction for the delivery of the same is provided.
51. The alleged liquidated damage provision of the Contract only relates to termination of the Contract by Plaintiff in order to move to a different school; and notwithstanding the

terms of the Contract, School's board of directors agreed to pay Plaintiff the remainder of the sums due under the Contract.

52. In response to School's and individual Defendants' actions terminating Plaintiff's employment; and in response to School's and individual Defendants' refusal to honor School's agreement to pay out the remainder of Plaintiff's Contract; Plaintiff filed a second, separate grievance relating thereto, a true copy of which is attached hereto as Exhibit G.
53. Neither School nor the individual Defendants comprising School's board of directors have taken any action relating to either of Plaintiff's grievances.
54. School's and the individual Defendants' actions described herein are in complete derogation of School's Procedures.
55. Following the refusal of School to deliver payment of the balance of Plaintiff's Contract, and its continuing refusal to allow Plaintiff to perform the duties required of him under the Contract, which he stands ready, willing, and able to do, Plaintiff has suffered economic damage and financial loss.
56. As a direct result of all Defendants' actions Plaintiff has suffered economic loss under the terms of the breached and wrongfully terminated Contract of no less than the amount remaining under Plaintiff's Contract as attached hereto as Exhibit A.
57. As a result of School's termination of his Contract without cause or reason, Plaintiff's professional reputation as a school administrator has been grievously and permanently damaged.

58. Plaintiff has attempted to obtain other employment over the course of the last three(3) months and has been unable to secure even an interested response from school's in need of administrators, much less an opportunity for an interview or an offer of employment.
59. It is questionable if Plaintiff's professional reputation as an education administrator can be rehabilitated.
60. Plaintiff has a remaining, professional working life of approximately ten (10) years, Plaintiff being fifty-seven (57) years of age, and as a result of the damage to his professional reputation and inability to obtain employment as an educational administrator, will suffer economic losses over the remainder of his working career of no less than Seven Hundred Thousand Dollars (\$700,000.00).
61. School's termination of Plaintiff's Contract was done without cause, recklessly, and complete disregard of the terms of the Contract and applicable law.
62. The actions of Defendant Elk Soldier in leading the aforesaid student walk-out were intentional and calculated to injure Plaintiff's personal and professional reputation and did so injure Plaintiff and cause Plaintiff economic loss.
63. The actions of Defendants Elk Soldier and Galena Drapeau on December 1, 2017, in submitting a resignation from school and demeaning and defaming Plaintiff, and subsequently withdrawing their resignations following termination of Plaintiff, were intentional and calculated to injure Plaintiff's personal and professional reputation and resulted in economic loss to Plaintiff.
64. The actions, statements, and defamatory comments of Defendants John and/or Jane Does One (1) through Five (5) were careless and negligent and injured Plaintiff's personal and professional reputation and resulted in economic loss to Plaintiff.

65. The actions of Defendant Sarah W. Zephier as president of the School's board of directors were careless, reckless, and grossly negligent and not undertaken in good faith; such actions were outside of her responsibility as a member of School's board of directors and injured Plaintiff's personal and professional reputation and resulted in economic loss to Plaintiff.
66. The actions of Defendants Sarah W. Zephier; Sarah R. Zephier; Stephanie Cournoyer; and Julie Blackmoon-Wright, both as members of the School's board of directors and as individuals were careless, reckless, and grossly negligent and not undertaken in good faith.
67. The actions of Defendants Sarah W. Zephier; Sarah R. Zephier; Stephanie Cournoyer; and Julie Blackmoon-Wright, both as members of the School's board of directors and as individuals were intentional and under taken specifically to injure Plaintiff's personal and professional reputation and resulted in economic loss to Plaintiff.

COUNT ONE: BREACH OF WRITTEN CONTRACT

68. School wrongfully and without cause breached its employment contract with Plaintiff by first suspending him without just cause, without pay, and in complete derogation of its own Procedures and thereafter by terminating him and tendering a sum significantly less than Plaintiff's expected earning under the specific, applicable terms of the employment agreement.

COUNT TWO: BREACH OF SETTLEMENT CONTRACT

69. School, through its legal counsel and agent, offered Plaintiff the balance of all sums due under Plaintiff's Contract in return for Plaintiff leaving School's employment.
70. Plaintiff, through his legal counsel and agent, accepted such offer.

71. Plaintiff, individually, in consultation with School's superintendent, accepted such offer.

72. Offer and acceptance having been completed, a binding contract for payment of the balance of all sums due under Plaintiff's Contract was completed.

73. School failed and refused, and fails and refuses, to pay the balance of all sums due under Plaintiff's Contract.

COUNT THREE: WRONGFUL TERMINATION

74. Plaintiff restates and realleges paragraphs 1 through 73, above, as though set forth herein at length.

75. School, without cause, wrongfully, and without following its own, required, Procedures terminated Plaintiff's employment.

76. As a direct and proximate result of School's actions in wrongfully terminating Plaintiff, Plaintiff has suffered both economic losses and damages to his professional reputation.

COUNT FOUR: DEFAMATION OF CHARACTER/SLANDER

77. Plaintiff restates and realleges paragraphs 1 through 76, above, as though set forth herein at length.

78. Defendant Elk Soldier, in leading the student walk-out and inviting public complaint about Plaintiff, and participating in such public complaint about Plaintiff, defamed and slandered Plaintiff.

79. Defendants, including Defendants John and Jane Doe One (1) through Five (5), made the following defamatory, slanderous, and false statements regarding Plaintiff:

- a. That due to Plaintiff's actions or inactions students were not progressing to graduation;
- b. That Plaintiff arbitrarily changed students grades to suit his needs;

- c. The foregoing statements are patently false and defamatory as
 - i. Plaintiff was hired to, and maintained at all times, a first priority of progressing students to graduation and continuously improving School's graduation rate; and
 - ii. School's data management system only allowed the student data coordinator to adjust grade entries and such adjustments, if any were made by the student data coordinator, had to be approved by individual instructors;
- d. Other patently false and defamatory statements were made defaming and demeaning Plaintiff's personal and professional character when Defendant Sarah W. Zephier read out her notes taken during the November 15, 2017, library sit-in.

80. Defendants Elk Soldier, Glenn Drapeau, and Galena Drapeau in organizing and conducting the aforesaid "Victory Dance" was an intentional action designed to defame and slander Plaintiff, demean his personal and professional reputation, and cause him economic damage and loss.

81. Defendants Sarah W. Zephier, Sarah R. Zephier; Stephanie Cournoyer, and Blackmoon-Wright, in meeting with the students and public in the School library for some two (2) hours during the student walk-out and participating in public complaint about Plaintiff, defamed and slandered Plaintiff in the same manner as specified above.

82. All individual, including Defendants John and/or Jane Doe One (1) through Five (5), participated in both the aforesaid "walk out", and public commentary thereat, and, both directly and indirectly, in the aforesaid "Victory Dance", and public commentary thereat; and made false, slanderous, and defamatory statements regarding Plaintiff's personal and

professional reputation and false, slanderous, and defamatory statements regarding Plaintiff's actions as an employee of School.

COUNT FIVE: DEFAMATION OF CHARACTER/LIBEL

83. Plaintiff restates and realleges paragraphs 1 through 82, above, as though set forth herein at length.

84. Defendant Sarah W. Zephier, in circulating the aforesaid public letter regarding the student walk-out and thanking the public for comments, and soliciting further comments, regarding Plaintiff libeled Plaintiff by offering defamatory, libelous, and false statements regarding Plaintiff's character, performance as an educational administrator.

COUNT SIX: PUNITIVE DAMAGES

85. Plaintiff restates and realleges paragraphs 1 through 84, above, as though set forth herein at length.

86. The actions of all Defendants were done in reckless disregard of the truth, were negligent, careless, and in the case of School and Defendants Sarah W. Zephier, Sarah R. Zephier; Stephanie Cournoyer, Blackmoon-Wright, acting as the School's board of directors, done in complete derogation of School's Procedures.

87. The actions of all Defendants described immediately above shock the conscience and example must be made of Defendants to punish their reckless and unwarranted actions and to deter them from repeating the offense and others from committing it.

88. Plaintiff is entitled to an award of punitive damages apportioned among all Defendants, jointly and severally.

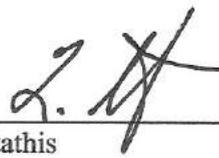
WHEREFORE, Plaintiff requests the following:

- A. Under COUNT ONE just compensation for School's breach of Plaintiff's employment contract in an amount no less than the balance remaining due and unpaid thereunder through June 30, 2018, including all salary and benefits including, but not limited to, accrued and unpaid vacation, sick leave, 403(b) plan contributions, and all other elements of Plaintiff's salary and benefit package; or
- B. Under COUNT TWO just compensation for School's breach of Plaintiff's separate contract with School to terminate his employment for payment of an amount no less than the sums unpaid during his period of wrongful suspension plus an amount no less than the balance remaining due and unpaid under Plaintiff's employment contract through June 30, 2018; , including all salary and benefits including, but not limited to, accrued and unpaid vacation, sick leave, 403(b) plan contributions, and all other elements of Plaintiff's salary and benefit package; or
- C. Under COUNT THREE an amount no less than the balance remaining due and unpaid under Plaintiff's Contract with School through June 30, 2018; and

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- D. Under COUNT FOUR an amount no less than Seven Hundred Thousand Dollars (\$700,000.00), or such other amount as the evidence adduced at trial supports, representing Plaintiff's damages to his personal and professional reputation resulting from Defendants Elk Soldier's, Galena Drapeau's, and Glenn Drapeau's actions and the separate actions of Defendants' Sarah W. Zephier, Sarah R. Zephier; Stephanie Cournoyer, Cournoyer, Blackmoon-Wright, actions, such damages resulting from the named parties slanderous statements and actions, all to be apportioned between the individual Defendants as their individual culpability may appear; and
- E. Under COUNT FIVE, as against Defendant Sarah W. Zephier, an amount no less than Seven Hundred Thousand Dollars (\$700,000.00), or such other amount as the evidence adduced at trial supports, representing Plaintiff's damages to his personal and professional reputation resulting from this Defendant's libel; and
- F. Under COUNT SIX, as against all Defendants jointly and severally, punitive damages in an amount at least equal to, no less than, and in such additional amount as the finder of fact may warranted, as and for punitive damages calculated to deter all Defendants from repeating the offenses set forth herein and to deter others from committing the same; and
- G. Prejudgment interest, costs, and attorney fees as allowed by law; and
- H. Such other and further relief as the Court deems just.

Dated this 26th day of March, 2018.



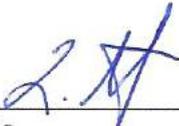
Timothy Stathis
Plaintiff

VERIFICATION

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF CHARLES MIX)

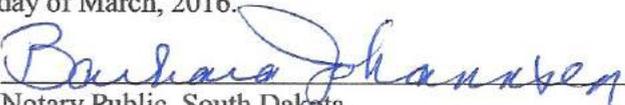
Timothy Stathis, being first duly sworn upon his oath, deposes and says that he is the Plaintiff in the above and foregoing Complaint, that he has read the above and foregoing Complaint and knows the contents thereof and that the same is true of his knowledge and belief.

Dated this 26th day of March, 2017.

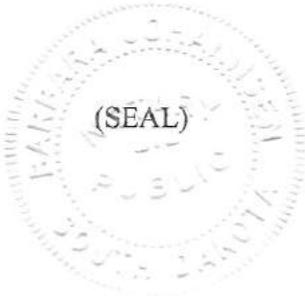


Timothy Stathis

Subscribed and sworn to before me this 26th day of March, 2016.

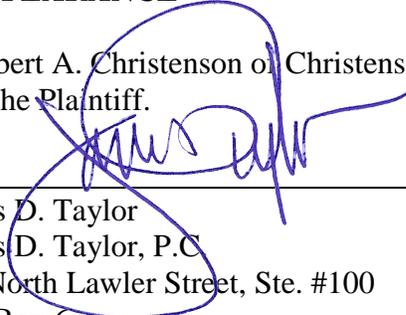


Notary Public, South Dakota
My Commission Expires: 5/23/22



NOTICE OF APPEARANCE

James D. Taylor of James D. Taylor, P.C., and Robert A. Christenson of Christenson Law, Prof. L.L.C., hereby note their appearance on behalf of the Plaintiff.



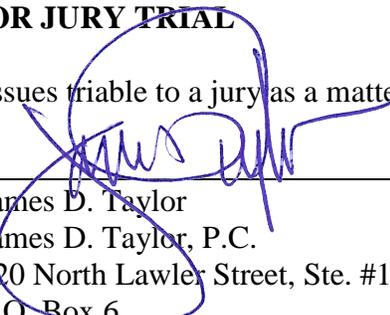
James D. Taylor
James D. Taylor, P.C.
520 North Lawler Street, Ste. #100
P.O. Box 6
Mitchell, SD 57301
(605) 996-3882
taylor@tmlawsd.com

/s/ Robert A. Christenson

Robert A. Christenson
Christenson Law, Prof. L.L.C.
400 North Main Avenue, Ste. #206
Sioux Falls, SD 57104
(605) 332-1200
Rac.clolaw@midconetwork.com

DEMAND FOR JURY TRIAL

Plaintiff herewith demands a jury trial for all issues triable to a jury as a matter of right.



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MARTY INDIAN SCHOOL BOARD, INC.
ADMINISTRATOR OR SUPERVISOR'S CONTRACT

Marty Indian School Board, Inc.

With

Timothy Stathis

THIS AGREEMENT made and entered this 6th day of April 2017 by and between Marty Indian School Board, Inc., a non-profit South Dakota corporation, hereinafter referred to as "School Board", and Timothy Stathis, here in after referred to as "Administrator or Supervisor".

CONSIDERATION. For and in consideration of the sum of \$70,000.00 to be paid in weekly pay periods, less such lawful withholding as are required by law, beginning on the 1st day of August 2017 and ending on the 30th day of June 2018 and payable at the expiration of each weekly period thereafter during the term of this contract or during the period of one year as the parties may agree.

DEDUCTIONS. Any meal service, rent, key or security deposits and other charges shall be deducted from weekly compensation installments as are arranged with, or at the discretion of, the Accountant of the School Board. All deductions required by law shall be deducted from the weekly compensation installments.

ADMINISTRATOR OR SUPERVISORS CERTIFICATION. Except for non-education personnel, Administrator or Supervisor hereby certifies that he is the lawful holder of South Dakota Teacher's Certificate No. 78073-1 for the grades and subjects to be taught, and that such South Dakota Teacher's Certificate is or will be valid for the school year to be taught by Administrator or Supervisor. Administrator or Supervisor further certifies that Administrator or Supervisor is not under contract with another School Board of Education covering a part of all of the same time of performance as is covered by this Agreement.

EMPLOYMENT TERM. Administrator or Supervisor agrees to teach in the Marty Indian School operated by the School Board for the full period of the school term beginning on or about the 1st day of August 2017 and ending 30th day of June 2018 as decided by the School Board, with such vacation intervals as shall be determined upon and directed by the School Board. This Agreement shall continue in full force and effect for the term set forth herein, unless annulled by mutual consent, operation of law, or by the expiration or revocation of Teacher's Certificate. To resign in good standing, Administrator or Supervisor must give School Board thirty (30) days written notice prior to the termination date unless waived in writing by the School Board.

EMPLOYMENT. Administrator or Supervisor hereby agrees to be governed by the policies of the School Board and that the employment duties to be performed by Administrator or Supervisor under this Agreement shall be subject to assignment by the Superintendent of Education of the School Board or the School Board; and Administrator or Supervisor further agrees to devote full time, during days of school, to Administrator or Supervisor's position in all respects, and to diligently and faithfully perform Administrator or Supervisor's assigned duties to the best of Administrator or Supervisor's assigned duties to the best of Administrator or Supervisor's professional ability.

EXTRA DUTIES. Administrator or Supervisor agrees to accept such assigned extra duty assignments by the School Board which shall be upon the terms and conditions as set forth in the By-laws and the Policies and Procedures Manual of the School Board, or as may be agreed by Administrator or Supervisor and the School Board.

DISCIPLINE. In the event that Administrator or Supervisor violates any of provisions set forth in the Policies and Procedures Manual, Administrator or Supervisor may be disciplined in the manner prescribed in the Policy and Procedures Manual.

COMPENSATION FOR CONTRACT TERMINATION. In the event that the instant Agreement is terminated for any cause or reason, the compensation paid or to paid hereunder shall be a pro rata amount of the entire compensation provided for in this Agreement that the time employed bears to the employment term. Any unearned fractional portion of an installment paid but not earned prior to the termination of the contract shall be refunded by Administrator or Supervisor.

WITHHOLDING LAST INSTALLMENT PAYMENT. The School Board shall withhold the last weekly salary installment due Administrator or Supervisor until Administrator or Supervisor's final report is filed and approved as required; and in the event that this Agreement be annulled for any reason, all money then earned by Administrator or Supervisor shall be paid when all reports due at the time of annulment shall be properly made, filed and approved.

LEAVE DAYS. Sick Leave and Annual Leave shall be accordance with the Policies and Procedures Manual of the School Board.

SCHOOL LAW. The School Board is an entity of the Yankton Sioux Tribe, and is not bound by the laws of the State of South Dakota. The By-laws and Policies and Procedures Manual of the School Board shall be binding and controlling on the parties and shall control the conduct of the operation of the school. Any matter by controlled by the By-laws and Policies and Procedures will be controlled by the laws of the State of South Dakota. If any ambiguity or question as to whether the laws of the State of South Dakota or the By-laws and Policies and Procedures Manual of the School Board is controlling shall arise, the By-law and Policies and Procedures of the School Board shall be binding and controlling. The exceptions to South Dakota School Law includes, but is not limited to, the following matters, to wit:

Administrator or Supervisor Retirement, School Calendar, Continuing Contract and Tenure, and Conflict of Interest. Nothing herein shall be construed to constitute and acceptance by the School Board of the jurisdiction of South Dakota courts.

CONTRACT CONTINGENT UPON FEDERAL FUNDING. This contract is contingent upon Federal Funding and renewal of the School contract by the Yankton Sioux Tribe.

LAST WORK DAY. The last day of work by Administrator or Supervisor shall be the 30th day of June 2018 unless changed to a different date by the School Board.

OTHER MATTERS. Timothy Stathis shall assume the responsibility of High School School Principal and provide all other services as required for an effective and successful year.

IN WITNESS WHEREOF, the School Board an Administrator or Supervisor have caused this Agreement to be executed on the day and year first above written.

Marty Indian School Board Inc.

By: _____

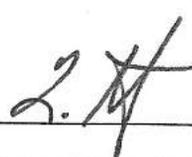
Its President

Date

 5/11/17

Administrator/Supervisor

Date

 5/8/17

To be accepted, this Agreement must be filed with the Superintendent of Education on or before the 10th day of May 2017.

Admincon 05/98

BUY OUT CLAUSE:

\$500.00 thru June 2017

\$1,000.00 thru July 2017

\$1,500.00 from August 2017 thru school year.

POLICIES AND PROCEDURES

Manual

Robert Cournoyer, President,
Yankton Sioux Tribe

Mike Elsberry, Superintendent

Approved by:
Business & Claims Committee

Karen Archambeau, Vice-President
Yankton Sioux Tribe

Date:

**MARTY INDIAN SCHOOL
POLICIES OF PROCEDURES MANUAL**

INTRODUCTION:

Marty Indian School is a tax-exempt, nonprofit governmental corporation formed to benefit Indians in and around the Yankton Sioux Reservation through educational and charitable means. The corporation is intended as a vehicle by which tribal members may receive educational and technical assistance. Because tribal members are Marty Indian School's primary beneficiaries, the responsibilities of the Marty Indian School Board and staff extend beyond normal responsibilities. Marty Indian School has accepted its obligation to foster and promote Indian preference in hiring, particularly in management positions. The Board and staff shall keep paramount the cultural and traditional value system of the Dakota and incorporate the same into all aspects of the School. Being cognizant that Marty Indian School's future depends on sound and fair business practices, the Board and staff has established and incorporated standard, acceptable business practices into the School's fiscal management policies and procedures. The Board and staff are fully cognizant that sound personnel policies and procedures are essential to the realization of Marty Indian School's mission and reaffirmation of its philosophy.

SCHOOL PHILOSOPHY:

Marty Indian School is a tribally-controlled school, administered and managed by tribal members, which exists primarily to benefit and serve the students and local communities through a comprehensive, quality education provided in a drug and alcohol free environment.

MISSION STATEMENT:

The mission of Marty Indian School, in partnership with the Yankton Sioux Tribe and its communities, is to offer a safe, supportive environment; to provide intellectual, social and cultural values needed to prepare our students for a multi-cultural Circle of Life; and to instill self-discipline and respect for self and others.

GOALS AND OBJECTIVES OF MARTY INDIAN SCHOOL

Marty Indian School has adopted a holistic approach to education by focusing proportionate amounts of time and attention on the intellectual, spiritual, psychological, social and physiological development of its students and staff. Through this approach, Marty will achieve its ultimate goal to produce and well-educated, well-rounded, self-confident, physically fit student possessed of the skills necessary to function in both the present and the future, while drawing on the past for reaffirmation of being and support. Marty will integrate the educational process into the surrounding communities of the Reservation. Marty will maintain an accredited K-12, alcohol and drug free school.

COMPLIANCE WITH TRIBAL LAW

All individuals who are directly or indirectly responsible for providing educational opportunities and related services at MIS shall strictly adhere to and comply with the Yankton Sioux Tribe Law and Order Code, Title XV, Education and School Code.

CHAPTER 1 – ETHICS, RESPONSIBILITIES, RIGHTS

SECTION 1 – 101. MARTY INDIAN SCHOOL CODE OF ETHICS

Ethical behavior on all levels of administration and management of Marty Indian School is key to achievement of Marty's goal and objectives. Accordingly, school board members, school administrators, teachers, staff, and students shall be held to individual ethical standards.

(A) Marty Indian School Board

PREAMBLE

This Code is intended to serve as a guide to the everyday conduct of members of the Marty Indian School (MIS) Board of Education, and as a basis for adjudication of issues in ethics when the conduct of school board members is alleged to deviate from the standards expressed or implied in this Code. The Code represents standards of ethical behavior for public officials in professional relationships with MIS students, colleagues, employees, other individuals and professions, and the tribal community and society as a whole. The Code also embodies standards of ethical behavior governing individual conduct to the extent that such conduct is associated with an individual's status and identify as a school board member.

This Code is based on the traditional Dakota values that include honesty, wisdom, generosity, and respect for the worth, dignity, and uniqueness of all persons as well as their rights and opportunities. The Code is also based on the nature of public service, which fosters conditions that promote these values.

In subscribing to and abiding by this Code, the MIS school board member is expected to view ethical responsibility in as inclusive a context as each situation demands and within which ethical judgment is required. The school board member is expected to take into consideration all the principles in this Code that have a bearing upon any situation in which ethical judgment is to be exercised and official involvement or conduct is planned. The course of action that the school board member chooses is expected to be consistent with the spirit as well as the letter of this Code.

In itself, this Code does not represent a set of rules that will prescribe all the behaviors of school board members in all the complexities of public life. Rather, it offers general principles to guide conduct, and the judicious appraisal of conduct, in situations that have ethical implications. The Code provides the basis for making judgments

about ethical actions before and after they occur. Frequently, the particular situation determines the ethical principles that apply and the manner of their application. In such cases, not only the particular ethical principles are taken into immediate consideration, but also the entire Code and its spirit. Specific applications of ethical principles must be judged within the context in which they are being considered. Ethical behavior in a given situation must satisfy not only the judgment of the individual school board member, but also the judgment of an unbiased jury of peers.

This Code should not be used as an instrument to deprive any school board member of the opportunity or freedom to perform public duties and obligations with complete professional integrity; nor should any disciplinary action be taken on the basis of this Code without maximum provision for safeguarding the rights of the school board member affected.

The ethical behavior of school board members results not from edict, but from a personal commitment of the individual. This Code is offered to affirm the will and zeal of all school board members to be ethical and to act ethically in all that they do as school board members.

The following codified ethical principles should guide school board members in the various roles and relationships and at the various levels of responsibility in which they function professionally and publicly. These principles also serve as a basis for the adjudication of issues in ethics.

In subscribing to this Code, school board members are required to cooperate in its implementation and abide by any disciplinary rulings based on it. They should also take adequate measures to discourage, prevent, expose, and correct the unethical conduct of colleagues. Finally, school board members should be equally ready to defend and assist colleagues unjustly charged with unethical conduct.

SUMMARY OF MAJOR PRINCIPLES

1. The School Board Member's Conduct and Comportment

- **Propriety.** The school board member should maintain high standards of personal conduct in the capacity or identity as a school board member.

- **Competence and Professional Development.** The school board member should strive to become and remain proficient in the performance of professional and public services and functions.
- **Service.** The school board member should regard as primary the public trust obligation of the school board member.
- **Integrity.** The school board member should act in accordance with the highest standards of public service and professional integrity.

2. The School Board Member's Ethical Responsibility

- **Primacy of Marty Indian School interests.** The school board member's primary responsibility is to Marty Indian School.
- **Rights and Prerogatives of Marty Indian School Students, Administrators, Educators, and Staff.** The school board member should make every effort to foster maximum involvement of MIS students, administrators, educators, and staff in school issues and concerns.
- **Confidentiality and Privacy.** The school board member should respect the privacy of the students, administrators, educators, and staff, and hold in confidence all information obtained about individuals unless the individuals from whom the information was obtained give express permission that said information may be made public through the tribal government process.

3. The School Board Member's Ethical Responsibility to Colleagues

- **Respect, Fairness, and Courtesy.** The school board member should treat colleagues with respect, courtesy, fairness, and good faith.
- **Dealing with Colleagues Constituents.** The school board member has the responsibility to interact and relate to the constituents of colleagues with full respect, courtesy, fairness, and good faith.

4. The School board member's Ethical Responsibility to MIS Employees

- **Respect, Fairness and Courtesy.** The school board member should treat all MIS employees with respect, courtesy, fairness, and good faith.

5. The School Board Member's Ethical Responsibility to Society

- **Promoting the General Welfare.** The school board member should promote the general welfare of society.

CODE OF ETHICS

The School Board Member's Conduct and Comportment

- A. Propriety.** The school board member should maintain high standards of personal conduct in the capacity or identity as a school board member.
1. The private conduct of the school board member is a personal matter to the same degree as is any other person's, except when such conduct compromises the fulfillment of official duties and responsibilities.
 2. The school board member should not participate in, condone, or be associated with dishonesty, fraud, deceit, or misrepresentation.
 3. The school board member should distinguish clearly between statements and actions made as a private individual and as an official of tribal government.
- B. Competence and Professional Development.** The school board member should strive to become and remain proficient in all aspects of official responsibility and the performance of official functions.
1. The school board member should accept responsibility for issues involving the public trust only on the basis of existing competence or the intention to acquire the necessary competence.
 2. The school board member should not misrepresent individual qualifications, education, experience, or affiliations.

- C. Service.** The school board member should regard as primary the public trust obligation to Marty Indian School.
1. The school board member should retain ultimate responsibility for the quality and extent of the public service the individual assumes, assigns, or performs.
 2. The school board member should act to prevent practices that are inhumane or discriminatory against any person or group of persons.

- D. Integrity.** The school board member should act in accordance with the highest standards of public and professional integrity.
1. The school board member should be alert to and resist the influences and pressures that interfere with the exercise of public discretion and impartial judgment required for the performance of public functions.
 2. The school board member should not exploit their office for personal gain.

The School Board Member's Ethical Responsibility to Marty Indian School

- A. Primacy of Marty Indian School Interests.** The school board member's primary responsibility is to Marty Indian School.
1. The school board members should serve Marty Indian School with commitment, loyalty, determination, and the maximum application of professional skill and competence.
 2. The school board member should not exploit relationships with MIS students, administrators, educators, and staff for personal advantage.
 3. The school board member should not practice, condone, facilitate, or collaborate with any form of discrimination on the basis of race, color, sex, sexual orientation, age, religion, national origin, marital status, political belief, mental or physical handicap, or any other preference or personal characteristic, condition or status, unless otherwise permitted by tribal or federal law.
 4. The school board member should avoid relationships or commitments that conflict with the interests of MIS.

5. The school board member should seek the advice and counsel of colleagues and others with knowledge of school issues and concerns whenever such consultation is in the best interests of MIS.

B. Rights and Prerogatives of Marty Indian School Students, Administrators, Educators, and Staff. The school board member should make every effort to foster maximum participation of MIS students, administrators, educators, and staff in school issues and concerns.

1. The school board member should not engage in any action that violates or diminishes the civil or legal rights of MIS students, administrators, educators, and staff, to the extent that the several individual civil rights have been made applicable to the Yankton Sioux Tribe by federal or tribal law.

C. Confidentiality and Privacy. The school board member should respect the privacy of the MIS students, administrators, educators, and staff, and hold in confidence all information obtained in the course of public service and/or executive sessions of the Tribal Council.

1. The school board member should share with others confidences revealed by MIS students, administrators, educators, and staff, without their consent, only for compelling reasons, and, in no case, shall information obtained during an executive session of the school board be shared with anyone other than those who were privy to said executive session.
2. The school board member should inform the MIS students, administrators, educators, and staff fully about the limits of confidentiality in a given situation, the purposes of which information is obtained, and how it may be used.
3. The school board member should afford MIS students, administrators, educators, and staff reasonable access to any official tribal record concerning them.

The School Board Member's Ethical Responsibility to Colleagues.

- A. Respect, Fairness, and Courtesy.** The school board member should treat colleagues with respect, courtesy, fairness, and good faith.
1. The school board member should cooperate with colleagues to promote MIS issues, interests and concerns.
 2. The school board members should respect confidences shared by colleagues in the course of their professional and public relationships and transactions.
 3. The school board member should create and maintain conditions that facilitate ethical and competent public and professional performance by colleagues.
 4. The school board member should treat with respect, and represent accurately and fairly, the qualifications, views, and findings of colleagues and use appropriate channels to express judgments on these matters.
 5. The school board member who replaces or is replaced by a colleague through the electoral process or appointment should act with consideration for the interest, character, and reputation of that colleague.
- B. Dealing with a Colleague's Constituents.** The school board member has the responsibility to relate to the constituents of colleagues with full professional consideration.
1. The school board member should not interfere with the constituents of a colleague without appropriate communication with that colleague.
 2. The school board member who serves the constituents of a colleague, should serve those constituents with the same consideration afforded his/her own constituents.

The School Board Member's Ethical Responsibility to MIS Employees.

- A. Commitments to MIS Employees.** The school board member should adhere to commitments made to MIS employees, and promote only those employment policies and procedures that serve to improve and strengthen employee performance of duties and obligations.
1. The school board member should work to improve MIS employee policies and procedures, and the efficiency and effectiveness of provision of educational opportunities and school services.
 2. The school board member should act to prevent and eliminate discrimination in hiring and in employment policies and practices, unless otherwise allowed by tribal or federal law.
 3. The school board member should use with scrupulous regard, and only for the purposes for which they are intended, the employment resources of MIS.

The School Board Member's Ethical Responsibility to the Yankton Sioux Tribe and Marty Indian School.

- A. Promoting the General Welfare.** The school board member should promote the general welfare of the Tribe and keep paramount the knowledge that he/she is entrusted with the security, safety, health, prosperity, and general well-being of those whom he/she serves.
1. The school board member should put loyalty to the highest moral principles and to the Yankton Sioux Tribe and Marty Indian School above loyalty to persons.
 2. The school board member should uphold the Constitution, laws, and regulations of the Yankton Sioux Tribe, the United States, and Marty Indian School and never be a party to their evasion.
 3. The school board member should employ earnest effort and conscious thought to the performance of public and professional duties, and conduct commensurate with the trust placed in him/her by the Tribe.
 4. The school board member should seek to find and employ more efficient and economical methods of accomplishing duties and obligations.

5. The school board member should never discriminate unfairly by dispensing of special favors or privileges to anyone, whether for remuneration or not; and never accept, for himself or herself or for the family members, favors or benefits under circumstances which might be construed by reasonable persons as influencing the performance of governmental functions.
6. The school board member should make no private promises binding upon the duties of office.
7. The school board member should engage in no business with Marty Indian School, either directly or indirectly, which is inconsistent with the conscientious performance of governmental duties, not accept any employment which can possibly impair his/her independence and integrity of judgment nor exercise his/her position of trust to secure unwarranted privileges for themselves or others.
8. The school board member should never use information gained in confidence in the performance of his/her duties as a means of private gain, monetary or otherwise.
9. The school board member should expose corruption wherever discovered.
10. The school board member should decline personal gifts and gratuities.
11. The school board member should be ever mindful of tribal members who might otherwise be unrepresented, and should be ever conscious that public office is a public service.

B. Educators, Auxiliary Personnel & Support Staff

Obligations to Students

1. Shall make reasonable efforts to maintain discipline and order in the classroom and the school system, and to protect the students from conditions harmful to learning, health and safety;
2. Shall conduct themselves professionally, and in their personal lives, so as not to subject students to unnecessary disparagement or embarrassment;

APPENDIX PAGE A-35

3. Shall maintain confidentiality on all matters relevant to their work, co-workers, and students, unless disclosure is required by tribal or federal law or serves a professional purpose;
4. Shall maintain professional relationships with students which are above reproach and which are free from vindictiveness, recrimination, or favoritism;
5. Shall assume full responsibility for the conduct, safety and presence of students when they are under the direct supervision, e.g. in class, in a school building, or at an approved school function;
6. Shall not, without just cause, restrain students from independent action in their pursuit of learning; or deny students the right to different points of view;
7. Shall not deliberately suppress or distort subject matter for which they bear direct responsibility;
8. Shall not use professional relationships with students for private advantage;
9. Shall not for reasons of race, color, creed, sex, national origin, marital status, political affiliation, or family, social, or cultural background exclude any student from participation in, or deny him or her any benefits, or any school program, nor grant any discriminatory consideration or advantage unless otherwise required by tribal or federal law, or unless stated in other departmental policies.

Obligations to Public

1. In fulfilling their obligations to the public, educators, auxiliary personnel and support staff shall accept no gratuities, gifts, or favors that might impair or appear to impair their professional judgment; nor offer any favor, service, or thing of value to obtain special advantage.
2. In fulfilling their obligations to the public, educators, auxiliary personnel and support staff shall not misrepresent any institution or organization with which they are affiliated, but shall take adequate precautions to distinguish between personal and institutional/organizational views.
3. Knowingly distort or misrepresent the facts concerning educational matters in direct or indirect public expressions.
4. Interfere with a colleague's right to exercise his/her political & citizenship rights and responsibilities.
5. Use institutional privileges for private gain or to promote political candidates or partisan political activities.

Obligations to the Profession

In fulfilling the affairs of their professional associations, educators, auxiliary personnel and support staff shall:

1. Accord just and equitable treatment to all members of the profession;
2. Withhold and safeguard information acquired about colleagues in the course of employment, unless disclosure is mandated by tribal or federal law or serves a professional purpose;
3. Provide, upon request written request of a co-worker, a written statement of specific reasons for recommendations that lead to significant changes in employment.

In fulfilling the affairs of their professional associations, educators, auxiliary personnel and support staff shall not:

1. Interfere with the free participation of colleagues in the affairs of their professional associations;
2. Use coercive means or promise special treatment in order to influence professional decisions of colleagues;
3. Misrepresent their professional qualifications;
4. Disparage a colleague before others, nor criticize a colleague in the presence of others.

Obligations to Professional Employment Practices

In fulfilling their obligations to professional employment practices, educators, auxiliary personnel and support staff shall:

1. Apply for, accept, offer, or assign a position or responsibility on the basis of professional preparation and legal qualifications;
2. Apply for a specific position only when it is known to be vacant and refrain from commenting adversely about other candidates;
3. Give prompt notice to the employing agency of any change of availability of service;
4. Adhere to the terms an appointment contract unless the contract has been significantly altered without the consent of the affected parties, except as provided by law, legally terminated, or legally voided;
5. Conduct professional business through channels that have been adopted by Marty Indian School policy.

Obligations to the School Board

In fulfilling their obligations to the Marty Indian School Board, educators, auxiliary personnel and support staff shall:

1. Adhere to and comply with the policies and procedures adopted by the School Board;
2. Refrain from attempting to influence individual board members outside a duly called meeting of the school board;

3. Refrain from attempting to circumvent the MIS chain of command by contacting school board's members outside a duly called meeting of the school board

Marty Employee Code of Ethics

1. In carrying out their normal daily duties, staff members are expected to show respect for and cooperate with all the people with whom they work.
2. Supervisors shall treat their employees fairly and in a professional manner.
3. Supervisors shall not physically or verbally abuse their employees.
4. Employees shall not physically or verbally abuse their supervisors.
5. Employees shall follow the chain of command which governs Marty Indian's grievance and appeals procedures.
6. Staff members shall not engage in any of the following relationships with students: (a) there shall be no dating of students; and, (b) staff members shall not utilize their professional relationships with students for personal advantage.

SECTION 1 – 102. CODE FOR AN ALCOHOL AND DRUG-FREE SCHOOL ENVIRONMENT

1. The unlawful manufacture, distribution, dispensing, possession or use of a controlled substance or alcohol is prohibited in all areas of the Marty Indian School complex. Individuals who violate this policy shall be subject to immediate termination.
2. All employees may be required to attend substance use and abuse seminars, workshops, or classes deemed beneficial to employees by the superintendent or department head. The superintendent or department head may dock an employee for failing to attend all or part of said seminars, workshops, or classes.
3. An employee demonstrating a pattern of tardiness or absenteeism as a result of a substance use or abuse problem may be referred for appropriate counseling for a first offense. A

second offense may result in a reprimand, referral to counseling and testing, or immediate termination.

4. Employees shall report to the superintendent or his designee any suspected illegal drug activity occurring on school grounds within five (5) days of the incident.
5. Staff members are expressly prohibited from providing alcohol, controlled substances, and/or non-prescription drugs to students, and shall not allow their homes or premises to be used by students to consume the same. To do so will result in immediate termination of the staff member.
6. Employees shall report suspected involvement of any employee with the sale or distribution of alcohol, controlled substances, and/or non-prescription drugs to students or community residents, or with allowing their homes or premises to be used by students to consume the same. (Failure to report may result in suspension or termination.)
7. Supervisors shall review this policy with their staff and require each staff member to verify in writing that said review has occurred.

SECTION 1 – 103. DEFINITIONS

The following terms shall carry consistent and uniform meanings throughout this policies and procedures manual:

1. “Appeals Process” shall mean the corporation’s organization structure designed to ensure that proper due process is followed in cases of adverse action taken against an employee or student.
2. “Adverse Action” shall mean any disciplinary action taken an employee or student including, but not limited to the following, demotion, suspension, and termination.
3. “Business Department” shall mean the administrative department which is responsible for the fiscal operation of the corporation.
4. “By-Laws” shall mean the by-laws of Marty Indian School.

5. “Code of Ethics” shall mean all the codes adopted by the school board which govern the relationship of the various school entities; i.e. school board, administrative personnel, educators, auxiliary staff, support staff, and students.
6. “Constitution” shall mean the constitution of Marty Indian School, Inc..
8. “Contract Employee” shall mean a full-time contract employee, who is a supervisor professional other than an educator, who is eligible for full employee fringe benefits; and a part-time contract employee who has no supervisory authority and who is not eligible for any employee benefits.
9. “Contractor” shall mean an individual or an organization which is not directly employed by the corporation, but which provides goods and/or services to Marty through negotiated contract.
10. “Corporation”, as herein used, shall mean Marty Indian School, Inc.
11. “Employee” shall mean a person who is:
 - a. recruited and hired by the employer;
 - b. paid pursuant to contract or on a regular hourly wage;
 - c. directly responsible to the School or indirectly through an agreement thereof, in all matters of his/her employment;
 - d. subject to the policies and procedures of this manual in its entirety.
12. “Employee Benefits” shall mean all fringe benefits including but not limited to one or more of the following:
 - a. regular leave
 - b. personal leave bank
 - c. maternity leave
 - d. holidays
 - e. exceptional leave
 - f. religious leave
 - g. insurance benefits
 - h. retirement plan
 - i. other benefits as may be approved from time to time by the employer.
13. “Employer” shall mean Marty Indian School, Inc., and is used interchangeably with “corporation” and “MIS.”

14. “Family” shall include and restricted to the following relationships: spouse, parents, siblings, children, in-laws (father-, mother-, sister-, brother-), stepchildren, stepparents, nieces, nephews, aunts, uncles and grandparents and adopted family including adoption through spiritual and religious beliefs.
15. “Grievance Process” shall mean the corporation’s internal system designed to settle employee/employee, employee/supervisor, employee/corporation disputes. Said process shall be applied on in cases where there is a deviation from established policy; where there is no applicable policy; and when School policy is alleged to be arbitrary and/or unfair, or in cases of adverse action taken against an employee including, but not limited to, the following: demotion, suspension, and termination.
16. “Handbook”, for the purpose of this manual, shall mean any publication recognized by the corporation as a convenience in fulfilling the letter and spirit of this manual. Such handbook(s) may be published and issued to simplify, consolidate, or shorten the applicable section(s) of this manual, as required
17. “Holiday” shall mean any day of the work week (Monday through Friday) as designated by the school calendar as established by the school board, for which the employer does not require the employee to perform any work, and for which the employee is paid a full day’s wage. Leave without pay, regular leave, and exceptional leave shall not be counted as holidays.
18. “In Loco Parentis” shall mean the legal relationship between the school an its employees and the students under their care. The legal definition is “in the place of the parent.”
19. “Personnel Officer”, for the purpose of this manual, shall mean the person designated as the equal opportunity officer, who is appointed by the superintendent, and who fulfills the duties found in Section 3-301 Personnel Recruitment and Selection. The personnel officer shall not have final authority in any personnel action.
20. “Professional” shall mean any MIS employee who is required to be certified by a governmental board in order to perform the duties and responsibilities of their position.

21. “School” shall mean Marty Indian School, Inc., Marty, South Dakota.
22. “School Official In Charge” shall mean any MIS employee who is responsible for the instruction and/or supervision of students. Such officials are responsible for students’ conduct, safety and presence during the time students are in the official’s custody and control, for the observance of the policies and procedures of Marty Indian, and for the enforcement of their prescription. “Department Head” and “Supervisor” are used interchangeably with “School Official In Charge.”
23. “Volunteer” shall mean any individual who performs a service or function for and/or on behalf of the MIS for which said individual is not compensated.

CHAPTER 2 – GENERAL POLICY STATEMENTS

SECTION 2 – 201. CHAIN OF COMMAND

- (A) The Yankton Sioux Tribe owns Marty Indian School, Inc.
- (B) The Tribal Business and Claims Committee has, by Resolution # _____ delegated to Marty Indian School, Inc. the responsibility for the school's administration and maintenance, which duties, responsibilities, powers and obligations shall rest in the Marty Indian School Board.
- (C) The board has delegated to the superintendent the authority and responsibility for enforcement of these policies, procedures and intent of this manual.
- (D) Department heads and program directors are authorized to oversee the staff, vehicles, equipment and supplies for their respective department/programs.
- (E) All administrators, educators, auxiliary personnel and support staff are fully responsible for each and every student entrusted to their care while they are in attendance at class, or attending an authorized school activity, and shall be responsible and accountable for the student's presence.

SECTION 2 – 202. ROLE OF THE BOARD

- (A) Marty Indian School shall operate, maintain and upgrade school programs and facilities whenever fiscally and physically feasible. The school board shall be responsible for monitoring and evaluating existing programs to plan for future needs, shall employ qualified staff to carry out its directives and policies, and shall be fiscally accountable for all income and expenditures as required by tribal and federal law. Currently, the YST Business and Claims Committee is serving as the school board.
- (B) The board reserves to itself the exclusive right to final review and approval of all personnel actions taken by school administrators, educators, and staff.

SECTION 2 – 203. ROLE OF THE ADMINISTRATORS

- (A) The superintendent is the official educational and support staff representative of MIS, and is responsible for the day-to-day operation, the education and counseling of the students, and other matters pertaining to the total operation of the school.
- (B) The board has vested in the superintendent and his/her designee the authority and responsibility for the employment selection process of all Marty personnel as provided by the MIS Constitution, Article IV, Section 5. The final approval of staff lies with the board.
- (C) The department heads shall oversee the daily duties of personnel within their respective departments. Each department head is also responsible for orientation of personnel concerning their duties and responsibilities and all relevant aspects of the school system.
- (D) It shall be the duty of department heads and school administrators to exercise the corporation's *in loco parentis* powers by assuming full responsibility for students' conduct, safety and presence during the time students are in attendance in class. Said dormitory department heads and school executive members shall keep paramount the best interests of the students and shall exercise extreme care when determining to suspend or expel a student from school for violations of the Rules and Regulations provided herein and the Student Handbook.

SECTION 2 – 204. ROLE OF THE STAFF

- (A) During performance of their duties and responsibilities, school staff shall observe the Employee Code of Ethics, and the Code for an Alcohol and Drug Free Environment, of this Manual.
- (B) Staff members shall go through the chain of command within school system, beginning with their immediate supervisor and then to the superintendent before taking any complaints or concerns, which shall be in writing, to the school board.

- (C) When dealing with a student(s) staff will be expected to perform the following roles:
- (1) Cultural preservation facilitator;
 - (2) Communicator of academic and cultural values and beliefs;
 - (3) Student disciplinarian;
 - (4) Counselor;
 - (5) Role model;
 - (6) Reinforce school philosophy;
 - (7) Student advocate.
- (D) Staff will assume full responsibility for students' conduct, safety and presence during class and school related activities. Staff shall also be accountable for students' school attendance, student check-out, and other related school policy.

SECTION 2 – 205. SCHOOL ATTENDANCE BOUNDARIES

- (A) Boundary 1 – All students who are enrolled or eligible for enrollment in federally recognized tribes who reside within the exterior boundaries of the Yankton Sioux Reservation.
- (B) Boundary 2 – All students who are enrolled or eligible for enrollment in federally recognized tribes who reside in Minnesota, Iowa, Nebraska, North and South Dakota, Wyoming, and Montana, and who meet the requirements of school board policy.
- (C) Students living outside Boundaries 1 and 2 may be enrolled at the discretion of the home living specialist, with approval of the superintendent.

SECTION 2 – 206. SUPPLEMENTAL PROGRAMS

Funds obtained from the Department of Education shall be for projects supplemental to the basic education programs and shall not be designated to supplant Public Law 100-297 Basic Support Program funds.

*Pages 24 through 46 were deleted as irrelevant to the issues in litigation.
The complete manual is available for introduction at hearing or trial.*

SECTION 3 – 310. PERSONNEL ACTIONS

A Personnel Action is any one of the following:

- (A) Appointment to a position of employment
- (B) Employee evaluation
- (C) Increase or decrease in salary
- (D) Upgrading or re-grading of position when occupied by an employee
- (E) Promotion or demotion
- (F) Transfer
- (G) Admonishment
- (H) Reprimand
- (I) Suspension of employment
- (J) Termination of employment
- (K) Any combination of the above

SECTION 3 – 311. CAUSES FOR DISCIPLINARY ACTION/DISMISSAL

Causes for disciplinary action and/or dismissal shall be initiated by the supervisor, the superintendent, or his/her respective designees; and shall include, but not be limited to, the following actions, conduct, or lack of action:

- A. Willful violations of the provisions of the personnel policies and procedures or other regulations, or the written orders of the superintendent or his/her designee, or gross violation of the corporation's policy.
- B. Incompetence or inefficiency in the performance of duties, reflected by at least two (2) consecutive low performance ratings on the employee's evaluation reports.
- C. Gross carelessness, theft of school property negligence, destruction or willful abuse of property or equipment belonging to the corporation.
- D. Abusive and improper treatment of other employees, the students, or the public, provided that such conduct cannot be shown to be committed properly in self-defense or to protect the best interests of others.
- E. The habitual tardiness or absence from their duty station during regular work hours. If an employee does not report to work, or is

- late for work by an hour or more, then the employee who extended his/her tour of duty will be paid for that time, and the absent/tardy employee will be docked accordingly. In addition, the employee is subject to further disciplinary action, including termination.
- F. An employee who is absent without notifying his/her supervisor shall not receive pay for work missed, nor can he/she work to make up time for the work missed. In addition, the employee is subject to further disciplinary action, including termination.
 - G. The conviction of a felony.
 - H. Abuse of leave or abuse of leave policies.
 - I. Absence without notification, for a period of twenty-four (24) hours. If an employee is absent for two (2) consecutive working days without notifying his/her supervisor or superintendent, the school board may rule that the position has been abandoned and may authorize the position to be advertised.
 - J. Falsification of job application, travel forms, time sheets, purchase order, etc.
 - K. Insubordination or failure to adequately carry out assigned duties, responsibilities or directives of the department head;
 - L. Consumption of alcohol and/or non-prescription drugs during duty hours, or reporting to work under the influence of same.
 - M. That the good of the corporation would be served thereby.

Any employee found guilty of the above infractions shall be disciplined for violations of the policies and procedures of the corporation. The authority for suspension or dismissal lies with the superintendent. The employee so affected may avail him/herself of appeals procedure outlined in this manual.

SECTION 3 – 312. AUTHORITY FOR DISCIPLINARY ACTIONS

- (A) All school supervisors are hereby authorized to discipline their respective subordinate personnel in the appropriate manner, as follows:
- (1) Corrective interview: a discussion with the employee by the supervisor regarding problems that have been noted in the employees work habits, absenteeism, etc., instructing the employee in the areas that need improvement.
 - (2) Oral admonishment: an oral admonishment is an oral reprimand given an employee for minor infractions of corporate guidelines, policies, instruction, etc. When an oral admonishment is given by the supervisor to an employee, the supervisor shall write a memo to file concerning the conduct giving rise to said admonishment. The memo shall be dated and signed by the supervisor. The employee has no grievance or appeals rights.
 - (3) Written admonishment: when appropriate, the supervisor may issue a written admonishment in the form of a personal letter to an employee for minor infractions contrary to the intent and spirit of these policies and procedures. This written admonishment will specifically describe the nature of the employee's infraction(s) and present alternatives to correct such behavior/attitude.
 - (a) No later than five (5) working days from delivery of such written admonishment, the employee may submit a written reply to express any matters of justification or denial, or to include any other commentary which the employee deems to be essential to a better understanding of the situation in question.
 - (b) The written admonishment, with the employee's reply, if any, will be filed in the employee's file.
 - (c) When a full year has elapsed without additional disciplinary action, the employee may request

that the written admonishment and any replies be removed and destroyed.

- (4) Reprimand: a reprimand is a written reprisal for continued violation of the corporation's regulations, policies, procedures, etc.; however, a supervisor may issue a reprimand to an employee for a first violation, depending on the severity of such violation. A reprimand is issued by the supervisor to an employee. It must be delivered within five (5) days of the infraction, or five (5) days after the time the infraction is revealed. It must state explicitly the nature of the infraction; and when, where, how and under what circumstances it occurred. A copy must be placed in the employee's personnel file. An employee may file an appeal in accordance with the appeals procedures found in Section 3-317 (E).
- (5) Monetary compensation: for acts created by carelessness, negligence, willful abuse or destruction of property or equipment belonging to the corporation, monies may be withheld from an employee's pay check upon one or more of the following:
- (a) Verification of the actual event causing monetary loss to the school;
 - (b) Notification to the employee that the money will be collected by the school as long as the employee remains employed by the school.

Should employment terminate for any reason, substantiated claims shall be withheld from the employee's final check.

Substantiated debts or balances owed the corporation remaining after payroll deduction shall be turned over to the Tribal Court for collection.

- (B) The following forms of discipline are authorized to be exercised by the superintendent only:

A warning period is a corporation-enforced period to correct a permanent employee's negligent work habits, and may be enforced for up to ninety (90) calendar days. A permanent employee given a warning shall be eligible for all accrued leave and health benefits. Leave without pay will be granted for emergency purposes only.

- (1) Suspension: A suspension is a temporary corporation enforced absence from duty in a non-pay status. It may be imposed in lieu of dismissal for cause. The superintendent must prepare a statement setting forth the causes and reasons for suspension; and stating what, if any, previous disciplinary action(s) have been taken. Actual suspension shall be immediate upon discovery of a violation, and may be conducted orally; however the superintendent shall deliver the written statement to the suspended employee within two (2) working days. A copy must be permanently placed in the employee's personnel file. The employee may grieve in accordance with the appeal procedure found in Section 3-317 (F). Suspension shall not exceed ten (10) working days. If the superintendent determines that additional time is needed in which to investigate the reason(s) for suspension, the suspension may be extended for an additional ten (10) working days. However, in no case, shall a suspension last more than thirty (30) working days. Beyond this point, removal is mandatory.

The decision to suspend with (or without) pay is discretionary with the superintendent and shall be decided on a case-by-case basis.

- (2) Removal: Removal is action taken by the corporation to terminate an employee's assignment, for cause, for actions which are incompatible with the corporation's mission and purpose. A written statement must be presented by the superintendent to the employee, setting forth in specific detail the reason(s) for removal. The action is taken by the superintendent, unless the employee being removed is the superintendent, in which case the school board must take the action. Circumstances may dictate immediate removal. A written copy of such removal shall be delivered to the employee and one shall be permanently placed in the employee's personnel file.

- (3) No disciplinary action of any employee may be taken, or will take effect, unless the employee has been given written notice of such action and the notice has been delivered to him/her either in person or by certified mail, in accordance with the above, prior to the effective date of the action.

SECTION 3 – 313. PROMOTION

- (A) Promotion can be accomplished in two ways:
 - (1) There is no change in position of the employee, but the job description carries more than one grade classification. Therefore, once an employee is deemed as meriting the higher grade specified within their job description they may be recommended for the higher grade.
 - (2) An employee may move to a different position in the school organization that carries with it greater responsibilities and compensation. See the Wage Pay Scale policies.
- (B) The school board and its supervisory staff shall observe these considerations:
 - (1) In filling a vacancy or new position, the superintendent shall give first consideration to the promotion of qualified employees already employed by the school. An employee will not be required to resign his/her position if he/she desires to be promoted.
 - (2) Promotions shall be awarded without discrimination on such bases as race, color, creed, age, sex, handicap, and religious or political consideration.
 - (3) A promotion shall be based on written evaluations of the employee's past performances and his/her qualifications for the position to be filled. When these factors are relatively equal between two or more employees, seniority and Indian preference shall be the decision factors.
- (C) In accordance with such considerations, the following promotion procedures shall be observed:

- (1) An employee wishing to be considered for a promotion to a higher grade within their job description shall notify their supervisor and superintendent in writing.
- (2) An employee wishing to be considered for a promotion to a new or vacant position shall make application and be given consideration as outlined in the Personnel Recruitment and Selection Policies.
- (3) The superintendent shall submit his/her recommendation to the school board for approval.
- (4) When an employee is selected for a promotion, a new contract or a new hourly wage agreement shall be entered into, if applicable.

SECTION 3 – 314. DEMOTION

- (A) For the purposes of this section, demotion is defined as an administrative act of moving an employee to a position of less responsibility and compensation than the employee presently holds, or as an administrative act of moving an employee backwards in grade or step placement within their same job description. See the Wage Pay Scale policies.
- (B) An employee may be demoted for the following circumstances:
 - (1) When an employee's immediate supervisor and the superintendent decide that the employee does not possess the necessary qualifications to render satisfactory service in the position the employee presently holds.
 - (2) The supervisor, with the concurrence of the superintendent, shall prepare a written statement of reasons for the demotion.
 - (3) Upon the recommendation of the superintendent, the school board shall act on the demotion of an employee. A new contract or new hourly wage agreement shall be entered into, if applicable.
 - (4) The employee has recourse through the appeals process, if he/she wishes to protest the demotion.

*Pages 54 through 57 were deleted as irrelevant to the issues in litigation.
The complete manual is available for introduction at hearing or trial.*

APPENDIX PAGE A-53

- (C) Each performance evaluation shall be prepared by the employee's supervisor and shall be related specifically to written standards for the position. If the job description does not adequately describe the employee's duties during the rating period, the supervisor should state what the employee's job duties are, and, in addition, seek to amend the job description with permanent changes.
- (D) Each written performance evaluation shall be discussed with the employee. The supervisor shall obtain the employee's signature acknowledging the discussion and the employee's review of the report. Such signature does not denote agreement with the results of the evaluation. The employee may make a statement of disagreement and attach it to the evaluation. All employees of Marty who have worked two (2) years or less shall be evaluated each semester. Employees with over two (2) years' experience at Marty shall be evaluated once a year. Evaluation files shall be kept separately from personnel files and shall be treated in a confidential manner. All materials or information pertinent to the evaluation shall be reduced to writing and signed by the evaluator and individual evaluated, and shall be placed in the employee's personnel file. The evaluation file shall be subject to annual reviews by the one evaluated and evaluator. It shall be available at the time to the person evaluated, the evaluator, and the superintendent. The three (3) most recent evaluations shall be kept of file. Materials prior to the three (3) most recent evaluations may be removed at the request of the one evaluated, and by approval of the superintendent.
- (E) A performance evaluation can also be used to determine eligibility for promotion and/or step increases, as well as determining cause for demotion or dismissal, and must, therefore, be completed on a timely basis.

SECTION 3 – 317. GENERAL PERSONNEL PRACTICES

- (A) **CONTRACTS:** Annual contracts shall be offered to all certified staff. All contracts are for the period of one year unless otherwise changed by the board. There is no tenure allowed at MIS. All other staff shall enter into an Employment Agreement upon initial hiring.
- (B) **SALARY SCHEDULES:** Policy and procedures concerning salary schedules is consistent with Marty Indian School Bylaws, Article II (C), and Chapter Five (5) of this manual.

(C) REQUIRED PERSONNEL DOCUMENTS AND RECORDS

- (1) On the date of employment, an official personnel file shall be established for the new employee. Such file shall contain:
 - (a) A written description of the position and salary range;
 - (b) The employee's application form and/or resume;
 - (c) The employee's letters of reference and transcribed reference checks conducted in person or by telephone;
 - (d) A record of the employee's interview, if any;
 - (e) A letter of employment;
 - (f) Date employed, date terminated, reason why, and performance evaluation(s); and
 - (g) A current physical examination.

- (5) The following may be added to the employee's file:
 - (a) Record of beginning salary and subsequent salary changes;
 - (b) Copies of applicable job description and revisions; and
 - (c) Records of all personnel actions involving the employee, including:
 - (1) Hiring.
 - (2) Training.
 - (3) Promotions.
 - (4) Demotions/disciplinary actions, and
 - (5) Discharge/removal/resignation.

(D) STAFF TRAINING

- (1) All personnel shall be actively engaged in a continuing planned program of pre-service and in-service development designed to improve employee job performance.

- (2) In-service shall be held for all Marty staff before the beginning of school in August.

- (3) The home living specialist, as funds permit, shall arrange a program of in-service training for the dorm staff.

- (4) If substitutes are utilized, regular classroom teachers are expected to provide the substitutes with an easily understood set of lesson plans which details desired objectives, instruction, activities, and evaluative measurements. Each building principal will be responsible to see that lesson plans meet criteria mentioned. If a substitute is utilized, he or she will be paid for the entire day—whether used for that period or not.

(E) GRIEVANCE PROCEDURE

1. Any employee who has a grievance shall follow the chain of command as outlined below in seeking resolution of said grievance.
2. All grievances shall be presented to the appropriate supervisor in writing. A teacher who has his/her contract non-renewed, must understand that this is not a grievance issue. The written grievance must state specifically the nature of the grievance, the form of redress sought, and all other specific information relevant to the grievance. The grievance must be presented to the employee's supervisor for resolution within five (5) working days from the occurrence of the action causing the grievance, or the grievance shall be deemed to be waived by the employee. However:
 - (a) The five (5) day period may be extended for vacations, sickness, or leaves of absences; or
 - (b) If the grievance occurs when an employee is absent from work due to vacation, sickness, or leave of absence, the five (5) day period shall not commence until the employee returns to work.
- (3) An aggrieved employee shall observe the following procedures in pursuing his/her grievance:
 - (a) Any employee who feels that he/she has a valid request or complaint must discuss the request/complaint with his/her supervisor. The request/complaint must be presented in writing. The supervisor has two (2) working days in which to answer, in writing, the employee's request/complaint. A non-renewal of an

employee contract is not a complaint that can be grieved.

- (b) If the request/complaint cannot be resolved at the initial stage, and the aggrieved wishes to grieve further, he/she must submit their grievance, in writing, to the superintendent. The superintendent shall have five (5) working days in which to review the situation and make a decision, in writing, to the aggrieved.
 - (c) If the request/complaint cannot be resolved at the secondary stage, and the employee wishes to grieve further, the employee shall within five (5) working days, serve the superintendent with a written request for review by the grievance committee. Upon receipt of the employee's request for a grievance committee hearing, the superintendent shall have two (2) working days to inform such committee and the school board that the aggrieved employee has request a hearing before the grievance committee.
- (4) Grievance committee
- (a) The composition of the grievance committee shall consist of five (5) members: one from each department, appointed at random by the superintendent.
 - (b) Hearings before the grievance committee shall be held at a time set by the committee within ten (10) working days following the receipt of notice from the superintendent that an employee wishes to grieve to the committee. The aggrieved shall be given notice of such hearing not less than two (2) days before such hearing. The grievance committee may, in its sole discretion, accept oral testimony.
 - (c) Following hearing before the grievance committee, should the aggrieved feel that the committee has acted arbitrarily or capriciously, the aggrieved may file his/her grievance with the school board president.

(d) The school board president shall request that the grievance committee submit all documentation relevant to the aggrieved's request/complaint to the President and members of the school board.

(5) FINAL GRIEVANCE PROCEDURE

(a) The school board president shall set the time for hearing the grievance at the next regularly scheduled school board meeting.

(b) The aggrieved shall be given notice, in writing, of the date and time of the hearing and inform that he/she may be represented by counsel and may present witnesses in support of his/her position, provided, however, said witnesses may be subject to cross-examination by the school board members and/or the MIS legal counsel.

(c) The school board shall hear the evidence and shall make a decision based on the same. The school board shall make findings of fact and conclusions of law in support of its decision. The decision of the school board shall be final.

(F) RESIGNATION AND LAYOFF

(1) To resign in good standing, an employee should submit his/her notice through the supervisor to the superintendent at least fifteen (15) calendar days in advance of resignation. The superintendent and other contract employees should give thirty (30) days prior notice unless the school board waives such notice because of extenuating circumstances or permits a shorter period of time. Written resignations shall be supplied by the employee, stating the general reason(s) for his/her resignation. The superintendent shall accept said resignation on behalf of the school board, who has final authority to accept or reject resignation. Once such notice is received, and there is no date or signature affixed, then the date of delivery becomes the effective date of resignation. Employees who have resigned in good standing with Marty Indian School shall become eligible for re-employment after six (6) months. Once a resignation, WRITTEN OR VERBAL,

has been accepted by the school board, the resignation is deemed to be final and irrevocable.

- (2) The order of layoff shall be made at the discretion of the school board, who shall give due consideration to seniority and to performance ratings. The objective of the school board in such cases shall be to conserve for the corporation the services of the most valuable employees. Such employees laid off shall be notified in advance of said layoff for as long a period as may be possible, but at least fifteen (15) calendar days prior to the effective date of the layoff.
- (3) Any employee who resigns or who is terminated and who has school property (e.g. keys) must return such property to the school prior to receiving his/her final paycheck.

(G) CLEARANCE PROCEDURE

Upon termination, an employee must clear financial and property accounts through the payroll officer. An employee's last pay check shall be held until the clearance is accomplished. If the property is not returned, the cost shall be deducted from the employee's final pay check. The superintendent is the only employee who may approve deviation from this clearance procedure.

*Pages 64 through 226 were deleted as irrelevant to the issues in litigation.
The complete manual is available for introduction at hearing or trial.*

Date: November 16, 2017
To: Gina Curran, MIS Superintendent
George Erdahl, MIS Elementary Principal
CC: Andrea Fischer, MISB Vice-President
Sarah R. Zephier, MISB Secretary/Treasurer
Stephanie Cournoyer, MISB Member
Julie Blackmoon-Wright, MISB Member
Clem Zephier, MISB Member
From: Sarah W. Zephier, MISB President
Re: Investigation

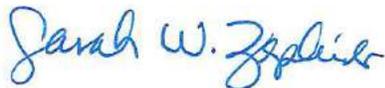
Due to the events that had taken place yesterday, an emergency school board meeting was called to discuss possible remedies to the verbal and written reports that were submitted to the school board. During our emergency meeting, a motion was made to place the HS/MS Principal on a ten working-day, unpaid suspension in order to conduct a proper investigation into all of the verbal and written reports that were submitted and discussed.

Further, because the reports included both the HS/MS Principal, Timothy Stathis, and Superintendent, Gina Curran, it is reasonable to request that a third party administrator conduct this investigation. After that being said, the Elementary Principal, George Erdahl, will be placed in charge of this investigation and will be given the responsibility to follow-up on all of the reports that have been submitted.

We will be having a special school board meeting on Wednesday, November 29, 2017 at 12pm in the administration building. We will begin with the financial reports from Frank Bures and Pam Aungie and will add the report to the agenda under executive session.

Today was an extremely busy day at work and I know that I have not touched base on everything that was discussed, but as soon as I get some free time I will compile all of my notes from the informational meeting and forward them. I encourage all of my fellow board members to submit their notes that they gathered from the meeting and forward them as well.

Respectfully,



Sarah W. Zephier
Marty Indian School Board President



Marty Indian School

Box 187, Marty, South Dakota 57361 605-384-5431 Fax # 605-384-5933

Date: November 16, 2017
To: MIS Students, Parents, Staff and Faculty
From: Sarah W. Zephier, MISB President
Re: Response to 11-15-17 Walk-Out and Informative Meeting

In the early morning on Wednesday, November 15, 2107, I was made aware of a student walk-out that was taking place at Marty Indian School. I was also notified that before they would return to class the student body requested to have a meeting with the Marty Indian School Board (MISB). At this point, every MISB member was contacted and arrived to meet with students, parents, and staff members for an informational meeting in the Library where everyone was welcome to address the MISB with their concerns and questions. We met from 12pm-2:45pm and based off of all of the information that was shared, an emergency school board meeting was called to officially address the events that had taken place.

After further discussion in the school board meeting, a unanimous decision was made to complete an investigation into all of the reports that had been submitted; verbally and in writing, to be submitted to the MISB on Wednesday, November 29, 2017 during a special school board meeting.

Once again, I would like to say "Thank you" to all of the individuals that shared their concerns with the MISB. I also want to ensure you that the MISB is taking what was shared in the informational meeting very serious and we are taking every avenue available to us to find a reasonable resolution. If you have any comments or concerns please feel to email me at sarah.zephier23@gmail.com.

Respectfully,

A handwritten signature in blue ink that reads "Sarah W. Zephier". The signature is written in a cursive, flowing style.

Sarah W. Zephier
Marty Indian School Board President

Grievance

Tim Stathis, Marty Indian School Principal

November 21, 2017

The following sets forth an official Grievance for listed violations of Marty Indian School Policy and for egregious actions by Sarah Zephier done in the name of the Marty Indian School Board.

There are 3 areas of Grievance herein communicated, with several elements as delineated.

The School District has placed itself in the status of a Breach of Contract with me already, and by certain actions of certain individuals acting in the name of the School Board, by leading a public Defamation of Character of myself, has made not only themselves vulnerable to be sued, but have opened the way for Marty Indian School to be sued as well.

The Grievance seeks redress to the Contract Breach, and redress for the Defamation of Character that has occurred and attempt to mutually come to terms to avoid a further lawsuit.

A brief introduction to the events of November 15, 2017 that occurred on school property herein follows:

At approximately 11AM, Staff member Elk Soldier (formerly Gary Drapeau) led a contingent of students over to the High School building from the Culture Center. They took up a protest stance in the Library, sending runners to varying classrooms to entice more students to leave their classes and join the fray.

When I entered the Library to see what was going on, a staff member was addressing the students trying to find-out why they were there. The students were silent. Following that attempt by that staff member, Elk Soldier then addressed the students. I remained in a listening mode and chose not to confront or redirect anything as the whole matter was bewildering. In fact, when asked by another staff member to explain why they were there, all students remained quiet and most had no idea as to the reasoning. Only Elk Soldier himself spoke and then his eldest son spoke and seemed to be addressing a matter that had happened weeks earlier for which I could not understand what the issue was.

Meanwhile, Community member Julia Wright arrived and pulled up a seat in the middle of the gathered students, and addressed the students saying she was a School Board member and was ready to listen.

Gina Curran, the Superintendent arrived, and addressed the students.

A few students spoke in very general terms.

Then, as the lunch bell rang for Middle School, there was mutual agreement in the room for Middle School students to go to lunch and for High School to go to their next class except that Elk Soldier directed for all Student Council members to go to a meeting he was calling to include any community member, parent, or Board member who wanted to go into the Teacher Lounge. That being filled by Teachers eating, he returned his large contingent of students and other adults to the Library.

Around this time, Board President Sarah Zephier arrived. She took command of the meeting in the Library and what ensued was the most egregious act I have ever witnessed in my 31 years in public education, as she began asking for any and all students and staff members who had a complaint against the Principal or Superintendent to speak-out. This process went on until approximately 2:45PM or so. One

APPENDIX PAGE A-62

after another students and staff were encouraged to speak their minds publically, in front of any and all students and staff who wished to remain present, and any community members who had arrived and chose to be present, in complaint against my person and that of the Superintendent.

Sarah Zephier, Board President, led this shameful display, encouraged it, and did so in the name of the School Board.

This was an illegal meeting; it was a meeting in violation of all known Open Meeting Laws; it was a gathering in violation of several School Policies in chain-of-command in how all matters of discussion of personnel or administrative matters need to occur. It was a meeting whose sole purpose served to derogate my person and professional position, and was an encouraged, outright, and ongoing defamation of my character promulgated by Sarah Zephier, Board President. There is some evidence, as well, that my civil rights may have been violated.

The Board then called for an "Emergency Executive Session," made statement to that effect over the school loud speaker and I do not know if they made any other public announcement of it.

All members of the School Board then remained gathered in the Library. At approximately 4:30PM, Greg Zephier II came to get me from my office stating: "The Board wanted to hear 'my side.'"

I entered the Library. Board Chair, Sarah Zephier informed me that the Board had several matters they wanted me to respond to. I responded to each and every point showing the proper perspective and truth to all matters of which they only had innuendo or rumor. There were only 6 points I was asked of. I understand the Board had listened to and interacted with Staff members and students on many more matters than that which I was asked to respond to.

Board Chair, Sarah Zephier, asked if any Board members had anything else to say or ask. I was asked to leave the meeting.

At approximately 9PM, I opened my computer at home and saw I had received from the Superintendent a forward of a message from Board President, Sarah Zephier to Ms. Curran. There was no direct message from the Superintendent, only the forward of the email from Board President, Sarah Zephier.

The email had the subject "suspension." This was a forward to me, not a direct communication from the Superintendent to me from herself, nor definite direction of anything to me other than the implied action of the Board as follows:

Good evening Gina,

We just adjourned from our emergency school board meeting. The action that was taken was a 10 working day suspension of Mr. Stathis beginning tomorrow.

When I get to my computer I will send you the wording of the official motion in the minutes from tonight's meeting.

Sarah

I wrote to the Superintendent early in the morning of the next day, November 16th, stating I took the forward as implied that I should not go to campus, and stated I was going to take the day off. I called the Superintendent that morning and asked if I was still going to be paid, and she said, "Sure as I can see as there is nothing else I have received from the Board other than this." We both agreed in our understanding of policy that a Board does not have the authority to place a contracted employee on "suspension" and that that authority rests only with the Superintendent and only after which an employee has been found guilty of something. Nevertheless, I stated that until the matter was made more clear and perhaps Policy coming back into being, that I would take Personal Leave, as I didn't give recognition to the 'suspension' being valid.

Grievance 1: The School Board violated Marty Indian School Policy by voting to place me on ‘Suspension,’ and thereby has caused a unilateral Breach of Contract upon me.

Grievance 1. a.) As no “guilt” of any violation has occurred, the act of “suspension” is in violation of Policy. As shown in Policy 3-311 given below, “suspension” can only follow due process of guilt having been established. By the School Board President’s own statements made in Letter to the “MIS Students, Parents, Staff and Faculty” dated November 16, 2017, this is only a period of “investigation,” by which is meant investigation to determine next steps and possible future due process of a hearing to establish guilt or not of something or other. Not only has there not been a Hearing, there was not yet even any result of any such investigation. The School Board President wrote: “...a unanimous decision was made to complete an investigation into all reports that have been submitted; verbally and in writing, to be submitted to the MISB with their concerns and questions.”

And then in a letter to Gina Curran, Superintendent, and George Erdhal, Elementary Principal, and to all School Board members, the Board President stated the same to equal effect (Copy of Letter attached).

Policy to the effect in violation:

As stated in 3 – 311:

Any employee found guilty of the above infractions shall be disciplined for violations of the policies and procedures of the corporation. The authority for suspension or dismissal lies with the superintendent. The employee so affected may avail him/herself of appeals procedure outlined in this manual.

Grievance 1. b.) By Marty Indian School Policy, the School Board does not have the authority to directly impose the status of ‘suspension’ on an employee. That authority rests solely with the Superintendent.

3 – 312 (B) (2)

Suspension: A suspension is a temporary corporation enforced absence from duty in a non-pay status. It may be imposed in lieu of dismissal for cause. The superintendent must prepare a statement setting forth the causes and reasons for suspension; and stating what, if any, previous disciplinary action(s) have been taken.

and further : The decision to suspend with (or without) pay is discretionary with the superintendent and shall be decided on a case-by-case basis.

b) The Policy stated above implies the establishment of “guilt” to be cause of suspension in lieu of termination, that guilt by procedure and due process has been established and that suspension is imposed in consequence of such guilt.

By declaring that I am on “Suspension without pay” as written in a Letter addressed to both Gina Curran, Superintendent, and George Erdhal, Elementary Principal dated 11/17/2017, and signed by Sarah Zephier under title, Marty Indian School Board President, “...a motion was made to place the MS/HS Principal on a 10 working day unpaid suspension in order to conduct a proper investigation into all of the written and verbal reports that were submitted and discussed,” Sarah Zephier, Board President has exceeded her authority and admittedly conducted discussions out of compliance with chain-of-command procedures, and in a manner conducive to character defamation.

APPENDIX PAGE A-64

Grievance 1. c.) By declaring unpaid time for my working days according to my contract, and directing the Superintendent and Business Office to so not pay me according to the School District's contractual obligation to me, by doing so in the name of an illegal placement of 'suspension,' thereby the School District and Sarah Zephier, Board President, have directly and immediately therein, committed a Breach of Contract.

Grievance 1. d.) The District has committed Breach of Contract by withholding due pay. On November 21st, at approximately 2PM, the School Board President issued a Letter to me, copied to all Board members. This letter stated to the effect the reinforcement of the belief that I was on "Suspension without pay" for a period of 10 working days and that such began on Thursday, November 16th. Such an issuance is in violation of Policy wherein it is stated that:

3 – 312 (B) (3):

No disciplinary action of any employee may be taken, or will take effect, unless the employee has been given written notice of such action and the notice has been delivered to him/her either in person or by certified mail, in accordance with the above, **prior to the effective date of the action.**

No letter was so forthcoming and yet pay was withheld from the dates of November 16th forward. The School District, by the usurpation of power and authority of Sarah Zephier, School Board President, has withheld due pay from their contractual obligation. I withhold the right not only to seek redress of due pay, but to sue for punitive damages further for willful and knowingly breaching my contract. I gave due warning of potential for suit in a letter given via email attachment to the Superintendent, the Business Manager, and permission for the Superintendent to forward the said Letter to the Board President, which indeed did occur. Notwithstanding that attempt and stating therein applicable Marty Indian School Policy, the School District and Board President, Sarah Zephier chose to act in violation and justify with withholding of all contractually obligated due pay.

Grievance 2: Sarah Zephier, acting in the capacity of Marty Indian School Board President, signing her name as such in communication in a Letter addressed to: "Students, Parents, Staff, and Faculty" has violated Marty Indian School Policy in Chain-of-Command in all protocols common for the reception of any complaining party to any school matter (Copy of Letter attached). Continuance of such encouragement makes the job of a Department Supervisor, Principal, and Superintendent impossible in regards to administratively resolving matters and restoring public confidence.

To Wit, The Marty Indian School Policy and Procedure Manual States of "Educators, Auxiliary Personnel, and Support Staff" as follows [Section 1 – 101]:

Obligations to the School Board

In fulfilling their obligations to the Marty Indian School Board, educators, auxiliary personnel and support staff shall:

1. Adhere to and comply with the policies and procedures adopted by the School Board;
2. Refrain from attempting to influence individual board members outside a duly called meeting of the school board;

3. Refrain from attempting to circumvent the MIS chain of command by contacting school board's members outside a duly called meeting of the school board

In the Letter of written by Sarah Zephier, Board President, dated November 16, 2017, she states: "Once again, I would like to say" "Thank You" to all the individuals that shared their concerns with the MISB. I also want you to be sure that MISB is taking all this very seriously and we are taking every avenue available to us to find a reasonable solution. If you have any comments or concerns, please feel free to email me at sarah.zephier23@gmail. com."

By so stating, Sarah Zephier is usurping her authority and encouraging people to violate chain-of-command expectations wherein parental and student concerns are expressed through District Administration for resolution, first. She has encouraged direct communication from the public to the School Board, namely herself, for concerns and complaints, which completely violates school protocols and procedures and only encourages the avoidance of proper channels and procedures by students, parents and staff, which encourages chaos, defiance, and the common order in the professional environment of a school.

Such statements and encouragements by the School Board President encourages disrespect and gives license for disorder.

Such encouragement by the School Board President to students, parents, staff, and faculty leads to the break-down of chain-of-command and places the Board out of its proper role as final arbiter after administrative procedures have been exhausted.

The Letter appears to be an arrogant display by the Board President that she can solve all ills. This is a gross misrepresentation of the position of School Board President.

The Letter to the public in this regard in these encouragements, violates the position and authority of the Board.

Grievance 3: The School Board President encouraged and directed open public "Defamation of Character" of myself, by taking unauthorized control of the setting of the school and encouraging students and staff to disparage and derogate me, the School Principal. The actions of the School Board President can only be described as "reckless," disrupting all order of school functions and eliciting disorder, and condoning public Defamation of Character of myself and the Superintendent.

The Board President, by placing herself in pseudo role as Board President at the time has admitted from 12:45 to 2:45 PM on November 15, 2017, but who in fact, acted as an individual, as no official Board Meeting, no legal meeting occurred, and thereby encouraged students and staff of Marty Indian School to violate the ethical outlines in Marty Indian School Policy, To Wit: Policy, Section 1 – 101 Code of Ethics:

In fulfilling the affairs of their professional associations, educators, auxiliary personnel and support staff shall not:

4. Disparage a colleague before others, nor criticize a colleague in the presence of others.

The Board President, instead of shutting down any attempt of anyone, and especially that of students or MIS Staff, to disparage another employee in public, which is common practice even at legal, public, properly open and legitimate Meetings of a Public Board, proceeded to arrange for, by herself, acting independently but in the name of being the School Board President, enable likewise the pseudo acknowledgement of fellow Board members, as though they too were in legal, open session in a properly arranged meeting (but were not), set forth continuance of, and repeated invitation to, and stated goal of, people expressing in public their derogation, disparagement, and defamation of the School Principal

APPENDIX PAGE A-66

(myself) and the School Superintendent (Gina Curran). This is a gross violation of any and all common practice of Open Meeting Laws, Board Rules, Policies, Public Official Ethics, and has thereby subjected herself, and potentially other Board Members, to civil suit for Defamation of Character and other ethical violation of elected officials.

It also led to confusion among Staff that such conduct was sanctioned, as in a position representing herself as the Board President, deceived students and staff that such conduct was acceptable, and thereby has subjected those staff who participated to professional ethical violations.

The Board President by this conduct has potentially, irreversibly damaged the reputation of the School Principal (myself) and Superintendent, by condoning student and staff public criticism, condemnation, and disparagement of these school administration officials.

Redress of Grievances Sought:

Redress being sought recognizes in summary: 1) Unauthorized placement by the School Board of my status of suspension and that being 10 working days, unpaid; 2) School Board President violation of common chain-of-command procedures; 3) Severe elicitation of Defamation of Character. All in violation of numerous Marty Indian School written Policies.

1. In recognition of the unauthorized placement of me in “suspension” status, and in recognition that the School District violated contractual agreements and withheld due pay, redress is sought for the immediate restoring of all due pay, and removal of the erroneous status of “suspension.” Immediately restore all pay withheld in violation of the School District’s contractual obligation. The erroneous “suspension without pay” period of days in which pay was erroneously held, be restored in payment, and days shown instead as Administrative Leave, paid.

2. In recognition of the introductory paragraph of the volume of the Marty Indian School Policy and Procedures Manual, To Wit:

The Board and staff are fully cognizant that sound personnel policies and procedures are essential to the realization of Marty Indian School’s mission and reaffirmation of its philosophy.

Redress is sought for either for the School Board to act upon itself, or the Business & Claims Committee of the Yankton Sioux Tribe which governs the School Board, to restore the Marty Indian School Board’s proper and authorized role, by sanctioning said School Board with the aim of keeping them from interfering in the administrative functions of the school and those things stated in Policy as being in the sole discretion of the Superintendent, restoring the proper authority of the Superintendent to conduct Administrative Functions, including any and all Directive to be given to the Principal and all Staff.

3a. In recognition of the events condoned and perpetuated by the School Board President on Wednesday, November 15, from approximately 12:45 to 2:45 PM as fully delineated in the Grievance above, and because of the issuance of subsequent communication by public letter authored by and signed by the School Board President, all of which has led to a Defamation of Character of myself, and created a hostile working environment for my position as School Principal, issue in public session, a School Board apology to me.

3b. By so recognizing that the School Board President has usurped and violated her proper authority, a Public Letter of Apology to me, the Principal, should be issued to students, parents, staff, and faculty, stated wrongs committed to me by the illegal meeting that occurred from 12:45 to 2:45 on Wednesday, November 15, 2017. Only by such acknowledgement of the wrongs committed, and thereby re-establishing by stated communication to the public and staff, can the School Board continue to function in its proper role and restore order that the students, parents, staff, and faculty properly can thereby be told and understand the role of the Board and understand the improper and unethical nature of that which was condoned, i.e.: to utter in public derogation and defamation of the character of a school official. And thereby restore the knowledge to the said recipients of such a Letter what is the proper chain-of-command for concerns and complaints. Such public apology and acknowledgement is necessary to restore proper order and proper functioning of the Administration of the School and properly restore the Administrative functioning of the Principal (myself) in service to the fulfillment of the Principal's multifaceted, multidimensional duties to the students, parents, staff, and faculty.

3.c In addition to or in lieu of an apology, alternative redress could be established by the Business & Claims Committee removal of the Resolution of the School Board existence, recognizing errors committed on November 15, 2017 and other errors in communication given by the Board President since then, and restore thereby non-interference in the chain-of-command between students, parents, staff, and faculty, and so communicate from the Business & Claims Committee delineation of proper chain-of-command for concerns and complaints.

And/Or:

3.d. In recognition of the potential for the irreparable damage caused to my reputation, immediately pay-out the remainder of the School District's 2017-18 Contract to me and agree to common terms of arrangement for such a buy-out as so established between my Attorney and the Attorney of the School District.

3.e. In lieu of or in addition to the above, the School District should pay in damages for the "Defamation of Character" so elicited by Sarah Zephier, done in the name of her position of School Board President, thereby making vulnerable the School District to tort punitive damages, the sum of \$250,000, payable immediately, with further terms established by settlement between my Attorney and the Attorney of the School District.

Notwithstanding the above, I hereby reserve the right to further legal action if all matters of grievance are not adequately addressed and fully resolved as mutually-agreeable resolution between myself and the School District.

Respectfully Submitted by:



T. Stathis, Principal



Marty Indian School

Box 187, Marty, South Dakota 57361 605-384-5432 Fax # 605-384-5933

Date: December 1, 2017
 Emergency School Board Meeting
 Meeting called to order at 12:10 pm
 Roll Call:

Andrea Fischer- Present 12:45
 Julie Wright - Present
 Sarah R. Zephier- Present
 Sarah W. Zephier – Present
 Stephanie Cournoyer- Present
 Clem Zephier- Present
 Vacant -

Other: Greg Zephier Jr, Greg Cournoyer Jr

Agenda

Legal matters

B&CC recommendations

Personnel

Motion by Clem Zephier Jr to approve the agenda.

Motion Second by Stephanie Cournoyer

MOTION CARRIED: 3 in favor, 0 opposed, 2 absent (Andrea, Stephanie), 1 abstain

MOTION by Clem Zephier to go into Executive Session at 12:40 pm.

MOTION Second by Sarah R Zephier.

MOTION CARRIED: 4 in favor, 0 opposed, 1 absent (Andrea F), 1 abstain

Stephanie present

Andrea Fischer came in at 12:45

Came out of Executive Session @ 2:45 pm

MOTION by Stephanie Cournoyer to offer buy-out of contract of HS/MS Principal.

MOTION Second by Sarah R Zephier.

MOTION CARRIED: 4 in favor, 0 opposed, 0 absent, 2 abstain (SWZ, Clem Zephier Jr)

MOTION by Stephanie Cournoyer to omit the word "offer", from the previous motion concerning HS/MS Principal contract.

MOTION Second by Julie Wright.

MOTION CARRIED: 3, 0 opposed, 0 absent, 3 abstain (SWZ, Clem Z, Andrea Fischer)



Marty Indian School

Box 187, Marty, South Dakota 57361 605-384-5432 Fax # 605-384-5933

MOTION by Stephanie Cournoyer to adjourn at 2:49 pm.

MOTION Second by Sarah R Zephier.

MOTION CARRIED: 5 in Favor, 0 opposed, 0 absent, 1 abstain

Minutes approve on: _____
Date

President/Vice-President

Secretary

Tim Stathis, Middle School/High School Principal, Marty Indian School

To: Gina Curran, Superintendent, Marty Indian School

Introduction: This is to set forth the second set of Grievances seeking redress for violations enacted against me by the Marty Indian School.

The Marty Indian School Board, and now by actions thereto by the Yankton Sioux Indian Tribe as enacted by their Tribal Council, have conducted egregious acts against me, violated their own Policies and Procedures, and have failed to attempt resolution of matters in good faith.

Marty Indian School, in its reckless acts against me, being its Middle School and High School Principal, has compromised all integrity as an institution in regards to its treatment of me, and therein has caused irreparable professional and personal damages unto me.

The Marty Indian School Board, by its actions taken in regards to my employment, has repeatedly violated its own Policies and Procedures, again, and again, and again. And as delineated in my Grievance unto them of November 21, 2017, has conducted actions in Breach of Contract and of public defamation of my character. The matters of the Grievance of November 21st have not been resolved and since then, further egregious violations and reckless conduct by the Marty Indian School Board, and the Tribal Council of the Yankton Sioux Tribe have occurred in damage to me.

Grievance 1: Marty Indian School Policies and Procedures for resolution of Grievances of an Employee, in relation to my submitted Grievance o November 21, 2017, were not followed. Resolution of these stated Grievances as put forth on November 21, 2017, and the redress sought therein have not been resolved to date. All parts of this Grievance of Nov. 21 and the redress sought therein are yet hereby still considered open and in full force seeking resolution.

Grievance 2: Marty Indian School has recklessly withheld due pay according to the payment schedule as per its contractual obligations unto me, since late November 2017. Regular paychecks were arbitrarily stopped in late November 2017 and to date no payment according to Marty Indian School's contractual obligations unto have been forthcoming, i.e.: I have not received due weekly paychecks according to my Contract of employment. I find Marty Indian School in egregious Breach of Contract.

Grievance 3: Egregious and reckless action in withdraw of promised pay.

According to its Motion made and Action voted upon on December 1, 2017, the Marty Indian School Board voted to pay-out my entire Contract, it's contract obligations unto me for the 2017-18 School-year, contractual pay in sum with what was already paid, totaling my annual salary of \$70,000. Open and pending for further resolution at that time was my expectation for other payment due according to Contractual Obligation of unused Leave buy-out and payment of Annuity.

Following the meeting in which this Action was taken on Friday, December 1st, at approximately 3PM, I met with the Superintendent in her Office at which time she indicated to me that I should clear-out my personals from my Office by the end of the weekend and that I was not expected back to my employed duties as my Contract was to be bought-out in its entirely forthwith.

On Monday, December 4th, in an All-Staff email sent by the Superintendent to all Marty Indian School Staff, it was indicated that I was "not coming back."

Nevertheless, I received nothing in writing addressed specifically to me in regards to my employment status.

APPENDIX PAGE A-71

Grievance, T. Stathis, January 3, 2018, pg. 2

Further communication in my attempt to discovering the status of the promised remaining pay-out of my annual Salary of \$70,000 during the week of December 4 -8, as per the Action of the School Board on December 1st, communication by me to both to the Superintendent and the payroll secretary, only indicated ongoing delays. Stated by the payroll secretary was that she was awaiting the unofficial Minutes from the Board meeting of December 1st, indicating the contract buy-out. This document of the Minutes of the Board Meeting of December 1st finally reached the payroll secretary on Friday, December 8th, but no action was taken to produce the promised paycheck of the contractual buy-out.

Late Monday afternoon of December 11, I was informed by the Superintendent that the buy-out paycheck was being generated and that it would be made available to me upon return of my District Property (the Principal laptop computer) and my school keys the following day.

I met with the Superintendent on the morning of December 12th in her Office at 9AM. I returned District property in my possession, and was handed the paycheck representing the amount in sum, owed to me in annual salary for the 2017-18 school-year bringing to total with what had already been paid to me during the school-year, my contractual annual salary of \$70,000. I recall this check was in gross amount somewhere in the realm of \$46,000 give or take a few thousand dollars.

As the Superintendent and I went into the office of the payroll secretary to ask a question, we found the payroll secretary on the phone. As a result of this phone call in which she handed the receiver to the Superintendent, the Superintendent informed me that the check was no longer valid, she asked for it back, that the Tribal Council Chairman had just stated to her in this phone call that the Tribal Council lawyer had advised them of their right to stop the payment to me if they so choose.

Upon returning to the Superintendent's Office, and while there in discussion, a Tribal Police Officer entered and stated his purpose was to escort me off the School Property, and to ensure I left behind my District laptop and the school keys. I inquired by whose direction he was taking this action, and he responded it was as per the direction given him by the Tribal Council.

I exited the School Campus.

Grievance 4: Erroneous Action has been taken by the School Board on December 20, 2017, in violation of all heretofore agreed attempts at resolution of Grievances and Action in violation of its own Contractual Obligations unto me, and in violation of its own Policies and Procedures.

On December 20, 2017 I had "heard" that there may have taken place a Special Meeting of the Marty Indian School Board that day and that this meeting might have had something to do with me and my employment status and the District's contractual obligations unto me. But I received no communication from the Marty Indian School Administration regarding this meeting.

On the morning of December 21st, I texted by phone the Superintendent as follows:

"Good Morning, Gina. I understand there was supposed to be a mtg. last night with me on the Agenda. Did that mtg. occur and if so, was there any action that occurred in regards to me? Tim

The Superintendent replied immediately with the following:

"Yes. They are going to give you the two weeks' pay you missed in November when you were suspended. They are also going to give you the \$1500 amount stated in your contract for a buy-out. You will not receive a payment until January as the school is now closed for the Holiday."

This action is arbitrary and capricious as a payment of \$1500 does not satisfy the School District's contractual buy-out as indicated as purported reasoning for the amount as stated in the text from the Superintendent in regards to the Action taken by the School Board, and thus the Action is arbitrary, in violation of the District's own Policies and Procedures, and a reckless act in order to avoid its proper

Grievance, T. Stathis, January 3, 2018, pg. 3

Contractual Obligations to me, and thus I find the District again in Breach of Contract. The statement of \$1500 buy-out in the employment contract refers, only, to the amount obligatory in pay-out from an employee to the School District should the employee unilaterally cease his/her contractual obligations. School District contractual obligations to its employees are referenced to resolutions as per its full Policies and Procedures. Resolution for a unilateral termination of its contractual obligations by the District could only be accomplished by a full buy-out of the contractual annual salary.

Grievance 5: As the status of my employment has not been given to me, and based on the all the indicators as so delineated, I find the District's actions paramount to Wrongful Termination.

Grievance 6: As indicated in the Grievance submitted on November 21, 2017, I have belief and potential proof that the actions of violations upon me perpetrated by at least certain members of the Marty Indian School Staff and Board, have been, at least in part, racially motivated.

Redress of Grievances being sought:

For resolution of the all Grievances as delineated above, inclusive of unresolved Grievances mentioned pertaining to the Grievances submitted by me on November 21, 2017, the following redress is hereby being sought:

1. The Marty Indian School needs to pay-out my full 2017-18 annual Salary immediately, along with payment for unused Leave pay-out as per my daily rate, and pay the District amount of due to my Annuity according to the 2017-18 amount I signed-up for in payment from my salary and the District's matching obligation for the entire 2017-18 school-year.
2. Marty Indian School to pay all my legal fees incurred in my pursuit of justice in regards to resolution of my contractual matters to date and further until resolution is achieved, and in my pursuit of justice in response to the defamation of character as outlined in the Grievance submitted on November 21, 2017 to date and further fees until full resolution is achieved.
3. Damages in the amount of \$250,000 paid to me immediately by the Marty Indian School for its reckless Breach of Contract, continued thwarting of its contractual obligations, violations of its own Policies and Procedures in regards to my employment ongoing since November 15, 2017, Defamation of Character, and Hardship and Suffering placed upon me by its continual egregious acts, reckless actions, and purposeful failure to engage in resolution of matters in good faith.
4. Marty Indian School Board public sanctioning of itself in regards to its egregious and reckless actions perpetrated upon me, with a full public apology to me for those actions, apology publically made to all students, parents, and staff members associated with the Marty Indian School.

Submitted this day, January 3, 2018,



Timothy Stathis

STATE OF SOUTH DAKOTA) IN THE CIRCUIT COURT
) :SS
 COUNTY OF CHARLES MIX) FIRST JUDICIAL CIRCUIT

Timothy Stathis,

Plaintiff,

vs.

Marty Indian School, a South Dakota non-profit corporation; Elk Soldier, also known as Gary Drapeau, Sr.; Glenn Drapeau; Galena Drapeau; Sarah W. Zephier; Sarah R. Zephier; Stephanie Courmoyer; Julie Blackmoon-Wright; and John and/or Jane Does One (1) through Five (5),

Defendants.

Signed: 8/14/2018 3:42:41 PM

~~EXHIBIT~~ 
 FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

Hearing Date: July 9, 2018

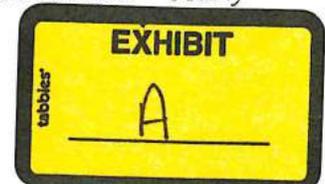
Time: 2:30 p.m.

Judge: Hon. Bruce Anderson

FINDINGS OF FACT

- 1) The Yankton Sioux Tribe ("Tribe") is a federally-recognized Indian tribe with headquarters on the Yankton Sioux Indian Reservation.
- 2) Marty Indian School is a tribally chartered entity of the Yankton Sioux Tribe, and receives funding under the Tribally Controlled Schools Act (TCSA), 25 U.S.C. §2501 *et seq.*, as a tribally controlled school of the Yankton Sioux Tribe. 25 U.S.C. § 1511(9).
- 3) Marty Indian School operates under a School Constitution approved by the Yankton Sioux Tribe Business and Claims Committee on November 6, 2013, pursuant to which it operates as a "legal entity of the Yankton Sioux Tribe, from whom Marty Indian School, Inc. has been delegated authority to operate and maintain the Marty Indian School. This authority has been delegated from the Yankton Sioux Business and Claims Committee." *Marty Indian School Constitution, Article I, Section 3.*

APPENDIX PAGE B-1



- 4) Marty Indian School was also incorporated as a non-profit corporation under the laws of the State of South Dakota until April 20, 2015 when that charter was administratively dissolved by the South Dakota Secretary of State.
- 5) Marty Indian School is located on the Yankton Sioux Indian Reservation. *Marty Indian School Bd., v. State of South Dakota*, 824 F.2d 684, 685 (8th Cir. 1987).
- 6) Defendants Gary Drapeau, Glenn Drapeau and Galena Drapeau are employees of the Marty Indian School, and are members of the Yankton Sioux Tribe.
- 7) Defendants Sarah W. Zephier, Sarah R. Zephier, Stephanie Cournoyer, and Julie Blackmoon-Wright were members of the Marty Indian School Board and are members of the Yankton Sioux Tribe. Other members of the Marty Indian School School Board were not named as Defendants in the Complaint.
- 8) Defendants John and/or Jane Does One (1) through Five (5) remain unnamed, but were presumably either employees or Board members of the Marty Indian School, or students at Marty Indian School.
- 9) All of the named Defendants are members of the Yankton Sioux Tribe.
- 10) Plaintiff Timothy Stathis was a Principal at Marty Indian School, and presently resides in South Dakota. Plaintiff is not an enrolled member of any federally recognized Tribe.
- 11) All of the actions and activities giving rise to the Complaint in this matter occurred on the Yankton Sioux Indian Reservation, and at the Marty Indian School.
- 12) Plaintiff entered into a contract for employment with the Marty Indian School Board on April 6, 2017.

13) The term of the employment contract was from August 1, 2017 until June 30, 2018, unless
“annulled by mutual consent, operation of law, or by the expiration or revocation of the
Teacher’s Certificate.”

14) The employment contract specified that:

The School Board is an entity of the Yankton Sioux Tribe, and is not bound by the laws of the State of South Dakota. The By-Laws and Policies and Procedures Manual of the School Board shall be binding and controlling on the parties and shall control the conduct of the operation of the school. Any matter by controlled by the By-Laws and Policies and Procedures will be controlled by the laws of the State of South Dakota. If ambiguity or question as to whether the laws of the State of South Dakota or the By-laws and Policies and Procedures Manual of the School Board is controlling shall arise, the By-Laws and policies and Procedures of the School Board shall be binding and controlling. The exceptions to South Dakota School Law includes, but is not limited to, the following matters, to wit: Administrator or Supervisor Retirement, School Calendar, Continuing Contract and Tenure, conflict of Interest. Nothing herein shall be construed to constitute and acceptance by the School Board of the jurisdiction of South Dakota courts.

15) The Yankton Sioux Tribal Code, Section 1-8-4, states, “Except as required by federal law, or the Constitution and By-Laws of the Yankton Sioux Tribe, or specifically waived by resolution or ordinance of the Tribal Council specifically referring to such, the Yankton Sioux Tribe shall be immune from suit in any civil action, and its officers and employees immune from suit for any liability arising from the performance of their official duties.”

16) Counts I, II, and III of the Complaint are claims based on alleged breach of the employment contract, and an alleged breach of an alleged verbal settlement agreement between the Plaintiff and the Marty Indian School School Board.

17) Counts IV and V of the Complaint allege libel and slander by named Defendants.

18) Count VI is a claim for punitive damages based on Counts I through V of the Complaint.

19) The relief sought in the Complaint is a monetary judgment against the Defendants.

20) On May 16, 2018, Defendants filed a Motion to Dismiss on the basis of lack of personal and subject matter jurisdiction, sovereign immunity, a failure to state a claim upon which relief can be granted, and inability to join a necessary and indispensable part pursuant to SDCL § 15-6-12(b)(1), (2), (5) and (6). A Hearing on the Motion was held on July 9, 2018, at which time the court heard oral argument and rendered its decision.

CONCLUSIONS OF LAW

- 1) The standard of review of a grant or denial of a motion to dismiss is the same as review of a motion for summary judgment. The question is whether the pleader is entitled to judgment as a matter of law. *Risse v. Meeks*, 1998 S.D. 112, 585 N.W.2d 875.
- 2) The Marty Indian School is a tribal entity of the Yankton Sioux Tribe, and is immune from suit in State Court, unless there is a clear and unequivocal waiver of tribal sovereign immunity, or clear congressional abrogation of tribal immunity. *C & L Enterprise, Inc. v. Citizen Band of Potawatami Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001); *Kiowa tribe of Okla. V. Mfg. Techs, Inc.*, 523 U.S. 751, 754 (1998).
- 3) The sovereign immunity of a Tribe extends to legal entities of the Tribe, including tribally controlled schools and colleges. *Sage v. Sicangu Oyate Ho, Inc.*, 473 N.W.2d 480, 482-483 (S.D. 1991); *Geidosh v. Little Wound School Board*, 995 F. Supp. 1052 (D.S.D. 1997); *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1044 (8th Cir. 2000).
- 4) In this case, Congress has not abrogated the sovereign immunity of the Marty Indian School, nor has the Marty Indian School waived sovereign immunity from suit in state courts. The employment contract in dispute in this case specifically states that, "Nothing herein shall be construed to constitute and acceptance by the School Board of the jurisdiction of South Dakota courts."

- 5) Whether the Marty Indian School at one time maintained state of South Dakota non-profit corporation status does not alter the sovereign immunity analysis. As the court found in *Geidosh v. Little Wound School Board*, “the fact that the board chose to incorporate under South Dakota law does not eliminate the Board’s connections to the Tribe...,” and “the fact that the Board is incorporated as a nonprofit corporation under South Dakota law does not affect its status as an ‘Indian tribe’”. 995 F. Supp. at 1055, 1059. *See also, Sage v. Sicangu Oyate Ho, Inc.*, 473 N.W.2d 480, 482-483 (S.D. 1991). Further, the employment contract at issue in this case clearly states that the School Board is not governed by South Dakota law, and that nothing in the contract provides a consent to the jurisdiction of South Dakota courts. As the Court found in *Sage v. Sicangu Oyate Ho, Inc.*, “No incorporation of state law by school . . . can create state subject matter jurisdiction where it does not otherwise exist or defeat the exclusive subject matter jurisdiction of the tribe where it is independently established on the basis of infringement or preemption principles.” 473 N.W.2d 480, 484 (S.D. 1991).
- 6) Under the Yankton Sioux Tribal Code, officers and employees of the Yankton Sioux Tribe, and its legal entities, including the Marty Indian School, are immune from suit seeking monetary damages “for any liability arising from the performance of their official duties.” *Yankton Sioux Tribal Code §1-8-4*. The Yankton Sioux Tribal Code clearly extends immunity to the actions of officers and employees of the Tribe when performing their duties. All of the actions forming the basis of this Complaint were undertaken by School Board members and employees while acting as Board members or employees of the School, while on the Yankton Sioux Indian Reservation. As such, under Tribal law, they retain immunity from suit in state court. *Geidosh v. Little Wound School Board*, 995 F.

Supp. 1052. (D.S.D. 1997). Although the Supreme Court recently held in *Lewis v. Clarke* that tribal sovereign immunity does not extend to the actions of employees of a tribal entity for tortious conduct off the reservation, that case is distinguishable from this case. 13 S. Ct. 1285, 1288 (2017). In *Lewis v. Clarke*, the Supreme Court did not rule on whether the individual employee had personal immunity from suit. *Id.* at 1291. In this case, the Yankton Sioux Tribal Code, §1-8-4 establishes personal immunity of tribal officers and employees performing their duties. *See also, Brown v. Garcia*, 17 Cal. App. 5th 1198, 1206-120, 225 Cal. Rptr.3d 910, 916-17 (Ct. App. 2017)(holding suit for defamation of character against tribal officials barred by immunity).

- 7) A second barrier to this Court's jurisdiction over this case arises from federal preemption and from the right of the Tribe and its tribal members to make its own laws and to be governed by them. It is well settled law that state regulation of, and state court jurisdiction over, disputes between a non-Indian employee and a tribal school and its employees and officials are pre-empted by federal laws including the Indian Self-Determination and Education Assistance Act and the Tribally Controlled Schools Act. *Marty Indian School Bd., Inc. v. State of South Dakota*, 824 F.2d 684, 688 (8th Cir. 1987); *Sage v. Sicangu Oyate Ho, Inc.*, 473 N.W.2d 480, 482 (S.D. 1991). All actions that form the basis of the Complaint in this case were undertaken on the Yankton Sioux Indian Reservation, by tribal member officers and employees of the Marty Indian School, at the tribally controlled Marty Indian School. As the Court reasoned in *Sage v. Sicangu Oyate Ho, Inc.*, application of state laws or state court jurisdiction over actions involving contracts between tribal members on the reservation or tribal entities and non-Indians on the reservation, "have generally been found either to infringe tribal sovereignty or to be preempted by federal

law.” *Id.* In this case, Plaintiff entered into a voluntary employment contract with the Marty Indian School Board. The actions and activities forming the basis of the Complaint were actions or activities by tribal members, on the Yankton Sioux Indian Reservation, at a tribally controlled school that is a legal entity of the Tribe. As such, this Court lacks subject matter jurisdiction over the Complaint on the grounds of federal preemption and infringement on the right of the Tribe and its members to make their own laws and to be governed by them. *Id.* See also, *Williams v. Lee*, 358 U.S. 217, 220 (1959).

- 8) The South Dakota Supreme Court has held that state courts have no jurisdiction over an action for punitive damages for the conduct of a tribal member on tribal lands, because it would infringe on tribal sovereignty. *Risse v. Meeks*, 585 N.W.2d 875, 877-878 (1998). Just as in *Risse v. Meeks*, while this Court does not have jurisdiction over the tort claims and contractual claims alleged in the Complaint, this Court expresses no opinion on whether a cause of action lies in tribal court. That is a question for the Yankton Sioux Tribal courts to answer in the event the Plaintiff brings a cause of action in tribal court.
- 9) Defendants in this case also allege the Complaint should be dismissed for inability to join the Yankton Sioux Tribe as a necessary and indispensable party. Because this case is disposed of on the basis of sovereign immunity, the immunity of tribal employees and officials, federal pre-emption, and infringement on tribal sovereignty, the Court need not decide this issue and declines to do so at this time.
- 10) The Court declines to grant the Motion for Dismissal on the basis of failure to state a claim on which relief can be granted because the Complaint fails to establish the necessary elements of defamation and slander. Whether there is a sufficient basis to proceed on the

tort claims in this action would be more appropriately decided on a motion for summary judgment pursuant to SDCL § 15-6-56.

ORDER

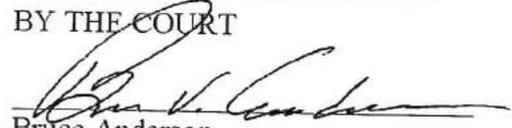
It is hereby ordered:

- 1) Defendants' Motion Dismiss the Complaint with prejudice is granted on the basis of tribal sovereign immunity, immunity of tribal officials and employees, federal pre-emption, and infringement on tribal sovereignty under SDCL § 15-6-12(b)(1), (2), and (5).
- 2) The Court declines to rule upon Defendant's Motion to Dismiss the Complaint for inability to join a necessary and indispensable party under SDCL § 15-6-12(b) (6) at this time.

SO ORDERED this ____ day of July, 2017.

Signed: 8/14/2018 3:41:59 PM

BY THE COURT


Bruce Anderson

Attest:
Robertson, Jennifer
Clerk/Deputy



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

APPEAL NO. 28738

Timothy Stathis

Plaintiff and Appellant,

vs.

Marty Indian School, a South Dakota non-profit corporation;
Elk Soldier, also known as Gary Drapeau, Sr.;
Glenn Drapeau; Sarah W. Zephier; Sarah R. Zephier;
Stephanie Cournoyer; Julie Blackmoon-Wright;
and John and/or Jane Does One (1) Through Five (5),

Defendants and Appellees.

BRIEF OF APPELLEES'

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Notice of Appeal filed on September 28, 2018.

Brief of Appellant filed on November 28, 2018.

TABLE OF CONTENTS

TABLE OF CASES, STATUTES AND OTHER AUTHORITIES CITED iii

PRELIMINARY STATEMENT1

JURISDICTIONAL STATEMENT1

STATEMENT OF THE ISSUE1

STATEMENT OF THE CASE3

STATEMENT OF THE FACTS4

STANDARD OF REVIEW6

ARGUMENT7

 I. TRIBAL SOVEREIGN IMMUNITY IS WELL ESTABLISHED
 IN LAW AND SHOULD NOT BE ABANDONED. 7

 A. Indian Tribes and Tribal Entities are Immune from Suit. 8

 B. Congress Has Not Abrogated the Sovereign Immunity of the Marty
 Indian School and Neither the Yankton Sioux Tribe nor the Marty
 Indian School Has Waived Sovereign Immunity. 10

 C. No Waiver of Tribal Sovereign Immunity Can Be Implied from the
 Employment Contract, or Granted based on an Argument of
 Detrimental Reliance or Estoppel. 14

 II. TRIBAL OFFICIALS AND EMPLOYEES ARE NOT SUBJECT TO SUIT
 IN STATE COURTS..... 18

 A. Tribal Officials and Employees are Immune from Suit for Their
 Conduct on the Reservation Within the Scope of Their Duties..... 18

 B. Tribal Officials and Employees Acted Within the Scope of Their
 Official Duties..... 20

 C. Federal Pre-Emption, and the Right of The Tribe to Make
 its Own Laws and be Governed by Them Bar Suit Against
 Tribal Employees and Officials. 22

 III. SUIT IN STATE COURT IS BARRED BY FEDERAL
 PRE-EMPTION AND INFRINGEMENT ON THE RIGHT OF

THE TRIBE TO MAKE ITS OWN LAWS AND TO BE
GOVERNED BY THEM. 23

IV. THE INTERESTS OF JUSTICE ARE SERVED BY UPHOLDING THE
TRIAL COURT’S DISMISSAL OF THIS ACTION. 26

CONCLUSION28

CERTIFICATE OF COMPLIANCE30

CERTIFICATE OF SERVICE.....30

APPENDIX I

TABLE OF AUTHORITIES

CONSTITUTIONS

S.D. CONST., art. XXII.....2, 25-26
Marty Indian School Constitution and Bylaws.....passim

STATUTES

Tribally Controlled Schools Act, 25 U.S.C. §§ 2501..... 2, 4, 5, 24
25 U.S.C. §2502 (a)(3) 5
25 U.S.C. §2511 (9) 5
SDCL 15-6-12(b)(1).....1, 2, 3
SDCL 15-6-12(b)(2).....1, 2, 3
SDCL 15-6-12(b)(5).....1, 2,3
SDCL 16–18–2.....12
SDCL 47-22-73.....14, 15
Yankton Sioux Tribal Law and Order Code, Section 1-8-4.....passim

REGULATIONS

2 C.F.R. Part 225, Appendix B, Sections 8, 10(g).....5
25 C.F.R. § 44.110(a).....5
25 C.F.R. § 900.45(e).....5

CASES

Allen v. Gold Country Casino, 464 F.3d 1044 (9th Cir. 2006)..... 11
Barry v. Time, 789 F. Supp. 2d 1015 (D.S.D. 2011).....16
Brown v. Garcia, 17 Cal. App. 5th 1198, 1206-1207, 225 Cal. Rptr. 3d 910, 916-17 (Ct. App. 2017).....22
California v. Cabazon Band of Mission Indians, 480 U.S. 202 (1987).....26
Calvello v. Yankton Sioux Tribe, 1998 S.D. 107.....2, 9, 10,13
Chayoon v. Sherlock, 877 A.2d 4 (Conn. App. 2005).....11
Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831).....17
Cheyenne River Sioux Tribe Tel. Auth. v. Pub. Utils. Comm’n of S.D.,
1999 S.D. 60.....10-13
Cournoyer v. Montana, 512 N.W.2d 479 (S.D. 1994).....11-12
DeCoteau v. District County Court, 420 U.S. 425, 428 (1975).....26

<i>Dillon v. Yankton Sioux Tribe Housing Auth.</i> , 144 F.3d 581, 583 (8 th Cir. 1998)..9	
<i>Employment Sec. Dep't v. Cheyenne River Sioux Tribe</i> , 119 N.W.2d 285 (S.D. 1963).....	10
<i>Estate of Billings v. Deadwood Congregation of Jehova Witnesses</i> , 506 N.W.2d 138, 140 (S.D. 1993).....	6
<i>Fletcher v. U.S.</i> , 116 F.3d 1315 (10 th Cir. 1997).....	19
<i>Geidosh v. Little Wound School Bd., Inc.</i> , 995 F. Supp. 1052 (D.S.D. 1997).....	9, 10, 15
<i>Guthmiller v. Deloitte & Touche, LLP</i> , 2005 S.D. 77.....	6-7
<i>Hagen v. Sisseton-Wahpeton Cmty. Coll.</i> , 205 F.3d 1040 (8 th Cir. 2000).....	2, 8,10,21
<i>Hardin v. White Mountain Apache Tribe</i> , 779 F.2d 476 (9 th Cir.1985).....	19, 21
<i>Iowa Mut. Ins. Co. v. LaPlante</i> , 480 U.S. 9 (1987).....	25, 27
<i>Kiowa Tribe of Okla. v. Mfg. Techs., Inc.</i> , 523 U.S. 751 (1998).....	8, 11, 14
<i>Larson v. Domestic Foreign Commerce Corp.</i> , 337 U.S. 682 (1949).....	21
<i>Lewis v. Clarke</i> , 581 U.S. ___, 137 S. Ct. 1285 (2017).....	22
<i>Linard v. Hershey</i> , 516 N.W.2d 304 (S.D. 1994).....	29
<i>Marty Indian Sch. Bd., Inc. v. State of S.D.</i> , 824 F.2d 684 (8 th Cir. 1987).....	5, 23-24
<i>Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.</i> , 2009 WL 11318298 (W.D. Tenn., Aug. 13, 2008), <i>aff'd</i> , 585 F.3d 917 (6 th Cir. 2009).....	16
<i>Merrill v. Birhanzel</i> , 310 N.W.2d 522 (S.D. 1981).....	19
<i>Michigan v. Bay Mills Indian Cmty.</i> , 572 U.S. 782 (2014).....	8, 9, 17
<i>M.J. v. U.S.</i> , 721 F.3d 1079 (9 th Cir. 2013).....	18
<i>Mordhorst v. Dakota Truck Underwriters & Risk Admin.</i> , 2016 S.D. 70.....	7
<i>Mortensen v. First Fed. Sav. and Loan Ass'n.</i> 549 F.2d 884, 891 (3 rd Cir. 1977)...	7
<i>Native American Distributing v. Seneca-Cayuga Tobacco, Co.</i> , 546 F.3d 1288 (10 th Cir. 2008).....	16
<i>Nygaard v. Sioux Valley Hosps. & Health Sys.</i> , 2007 S.D. 34.....	7
<i>Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.</i> , 498 U.S. 505 (1991).....	passim
<i>Osborn v. U.S.</i> , 918 F.2d 724 (8 th Cir. 1990).....	7, 28
<i>Phipps Bros. Inc. v. Nelson's Oil & Gas, Inc.</i> , 508 N.W.2d 885 (S.D. 1993).....	27
<i>Risse v. Meeks</i> , 1998 S.D. 112.....	2, 6, 25-27

<i>Sage v. Sicangu Oyate Ho, Inc.</i> , 473 N.W.2d 480 (S.D. 1988).....	passim
<i>Sanderlin v. Seminole Tribe of Fla.</i> , 243 F.3d 1282 (11th Cir. 2001).....	17
<i>Santa Clara Pueblo v. Martinez</i> , 436 U.S. 49 (1978).....	8
<i>Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng’g</i> , 476 U.S. 877 (1986).....	8, 12, 13
<i>U.S. v. Testan</i> , 424 U.S. 392 (1976).....	8
<i>Washington v. Confederated Tribes of Colville Reservation</i> , 447 U.S. 134 (1980).....	8
<i>White Mountain Apache Tribe v. Smith Plumbing Co.</i> , 856 F.2d 1301 (9th Cir.1988).....	13, 25
<i>Wilson v. Marchington</i> , 127 F.3d 805 (1997).....	17
<i>Worcester v. Georgia</i> , 31 U.S. (6 Pet.) 515 (1832).....	17
<i>Yankton Sioux Tribe v Podhrasky</i> , 606 F.3d 994, 1000–01 (8th Cir. 2010), <i>cert. denied</i> , <i>Yankton Sioux Tribe v. Daugaard</i> , 564 U.S. 1019 (2011), and <i>cert. denied</i> , <i>Daugaard v. Yankton Sioux Tribe</i> , 564 U.S. 1019 (2011)	27

SECONDARY AUTHORITIES

The Federalist No. 81, p. 511 (B. Wright ed. 1961) (A. Hamilton).....	7-8
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PRELIMINARY STATEMENT

References to the settled Record will be designated by “SR” followed by the page number. References to materials reproduced in the Appellant’s Appendix will be cited as “AP” followed by the page number. References to materials reproduced in the Appellee’s Appendix will be cited as “Appendix” followed by the page number. References to Appellant’s Brief will be cited as “App. Br.” followed by the page number.

The Appellant and Plaintiff in this matter will be referred to as “Plaintiff” or by name. The Appellees in this matter will be referred to as “Defendants” or by name or job title.

JURISDICTIONAL STATEMENT

This appeal arises from the Order granting in part the Defendants’ Motion to Dismiss issued by Judge Bruce Anderson in the First Judicial Circuit, Charles Mix County, South Dakota on August 14, 2018. The Court held a hearing on the Motion on July 9, 2018. Notice of Entry of Order and Judgment was served upon Appellant’s counsel on September 10, 2018. Appellant’s Notice of Appeal was filed on September 28, 2018.

STATEMENT OF THE ISSUE

Whether the Trial Court erred by granting Defendants’ (Appellees’) Motion to Dismiss on the basis of tribal sovereign immunity, immunity of tribal officials and employees, federal preemption, and infringement on tribal sovereignty under SDCL 15-6-12(b)(1), (2), and (5).

The Trial Court below held that it was without jurisdiction to hear the merits of Plaintiff’s Complaint and dismissed the case on the basis of tribal sovereign immunity, immunity of tribal officials and employees, federal preemption, and infringement on tribal sovereignty under SDCL 15-6-12(b)(1), (2), and (5). This Court’s clear precedent

establishes that the State courts lack jurisdiction to hear cases against the Marty Indian School, a tribal entity of the Yankton Sioux Tribe, by an employee pursuing contractual claims on the basis of sovereign immunity, federal pre-emption, and infringement on the right of the Tribe to make its own laws and be governed by them. This Court's precedents also establish that state courts lack jurisdiction to hear suits against tribal member employees for the alleged conduct of those tribal member employees that occurs within the scope of their official duties as officers and employees of a tribally controlled school on the Reservation. This Court's precedents establish that such cases are outside of state court jurisdiction on the basis of immunity, federal pre-emption, and infringement on the right of the Tribe and its members to make their own laws and to be governed by them.

- 1.) S.D. CONST. art. XXII
- 2.) Marty Indian School Constitution
- 3.) Tribally Controlled Schools Act of 1988 Sec. 5202-5203, 25 U.S.C. §§ 2501 *et seq.*
- 4.) SDCL 15-6-12(b)(1), (2), & (5)
- 5.) Yankton Sioux Tribal Law and Order Code, Section 1-8-4
- 6.) *Sage v. Sicangu Oyate Ho, Inc.*, 473 N.W.2d 480 (S.D. 1988)
- 7.) *Risse v. Meeks*, 1998 S.D. 112
- 8.) *Calvello v. Yankton Sioux Tribe*, 1998 S.D. 107
- 9.) *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040 (8th Cir. 2000)

STATEMENT OF THE CASE AND FACTS

STATEMENT OF THE CASE

This is an appeal from an order granting in part Defendants' Motion to Dismiss under SDCL 15-6-12(b) (1), (2) and (5) for lack of jurisdiction. In the proceedings below, Plaintiff alleged breach of contract, breach of settlement contract, wrongful termination, defamation of character/libel, and slander. (AP 13-16, Complaint). Mr. Stathis voluntarily entered into an employment contract with the Marty Indian School (hereinafter "MIS") on May 8, 2017, with an effective date of April 6, 2017. (AP A-23, Contract). The Contract was subsequently terminated by the MIS School Board on December 1, 2017. (AP A-69, School Board Draft Minutes). Legal Counsel to MIS, its School Board, and all named Defendants in the Complaint admitted Service of the Summons and Complaint on May 1, 2018. (SR 78).

The named Defendants filed a Motion to Dismiss and a Brief in Support thereof on May 16, 2018 based on lack of jurisdiction, sovereign immunity, federal preemption, failure to state a claim for which relief can be granted, and inability to join a necessary and indispensable party. (SR 88-127). Following a hearing on the matter, the Trial Court in the First Judicial Circuit, Charles Mix County, South Dakota, the Honorable Judge Bruce Anderson presiding, granted Defendants' Motion to Dismiss on the basis of lack of jurisdiction, tribal sovereign immunity, immunity of tribal officials and employees, federal preemption, and the right of the Tribe to make its own laws and be governed by them. Findings of Fact, Conclusions of Law, and Order Granting Defendant's Motion to Dismiss, ¶ 1, 11CIV18-000022 (Aug. 8, 2018) (hereinafter "Order") (AP B-8, Order).

The Court denied the Defendants' Motion to Dismiss on the basis of failure to state a claim and failure to join a necessary and indispensable party. (AP B-8, Order).

STATEMENT OF THE FACTS

The Yankton Sioux Tribe (hereinafter "Tribe") is a federally-recognized Indian Tribe. (AP B-1 at ¶1, Order). In exercising its sovereign powers as a tribal government, the Tribal Business and Claims Committee chartered the Marty Indian School on November 6, 2013. (AP B-3 at ¶3, Order); (Appendix A-4, MIS Constitution and By-laws). In the MIS Constitution, the Tribal Business and Claims Committee designated the MIS as "a legal entity of the Yankton Sioux Tribe, from whom Marty Indian School, Inc. has been delegated authority to operate and maintain the Marty Indian School." (Appendix A-5, MIS Constitution, Article 1, Section 3). This authority was delegated by the Yankton Sioux Business and Claims Committee to the MIS. *Id.* The MIS is located on the Yankton Sioux Indian Reservation in the town of Marty, South Dakota. (AP B-2, at ¶5, Order).

The MIS was also a not-for-profit corporation registered in South Dakota until it was administratively dissolved by the Secretary of State on April 20, 2015. (AP B-2 at ¶4, Order). The MIS has not been a registered South Dakota non-profit corporation since that time.

The MIS receives federal funding to operate under the Tribally Controlled Schools Act, 25 U.S.C. § 2501 *et seq.* from the Department of the Interior Bureau of Indian Education ("BIE"). (AP B-1 at ¶2, Order); *See also*, (SR 91, Defendants' Brief in Support of Motion to Dismiss). Because the MIS is "operated by an Indian tribe or tribal organization," the MIS is a "tribally controlled school" receiving federal funding

available under the Tribally Controlled Schools Act, as that term is defined in 25 U.S.C. § 2511(9). (AP B-4 at ¶3, Order). Pursuant to the Tribally Controlled Schools Act, the MIS uses its funding to provide an education to members of federally-recognized tribes at the school in grades kindergarten through eighth grade. (SR-91, Brief in Support of Motion to Dismiss at 2). *See also, Marty Indian Sch. Bd., Inc. v. State of S.D.*, 824 F.2d 684, 688 (8th Cir. 1987) (holding state fuel tax is pre-empted by federal educational laws governing Marty Indian School, Inc.). Federal funds may not be used to pay judgments, fines, sanctions, or damages claimed. 25 U.S.C. § 2502(a)(3); 25 C.F.R. § 900.45(e); 25 C.F.R. § 44.110(a); 2 C.F.R. § Part 225, Appendix B, Sections 8, 10(g); (SR 91, Brief in Support of Motion to Dismiss at 2).

Each of the named defendants are elected members of the MIS School Board or employees of the MIS, and are tribal members of the Yankton Sioux Tribe. (AP B-2 at ¶6, 7 and 9, Order). The unnamed Defendants are presumably either employees or School Board members or students at the MIS. (AP B-2 at ¶8, Order). All of the actions and activities Plaintiff alleges Defendants undertook in this matter occurred on the Yankton Sioux Indian Reservation at the MIS. (AP B-2 at ¶11, Order). Under the Yankton Sioux Tribal Code, Section 1-8-4, officers and employees of the Yankton Sioux Tribe, and its legal entities, are immune from suit seeking monetary damages, “for any liability arising from the performance of their official duties.” (Appendix B-15, Yankton Sioux Tribal Code, Section 1-8-4); (AP B-5 at ¶6, Order). All of the actions forming the basis of the Complaint were undertaken by MIS Board members and employees while acting as Board members or employees of the MIS. (AP B-5 at ¶6, Order).

Mr. Stathis voluntarily signed an employment contract with the MIS for the 2017-2018 school year on May 8, 2017, with an effective date of April 6, 2017. (AP A-21, A-23, Employment Contract); (AP B-2 at ¶12, Order). The Employment Contract specified that “The School Board is an entity of the Yankton Sioux Tribe, and is not bound by the laws of the State of South Dakota.” (AP B-3 at ¶14, Order); (AP A-22, A-23, Employment Contract). The Contract further stated, “Nothing herein shall be construed to constitute an acceptance by the School Board of the jurisdiction of South Dakota Courts.” (AP A-23, Employment Contract). The Employment Contract was terminated on December 1, 2017 by the School Board. (AP A-69, Draft School Board Minutes).

Mr. Stathis is not a member of any federally recognized Indian Tribe. (AP B-2 at ¶10, Order). Mr. Stathis has never filed suit in the courts of the Yankton Sioux Tribe in this matter. The MIS Board issued a check for \$1,500.00 to Mr. Stathis as a contract payment, but Mr. Stathis rejected that payment. App. Br. at 13.

STANDARD OF REVIEW

The standard of review applicable to a grant or denial of a motion to dismiss or a motion for summary judgement is the same: whether the pleader is entitled to judgment as a matter of law. *Risse v. Meeks*, 1998 S.D. 112, ¶ 10 (citing *Estate of Billings v.*

Deadwood Congregation of Jehova Witnesses, 506 N.W.2d 138, 140 (S.D. 1993)).

Although all properly pled facts should be treated as true, and all reasonable inferences of fact must be drawn in favor of the non-movant, a motion to dismiss tests the legal sufficiency of the pleading, not the facts which support it.¹ *Guthmiller v. Deloitte &*

¹ While the alleged facts asserted by the Plaintiff in his Complaint are treated as true, the Defendants do dispute Plaintiff’s assertions regarding some of the alleged tortious conduct occurring in this matter. However, such alleged facts are immaterial to the legal

Touche, LLP, 2005 S.D. 77 ¶ 4. This court exercises *de novo* review of trial court orders granting motions to dismiss. *Mordhorst v. Dakota Truck Underwriters & Risk Admin.*, 2016 S.D. 70, ¶ 8 (citing *Nygaard v. Sioux Valley Hosps. & Health Sys.*, 2007 S.D. 34, ¶ 9). Once sovereign immunity is asserted, the burden of proof is upon the Plaintiff to demonstrate that jurisdiction exists. *Osborn v. U.S.*, 918 F.2d 724, 730 (8th Cir. 1990) (citing *Mortensen v. First Fed. Sav. And Loan Ass'n.*, 549 F.2d 884, 891 (3rd Cir. 1977)).

ARGUMENT

I. TRIBAL SOVEREIGN IMMUNITY IS WELL-ESTABLISHED IN LAW AND SHOULD NOT BE ABANDONED.

Plaintiff's Opening Brief does not assert that there has been an explicit waiver of tribal sovereign immunity or the personal immunity of tribal officials or employees that is a prerequisite to jurisdiction of state courts to hear contractual and tort claims against tribes, tribal entities, and tribal members for conduct occurring on the Reservation on tribal land. Rather, Plaintiff asserts that the doctrine of tribal sovereign immunity "should be abandoned, or if not abandoned, sufficiently narrowed to allow suits by non-Indians over contractual or tortious matters to proceed so that they may be adjudicated on their merits in a state forum." App. Br. at 19-20. Such an invitation to abandon all prior South Dakota Supreme Court precedent on this matter is unwarranted. Like other governments, tribal governmental entities are entitled to sovereign immunity, as are their officials and employees, when acting within the scope of their official duties. As the very founders of the United States government explained, it is "inherent in the nature of

question of whether state courts lack jurisdiction to hear the matter. With respect to the facts material to jurisdiction, there is no disagreement between the parties. (SR 79-85, Defendants' Answer).

sovereignty not to be amenable” to suit without consent. *The Federalist No. 81*, p. 511 (B. Wright ed. 1961) (A. Hamilton).

A. Indian Tribes and Tribal Entities are Immune from Suit.

Indian tribes possess inherent sovereign authority that includes sovereign immunity from suit traditionally enjoyed by all governments and governmental entities. *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788 (2014); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Tribal sovereign immunity is subject to abrogation by explicit acts of the United States Congress when exercising Congressional plenary authority over Indian affairs; it is not subject to diminution by State governments. *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng’g*, 476 U.S. 877, 890 (1986); *Washington v. Confederated Tribes of Colville Reservation*, 447 U.S. 134, 154 (1980). There are only two mechanisms for the waiver of tribal sovereign immunity: explicit Congressional abrogation of tribal sovereign immunity, or an explicit waiver of tribal sovereign immunity by the Tribe itself. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998); *Santa Clara Pueblo*, 436 U.S. at 58. *See also, Oklahoma Tax Comm’n v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991) (“Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.”). This abrogation *must* be expressly and unequivocally stated. *Santa Clara Pueblo*, 436 U.S. at 58 (citing *U.S. v. Testan*, 424 U.S. 392, 399 (1976) (internal quotation omitted)).

Tribal sovereign immunity extends to tribal entities, that are an arm of the Tribal government, including tribally chartered schools. *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000) (holding that tribal community college is

immune from employment suit as an arm of the tribe); *Geidosh v. Little Wound School Bd., Inc.*, 995 F. Supp. 1052, 1059 (D.S.D. 1997) (holding Tribal School incorporated under South Dakota law as a non-profit corporation was an arm of the tribe exempt from Title VII and the ADA).

Like the tribes in the above-referenced cases, the Yankton Sioux Tribe, and the MIS as a tribal entity, is inherently immune from suit unless such immunity is abrogated by Congress or waived by the Tribe itself. *Calvello v. Yankton Sioux Tribe*, 1998 S.D. 107, ¶ 22 (holding Yankton Sioux Tribe is immune from suit in South Dakota court for termination of employment contract with Casino manager); *See also, Bay Mills Indian Cmty.*, 572 U.S. at 788 (citing *Okla. Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991)). In this case, the Yankton Sioux Tribe has not waived this immunity, and Congress has not abrogated the Tribe's immunity pursuant to its plenary authority over Indian affairs. Under this Court's binding precedent established in *Calvello v. Yankton Sioux Tribe*, the Yankton Sioux Tribe and its tribal entities are immune from suit. *Calvello*, ¶ 22. *See also, Dillon v. Yankton Sioux Tribe Housing Auth.*, 144 F.3d 581, 584 (8th Cir. 1998) (holding tribal housing authority immune from suit for termination of employment by non-Indian employee).

The Yankton Sioux Tribe created the Marty Indian School as a legal entity of the Tribe. (Appendix A-5, Marty Indian School Constitution, Article I, Section 3). The MIS School Board was delegated authority to operate the School from the Tribal Business and Claims Committee to provide an educational program for tribal students on the Yankton Reservation. *Id.* Numerous Courts, including this Court, have held that tribally controlled schools are an arm of the Tribe and as such, are entitled to tribal sovereign immunity

absent an explicit waiver or congressional abrogation of that immunity. *Sage v. Sicangu Oyate Ho, Inc.*, 473 N.W.2d 480, 482 (S.D. 1988) (holding that state court lacked jurisdiction over a school funded under the Indian Self-Determination Education and Assistance Act and operated for the sole benefit of Indian children, even though the school was incorporated as a non-profit under South Dakota law); *Geidosh v. Little Wound School Bd., Inc.*, 995 F. Supp. 1052, 1059 (D.S.D. 1997) (holding that a tribally controlled school incorporated under South Dakota law was immune from suit); *Hagen v. Sisseton-Wahpeton Cmty. Coll.*, 205 F.3d 1040, 1043 (8th Cir. 2000) (holding that a tribal college chartered, funded, and controlled by the tribe to provide education to tribal members is an arm of the tribe and therefore immune from suit). The MIS is, just like the tribally controlled schools in *Sage*, *Geidosh* and *Hagen*, a tribally controlled school not subject to suit in South Dakota state courts.

B. Congress Has Not Abrogated the Sovereign Immunity of the Marty Indian School and Neither the Yankton Sioux Tribe nor the Marty Indian School Has Waived Sovereign Immunity.

The South Dakota Supreme Court has already held that tribal sovereign immunity precludes state court jurisdiction over cases against Indian tribes and tribal entities. *See Calvello v. Yankton Sioux Tribe*, 1998 S.D. 107, ¶ 9 (holding that an action by a former employee of tribe to enforce an arbitration award was barred by sovereign immunity); *Employment Sec. Dep't v. Cheyenne River Sioux Tribe*, 119 N.W.2d 285, 287 (S.D. 1963) (holding that state court lacked jurisdiction in an action by the Employment Security Department of South Dakota to collect contributions allegedly owed to the state by the tribe).

Tribes may waive their sovereign immunity. *Kiowa Tribe*, 523 U.S. at 754. Like Congressional abrogation of immunity, this waiver must be expressly stated and cannot be implied from the text of a document, the circumstances of a dispute, or the actions of the tribe. *Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. at 509 (1991) (stating that a tribe’s waiver of sovereign immunity must be clear); *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006) (holding that employee manual stating that tribe would act in compliance with federal employment law did not waive tribal sovereign immunity); *Chayoon v. Sherlock*, 877 A.2d 4, 9 (Conn. App. 2005) (incorporation of Family Medical Leave Act in tribal employment contracts did not waive immunity from suit to enforce FLMA in federal or state courts).

Plaintiff asserts that “tribal immunity as a doctrine should be abandoned or narrowed.” App. Br. at 14. In support of this argument, Plaintiff cites to *Cournoyer v. Montana* and *Cheyenne River Sioux Tribe Tel. Auth. v. Pub. Utils. Comm’n of S.D.* for the proposition that tribal immunity has been limited by the South Dakota courts. 512 N.W.2d 479, 480 (S.D. 1994); 1999 S.D. 60, ¶ 23; *See*, App. Br. at 17. However, Plaintiff misapplies the holdings in these cases.

Cournoyer addressed the issue of whether South Dakota courts could prohibit an attorney who was not licensed to practice law in the state of South Dakota from representing the Yankton Sioux Tribe in South Dakota courts, even though the attorney was employed as a tribal attorney for the Yankton Sioux Tribe. *Cournoyer v. Montana*, 512 N.W.2d at 480 (S.D. 1994). The South Dakota Supreme Court held that South Dakota courts had jurisdiction to restrain a non-South Dakota licensed attorney from practicing in its state courts, but that South Dakota state courts had no jurisdiction to

restrain the attorney from practicing law in the Yankton Sioux tribal courts. *Id.* at 480-81. In fact, the restraining order issued by the Trial Court specifically stated that it did not affect Mr. Montana's ability to practice law in the Yankton Sioux Tribal Court. *Id.* at 480. ("[The TRO restricted] Montana's practice of law to the physical confines of the Yankton Sioux Tribe reservation or to the nonresident requirements of SDCL 16-18-2."). To the extent that *Cournoyer* deals with tribal sovereignty, the South Dakota Supreme Court did not interfere with tribes' sovereign authority to set their own licensing requirements for attorneys who practice in tribal courts.

In *Cheyenne River Sioux Tribe Tel. Auth.*, this Court held that the South Dakota Public Utilities Commission's (PUC) authority to approve the sale of telephone exchanges did not infringe upon tribal self-government. 1999 S.D. 60, ¶ 23. Plaintiff cites to this case as an example of a case where the South Dakota Supreme Court limited tribal sovereign immunity. App. Br. at 17-18. To the contrary, the South Dakota PUC initially attempted to condition its approval of the sale of the telephone exchanges to a tribal entity on the Tribe's waiver of its sovereign immunity. 1999 S.D. 60 at ¶ 7. On remand to the South Dakota PUC, the Trial Court directed the PUC to consider approval of the sale without conditioning that sale on the Tribe's waiver of its sovereign immunity. 1999 S.D. 60, ¶ 35. The South Dakota Supreme Court held that the South Dakota PUC complied with this directive and the South Dakota PUC did not consider the Tribe's refusal to waive its sovereign immunity when deciding to disapprove the sale of the telephone exchanges. *Id.* This Court noted that requiring the Tribe to waive its immunity as a precondition to the sale is preempted by federal law, and violates the United States Supreme Court's holding in *Three Affiliated Tribes of Fort Berthold Reservation*, 476

U.S. 877, 887 (1986), that a State’s jurisdiction cannot be unduly burdensome on tribal or federal interests. *Id.* To the extent that *Cheyenne River Sioux Tribe Tel. Auth.* applies to this case, it affirms the doctrine of preemption and upholds the right of tribal governments not to waive their sovereign immunity, consistent with U.S. Supreme Court precedent in *Three Affiliated Tribes of Fort Berthold Reservation*. 476 U.S. 877, 888 (1986).

Like the plaintiff in *Calvello*, the Mr. Stathis is a non-member employee of a tribal entity that has sovereign immunity. 1998 S.D. 107; (AP B-2 at ¶10). Mr. Stathis was employed at a tribally-chartered school located on the Reservation, just like the plaintiff in *Sage*. 473 N.W.2d 480, 483 (S.D. 1988); (AP B-1 and B-2 at ¶2, ¶3, ¶5). Mr. Stathis argues that tribal sovereign immunity should be abandoned, yet overlooks the substantial body of precedent from this Court, and from courts across the United States, recognizing tribal sovereign immunity as a necessary corollary to Indian self-governance. *Three Affiliated Tribes of Fort Berthold Reservation*, 476 U.S. at 890.

Because tribal sovereign immunity is well-established in law, this Court should not abandon its own precedents. As the South Dakota Supreme Court has opined when asked to take jurisdiction of a lawsuit against a Tribal school by a disgruntled former employee, “[i]t is well settled that civil jurisdiction over activities of non-Indians concerning transactions taking place on Indian lands presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute.” *Sage*, 473 N.W.2d at 482 (quoting *White Mountain Apache Tribe v. Smith Plumbing Co.*, 856 F.2d 1301, 1305 (9th Cir.1988) (internal citations omitted).

Plaintiff asks this Court to ignore its own precedents and an entire body of law that recognizes the only entity with authority to abrogate tribal sovereign immunity, other than the Tribe as the sovereign itself, is the United States Congress. Rather than ask this Court to overrule its own precedents, as well as those of the United States Supreme Court, Plaintiff should bring his complaints to the United States Congress or to the Tribal government of the Yankton Sioux Tribe. As Justice Anthony Kennedy explained in *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*:

. . . Congress is in a position to weigh and accommodate the competing policy concerns and reliance interests [of tribal sovereign immunity]. The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area. Congress . . . has always been at liberty to dispense with such tribal immunity or to limit it. It has not yet done so.

523 U.S. 751, 759 (1998).

C. No Waiver of Tribal Sovereign Immunity Can Be Implied from the Employment Contract, or Granted based on an Argument of Detrimental Reliance or Estoppel.

Mr. Stathis alleges that he was misled when entering into his Employment Contract because the Contract states that the MIS is a non-profit South Dakota corporation. App. Br. at 20. Mr. Stathis states that this single sentence in the Contract either constitutes a waiver of the MIS's immunity, or that it triggers this Court's jurisdiction under SDCL 47-22-73.² This argument is unfounded.

² Plaintiff did not assert in the Complaint that SDCL 47-22-73 was a basis for State court jurisdiction, or even assert that Mr. Stathis relied upon the School's incorporation in South Dakota as a basis for contracting with the School Board. Rather, this argument was first made during briefing in response to the Motion to Dismiss. (SR 134, Plaintiff's Response Brief to Defendants' Motion to Dismiss).

Even if the School acted as or held itself out as a non-profit corporation, tribal sovereign immunity would preclude state court jurisdiction under SDCL 47-22-73. In *Sage*, the South Dakota Supreme Court held that South Dakota state courts lacked jurisdiction over a school operated for the sole benefit of Indian children, even though the school was incorporated as a non-profit under South Dakota law. *Sage*, 473 N.W.2d at 482. The federal District of South Dakota Court reached the same conclusion in *Geidosh v. Little Wound School Bd., Inc.* 995 F. Supp. 1052, 1059 (D.S.D. 1997). In that case, the Oglala Sioux Tribe created a non-profit corporation under South Dakota Law for the purpose of operating the tribal school. When employees brought suit alleging violations of federal law, the Court dismissed the suit for lack of jurisdiction due to the tribe's sovereign immunity. *Id.*

The Employment Contract's reference to the MIS's status as a non-profit South Dakota corporation is not an express waiver of immunity required for a state court to exercise jurisdiction over this matter. *Sage*, 473 N.W.2d at 483-84. *See also*, *Citizen Band of Potawatomi*, 498 U.S. at 509 (stating that tribal waiver of sovereign immunity must be clear). To the contrary, the Employment Contract expressly states that "[n]othing herein shall be construed to constitute and [*sic.*] acceptance by the School Board of the jurisdiction of South Dakota Courts." (AP A22-23, Employment Contract). Further, the contract explicitly placed Mr. Stathis on notice that he was contracting with the School Board. (AP A-21 at ¶1, Employment contract). It also included explicit notice to Mr. Stathis that, "The School Board is an entity of the Yankton Sioux Tribe, and is not bound by the laws of the State of South Dakota." (AP A-22 at ¶7 "School Law", Employment Contract). Given the explicit contractual language stating that the School Board is not

subject to suit in state courts, it is not plausible that Mr. Stathis detrimentally relied upon the incorporation of the school under State law as a basis for contracting with MIS. Mr. Stathis was placed on notice by the explicit language in the contract that the School Board was not subject to State law, or suit in South Dakota courts.

Failing to find an express waiver of immunity required to maintain a suit against the School in South Dakota courts, Plaintiff argues that the School waived its immunity under the “waiver by estoppel doctrine.” Appellant’s Brief at 21. To support this argument, Plaintiff cites to *Barry v. Time*, a case involving whether a private insurance company was obligated to pay alternative care benefits to an insurance customer. *Barry v. Time*, 798 F. Supp. 2d 1015, 1017 (D.S.D. 2011). The issue before the Court was whether the insurance company’s efforts to prevent the occurrence of a condition precedent in the insurance contract that would obligate the insurance provide to pay the alternative care benefits to the insured constituted bad faith. *Id.* at 1020. The “waiver by estoppel” that the Court relied upon was the waiver of the condition precedent, not a waiver of sovereign immunity. *Id.* at 1019-20. There were no governmental parties or tribal interests involved in *Barry v. Time*.

The Tribal government and its tribal governmental entities, just like state and federal government entities, are not subject to equitable estoppel doctrines applicable to private parties. As with state and federal immunity, tribal sovereign immunity includes a presumption against finding a waiver of immunity by estoppel. *Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc.*, 2009 WL 11318298 at *9 (W.D. Tenn., Aug. 13, 2008), *aff’d*, 585 F.3d 917 (6th Cir. 2009) (holding that a contracting party’s reasonable belief that the tribe had waived its immunity did not create a waiver by estoppel); *Native*

American Distributing v. Seneca-Cayuga Tobacco, Co., 546 F.3d 1288, 1295 (10th Cir. 2008) (holding that the Tribe’s false statement that it waived its immunity did not create a waiver by estoppel); *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1289 (11th Cir. 2001) (holding that waiver by estoppel does not apply, even when the Tribal Chairman promised that the Tribe would not take certain actions that it subsequently takes).

Waivers of tribal sovereign immunity may not be implied or inferred, under any equitable principles of law. Rather, courts strictly construe language and strictly apply statutes dealing with alleged waivers of tribal sovereign immunity. *Citizen Band Potawatomi*, 498 U.S. at 509.

Likewise, there is no similarity between this Court’s rulings regarding religious freedom and the doctrine of sovereign immunity. App. Br. at 19. Tribal entities and Tribes are not religious entities. *See, Michigan v. Bay Mills Indian Cmty.*, 572 U.S. at 788 (“Indian tribes are ‘domestic dependent nations’ that exercise ‘inherent sovereign authority.’” *Citizen Band Potawatomi*, 498 U.S. at 509 (1991) (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831))). *See also, Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832) (“Indian nations had always been considered as distinct, independent political communities, retaining their original natural rights, as the undisputed possessors of the soil, from time immemorial.”). Tribes are governments entitled to the same respect, and the same rights as are accorded to other sovereign governments recognized under the laws of the United States. *See Wilson v. Marchington*, 127 F.3d 805, 807 (1997), *cert. denied*, 523 U.S. 1074 (holding that principles of comity govern whether a district court should recognize and enforce tribal court judgment).

The lament that it is unfair for Mr. Stathis not to have access to suit against the tribal entity and its officers and employees in state courts is simply misplaced. App. Br. at 19. Mr. Stathis entered into a voluntary consensual contract with a Tribal entity. (AP A-21, Employment Contract). He knew the contract would be performed on the Yankton Sioux Indian Reservation where the MIS is located. (AP A-21, Employment Contract). He knew from the explicit language in the contract that the School Board would not be subject to suit in State court or subject to State laws. (AP A-22; A-23, Employment Contract). This is no different than a resident of the State of Nebraska who works at a school in South Dakota alleging it is unfair for a Nebraska Court to rule it does not have jurisdiction over a South Dakota school or its employees residing in South Dakota.

Because the MIS expressly affirmed its immunity from suit in South Dakota Courts within the Employment Contract, and because that contract does not include any explicit waiver of sovereign immunity, there is no waiver of sovereign immunity in this case. The waiver by estoppel doctrine Plaintiff advances in his Brief as an equitable theory of relief is inapplicable to tribes and tribal entities. In this case, the Trial Court properly applied the law to the facts and dismissed the Complaint against the Defendants (Appellees) on the basis of tribal sovereign immunity.

II. TRIBAL OFFICIALS AND EMPLOYEES ARE NOT SUBJECT TO SUIT IN STATE COURTS.

A. Tribal Officials and Employees are Immune from Suit for Their Conduct on the Reservation Within the Scope of Their Duties.

Tribal employees and elected officials acting within the scope of their authority are also entitled to immunity from suit both under tribal law, and under this Court's precedent and other federal court precedent. *M.J. v. U.S.*, 721 F.3d 1079, 1084 (9th Cir.

2013) (holding tribal police officers are immune from tort liability while acting in their official capacity); *Fletcher v. U.S.*, 116 F.3d 1315, 1324 (10th Cir. 1997) (holding that tribal immunity protects tribal officials sued in their official capacities); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985) (holding tribal police officers acting within their official capacity are immune from suit for removing a non-member from tribal land);. Tribal employees and elected officials are immune from suit under the Yankton Sioux Tribal Law and Order Code, Section 1-8-4, which states,

Except as required by federal law, or the Constitution and By-laws of the Yankton Sioux Tribe, or specifically waived by a resolution or ordinance of the Tribal Council specifically referring to such, the Yankton Sioux Tribe shall be immune from suit in any civil action, and its officers and employees immune from suit for any liability arising from the performance of their official duties.

(Appendix B-15, Yankton Sioux Tribal Code Section 1-8-4); (SR 93, Defendants Brief in Support of Motion to Dismiss).

The named and unnamed Defendants are each enrolled members of the Yankton Sioux Tribe who are either members of the Marty Indian School Board or are employees of the Marty Indian School. (AP B-2 at ¶6-9, Order). The conduct Plaintiff alleges occurred happened while the Defendants were acting within the scope of their official capacity as School Board members or School employees. (AP B-5 at ¶6, Order). Because these defendants are tribal officials acting within the scope of their official capacities, these defendants are entitled to immunity from suit under Tribal law. *See also, Fletcher*, 116 F.3d at 1324.

In the context of suit against state school officials, this Court has recognized that immunity extends to suits against school district employees for alleged tortious conduct. *Merrill v. Birhanzel*, 310 N.W.2d 522, 524 (S.D. 1981). Just as in *Merrill*, Tribal school

officials cannot be sued for alleged tortious conduct unless the Yankton Sioux Tribe enacts legislation expressly permitting such suit. The Tribe in this case has not enacted such legislation. To the contrary, the Yankton Sioux Tribe has expressly extended personal immunity from suit to its officers and employees acting within the scope of their duties by enacting Yankton Tribal Code Section 1-8-4. (Appendix B-15, Yankton Sioux Tribal Code Section 1-8-4); (SR 93, Defendants Brief in Support of Motion to Dismiss).

B. Tribal Officials and Employees Acted Within the Scope of Their Official Duties.

Mr. Stathis alleges breach of contract, breach of an alleged verbal settlement agreement, and libel, and slander and libel by individually-named and unnamed defendants, all of whom are either elected members of the Marty Indian School Board, or employees of the MIS. (AP A-2 at ¶6, Complaint); (AP B-2 at ¶6-8; B-5 at ¶6, Order). Mr. Stathis alleges that the actions of the School Board Members “both as members of the School’s board of directors and as individuals, were careless, reckless, grossly negligent, and not taken in good faith.” (AP A-13 at ¶ 66, Complaint). However, Mr. Stathis does not allege any facts establishing that the actions of the School Board members were taken in any capacity other than the board members’ official capacity, as the Trial Court recognized. (AP B-5 at ¶6). The alleged contract actions were taken by the School Board acting as a whole, not by Board members in their individual capacity acting outside the scope of their official duties. *Id.* Article I, Section 4 of the School By-laws authorizes the School Board President to call emergency meetings of the Board. (Appendix A-13, Marty Indian School By-laws, Article I, Section 4). Article 4, Section 3 of the School Constitution states that the School Board Chairperson is responsible for conferring with the School Superintendent between Board Meetings. (Appendix A-10,

Marty Indian School Constitution, Article 4, Section 3). Under the MIS School By-laws, “the board retains and reserves unto itself the sole and exclusive right to the management and administrative control of the Marty Indian School system...” (Appendix A-17, MIS By-Laws, Article 4, Section 1)

Mr. Stathis may disagree with the alleged actions on his contract for employment. But the facts alleged by the Plaintiff, even in their most favorable light, demonstrate that the School Board as a whole, acting as a Board, took the alleged actions, not any individual Board member acting outside the scope of their duties. (AP A-13; A-14, Complaint, Counts I, II, and III). As such, the suit against individual School Board members on Counts I, II, and II of the Complaint is barred. *Hagen*, 205 F.3d at 1043. Appellant cannot defeat this immunity merely by suing officers in their individual capacity. *Larson v. Domestic Foreign Commerce Corp.*, 337 U.S. 682, 688 (1949). *See also, Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1988) (noting this principle of law extends to tribal officers).

Counts 4 and 5 of the Complaint allege Defamation of Character, Slander and Libel that occurred by named and unnamed employees and officials of the MIS during school hours, on school property on the Yankton Sioux Reservation, and while such employees were on the clock performing work for the school. (AP A-15, A-16, Complaint). For this reason, the immunity of tribal officials and employees established by Yankton Tribal Code Section 1-8-4 precludes state court jurisdiction over the named and unnamed Defendants in this case. (Appendix B-15, Yankton Sioux Tribal Code Section 1-8-4). The Trial Court correctly determined that such alleged actions occurred

while employees were performing official duties and not outside the scope of their duties. (AP B-5 at ¶ 6, Complaint).

C. Federal Pre-Emption, and the Right of The Tribe to Makes its Own Laws and be Governed by Them Bar Suit Against Tribal Employees and Officials.

Mr. Stathis urges this Court to hold that tribal officials and employees are not entitled to immunity from suit based on the recent Supreme Court holding in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017). App. Br. at 21. However, *Lewis* is distinguishable from this case. First, the tribal casino employee conduct at issue in *Lewis* occurred outside of the Tribe's Reservation, not on tribal lands. 137 S. Ct at 1289. Second, unlike the *Lewis* case, there would be substantial infringement on the Tribe's right to make its own laws and to be governed by them in this case. As the Court in *Brown v. Garcia* held after the Supreme Court's ruling in *Lewis*, actions for defamation of character against tribal officials conducting tribal business do infringe on the Tribe's right to make its own laws and to be governed by them. 17 Cal. App. 5th 1198, 1206-07 (Ct. App. 2017). This case would require the state court to determine if the actions of the tribal employees in conducting school business, including the actions of the School Board President and other teachers at Marty Indian School, constituted tortious conduct under tribal law (or state law and whether state law could supersede tribal law), and whether Yankton Sioux Tribal Code Section 1-8-4 applied. Just as in *Brown*, here, the act of a State court applying state law to the actions of tribal personnel acting within the scope of their duties on the Tribe's reservation is an infringement on the Tribe's right to make its own laws governing tribal member conduct, and to be governed by those laws. *Id.*

Third, Yankton Sioux Tribal Code Section 1-8-4 establishes personal immunity of tribal officials and employees when acting on behalf of the Tribe and its entities.

(Appendix B-15). The Supreme Court, in *Lewis*, specifically held that it was not ruling on any personal immunity that might apply to Lewis as a tribal employee as this issue was not presented to the Court. *Lewis*, 137 S.Ct. at 1291.

III. SUIT IN STATE COURT IS BARRED BY FEDERAL PRE-EMPTION AND INFRINGEMENT ON THE RIGHT OF THE TRIBE TO MAKE ITS OWN LAWS AND TO BE GOVERNED BY THEM.

Tribal control over the operation of tribal schools is of critical importance to tribal nations. As the Court explained in *Marty Indian School, Inc. v. South Dakota*,

The Self-Determination Act declares that a “major national goal of the United States is to provide the quantity and quality of educational services and opportunities which will permit Indian children to compete and excel in the life areas of their choice, and to achieve the measure of self-determination essential to their social and economic well-being.” 88 Stat. 2203, as set forth in 25 U.S.C. § 450a(c). In achieving this goal, Congress expressly recognized that “parental and community control of the educational process is of crucial importance to the Indian people.” 88 Stat. 2203, as set forth in 25 U.S.C. § 450(b)(3).

824 F.2d 684, 687 (8th Cir. 1987). The court found that, “Plaintiff Yankton Sioux Tribe, like the Ramah Navajo Tribe, seeks to promote Indian self-determination by creating and operating an Indian school tailored to the needs and goals of the Indian people.” *Id.*

Ultimately, the court held that South Dakota law imposing a motor vehicle tax on the Marty Indian School was pre-empted by federal law, “in light of the strong federal policy of promoting Indian self-determination and education and the pervasive involvement of the federal government in the operation of the Marty Indian School.” *Id.* at 688 (8th Cir. 1987).

The Tribally Controlled Schools Act further delineates the incredibly important interest Tribal nations and the federal government have in the operation of tribal schools.

Congress explicitly recognized how essential tribal control over the operation of tribal schools is when it enacted the Tribally Controlled Schools Act, finding that,

Congress recognizes that the Indian Self-Determination and Education Assistance Act [25 U.S.C. § 5301 *et seq.*], which was a product of the legitimate aspirations and a recognition of the inherent authority of Indian nations, was and is a crucial positive step toward tribal and community control and that the United States has an obligation to assure maximum Indian participation in the direction of educational services so as to render the persons administering such services and the services themselves more responsive to the needs and desires of Indian communities.

25 U.S.C. §2501(a). (Appendix D-1). Congress further recognized that,

(1) true self-determination in any society of people is dependent upon an educational process that will ensure the development of qualified people to fulfill meaningful leadership roles;

(2) that Indian people have special and unique educational needs, including the need for programs to meet the linguistic and cultural aspirations of Indian tribes and communities; ...

25 U.S.C. §2501(d) (1) and (2). (Appendix D-1, D-2). Few fields are as fundamentally important to the self-determination and the health and well-being of Tribal nations as the ability to have decision making authority in the operation of tribal schools, including the employment of persons by tribal schools, and the regulation of relationships between employees within tribal schools.

Just as in *Marty Indian Sch. Bd., Inc.*, this Court has held that State Court jurisdiction over employment disputes between a non-member employee and a tribal school are pre-empted by federal law. In *Sage v. Sicangu Oyate Ho*, this Court explained that,

assertions of state subject matter jurisdiction over contracts between reservation Indians and outsiders have generally been found either to infringe tribal sovereignty or to be preempted by federal law. “It is well settled that civil jurisdiction over activities of non-Indians concerning transactions taking place on Indian lands ‘presumptively lies in the tribal courts unless affirmatively limited by a specific treaty provision or federal statute’.

473 N.W.2d 480, 482 (S.D. 1991) (citing *White Mountain Apache Tribe v. Smith Plumbing Co.*, 856 F.2d 1301, 1305 (9th Cir.1988)) (quoting *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18 (1987)) (citations omitted)). As Justice Henderson explained in his concurrence, “Indian tribal courts must be left to determine disputes involving personnel matters in Indian schools.” *Id.* at 484 (S.D. 1991) (Henderson, J. concurring).

This Court has also held that it lacks jurisdiction over the alleged tortious conduct of tribal members on tribal lands in a suit seeking punitive damages against tribal members, even where the complaining party is a non-member of the Tribe. In *Risse v. Meeks*, the Court held that suit for punitive damages for a tribal member’s failure to fence tribal trust lands resulting in cattle damage to off-reservation fee lands was beyond the State Court’s jurisdiction. 1998 S.D. 112, ¶ 18. As this Court explained, South Dakota’s own State Constitution limits the jurisdiction of the State of South Dakota over conduct of tribal members on tribal lands. *Id.* Article XXII of the South Dakota Constitution is a compact between the state of South Dakota and the United States that was a prerequisite to South Dakota’s entry into the Union of the United States. It specifically required the State to abdicate all jurisdiction over tribal lands, stating,

That we, the people inhabiting the state of South Dakota, do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundary of South Dakota, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States; and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States

S.D. CONST. art. XXII. (Appendix C-1). Based upon this provision, this Court explained that

It is common ground here that Indian conduct occurring on the trust allotments is beyond the State's jurisdiction, being instead the proper concern of tribal or federal authorities.

Risse v. Meeks, 1998 S.D. ¶18 (quoting *DeCoteau v. District County Court*, 420 U.S. 425, 428 (1975)).

IV. THE INTERESTS OF JUSTICE ARE SERVED BY UPHOLDING THE TRIAL COURT'S DISMISSAL OF THIS ACTION.

Congress, in exercising its plenary authority over Indian affairs, has consistently recognized that tribal sovereign immunity is essential to carrying out its policy of promoting Indian self-government, including Congress's overriding goal of “. . . encouraging tribal self-sufficiency and economic development.” *Citizen Band of Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991) (quoting *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987)).

Plaintiff asserts that “even if immunity applies, it should be deemed waived by the Court in this case in the interest of justice.” App. Br. at 22. Plaintiff supports this argument with speculation and assertions that if he were to file his case in the Yankton Sioux Tribal Court, he would meet the same jurisdictional bar as he faces in South Dakota state court. *Id.*

What Plaintiff fails to address, however, is the injustice of any Court exceeding its jurisdictional limits. If courts were to abandon all jurisdictional requirements based on equitable arguments, then tribes, other governmental entities, and citizens would be subject to endless litigation without bounds in any court where a plaintiff chose to file an action. Mr. Stathis may not like that tribes and tribal officials and employees are immune from suit in state court absent an explicit waiver of immunity, and that state court assumption of jurisdiction over actions against tribal members for conduct on tribal lands,

or against the tribe and its entities, is pre-empted under federal law and infringement doctrines.³ But this discontent with judicial precedents does not amount to an injustice that compels this Court to assert jurisdiction where none exists. As this Court has explained,

Risses conceded to the trial court that they could have litigated this matter in tribal court and their sole justification for not doing so was because “we ain't going there [.]” Personal dissatisfaction with using a tribal court as the jurisdiction for the resolution of a legal dispute has been rejected as a valid basis to create jurisdiction to proceed in another court system.

Risse v. Meeks, 1998 S.D. 112, ¶ 20 (citing *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 18–19 (1987)).

Tribes and their members should have the same right to certainty in the law when established by precedents of this Court that all other citizens of South Dakota have when bringing actions in court systems: the right to expect that a Court will be bound by the doctrine of *stare decisis*. As Justice Henderson once explained, “South Dakota's lawyers are entitled to a continuity of the law, rooted in a belief of reliance on how this Court has ruled in the past. Based on such a reliance, they have a reasonable expectation of future decisions. This, in turn, equates into advice unto the public.” *Phipps Bros. Inc. v.*

³ Plaintiff asserts that, by not consenting to suit in State Court, Defendants and their legal counsel are perpetuating the “further isolation of tribes and their members from the rest of society.” App. Br. at 23. This point is not well taken by Defendants. Such assumptions about tribal nations and tribal members living within their homelands are based upon stereotypes of tribal peoples and tribal nations. Contrary to the Plaintiff’s assertion, the Yankton Sioux Tribe and its members are not “isolated,” nor is their self-determination as a nation to their detriment. As the court found in *Yankton Sioux Tribe v Podhrasky*, national policies of allotment of tribal lands and efforts to assimilate Indian persons into non-tribal governance systems were ultimately destructive to the health and well-being of the Yankton Sioux Tribe and its members. 606 F.3d 994, 1000–01 (8th Cir. 2010), *cert. denied*, *Yankton Sioux Tribe v. Daugaard*, 564 U.S. 1019 (2011).

Nelson's Oil & Gas, Inc., 508 N.W.2d 885, 891–92 (S.D. 1993) (Henderson, J. concurring in part and dissenting in part). Injustice would result from upsetting the reasonable expectations of tribal schools and their employees, based on this Court’s prior precedent, and federal educational laws, holding that disputes involving employment, or the conduct of school personnel, will be heard in tribal court – not state court.

CONCLUSION

The Trial Court did not err in granting Defendants’ Motion to Dismiss. Tribal sovereign immunity, federal preemption, and infringement on the Tribe’s right to make its own laws and be governed by them are threshold determinations of jurisdiction over claims brought against Indian tribes, tribal entities, or tribal officers and employees acting within the scope of their official capacity. If a court does not have jurisdiction, then its only option is to dismiss the case.

Relying on this Court’s precedents, as well as those from federal courts including the United States Supreme Court, the Trial Court determined that dismissal was required. Plaintiff has not met his burden to prove that tribal sovereign immunity does not apply in this case. *See Osborn v. U.S.*, 918 F.2d 724, 730 (8th Cir. 1990) (stating that once sovereign immunity is asserted, the burden of proof is upon the Plaintiff to demonstrate that jurisdiction exists). Further, Plaintiff has not provided any basis for this Court to find that federal preemption does not apply to this case of an employment dispute between a tribally controlled school and its employee, and a dispute between that employee and tribal employees and officials acting within the scope of their duties.

Justice Henderson’s analogy between the doctrine of *stare decisis* and a bridge carrying justice was never more apt as it is in this case. As he explained,

Stare decisis may be likened unto a bridge over which the law travels—and travels safely—as it bears the burden of carrying the cargo of justice. When the bridge breaks down, justice can flounder, in confusion, in the swirling water below. As a life jacket, it does not hurt, from time to time, to examine the pilings of the bridge to determine if it is still strong enough and stable enough to bear the load.

Linard v. Hershey, 516 N.W.2d 304, 308 (S.D. 1994) (Henderson, J. dissenting). Here, Mr. Stathis asks this Court not just to examine one of the many pilings of the bridge carrying justice, but rather, to tear away all the pilings under the bridge and expect justice to safely continue on its travels. Of course, a bridge without pilings will not stand.

For these reasons, Defendants respectfully ask this Court to affirm the Trial Court's Order granting the Motion to Dismiss on the basis of sovereign immunity, immunity of tribal officials and employees, federal preemption, and infringement on the Tribe and its members' right to make their own laws and be governed by them.

Dated this 11th day of January, 2019.

Respectfully submitted
For Appellees by

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CERTIFICATE OF COMPLIANCE

Rebecca L. Kidder, attorney for Appellees, hereby certifies that the foregoing brief meets the requirements for proportionally spaced typeface in accordance with SDCL § 15-26A-66(b) as follows:

- a. Appellees’ Brief does not exceed 32 pages.
- b. The body of Appellees’ Brief was typed in Times New Roman 12-point typeface;
and
- c. The body of Appellees’ brief contains 8,237 words and 42,577 characters without spaces, according to the word and character counting system in Microsoft Office Professional Plus 2013 for Windows used by the undersigned.

 /s/ Rebecca Kidder
Rebecca Kidder
Attorney for Appellees

CERTIFICATE OF SERVICE

The undersigned attorney for Appellees, does hereby certify that she served copies of Appellee’s Brief and Appendix, via USPS First-Class Mail and by email in PDF format, upon the following:

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

APPEAL NO. 28738

Timothy Stathis

Plaintiff and Appellant,

vs.

Marty Indian School, a South Dakota non-profit corporation;
Elk Soldier, also known as Gary Drapeau, Sr.;
Glenn Drapeau; Sarah W. Zephier; Sarah R. Zephier;
Stephanie Cournoyer; Julie Blackmoon-Wright;
and John and/or Jane Does One (1) Through Five (5),

Defendants and Appellees.

APPENDIX TO APPELLEE'S BRIEF

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INDEX TO APPENDIX

A. Affidavit of Rebecca L. Kidder in Support of Defendants’ Motion
To Dismiss.....A-1 through A-2

 Kidder Affidavit Exhibit 1: Constitution and Bylaws of
 Marty Indian School, November 6, 2013.....A-3 through A-18

 Kidder Affidavit Exhibit 2: Secretary of State Business Search
 Record of Administrative Dissolution at [https://sosenterprise.sd.
gov/BusinessServices/Business/FilingDetail.aspx? CN=104007
179079134131160203131017187239126109175063](https://sosenterprise.sd.gov/BusinessServices/Business/FilingDetail.aspx?CN=104007179079134131160203131017187239126109175063)
 (last accessed on May 15, 2018)A-19 through A-20

B. Yankton Sioux Tribal Code Title 1.....B-1 through B-17

 Yankton Sioux Tribal Code Section 1-8-4.....B-15

C. South Dakota Constitution Article XXII.....C-1

D. Tribally Controlled Schools Act 25 U.S.C. §2501.....D-1 through D-2

E. Tribally Controlled Schools Act 25 U.S.C. §2511.....E-1 through E-3

STATE OF SOUTH DAKOTA) COUNTY OF CHARLES MIX)	IN THE CIRCUIT COURT :SS FIRST JUDICIAL CIRCUIT
Timothy Stathis, Plaintiff, vs. Marty Indian School, a South Dakota non-profit corporation; Elk Soldier, also known as Gary Drapeau, Sr.; Glenn Drapeau; Galena Drapeau; Sarah W. Zephier; Sarah R. Zephier; Stephanie Cournoyer; Julie Blackmoon-Wright; and John and/or Jane Does One (1) through Five (5), Defendants.	11CIV18-000022 AFFIDAVIT OF REBECCA L. KIDDER

I, Rebecca L. Kidder, declare as follows:

1. My name is Rebecca L. Kidder and I am a partner at Fredericks Peebles & Morgan LLP and I am legal counsel to Defendants Marty Indian School and all employees and School Board members named in this action as Defendants in their official capacities.

1. Attached to this Affidavit as Exhibit 1 is a true and correct copy of the Constitution and By-Laws of the Marty Indian School adopted by the Yankton Sioux Tribe Business and Claims Committee on November 6, 2013.

2. Attached to this Affidavit as Exhibit 2 is a true and correct copy of the South Dakota Secretary of State Website Business Search for "Marty Indian School" accessed by me on May 15, 2018 documenting the dissolution of the not for profit state chartered corporation Marty Indian School, Inc. dissolved on April 20, 2015. The website address for this document id

<https://sosenterprise.sd.gov/BusinessServices/Business/FilingDetail.aspx?>

CN=104007179079134131160203131017187239126109175063.

I swear under the penalty of perjury under the laws of the United States that the foregoing is true and accurate to the best of my knowledge.

Dated this 16th day of May, 2018.



Rebecca L. Kidder

KIDDER AFFIDAVIT

EXHIBIT 1



Marty Indian School, Box 187 100 South Main Marty, SD 57364



MARTY INDIAN SCHOOL

CONSTITUTION

**Approved by the Business and Claims Committee on
November 6, 2013**

CONSTITUTION OF MARTY INDIAN SCHOOL

ARTICLE 1 -- ORGANIZATION

Section 1: Name of Corporation.

The name of the corporate body found herein shall be Marty Indian School, Incorporated. The governing body of the corporation shall be the Marty Indian School Board.

Section 2: Purpose of the Corporation.

The Marty Indian School Board (referred to as the school board or the board) is the elected body of the corporation, which is a non-profit educational enterprise, and which has been created for the purpose of maintaining and continually upgrading the educational process for the students of the Marty Indian School.

Section 3: Authority of the School Board.

The Marty Indian School is a legal entity of the Yankton Sioux Tribe, from whom Marty Indian School, Inc., has been delegated authority to operate and maintain the Marty Indian School. This authority has been delegated from the Yankton Sioux Business and Claims Committee.

Section 4: Powers of the School Board.

Board members are to have legal authority to conduct business at any properly called school board meeting.

- A. An individual school board member cannot make any unilateral or arbitrary action on behalf of the board outside of a properly called meeting.
- B. Any statement or action taken by an individual board member in the name of the corporation shall be null and void, and the board member shall be subject to sanction according to the policies and procedures developed by the board.

Section 5: Responsibilities of the School Board

It shall be the responsibilities of the board to: meet at a regularly designated time to transact business, establish policy, and plan as necessary to maintain the educational process of the Marty Indian School. This includes meeting state educational accreditation requirements, hiring the superintendent and other corporate employees, and delegating to the superintendent authority to act on behalf of the school board in all pertinent areas; approve all board and staff travel done on the part of the corporation; develop appropriate school policy; adopt salary schedules for all employees; adopt an annual budget; review the school budget on a timely basis; decide the nature and extent of the educational programs; and represent the entire community without fear of favor or reprisal; select a school board election committee and authorize them to conduct all school board elections.

Section 6: Committees

There shall be no standing or permanent committees; however, committees may be formed and dissolved in order to assure the orderly operation of Marty Indian School.

ARTICLE 2: SCHOOL BOARD MEMBERSHIP

Section 1: Eligibility Requirements

Eligibility to serve on the Marty Indian School Board shall be limited to enrolled Yankton Sioux Tribal members and any Native American person living within the exterior boundaries of the Yankton Sioux Reservation, who is twenty-one (21) years of age or older and who has not been selected by the Marty Indian School Board for employment. Anyone working for the Marty Indian School is ineligible to be a member of the Marty Indian School board, unless they are willing to resign their position from the school system. Any person convicted of a felony will not be allowed to be a member of the school board. In the case of a vacancy, a school board member shall not hold another seat on the school board until his/her term is completed. Reservation Residency: One (1) year prior to the election with proof of residency: mailing and/or employment address.

Section 2: Resignation of Board Members

Any school board member may resign at any time by delivering a written resignation to the superintendent. Acceptance of any such resignation shall be as stated in the written resignation; or if no date is provided, then the date of the delivery shall be the effective date of resignation.

Section 3: Removal from Board Membership

The following are causes for removal from board membership:

- A. If a board member is absent from three (3) consecutive regular meetings, s/he may be removed by the other school board members by a majority vote of the remaining members. The President of the school board shall notify the ex-member by certified mail that such removal has taken place.
- B. A board member may also be removed due to inadequate attendance at meetings while on travel status, unethical and/or unlawful conduct, or for conduct unbecoming a board member as determined inappropriate by an affirmative vote of three (3) of the remaining members of the school board.
- C. A school board member may be removed for cause in a vote of fifty-one percent (51%) of the electorate eligible to vote in a school board election; such vote shall be in favor of removal of such board member at a duly held recall election. A recall election shall be held only upon the satisfactory completion of the following conditions and procedures:
 - 1. A recall petition must be prepared naming the board member or members to be removed, the reasons for such removal, and be duly verified by the circulation of the recall petition.
 - 2. The recall petition must be circulated and signed by fifty-one percent (51%) of the total number of votes cast in the preceding school board election. Beside each signature, the signer shall place the date of signing and his/her local address.
- D. Violation of the MIS Drug and Alcohol policy as set forth in the Personnel Policies and Procedures Manual.
- E. Violation of Credit Card policy as set forth in the MIS Fiscal Management Policy Chapter of the Policies and Procedures Manual.

Section 4: Sanctioning of Board Members

An admonishment by the members of the Martyr Indian School Board of another board member for actions not in accordance with the Martyr Indian School Policies and Procedures Manual, or for conduct unbecoming a board member, as determined by an affirmative vote of three (3) of the school board members present at a duly called meeting, shall be published in the minutes of the school board meeting.

Section 5: Filling Board Vacancies

A vacancy on the board shall be filled by a majority vote of the remaining board members for the unexpired portion of the term; the new board member shall be appointed at-large by the school board

If there is no school board the following will occur:

- 1. Participation in the election process as described within this document.**

ARTICLE 3 – VOTING IN ELECTIONS

Section 1: Nominations

Any person eligible for board membership under Article II, Section 1, shall be given the opportunity to volunteer his/her name for membership on the school board by submitting a properly completed petition to the chairperson of the election committee by 5:00 p.m., on the weekday preceding the day of the election, two weeks prior to the date of the election. Each petition shall bear at least twenty (20) signatures of people over eighteen (18) years of age, and who are themselves eligible for voting membership.

Section 2: Eligibility for Voting Membership

Yankton Sioux Tribal members residing within the boundaries of the area known as the 1858 Boundaries who are twenty-one (21) years of age or older. A Yankton Sioux Tribal Identification card is required at the time of voting.

Section 3: Election Committee

- A. The election committee, for the purposes of this section, shall be the Marty Indian School Election Committee. The Marty Indian School Election Policies and Procedures shall be those found within this Marty Indian School Constitution and Bylaws. It is the function of the election committee to verify nominations according to provisions of this Constitution and Bylaws; select the election officials for the designated polling places; and designate length of balloting. The election committee and election officials shall, by their capacity, be ineligible for board membership.**
- B. During the conducting of the elections hereunder there shall be no loitering. Nor shall there be electioneering within 100 feet of the polling place. Candidates who violate this provision are subject to disqualification.**

Section 4: Notice of Election

Notice of election must be published and/or posted in all polling places and conspicuous places at least thirty (30) days prior to the designated election date.

Section 5: Election and Tenure in Office

1. Every election shall be by secret ballot at each local polling place, as provided by the Constitution.
2. Board members shall be elected to three-year terms. In order to maintain a balance, the first election shall be as follows: Two (2) three (3) year terms; Two (2) year terms; and, one (1) one year term. Thereafter, all are three (3) year terms.
3. A school board election shall be held annually on the third (3d) Tuesday in April, or within thirty (30) days prior to, or within thirty (30) days after that day, if approved by an affirmative vote of three (3) members of the board.

Section 6: Challenge of Election Results

An unsuccessful candidate for the school board may challenge the results of the school board election within twenty-four (24) hours of the posting of the election results by submitting his/her grievance to the election board in writing, stating the reason(s) for such a challenge. The Marty Indian School Election Committee shall make the final decision as to the results of such challenge.

Section 7: Size of School Board

The size of the school board shall be five (5).

Section 8: Circumstances

- A. To clarify tie votes if they cause competition for remaining positions on the board.
 1. Notification of the runoff voting will contain the nominees who will be voted on, and why those specific nominees need to be voted on.
 2. Voting on the nominees who are involved in the runoff shall be no later than two (2) weeks following the school board election.

ARTICLE 4: RESPONSIBILITIES OF SCHOOL BOARD MEMBERS AND ADMINISTRATIVE OFFICERS

Section 1: Composition of Board Officers

The school board shall consist of five (5) members, and includes two (2) officers: The President and Vice-President.

Section 2: Seating of New Members/Terms of Office

1. At the annual organization meeting, normally held at the regular board meeting during the second Monday in May, the retiring board members shall remain an official part of the board until such time as the unfinished business portion of the meeting is completed.
2. At the beginning of new business in the annual meeting, the board shall have the newly elected members installed by oath and shall take the seats of the members whose terms have expires.
3. Immediately following installation of new members, the board shall recognize its reorganization by selecting a President and Vice-President whose term's of office will be one (1) year. They may succeed themselves as officers of the board.

Section 3: Responsibilities of the President

The duties of the President of the school board are to: appoint/dissolve all committees, with the approval of a majority vote of the board; preside at all meetings of the board (keeping in mind that s/he does not make motions, but entertains them); act as liaison between Marty Indian School Board, Inc., and the Yankton Sioux Business and Claims Committee and report to such Committee on a regular basis, or when called upon by the Committee, concerning all pertinent operations and developments which occur at Marty Indian School; countersign all checks, contracts, and official reports submitted on behalf of the board; confer with the Superintendent on crucial matters which may occur between school board meetings; vote on all issues coming before the board; and, represent Marty Indian School when called upon to do so. Further, presidential duties shall include: working in conjunction with the Superintendent to prepare agendas for the regular and special meetings of the board; call emergency session when the superintendent and president agree that such a meeting is needed; maintain an accurate journal of the proceedings of the board; make certain that all minutes are made public by publishing them in the Yankton Sioux Messenger, and the Lake Andes Wave; and, giving notice of school board elections to the voting membership not earlier than sixty-two (62) days, and not later than thirty-two (32) days, prior to the school board election date. The President may delegate his/her duties under this section.

Section 4: Responsibilities of the Vice-President

In the absence of the President, the Vice-President shall have all the powers of the President and shall be responsible to preside at all meetings of the board; further, the incumbent shall perform other duties as delegated by the school board which are not inconsistent with this Constitution, its Bylaws, or any federal or state statute and rule.

Section 5: Responsibilities of the Superintendent

The Superintendent shall act as the chief educational and administrative officer of the school board; shall conduct daily academic affairs of the elementary and secondary schools; shall implement all educational policies established by the board; shall give reports to the board which evaluate the academic programs and educational staff of the schools; shall be responsible for the instruction, guidance, and discipline of the students; shall exercise the right to release from Marty Indian School any student or staff member for cause and in the best interest of the student, staff member, and/or the school, subject to appeal by the student or staff member, and by approval of the school board; shall recommend the employment, change of status, and discharge of all personnel; shall encourage and promote the professional growth and competence of all Marty staff; shall evaluate the physical condition, staff efficiency and material needs of the school; shall be responsible to the school board for the flow of information regarding financial matters, minutes, reports, etc.; shall develop plans for school construction; shall monitor and make recommendations for changes in the financial plan for the effective management of resources; shall recommend travel for all staff; shall be responsible for the repairs of all the buildings, grounds and equipment of Marty Indian School; shall oversee contract and budget preparation; shall attend professional conventions and other workshops or meetings beneficial to the school; shall be authorized to delegate authority to other staff members, but in all instances will be held accountable to the school board.

Section 6: Fiscal Officer

The board shall appoint a fiscal officer who is not a member of the board. The fiscal officer need not have the same residence qualifications as elected board members. The fiscal officer shall: take charge of the school's fiscal books and documents; issue all payments of verified bills approved for payment by the superintendent; prepare and submit to the board, in writing, a monthly report of the state of finances; and shall, when required, produce at any meeting of the board, all books and papers pertaining to the business office; and shall perform any other duties as required by law and as set forth in the FISCAL MANAGEMENT POLICIES AND PROCEDURES MANUAL.

Section 7: Bonding

The Superintendent, fiscal officer, other staff members, and the members of the board charged with the responsibility for the custody of school funds or property shall be bonded in such sum and with such surety as the board may determine.

ARTICLE 5- APPROVAL AND AMENDMENTS TO THE CONSTITUTION

Section 1: Approval of the Constitution

The Constitution must have the approval of three (3) of the five (5) members of the Marty Indian School Board, Inc., and a majority vote of the Yankton Sioux Business and Claims Committee.

Section 2: Amendments to the Constitution

Any amendments of this Constitution must have the approval of three (3) of the five (5) members of the Marty Indian School Board and a majority vote of approval by the Yankton Sioux Business and Claims Committee as heretofore prescribed in the approval of this Constitution.

BYLAWS OF MARTY INDIAN SCHOOL

ARTICLE I – MEETINGS

Section 1: General Statements

All meetings of the Marty Indian School Board shall be open to the public and shall include an opportunity for the public to address the board. The board may go into executive (closed) session only to discuss personnel, property purchases, student disciplinary hearings, or when the business to be discussed is of a highly personal nature, or when the best interests of the board may be served. No minutes shall be taken or recorded of an executive session. An executive session can be called only during a regular or special board meeting and the purpose of the executive session must be stated prior to recessing to go into executive session. All voting concerning executive sessions must be held in public.

The board may appoint a secretary to record board minutes. The board may compensate the secretary according to local rates of such work. No member of the board will be appointed or be required to be secretary of the school board. The secretary shall take accurate minutes of the meetings and furnish copies of the minutes to the school board as required.

Section 2: Regular Meetings

A regular meeting of the school board shall be called every month on a day, time, and place which are selected by the board. Written notice of the regular meeting, minutes of the previous meeting, and the prescribed agenda shall be mailed to the board members, posted in conspicuous places, and/or published no later than five (5) working days in advance of the meeting date. Unless determined otherwise, the regular board meeting shall be held on the second Tuesday of each month beginning at 1:00 p.m. in the administrative building's board room.

Section 3: Special Meetings

Special meetings of the board may be called by the President, a majority of the board or by a petition signed by no less than fifteen percent (15%) of the eligible voters. It shall be the duty of the President or his/her designee to cause written notice of such a meeting to be given, as provided in this section. Written notice of time, place and purpose of any special meeting of the board shall be posted in conspicuous places and/or mailed not less than three (3) days prior to the proposed meeting. Every reasonable effort shall be made to deliver such notice to each board member. The Superintendent of the Marty Indian School must be in agreement that this special meeting is needed, and must be in attendance at the meeting with a specific agenda for this special session.

Section 4: Emergency Meetings

In the event of the need of immediate board action, which for the purposes of this section shall be defined as an emergency, the President may contact the other board members, either personally or by telephone, notifying them of a need to hold an emergency meeting. The emergency school board meeting may be held wherever or whenever it is deemed necessary. An emergency is defined as a topic that cannot wait until a regular board meeting, or is too sensitive to wait for a special board meeting. An emergency meeting is usually defined as a safety issue of some magnitude. It might include allocating money to resolve this safety concern. The superintendent and school board president must be in agreement that such a meeting is needed. The presence of a quorum of the school board shall be sufficient and necessary to hold a proper emergency school board meeting. The President may appoint a school board member to be the secretary at the time in order to have an accurate record of such proceedings.

Section 5: Waiver of Notice

Attendance of a board member at a meeting constitutes a waiver of the notice of meeting except where a member attends a meeting for the express purpose of objecting to the transaction of business because the meeting is not properly called or convened.

Section 6: Order of Business

The order of business at a school board meeting shall be as follows:

1. Roll Call.
2. Call to Order.
3. Invocation.
4. Approval of Agenda.
5. Approval of Minutes.
6. Unfinished Business.
7. New Business.
8. Other.
9. Adjournment.

Section 7: Quorum

A majority of the board members, which is three (3), shall constitute a quorum. The act of the majority of the members of the school board during a properly called meeting at which a quorum is present shall be the proper act of the board, except under those circumstances when a two-thirds (2/3) majority vote of the full board is required. In this instance, four (4) board members would be required for proper action to occur. If the President and Vice-President are absent, but a quorum is present at a properly called meeting, the members present may appoint a president pro tem. If less than a majority of the board is present no meeting may be conducted. The President or his/her designee shall notify all board members of the time and place when said meeting is rescheduled.

Section 8: Organization of Meetings

At each meeting of the board, the President shall act as chairperson thereof; or, in case of the President's absence the Vice President shall preside. In the case of both the President's and Vice President's absence, an appointed member shall act as president pro-tem. Appointment is made by majority vote of the quorum.

Section 9: Voting at Meetings

All voting shall be on the basis of a motion duly made necessary and sufficient for approving or defeating a motion. Each member shall have only one (1) vote at board meetings. All matters shall be decided by a vote of the majority of the quorum, except in those circumstances which require a two-thirds (2/3) vote. A roll call vote shall be taken of all motions, and published as such in the board minutes. Abstentions are counted as such, and shall not be counted either as a "yes" or "no" vote. No contract officer, nor his/her designee, shall have a vote on the board; such officers and/or representatives are recognized only in an advisory capacity.

Section 10: Approval and Publication of Minutes

The school board shall approve the minutes of every meeting of the board within forty-five (45) calendar days after such meeting. The presiding officer of the board and the Superintendent shall sign minutes of all meetings after the board approves them. The Superintendent or his/her designee will also be responsible for publishing the minutes within a week following the approval of the minutes of each meeting. Minutes of all board meetings and records of all board transactions and dates pertaining thereto shall be retained in the Administrative Offices of the Marty Indian School.

ARTICLE 2: CONFLICT OF INTEREST OR NEPOTISM

Section 1: Conflict of Interest and Nepotism

No officers or members of the school board shall receive any financial benefits whatsoever from the purchase of goods or services for the school.

- A. Any contract of the school in which a member of the school board has a direct or indirect interest shall be considered null and void.
- B. No school board member shall be employed by Marty Indian School and draw salary or compensation for work completed that is a direct part of the school, unless otherwise specified within these bylaws.
- C. Any Marty Indian School Board member may run for the Yankton Sioux Business and Claims Committee. However, if elected to this Committee, s/he must resign from the Marty Indian School Board. ~~AA~~
- D. In the event that such Committee member, or Marty Indian School board/staff member should seek office or employment at Marty Indian School, Inc., s/he must first resign his/her employment or his/her elected position before being seated or employed by the corporation.

Section 2: Employment of a Relative

No applicant for employment, related by blood to the second degree of kindred or by marriage to a member of the board, shall be employed by the school board except:

- A. By an affirmative vote of three (3) of the five (5) members of the board; and,
- B. When the employee was employed prior to his/her relative becoming a board member.

ARTICLE 3 – COMPENSATION

Section 1: Compensation to Board Members

Board members shall receive compensation for attendance at regular and special meetings when any business is transacted and for sitting on committees instituted by the board. In addition, the board may also authorize the payment of reasonably incurred expenses by board members in the performance of their duties. These reasonably incurred expenses can only be made if the current budget has funds to do so. All payments to board members will be made during the final pay period each month.

Section 2: Salary of the Teaching Component

A teacher salary scale shall be developed annually by the Superintendent based upon projected funding, and shall be submitted to the board for its approval. The approved salary schedule shall be effective from October 1st of the coming school year and remain in effect until September 30th of that school year.

Section 3: Salary of Other Contract

The school board shall set the salary of all other contract personnel based upon the recommendation of the Superintendent, or as established by an approved program budget.

Section 4: Salary of Hourly Wage Employees

The school board shall establish the minimum hourly wage, fix the salary of all hourly wage employees, and develop and utilize a salary schedule.

ARTICLE 4 – RELATIONSHIP OF MIS BOARD TO OTHER ORGANIZATIONS

Section 1: Exclusive Powers of the Board

Except as specifically authorized in this article, the board retains and reserves unto itself the sole and exclusive right to the management and administrative control of the Marty Indian School system; along with other rights, powers, authority, duties, and responsibilities conferred upon and vest in the school board by the Yankton Sioux Business and Claims Committee, the State of South Dakota, and applicable federal regulations and statutes.

Section 2: Relationship of the MIS Board to the Yankton Business and Claims Committee

Marty Indian School, Inc., is a legal entity of the Yankton Business and Claims Committee, and is authorized to operate, maintain, and administer Marty's educational programs on behalf of the Yankton Sioux Tribe (see Yankton Sioux Business and Claims Committee Resolution). Marty Indian School Board, Inc. shall establish policy for the Marty Indian School.

Section 3: Relationship of Board to Its Voting Membership

The school board shall establish policies in a systematic procedure that allows the voting membership to provide input, to review, and to approve, reject, or modify such policies and their subsequent publication.

Section 4: Relationship of the Board to the Marty Foundation

Marty Indian School Board, Inc. recognizes the Marty Foundation, a private, non-profit organization with no formal interests in the corporation, as its alumni association which possesses only advisory powers in its relationship to the corporation. Membership in the Marty Foundation does not affect membership in the Marty Indian School, Inc.

Section 5: Relationship of Board to the Parent Teacher Organization

Marty Indian School Board, Inc., recognizes the Marty Parent Teacher Organization, an organization which represents the interests of the parents and teachers at Marty Indian School, as a quasi-corporation which possesses only advisory powers in its relationship to the corporation. Membership in the Marty Parent Teacher Organization does not affect membership in the MIS, Inc., except as provided by the Marty Parent Teacher Organization Constitution and Bylaws.

ARTICLE 5 – SCHOOL LAW

Section 1: School Law of South Dakota

Marty Indian School will utilize the Code of School law used by the State of South Dakota, with exceptions listed herein or that are evidently not applicable to the organizational pattern of Marty Indian School.

Section 2: Exceptions to South Dakota Law

- A. Teacher Retirement. The State Code of School Law relative to teacher retirement withholding procedures is not applicable to Marty Indian School employees.
- B. School Calendar: Marty Indian School may not honor the holidays prescribed by the State code.
- C. Election: The election procedures of the school board as set forth in Article III of the Constitution are to be utilized rather than those contained in SD Code.
- D. Continuing contract or Tenure: Marty Indian School Board will not be obligated to the state code governing continuing contract or tenure.
- E. Conflict of Interest: The state code concerning conflict of interest will be superseded by Article II of these bylaws. Contracts are let on an annual basis, making a contract non-renewal does not fall under the grievance policy.
- F. Attendance: The school attendance laws shall remain the responsibility of the local public school district.

ARTICLE 6– APPROVAL & AMENDMENTS OF THE BYLAWS

Section 1: Approval of Bylaws

These bylaws must have approval of two-thirds (2/3) majority vote of the Marty Indian School Board, Inc., unless there is no sitting board at the time of adoption, and a majority vote of the Yankton Sioux Business and Claims Committee.

Section 2: Amendments to Bylaws

Any amendment to these bylaws must have approval of two-thirds (2/3) majority vote of the Marty Indian School Board, Inc., unless there is no sitting board, and a majority vote of approval from the Yankton Sioux Business and Claims Committee as heretofore prescribed in this Article.

KIDDER AFFIDAVIT

EXHIBIT 2



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Nonprofit Corporation - Domestic

Printer Friendly Version

Business ID: NS005987
 Name: MARTY INDIAN SCHOOL BOARD, INC.
 Status: Dissolved (Administrative) Initial Filing Date: 04/30/1976
 Formed in: SOUTH DAKOTA
 Term of Duration: Perpetual Next Annual Report Due Date: 04/01/2011
 Inactive Date:
 Principal Office: 100 SOUTH MAIN ST Mailing Address: PO BOX 187
 MARTY, SD 57361 USA MARTY, SD 57361-0187 USA

Registered Agent

Agent Name: PATRICK C MULLEN
 Agent Address: 100 S MAIN ST
 MARTY, SD 57361 USA
 Agent Mailing Address: PO BOX 187
 MARTY, SD 57361-0187 USA

PLEASE NOTE: Some historical documents prior to 11/12/2016 may NOT be included in the document link. Only Certified Copy Requests are guaranteed to show all documents on file.

History

Type	File Date	View All Document Links (Scroll Down)	Detail
Dissolution/Revocation - Administrative	04/20/2015	"Included in Initial Filing"	
2010 Annual Report	04/29/2010	"Included in Initial Filing"	
2010 Annual Report	04/29/2010	"Included in Initial Filing"	
2008 Annual Report	04/04/2008	"Included in Initial Filing"	
2008 Annual Report	04/04/2008	"Included in Initial Filing"	
Statement of Change	04/04/2008	"Included in Initial Filing"	
Application for Reinstatement	04/04/2008	"Included in Initial Filing"	
Cancellation	11/09/2007	"Included in Initial Filing"	
2006 Annual Report	04/12/2006	"Included in Initial Filing"	
2005 Annual Report	04/22/2005	"Included in Initial Filing"	



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[Back to Table of Contents](#)

YANKTON SIOUX TRIBAL CODE

Last Revised: 1995

TITLE I - YANKTON SIOUX TRIBAL GENERAL PROVISIONS

CHAPTER I. PRELIMINARY PROVISIONS

Sec. 1-1-1 Constitutional Authority

This Law and Order Code is adopted pursuant to the authority vested in the General Tribal Council under the Constitution of the Yankton Sioux Tribe.

Sec. 1-1-2 Name of Code

This Law and Order Code shall be known as the Law and Order Code of the Yankton Sioux Tribe and may be referred to as the Code, or Yankton Sioux Code, and may be abbreviated as Y.S.T.

Sec. 1-1-3 Prior Inconsistent Ordinances Repealed

Any and all ordinances of the Tribal Council which conflict in any way with the provisions of this Law and Order Code are hereby repealed to the extent that they are inconsistent with or conflict with, or are contrary to the spirit and/or purpose of this Law and Order Code. All prior ordinances and resolutions of the Tribal Council dealing with the same subject matter as the titles of this Code are repealed as of the effective date of this Code.

Sec. 1-1-4 Amendment of Law and Order Code

This Law and Order Code may be amended, additions made hereto, or deletions made therefrom in the manner provided for the adoption of Tribal Council ordinances. Amendments and additions to this Law and Order Code shall become a part thereof for all purposes and shall be codified and incorporated herein in a manner consistent with the numbering and/or annexion hereof.

CHAPTER II. ESTABLISHMENT OF COURTS; JUDGES AND OTHER COURT PERSONNEL

Sec. 1-2-1 Courts Established

1. There is hereby established a Yankton Sioux Tribal Supreme Court which may be referred to as the Appellate Court, to handle all appeals from the Tribal Court and Tribal Juvenile Court as provided elsewhere in this Law and Order Code. The Supreme Court shall consist of three Justices.
2. There is hereby established a Yankton Sioux Tribal Court, which may be referred to as the Tribal Court, to handle all matters of a judicial nature not specifically placed within the jurisdiction of some other judicial forum. The Yankton Sioux Tribal Court shall be a court of general, civil and criminal jurisdiction and shall hear appeals from decisions of the Tribal Council and all Tribal administrative bodies.
3. There is hereby established a Yankton Sioux Tribal Juvenile Court, which may be referred to as the Tribal Juvenile Court, to handle all matters as set forth in the Juvenile Code contained in this Law and Order Code.

Sec. 1-2-2 Judges

1. There shall be appointed:
 - A. Three law-trained Supreme Court Judges for the Supreme Court;
 - B. One law-trained Chief Judge and as many law-trained associate Judges as the Yankton Sioux Tribal Council sees fit for the Tribal Court; and
 - C. One law-trained Juvenile Court Chief Judge and as many law-trained associate Juvenile Court Judges as the Yankton Sioux Tribal Council may see fit for the Juvenile Court.

2. The appointment, qualifications, terms of office, and compensation to be received by such judges shall be determined by the Tribal Business and Claims Committee, provided, however, that a judge once appointed shall not have his compensation decreased during his term of office, and provided further that no judge shall be suspended or removed from office prior to the expiration of his term, except as provided hereinafter.

3. Judges may be appointed to successive terms of office.

Sec. 1-2-3 Removal of Judges

Any judge may be removed from office prior to the expiration of his term of office by the majority vote of the Tribal Council only upon the grounds of neglect of duty or gross misconduct, and only after the holding of a public hearing at which the judge, after being given not less than five days notice, is given an opportunity to answer all charges and present evidence in his own defense.

Sec. 1-2-4 Powers and Duties of Judges

1. Judges shall administer justice and discharge all duties imposed upon them by law and shall hear and decide matters of a judicial nature and enter judgments and orders disposing of such matters. In the absence of the Court Clerk, a Judge may perform the clerk's duties in addition to his own and may receive cash bail or bonds whenever a clerk or other authorized person is not available.

2. The Chief Judge shall be responsible for the administration of all courts, except the Tribal Juvenile Court which shall be administered by the Juvenile Court Chief Judge, and shall supervise all probation and parole officers. In addition, the Chief Judge shall be responsible for the assignment of cases and the management of the Court's calendar and business. The Chief Judge shall designate an Associate Judge to act as Chief Judge in his absence.

3. All judges of the Courts of the Yankton Sioux Tribe shall conform their conduct to the Code of Judicial Conduct as adopted by the American Bar Association until such time as a Yankton Sioux Tribe Code of Judicial Conduct is adopted by the Tribal Bar Association or the Tribal Judges' Association.

4. Every judicial officer has power to:

A. Preserve and enforce order in his immediate presence, and in proceedings before him, when he is engaged in the performance of his of judicial duty;

B. Compel obedience to his lawful orders;

C. Compel the attendance of persons to testify in proceeding before him as provided by law;

D. Administer oaths to persons in proceedings before him and in any other case where such shall be necessary in the exercise of his powers and duties;

E. Punish for contempt to assure the effectual exercise of these powers.

Sec. 1-2-5 Disqualification of Judges

1. A Judge shall disqualify himself from hearing any matter in which he has a direct interest or in which any party to the matter is a relative by blood, in the fourth degree (first cousins), or where he feels that he will not be able to render a just decision.

2. Any party to a legal proceeding may request a change of assignment of judges to hear the proceeding by filing a written affidavit of Prejudice giving sufficient, reasonable grounds why the judge assigned should not hear the case. Such affidavit shall be presented to the Judge assigned to hear the case who shall rule on the sufficiency of the affidavit, and, if sufficient, either disqualify himself or turn the affidavit over to the Chief Judge or some other judge for a decision as to whether a different Judge should be assigned.

Sec. 1-2-6 Oath of Office of Judge

1. Every Judge, prior to taking office or acting in such office, shall take the following oath or affirmation:

I, _____, do solemnly swear (affirm) that I will support, defend, and uphold the Yankton Sioux Tribal Constitution, By-laws and Treaties of the Yankton Sioux Tribe; that I will support, uphold and enforce the Law and Order Code of the Yankton Sioux Tribe, and that I will faithfully and impartially discharge the duties of my office to the best of my ability.

2. Said oath may be administered by a member of the Tribal Business and Claims Committee or a Tribal Supreme Court Justice.

Sec 1-2-7 Clerks of Courts

1. There shall be a clerk of the Tribal Juvenile Court and two clerks of the Tribal Court, one of whom shall be designated by the Chief Judge as the Clerk of the Tribal Supreme Court. Additional assistant clerks may be appointed by the Tribal Council if such is deemed necessary.

2. The appointment, qualifications, terms of office and compensation of clerks shall be determined by the Tribal Council.

Sec. 1-2-8 Duties of Clerks

It shall be the duty of the Clerks of the Tribal Courts to supervise and keep all records, files, dockets or other records required to be kept by this Code, by rule of the Court, Tribal resolution or as otherwise established, and further to keep a written record of all proceedings of the Court, to administer oaths, to collect and account for all fines, bail or bond money, fees or other charges which cause money to come to the Court, to deposit and account for all such moneys in the manner prescribed by the Tribal Council, and to disburse such money as authorized by law. The Clerks shall further assist the Court in any way required to facilitate the performance of its duties, to aid the police or private citizens in their dealings with the Court, and may render advice and assistance to individual members of the Tribe or their counsel in the drafting of documents incidental to proceedings in the Courts:

Sec. 1-2-9 Oath of Clerks

1. Every Clerk shall take the following oath upon assuming office:

I, _____, having been appointed Clerk of the Yankton Sioux Tribal (Juvenile) Court, do solemnly swear (affirm) that I will truly, faithfully, honestly, and impartially discharge all of the duties of my office to the best of my ability and understanding.

2. Such oath shall be administered by a Judge of the Tribal Court.

Sec. 1-2-10 Court Administrator

The Tribal Business and Claims Committee may, at such time as it appears reasonably necessary for the efficient functioning of the Court, appoint a Court Administrator whose job it will be to aid the Chief Judge in administering the courts, the scheduling of cases and processing of papers for scheduled cases, and do such other things as the Tribal Business and Claims Committee or Chief Judge directs to assure the orderly and efficient operation of all Tribal Courts.

Sec. 1-2-11 Probation and Parole Officers

1. The Tribal Business and Claims Committee shall appoint one or more persons to be Probation and Parole Officers and shall determine the qualifications, terms of employment and compensation of such officers.

2. Probation and Parole Officers, subject to the supervision of the Chief Judge, shall have the responsibility of assuring the faithful performance of probation or parole agreements by persons subject thereto, counseling such persons and their families, preparing presentence or other reports as requested by a Tribal Judge, and doing such other things as may be directed by a Tribal Judge or otherwise required by law.

3. A Probation and Parole Officer shall have the authority of a police officer to make arrests for violation of probation or parole agreements.

Sec. 1-2-12 Bonding of Court Personnel

1. All Judges and Clerks shall be bonded, at Tribal expense, in amounts determined by the Tribal Council, to secure the honest performance of their duties.

CHAPTER III. CONTEMPTS**Sec. 1-3-1 Acts or Failure to Act Which Constitute Contempt of Court**

The following acts or failures to act may serve as the basis for finding an individual or other entity in contempt of court:

1. Disorderly, contemptuous, or insulting behavior toward a Judge while holding Court, which tends to interrupt the course of the proceedings or undermine the dignity of the Court.
2. A breach of the peace, or loud boisterous conduct which tends to interrupt the course of a judicial proceeding.
3. Deceit, or abuse of process or proceedings of the Court by a party or counselor to a judicial proceeding.
4. Disobedience to a lawful judgment, order or process of the Court.
5. Assuming to be an officer, spokesman or other official of the Court and acting as such without authority.
6. Rescuing or taking any person or property from the Court or an officer acting under Court order, contrary to the order of the Court.
7. Unlawfully detaining or otherwise interfering with a witness or party to an action while such person is going to or from a Court proceeding or attending Court.
8. Disobedience of a subpoena duly served, or refusing to be sworn or answer as a witness.
9. Any other interference with the process, proceeding, or dignity of the Court or a Judge of the Court while in the performance of his official duties.

Sec. 1-3-2 Civil Contempt

1. A civil contempt is prosecuted to preserve, protect, enforce or restore the duly adjudicated rights of a party to a civil action against one under legal obligation to do or refrain from doing something as a result of a judicial decree or order.
2. Relief in a civil contempt proceeding may be coercive or compensatory in nature as to the complaining party and may include a fine payable to the Court or to the complaining party or imprisonment of the party in contempt to secure compliance, or both.

Sec. 1-3-3 Criminal Contempt

1. Conduct which is directed at, or is detrimental to, the dignity and authority of the Court is a criminal contempt.
2. Criminal contempt is an offense which may be punishable, at the discretion of the Court based on the nature of the conduct in question, with a fine of up to five hundred dollars \$500.00 and/or up to six (6) months in jail.

Sec. 1-3-4 Contempt Procedure

1. A direct contempt is one committed in the presence of the Court or so near thereto as to be disruptive of the Court proceedings, and such may be adjudged and punished summarily.
2. All other contempts shall be determined by a hearing at which the person accused of contempt is given notice and an opportunity to be heard.

CHAPTER IV. JURISDICTION

Sec. 1-4-1 Jurisdiction, Tribal Policy

It is hereby declared as a matter of Tribal policy, that the public interest and the interests of the Yankton Sioux Tribe demand that the Tribe provide itself, its members, and other persons living within the territorial jurisdiction of the Tribe as set forth in the 1858 "Treaty with the Yankton Sioux," (11 Stat. 743) with an effective means of redress in both civil and criminal cases against members and non-Tribal members who through either their residence, present business dealings, other actions or failures to act, or other significant minimum contacts with this Reservation and/or its residents commit criminal offenses against the Tribe or incur civil obligations to persons or entities entitled to the Tribes protection. This action is deemed necessary as a result of the confusion and conflicts caused by the increased contact and interaction between the Tribe, its members, and other residents of the Reservation and other persons and entities over which the Tribe has not previously elected to exercise jurisdiction. The jurisdictional provisions of this Code, to insure maximum protection for the Tribe, its members and other residents of the Reservation, should be applied equally to all persons, members and non-members alike.

Sec. 1-4-2 Territorial Jurisdiction

The Jurisdiction of the Courts of the Yankton Sioux Tribe shall extend to the territory within the exterior boundaries as set forth in the 1858 "Treaty with the Yankton Sioux" (11 Stat. 743) and to such other lands without such boundaries as may hereafter be added to the Reservation or held in Trust for the Tribe under any law of the United States or otherwise.

Sec. 1-4-3 Personal Jurisdiction

1. As used in these jurisdictional provisions, the word "person" shall include any individual, firm, company, association, or corporation.
2. Subject to any contrary provisions, exceptions or limitations contained in either federal law, the Tribal Constitution, or as expressly stated elsewhere in this Code, the Courts of the Yankton Sioux Tribe shall have civil and criminal jurisdiction over the following persons:

A. Any person residing, located or present within the Reservation for:

1. Any civil cause of action; or
2. Any charge of criminal offense prohibited by this Code or other ordinance of the Tribe when the offense is alleged to have occurred within the Reservation.

B. Any person who transacts, conducts, or performs any business or activity within the Reservation, either person or by an agent or representative, for any civil cause of action or charge of criminal offense for any act expressly prohibited by this Court or other ordinance of the Tribe arising from such business or activity.

C. Any person who owns, uses or possesses any property within the Reservation, for any civil cause of action or charge of criminal offense prohibited by this Code or other ordinance of the Tribe arising from such ownership, use or possession.

D. Any person who commits a tortious act or engages in tortious conduct within the Reservation, either in person or by an agent or representative, for any civil cause of action arising from such act or conduct.

E. Any person who commits a criminal offense prohibited by this Code or other ordinance of the Tribe, by his own conduct or the conduct of another for which he is legally accountable, if:

1. The conduct occurs either wholly or partly within the Reservation; or
2. The conduct which occurs outside the Reservation constitutes an attempt, solicitation, or conspiracy to commit an offense within the Reservation, and an act in furtherance of the attempt or conspiracy occurs within the Reservation; or
3. The conduct which occurs within the Reservation constitutes an attempt, solicitation, or conspiracy to commit in another jurisdiction an offense prohibited by this Code or ordinances of the Tribe and such other jurisdiction.
4. None of the foregoing bases of jurisdiction is exclusive, and jurisdiction over a person may be established upon any one or more of them as applicable.

Sec. 1-4-4 Jurisdiction Over Property

Subject to any contrary provisions, exceptions, or limitations contained in either federal laws and regulations, the Tribal Constitution, or as expressly stated elsewhere in this Code, the Tribal Court shall have jurisdiction over any real or personal property located on the Reservation to determine the ownership thereof or rights therein or to determine the application of such property to the satisfaction of a claim for which the owner of the property may be liable.

Sec. 1-4-5 General Subject Matter Jurisdiction, Limitations

Subject to any contrary provisions, exceptions, or limitations contained in federal law or the Tribal Constitution, the Courts of the Yankton Sioux Tribe shall have jurisdiction over all civil causes of action and over all offenses prohibited by this Code except the Courts of the Yankton Sioux Tribe shall not assume jurisdiction over any civil or criminal matter which does not involve either the Tribe, its officers, agents, employees, property or enterprises, or a member of the Tribe, member of a federally recognized tribe, if some other forum exists for the handling of the matter and if the matter is not one in which the rights of the Tribe or its members may be directly or indirectly affected.

Sec. 1-4-6 Concurrent Jurisdiction

The jurisdiction involved by this Code over any person, cause of action, or subject shall be concurrent with any valid jurisdiction over the same of the courts of the United States, any state, or any political subdivision thereof; provided, however, this Code does not recognize, grant, or cede jurisdiction to any political or governmental entity in which jurisdiction does not otherwise exist in law.

Sec. 1-4-7 Exclusive Original Jurisdiction

1. The Courts of the Yankton Sioux Tribe shall have exclusive original jurisdiction in all matters in which the Yankton Sioux Tribe or its officers or employees are parties in their official capacities.
2. Nothing contained in the preceding paragraph or elsewhere in this Code shall be construed as a waiver of the sovereign immunity of the Tribe or its officers or enterprises unless specifically denominated as such.

CHAPTER V. COUNSELORS AND PROFESSIONAL ATTORNEYS**Sec. 1-5-1 Lay Counsel**

1. Any person appearing as a party in any judicial proceeding before a Court of the Yankton Sioux Tribe shall have the right to be represented by a lay counselor (not a professional attorney) and to have such person assist in the preparation and presentation of his case.
2. The Yankton Sioux Tribe shall have no obligation to provide or pay for such lay counselors and such obligation shall rest entirely with the person desiring such a counselor.
3. Any person appearing as a lay counselor shall be subject to the same ethical obligations of honesty and confidentiality towards his client and the Court as would a professional attorney, and the attorney-client testimonial privilege shall apply in appropriate circumstances.

4. Lay counselors shall be deemed officers of the Court for purposes of their representation of a party and shall be subject to the disciplinary authority of the Court in all matters relating to their representative capacity.

Sec. 1-5-2 Right to be Represented by a Professional Attorney

Any person appearing as a party in any civil or criminal action shall have the right to be represented by a professional attorney of his own choice and at his own expense; provided, however, that the Yankton Sioux Tribe has no obligation to provide or pay for such an attorney; provided further, that any such attorney appearing before the Courts of the Yankton Sioux Tribe shall have first obtained admission to practice before such Courts in accordance with the procedures set forth herein.

Sec. 1-5-3 Eligibility for Admission

Any attorney who is an active member in good standing of the South Dakota State Bar, or any attorney certified and eligible to practice before the highest court of any other state or of the Supreme Court of the United States is eligible to be admitted to practice before the Courts of the Yankton Sioux Tribe.

Sec. 1-5-4 Procedure for Admission

1. Any professional attorney desiring to be admitted to practice before the courts of the Yankton Sioux Tribe shall apply for admission by certifying under oath, either verbally or in writing to the following:

A. That he is an active member in good standing of the South Dakota State Bar or is certified and eligible to practice before the highest court of any other state or of the Supreme Court of the United States.

B. That if admitted to practice before the courts of the Yankton Sioux Tribe he will take the required oath as prescribed in the Law and Order Code for Attorneys and be bound thereby.

C. That if admitted to practice he will accept and represent indigent clients without compensation or without full compensation when asked by a Judge of the Court to do so.

2. An admission fee of \$75.00 shall be tendered with the application, subject to return if the application is denied. The fee shall be waived for attorneys employed by the Tribe and for others upon tribal council resolution. The fee shall go into a special Bar Admission Fund to be used for training of tribal court staff, lay counselors and other officers of the Tribal Court. If a Yankton Sioux Tribal Bar Association is formed, then that association shall assume responsibility and control for the collection and expenditures of these fees. The Tribal Court or, if organized, the bar association shall retain the right to establish and require the taking of a bar examination for admission to practice before the Yankton Sioux Tribal Court.

3. Upon receipt of an application for admission to practice before the Courts of the Yankton Sioux Tribe, the Chief Judge shall review the application and may, but need not, investigate into the truth of the matters contained therein. If satisfied that the applicant meets the qualifications set forth herein, the Chief Judge shall notify such person who may then appear in person to take the oath prescribed herein or may subscribe his signature to such oath and forward it to the Chief Judge.
4. Upon the taking of the oath, either orally or in writing, the Chief Judge shall cause a certificate to be issued evidencing the admission of the attorney to practice before the Courts of the Yankton Sioux Tribe.
5. Any person denied admission shall have a right to appeal and have a due process hearing before the Tribal Supreme Court.

Sec. 1-5-5 Disbarment and Discipline

1. Whenever it is made to appear to the Chief Judge that any attorney admitted to practice before the Courts of the Yankton Sioux Tribe has been disbarred or suspended from the practice of law in the State of South Dakota or other state to which reference for admission to practice was made as a condition to obtaining admission to practice before the Tribal Courts, he shall immediately be given notice at his last known address that he shall be suspended from practice before the Courts of the Yankton Sioux Tribe for an indefinite period unless he appears within five (5) days and shows good cause why such order should not be made.
2. Any judge who finds an attorney admitted to practice before the Courts of the Yankton Sioux Tribe to be in contempt of Court may, in addition to any other sanction imposed, order the attorney to appear within ten (10) days and show cause why he should not be suspended from practicing before the Courts of the Yankton Sioux Tribe.
3. The Chief Judge may, upon receiving a written, verified complaint which indicates that an attorney admitted to practice before the Courts of the Yankton Sioux Tribe has acted in an unethical or otherwise improper manner while functioning as an attorney, order such attorney to appear and defend himself at a hearing, to hear all evidence relevant to the matter, and may order the suspension of such an attorney if such appears reasonably necessary or appropriate. If the Chief Judge is the complainant, another trial judge shall hear and decide the matter.
4. All suspensions from practicing before the Courts of the Yankton Sioux Tribe shall be for an indefinite period unless the Judge specifically orders otherwise. An attorney suspended for an indefinite period, or one suspended for a specific period, may petition the Tribal Court for permission to re-apply for permission to practice at the end of one year or the specific period of suspension, and such permission shall be granted if it is made to appear, at a hearing or otherwise as the Court shall direct that he has been adequately reprovved and now appears willing to conduct himself in a proper manner, and that the petitioner has been reinstated to practice if previously disbarred or suspended in another jurisdiction.
5. Any person appearing as lay counsel for another may be suspended from further appearances as such for misconduct or improper behavior by any Judge upon the same conditions of notice and hearing provided professional attorneys

Sec. 1-5-6 Standards of Conduct and Obligations for Attorneys and Lay Counsel

1. Every attorney admitted to practice before the Courts of the Yankton Sioux Tribe, and every lay counsel employed or appointed to represent another before such courts when acting in such capacity or in matters in any relation thereto shall conform his conduct in every respect to the requirements and suggested behavior of the Code of Professional Conduct as adopted by the American Bar Association.
2. Both professional attorneys and lay counselors who hold themselves out as being available to act as such have a responsibility to accept as clients and represent without compensation or without full compensation, such persons as a Judge of a Tribal Court feels have particularly urgent needs for such representation but are personally unable to afford to pay for such legal help.

Sec. 1-5-7 Oath of Attorneys and Counselors

1. Upon admission to practice as provided herein, an attorney shall take the following oath, either verbally before the Court, or subscribe his signature to such oath if admitted without personally appearing:

I do solemnly swear (affirm):

That I will support and defend the Constitution and By-laws, Law and Order Code and all resolutions and ordinances of the Yankton Sioux Tribe; that I will maintain the respect due the Courts and Judicial officers of the Yankton Sioux Tribe; that I will not counsel or maintain any suit or proceeding which shall appear to me to be unjust, nor any defense except such as I believe to be honestly debatable under the law of the land; that I will employ for such purposes of maintaining the cause confided to me such means only as are consistent with truth and honor, and will never seek to mislead the judge or jury by any artifice or false statement or fact or law; that I will maintain the confidences and preserve inviolate the secrets of my client, and will accept no compensation in connection with his business except from him or with his knowledge and approval; that I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required in justice by the cause with which I am associated; that I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed or delay any man's cause for lucre or malice. SO HELP ME GOD.

2. A lay counselor hired, retained or appointed to represent another before any Court of the Yankton Sioux Tribe, shall take the foregoing oath at the time of his first appearance in Court.

Sec. 1-5-8 Non-Resident Attorneys

Any tribal Judge may waive the formal admission procedure and payment of the fee as required herein in the case of an attorney, not a resident of the State of South Dakota, making an appearance for the limited purpose of a single, specific case, and if such attorney is associated in such case with an attorney or counselor who is formally admitted to practice before the

Courts of the Yankton Sioux Tribe or upon stipulation of the Tribal Prosecutor in a criminal proceeding.

CHAPTER VI. JURORS

Sec. 1-6-1 Eligibility for Jury Duty

1. Any enrolled member of the Yankton Sioux Tribe, between the ages of 21 and 70, who has not been convicted of a felony or a Class A offense under this Code, and who resides on the Yankton Sioux Indian Reservation, shall be eligible to be a juror. Judges, other officers or employees of the Court, attorneys and lay counselors shall not be eligible to be jurors.
2. The Chief Judge may by rule adopt procedures whereby non-enrolled Indians and non-Indians may be summoned for jury duty in cases involving one or more non-Indian parties involved.

Sec. 1-6-2 Jury Lists

Each year, the Tribal Council, or the Clerk of Courts, at the direction of the Tribal Council, shall prepare a list of eligible jurors, which list shall contain not less than fifty (50) names and which shall contain the names of persons from each community and Reservation district, prorated according to the relative population of the communities and districts.

Sec. 1-6-3 Jury Trials

1. The Clerk shall subpoena not less than twenty (20) persons from the list of eligible jurors to appear and be available to serve as jurors whenever a jury trial is scheduled in a civil or criminal matter.

2. THE SELECTION FROM THE LIST OF ELIGIBLE JURORS SHALL BE BY LOT OR SOME OTHER MEANS OF RANDOM, IMPARTIAL SELECTION.

3. Selection of jurors to hear the case shall be accomplished as provided for in the rules of Civil and Criminal Procedure elsewhere in this Code.

Sec. 1-6-4 Power to Excuse Jurors

Only the Judge assigned to hear a case shall have the power to excuse a person subpoenaed to appear as a juror, doing so on account of sickness, disability, extreme hardship or other good cause shown upon a request for excusal by the person subpoenaed.

Sec. 1-6-5 Compensation of Jurors

Each juror who is called and reports for jury duty or who serves on a jury shall be entitled to receive such fees for daily service and/or mileage, if any, as the Tribal Council shall establish by resolution or as established by a rule of the Court.

CHAPTER VII. SUBPOENAS AND SERVICE OF OTHER PAPERS**Sec. 1-7-1 Issuance of Subpoenas**

1. The Clerk shall issue subpoenas to compel the attendance of witnesses, jurors or such other persons as a judge may direct for a trial, hearing or other proceeding before a Court of the Yankton Sioux Tribe.
2. In a criminal case, the complaining witness and all witnesses for the Yankton Sioux Tribe may be subpoenaed to appear at the date and time set for trial or a reasonable time before such time, and the defendant shall have the right to have witnesses subpoenaed to appear in his behalf by notifying the Clerk of Court of the names and addresses of such witnesses not less than ten (10) days prior to the scheduled trial date.

Sec. 1-7-2 Services of Subpoenas; Return of Service

1. Subpoenas in criminal cases shall be served by a tribal policeman, or other person designated by the Chief Judge, Chief of Police or Tribal Council.
2. Subpoenas in non-criminal cases may also be served by any tribal member over 18 years of age, not a party to the action, who is a resident of the reservation.
3. Except by order of the Court based upon good cause shown, no subpoena shall be served between the hours of 9:00 p.m. and 7:00 a.m. or on Sundays or legal holidays.
4. The person serving a subpoena shall endorse upon the copy served his name, title, and the place, date, and time of service.
5. The person serving a subpoena shall make a return to the Clerk stating the name of the case, the name of the person served, the place, date, and time of service and shall subscribe his name thereto under penalty or perjury for the intentional making of a false return.

CHAPTER VIII. GENERAL PROVISIONS**Sec. 1-8-1 Signature Defined**

The term "signature" or any term relating thereto as used in this Law and Order Code or subsequent resolutions or ordinances of the Tribal Council shall mean the written signature or mark or thumbprint of any individual witnessed by two disinterested persons subscribing their names therewith, or made before one authorized to administer oaths.

Sec. 1-8-2 Records of Court Open to Public Inspection; Exceptions

The files and records of the Courts of the Yankton Sioux Tribe shall be open for public inspection except that the files and records of adoptions, incompetency proceedings, and Tribal Juvenile Court proceedings shall not be open to public inspection and may be inspected only with prior specific judicial authorization.

Sec. 1-8-3 Adoption by Reference Not a Waiver of Sovereign Power of the Yankton Sioux Tribe

The adoption of any law, code or other document by reference into this Code shall in no way constitute a waiver or cession of any sovereign power of the Yankton Sioux Tribe to the jurisdiction whose law or code is adopted or in any way diminish such sovereign power, but shall result in the law or code thus adopted becoming the law of the Yankton Sioux Tribe.

Sec. 1-8-4 Sovereign Immunity

Except as required by federal law, or the Constitution and By-Laws of the Yankton Sioux Tribe, or specifically waived by a resolution or ordinance of the Tribal Council specifically referring to such, the Yankton Sioux Tribe shall be immune from suit in any civil action, and its officers and employees immune from suit for any liability arising from the performance of their official duties.

Sec. 1-8-5 Actions By or Against Tribe or Its Officers or Employees

In any action otherwise authorized by or against the Tribe or its officers or employees arising from the performance of their official duties, the following modifications to the rules and procedures set forth in this Code shall apply:

1. The periods of time specified for civil cases or appeals of either a civil or criminal nature in which an answer, reply or other pleading, or response of any kind shall be required, shall be double the period specified.
2. Neither the Tribe nor its officers or employees when involved in a civil action arising from the performance of their official duties shall be liable for the payment of the costs or expenses of the opposing party.
3. Neither the Tribe nor its officers or employees when involved in a civil action arising from the performance of their official duties shall be required to post security by bond or otherwise for any purpose.

Sec. 1-8-6 Limitations in Civil Actions

Unless otherwise specifically provided in this Code, the following limitations on the bringing of civil actions will apply:

1. Any action against the Tribe or its officers or employees arising from the performance of their official duties must be commenced within one year of the date the cause of action accrued, unless barred by the doctrine of sovereign immunity.
2. Any other action must be commenced within three years of the date the cause of action accrued, provided, however, that any cause of action based on fraud or misrepresentation shall not be deemed to have accrued until the aggrieved party has discovered the facts constituting the fraud or misrepresentation.

Sec. 1-8-7 Principles of Construction

The following principles of construction will apply to this Code unless a different construction is obviously intended:

1. Masculine words shall include the feminine, and singular words shall include the plural, and vice versa.
2. Words shall be given their plain meaning and technical words shall be given their usually understood meaning where no other meaning is specified.
3. Whenever a term is defined for a specific part of this Code, that definition shall apply to all parts of the Code unless a contrary meaning is clearly intended.
4. This Code shall be construed as a whole to give effect to all its parts in a logical and consistent manner.
5. If any provision of this Code or the application of any provision to any person or circumstance is held invalid, the remainder of this Code shall not be affected thereby and to this end the provisions of this Code are declared to be severable.
6. Any typographical errors or omissions shall be ignored whenever the full meaning of the provision containing the error or omission is otherwise reasonably ascertainable to the Court.
7. Any other issues of construction shall be handled in accordance with generally-accepted principles of construction giving due regard for the underlying principles and purposes of this Code.

Sec. 1-8-8 Definitions

The following definitions will apply for the purposes of this Code:

1. "Indian" or "Indian Person" shall include any person of Indian descent who is a member of any federally recognized Tribe.
2. "Member" shall include a person whose name appears on the Membership Roll of the Yankton Sioux Tribe.
3. "Reservation" shall include all lands within the exterior boundaries of the Yankton Sioux Indian Reservation as set forth in the 1858 "Treaty with the Yankton Sioux" (11 Stat. 743).
4. "Tribe" shall mean the Yankton Sioux Tribe unless another or specific Indian Tribe is clearly intended.
5. "Tribal Council" shall mean the Yankton Sioux Tribal Council.
6. "Superintendent" shall mean the of the Bureau of Indian Affairs, Yankton Sioux Agency, Wagner, South Dakota.
7. "Age of Majority" shall mean 18 years of age unless otherwise provided in this Code, or in the Yankton Sioux Tribal Constitution and By-laws.

[Back to Top](#)

[Hours & Location](#) [Contact Us](#)

[DISCLAIMER](#) [PRIVACY STATEMENT](#) [NARF](#)

ARTICLE XXII

COMPACT WITH THE UNITED STATES

The following article shall be irrevocable without the consent of the United States and the people of the state of South Dakota expressed by their legislative assembly:

First. That perfect toleration of religious sentiment shall be secured, and that no inhabitant of this state shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That we, the people inhabiting the state of South Dakota, do agree and declare that we forever disclaim all right and title to the unappropriated public lands lying within the boundary of South Dakota, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States; and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said state shall never be taxed at a higher rate than the lands belonging to residents of this state; that no taxes shall be imposed by the state of South Dakota on lands or property therein belonging to or which may hereafter be purchased by the United States, or reserved for its use. But nothing herein shall preclude the state of South Dakota from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relation and has obtained from the United States, or from any person a title thereto by patent or other grant save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation. All such lands which may have been exempted by any grant or law of the United States, shall remain exempt to the extent, and as prescribed by such act of Congress.

Third. That the state of South Dakota shall assume and pay that portion of the debts and liabilities of the territory of Dakota as provided in this Constitution.

Fourth. That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of this state, and free from sectarian control.

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 27. Tribally Controlled School Grants (Refs & Annos)

25 U.S.C.A. § 2501

§ 2501. Declaration of policy

Effective: January 8, 2002

Currentness

(a) Recognition

Congress recognizes that the Indian Self-Determination and Education Assistance Act, which was a product of the legitimate aspirations and a recognition of the inherent authority of Indian nations, was and is a crucial positive step toward tribal and community control and that the United States has an obligation to assure maximum Indian participation in the direction of educational services so as to render the persons administering such services and the services themselves more responsive to the needs and desires of Indian communities.

(b) Commitment

Congress declares its commitment to the maintenance of the Federal Government's unique and continuing trust relationship with and responsibility to the Indian people for the education of Indian children through the establishment of a meaningful Indian self-determination policy for education that will deter further perpetuation of Federal bureaucratic domination of programs.

(c) National goal

Congress declares that a national goal of the United States is to provide the resources, processes, and structure that will enable tribes and local communities to obtain the quantity and quality of educational services and opportunities that will permit Indian children--

(1) to compete and excel in areas of their choice; and

(2) to achieve the measure of self-determination essential to their social and economic well-being.

(d) Educational needs

Congress affirms--

(1) true self-determination in any society of people is dependent upon an educational process that will ensure the development of qualified people to fulfill meaningful leadership roles;

(2) that Indian people have special and unique educational needs, including the need for programs to meet the linguistic and cultural aspirations of Indian tribes and communities; and

(3) that those needs may best be met through a grant process.

(e) Federal relations

Congress declares a commitment to the policies described in this section and support, to the full extent of congressional responsibility, for Federal relations with the Indian nations.

(f) Termination

Congress repudiates and rejects House Concurrent Resolution 108 of the 83d Congress and any policy of unilateral termination of Federal relations with any Indian nation.

CREDIT(S)

(Pub.L. 100-297, Title V, § 5202, as added Pub.L. 107-110, Title X, § 1043, Jan. 8, 2002, 115 Stat. 2063.)

Notes of Decisions (7)

25 U.S.C.A. § 2501, 25 USCA § 2501

Current through P.L. 115-281. Also includes P.L. 115-283 to 115-327, 115-329 to 115-333, 115-337, and 115-338. Title 26 current through P.L. 115-338.

United States Code Annotated
Title 25. Indians (Refs & Annos)
Chapter 27. Tribally Controlled School Grants (Refs & Annos)

25 U.S.C.A. § 2511

§ 2511. Definitions

Effective: January 8, 2002
Currentness

In this chapter:

(1) Bureau

The term "Bureau" means the Bureau of Indian Affairs of the Department of the Interior.

(2) Eligible Indian student

The term "eligible Indian student" has the meaning given such term in section 2007(f) of this title.

(3) Indian

The term "Indian" means a member of an Indian tribe, and includes individuals who are eligible for membership in a tribe, and the child or grandchild of such an individual.

(4) Indian tribe

The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community, including an Alaska Native Village Corporation or Regional Corporation (as defined in or established pursuant to the Alaska Native Claims Settlement Act [43 U.S.C. 1601 et seq.]), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

(5) Local educational agency

The term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for, public elementary schools or secondary schools in a city, county, township, school district, or other political subdivision of a State or such combination of school districts or counties as are recognized in a State as an administrative agency for the State's public elementary schools or secondary schools. Such term includes any other public institution or agency having administrative control and direction of a public elementary school or secondary school.

(6) Secretary

The term "Secretary" means the Secretary of the Interior.

(7) Tribal governing body

The term "tribal governing body" means, with respect to any school that receives assistance under this Act, the recognized governing body of the Indian tribe involved.

(8) Tribal organization

(A) In general

The term "tribal organization" means--

(i) the recognized governing body of any Indian tribe; or

(ii) any legally established organization of Indians that--

(I) is controlled, sanctioned, or chartered by such governing body or is democratically elected by the adult members of the Indian community to be served by such organization; and

(II) includes the maximum participation of Indians in all phases of the organization's activities.

(B) Authorization

In any case in which a grant is provided under this chapter to an organization to provide services through a tribally controlled school benefiting more than one Indian tribe, the approval of the governing bodies of Indian tribes representing 80 percent of the students attending the tribally controlled school shall be considered a sufficient tribal authorization for such grant.

(9) Tribally controlled school

The term "tribally controlled school" means a school that--

(A) is operated by an Indian tribe or a tribal organization, enrolling students in kindergarten through grade 12, including a preschool;

(B) is not a local educational agency; and

(C) is not directly administered by the Bureau of Indian Affairs.

CREDIT(S)

(Pub.L. 100-297, Title V, § 5212, as added Pub.L. 107-110, Title X, § 1043, Jan. 8, 2002, 115 Stat. 2078.)

25 U.S.C.A. § 2511, 25 USCA § 2511

Current through P.L. 115-281. Also includes P.L. 115-283 to 115-327, 115-329 to 115-333, 115-337, and 115-338. Title 26 current through P.L. 115-338.

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

APPEAL NO. 28738

Timothy Stathis,

Plaintiff and Appellant,

vs.

Marty Indian School, a South Dakota non-profit corporation;
Elk Soldier; also known as Gary Drapeau, Sr;
Glenn Drapeau; Galena Drapeau;
Sarah W. Zephier; Sarah R. Zephier;
Stephanie Cournoyer; Julie Blackmoon-Wright;
and John and/or Jane Does One (1) through Five (5),

Defendants and Appellees.

Appeal from the 1st Judicial Circuit, Charles Mix County, South Dakota
The Honorable Bruce Anderson, Circuit Judge

APPELLANT'S REPLY BRIEF

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Notice of Appeal Filed on September 28, 2018

TABLE OF CONTENTS

Table of Authorities3

Preliminary Statement.....4

Argument4

Conclusion11

Certificate of Compliance13

Certificate of Service14

TABLE OF AUTHORITIES

CASES:

United States Supreme Court:

Bryan v. Itasca County, Minnesota, 426 U.S. 373 (1976) 9

Lewis v. Clarke, 137 S. Ct. 1285 (2017) 7

South Dakota:

Anderson v. Brule Cty., 292 N.W. 429 (S.D. 1940) 8

Cheyenne River Sioux Tribe Tel. Auth. v. Pub. Utilities Comm’n of S.D., 1999 S.D. 60
..... 5, 6

Cournoyer v. Montana, 512 N.W. 2d 479 (S.D. 1994) 5, 6

State v. Waff, 373 N.W.2d 18 (S.D. 1985) 10

Tribal:

Gerken v. Marty Indian School, 2001 NPICA 15 (N. Plains Intertribal Ct. App. May 16,
2003) 12

STATUTES/CONSTITUTIONAL PROVISIONS:

S.D. Const. Art. XXII 8, 9

SDCL 1-1-21 9

SDCL 15-26A-66(b)(2) 13

SDCL 15-26A-66(b)(4) 13

SDCL 15-26C-1..... 14

OTHER AUTHORITY:

Patrick M. Garry & Candice Spurlin, History of the 1889 South Dakota Constitution, 59
S.D. L. Rev. 14, (2014) 8

Restatement (Second) of Contracts § 1 (1981) 11

PRELIMINARY STATEMENT

For the purposes of avoiding repetitive arguments, Appellant will attempt to limit the discussion herein to addressing select points raised by Appellees within their brief. Any matter raised in Appellant's initial brief that is not specifically mentioned herein is not intended to be waived. Appellant relies upon the Jurisdictional Statement, Statement of the Case, Statement of Facts, and Statement of Legal Issues presented in Appellant's initial brief filed with this Court on November 28, 2018.

References to Appellees' brief will be cited as "Appellee Br." followed by the page number. Appellant shall be referred to as "Stathis" or "Plaintiff", and Appellees shall be referred to as "Defendants", "Marty Indian School", or by individual name.

ARGUMENT

Defendants go to great lengths in their brief to paint tribal sovereign immunity as an absolute and impenetrable shield, the existence of which should serve to prevent not only them, but any other tribal defendant from ever being forced to defend on the merits against any cause of action brought in a state court. While they do concede the potential for tribal sovereign immunity to be limited by an Act of Congress or waived by the tribal entity itself, they otherwise fail to recognize even existing limitations placed on the doctrine by this Court or others. There are few if any doctrines under the law that are entirely immutable, and even fewer of those doctrines are purely judicially created doctrines, as is the case with tribal sovereign immunity. Defendants conclude their brief emphasizing the importance of *stare decisis*. While the value of *stare decisis* is certainly not deniable, even *stare decisis* should not be unlimited, and nor should tribal sovereign immunity be similarly unlimited.

A) Tribal Sovereign Immunity Has Been Limited Previously by This Court.

Defendants deny that the holdings by this Court in Cournoyer v. Montana and Cheyenne River Sioux Tribe Tel. Auth. v. Pub. Utils. Comm'n' of S.D. served to limit sovereign tribal immunity. That analysis is incorrect. 512 N.W. 2d 479 (S.D. 1994); 1999 S.D. 60. See, Appellee Br. 11-13.

This Court considered two issues in Cournoyer. Specifically, the issues of trial court subject matter jurisdiction and plaintiff's standing. The argument presented against subject matter jurisdiction in Cournoyer was that the underlying dispute was "an internal tribal matter" and as such a state trial court lacked the subject matter jurisdiction necessary to adjudicate the dispute. This is not at all unlike the argument being invoked by Marty Indian School against Stathis. While tribal sovereign immunity was not specifically invoked by name in Cournoyer, this Court's analysis was clearly guided by the interpretation of tribal sovereign immunity doctrine. This Court was essentially being asked in Cournoyer to weigh tribal immunity against the state's authority to regulate the practice of law. This Court even specifically considered the "right of reservation indians to make their own laws and be ruled by them" in its analysis, but ultimately found the argument presented against the subject matter jurisdiction of the trial court to be "ludicrous". Subject matter jurisdiction did indeed exist for the trial court. Stating – even correctly – that the dispute involved an "internal tribal matter" is not enough to defeat jurisdiction. While the end result of Cournoyer was a perfectly reasonable one – after all, it really does not make sense to allow an unlicensed attorney to practice in the state's courts simply on the basis that his employer happens to be an Indian Tribe – it cannot be denied that the holding was indeed an early example of limitations being placed on

exactly how far reaching the effects of the doctrine of tribal immunity could be in our state.

Likewise, and contrary to what is claimed by Defendants in their brief, the holding by this Court in Cheyenne River Sioux Tribe Tel. Auth. also served to place some limitations on the doctrine of tribal immunity. While there were several issues before this Court in the case, the key dispute was one of jurisdiction, which again is not dissimilar to the key issue disputed between Stathis and the Marty Indian School. In Cheyenne River Sioux Tribe Tel. Auth. a tribally owned telephone company argued that the South Dakota Public Utilities Commission lacked jurisdiction to regulate the sale of a telephone exchange located on an Indian Reservation. Again this Court looked to the origins of tribal sovereignty and considered the principles of tribal self-governance. Despite considering these points, ultimately it would be decided that the PUC has “extensive congressional and legislative authority” and that allowing regulation by the PUC was “not an improper infringement upon the Cheyenne River Sioux Tribe’s right to self-government”. Thus, the PUC did have regulatory jurisdiction. Just as in Cournoyer, after a detailed analysis it was determined that a tribe’s right to self-governance is not unlimited – even if the activities in question directly involved or took place on an Indian Reservation.

These two earlier decisions by this Court are consistent with later decisions coming from both the United States Supreme Court and the Alabama Supreme Court. Specifically, the South Dakota decisions illustrate the principle that there are limits to how much protection is afforded under tribal sovereign immunity and that both the

amount and the extent of that protection may be judicially limited as the doctrine continues to be evaluated.

B) Defendant Fails to Sufficiently Differentiate This Case from Lewis v. Clarke.

While Defendants attempt to differentiate this case from Lewis v. Clarke, they fail to do so convincingly. 137 S. Ct. 1285, (2017). See, Appellee Br. 22-13. First, Defendants point out that the tribal casino employee conduct at issue in Lewis occurred outside the Tribe's Reservation and not on tribal lands. What Defendants neglect in pointing this out is that the tribal casino employee involved was a limo driver and that his job duties involved driving casino patrons to and from the casino. Unless all of the casino patrons the driver was assigned to transport all happened to live on the reservation, it would be impossible for the driver to perform his job duties without driving off the reservation from time to time. As such, the fact the conduct at issue in Lewis took place off the reservation is not relevant. Instead, the key issue is that the driver was in the scope of his employment, much like the named defendants were in this case – a fact that is not disputed by Defendants.

Second, Defendants attempt to further differentiate Lewis by claiming that, unlike in Lewis, granting jurisdiction in this case would constitute a “substantial infringement on the Tribe's right to make its own laws and be governed by them”. The irony with this argument is that had the tribe and its members here legitimately adhered to and allowed themselves to be governed by their own published policies and procedures, the claims made by Stathis would not exist. In fact, the claims here are even more egregious than the claims in Lewis, as the conduct at issue in Lewis was merely negligent, while the conduct at issue here was intentional.

C) Article XXII of the South Dakota Constitution Was Included Under Duress, and This Was Later Recognized by the United States Congress

Defendants' brief also makes mention of Article XXII of the South Dakota Constitution. See, Appellee Br. 25. As correctly alluded to by Defendants, the inclusion of this article was a prerequisite to South Dakota joining the Union of the United States as per the Enabling Act of 1889. States to join the union under this Enabling Act were required to include in their state constitutions provisions "disclaiming title to Indian land", as well as provisions regarding the equality of tax rates, assumption of territorial debts, and provisions for a public school system. Patrick M. Garry & Candice Spurlin, History of the 1889 South Dakota Constitution, 59 S.D. L. Rev. 14, (2014). The requirements of the Enabling Act would ultimately be adopted by South Dakota. However, it is clear given the circumstances that the requirements were adopted under duress. In an early case of this Court examining the provisions of Article XXII and the surrounding circumstances it was concluded:

That these and similar provisions in other enabling acts and constitutions of the several states were inserted for the purpose of maintaining ample supreme powers on the part of the United States to permit it to fully respond to its legal and moral obligations to the Indians rather than for the purpose of withholding power from the states to exercise jurisdiction over the reservations, and that it was intended the states should exercise a limited jurisdiction over Indian reservations within their exterior boundaries, are settled propositions.

Anderson v. Brule Cty., 292 N.W. 429 (S.D. 1940).

In recognition of the issues created by the 1889 Enabling Act, in 1953 the United States Congress passed Public Law 280, which opened the door for states that had joined the Union pursuant to the 1889 Enabling Act to fully assume jurisdiction with regards to Indian land. The United States Supreme Court observed that the intent of Public Law 280

was “the conferral of state-court jurisdiction to adjudicate private civil causes of action involving Indians”. Bryan v. Itasca County, Minnesota, 426 U.S. 373 (1976).

While ultimately South Dakota never formally assumed civil jurisdiction pursuant to the opportunity created by Public Law 280, evidence of the state legislature’s attempts to do so remain on the books, with SDCL 1-1-21 specifically indicating the main reason the jurisdiction offered was never fully assumed was due to a lack on the Federal government’s part to come to an agreement with the State of South Dakota with regards to “reimbursement to this state and its counties for the added costs in connection with the assumption of said jurisdiction”. It is important to recognize that by revisiting the issue with Public Law 280 the United States Congress recognized the harsh and coercive nature of the Enabling Act of 1889 which lead to the inclusion of Article XXII in the South Dakota State Constitution and subsequently took steps to attempt to remedy that overreach.

D) *Stare Decisis* Itself Is Not a Limitless Doctrine

Towards the conclusion of their brief Defendants spend time discussing the importance of *stare decisis*, looking specifically to dissenting comments made by Justice Henderson. Phipps Bros. Inc. v. Nelson’s Oil & Gas, Inc., 508 N.W.2d 885 (S.D. 1993); Linard v. Hershey, 516 N.W.2d 304 (S.D. 1994). See, Appellee Br. 27-29.

While these points are not without merit, it is interesting to note the quote from Blackstone which was also included by Justice Henderson alongside his remarks in Phipps Bros. Inc.:

The doctrine of the law then is this: that precedents and rules be followed, unless flatly absurd or unjust; for though their reason be not obvious at first view, yet we owe such a deference to former times as to not suppose that they acted wholly without consideration.

Blackstone recognized the need to re-examine precedence from time to time; specifically in instances where strict adherence to such precedents yields a result that is “absurd or unjust”. This is something that Justice Henderson himself also recognized, and discussed at length, in one of his especially learned concurrences:

The law must be adaptable to the facts at hand so that the decision makes sense. A decision must reach out and fairly touch the parties involved in the litigation, not just history. Precedent addresses the past; often, it is full of wisdom and cannot be fully, nor partially disregarded. When it is defensible and applicable, it should live on.

Those of us who are weighted with the decision-making process must realize, however, that the law must address the needs of the present. In South Dakota, I have lived in an age where the farmers drove the team to town to get groceries and a load of coal, to watching through television, America placing a man on the moon via a rocket and spaceship. Now, the advent of a new defense stratagem for our country called “Star Wars” mystifies us. Law must change with the times. It cannot be 100% continuous. It must be adaptable. It must serve the needs of society. We cannot always cherish a doctrine or principle hoary with age. Innovations in society, technological advances beyond our wildest imagination, and revolutionary economic change and expansion require adaptability in the ever-development and growth of the law.

State v. Waff, 373 N.W.2d 18 (S.D. 1985) (Henderson, J. concurring).

It is important again to recall that tribal sovereign immunity is itself a judicially created doctrine and the fact it exists at all in its current form is a direct result of *stare decisis* being overridden previously by prior courts. The fact that tribal sovereign immunity doctrine has been limited and modified over the years by this Court, the United States Supreme Court, and, most recently, the Alabama Supreme Court, further illustrates that the doctrine is not as absolute as Defendants’ brief suggests.

CONCLUSION

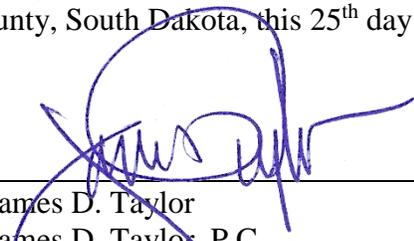
It is important to revisit the nature of the dispute itself between Stathis, the Marty Indian School, and the named Defendants. Stathis, as agreed by Defendants, entered into a voluntary contractual relationship with the Marty Indian School. Specifically, a contract of employment. See, Appellee Br. 3. A contract is “a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty”. Restatement (Second) of Contracts § 1 (1981).

By asserting tribal sovereign immunity and moving to dismiss Stathis’ claims, Defendants are in effect denying Stathis the possibility of a remedy, as well as denying the existence of any duties they might have under the contract. Without these key elements – those of remedy and duty – the agreement between Stathis and Marty Indian School, for all practical purposes, ceases to be a contract at all. In the absence of an enforcement mechanism a contract is really nothing more than a mere agreement subject to the whims of the parties. If Defendants are going to concede the existence of a contract between themselves and Stathis, it should be incumbent upon this Court to see that the possibility of enforcement of that contract exists, thereby affirming that the agreement truly is a contract. If it is suggested that a correlative remedy exists in Tribal Court, one need look no further than the nearly identical case of Gerken v. Marty Indian School, as cited in Stathis’ initial brief. 2001 NPICA 15 (N. Plains Intertribal Ct. App. May 16, 2003).

For the above reasons, as well as the reasons contained within Appellant’s initial brief, it is requested that this Court determine the trial court erred in granting Defendants’

Motion to Dismiss and remand the case back to the trial court for further proceedings consistent with this Court's determination.

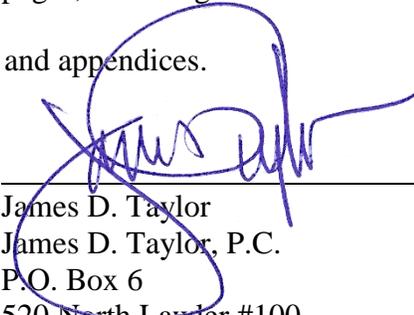
Dated at Mitchell, Davison County, South Dakota, this 25th day of January, 2019.



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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that he prepared the *Appellant's Reply Brief* herein and pursuant to SDCL 15-26A-66(b)(2) and (4) he certifies it complies with the statutory type volume limitation as calculated by Microsoft Word 365 exclusive of the Cover Sheet, Table of Contents, Table of Cases, Signatures and Certificates of Counsel, to wit: two thousand four hundred seventy two (2,472) words consisting of fifteen thousand two hundred sixty three (15,263) characters and spaces, and less than sixteen (16) pages, particularly, thirteen (13) pages, including all indices and certificates of counsel but excluding the cover page and appendices.

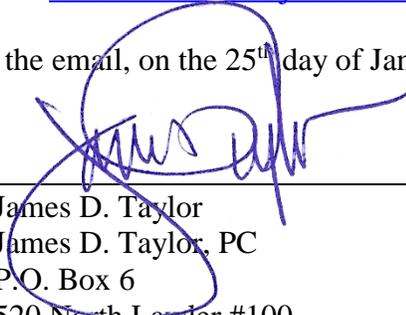


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CERTIFICATE OF SERVICE

The undersigned, James D. Taylor, hereby certifies that he served a true and correct copy of this *Appellant's Reply Brief* on Rebecca L. Kidder, Fredericks Peebles & Morgan LLP, 1830 West Fulton Street, Rapid City, SD 57701, by emailing a copy to her at rkidder@ndnlaw.com as well as depositing a copy of same in a postage paid envelope and depositing the same at the United States Post Office in Mitchell, South Dakota, on the 25th day of January, 2019.

The undersigned further certifies that in compliance with SDCL 15-26C-1 he has submitted a copy of this brief by email to SCClerkBriefs@ujs.state.sd.us with the number of the case appearing in the subject of the email, on the 25th day of January, 2019.



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