

**CIRCUIT COURT OF SOUTH DAKOTA  
SECOND JUDICIAL CIRCUIT  
LINCOLN & MINNEHAHA COUNTIES**

425 North Dakota Avenue  
Sioux Falls, SD 57104-2471

**CIRCUIT JUDGES**

Glen A. Severson, Presiding Judge  
William J. Srstka, Jr.  
Kathleen K. Caldwell  
Peter H. Lieberman  
C. Joseph Neiles  
Stuart L. Tiede  
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August 10, 2007

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Re: Secretary of State Chris Nelson v. Promising Future, Inc. and Roger W. Hunt, CIV 06-4319 – **Defendants' Motion for Judgment on the Pleadings or, in the alternative, Motion for Summary Judgment.**

Dear Counsel:

This matter came for hearing before the Court on August 3, 2007 on Defendants' Motion for Judgment on the Pleadings or, in the alternative, Motion for Summary Judgment. Assistant Attorney General Jeffrey P. Hallem appeared on behalf of Plaintiff Secretary of State Chris Nelson, who was personally present. Attorney Steven Sanford appeared on behalf of Defendants Promising Future, Inc. and Roger W. Hunt. Having reviewed the parties' submissions and considered the arguments of counsel, the Court issues its decision as follows:

## FACTS AND PROCEDURE

The Secretary of State, Chris Nelson, (Secretary or Plaintiff) brought this cause of action pursuant SDCL ch. 21-24 seeking a declaration of the status of Promising Future, Inc. and Roger Hunt (PFI or Hunt, individually, or Defendants collectively) under SDCL 12-25-1(1A) and of the filing and reporting obligations under SDCL 12-25-19.1 and 12-25-13.1. Defendants previously moved, pursuant SDCL 15-6-12(b)(5), for an order dismissing Plaintiff's Complaint on its merits and with prejudice. This Court denied the motion to dismiss on April 25, 2006.

On May 23, 2007, Defendants filed their current Motion for Judgment on the Pleadings, or alternatively, Motion for Summary Judgment. Plaintiff opposed the motions both procedurally and substantively. However, the parties have entered into a stipulation by which Plaintiff has withdrawn its procedural objections to the Court's consideration of Defendants' motions. Defendants have filed a Statement of Undisputed Material Facts in which, for purposes of their motions only, they admit to all factual allegations in Plaintiff's Complaint. The parties have agreed that the scope of Defendant's Motion for Summary Judgment is limited to:

1. Whether under the undisputed material facts a ballot question committee was created which is subject to the reporting requirements of SDCL 12-25-19.1 and 12-25-13.1;
2. If the Court declares that a ballot question committee was created and is required to comply with the reporting requirements concerning the unnamed third party, whether, as applied to Defendants and the unnamed third party, the statute is unconstitutional as violative of the First Amendment;
3. Whether the statutes relied upon by the Secretary are unconstitutionally vague.

For purposes of this motion only, the following facts asserted in Plaintiff's Complaint are admitted by Defendants:

Plaintiff is the duly elected Secretary of State for the State of South Dakota. One of his duties is to administer the campaign finance provisions of SDCL ch. 12-25. Defendant PFI is a corporation under the laws of the State of South Dakota. Defendant Hunt is a resident of Minnehaha County. PFI filed its Articles of Incorporation with the Secretary's Office on September 14, 2006. At the direction of an unnamed third party, PFI was incorporated by Hunt who is its registered agent and holds all offices. PFI's corporate address is Hunt's law office in Brandon, South Dakota. However, Hunt is not a shareholder or equity owner of PFI. PFI is wholly owned by a single shareholder, the unnamed third party who directed Hunt to incorporate.

PFI's Articles of Incorporation include the following stated purposes:

The purpose for which the corporation is organized is to invest in real estate and other commercial venture; for the advancement and support of public and special activities, causes, events, issues, and entities furthering the general welfare and interests of the people of South Dakota; for education of the public concerning ballot issues; and to engage in and support public and private endeavors, interests, activities, causes, events, programs, and entities in and related to maintaining and preserving traditional family values; and in general to carry on any other lawful business whatsoever in connection with the foregoing or which is calculated directly or indirectly, to promote the interests of the corporation or to enhance the value of its properties. Nothing herein contained shall be deemed to limit or deprive the corporation of the powers and rights granted to it by the South Dakota Business Corporation Act.

South Dakotans for 1215/VoteYesForLife.com (VoteYesForLife) is a ballot question committee that was organized to support the adoption of HB 1215 (known as Referred Law 6) which was referred and voted upon during the November 7, 2006 general election. On November 2, 2006, the Secretary received VoteYesForLife's pre-election campaign finance report which reported two separate \$250,000 contributions from PFI. VoteYesForLife also filed a Supplemental Campaign Finance Report with the Secretary that reported an additional \$250,000 contribution from PFI.

On or about November 3, 2006, the Secretary advised Hunt that PFI was required to file campaign finance reports with his office pursuant to the provisions of SDCL 12-25-19.1 and 12-25-13.1. Hunt was advised that such reports and supplemental reports needed to include the name, address, and place of employment of any individual that provided funds to PFI that were expended as contributions to VoteYesForLife. On November 3, 2006, the Secretary received from PFI, via facsimile, a "State of South Dakota Candidates or Committee Report of Receipts and Expenditures" through October 28, 2006 which noted a contribution from PFI in the amount of \$500,000 and an expenditure in the identical amount to VoteYesForLife. The report was signed by Hunt. Also, a "State of South Dakota Supplemental Statement of Committee's Report of Receipts" was received which reported a contribution in the amount of \$250,000 and an expenditure in that amount to VoteYesForLife. It was also signed by Hunt. The cover letter faxed with the reports stated that the reports were filed under protest because it was Hunt's opinion that PFI was not a ballot question committee and not required to file any campaign finance reports. Hunt has stated that PFI is not by law required and will not otherwise identify the source of the \$750,000 that PFI contributed to VoteYesForLife.

The Secretary alleges that the entire \$750,000 that PFI contributed to VoteYesForLife was money that the sole shareholder provided to PFI for the

purposes of making the three \$250,000 contributions to VoteYesForLife. It claims that the real purpose of PFI's creation was to provide a corporate shell by which the sole shareholder that directed Hunt to incorporate could make anonymous contributions to ballot question committees that supported the passage of Referred Law 6, such as VoteYesForLife. The Secretary contends that Hunt, PFI and its unnamed shareholder constitute a "ballot question committee" under SDCL 12-25-1(1A) and are required to file reports under SDCL 12-25-19 and 12-25-13.1 which include the name, address and place of employment of the unnamed shareholder who provided the \$750,000 that was contributed to VoteYesForLife.

### STANDARD OF REVIEW

Defendants have moved for judgment on the pleadings, or alternatively, for summary judgment. "Judgment on the pleadings provides an expeditious remedy to test the legal sufficiency, substance, and form of the pleadings." *Loesch v. City of Huron*, 2006 SD 93, ¶3, 723 NW2d 694, 695 (quoting *M.S. v. Dinkytown Day Care Center, Inc.*, 485 NW2d 587, 588 (SD 1992) (internal quotations omitted)). "It is only an appropriate remedy to resolve issues of law when there are no disputed facts." *Id.* Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." SDCL 15-6-56(c). All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. *Hayes v. Northern Hills Gen. Hosp.*, 1999 SD 28, ¶12, 590 NW2d 243, 247 (SD 1999) (citation omitted). The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. *Id.* "A disputed fact is not material unless it would affect the outcome of the suit under the governing substantive law in that 'a reasonable jury could return a verdict for the nonmoving party.'" *SD State Cement Plant Comm'n v. Wausau Underwriters Ins. Co.*, 2000 SD 116, ¶9, 616 NW2d 397, 400-01 (quoting *Weiss v. Van Norman*, 1997 SD 40, ¶11 n.2, 562 NW2d 113, 116 (internal citations omitted)). However, the party who opposes a Motion for Summary Judgment "may not rest on the mere allegations . . . in his pleading. He must present evidentiary matters showing that there is a genuine issue of material fact that is worth bringing to trial." *Peterson v. Spink Electric Co-op Inc.*, 1998 SD 60, ¶8, 568 NW2d 589, 591.

### LAW AND ANALYSIS

The issue in this case deals with the application of SDCL 12-25-1(1A) (now repealed) to the facts. The Secretary claims that Hunt, PFI and the unnamed third party, the sole shareholder of PFI, constitute a ballot question committee under SDCL 12-25-1(1A) which defines a ballot question committee as:

any two or more people who cooperate for the purpose of raising, collecting or disbursing money for the adoption or defeat of any question submitted to the voters at any election[.]<sup>1</sup>

The rules of statutory constructions are well-established:

The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute. The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must

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<sup>1</sup> This case must be decided under the law as it existed in 2006. During the 2007 legislative session, the Legislature revised the campaign finance statutes and repealed SDCL 12-25-1 to 12-25-26, inclusive. SDCL 12-27-1 now defines a ballot question committee as:

[A] person or organization that raises, collects, or disburses contributions solicited for the placement of a ballot question on the ballot or the adoption or defeat of any ballot question. A ballot question committee is not a person, political committee, or political party that makes a contribution to a ballot question committee. A ballot question committee is not an organization that makes a contribution to a ballot question committee from treasury funds.

The Legislature also enacted SDCL 12-27-19 which specifically address contributions made by an organization to a ballot question committee:

Any organization that makes a contribution to a ballot question committee pursuant to § 12-27-18 shall:

(1) Be filed as a domestic or foreign entity in good standing with the Office of the Secretary of State of this state, or

(2) If the organization is not filed as a domestic or foreign entity in good standing with the Office of the Secretary of State of this state, the organization shall include with any contribution to a ballot question committee a statement providing the following information:

(a) The name of the organization;

(b) The name of the state or country under whose law the organization is incorporated or organized; and

(c) The street address of the organization's principal office; or

(3) However, if subdivisions 1 and 2 do not apply to the organization, then the organization shall include with any contribution to a ballot question committee a statement providing the following information:

(a) The name of the organization;

(b) The street address of the organization's principal office; and

(c) The names and street addresses of any owners, directors, or officers of the organization including the name and street address of the person authorizing the contribution.

*Further, if any contribution from an organization to a ballot question committee exceeds ten thousand dollars in the aggregate, and the organization is comprised of twenty or fewer members or shareholders, the contribution shall include a statement with the name and address of each shareholder or member who owns ten percent or more of the organization. The ballot question committee shall disclose all information provided in the statement in the applicable campaign financial disclosure statement or supplemental statement.*

If any of the information required by this section is not delivered to the treasurer of the ballot question committee, the treasurer shall return the contribution. A violation of this section is a Class 1 misdemeanor.

Emphasis added.

confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed. Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject. But, in construing statutes together it is presumed that the legislature did not intend an absurd or unreasonable result. When the question is which of two enactments the legislature intended to apply to a particular situation, terms of a statute relating to a particular subject will prevail over the general terms of another statute. *Moss v. Guttormson*, 1996 SD 76, ¶10, 551 NW2d 14, 17 (citing *U.S. West Communications, Inc. v. Public Util. Comm'n*, 505 NW2d 115, 122-23 (SD 1993)) (citations omitted).

*Benson v. State of South Dakota*, 2006 SD 8, ¶71, 710 NW2d 131, 158 (quoting *Martinmaas v. Engelmann*, 2000 SD 85, ¶49, 612 NW2d 600, 611).

For purposes of their motions only, Defendants concede that the purpose for incorporating PFI was to allow the unnamed shareholder to make an anonymous donation to VoteYesForLife. The question is whether, under the law as it existed in 2006, Defendants' conduct made PFI a ballot question committee. The unnamed shareholder instructed Hunt to incorporate PFI. Hunt, who is an attorney, acted as PFI's incorporator and held all corporate offices. The unnamed sole shareholder of PFI placed the money in PFI. PFI then made a contribution to VoteYesForLife. PFI did not raise or collect money because, as the Secretary asserts, the unnamed shareholder directed the formation of PFI with the already formed intent to make a donation. Further, PFI's giving of \$750,000 to VoteYesForLife was not a disbursement. Rather, it was a contribution which is defined as "any valuable consideration in whatever form received by any candidate, candidate's committee, political party committee, ballot question committee or political action committee." SDCL 12-25-1(5). "Contribution" is defined in the statute. "Disbursement" is not. If disbursement and contribution were meant to have the same meaning, the statute would so state. The legislature did not define ballot question committee as two or more people who cooperate for the purpose of making a contribution.<sup>2</sup> Giving a contribution does not make a corporation a ballot question committee.

Even if PFI was formed with the motive of protecting the identity of the unnamed shareholder who wished to donate to VoteYesForLife, that does not mean that its conduct violated SDCL ch 12-25. A corporation is allowed to make contributions to a ballot question committee. SDCL 12-25-2.<sup>3</sup> The ballot question

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<sup>2</sup> SDCL 12-27-1 now defines a ballot question committee as a person or organization that raises, collects, or disburses contributions[.]

<sup>3</sup> SDCL 12-25-2 provides, in relevant part:

No candidate, candidate's committee, political action committee, or political party committee may receive any contribution except from an individual, political action committee, or a political party. *No corporation may contribute or attempt to contribute any valuable*

committee, in this case *VoteYesForLife*, disclosed the corporate contributor in its finance report. However, the corporation making the contribution was not required to disclose every shareholder of the corporation under the laws in place in 2006. In 2006, there was no law requiring that a contributor make a contribution to a ballot question committee in its, his or her own name or using only its, his or her own funds.<sup>4</sup>

The Secretary's interpretation of the statutes to require PFI to identify its shareholder is problematic both under the plain language of the statutes and in its application. The Secretary wants this Court to look beyond the language of SDCL 12-25-1(1A) and look at the subjective intent of Hunt and the unnamed third party in creating PFI. The Secretary characterized this at the hearing as the "functionality of their actions." The Secretary is not claiming that every corporation which makes a contribution is a ballot question committee which must disclose its shareholders. In essence, the Secretary argues that PFI is not a "legitimate" corporation because it was created to hide the identity of the unnamed third party. However, the Secretary acknowledges that PFI is a duly authorized corporation organized under the laws of the State of South Dakota. In 2006, there was no law prohibiting an individual from giving money to another entity to make a contribution. "[T]his Court must apply the law as the legislature enacted it and must search for legislative intent by what the legislature said rather than what it should have said or might have said." *Slama v. Landmann Jungman Hosp.*, 2002 SD 151, ¶7, 654 NW2d 826, 828 (citing *Whitney v. AGSCO Dakota*, 453 NW2d 847, 851 (SD 1990)). This Court concludes that PFI is not a ballot question committee under the definition provided in SDCL 12-25-1(1A). Having reached this conclusion, it is not necessary to reach Defendants' First Amendment arguments.

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*consideration to any candidate, committee, or political party except a ballot question committee. No association may contribute or attempt to contribute any valuable consideration to any candidate, committee, or political party except a ballot question committee*

Emphasis added.

<sup>4</sup> In 2007, the Legislature enacted SDCL 12-27-11 which provides:

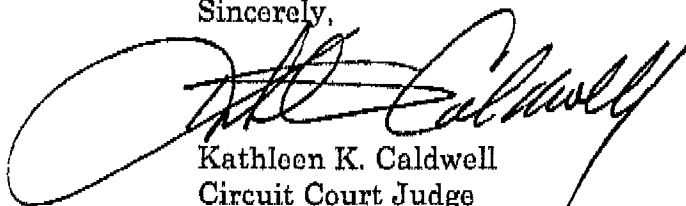
No person, organization, candidate, political committee, or political party may give or accept a contribution unless the name and residence address of the contributor is made known to the person receiving the contribution. Any contribution, money, or other thing of value received by a candidate, political committee, or political party from an unknown source shall be donated to a nonprofit charitable organization. A violation of this section is a Class 2 misdemeanor.

It also enacted SDCL 12-27-12 which provides:

No person may make a contribution in the name of another person, make a contribution disguised as a gift, make a contribution in a fictitious name, make a contribution on behalf of another person, or knowingly permit another to use his or her name to make a contribution. No candidate may accept a contribution disguised as a gift. A violation of this section is a Class 1 misdemeanor.

Therefore, Defendants are entitled to summary judgment. Counsel for Defendants should prepare the appropriate order and judgment incorporating this decision.

Sincerely,



Kathleen K. Caldwell  
Circuit Court Judge

Cc: clerk's file

**FILED**  
AUG 13 2007  
Minnehaha County, S.D.  
Clerk Circuit Court