24684

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

CHARLES E. SISNEY, Appellant, v. STATE OF SOUTH DAKOTA, et al., Appellees.	CIVIL APPEAL # 24684 APPELLANT'S REPLY BRIEF

APPEAL FROM THE CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

MINNEHAHA COUNTY, SOUTH DAKOTA

THE HON. KATHLEEN K. CALDWELL, PRESIDING

Attorney for Plaintiff-Appellant:

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THE NOTICE OF APPEAL WAS FILED ON

THE 17th DAY OF OCTOBER, 2007.

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PRELIMINARY STATEMENT:

Appellant restates the Jurisdictional Statement, Statement of Legal Issues, Statement of the Case, and Statement of the Facts as stated in the Appellant's Brief.

Appellant would clarify the issues, his position, and to the extent new material was introduced by the Appellees, make arguments in his Reply Brief.

DISPUTED FACTS:

Appellant disputes portions of the Appellees' Statement of the Facts and asserts the following: 1) Sisney's rendition of the facts does contain citations to the record as required by SDCL § 15-26A-60(8)(b) as shown in the Appellant's Brief Appendix (page 1) Statement of Material Facts; 2) Weber's administrative remedy response to Sisney's grievance was that while Sisney's caloric values were correct, he did not list all the food being provided -- which was then disputed when Sisney submitted to Weber twelve independent declarations supporting his list of food being provided; and 3) The Appellees are not qualified to determine whether or not Sisney is Jewish by Orthodox standards -- Sisney has sincerely held Jewish religious beliefs, with said beliefs on file with the SDDOC/SDSP since early 2000.

ARGUMENTS:

1. The Defendants are not entitled to statutory immunity from Sisney's breach of contract claim.

Appellant would restate his arguments in support of his contention that the Defendants are not entitled to statutory immunity from his breach of contract claim. To the extent that the Appellees introduce new material, the Appellant makes the following arguments.

The Appellees contend that SDCL §§ 3-21-8,9 "provide correctional officers and parties acting on behalf of the State a complete defense against inmate lawsuits claiming violations of state law." citing Webb v. Lawrence County, 144 F.3d 1131, 1139-40 (8th Cir. 1998). The Appellees are deliberately misleading the Court. Webb actually reads, "... we agree with the district court that S.D. Codified Laws § 3-21-9 provide defendants with a complete defense to Webb's state **negligence** claim ...." (emphasis added) and "... thus provide public employees with a complete defense to state **tort** claim ...." (emphasis added) finally, "We agree with the district court that the statutory immunity defense applies **only** to defeat a tort claim arising under state law." (emphasis added) Id. at 1141. The instant case pertains to neither negligence nor tort, but is rather a

breach of contract claim.

Further, the Appellees would insist that SDCL §§ 3-21-8,9 must encompass both tort and breach of contract claims. "Otherwise, litigants could avoid statutory immunity by simply labeling or casting their claims as breach of contract claims." (Appellees Brief at 12). This not only flies in the face of Eighth Circuit ruling "... statutory immunity defense applies only to defeat a tort claim arising under state law." (Webb at 1141) but also insults the intelligence of the courts to be able to differentiate between a breach of contract claim and a tort claim.

The Appellees also attempt to bootstrap immunity to CBM in opposition of the Trial Court's ruling "... that SDCL § 3-21-8 would not confer immunity to a private corporation." citing Brown v. Youth Services Int'l of South Dakota, 89 F.Supp.2d 1095, 1101 (D.S.D. 2000). "This precedent indicates that CBM, as a private corporation merely doing business with the State, would not be afforded the statutory immunity conferred by § 3-21-8." (Memorandum and Opinion Letter page 8).

Furthermore, the Appellees argue semantics claiming that there is a difference between sovereign immunity and statutory immunity. This course of reasoning -- that there is a separate and distinct form of immunity -- was rejected by the Eighth Circuit in Webb at 1138-40.

When the Appellees' need does not conform with statute and case precedent, they then attempt to fit a square peg into a round hole by saying Sisney's breach of contract claim is actually a tort action; additionally, requiring statutory notification. This argument is wholly without merit.

Continuing their flawed reasoning, the Appellees contend that whether CBM and the State amend the contract between them to provide for a different kosher diet menu is a discretionary act. The menu is not in dispute and has no relevancy to the instant case -- only the amount of calories provided. The contract states, "[t]he proposed menu at Correctional Facilities will have an average caloric base of 2700-3500 calories per day." (Appellees' Statement of the Facts). The word "will" here denotes a mandatory or ministerial action, **not** a discretionary one.

When all else fails and the Appellees' house of cards begins to collapse, they then attempt in inflame this Court against Sisney by making note that Sisney admitted in his pending federal lawsuit that he is receiving a nutritionally adequate kosher diet, citing Sisney v. Reisch, et al., CIV 03-4260 (D.S.D.), Doc. 218 ¶¶ 99-100; Doc. 248 ¶¶ 99-100.[1]

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[1] What the Appellees deliberately fail to mention is that Doc. 218 ¶¶ 99-100 is the Defendants' Statement of Undisputed

Sisney would thank the Appellees for pointing out to the Court that he **was** receiving a nutritionally adequate kosher diet -- **two years ago** when he was receiving the amount of calories called for in the food service contract.

2. Sisney has standing to assert a breach of contract against the Defendants.

Here, the Appellees continue their disparaging attacks in the drive to envenom this Court against Sisney. They claim that the Appellant has filed several lawsuits, including an attempt to sue CBM under a [separate] breach of contract theory. They aver that since Sisney has already sought a breach of contract once before, he should be barred by comity from **ever** seeking a breach of contract against CBM. This is aberrant reasoning. While Sisney has brought a previous breach of contract claim against CBM, it

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Material Facts pertaining to a deposition taken upon Sisney in January 2006 -- over a year before the instant case's breach of contract violation -- when he was receiving the requisite calories; Doc. 248 is the Plaintiff's Statement of Disputed and Undisputed Material Facts dated the 23rd September 2007. ¶ 99 pertains to kosher commissary while ¶ 100 disputes the nutritional adequacy of the **current** kosher diet.

was in regards to a completely different issue. Even should the court compare the two separate issues, failure to prosecute one claim does not grant comity concerning a different claim. Each claim is to be reviewed separately.

Regarding the question of "express benefit" -- this was addressed by Sisney pointing out that Section 1.2 of the Food Service Contract states, "These services must be provided in a manner that will meet the needs and concerns of residents, inmates and staff." Consequently, "Where the third-party beneficiary is so described as to be ascertainable, it is not necessary that he be named in the contract in order to recover thereon. Indeed, he may be one of a class of persons, if such class is sufficiently described or designated." 17A Am. Jur. 2d Contracts § 443. Additional arguments were expounded in the Appellant's Brief.

According to the RESTATEMENT, a promisor who contracts with a government to do an act or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless: 1) the terms of the promise provide for such liability; or 2) the promisee is subject to liability to the member of the public for the damages. Id. § 429.

First, the damages suffered by the class-beneficiary are not merely consequential, but rather direct and substantial;

second, even if the court considered the damages consequential, the contract provided liability by giving the "right of grievance" to the class-beneficiaries through the government's administrative remedy process (see Section 5.10 of Contract); and finally, the State is subject to liability under law by the class should the contract not be performed (ie. if the class is not fed, then there would be, at a minimum, an U.S. Eighth Amendment Constitutional violation by the State). Any member of a class for whose benefit a contract is intended may enforce it, and the fact the government is one of the contracting parties does not change this rule. Id. § 436. The law presumes that the parties understood the import of their contract and that they had the intention which its terms manifested. Id. § 347.

The Appellees propagate scare tactics with claims insinuating that there would be tens of thousands of third-party beneficiaries suing the State should the Court adopt the Appellant's argument. This is an outrageous embellishment for it is only Sisney's diet which has been violated It is the individual who is entitled to equal protection of law, and if he is denied facility or convenience which under substantially same conditions is furnished to another, the individual alone may complain that his privilege has been invaded. Williams v. Kansas City, Mo., 104 F.Supp. 848, affirmed 205 F.2d 47, cert. denied 346 U.S. 826.

3. Sisney's federal claims were properly alleged and do state claims upon which relief can be granted.

The Appellant reasserts arguments made in his brief to support his charge that the Defendants violated his rights under 42 U.S.C. §§ 1981 and 1985. Appellant maintains that he met his threshold burden in pleadings and should be given the opportunity to prove his case in court.

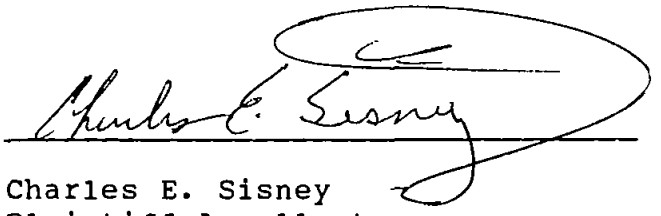
4. If the Plaintiff's Complaint was deficient, the Trial Court should have given him the opportunity to amend.

The Appellant restates his arguments in support of his contention that if his complaint was deficient, the Trial Court should have allowed him the opportunity to amend such when he asked. Pro se pleadings are to be held to a less stringent standard than formal pleadings drafted by lawyers. [cf. Haines v. Kerner, 404 U.S. 519 (1972)].

CONCLUSION

In conclusion, the Appellant would ask this Court to reverse the Trial Court's dismissal and allow him to proceed forward with this litigation.

Respectfully submitted on this 28 day of January, 2008.



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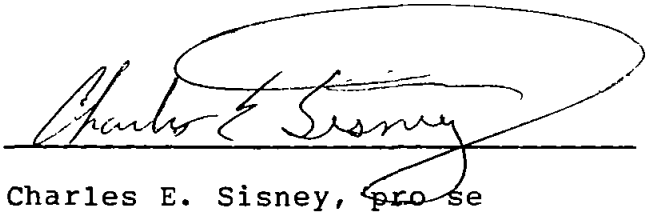
WAIVER OF ORAL ARGUMENT:

To the extent that this appeal presents properly-reviewable legal issues, these issues can be disposed of by relying upon well-settled principles of law. Accordingly, the Appellant respectfully submits that oral arguments would not be helpful.



Charles E. Sisney, ~~pro se~~

CERTIFICATE OF SERVICE

I, Charles E. Sisney, hereby certify under penalty of perjury that on the 28 day of January, 2008, I sent the below listed parties the indicated number of copies of the foregoing Appellant's Reply Brief through the SDDOC Legal Mail System.

Jeffrey L. Bratkiewicz, c/o Woods, Fuller, Shultz & Smith, P.C., P.O. Box 5027, Sioux Falls, S.D. 57117-5027.

(Two Copies)

South Dakota Supreme Court, c/o Shirley Jameson-Fergel, Clerk of the Supreme Court of South Dakota, 500 E. Capitol Avenue, Pierre, S.D. 57501-5070.

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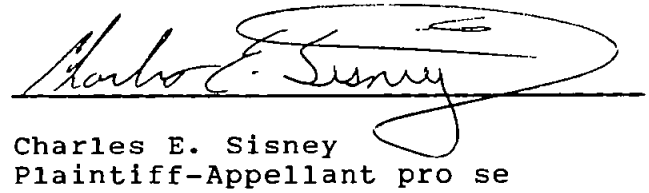

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