CHEYENNE RIVER SIOUX TRIBAL COURT
CHEYENNE RIVER SIOUX TRIBE
CHEYENNE RIVER INDIAN RESERVATION

GENERAL SESSION
CIVIL APPELLATE COURT

APPEAL NO. 03-002-A

THE BANK OF HOVEN,
NOW KNOWN AS PLAINS COMMERCE BANK,

Appellant,

vs.

LONG FAMILY LAND AND CATTLE COMPANY, INC.-
RONNIE AND LILA LONG,

Respondents.

APPEAL FROM THE CHEYENNE RIVER SIOUX TRIBAL COURT,
CHEYENNE RIVER SIOUX TRIBE
CHEYENNE RIVER INDIAN RESERVATION
CIVIL COURT, GENERAL SESSION

The Honorable B. J. Jones, Special Judge

Notice of Appeal was filed by Appellants on March 19, 2003
Notice of Appeal of Respondents dated March 27, 2003

BRIEF OF RESPONDENTS, LONG FAMILY LAND AND CATTLE COMPANY, INC.-RONNIE AND LILA LONG

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

ISSUE ONE: DISCRIMINATION

The Bank's motion to dismiss the Longs' claim of discrimination for lack of jurisdiction was denied. Based on the facts of this case and the applicable law, the trial court's decision is correct and should be affirmed. The facts relevant to jurisdiction and discrimination are attached. (Tab 3) The jury determined that the Bank intentionally discriminated against Longs based solely on their status as Indians or tribal members (Tab 1).

CRST Judge Bluespruce heard testimony and ruled on this issue. Judge Bluespruce held that the CRST Court has jurisdiction in this case. (Tab 5) The CRST Code provides for jurisdiction over non-members who through their presence, business dealings, or other minimum contacts incur civil obligations to CRST members. (Tab 2) The Bank has had more than minimum contacts in this case. The Bank had a mortgage on the land located on the reservation, and liens on the Longs' cattle, machinery, and hay located on the reservation. Bank officers came on the Longs' land on the reservation and inspected Longs' cattle, hay, and machinery on the land. Discussions with Bank officers, the Longs, and CRST officers on the Bank's proposed restructuring plan took place on the reservation on the Longs' land and at the CRST offices.

The Bank and Longs had reached an understanding that the Bank would resell the land back to them on a contract for deed. (Tr. 106)(Ex. 4) The Bank then changed its position. The Bank sent a letter to Ronnie Long, which was admitted into evidence without objection. The Bank told the Longs it would not finance the sale of the land to them on a contract for deed because they are Indians. (Tr. 106-107, 330)(Ex. 4) In the revised agreement the Bank changed the terms from a contract for deed to a two-year lease, where the Longs only had two years to pay in full for their land. (Exs. 6, 7, 19, 25)(Tr. 167, 362) While the Longs were still legally in possession of the land, the Bank sold their land to Pesicka and Maciejewski, who are not Indians or tribal members (Ex. 26), on terms more favorable than the Bank required of the

Longs. The Bank sold 320 acres to Pesicka for $155 per acre, but the Bank required Longs to pay $210 per acre. (Tr. 167) The Bank sold Longs' land to non-member Pesicka for $55 less per acre, which is $17,600 less than the Bank required Longs to pay for the 320 acres. (Tr. 167)

The Bank also sold 1,905 acres to Maciejewski, who is not an Indian or a tribal member, on a contract for deed with favorable terms at 7.75% interest, with ten years to pay in annual payments of $23,229. (Ex. 21,25)(Tr. 168, 366) FSA payments on the land of $23,000 per year (Ex. 23a) paid the payments for Maciejewski on the contract for deed. (Tr. 367-368) The Bank's terms of sale for Maciejewski are more favorable than the terms the Bank required of Longs. (Tr. 168) The Bank required Longs to pay 9.25% interest to restructure the note (Tr. 351)(Ex. 8), and 8.5% on the Lease With Option to Purchase (Ex. 7), but the Bank charged Maciejewski only 7.75% interest. (Ex. 21) The Bank required Longs to pay the full purchase price of $468,000 in a cash lump sum in two years, but Maciejewski got ten years to pay for the land in payments of $23,329 a year. (Tr. 169, 366)(Exs. 7, 21) A contract for deed would have made it substantially easier for Longs to buy back their land, where the annual FSA payments and annual crop production pay the contract for deed payments over ten years. (Tr. 168)

Judge Jones determined that the above facts are prima facie evidence that the Bank denied Longs the privilege of favorable bank financing on a contract for deed solely because of their status as Indians and tribal members, and thus submitted Longs' claim to the jury. (Tr. 438-439) The jury determined that the Bank intentionally discriminated against Longs solely on their status as Indians or tribal members in the Lease With Option to Purchase. Judge Jones correctly denied the Bank's motion to dismiss for lack of jurisdiction in the attached decision. (Tab 4) The CRST Court has jurisdiction over this issue under CRST Code Sec. 1-4-1, and 42 U.S.C. 2000d. The trial court was correct in denying the

Bank's motion to dismiss for lack of jurisdiction. Laufman v. Oakley Bldg and Loan; Nevada v. Hicks; Montana v. United States; Gesinger vs. Gesinger; and Santa Clara Pueblo v. Martinez. (Tab 4)

In response to the Bank's motion for judgment notwithstanding the verdict, the Court must accept as true evidence presented by the non-moving party (the Longs), and indulge all legitimate inferences in favor of the party against whom the motion is brought (the Longs). First Bank of SD v. Von Eye, 425 N.W.2d 630 (S.D. 1988). The Court must determine if there is any substantial evidence to sustain the cause of action. If there is such evidence as would allow reasonable minds to differ, the issue must go to the jury. First Bank of SD v. Von Eye, supra. (Tab 10) It is not this Court's function on appeal to weigh the evidence or substitute the Court's judgment for that of the jury. First Bank of SD v. Von Eye, supra. (Tab 10) The test is whether there is substantial credible evidence that would tend to sustain the verdict. Longs presented a prima facie case of discrimination, that would allow reasonable minds to differ, and therefore, the trial court was correct in allowing the issue to go to the jury. Accepting as true the evidence presented by the Longs, and indulging all legitimate inferences in favor of the Longs, sufficient credible evidence was presented to sustain the verdict. The jurors are the exclusive judges of the weight of the evidence and the credibility of the witnesses. First Bank of SD v. Von Eye, supra. On these facts, the jury determined that the Bank intentionally discriminated against the Longs based solely on their status as Indians or tribal members. The Longs request that this Appellate Court affirm the decisions of the trial court and the jury on the discrimination issue.

ISSUE TWO: BREACH OF CONTRACT

The trial court did not err in denying the Bank's motion for a directed verdict and judgment notwithstanding the verdict on Longs' breach of contract claim. There is

sufficient evidence to support the jury verdict that the Bank breached the Loan Agreement. (Tab 1)

1. The agreement between the Bank and the Longs involves several points: (a) the farmland and house would be deeded to the Bank for a credit of $478,000 against debt owed to the Bank; (b) Longs would lease their land back from the Bank for a period of two years; (c) Longs would assign their CRP payments of $88,400 to the Bank, and pay the real estate taxes on the land for two years; (d) the Bank would request that BIA increase the guarantee and reschedule note #98181 at 9.25% over 20 years; (e) the Bank would make Longs an annual operating loan of $70,000 to care for their cattle and crops; (f) the Bank would make Longs a loan of $37,500 to purchase 110 calves to increase their income so they could buy back their land from the Bank at the end of two years. (Exs. 6, 7) (Tr. 118, 120, 342, 343)

2. The Bank proposed the restructure plan and prepared the written agreement. (Tr. 114) During the discussions and signing of the written agreement the Bank was represented by its lawyer, however, a lawyer did not represent the Longs because they could not afford a lawyer. (Tr. 294-296, 396-397) The Longs did not understand the legal ramifications of the Loan Agreement and Lease With Option To Purchase. (Tr. 295)

3. The agreement was prepared by the Bank in two documents entitled (a) Loan Agreement, and (b) Lease With Option to Purchase. Both were signed on December 5, 1996. (Exs. 6, 7) Both documents are part of the same agreement. (Tab 7) Longs claimed the agreement was breached by the Bank, and presented substantial evidence at trial in support of their claim. The Bank received from the Longs the deed in lieu of foreclosure to Longs' land worth $468,000, the house that sold for $30,000, and Longs' CRP payments of $88,400, in exchange for the new loans and the Lease With Option to Purchase. The Bank received consideration of $586,400, but the Bank did not perform its promises of new loans to the Longs. The Bank breached the agreement in two ways: It is undisputed that (a) the

new operating loan of $70,000 that the Longs needed to operate their ranch was never made (Tr. 122, 151, 358); and (b) the new loan for $37,500 to enable the Longs to purchase 110 calves to increase their income so they could buy back their land was never made. (Tr. 122-123 358) The new loans were intended to put the Longs in a stronger financial position to purchase back their land from the Bank. (Tr. 98, 118)

The Bank breached the promises of new loans that the Longs needed to pay for operating expenses and to purchase 110 calves to increase their income to buy back their land. (Tr. 122-123) As a direct result, they were unable to feed or care for their livestock during the winter of 1996-1997. (Tr. 117, 172-173) The Bank knew they did not have operating money to move their hay 20 miles to feed their cattle on their Indian Range Unit. (Tr. 151-152, 197, 203, 206-207, 291-294, 325, 359) The Bank knew the cattle did not have feed, and cattle without feed cannot survive very long in severe winter weather. (Tr. 354) Because the Bank failed to make the $70,000 operating loan as promised, and did not make an emergency loan to care for the cattle, Longs lost 230 cows, 277 yearlings, and 8 horses. (Tr. 173, 206-207, 293-294)(Ex. 14) The cattle that died had a value of $340,000, plus lost calf crops. (Ex. 23) The promised operating loan of $70,000 would have enabled Longs to move their hay to their cattle and care for their cattle during the winter. (Tr. 173, 206-207) Failure to make the loan caused Longs to suffer losses of $1,236,792. (Ex. 23) The Bank got $586,400 of value from the Longs through the deed to the land, the house proceeds, and the CRP payments, but the Longs did not get the new loans the Bank promised.

The Bank admitted at trial that the $70,000 operating loan was necessary for Longs' success, and that the $37,500 cattle purchase loan was to buy cattle to increase their income. Dennis Huber testified that without the operating loan the Longs were doomed to failure from the start. (Tr. 408) The Bank admitted that it did not make the $70,000 operating loan,

and did not make the $37,500 cattle purchase loan. (Tr. 358) The trial evidence is clear that the Bank breached the Loan Agreement. (Ex. 6)

The Bank argues that the Loan Agreement and Lease With Option to Purchase are unrelated separate agreements, and that the trial court erred in considering both documents as one agreement. The established law does not support the Bank's argument. In general, when construing a written document the trial court is confined to examining the language within the document and should not look beyond the document to determine the intent of the parties. There is an exception to the parol evidence rule, however, when the document being interpreted is not an integrated document. Battery Steamship Corp. v. Refineria Panama S.A., 513 F.2d 735, 738 n.3 (2nd Cir. 1975). If a party to a contract can demonstrate another writing executed at the same time or in close proximity, and that the document being interpreted does not have a merger clause, which the Loan Agreement and Lease With Option do not have, a Court may look to the other document to construe the intent of the parties. In this case, the trial court must examine both documents to determine if the performance of promises made within one agreement should be assessed by the promises referred to in the other. Where the Bank drafted both documents, and the Longs were not represented by a lawyer, if the Bank wanted the documents to be separate it could have simply included the appropriate language. The general rule is that a contract should be interpreted more strongly against the party who drafted the contract and caused the uncertainty to exist. Delzer Constr. Co. v. South Dakota State Bd., 275 N.W.2d 352, 357 (S.D. 1979); Northwestern Eng'g Co. v. Thunderbolt Enter., Inc., 301 N.W.2d 421 (S.D. 1981). The evidence shows that both documents were signed the same day, December 5, 1996. The Loan Agreement refers to and integrates the Lease With Option to Purchase. The Loan Agreement on page 2 states: "The Bank of Hoven will enter into a lease/purchase option on the approximately 2,230 acres of land described in exhibit A, under a separate

agreement attached hereto." The agreement attached to the Loan Agreement is the Lease With Option to Purchase, which is referred to in the Loan Agreement. The trial court was correct in considering the Loan Agreement and the Lease With Option to Purchase as related documents under the integrated document doctrine.

The Bank contends that it should be excused from making the operating loan and the cattle purchase loan because the BIA did not approve the Bank's application. (Ex. 8) The Bank should have advanced operating monies or made an emergency loan without waiting for BIA approval of the percent increase in the BIA guarantee. Without money to feed and insure the cattle, Longs' operation was doomed. The trial court found that the Loan Agreement is ambiguous on its face on the issue of whether the advance of $70,000 in operating monies was contingent upon the BIA approving the increase in the guarantee, and the ambiguity must be construed against the Bank as drafter of the document. Delzer Constr. Co., supra. This was an issue for the jury, and the jury ruled against the Bank.

The Bank argues that the Loan Agreement, that the jury found it breached, is not enforceable because of lack of consideration by the Longs. Longs submit that they did give adequate consideration for the Loan Agreement and the Lease With Option to Purchase. The well-established rule of law is that any benefit conferred or any prejudice suffered is sufficient consideration for a contract. SDCL 53-6-1. Harms v. Northland Ford Dealers, 602 N.W.2d 58 (S.D. 1999); Garrett v. BankWest, Inc., 459 N.W.2d 833 (S.D. 1990); Estate of Neiswender, 660 N.W.2d 249 (S.D. 2003). (Tab 9) The Supreme Court in Estate of Neiswender found consideration because the property was transferred for several reasons, including the release of claims by the contestants; to avoid being deposed; and to save further expense, personal grief, and emotional trauma associated with the family estate contest. The Supreme Court held that any of these reasons standing alone is sufficient consideration for an

agreement. See Crilly v. Morris, 15 N.W.2d 742 (S.D. 1944); Ewing v. Waddington, 252 N.W. 28 (S.D. 1933).

Longs gave consideration as follows: (a) The Bank states in its counterclaim and in its brief on page 2 and again on page 9, that the farmland and the house were "deeded to the Bank in lieu of foreclosure." One of the reasons Longs went along with the Bank's proposal was to settle the default issues and claims of the Bank; to avoid being deposed, and to save further expense, personal grief, and emotional trauma associated with the Bank's threatened foreclosure trial, and the forced sale of their land, cattle, and machinery. These reasons are sufficient consideration. Estate of Neiswender, supra. (b) Longs agreed to assign their CRP payments of $88,400 to the Bank, and pay the real estate taxes during the two-year lease of approximately $20,000. These amounts are valuable consideration of $108,400. (Ex. 7) (c) As shown on the Loan Agreement, Longs gave up $146,746.47 of their real estate value of $478,000, to pay the Bank's expenses for State Enhancement, taxes, attorney fees, title search, and title insurance. (Ex. 6) The result was the Bank received real estate worth $478,000, but Longs only got credit for $331,253.53, as shown on the Bank's Trial Exhibit 1, which states "$331,253.53, Pmt from land & house credit as outlined in Loan Agreement dated 12-5-96." This is valuable consideration of $146,746.47. (d) Longs agreed to continue operating the ranch and producing income in order to pay the entire amount of principal and interest to the Bank, instead of having the Bank call the loans and collect from the BIA guarantees substantially less than the amount owed by Longs to the Bank. Under the above authorities, these items of consideration given by the Longs are legally adequate.

The Bank argues that it should be excused from performing the Loan Agreement after the winter of 1996-97 because Longs lost a lot of cattle in January, which reduced the Bank's security, entitling the Bank to rescind the Loan Agreement. The trial court held that the Bank did not request a jury instruction on this defense, it was not preserved at trial, and

it was waived. (Tab 5, p.5) Failure to make adequate reference to the trial record waives the issue. (Tab 9, p.638) The Bank cites no authority for its position. In Knudsen v. Jensen, 521 N.W.2d 415 (S.D. 1994), the Supreme Court held that a rescinding party must promptly commence a suit for rescission, and waiting two and a half year was fatal to the claim. Here, the Bank delayed more than seven years and has still not filed any pleadings requesting rescission. Even if it had been proposed as a defense, success of this defense would depend upon the jury accepting the premise that the Bank had complied with the Loan Agreement up to the point in mid-January when the Longs' cattle died. Testimony was clear that if the Bank had made the operating loan monies available as soon as the Loan Agreement was signed December 5, or had made an emergency loan, which would have been automatically guaranteed by the BIA, the cattle would not have died. This was a question for the jury, and the jury decided against the Bank. (Tab 1) The jury apparently felt that the Bank breached its promise to advance the needed operating money, and this Court cannot substitute its opinion for that of the jury when evidence exists to support the verdict.

Accepting as true the evidence presented by the non-moving party (the Longs), and indulging all legitimate inferences in favor of the party against whom the motion is brought (the Longs), there was sufficient evidence presented to sustain the cause of action and send it to the jury. It is not this Court's function on appeal to weigh the evidence or substitute this Court's judgment for that of the jury. Considered in the light most favorable to the prevailing party (the Longs), as we must in view of the motion, there was substantial credible evidence presented which would tend to sustain the jury verdict. The jurors are the exclusive judges of the weight of the evidence and the credibility of the witnesses. On these facts, the jury determined that the Bank breached the contract. (Tab 1)

Based on the foregoing facts and authorities, the decisions of the trial court and the jury on the breach of contract claim should be affirmed.

ISSUE THREE: BAD FAITH

Longs submit that the trial court did not err in denying the Bank's motion for directed verdict and judgment notwithstanding the verdict. The jury decided that the Bank acted in bad faith when it attempted to gain the increased guarantee from the BIA as referenced in the Loan Agreement dated December 5, 1996. (Ex. 6)(Tab 1)

The Bank contends that a bad faith claim is not a separate cause of action. The South Dakota Supreme Court disagrees with the Bank's argument. In Diamond Surface, Inc. v. State Cement Plant Comm., 583 N.W.2d 155 (S.D. 1998), the Supreme Court held that as long as there is a contract, a party can bring a claim for breach of the implied covenant of good faith even though the conduct failed to violate any of the express terms of the contract. Citing Garrett v. BankWest, 459 N.W.2d 833, 841 (S.D. 1990), the Supreme Court stated:

> The application of this implied covenant allows an aggrieved party to sue for breach of contract when the other contracting party, by its lack of good faith, limited or completely prevented the aggrieved party from receiving the expected benefits of the bargain. A breach of contract claim is allowed even though the conduct failed to violate any of the express terms of the contract agreed to by the parties.

Therefore, breach of good faith is a separate claim from a claim for breach of the express terms of the contract. SDCL 57A-1-201(19) provides: "Good faith" is defined as "honesty in fact in the conduct or transaction concerned." The Supreme Court stated in Garrett: "Good faith is derived from the transaction and conduct of the parties." "Its meaning varies with the context and emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party." Some categories of bad faith performance of a contract include: "evasion of the spirit of the deal; abuse of power to determine compliance; and interference with or failure to cooperate in the other party's performance."

In this case the Bank breached the implied covenant of good faith and fair dealing by interference with or failure to cooperate in the performance of the contract preventing the

Longs from receiving the expected benefits of the bargain. All parties agreed to the cash flows and the plan on October 28, including the BIA. (Ex. 8A)(Tab 13) The Bank's lawyer was present, but a lawyer was not representing the Longs because they could not afford one. The Bank undertook the obligation of promptly preparing the agreement, and promptly obtaining a 6% increase in the existing BIA guarantees.

On October 28, the Longs met with Bank officers Jim Nielsen, Chuck Simon, and Dennis Jensen, and the Bank's lawyer; and with Dennis Huber, Bret Maxon, John Lemke, Harley Henderson, Monica Lind, and Stacey Johnston of the BIA. (Tr. 396) The cash flows developed by Dennis Huber and Bret Maxon were presented, and all parties agreed that the restructure plan would work. (Tr. 401) Dennis Huber of the North/South Dakota Native American Business Development Center testified that he and his associate, Bret Maxon, prepared the cash flows on October 28, and 29. (Ex. 8A)(Tab 13) He testified that the cash flows marked Exhibit 8A were his work product. (Tr. 397) The Huber cash flows, Exhibit 8A, were prepared to show if the Bank's restructuring plan would work. (Exs. 5A, 6, 7) All parties agreed that the plan was economically feasible and would work. (Tr. 401) Stacey Johnston, credit officer of the BIA, had final approval of the restructuring plan. (Tr. 397) At the end of the meeting on October 28, the Bank, the Longs, and the BIA all agreed on the restructuring plan and the Huber cash flows. Dennis Huber testified it was a done deal. (Tr. 400) Jim Nielsen for the Bank initialed the cash flows prepared by Dennis Huber. (Ex. 8A)

The Loan Agreement and Lease With Option to Purchase prepared by the Bank were not ready to be signed until December 5, five weeks later. The Bank did not send a letter to the BIA requesting approval until December 12, six weeks later. (Ex. 8). The Bank enclosed with its letter to BIA a financial statement and cash flows.

Ronnie Long learned for the first time at trial, that the Bank had modified the Huber cash flows and the plan without his knowledge or approval. (Tr. 188) Dennis Huber testified

that the cash flows sent by the Bank to the BIA (Ex. 8) were not his work. (Tr. 408-409) He explained that a line of credit loan is key to the success of a restructure plan. (Tr. 409) The Bank's cash flows (Ex. 8) did not show any line of credit loan. The cash flows that Huber prepared show that the restructure plan would work (Ex. 8A), but the cash flows sent by the Bank to the BIA show that Longs' restructure plan would not work. (Ex. 8) The overdrafts shown are $28,000 the first month, and continue to increase throughout the Bank's cash flow (Tr. 410), increasing to $104,280 in overdrafts in August of the third year. It appears clear that the Bank in its letter to the BIA unilaterally increased the line of credit operating loan from $70,000 to $85,000, showing Longs' operation more needy of borrowed money. (Tr. 410) The increased line of credit requested by the Bank in its letter to the BIA of $85,000, however, would not come close to covering the deficit spending of $104,280 shown on the Bank's cash flows for the third year of the plan. (Ex. 8) Dennis Huber testified that the BIA would not approve such negative cash flows. (Tr. 410) The Huber cash flows approved by everyone at the October 28 meeting, which were initialed by Jim Nielsen for the Bank and approved by Stacey Johnston for the BIA (Ex. 8A), show an operating loan of $70,000, not $85,000, and do not show $104,280 of red ink as shown on the Bank's cash flows. (Ex. 8)

One of the jurors asked the Court "whose initials are on top of the 8A cash flows, year 1?" The Bank responded that the initials are Jim Nielsen's, a Bank officer. (Tr. 429) This shows that the Bank approved Huber's cash flows. (Ex. 8A) Although the Bank's letter to the BIA of December 12 showed an operating loan of $85,000, agreeing with the bad cash flows attached to the letter (Ex. 8), the Bank's later letter of December 16 to Dennis Huber shows an operating loan of $40,000, which is in line with Huber's good cash flows (Ex. 8A). Stacey Johnston had already approved Huber's cash flows for the BIA on October 28. (Ex. 8A) It is suspicious that the Bank sent modified cash flows to the BIA, which the BIA

believed were a "modification" of the plan requiring a "more complete application." (Tr. 290)(Ex. 8, 11) It is also suspicious that the Bank never made a more complete application to the BIA as requested by the BIA. (Tr. 166, 290)(Ex. 11)

The Huber cash flows approved by everyone October 28, show that $40,000 of the $70,000 operating loan was needed just a few days later in November. (Ex. 8A) At the meeting on October 28, Ronnie Long stated that he needed the money right away before winter storms hit to move hay some 20 miles from the fields where it was baled to the cattle located in the winter breaks on their Indian Range Unit. He also requested $2,000 of the operating loan to purchase insurance on the cattle. The Bank never advanced the Longs any of the operating funds as promised. (Tr. 358) If the Bank had advanced $2,000, the insurance would have covered the cattle loss. (Tr. 156)

The Bank was in bad faith when it unilaterally changed the cash flows without the knowledge or approval of Longs or Dennis Huber, and sent the bad cash flows to the BIA. The Bank's cash flows modified the plan, delayed the approval process, and proved fatal to Longs' restructure plan. The Bank's cash flows show a materially different plan than the BIA agreed to on October 28. The Bank's cash flows show that Longs' restructure plan would not work. This was not the same restructure plan or cash flows that Stacey Johnston approved for the BIA on October 28. Dennis Huber testified that the Bank's cash flows were considerably different than his cash flows that everyone approved on October 28. (Tr. 407) He did not know where the Bank's cash flows came from, but he knew they were not his work. (Tr. 407) He testified he would never submit such negative cash flows to the BIA. They show the plan is unworkable and a waste of time. (Tr. 407) The BIA responded to the Bank's letter (Ex. 11), stating that Stacey Johnston of the BIA talked to the Bank by telephone on February 3. Stacey Johnston told the Bank on the phone on February 3, and in the letter (Ex. 11) "that this kind of request would have to be viewed as a modification

which requires a more complete application." The Bank had unilaterally changed Huber's cash flows (Ex. 8A) that were positive, showing that the plan would work as everyone agreed at the October 28 meeting, and substituted a negative cash flow that showed that Longs needed an $85,000 operating loan the first year with overdrafts increasing to $104,280 in the third year. (Ex. 8) The BIA viewed this as a "modification" that required a more "complete application." There is no dispute in the testimony that the Bank thereafter never contacted the BIA, never submitted a more complete application as requested by the BIA, and never loaned Longs any emergency operating money as authorized by the CFR. (Tr. 289-290) The BIA reminded the Bank that the Bank could make an emergency loan under the CFR of 10% of the existing loan guarantee, for an immediate loan of $42,800 to feed and care for the livestock. (Tr. 355)(Ex. 11) Such emergency loan would be automatically guaranteed by the existing 84% BIA guarantee to preserve the collateral. (Tr. 291) The Bank did not make an emergency loan to move the hay to the cattle or to insure the cattle. (Tr. 290, 359-360) In December before Christmas, Ronnie Long and John Lemke of the CRST Planning Office called the Bank and requested that the Bank make a CFR emergency feed loan under the existing BIA guarantee to protect the cattle. (Tr. 292) The Bank made no response to the BIA, the Longs, or to the CRST Planning Office.

The Bank was in bad faith in not promptly preparing the agreement and securing BIA approval within a few days after the October 28 meeting when everyone agreed, including the BIA. At trial the Bank offered no testimony to explain why it took the Bank from October 29, to December 5, a period of five weeks to get the agreements ready to sign (Exs. 6, 7), or why it took another week to send the application to the BIA, or why the Bank modified the Huber cash flows. Seven weeks went by from October 28, when everyone approved the plan and Huber's cash flows, until the Bank finally sent the application to the BIA. This period of time was critical to the Longs to obtain operating funds so they could

move the hay to the cattle and prepare for the coming winter storms. The Bank offered no testimony to show that it telephoned, or faxed, or met with the BIA on one or more occasions during this period of time to make any changes or clear up any misunderstandings in order to obtain BIA approval as quickly as possible. The Bank made no showing that it was diligent in performing its obligation under the agreement. From the evidence the jury could infer that after the Bank got Longs' land, house, and CRP payments that it wanted, it had no intention of performing its contractual obligations to the Longs.

The Bank's act in switching the cash flows, failure to act diligently in preparing the agreement to be signed and securing the approval of the BIA promptly after the October 28 meeting, and failure to make an emergency loan in December was bad faith. Such acts and failures to act violated the spirit of the deal, failed to cooperate with and interfered with the Longs performance under the agreement, and frustrated the Longs' justified expectations under the agreement. Such acts and failures to act prevented the Longs from receiving the expected benefits of the contract. Apparently the jury agreed.

The Bank argues that Longs did not need any operating money in November, December, or January because they had cattle proceeds in September and the unused portion of a line of credit from previous year. The facts do not support the Bank's argument. Ronnie Long testified that the Bank controlled every cent he spent with vouchers and a controlled account. (Tr. 300-301, 316-323) He had to request approval of every expense, and if the Bank finally approved he could write a check to pay that expense. (Tr. 301, 317) The cattle proceeds in September were approved by the Bank to pay specific old bills because people were taking Longs to court. (Tr. 320) The lease due in October was paid, a used snowmobile was paid for, and old bills were paid as shown on Exhibit 22. Cattle proceeds in September are irrelevant to the breach of contract claim. The Bank promised in the Loan Agreement on December 5, to make a new operating loan of $70,000 to the Longs to pay

expenses. The Bank admitted at trial that no part of the new $70,000 operating loan was ever made. (Tr. 358) When Ronnie Long asked Bank Officer Jim Nielsen for money to move the hay Mr. Nielsen responded: "You aren't getting a dime until we get the deed to the land." (Tr. 197) To show good faith, the Bank should have advanced $40,000 of the operating loan on December 5, when the agreement was signed as shown on the Huber cash flows. (Ex. 8A) The Bank received a deed to the land signed by Paulette Long in September, but due to a procedural problem it had to be redone. Paulette Long signed another deed to the land on December 10, and it was filed on December 27. (Ex. 9) It would have cost about $20,000 to move the hay to the cattle. (Tr. 195) If the Bank had advanced the money, the hay could have been moved from December 5, through 13, a period of eight days. (Ex. 21)(Tr. 197) From the 13th through the 18th the roads were blocked. From the 18th on it was possible to get into the cows off and on with a tractor. It was not possible to get the cows out with large semi trucks, but it was possible to get feed in with smaller vehicles such as a tractor or a small truck. (Ex. 13) If the money had been loaned by the Bank as promised, enough hay would have been delivered to keep the cows alive.

As discussed above, the trial testimony and exhibits show that substantial evidence was presented to sustain Longs' bad faith cause of action. In view of the Bank's motion, the evidence must be considered in the light most favorable to the prevailing party (the Longs). The test is whether there is any substantial credible evidence which would tend to sustain a verdict. The jurors are the exclusive judges of the weight of the evidence and the credibility of the witnesses. The jury was presented substantial evidence to support its verdict that the Bank acted in bad faith as described above. The trial court was correct in denying the Bank's motion for a directed verdict and judgment notwithstanding the verdict. The decisions of the trial court and the jury on this issue should be affirmed.

ISSUE FOUR: DAMAGES

Longs submit that the trial court did not err in denying the Bank's motion for judgment notwithstanding the verdict, because the damages awarded by the jury were not excessive or controlled by passion or prejudice. (Tab 15)

Longs requested damages of $1,236,792 (Ex. 23). The jury returned a verdict of $750,000 (Tab 1). The jury awarded only 60% of the amount requested. The evidence shows that the jury had adequate factual basis to support its award of $750,000. The jury award was approximately $500,000 less than the Longs requested, and the jury rejected Longs' self help claim. The amount of damages awarded is well supported and not controlled by passion or prejudice. The Bank objected to some of Longs' claimed damages, the trial court sustained the Bank's objections, and Exhibit 23 was changed deleting a significant amount of claimed damages. The Bank did not object to Exhibit 23 as changed, stating: "I have no objections with the changes." (Tr. 308) Thus, the Bank waived all objections to Longs' claimed damages of $1,236,792. (Ex. 23)

There was substantial evidence presented by the Longs to support their damage claims. Discrimination by the Bank caused Longs to be refused a favorable contract for deed to buy back their land like the one the Bank gave to Maciejewski. The Bank's discrimination caused damages because Longs lost the use of their land, their CRP payments, their FSA payments, and their annual crops from 1996 on. (Ex. 23) The Bank's bad faith caused the BIA to refuse the restructure plan, resulting in the loss of the Longs' feasible refinancing plan and loss of their land. Exhibit 23 shows damages for loss of the land, including loss of CRP payments, FSA payments, and loss of use of the land due to the Bank's bad faith and discrimination, in the amount of $346,000.

The Bank's breach of contract caused the Longs to lose a substantial number of livestock. Ronnie Long testified to the livestock losses of approximately $900,000. (Tr.

157-158, 301-308)(Exs. 14, 23, 23A) He testified that all damages were actual values based on his years of experience and on current values reported by area livestock markets, FSA reports, CRP reports, and FEMA reports. (Tr. 157-158, 301-308)(Exs. 14, 23, 23)

The Bank argues that the Bank's breach of the Loan Agreement did not cause the death of the cattle. The Bank states on page 17 that it applied for the BIA increase on December 5, which is not true. The Bank's letter is dated December 12. (Ex. 8) The Bank contends that the BIA response (Ex. 11) was too late to save the cattle that died in mid-January. But why didn't the Bank promptly prepare the agreement to be signed the week after the Bank, Longs, and the BIA approved the plan and Huber's cash flows on October 28? Why did it take the Bank five weeks to prepare the agreement for signatures, and another week to send the application to the BIA? Why didn't the Bank advance $40,000 of the $70,000 operating loan in November as shown on Huber's cash flows which the Bank approved? Why did the Bank modify Huber's cash flow to show that Long's plan would not work? The BIA viewed the Bank's bad cash flows as a "modification" of the plan requiring a "more complete application." Why didn't the Bank make an emergency loan of $42,500 to feed the cows in early December, which would have been automatically guaranteed by the BIA under the CFR? If the Bank wanted to show good faith and make a loan to move the hay it could have done so on December 5, when the agreement was signed. Longs would have had time to move the hay before the severe winter storms in January. Everyone knew without operating money Longs were doomed and would not be able to buy their land back. The Bank admitted that the operating loan was necessary for success of the plan. (Tr. 343) Why didn't the Bank make the promised loan of $37,500 to purchase cattle? The Bank admitted this was a direct loan not guaranteed by the BIA. (Tr. 342) From these facts the jury could have inferred that the Bank had no intention of keeping its promises of a new operating loan of $70,000 or a new cattle purchase loan of $37,500.

As discussed above, in view of the Bank's motion the Court must consider the evidence in the light most favorable to the prevailing party (the Longs). The test is whether there is substantial credible evidence, which would tend to sustain the verdict. The jurors are the exclusive judges of the weight of the evidence and the credibility of the witnesses. The jury had substantial evidence to determine that the damages awarded to the Longs should be set at $750,000 to compensate in part for the Bank's discrimination, bad faith, and breach of contract. The jury awarded only 60% of the amount requested by the Longs as actual damages, and there were no exemplary or punitive damages awarded. The trial court was correct in denying the Bank's motion for judgment notwithstanding the verdict as to the amount of damages, and the trial court should be affirmed.

ISSUE FIVE: EVICTION

The Bank states on page 18 of its brief that its counterclaim is for forcible entry and detainer. It states on page 19 that Longs were "holding over after the term of the lease had expired." The Bank argues that "The provisions of CRST Law and Order Code Sec. 10-2-1, et seq were clearly applicable." On these points the Longs agree.

CRST Law and Order Code 10-2-6(6) provides that when a tenant has held over for more than 60 days without any notice to quit by the landlord, the tenant shall have the right to remain in possession for a full year after the lease termination date. (Tab 12)

Under the terms of the Lease With Option to Purchase the lease term began on December 5, 1996, and terminated on December 6, 1998. Longs held over and retained possession for more than 60 days after the expiration of the term without any demand of possession or notice to quit by the landlord Bank. Therefore, the Longs are deemed to have the permission of the landlord Bank to hold over for a full year December 6, 1998, to December 7, 1999, pursuant to CRST Code 10-2-6(6). The 60-day period after expiration of the lease term runs from December 6, 1998, to February 5, 1999. The notice to quit by the

Bank was not served on Longs until June 16, 1999. (Ex. 20) The Longs were therefore legal tenants in rightful possession of the land from December 6, 1998, to December 7, 1999. The Bank knew on June 16, 1999, that the Longs were in possession of all of the land because the Bank described the entire 2,230 acres in its Notice to Quit. (Ex. 20)(Tr. 371) The Bank knew that the Longs wanted to continue in possession of the land. (Tr. 365)

During this one-year period from December 6, 1998, to December 7, 1999, the Bank sold 320 acres of the land to Pesicka and gave Pesicka possession on March 22, 1999 (Ex. 19) in violation of the Longs' leasehold rights under CRST Code 10-2-6(6), and in violation of their right to buy back their land from the Bank. Longs did not voluntarily relinquish possession. (Tr. 169) The Bank sold the land to Pesicka before it served its Notice to Quit on June 16, 1999. (Ex. 20) The Bank never did get an order from the CRST Court removing Longs from the land. (Tr. 370) Also, during this one-year lease period the Bank sold 1,905 acres of their land to Maciejewski with possession of parcel one of 960 acres on June 25, 1999 (Ex. 21) in violation of the Longs' leasehold rights under CRST Code 10-2-6(6) ,and in violation of their right to buy back their land from the Bank. Longs did not voluntarily relinquish possession. The Bank divided the 1,905 acres into parcel one and parcel two. (Ex. 21) The Bank gave possession of parcel one to Maciejewski on June 25, 1999. On that date Longs had people haying the hay land, had machinery on the land, and had cattle grazing on parcel one. Maciejewski threatened and ran the hayers off parcel one. The trial court knew from the first hearing that Maciejewski stopped Longs' haying by threatening the hayers. (Tab 14) Maciejewski drove Longs' cattle off parcel one and put a fence in to separate parcel one from parcel two, and pulled some of Longs' machinery off parcel one. (Tr. 274)

In light of Jury Verdict Two that the Bank breached the Loan Agreement, and the Court's finding that the Lease With Option to Purchase and Loan Agreement were part and

parcel of the same agreement, the trial court ruled against the Bank on its counterclaim for eviction. The jury determined that the Bank's breach of the Loan Agreement prevented the Longs from performing under the Lease With Option to Purchase. (Tab 1) The trial court reasoned that a party that has failed to comply with a lease with option to purchase cannot seek to enforce that agreement through an eviction action. Based on the foregoing the trial court held that Longs' option to purchase remains intact. (Tab 6) (P10) Thus, Longs' land was sold to Pesicka and Maciejewski and they took possession of the land in violation of the Longs' right to possession under CRST Code 10-2-6(6), and Longs' land was sold in violation of the Longs' right to purchase the land under the Lease With Option to Purchase, which remains intact. The sale of land to Pesicka and Maciejewski was defective and is void. Based on the evidence and the applicable law discussed above, the trial court was correct in ruling against the Bank on its counterclaim for eviction. The ruling of the trial court should be affirmed.

ISSUE SIX: OPTION TO PURCHASE

Longs requested that the trial court permit them to purchase their land back under the Lease With Option to Purchase. The trial court permitted Longs to purchase parcel two of 960 acres, but did not permit them to purchase parcel one of 960 acres (sold to Maciejewski) or the 320 acres (sold to Pesicka). The trial court stated: "Were it not for the intervening purchases, the Court may well be inclined to agree with the Plaintiffs. However, the Court does not feel it has the authority to set aside the contracts for deed the Bank entered into with the other Defendants, if those Defendants entered into those contracts in good faith and without knowledge of the existing legal dispute between the Bank and the Plaintiffs." Pesicka and Maciejewski knew about the litigation as did almost everyone in the small community of Timber Lake. Pesicka asked Ronnie Long if the Longs lost the land, would it be all right if he bought it, would the Longs have any hard feelings. Ronnie Long

responded: "No, not if I lost it, but this is not over yet." (Tr. 284) Maciejewski knew about the litigation also. The contract for deed he signed states that the Bank is in the process of evicting Longs from the land, and due to the uncertainties of litigation it is impossible to predict when they will be evicted from the land. (Ex. 21) The Bank told him that Longs were not in possession of parcel one, but he immediately knew that was not correct. On June 25, Longs had people haying the hay land and their cattle were grazing on parcel one. Maciejewski threatened and ran Longs' hayers off parcel one. He drove Longs' cattle off of parcel one, put a fence in to separate parcel one from parcel two, and pulled Longs' machinery off parcel one. (Tr. 274) Maciejewski was named as a defendant in this case and an injunction was served on him on July 7, 1999. He appeared and testified at the first hearing and stated that the injunction stopped him from harvesting the hay on the land. (Tab 14) Maciejewski and Pesicka and were not involved in the trial (Tr. 65), therefore discovery and trial evidence did not focus on these defendants. For example, Jury Interrogatory Three asked whether the Bank used self-help in an attempt to remove Longs from the land. The jury was not asked, and did not decide, whether Pesicka or Maciejewski used self-help to remove Longs from the land. There is evidence, however, that they both knew about the litigation and knew that Longs were still in possession of the land. (Tab 14) Thus, Pesicka and Maciejewski were not purchasers "in good faith without knowledge of the existing legal dispute between the Bank and the Plaintiffs" as stated by the trial court.

The Bank argues that it "received absolutely nothing" from Longs for use of the land. This is not correct. During the holdover year and each year thereafter the Bank received Longs' annual FSA payments of $23,000, which the Bank split with Maciejewski, plus the crops each year. (Ex. 23A)(Tr. 263) In the first hearing Maciejewski valued the hay crop alone at $43,263 a year. (Tr. 75) The Bank also argues that the jury verdict unjustly enriches the Longs. This argument is also without merit. It will take all of the $750,000 to buy back

the land and the 507 head of cattle that died. Longs are not in a better position now than they would have been had there been no breach of the agreement by the Bank.

Where the trial court concluded that the Longs' option to purchase their land "remains intact," the Longs seek an order of this Court permitting them to exercise their option to purchase all of their 2,230 acres of land from the Bank, not just 960 acres. This is what the parties intended and agreed to under the agreement, and the Bank should be held to its contract.

ISSUE SEVEN: PREJUDGMENT INTEREST

The Bank argues that prejudgment interest should be denied because Longs' damages were not calculable. This argument is without merit. The Bank often calculates the value of a customer's cattle as of a certain date from current market prices. For example, the Bank calculated the value of Longs' cattle on December 9, 1996, at $700 for cows, $305 for calves, and $350 for yearlings. (Def.'s Ex. 11) The Bank did not object to Jury Interrogatory Six or to Jury Instruction 10A, did not propose any special interrogatories, and will not now be heard to complain. Alvine v. Mercedes-Benz of North America, 620 N.W.2d 608 (S.D. 2001) The Bank relies on SDCL 21-1-11 and cases that predate SDCL 21-1-13.1 (July 1, 1990) which do not apply here. In City of Bridgewater v. Morris, Inc., 594 N.W.2d 712 (S.D. 1999), Morris, like the Bank here, argued that prejudgment interest should not have been allowed because damages were not calculable until trial. The Supreme Court responded: "The law allows prejudgment interest from the day the loss or damage occurred. Any person who is entitled to recover damages is entitled to recover interest thereon from the day the loss or damage occurred," citing SDCL 21-1-13.1. (Tab 11) If the date of loss is a question of fact, that issue can be submitted to the jury. Here, there was no question as to the date the Longs' cattle died in mid-January, 1997, thus, the jury was not asked to determine the date of loss. The Supreme Court faced this same argument in Fritzel v. Roy

Johnson Constr., 594 N.W.2d 336 (S.D. 1999), and held: "Johnson contends the trial court erred in awarding any prejudgment interest because damages could not be reasonably ascertained before the jury's verdict. (Tab 8) He cites Colton v. Decker, 540 N.W.2d 172 (S.D. 1995). Colton interpreted SDCL 21-1-11, which applies to lawsuits commenced before July 1, 1990. The statute that applies here is SDCL 21-1-13.1, applicable to cases commenced after July 1, 1990, which abrogated the rule that prejudgment interest cannot be obtained if damages remained uncertain until determined by a court. Now prejudgment interest is allowed from "the day that the loss or damage occurred. SDCL 21-1-13.1."

The Bank proposed, and the trial court adopted, interest of $123,131.81 for prejudgment interest over a period of six years or 2.7%. The Bank cannot be heard to complain about prejudgment interest where the trial judge adopted the exact amount of prejudgment interest proposed by the Bank. Prejudgment interest of $123,131.81 over six years, February 1, 1997, to February 1, 2003, is only $20,521.96 per year, or 2.7% interest. The Bank does not make loans to the Longs or any other customer for 2.7% interest, but the Bank proposed, and the trial court agreed, that 2.7% interest was good enough for the Longs. This low interest rate violates and partially nullifies the jury's decision. Prejudgment interest should be calculated at 10% per annum, from the date of loss (February 1, 1999) as proposed by the Longs and as required by the statute SDCL 21-1-13.1.

In the Summary of its brief on page 23, the Bank states: "Once a claim for discrimination was allowed to be tried to the jury, where no one but tribal members could serve, the Bank could no longer obtain a fair trial. Allegations of racial discrimination by a nonmember Bank located off the reservation completely inflamed the jury. They became incapable of rendering a fair and impartial verdict. The race card tainted the entire process.

This statement by the Bank is irresponsible, lacks any factual basis, and shows the racial bias of the Bank. The Bank cites no legal authority. The CRST Code provides for

nonmembers to be on the jury panel upon request of a party to the litigation. The Bank made no request to the Chief Judge. CRST Code 1-6-1(2)

The Bank extensively questioned each potential juror during voir dire, and the Bank passed the jury for cause (Tr. 56). The Bank failed to challenge the jury for cause. Right of appeal on this issue has not been preserved. The Bank waived any objection to their selection as jurors. First Bank SD v. Von Eye, 425 N.W.2d 630, 633 (S.D. 1988). (Tab 10)

CONCLUSION

The Longs request that this Court order prejudgment interest at the rate of 10% on the damages awarded by the jury of $750,000, not 2.7% as ordered by the trial court. The Longs request that this Appellate Court order that the Longs can buy all of their land back from the Bank, not just 960 acres as ordered by the trial court.

Oral Argument is requested because this is a complicated case, and argument may answer questions and clarify matters for this Appellate Court.

Dated this 1st day of March, 2004.

BANGS, McCULLEN, BUTLER, FOYE & SIMMONS, L.L.P.

BY: James P. Hurley

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APPENDIX
TABLE OF CONTENTS

SPECIAL INTERROGATORY ONE TO JURY

Did the Defendant Bank breach the December 5, 1996 loan agreement (Plaintiff's Exhibit 6) between the Long Family Land and Cattle Co. Inc and the Bank of Hoven?

YES 7 (Number of jurors voting yes)
NO 0 (Number of jurors voting no)

Foreperson

SPECIAL INTERROGATORY TWO TO JURY

If you found in Interrogatory one that the Defendant Bank breached the loan agreement to the Plaintiffs, did that breach prevent the Plaintiffs Long Family Land and Cattle and Ronnie and Lila Long from performing under the lease with an option to purchase (Exhibit 7)?

YES 7
NO 0

Foreperson

SPECIAL INTERROGATORY THREE TO JURY

Did the Defendant Bank [redacted] use self-help remedies in an attempt to remove the Plaintiffs from the land that was subject to the lease with an option to purchase (Exhibit 7)?

YES 0
NO 7

Foreperson

SPECIAL INTERROGATORY FOUR TO JURY

Did the Defendant Bank intentionally discriminate against the Plaintiffs Ronnie and Lila Long based solely upon their status as Indians or tribal members in the lease with option to purchase. (Exhibit 7)?

YES 1

NO 0

Foreperson

SPECIAL INTERROGATORY FIVE TO JURY

Did the Defendant Bank act in bad faith when it attempted to gain the increased guarantee from the Bureau of Indian Affairs as referenced in the loan agreement dated December 5, 1996? (Exhibit 6)

YES 7

NO 0

Foreperson

SPECIAL INTERROGATORY SIX TO JURY

If you answered no to Numbers 1,3,4, and 5 you should stop here and not award damages.

If you answered yes to Number 1, 3,4, or 5 what amount of damages should be awarded to the Plaintiffs?

$ 750,000.00

AGREE 7

DISAGREE 0

Should interest be added to the Judgment?

YES 7

NO 0

Foreperson

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 Cheyenne River Sioux Tribe demand that the Tribe provide itself, its members, and other persons living within the territorial jurisdiction of the Tribe or as set forth in Section 4 of the Act of March 2, 1989, (48 Stat. 888) with an effective means of redress in both civil and criminal cases against members and non-Tribal members who through either their residence, presence, 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, should be applied equally to all persons, members and non-members alike.

FACTS RELEVANT TO JURISDICTION AND DISCRIMINATION

The farmland involved is located within the CRST Indian Reservation, and has been in the Long family for over forty years. Ronnie and Lila Long and their children are enrolled members of the CRST. (Tr. 93) Long Family Land and Cattle Company, Inc. is a wholly owned Indian corporation, owned 100 percent by Ronnie and Lila Long. (Tr. 93)(Ex. 1) Kenneth and Maxine Long, and Ronnie and Lila Long, have lived on the CRST Reservation all of their lives farming and ranching. Kenneth owned the farmland and 49 percent of the corporation until he died in 1995. (Tr. 90-95) The corporation owned the cattle and machinery. Crops were raised and cattle were pastured on the farmland, and cattle were pastured on the Longs' leased Indian Range Unit. Kenneth mortgaged the farmland to the Bank to provide collateral for loans to the corporation. The BIA guaranteed several of the Bank loans. (Tr. 95)

Ronnie inherited the farmland and the other 49 percent of the corporation through his father's will. (Tr. 94-96)(Ex. 2) In the spring of 1996 after Kenneth's death, Bank officers came on the Longs' land on the CRST Reservation and inspected the land and the Longs' cattle, hay, and machinery on the land. The Bank proposed a new loan agreement to the Longs. Discussions also took place with Bank officers, the Longs, and CRST officers at the CRST offices on the Reservation. The Bank proposed a deed in lieu of foreclosure transferring the farmland and house to the Bank, and in return the Bank would credit $478,000 against debt owed to the Bank, and the Bank agreed it would finance the sale of the farmland back to the Longs on a contract for deed. (Tr. 106-107)

The Bank then changed the agreement. The Bank sent a letter to Ronnie Long, which was admitted into evidence at trial without objection, wherein the Bank told the Longs the Bank would not finance the sale of the land back to them on a contract for deed because they are Indians. (Tr. 106-107, 330) (Ex. 4) In the revised agreement the Bank changed the terms from a contract for deed to a two-year lease. The Bank required the Longs to pay rent of $88,400 plus pay the real estate taxes on the land during the two-year lease. The Longs could buy back their land from the Bank by paying the Bank $468,000 in a lump sum at the end of two years. (Exs. 6, 7) The Longs only had two years to pay for their land. While the Longs were legally in possession of the land, the Bank sold 320 acres to Defendant Pesicka, who is not an Indian, for $55 per acre less than the Bank required the Longs to pay. (Tr. 167, 362) (Exs. 19, 25) The Bank also financed the sale of 1,905 acres to Defendant Maciejewski, who is not an Indian, on a favorable contract for deed where Maciejewski got ten years to pay for the land. (Tr. 168) (Exs. 21, 25)

In June of 1999 the Bank went to the CRST Court and requested that the CRST Court serve a notice to quit on the Longs. The Bank's request was approved exparte by Chief Judge Leisah Bluespruce on June 15, 1999, and was served on the Longs on June 16, 1999. (Ex. 20) The Bank voluntarily came into CRST Court requesting assistance of the Court without reserving any objection to the jurisdiction of the CRST Court over the Bank or any issues between the Bank and the Longs.

The Decision of Judge Jones on Jurisdiction

The Bank reiterates its argument that this Court has no jurisdiction over a claim of discrimination arising under federal law against a non-Indian entity. Federal law prohibits any entity that receives the benefit of federal financial assistance from discriminating against any person in the delivery of services. See 42 U.S.C. 2000d. This statute has been held to prevent a bank from "redlining" a certain area because of the racial composition of the residents of that area. See Laufman v. Oakley Bldg and Loan, 408 F.Supp. 489 (SD Ohio 1976). The Longs are Indian residents of the Cheyenne River Sioux Indian Reservation who claimed that the Bank denied them a privilege of contracting for a deed that was granted non-Indians.[5] There was uncontroverted evidence during the trial that the Bank was receiving the benefit of Department of Interior guarantees and CRP payments under federal programs and thus the Bank appears to be covered by federal law.

The Bank contends, however, that even if a prima facie case of discrimination was demonstrated, this court lacks the jurisdiction to enforce federal civil rights laws under Nevada v. Hicks, 150 L.Ed. 2d 398, 121 S.Ct. 2304 (2001). In Hicks the Supreme Court held that a tribal court

[5]In denying the Bank's motion for a directed verdict on this issue, the Court stated that it did not feel that the mere denial of the contract for deed to the Longs was conclusive evidence of discrimination and thus instructed the jury that it must find that the Bank's decision to deny the contract for deed was based "solely" upon their status as tribal members, thus permitting the jury to return a verdict for the Bank if it determined that the Bank had other non-discriminatory reasons to deny the contract for deed.

lacks the authority to hear claims against state officials or those acting under the color of state law who allegedly violate the rights preserved to persons under federal law under the provisions of 42 U.S.C. 1983. The Defendants argue that the same logic applies to claims brought against private parties for violations of other federal laws protecting the rights of individuals to be free from discrimination.

The Court disagrees with the Bank's argument that this Court lacks the jurisdiction to enforce federal anti-discrimination laws against non-Indian entities over which the Court clearly has jurisdiction under the principles laid out in Nevada v. Hicks. It is undisputed in this case, and was conceded by the Bank, that the Bank had a consensual commercial relationship with the Longs, enrolled members of the Cheyenne River Sioux Tribe, and their family cattle corporation, an Indian-owned entity. Even under the very proscribed view of tribal court jurisdiction over non-Indians contained in Hicks, this Court has jurisdiction over a non-Indian Bank that enters into a consensual relationship with a Band or its member or whose actions "threaten or have some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe." Montana v. United States, 450 U.S. 544, at 566 (1981); see also Gesinger v. Gesinger, 531 N.W.2d 17 (SD 1995). In Hicks the Supreme Court found that the tribal court jurisdiction over the game warden there was wanting because he had no consensual relationship with the Tribe or

its members and his actions did not meet the second prong of the Montana test.

The Court notes that the Cheyenne River Sioux Tribal Code directs this Court to apply federal law in the absence of applicable tribal law. The only anti-discrimination law explicitly contained in the Cheyenne River Sioux Tribal Code and Constitution are those prohibiting the Tribe from discriminating or denying equal protection of the laws to persons. The Tribe does not appear to have specific code provisions prohibiting private discrimination and the Court is therefore instructed to look to relevant federal law. The Court does not believe that Hicks precludes a tribal court from exercising jurisdiction over a claim of discrimination, ultimately founded upon federal law, against a party over which the Court can exercise jurisdiction under Hicks and Montana. 42 U.S.C. 1983 is not a basis for substantive law, but merely a procedural vehicle for a federal court to exercise jurisdiction over claim of violations of federal law that find their source in other federal laws. If this Court were precluded under Hicks from enforcing all federal civil rights laws, it would be stripped of the authority to enforce the Indian Civil Rights Act, notwithstanding the United States Supreme Court's pronouncement in Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978) that it has ultimate authority to enforce that law. Merely because the genesis of a right arises under federal law does not preclude this Court from enforcing that right.

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TRIBAL MEMORANDUM

TO : Georgia Gunville, Acting Chief Judge

CIH by WC

FROM : Colette LeBeau Iron Hawk, Tribal Secretary DATE: 03/08/00

SUBJECT: Request by Ronnie Long

The Cheyenne River Sioux Tribal Council, during its Regular Session held on March 7, 2000 approved a motion to allow Leisah Bluespruce to sign off on her case (Ronnie Long) for jurisdictional purposes.

CIH/wc
CC: Chairman
Treasurer
Administrative Officer
Council Representatives
Central Records
District Officers
Leisah Bluespruce
Ronnie Long
File/2

CHEYENNE RIVER SIOUX TRIBAL COURT
CHEYENNE RIVER SIOUX TRIBE
CHEYENNE RIVER INDIAN RESERVATION

LONG FAMILY LAND AND CATTLE COMPANY, INC. - RONNIE AND LILA LONG,
Plaintiffs

OPINION

Vs.

ED MACIEJEWSKI AND BANK OF HOVEN
Defendants

Case No.: R-120-99

This matter having come before this Court for a hearing on this 30th day of July, 1999 for a Preliminary Injunction. Plaintiff's, Ronnie Long and Lila Long appearing with legal counsel, James P. Hurley, pro hac vice. Defendant's, The Bank of Hoven being represented by David A. Von Wald, pro hac vice and Ed Maciejewski appearing without the assistance of legal counsel.

Long Family Land and Cattle Company (hereinafter Long Co.) is a corporation formed in South Dakota with its principal place of business located on fee land within the exterior boundaries of the Cheyenne River Indian Reservation. The Corporation was formed for the purpose of obtaining Bureau of Indian Affairs guaranteed loans for a farming and ranching operation. The Bureau of Indian Affairs (hereinafter BIA) will not provide guarantees unless the majority of the stock of the Corporation seeking the loans is owned by Indians. At all times since its inception, at least 51% of the Long Corp. Indians owned shares.

Bank of Hoven (hereinafter Hoven) is a South Dakota Corporation with its principal place of business located off the reservation. Hoven maintains no offices within the exterior boundaries of the reservation, but regularly loans money to Indian owned businesses under the BIA guarantees. Hoven entered into an agreement with Kenneth Long, (a non-Indian) on behalf of the Corporation that provided operation loans, some of which were guaranteed by BIA as well as a mortgage on the land owned by the corporation. Kenneth Long died in 1995, and left a will transferring his land and stock in the corporation to his children. In December 1995 three of Kenneth Long's children transferred their stock in the Corporation to their brother Ronnie Long.

At the time of his death, Kenneth Long had named his second wife, Paulette Long, Executrix of the estate. Paulette Long transferred the Corporation's land to Hoven, without first obtaining the permission of the shareholders of the corporation. This transfer was done to satisfy the debts of the estate.

In 1996, Ronnie Long, now president of the Corp., entered into discussions with Hoven for the purpose of attempting to save the assets of the Corp. Hoven came onto the reservation to assess the land, machinery, livestock and other assets of the corporation. Further discussions took place between the majority shareholders of the corporation, BIA and the planning Department of the Cheyenne River Sioux Tribe. As a result of the discussions the parties entered into the following agreement:

1. The Corporation would deed the land back to Hoven to satisfy the debt owed to the Bank. The Longs, in turn would enter into a lease with an option to purchase the land back from the bank for a period of two years, for $478,000. Credits would be given for proceeds from the Conservation Reserve Program as well as proceeds from the purchase of the house. Hoven agreed to request an increase on the guarantee on the loans to 90% from 84 % and to reschedule the payments to annual payments over a period of 20 years.
2. Hoven would request a new guarantee on an operating loan in the amount of $70,000.
3. Hoven would make an additional loan in the amount of $53,000.

Hoven failed to reschedule the note on the property. Hoven did apply for an increase in the BIZ guarantee, however Hoven was turned down due to Hoven's failure to fill out a complete application for the guarantee. There was no effort on Hoven's part to attempt to resubmit a completed application to the BIA. Hoven failed to request the additional BIA guaranteed operating loan. Hoven failed to provide the corporation with the additional $53,000.00 loan.

In addition, the Corporation was to receive credit for Conservation Reserve Program payments made to the bank of Hoven. These payments totaled $92,000.00. The Corporation was also to receive credit for the sale of a home. The credit was to be for the purchase price that exceeded $10,000.00. The home sold for $30,000.00 and after fees associated with the sale, $17,000.00 was to be applied toward the down payment on the lease-purchase agreement.

The winter of 1996-1997 was severe. As a result of Hoven's failure to provide Long Corp. with the means to continue to operate the ranch, and to provide feed to their livestock, the Corporation lost a substantial amount of livestock to the weather. This loss resulted in the Corporation's inability to make the requisite payments under the lease purchase agreement entered into between the parties.

At the end of the two-year period under the lease purchase agreement, Hoven served a Notice to Quit on the corporation. Hoven's representative admitted that the CRP payments and the $17,000.00 from the sale of the house in Timber Lake were to be credited toward the lease-purchase agreement, however Bank of Hoven mad a unilateral determination that these payments were not to be applied to the down payment. Based on the credits from the CRP payments and the sale of the house, Ronnie Long requested a 60-day extension to exercise the Corporation's option to purchase. Hove denied plaintiff's request.

Prior to filing a civil action for foreclosure, the bank sold 320 acres of the Corporation's 2,225 acres on March 17, 1999 to the Pesickas. On June 25, 1999, without filing an action to do so, Hoven sold the remaining 1905 acres to Ed and Mary Jo Maciejewski. Both buyers entered onto the land and began using the land for grazing of their own cattle and began harvesting the hay on the land. Plaintiffs attempted to harvest hay from the parcel sold to the Maciejewskis and were threatened with judicial action.

Long Corp. filed a complaint for a temporary restraining order and asking for a hearing on a preliminary injunction, enjoining Hoven and Maciejewski from the taking of the land and the assets attached to the land. Defendants object asserting that this Court lacks jurisdiction to hear the matter.

In determining whether a preliminary injunction should be issued, the court must consider the following:

> (1) the threat of irreparable harm to the movant; (2) the balance between the potential harm and any harm that granting the injunction will cause to the other parties to the litigation; the probability that the movant will succeed on the merits; and (4)the public interest. *National Credit Union v. Johnson*, 133 F.3d 1097

There is clearly a threat of irreparable harm to the plaintiffs. The issues hinge on land that is allegedly in the process of being foreclosed upon by the defendants. Land is unique. The ability of the parcel of land in question to produce the requisite crops for this Corporation's operation to survive may not be accomplished elsewhere. Therefore, plaintiff has met the burden of demonstrating irreparable harm.

In the instant action the likelihood of success on the merits hinges on whether this court has jurisdiction. If this Court has jurisdiction then Tribal Law applies and the parties engaged in self-help in violation of tribal law.

Hoven argues that since both parties are incorporated in South Dakota and since the land in question is fee land located within the exterior boundaries of the reservation, that this Court does not have jurisdiction in this matter. Defendant's argument is misplaced.

A Corporation has no race, although it is a person under the law. Therefore to determine whether this Court has jurisdiction, the Court must examine the relationship of the parties. At all times, Hoven was aware that they were dealing with tribal members. In fact, Hoven benefited from its dealings, in that, Hoven obtained guarantees on loans to Long Corp. that would not have otherwise been available, had Hoven been dealing with non-Indians. In addition, the negotiations that took place concerning the refinancing of the Long Corp. debt took place with the aid of both the BIA and Tribal planning offices. The crux of plaintiff's Breach of Contract action rests on whether Hoven acted in good faith in obtaining the requisite BIA guarantees for the refinancing of the outstanding debt.

Montana v. United States, 450 U.S. 544 (1981) is the seminal case concerning Civil jurisdiction of this Court over non-Indians. In *Montana*, the Supreme Court set forth a two-prong test to determine whether this Court maintains civil jurisdiction over non-Indians. It is the first prong of this test that decides jurisdiction here.

> To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing or other means, the activities of nonmembers who enter into consensual relationships with the tribe or its members, through commercial dealing, contracts leases or other arrangements. (emphasis added) Id. at 565.

For the reasons set forth previously herein, Hoven submitted itself to this Court's jurisdiction by benefiting from its dealing with a Corporation eligible for guarantees that would not be available to Hoven had the plaintiffs not enjoyed status of Indians in accordance with the BIA regulations. In doing so, Hoven entered into a contractual relationship with a tribal member, thus submitting itself to the jurisdiction of this Court.

The Cheyenne River Tribal Code contains a Leasehold/Mortgage Foreclosure Code. This code sets forth specific procedures by which a lender may foreclose on property, Chapter 3 §3-1, et seq. This Code is to be read in accordance with C.R.C. §10-1-1, which provides under no circumstance is a party to engage in self-help to recover property that secures a debt. In addition, prior to filing for foreclosure, the lender must meet certain notice requirements and make efforts to notify the borrower of those programs that may be available to aid the borrower in becoming current on the outstanding debt. Hoven made no effort to comply with these provisions of the Tribal Code. Furthermore, Hoven sold the property to third

parties without so much as filing a cause of action. The actions of Hoven in violating tribal law also contribute to the plaintiff's likelihood of success on the merits.

Plaintiff has therefore met its burden that a preliminary injunction should issue.

Cheyenne River R. Civ. Pro. 65 (c) requires that plaintiff submit a bond. In the instant action, plaintiff would owe $38, 440.00 as the down payment under the lease purchase agreement. Plaintiff will have to deposit $38, 440.00 with the Court within ten days of this hearing or the preliminary injunction will expire.

Dated this 24th day of January, 2000, nunc pro tunc July 30th, 1999.

BY THE COURT:

JUDGE
CHEYENNE RIVER SIOUX TRIBE

ATTEST:

CLERK OF COURT
CHEYENNE RIVER SIOUX TRIBE

CHEYENNE RIVER SIOUX TRIBAL COURT CHEYENNE RIVER SIOUX TRIBE CHEYENNE RIVER SIOU INDIAN RESERVATION	IN CIVIL COURT IN GENERAL SESSION
LONG FAMILY LAND AND CATTLE COMPANY- RONNIE AND LILA LONG, Plaintiffs, vs. EDWARD AND MARY MACIEJEWSKI, RALPH AND NORMA J. PSICKA, And THE BANK OF HOVEN, nka PLAINS COMMERCE BANK, Defendants.	R-120-99 ORDER

The Defendant Bank has moved this Court for judgment notwithstanding the verdict, or in the alternative a new trial, on several causes of action asserted in the Plaintiffs' complaint and tried to a seven-member jury[1] on December 6 and 11, 2002. This Court dismissed several counts of the complaint, including one for fraud, one for failure of consideration, one pleading an unconscionable contract, and one praying for rescission of contract, after submission of the Plaintiffs' case, but permitted four counts- breach of contract, bad faith, discrimination, and violation of self-help remedies- to be submitted to the jury.[2] The Defendant's counterclaim for unlawful entry and detainer was heard by the Court at the same time as the legal issues were tried to the jury. The jury returned its verdict in the form of six interrogatories finding for the Plaintiffs on the causes of action alleging breach of contract, bad faith, and discrimination and finding for

[1] Although the Court impaneled six jurors and one alternate in this case, the Parties during the trial stipulated that all seven jurors could deliberate the case.

[2] The Court also dismissed, prior to trial, the count of the complaint alleging fraud in the inducement of a personal representative's deed from the estate of Kenneth L. Long to the Bank prior to trial on the ground that this count was an attempt to collaterally attack state court probate proceedings and should have been brought in the state court.

the Defendants on the count alleging violation of self-help remedies. The jury also issued an advisory verdict on the issue of whether the Defendant Bank's breach of contract prevented the Plaintiffs from performing on a lease with an option to purchase, finding that it did. That verdict informs the Court with regard to the counterclaim of the Bank to evict the Plaintiffs from certain real property it had acquired title to in the probate proceedings of Kenneth L. Long. The jury also returned a verdict for damages in the amount of $750,000 and directed the Court to award interest on that amount. The Defendant Bank timely filed its motion for JNOV and for a new trial on all counts the jury returned against it. This order will also address the Defendant Bank's counterclaim seeking to evict the Plaintiffs from certain fee lands within the Cheyenne River reservation.

The Defendant Bank's first argument is that the finding that it breached a loan agreement (Plaintiff's Exhibit 6) is legally insufficient because the loan agreement is not a legally-enforceable contract because the Defendants failed to give consideration. Although this defense was not pled by the Defendant Bank prior to trial, it did make an oral motion to conform its pleadings to the evidence submitted and that motion was granted by the Court. The Defendant Bank also moved for a directed verdict on the issue and the motion is therefore appropriate. The issue of want of consideration was therefore appropriately submitted to the jury and is therefore now resolvable by the Court.

In general, a Court should not overturn the verdict of a jury if sufficient evidence was submitted to the jury so that reasonable minds could disagree about the evidence. See Dunes Hospitality v. Country Kitchen, 623 NW2d 484 (SD 2001). As the South Dakota Supreme Court has stated with regard to judgments nov:

> Thus, the grounds asserted in support of the directed verdict motion are brought before the trial court for a second review. We review the testimony and evidence in a light most favorable to the verdict or the nonmoving party, "then without weighing the evidence [we] must decide if there is evidence which would have supported or did support a verdict.

Matter of Estate of Holan, 621 NW2d 588, 591 (SD 2000).

BREACH OF CONTRACT ACTION

The Bank makes a strong argument that the loan agreement that the jury found it breached is non-enforceable because of a lack of consideration by the Plaintiffs. If a contract is lacking in consideration, a party not giving consideration cannot recover for a breach of that contract. At first blush, it is difficult to see what consideration the Plaintiffs gave in exchange for the promises made by the Bank in the loan agreement, Trial Exhibit 6. The Bank had received a personal representative's deed to the land owned by Kenneth Long that secured the loans to Long Family Land and Cattle Company. The Plaintiffs owed the Bank the amounts reflected in the loan agreement and the agreement appears to be a method for the Bank to re-amortize the payments on the outstanding owed the Bank by the Defendants. Admittedly, the Bank was attempting to gain an increased guarantee from the BIA and needed the Longs cooperation in seeking this, but that "consideration" is not anything the Longs were giving up.

However, the Longs still occupied the land and were receiving the CRP payments on the land. It is impossible to gauge whether valid consideration was given by the Plaintiffs for the loan agreement without also viewing the lease with the option to purchase, which the Court has already ruled, in denying the Defendant's motion for summary judgment on its counterclaim for eviction, was a related document under the integrated document doctrine. See Battery Steamship Corp. v. Refineria Panama S.A.,

513 F.2d 735, 738 n.3 (2d Cir. 1975). It is possible that the jury found consideration in the fact that the Longs were agreeing to continue the operation of their cattle ranch in order to pay the entire amount of principal plus interest instead of having the Bank call the loans and collect the guarantee from the BIA in an amount substantially less than what was owed by the Plaintiffs. In addition, the Longs agreed to assign the CRP payments to the Bank as part of the plan to permit them to get on their feet again and attempt to regain title to the land that was in the Long family name for many years. The Court cannot conclude that there is no evidence that supports the jury's verdict and therefore denies the motion for judgment notwithstanding the verdict on the claim that consideration was wanting.

The Bank also contends that even if consideration existed, no evidence was submitted to the jury to support the Plaintiffs' claim that the Bank breached the loan agreement. The Bank contends that by the time it was required to perform under the loan agreement- late winter of 1997- the Plaintiffs had suffered substantial livestock losses due to the catastrophic winter of 96-97 and could not have possibly met the loan payments under the loan agreement. The Bank also contends that the only thing it promised to do in the loan agreement was to seek an increase in the BIA guarantee, which it did and the BIA delayed action on the request, and the advance of operating monies of $70,000 was contingent upon the increased guarantee by the BIA which never came.

The Plaintiffs' theory at trial was that the guarantee of $70,000 in annual operating loans was breached and that the advances were not contingent upon the increase by the BIA in the guarantee. The Plaintiffs advanced the theory that had the Bank advanced the $70,000 in operating costs to it they would not have had the

catastrophic cattle losses they experienced because they would have gotten feed to their livestock.[3] It was undisputed that the Bank did not advance the $70,000 referred to in the loan agreement and the Court believes the issue of whether that advance was contingent upon the increase in the BIA guarantee is not clear from the face of the loan agreement and was therefore a jury issue. The jury apparently felt that the Bank breached the promise to advance the operating costs and this Court cannot substitute its opinion for that of the jury when evidence does exist to support the verdict. The loan agreement is ambiguous on its face on the issue of whether the annual advance of the $70,000 in operating monies was contingent upon the BIA improving the increase in the guarantee and that ambiguity must be construed against the drafter of the document- in this case, the Bank.

The Bank also seems to be contending in its motion that it should have been excused from performing the loan agreement after the winter of 96-97 because the catastrophic livestock losses suffered by the Longs precluded them from paying the notes that were consolidated into the loan agreement. This is a legal issue that the Bank did not ask for a jury instruction on and was not therefore properly preserved at trial. Even had it been proposed as a defense, however, the success of this defense would depend upon the jury accepting the premise that the Bank had complied with the loan agreement up to the point when the Longs lost their livestock. The Plaintiffs' theory of the case appeared to be that the operating loan, had it been made prior to the cattle losses, would have prevented those losses and this was a question of fact for the jury to resolve.

[3] There was conflicting testimony whether the Longs had ever asked the Bank for operating monies to move hay to the livestock or to move the livestock, but this was a jury issue that was apparently resolved against the Bank.

BAD FAITH CAUSE OF ACTION

The jury also returned a verdict finding that the Bank acted in bad faith when it attempted to gain the increase in the guarantee from the BIA. The Bank contends that there is no evidence to support this conclusion and the verdict should therefore be set aside. Although there is evidence from the record that the BIA was somewhat derelict in delaying a decision on the guarantee until after the Longs had suffered substantial cattle losses,[4] the undisputed evidence presented to the jury was that the Bank failed to respond to a request from the BIA to correct the submission for the increased guarantee in accordance with federal regulations attached to the letter notifying the Bank and the Longs of the insufficient application. The Bank decided not to respond to the request because it apparently had concluded that with the Longs' cattle losses the Longs were no longer able to make the payments on the loan agreement. Admittedly, the Bank did proceed to loan more monies to the Longs and to re-amortize additional loans. However, the jury must have decided that this was not a substitute for the $70,000 in operating monies the Longs needed in order to survive the winter of 96-97.

The Bank argues that the bad faith claim is subsumed into the cause of action alleging breach of contract and a separate cause of action should not have been tried to the jury on this issue. The Court believes that the bad faith claim relates to the failure of the Bank to follow through with the promise to seek an increase in the BIA guarantee, while the breach of contract action relates to the failure of the Bank to make the operating

[4] The BIA took almost two months before it denied the Bank's request for an increase in the BIA guarantee because it was not appropriately submitted. The record is not clear regarding who submitted the documentation for the increase- the Bank or the Cheyenne River Sioux Tribe's Finance Office- but it is clear in that the Bank did not respond to the increase for a correct application.

loans as promised in the loan agreement. These are discrete claims and both impacted the ultimate inability of the Longs to purchase back the land of Kenneth Long under the lease with an option to purchase.

DISCRIMINATION

The third verdict returned against the Defendant Bank related to the claim of the Longs for discrimination in the lending practices of the Bank. During the trial a document was admitted into evidence, without objection, wherein the Vice-President of the Bank advised the Longs that the Bank would not sell them the land they obtained from the personal representative of the estate of Kenneth Long by contract for deed because of the "jurisdictional problems if the Bank ever had to foreclose on this land when it is contracted or leased to an Indian owned entity on the reservation." (Pl's Exhibit 4). This letter was dispatched after the Parties had apparently reached an understanding that the Bank would resale the Longs the land on a contract for deed. The Bank then proceeded to sell a parcel of the land to the Maciejewskis, non-Indians, on a contract for deed. The Court determined that his was prima facie evidence that the Bank denied the Longs the privilege of contracting for a deed because of their status as tribal members and thus submitted the count to the jury for determination over the objection of the Bank, which timely made a motion for a direct verdict on that issue and objected to the jury instruction and interrogatory on the issue.

The Bank reiterates its argument that this Court has no jurisdiction over a claim of discrimination arising under federal law against a non-Indian entity. Federal law prohibits any entity that receives the benefit of federal financial assistance from discriminating against any person in the delivery of services. See 42 U.S.C. 2000d. This statute has been

held to prevent a bank from "redlining" a certain area because of the racial composition of the residents of that area. See Laufman v. Oakley Bldg and Loan, 408 F.Supp 489 (SD Ohio 1976). The Longs are Indian residents of the Cheyenne River Sioux Indian reservation who claimed that the Bank denied them a privilege of contracting for a deed that was granted non-Indians.[5]There was uncontroverted evidence during the trial that the Bank was receiving the benefit of Department of Interior guarantees and CRP payments under federal programs and thus the Bank appears to be covered by federal law.

The Bank contends, however, that even if a prima facie case of discrimination was demonstrated, this Court lacks the jurisdiction to enforce federal civil rights laws under Nevada v. Hicks, 150 L.Ed. 2d 398, 121 S.Ct 2304(2001). In Hicks the Supreme Court held that a tribal court lacks the authority to hear claims against state officials or those acting under the color of state law who allegedly violate the rights preserved persons under federal law under the provisions of 42 USC 1983. The Defendants argue that the same logic applies to claims brought against private parties for violations of other federal laws protecting the rights of individuals to be free of discrimination.

The Court disagrees with the Bank's argument that this Court lacks the jurisdiction to enforce federal anti-discrimination laws against non-Indian entities over which the Court clearly has jurisdiction under the principles laid out in Nevada v. Hicks. It is undisputed in this case, and was conceded by the Bank, that the Bank had a consensual commercial relationship with the Longs, enrolled members of the Cheyenne

[5] In denying the Bank's motion for a directed verdict on this issue, the Court stated that it did not feel that the mere denial of the contract for deed to the Longs was conclusive evidence of discrimination and thus instructed the jury that it must find that the Bank's decision to deny the contract for deed was based "solely" upon their status as tribal members, thus permitting the jury to return a verdict for the Bank if it determined that the Bank had other non-discriminatory reasons to deny the contract for deed.

River Sioux Tribe, and their family cattle corporation, an Indian-owned entity. Even under the very proscribed view of tribal court jurisdiction over non-Indians contained in Hicks, this Court has jurisdiction over a non-Indian Bank that enters into a consensual relationship with the Band or its member or whose actions "threaten or ha(ve) some direct effect on the political integrity, the economic security, or the health or welfare of the Tribe." Montana v. United States, 450 U.S. 544, at 566 (1981); see also Gesinger v. Gesinger, 531 N.W.2d 17 (SD 1995). In Hicks the Supreme Court found that the tribal court jurisdiction over the game warden there was wanting because he had no consensual relationship with the Tribe or its members and his actions did not meet the second prong of the Montana test.

The Court notes that the Cheyenne River Sioux Tribal Code directs this Court to apply federal law in the absence of applicable tribal law. The only anti-discrimination laws explicitly contained in the Cheyenne River Sioux Tribal Code and Constitution are those prohibiting the Tribe from discriminating or denying equal protection of the laws to persons. The Tribe does not appear to have specific code provisions prohibiting private discrimination and the Court is therefore instructed to look to relevant federal law. The Court does not believe that Hicks precludes a tribal court from exercising jurisdiction over a claim of discrimination, ultimately founded upon federal law, against a party over which the Court can exercise jurisdiction under Hicks and Montana. 42 U.S.C. 1983 is not a basis for substantive law, but merely a procedural vehicle for a federal court to exercise jurisdiction over claims of violations of federal law that find their source in other federal laws. If this Court were precluded under Hicks from enforcing all federal civil rights laws, it would be stripped of the authority to enforce the Indian Civil Rights Act,

notwithstanding the United States Supreme Court's pronouncement in Santa Clara Pueblo v. Martinez, , 436 U.S. 49, 58 (1978) that it has ultimate authority to enforce that law. Merely because the genesis of a right arises under federal law does not preclude this Court from enforcing that right.

REDUCTION OF DAMAGES

The Bank argues that the verdict returned by the jury was excessive and had no basis in the law. The Court disagrees. The verdict returned was approximately $500,000 less than what was claimed by the Longs as their damages. Based upon the special interrogatory answers and the exhibits submitted, including Plaintiff's Exhibit 23, the Court cannot conclude that there was no basis for the amount of damages awarded by the jury and therefore denies the motion to reduce the amount of damages awarded.

COUNTERCLAIM FOR EVICTION

In light of the jury's verdict that the Bank did breach the loan agreement, and this Court's previous finding that the lease with an option to purchase and loan agreement were part and parcel of the same agreement, the Court must rule against the Bank on the counterclaim for eviction. A party that has failed to comply with a lease with an option to purchase cannot seek to enforce that agreement through an eviction action. The jury advised the Court that the Bank's breach prevented the Longs from performing under the lease with an option to purchase. The Court therefore concludes that the Plaintiffs did not violate the lease with an option to purchase and their option to purchase remains intact.

However, the jury concluded that the Bank did not violate the tribal law prohibiting self-help remedies when it conveyed parcels of the land covered by the lease with an option to purchase to the other Defendants. The Court has no authority therefore

to set aside the land conveyances to the other Defendants. The Court acknowledges that this leaves an ultimate resolution of this matter in a state of flux. The parties are urged to seek a resolution of the issues left pending by the jury verdict regarding ownership of the land involved herein.

Now, therefore based upon the foregoing analysis, it is hereby

ORDERED, ADJUDGED, AND DECREED that the motion of the Defendant Bank for judgments notwithstanding the verdict, or in the alternative a new trial, on the counts of breach of contract, bad faith, and discrimination are hereby DENIED, and it is further

ORDERED, ADJUDGED, AND DECREED that the motion of the Defendant Bank for a reduction in the amount of damages of $750,000 is DENIED and it is further

ORDERED, ADJUDGED, AND DECREED that the Defendant Bank's counterclaim for eviction of the Plaintiffs from the lands they presently occupy is DENIED at this time, and it is further

ORDERED, ADJUDGED, AND DECREED that counsel for the Plaintiffs shall submit a judgment conforming to the verdict of the jury in this case.

So ordered this 3rd day of January 2003.

CHEYENNE RIVER SIOUX CIVIL COURT SEAL SOUTH DAKOTA

BY ORDER OF THE COURT:

B.J. Jones

BJ Jones
Special Judge

ATTEST: Dale Charging Cloud
Clerk of Courts

Dale Charging Cloud Clerk of the Cheyenne River Sioux Tribal Court, do hereby certify that the foregoing is a true, correct and complete copy of the instrument herewith set out as appears on file and of record in my said office.

Date this 07th day of Jan 20 03

Dale Charging Cloud
Clerk, Cheyenne River Sioux Tribal Court

By DCC

CHEYENNE RIVER SIOUX TRIBAL COURT — IN CIVIL COURT
CHEYENNE RIVER SIOUX TRIBE
CHEYENNE RIVER SIOU INDIAN RESERVATION — IN GENERAL SESSION

LONG FAMILY LAND AND CATTLE COMPANY- RONNIE AND LILA LONG, — R-120-99

Plaintiffs,

vs. — ORDER

EDWARD AND MARY MACIEJEWSKI,
RALPH AND NORMA J. PSICKA,
And THE BANK OF HOVEN, nka PLAINS COMMERCE BANK,

Defendants.

The Plaintiffs brought this instant action seeking to enjoin the Defendants from interfering with their asserted right to continue occupying certain fee lands located on the Cheyenne River Sioux Indian reservation and seeking monetary relief against the Defendant Bank for an alleged breach of a written agreement to loan the Plaintiffs monies for operating a ranch on that land. This Court, per the Honorable Chief Judge Leisah Bluespruce, denied the Plaintiffs' request for a preliminary injunction pending the resolution of this matter, due to the Plaintiffs' failure to post sufficient security, but did uphold this Court's exercise of jurisdiction over the causes of action asserted by the Plaintiffs.[1]

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[1] . Judge Bluespruce issued a memorandum opinion after she was removed as Chief Judge of the Tribal Court on January 24, 2000, nunc pro tunc July 30, 1999, explaining her reasoning for denying the preliminary injunction. In that decision, which the Court does not consider to be dispositive of the legal issues raised in this case, Judge Bluespruce found that the Plaintiffs did demonstrate a likelihood of success on the merits of their complaint and indicated she would grant a preliminary injunction preventing the Defendants from taking any action to remove the Plaintiffs from the certain fee lands within Dewey County, South Dakota if the Plaintiffs posted security. Because no security

The Defendant Bank filed a counterclaim in equity seeking an order evicting the Plaintiffs from the fee lands in dispute. The other Defendants have purchased some of those lands and were thus joined as party Defendants. The Bank has filed a motion for summary judgment on its counterclaim and hearing was held before the Court, Special Judge B.J. Jones presiding, on the 27th day of September 2002 with the Plaintiffs appearing through counsel, James Hurley Esq., and the Defendant Bank appearing through counsel, David Von Wald, Esq. The other Defendants did not appear. The Court took the motion under advisement and based upon that hearing and the Court's review of the affidavits submitted in support of and opposition to the motion, and the Court's review of the file, now issues the following decision.

In ruling on the motion for summary judgment, this Court must construe the facts in a light most favorable to the Plaintiffs. Summary judgment should not be granted unless the Plaintiffs can prove no set of facts that would entitle them to the defenses they assert to the counterclaim. See Jensen v. Taco John's Int'l, 110 F.3d 525,527 (8th Cir. 1997).

The Defendant Bank contends that the personal representative of the estate of Kenneth L. Long, a non-Indian, executed a deed of conveyance[2] on December 10, 1996 to the Bank abandoning any interest Plaintiffs may have had in the land in dispute. Ergo,

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was posted, Judge Bluespruce ultimately denied the preliminary injunction on August 23, 1999. At hearing, counsel for the Bank questioned how Judge Bluespruce could enter a subsequent memorandum decision after she was removed as the Judge in this case. In light of her ultimate denial of the preliminary injunction request, and because the Court does not find her decision to be controlling on the ultimate legal issues in this case, the Court need not decide that issue.

[2] That personal representative, Paulette Long- Kenneth's then wife, had actually executed another deed prior to the date of Judge Moses' order but then executed yet another deed after the Circuit Court order.

the Defendants allege that the Plaintiffs are trespassers on the land and should be evicted. That deed of conveyance was authorized by the Honorable Scott Moses, a South Dakota Circuit Court Judge, in an order dated December 2, 1996 as part of probate proceedings pending before the Dewey County Circuit Court. Kenneth Long had four children, three of whom are enrolled members of the Cheyenne River Sioux Tribe, all of whom formed a corporation called Long Family Land and Cattle Company in order to operate the 2230 acres of Dewey County land and home and appurtenances thereon. The Corporation is a majority Indian-owned corporation. The four children were nominated by Kenneth Long as the devisees of the interests Kenneth possessed in the land in Dewey County in Kenneth's will.

The facts pertinent to the probate proceeding are somewhat confusing. The claim of the Bank to the 2230 acres and land, including a home, in the probate proceedings of Kenneth arose from a guarantee Kenneth executed to secure a loan to the Long Family Land and Cattle Company. The property pledged in the guarantee is described as "all assets" and the Plaintiffs appear to agree in the affidavit of Ronnie Long that this included the land of Kenneth Long. Plaintiff Ronnie Long contends that he was not aware of the personal representative's intent to abandon the land in exchange for a write-off of the guarantee[3] and also asserts that the deed executed by the representative was induced by the false assertions of the Bank that the estate of Kenneth Long was insolvent. The estate's attorney, Andrew Aberle, however appeared to agree with the Bank that the

[3] This assertion is rendered somewhat dubious by the fact that Ronnie Long later would agree to a lease with an option to buy the very land that he asserts he was not aware was conveyed to the Bank in the probate proceedings.

estate of Kenneth was insolvent because he represented to the Court that the voluntary abandonment would be in the estate's interest. [4]

The Plaintiffs ask that this Court, as part of consideration of the present motion, re-examine the events that led to the execution of the deed by the representative of Kenneth Long's estate to the Bank. They urge this Court to find some material factual disputes in the manner in which that deed was induced, claiming that the estate of Kenneth Long was not insolvent and the Bank misled the representative of the estate to believe it was. If that is true, they urge, there would be genuine factual disputes regarding whether the Plaintiffs have a continuing right to occupy the lands in dispute.

This Court, however, believes that this effort by the Plaintiffs is an attempt to collaterally attack the order of Judge Moses authorizing the representative of the estate to execute the deed. If the Plaintiffs' assertions are true, they may move the Circuit Court to set aside Judge Moses' order and the deed on the ground that the order was obtained by fraud or some misrepresentation to the Circuit Court. That remedy is not foreclosed even if the estate of Kenneth Long is no longer an open matter, something that is not clear. The Plaintiffs' other insinuation- that the Circuit Court lacked the jurisdiction to adjudicate a claim of a Indian-owned corporation to fee land owned by a non-Indian and located within the exterior boundaries of an Indian reservation- is intriguing, but again should be brought to the attention of the Circuit Court initially. [5]Although this Court is not bound

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[4] The Plaintiffs appeared to assert at oral argument that counsel Aberle was actually representing the Bank. The Court's review of the state court pleadings reveals otherwise, although the Bank acknowledges paying the fees for Aberle to draw up the voluntary abandonment agreement and deed.

[5] In light of recent United States Supreme Court decisions expanding the jurisdiction of state courts in Indian country and constricting parallel tribal court authority, this may not be the type of argument Indian litigants may wish to raise in a state court forum. See

by the principles of full faith and credit to honor state court judgments, this Court does recognize that South Dakota courts have honored judgments from this Court under the doctrine of comity. See SDCL §1-1-25; Gesinger v. Gesinger, 531 N.W.2d 17 (SD 1995). The Court also notes that the Cheyenne River Tribal Court of Appeals has directed this Court to attempt to maintain positive relations with the state courts by attempting to honor their decisions. See Eberhard v. Eberhard, No. 96-005-A, slip op. at 6 (Cheyenne River Sioux Tribal Ct. App. Feb. 18, 1997)(honoring a state court child custody decision under the PKPA, 28 U.S.C §1738B). By permitting the Plaintiffs to use this forum to collaterally challenge the state court probate order, a resulting consequence may be conflicting court orders regarding the ownership of the land in question. The Plaintiffs' remedy with regard to its complaints regarding how the Bank obtained the deed to the land lies with the state court. Therefore, to the extent that the Plaintiffs are alleging material factual disputes based upon their assertions that the deed conveying the lands in dispute here to the Bank was obtained by false assertions, the Court determines that no factual disputes exist for this Court to resolve at trial.[6]

The Plaintiffs make other arguments, however, in opposition to the motion for summary judgment that must be considered. About the time the Bank gained the title to Kenneth Long's fee land and appurtenances thereon through the state court proceedings,

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Nevada v. Hicks, 150 L.Ed. 2d 398, 121 S.Ct 2304,2315 (2001). The US Supreme Court decision in Strate v. A-1 Contractors, 520 U.S. 438, 448 (1997) would seem to dictate that the state court has jurisdiction over the probate proceeding because it involved a non-Indian decedent and fee land. The Tribal Court may very well have concurrent jurisdiction over the claims of the Indian-owned corporation to this land but that does not necessarily bar state court jurisdiction.

[6] This ruling does not necessarily preclude the Plaintiffs from claiming at trial, should this matter reach trial, that the Defendant Bank did not act in good faith in obtaining a re-conveyance of the land and then leasing it to the Plaintiffs as a defense to the eviction action.

the Bank approached Plaintiff Ronnie and Lila Long to discuss the rights, if any, of the Corporation to the continued occupancy of the land. On December 5, 1996 the Corporation and Bank entered into both a lease with option to purchase and a loan agreement. The loan agreement expressly references the lease with an option to purchase and appears to be a document that attempts to both account for any outstanding debt of the Corporation, independent of Kenneth Long, to the Bank arising from the loans to the Corporation secured by the land and appurtenances and to authorize the Corporation certain operating expenses to permit it the opportunity to regain title to the land. The Court notes that no party has moved the Court for summary judgment on the Plaintiffs' complaint asserting a breach of this loan agreement and will assume, therefore, that factual disputes exist regarding whether this agreement was breached by the Defendant Bank.

The Bank asserts that the loan agreement and lease with option to purchase are not related and the lease with option to purchase, and alleged default, should be considered without reference to the other loan agreement. The Plaintiffs counter that the loan agreement and its promises therein were to be the basis for the Plaintiffs to obtain the funds to exercise their rights under the lease with option to purchase and must therefore be construed as two parts of the same transaction. The Plaintiffs also assert that the CRP payments received by the Bank were to be recognized by the Bank as the 5% down payment to exercise the option to buy. This latter argument appears to be erroneous to the Court because the lease expressly references those payments as lease payments and not as the down payment on the option to purchase.

In general, when construing a written document the Court is confined to examining the language within the four corners of the document and should not look beyond those four corners to divine the intent of the parties. See Video Update v. Videoland, 182 F.3d 659 (8th Cir. 1999). There is an exception to the parol evidence rule, however, when the document being interpreted is not an integrated document. See Battery Steamship Corp. v. Refineria Panama S.A., 513 F.2d 735, 738 n.3 (2d Cir. 1975). If a party to a contract can demonstrate another writing executed at the same time or in close proximity, and that the document being interpreted does not have a merger clause, which the lease does not appear to have, a Court may look to the other document to construe the intent of the Parties. In that case, the Court must examine both documents to determine if the performance of promises made within one agreement should be assessed by the promises referred to in the other.

The Defendant Bank asserts that it is undisputed that the Plaintiffs did not exercise the option given them in the lease by paying the 5% of the purchase price within the two years the lease was in duration. The Plaintiffs counter, however: first, with the argument that the CRP payments constituted the 5%, something the Court rejects as spurious; and second, that the Plaintiffs were foiled in their effort to exercise the option because of the Defendant Bank's breach of the loan agreement that guaranteed them certain operating expenses that, if received, would have enabled them to exercise the option. The Court does not find this argument so wanting so as to deny the Plaintiffs the right to argue it to a trier of fact, either a jury or the Court. The Plaintiffs' argument is that the Defendant Bank's performance on the loan agreement was a condition precedent to its performance on the lease with the option to purchase. A condition precedent is "any

fact except mere lapse of time which must exist or occur before a duty of immediate performance by the promisor can arise." See Video Update, at 663. Again, summary judgment is not a proper method of disposing of a case if the Plaintiffs could prevail under any legally-cognizable theory they assert. In the instant case, the Court believes factual disputes certainly exist as to whether the Defendant Bank breached the loan agreement and whether the performance of the Plaintiffs under the lease agreement was conditioned upon performance by the Bank under the loan agreement. The Court believes the Plaintiffs have demonstrated a sufficient legal basis to deny the motion for summary judgment.

The Defendant Bank points out, quite naturally, that the lease under which the Plaintiffs assert possessory rights to the land in dispute has expired and therefore whatever the Court's disposition of the Plaintiffs' claims against the Bank may ultimately be, the bottom line is that the Plaintiffs never paid the purchase price for the land. However, a party is not bound to perform a contract in the timeframe contracted for if the other party breaches prior to the required performance or commits an anticipatory breach of that contract. Therefore, if the Plaintiffs can demonstrate at trial that their performance under the lease agreement was conditioned upon the Defendant Bank's performance of the loan agreement, they may have an argument that the Defendant's breach relieved them of the obligation to perform under the time frames of the lease agreement.[7] This is a question for the trier of fact, however.

[7] Of course this would not mean that the Plaintiffs may never have to perform under the lease with the option to purchase, but only that their performance may be delayed if sufficient cause is demonstrated.

The Court will therefore deny the Defendant's motion for summary judgment. The Court notes that the Plaintiffs made a timely demand for a jury trial under Rule 14 of the Tribal Code on their complaint. The Court needs to resolve the issue, therefore, whether both the complaint and counterclaim should be resolved by the jury or only the complaint. Rule 14 states that "all factual issues property triable by a jury shall be decided by the jury at trial." Actions sounding in equity are generally not triable to a jury, but instead are triable to the Court. Rule 14 is certainly flexible enough, however, to permit the Court to designate the jury as the trier of all facts in this case. The Court notes that the Counterclaim filed by the Defendant Bank does not demand a trial by jury, nor has the Plaintiff made a demand that the issues in the counterclaim be tried by the jury. The Court will therefore be the trier of fact on the counterclaim and the jury the trier of fact on the Plaintiffs' complaint. The trial shall be consolidated, however.

For the foregoing reasons it is hereby

ORDERED, ADJUDGED, AND DECREED that the Defendant Bank's motion for summary judgment on its counterclaim for unlawful entry and detainer is DENIED and it is further

ORDERED, ADJUDGED, AND DECREED that the Plaintiffs' complaint and Defendant Bank's counterclaim shall come on for trial before the Tribal Court on the 6th day of December 2002 at 8:00 a.m., with the Plaintiffs' complaints to be tried to a jury and the Defendant Bank's counterclaim to be tried to the Court . The Tribal Clerk of Courts is hereby directed to call a sufficient number of jurors on that date and at that time.

So ordered this 30th day of September 2002.

BY ORDER OF THE COURT:

B.J. Jones
Special Judge

ATTEST: Dave Charging Glen d.
Clerk of Courts

Cheyenne River Sioux
the foregoing is a true,
with the
office

Dated this 2nd day of Oct. x-02

Cheyenne River Sioux Tribal Court

CERTIFICATE OF SERVICE

I, Dale Charging Cloud, do hereby certify that I served a true and correct copy of the foregoing, ORDER (R-120-99) on the person next designated by first class mail, postage prepaid, addressed as follow:

MR. JAMES P. HURLEY
ATTORNEY AT LAW
818 ST. JOE ST., PO BOX 2670
RAPID CITY, SD 57709

MR. DAVID A. VON WALD
ATTORNEY AT LAW
PO BOX 468
HOVEN, SD 57450

Dated this 02nd day of October, 2002

Dale Charging Cloud

DALE CHARGING CLOUD, CLERK
CHEYENNE RIVER SIOUX TRIBE

CHARLES H. FRITZEL
and First National Bank In Sioux Falls,
as Trustee for the Charles H. Fritzel Trust,
Plaintiffs and Appellees,
v.
ROY JOHNSON CONSTRUCTION,
Defendant and Appellant.
[1999 SD 59, 594 NW2d 336]

South Dakota Supreme Court
Appeal from the Second Judicial Circuit, Minnehaha County, SD
Hon. Glen A. Severson, Judge
#20617, #20642—Affirmed

Chad W. Swenson, Johnson, Heidepriem, Miner, Marlow & Janklow, L.L.P., Sioux Falls, SD
Attorneys for Plaintiffs and Appellees.

Patrick J. Kane, Robert L. O'Conner, Sioux Falls, SD
Attorneys for Defendant and Appellant.

Considered on Briefs Mar 25, 1999; Opinion Filed May 12, 1999

KONENKAMP, Justice.

[¶1] When an estate was closed while its lawsuit was still pending, the trial court allowed an heir and his trust to substitute as plaintiffs, but no "documented" transfer to them of the estate's chose in action was ever consummated. Could the new plaintiffs pursue the action if it was not formally assigned to them? Because a chose in action is a form of personal property, it must be legally conveyed to effect a transfer. Nonetheless, an assignment of an action need not be in writing and any arrangement however informal will suffice to effect a valid transfer if that was the owner's intent. Such intent having been shown, we affirm the circuit court's denial of summary judgment for defendant and uphold its award of prejudgment interest on plaintiffs' verdict.

FACTS

[¶2] In July 1993, Virginia Fritzel hired Roy Johnson Construction to install a drain tile system to divert groundwater seepage in her home at 1309 South Jefferson, Sioux Falls. When the job was finished, she paid the bill in full. Virginia Fritzel died in October 1994, leaving a will naming as beneficiaries her two sons, Charles and Robert Fritzel. The First National Bank in Sioux Falls was appointed the estate's administrator. As part of its duties for the estate, the Bank put the house on South Jefferson up for sale. It stood empty for some time.

[¶3] Charles created the Charles H. Fritzel Trust in February 1995, and named the Bank as trustee. Following probate of the will, title to the house eventually vested in Charles and Robert, but Robert conveyed his interest to Charles. Charles then transferred his ownership to the trust on December 11, 1995.

[¶4] In July 1995, an agent of the Bank noticed a musty smell in the basement and "intermittent colored spots" on the floor, signifying water seepage. The Bank hired Ray Brooks Construction to repair the damage. After consulting with an engineer, Brooks decided to replace the defective drain tile system Johnson had installed. The work totaled $4654.60, which included repairs to the basement floor, damaged during repair work. The Bank brought this action on behalf of the estate against Johnson in 1996. Its complaint alleged causes of action for negligent construction and breach of implied warranty.

[¶5] While suit was pending, the estate was closed by court order on August 4, 1997, and the Bank was discharged as the administrator. Johnson moved for summary judgment claiming that the Bank, in its capacity as administrator, was no longer a proper party in interest. In response, the Bank submitted an affidavit from trust officer, Andrea Kuehn, who personally handled the duties of administrator. Kuehn stated in her affidavit that the estate was closed, "[a]fter first transferring responsibility for the water damage to the Charles H. Fritzel Trust, by agreement of the beneficiaries to the estate ... ." Summary judgment was denied, and the trial court granted leave to amend the pleadings to substitute as real parties in interest, Charles Fritzel and the Bank as trustee for the Charles H. Fritzel Trust. SDCL 15-6-17(a).

[¶6] A jury returned a verdict for $5000 against Johnson. The circuit court added $1415 in pre-judgment interest, computing it from the date the water damage was discovered. Johnson appeals asserting that the circuit court erred in allowing the trust and Charles Fritzel to proceed with the estate's chose in action, when there was no proof that it had been transferred to them before the estate was closed and the administrator was terminated. Both sides appeal the trial court's method of calculating prejudgment interest.

STANDARD OF REVIEW

[¶7] When reviewing a motion for summary judgment our standard is well settled. We recently stated in Estate of Shuck v. Perkins County:

> Summary judgment is authorized 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law.' SDCL 15-6-56(c). We will affirm only when there are no genuine issues of material fact and the legal questions have been correctly decided. Bego v. Gordon, 407 NW2d 801, 804 (SD 1987). All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. Morgan v. Baldwin, 450 NW2d 783, 785 (SD 1990). 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. Wilson v. Great N. Ry. Co., 83 SD 207, 212, 157 NW2d 19, 21 (1968).

1998 SD 32, ¶6, 577 NW2d 584, 586 (quoting Julson v. Federated Mut. Ins. Co., 1997 SD 43, ¶5, 562 NW2d 117, 119). We are not bound by the trial court's factual assessment in granting summary judgment; we take an independent review of the record. Spenner v. City of Sioux Falls, 1998 SD 56, ¶7, 580 NW2d 606, 609 (citing Walz v. Fireman's Fund Ins. Co., 1996 SD 135, ¶6, 556 NW2d 68, 70).

ANALYSIS AND DECISION

1. Transfer of Chose in Action

[¶8] The right to proceed on Virginia Fritzel's chose in action for Johnson's defective work belonged to the estate after her death. Johnson contends that because there was no "documented proof" of transfer from the estate to the trust or to Charles Fritzel, the right of action was extinguished when the estate was closed. He concludes, therefore, that neither Charles nor the trust had standing to proceed with the suit and the trial court erred when it denied Johnson's motion for summary judgment.

[¶9] Choses in action, like debts owed a decedent, are estate assets. Johnson v. Zimmerman, 102 NYS2d 868, 869-70 (NY 1951); *see also* In re Wreede's Estate, 154 NE2d 756, 758 (OhioCtApp 1958) (unpaid debt owed to a decedent survives as an asset of the estate). A chose in action is intangible personal property. Teed v. Powell, 372 SE2d 131, 133-34 (Va 1988). As property of an estate, it must be passed to heirs or beneficiaries using "'a deed, the execution of an adequate release or transfer in writing, or the *performance of some other act* ... .'" Reardon v. Whalen, 29 NE2d 23, 24 (Mass 1940) (emphasis added) (quoting Millett v. Temple, 182 NE 921,

922 (Mass 1932)); *see also* Murphy v. Killmurray, 88 NE2d 544 (Mass 1949) (gift of chose in action, as intangible property, cannot be valid without a release, written transfer or the performance of some act putting it beyond the legal reach of creditors).

[¶10] Transfer of a chose of action is valid when "it is delivered to the assignee without being affixed to any other instrument showing a title or a right to the thing assigned, and any language, however informal, will suffice if it shows the intention of the owner of that property to transfer it." Briley v. Madrid Improvement Co., 122 NW2d 824, 826-27 (Iowa 1963). If a decedent's chose in action is not assigned to another person or entity, any right of recovery can "only be maintained by the duly authorized representative of that estate, i.e., the executor or administrator." *Johnson,* 102 NYS2d at 870.

[¶11] Unquestionably, the cause of action against Johnson survived Virginia Fritzel's death and became an intangible asset of the estate. For the trustor Charles Fritzel to be a real party in interest, then, the estate had to transfer ownership of the action to one or both of them. The Bank acted as both administrator and trustee. Was the Bank required to execute some document showing that it transferred the cause of action from the estate to the trust? We think not. "A transfer may be made without writing in every case in which a writing is not expressly required by statute." SDCL 43-4-5. No statute or case in South Dakota requires a "documented" transfer in these circumstances. *Accord* Champion Home Builders Co. v. Sipes, 269 CalRptr 75, 80 (CalCtApp 1990) (deciding under identical statute that assignment of choses in action need not be in writing). As evidenced by the trust officer's affidavit, the necessary act and the intent to transfer existed. Because the transfer legally passed the right of action from the Bank as administrator to the Bank as trustee, the trial court was correct in denying Johnson's summary judgment motion.

2. Prejudgment Interest

[¶12] Johnson contends the trial court erred in awarding any prejudgment interest because damages could not have been reasonably ascertained before the jury's verdict. He cites Colton v. Decker, 540 NW2d 172 (SD 1995). *Colton* interpreted SDCL 21-1-11, which applies to lawsuits commenced before July 1, 1990. The pertinent statute here, however, is SDCL 21-1-13.1, which for cases commenced after July 1, 1990, abrogated the rule that prejudgment interest cannot be obtained if damages remained uncertain until determined by a court. Now prejudgment interest is allowed from "the day that the loss or damage occurred." SDCL 21-1-13.1. Charles Fritzel and the trust argue that the damage occurred the day Johnson installed the drain tile system, July 24, 1993. The trial court figured interest from the date the damage was discovered. We concur with the trial court's date. The day of installation may have been when the negligence occurred, but no one knows for certain when the seepage began. Therefore, the only nonspeculative date from

which to compute interest was the day of discovery.

[¶13] Affirmed.

[¶14] MILLER, Chief Justice, and SABERS, AMUNDSON, and GILBERTSON, Justices, concur.

ESTATE OF JOHN LELAND NEISWENDER,
Deceased.
[2003 SD 50, 660 NW2d 249]

South Dakota Supreme Court
Appeal from the Fourth Judicial Circuit, Lawrence County, SD
Hon. Warren G. Johnson, Judge
#22331—Affirmed

Michael W. Strain, Candi L. Thomson
Morman Law Office, Sturgis, SD
Attorneys for Appellant Claire Neiswender.

John R. Frederickson, Frederickson Law Office, Deadwood, SD
Attorney for Appellees Margaret Reedy and Elaine Neiswender.

Considered on Briefs Nov 18, 2002; Opinion Filed Apr 30, 2003

ANDERSON, Lee D., Circuit Judge.

[¶1] Claire Neiswender, as personal representative of the Estate of John Leland Neiswender, appeals from the judgment in favor of the contestant, Elaine Neiswender and other interested heirs.

[¶2] Claire is the widow of John. Elaine is John's daughter from a prior marriage. The trial court held that the parties had reached a settlement agreement. Under the agreement Claire, individually and as personal representative of the Estate, agreed to deed real property located in New Mexico to John's cousin, Merilyn Howard, in exchange for all other heirs relinquishing any other interest or claims in the Estate. Later Claire requested that the grantees under the deed be changed to Elaine and her sister, Margaret Reedy. On appeal Claire contends that no enforceable agreement was reached.

[¶3] This is the second time this case has been before this Court. *See* Estate of Neiswender, 2000 SD 112, 616 NW2d 83 (*Neiswender I*). There we held that no irrevocable family agreement existed between John and his co-tenants restricting the transfer of the New Mexico property to

blood relatives.

FACTS

[¶4] John died on July 17, 1998. His will specifically bequeathed $1,000 to each of his two daughters, Margaret Elizabeth Reedy (Margaret) and Barbara Elaine Ocshanna, a/k/a Elaine Neiswender (Elaine), as well as $20,000 to his stepdaughter (Claire's daughter), Mari Etta Vickery and a total of $23,000 to his five grandchildren. His will also bequeathed his interest in land located in New Mexico to his wife Claire. The property consists of 160 acres leased for oil and gas exploration and production. John had a twenty-five percent interest in the land.

Settlement Negotiations

[¶5] Claire commenced informal probate proceedings on July 24, 1998. Elaine objected to the proceedings and filed a will contest which ultimately resulted in the court converting the estate to a formal probate and appointing Claire as personal representative with limited authority. In *Neiswender I* we held that no family agreement existed which would cause the New Mexico property to be excluded from the estate. While that issue was pending on appeal before this Court, negotiations ensued between Elaine (along with her family members) and Claire to settle disputed issues concerning the distribution of the estate assets, including the New Mexico property.

[¶6] These settlement negotiations were finalized in a series of letters between attorneys for the parties on July 20 and 21, 2000. At this time attorney A.P. Fuller represented Elaine and attorney Steven Beardsley represented Claire and the estate. Patrick Westerfield, an attorney from New Mexico, also represented Claire and the estate at all pertinent times and assisted the estate with the legal work surrounding the New Mexico property.

[¶7] Although the last settlement letters exchanged by counsel contained some variances in minor details, it appeared that a settlement had been reached. The attorneys participated in a telephonic status conference before Judge Warren Johnson on July 25, 2000. Beardsley appeared for Claire, and Fuller appeared for Elaine. During this status conference, both attorneys agreed that the parties had reached a settlement and the only thing left was execution of documents in accordance with that settlement agreement. The settlement agreement provided:

1. The Estate and Claire personally would transfer all of their right, title, and interest in and to the New Mexico property and in and to any oil, gas, and liquid hydrocarbons or minerals associated with that property.

2. A mutual release would be signed by the Estate, Claire personally and as

Personal Representative of the Estate, and all other people named in the will including Elaine and Margaret.

3. Claire was to receive any oil and gas lease payments that either had been paid or were to be paid through August 1, 2000.

4. Claire was to receive all other property under the Estate whether real, personal or combined and Elaine, Margaret and their children would disavow any interest in the Estate other than their interest in the New Mexico Property.

5. All objections to the Estate and the Will would be withdrawn.

Performance Under the Settlement

[¶8] As had been agreed at the status conference, Fuller and Westerfield began preparing the documents necessary to carry out the settlement agreement including a mutual release, a stipulation for dismissal and order for dismissal, a quitclaim deed, and an assignment of oil, gas and mineral lease.

[¶9] After Claire executed the quitclaim deed and assignment with a name misspelled, Westerfield contacted Fuller by letter stating that Westerfield would forward corrected documents to Claire for re-execution. At this point, the only other document to be executed under the settlement agreement was the mutual release, which needed to be signed by Claire.

[¶10] While execution of the settlement documents was proceeding, on August 16, 2000, this Court affirmed the trial court's ruling concerning the family agreement. *Neiswender I.* We held that no irrevocable family agreement existed between John and his co-tenants that would prevent transfer of the parcel to non- blood relatives.

[¶11] Claire apparently became dissatisfied with the settlement agreement and refused to sign the mutual release or re-execute the quitclaim deed or assignment. In response Elaine filed a series of motions including a motion to hold the personal representative in contempt, a motion to compel the personal representative to execute all settlement documents and a motion to produce signed deeds.

[¶12] A hearing on the motions and on the issues of whether the parties entered into a binding settlement agreement was held on August 29, 2001. Judge Johnson held that an agreement had been reached between the parties, the details of which could be found in the correspondence between attorneys Fuller and Westerfield in July 2000 and the transcript of the status conference held July 25, 2000.

STANDARD OF REVIEW

[¶13] Our review begins with the findings of fact and a determination of whether the findings support the conclusions of law. The trial court's findings of fact are given appropriate deference unless they are clearly erroneous, but conclusions of law are reviewed *de novo*. Jacobson v. Gulbransen, 2001 SD 33, 623 NW2d 84.

[¶14] When a trial court determines that an agreement exists between the parties based upon the evidence and testimony presented at trial, that determination will be reviewed with great deference. *Jacobson*, 2001 SD 33 at ¶13, 623 NW2d at 88.

ANALYSIS AND DISCUSSION

[¶15] The issue in this case is whether the parties reached an agreement settling the disputes between them. A settlement agreement is contractual in nature and subject to the same rules of construction as contracts. Lewis v. Benjamin Moore & Co., 1998 SD 14, 574 NW2d 887. An agreement exists when the following elements are present: (1) the parties are capable of contracting; (2) the parties consent to the agreement; (3) the agreement is for a lawful object; and (4) the parties have sufficient cause or consideration. SDCL 53-1-2. In this case there is no dispute as to the capability of the parties to contract, nor is there any dispute as to the lawful object of the agreement.

Consent

[¶16] Consent of the parties to a contract must be free, mutual and communicated by each to the other. SDCL 53-3-1. Whether consent was communicated is not an issue in this case. Communications by counsel are binding on the parties, *Lewis*, 1998 SD 14 at ¶10, 574 NW2d at 889.

[¶17] Consent is not real or free if obtained through duress, fraud, undue influence, or mistake. SDCL 53-4-1. In this case, Claire contends that the contestants, namely Elaine and Margaret, withheld information from her regarding the value of the mineral interest in the New Mexico property. Therefore, Claire claims her consent was the result of fraudulent inducement.

[¶18] The trial court found that the contestants of the will, including Elaine and Margaret, did not withhold any information from Claire and that any contention Claire had as to fraud or fraudulent inducement was not supported by the evidence. The trial court further found that Claire and her attorneys had personal knowledge of the mineral lease, as attested to by her signing of such a lease on April 12, 1999. Additionally, the trial court noted that it is the statutory duty of the personal representative to prepare an inventory and appraisement of the decedent's

property, describing in reasonable detail the property and its fair market value, using an appraiser if necessary. SDCL 29A-3-706. It is also the duty of the personal representative to supplement this inventory and appraisement if property not included in the original inventory comes to the representative's attention or if the value or description indicated in the original inventory turns out to be false or misleading. SDCL 29A-3-708.

[¶19] Claire, as personal representative of the Estate, had a duty to know the value of the New Mexico property. The trial court held that any failure of Claire to learn the full extent and value of the mineral lease must rest on her shoulders and not those of the contestants. The record supports the trial court's finding that consent to the settlement agreement on the part of Claire was not gained through any duress, fraud, undue influence, or mistake on the part of the contestants.

[¶20] Consent is not mutual unless the parties all agree upon the same thing in the same sense. SDCL 53-3-3. The existence of mutual consent is determined by considering the parties' words and actions. Coffee Cup Fuel Stops v. Donnelly, 1999 SD 46, 592 NW2d 924. In this case, Claire also contends that she and the contestants failed to establish the exact terms of the settlement agreement and that the parties were not consenting to the same terms.

[¶21] In the final exchange of settlement letters between counsel there may have remained an issue whether the transfer of rights and property under the settlement agreement should occur contemporaneously. During the status conference hearing the attorneys did point out to the trial judge that the conference was only to determine the status of the tentative agreement that they believed had been reached. Following the conference, however, attorneys for both parties began preparing documents in accordance with the agreement outlined at the status conference and both parties proceeded to sign those documents without objection until after our decision was handed down in *Neiswender I*.

[¶22] The trial court found that there was a meeting of the minds on all relevant terms of the settlement agreement. This mutual meeting of the minds was evidenced by the written negotiations between Westerfield and Fuller and the conduct of the parties in executing the settlement documents following the July 25, 2000 status conference. The record supports this finding that the consent of the parties was mutual.

Consideration

[¶23] Claire also claims a lack of consideration for the agreement. Any benefit conferred or any prejudice suffered is sufficient consideration for a contract. SDCL 53-6-1. *See* Harms v. Northland Ford Dealers, 1999 SD 143, 602 NW2d 58; Garrett v. BankWest, Inc., 459 NW2d 833 (SD 1990). The trial court found that Claire was transferring the property for several reasons,

including the release of any current and future claims by the contestants; to avoid being deposed; and to save further expense, personal grief, and emotional trauma associated with the ongoing family estate contest. Any of these reasons standing alone is sufficient consideration for an agreement and the trial court correctly found that sufficient consideration existed. *See* Crilly v. Morris, 70 SD 153, 15 NW2d 742 (1944); Ewing v. Waddington, 62 SD 166, 252 NW 28 (1933)

Changes of the Devisees

[¶24] In his final order following the motion hearings on August 29, 2001, Judge Johnson amended the original agreement by changing the recipient of the New Mexico property from John's cousin, Merilyn Howard, as the parties had originally agreed, to John's daughters Elaine and Margaret. Claire now objects to this change.

[¶25] Claire herself requested that the devisees be changed. Claire sent a letter to Westerfield stating that she was interested in deeding the property to Elaine and Margaret rather than Merilyn Howard. This preference was again expressed in a phone call to Margaret on December 26, 2000.

[¶26] The trial court incorporated Claire's own request in its final order entered February 22, 2002, and Elaine's family has never objected. We hold that the trial judge did not err in entering this order.

CONCLUSION

[¶27] The trial court was correct in determining that a settlement agreement was reached in the John Leland Neiswender Estate. The judgment is affirmed.

[¶28] GILBERTSON, Chief Justice, and SABERS, KONENKAMP, and ZINTER, Justices, concur.

[¶29] ANDERSON, Lee D., Circuit Judge, for AMUNDSON, Retired Justice, disqualified.

[¶30] MEIERHENRY, Justice, not having been a member of the Court at the time this action was submitted to the Court did not participate.

FIRST BANK OF SOUTH DAKOTA (NATIONAL ASSOCIATION), MILLER, SOUTH DAKOTA, a Banking Corporation, Plaintiff and Appellee,

v.

Barney VonEYE and Evelyn Mae VonEye, Husband and Wife, Defendants and Appellants.

and

United States of America, acting through the Small Business Administration, Appellee.

No. 15636.

Supreme Court of South Dakota.

Argued Sept. 3, 1987.

Decided June 1, 1988.

Bank brought suit against farmer borrowers on promissory note, and filed ancillary action for claim and delivery to seize farm collateral subject to security agreement. The Circuit Court, Third Judicial Circuit, Hand County, Irvin N. Hoyt, J., entered judgment in favor of bank, and farmer borrowers appealed. The Supreme Court, Morgan, J., held that: (1) evidence supported finding that prospective juror was not biased by his business relationship with bank, thereby supporting conclusion that juror was not subject to challenge for cause on grounds of interest; (2) evidence that truckers who loaded livestock collateral for bank charged excessive fees was admissible, but should have been raised in bank's principal action for deficiency judgment, rather than on farmer borrowers' counterclaim alleging unreasonable disposition of collateral; (3) farmer borrowers failed to prove that sale of livestock collateral was commercially unreasonable under South Dakota's UCC; and (4) fact that feed collateral was sold two days after bids were let out and several requests for feed came in after it had been sold did not compel finding that sale of feed was commercially unreasonable.

Affirmed in part, reversed in part, and remanded.

Wuest, C.J., concurred specially with statement.

Henderson, J., filed opinion concurring in part and dissenting in part.

Sabers, J., dissented and filed opinion.

1. Appeal and Error ⇐200

Failure of borrowers defending bank's suit against them to challenge for cause prospective jurors with alleged business relationship with bank was failure to preserve error with regard to those jurors.

2. Jury ⇐97(1)

Impartiality must be based upon whole voir dire examination; single isolated responses are not determinative.

3. Jury ⇐92

Evidence in bank's suit against borrowers supported finding that prospective juror was not biased by his business relationship with bank, thereby supporting conclusion that juror was not subject to challenge for cause on grounds of interest. SDCL 15–14–6(5).

4. Banks and Banking ⇐100

Evidence was insufficient to support finding that bank breached obligation of good-faith dealing on commercial transactions under South Dakota law by failing to advance monies to farmer borrowers to permit them to make payment due the Federal Land Bank, which resulted in the FLB initiating foreclosure proceedings; while borrowers alleged that bank's refusal violated previous years' practices and agreements, there was no evidence of consideration for bank to continue to advance funds for the FLB's payment. SDCL 57A–1–203.

5. Secured Transactions ⇐242

Evidence that truckers who loaded livestock collateral for bank during repossession charged excessive fees was admissible, but should have been raised in bank's principal action for deficiency judgment, rather than on farmer borrowers' counterclaim alleging unreasonable disposition of collateral. SDCL 57A–9–504, 57A–9–504(2).

6. Secured Transactions ⇐228

Criteria for commercial reasonableness attach to disposition or sale of collateral, not to the process of retaking. SDCL 57A-9-504, 57A-9-504(2).

7. Secured Transactions ⇐231

Commercial reasonableness of sale of collateral is question of fact.

8. Secured Transactions ⇐231

Bank's sale of livestock collateral during winter was not commercially unreasonable under South Dakota's UCC, notwithstanding that cattle would have brought higher price if bank had waited until spring to sell them; at time of sale, better price in spring was speculative, continuing to feed cattle would have depleted feed supply upon which bank also had lien, and interest continued to accrue daily during interim. SDCL 57A-9-504(3).

9. Secured Transactions ⇐242

Debtor is precluded from recovering from creditor for accidental loss or damage to repossessed collateral, and claim for recovery of damages must allege acts or omissions of nature rising to the level of gross negligence.

10. Secured Transactions ⇐242

Evidence did not support finding that bank was grossly negligent with regard to placing livestock collateral under stress in course of repossession, thereby supporting conclusion that bank's disposition was not commercially unreasonable under South Dakota's UCC; while there was proof that repossession was extremely difficult, took hours, and caused stress to the cattle, they were held for the requisite three days and presumably some of the stress effects should have warn off. SDCL 57A-9-207(2)(b).

11. Secured Transactions ⇐231

Manner in which collateral is sold can affect price, but low price is not conclusive proof that sale has not been commercially reasonable; however, large discrepancy between sale price and fair-market value signals need for close scrutiny of sale's procedures.

12. Secured Transactions ⇐242

Evidence failed to support finding that bank's disposition of livestock collateral was commercially unreasonable under South Dakota's UCC merely because the cattle were not sold as bred cows; three witnesses testified for bank that cattle were in generally poor condition prior to repossession, record disclosed that in order to sell cattle as bred cattle, they would have had to have been pregnancy tested at cost of $3-4 dollars each, auctioneer who sold cattle testified that in his opinion cattle would not have brought better price had they been pregnancy tested, and bank officer testified that cattle were sold in manner which would generate the most money.

13. Secured Transactions ⇐242

That feed collateral was sold two days after bids were let out and several requests for feed came in after it had been sold did not compel finding that bank's disposition of feed was commercially unreasonable under South Dakota's UCC; farmer borrowers did not claim that any of the later bids would have brought higher price, and testimony indicated that price received was within realm of reasonableness. SDCL 57A-9-507(2).

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Michael J. McGill and Todd C. Miller, Beresford, for defendants and appellants.

Mikal G. Hansen, Asst. U.S. Atty., Pierre, for appellee.

MORGAN, Justice.

First Bank of South Dakota N.A., Miller Branch (Bank), sued Barney VonEye and Evelyn May VonEye (VonEyes) on a promissory note, secured by a security agreement, and filed an ancillary action for claim and delivery to seize farm collateral subject to the security agreement. VonEyes appeal from the final judgment in favor of Bank. We affirm in part, reverse and remand in part.

VonEyes are farmer/ranchers who had transacted business with Bank for twenty-five years, through the spring of 1985.

VonEyes had a secured real estate loan with Bank and Bank provided an operating line of credit to VonEyes, secured by a security agreement on VonEyes' livestock, crops, feed, inventory and equipment. VonEyes also had other secured real estate loans with Federal Land Bank (FLB) and Farmers' Home Administration (FmHA). Any other pertinent facts will be commented upon in the analysis of the issues.

In response to Bank's complaints, VonEyes served and filed an answer and counterclaim and an amended counterclaim. The counterclaim alleged three counts: bad faith, breach of contract and commercial unreasonableness of the disposition of the collateral.

We perceive that the half dozen issues enumerated in VonEyes' brief fall into four categories and can be set out as follows:

1. The failure of the trial court to allow jury challenge to all bank customers when raised by pretrial motion and in the course of voir dire.
2. The trial court's error in granting a directed verdict on VonEyes' cause of action for breach of obligation for good faith dealing in commercial transaction per SDCL 57A–1–203.
3. Exclusion by the trial court of evidence of unreasonable trucking fees and insufficiency of the other evidence to support the jury verdict that the disposition of the collateral was in a commercially reasonable manner.
4. The allowance by the trial court of Bank's attorney fees incurred in both enforcement of the security agreement *and* the claim and delivery action.

We will consider these issues in the order enumerated.

VonEyes contend that the trial court committed reversible error in denying their motion to excuse all of Bank's customers from jury service. Prior to voir dire, defense requested a blanket challenge for cause to all depositors and borrowers of Bank on the theories of principal/agent relationship (SDCL 15–14–6(3)),[1] or that those potential jurors had an interest in the action (SDCL 15–14–6(5)).[2] VonEyes' counsel phrased their concerns as follows:

> ... Any individual who is banking at First Bank might have the even unknown bias in the back of their mind that if we award a money judgment it could be affecting the safety or status of our depositors at First Bank. By the same token, where you have any potential member of the jury that is currently obtaining, or operating funds at First Bank, we feel there is a real danger of prejudice in that particular juror thinking, my goodness, if I render a verdict in favor of First Bank what's the reaction going to be when I go into the bank six months from now to renew a note. We feel these are items of potential prejudice against my client.

The court denied the challenge at that time, but granted that individual voir dire would be allowed on the issue of bias or prejudice. During voir dire, VonEyes challenged two jurors for cause. The court granted one challenge on the basis of familial relationship. The court denied cause as to Larry Hurd (Hurd). VonEyes had used their three peremptory challenges before Hurd was called.

In their brief, VonEyes complain that of the twelve veniremen selected, five had a business relationship with Bank. Of these five, VonEyes challenged only Hurd for cause. It must be noted at this juncture that South Dakota cases which deal with juror qualification or impartiality are criminal in nature, but we believe the analyses in those cases are equally applicable here.

1. SDCL 15–14–6(3) provides, in pertinent part:
> Challenges for cause may be taken on one or more of the following grounds:
>
> ....
>
> (3) That the relationship of ... principal and agent exists between the juror and any party to the action....

2. SDCL 15–14–6(5) provides, in pertinent part:
> Challenges for cause may be taken on one or more of the following grounds:
>
> ....
>
> (5) Interest on the part of the juror in the event of the action, or in the main question involved in the action, except his interest as a member or citizen of a municipal corporation[.]

A 1958 case speaks directly to the importance of challenging for cause. *State v. Flack*, 77 S.D. 176, 89 N.W.2d 30 (1958).

> A defendant should not be compelled to use his peremptory challenges upon prospective jurors who should have been excused for cause. Prejudice will be presumed if a disqualified juror is left upon the jury *in the face of a proper challenge for cause*, so that defendant must either use one of his peremptory challenges or permit the juror to sit.

77 S.D. at 179, 89 N.W.2d at 32 (emphasis added).

[1] VonEyes failed to exercise their right to challenge four of the five veniremen who remained on the panel. Right of appeal has not been preserved as to these jurors. *See Bittner v. Miller*, 226 Neb. 206, 410 N.W.2d 478 (1987). (A party who fails to challenge prospective jurors for disqualification and passes them for cause waives any objection to their selection as jurors.) Therefore, appeal is preserved only as to VonEyes' challenge for cause to Hurd.

The question remains whether the trial court committed reversible error in denying VonEyes' challenge to Hurd as a potential juror. SDCL 15–14–6(5) provides that a challenge to jurors may be taken on grounds of interest on the part of the juror in the event or in the main question involved in the action. "The ruling of the trial court will not be disturbed, except in the absence of any evidence to support it, in which case it becomes an error at law." *Flack*, 77 S.D. at 181, 89 N.W.2d at 32. *See also State v. Hansen*, 407 N.W.2d 217 (S.D.1987); *State v. Muetze*, 368 N.W.2d 575 (S.D.1985); *State v. Volk*, 331 N.W.2d 67 (S.D.1983).

[2] A "mere expression of a predetermined opinion ... during voir dire does not disqualify a juror per se." *Hansen*, 407 N.W.2d at 220, *citing Muetze, supra; Flack, supra.* A potential juror should be excused for cause if he is unable to set aside preconceptions and render an impartial verdict. *Hansen, supra.* However, once a potential juror has declared, under oath, " ... 'that he can and will, notwithstanding such opinion, act impartially and fairly upon the matters to be submitted to him[,]' " he should not be disqualified as a juror. *Flack*, 77 S.D. at 181, 89 N.W.2d at 32. Finally, impartiality must be based upon the whole voir dire examination and single isolated responses are not determinative. *Hansen, supra; Flack, supra.*

[3] We reject VonEyes' contention that the challenge to Hurd should have been sustained based on *State v. Thomlinson*, 78 S.D. 235, 100 N.W.2d 121 (1960). In that case, we held that the challenge should have been sustained as to jurors who held a *membership* in a cooperative association. The association had been burglarized by the defendant. The interest of the jurors in this case does not rise to the level of those in *Thomlinson*. The interest in *Thomlinson* was akin to an ownership interest where the jurors' pecuniary or financial interests were directly involved. Such is not the case here.

Upon an examination of the record in this case, it is evident that juror Hurd was thoroughly examined as to bias and prejudice. After an examination by counsel for both VonEyes and Bank, the court conducted the following voir dire.

> The Court: Larry, in the course of the questions, I detected some reluctance.... and as I have asked before, in the event that you are on this panel, and voted to return a verdict in their favor, would that make you uncomfortable then going into the bank tomorrow or the next day and continue to try to conduct business with them?
>
> Hurd: No.
>
> The Court: Or do you think that would affect your relationship with the bank? Are you concerned about that at all?
>
> Hurd: No I don't think it would affect my relationship. It is very professional.
>
> The Court: Okay. So you have no problem sitting on the case, being fair and impartial to both sides in letting the chips fall where they may based upon the facts as you, the jury, will determine them and apply them to the instructions; is that correct?

Hurd: That's correct.

The Court: And would you weigh the witness' testimony, and I'm going to tell you how you view the testimony of witnesses, you would follow those instructions?

Hurd: Yes.

Thereafter, the court denied cause and seated Mr. Hurd on the jury. When voir dire examination of a juror "... 'is subject to more than one construction, a finding by the trial court either way upon the challenge is conclusive on appeal.'" *Flack*, 77 S.D. at 181, 89 N.W.2d at 32 (citation omitted). We conclude there was support in the evidence for the trial court's decision and accordingly affirm on this issue.

In order to discuss the remaining issues, it is necessary to establish the posture of the proceedings at the time the trial court ruled. The personal property had been seized, delivered to Bank, and sold at auction. In this action Bank sought a deficiency judgment. By answer, counterclaim, and amended counterclaim, VonEyes had sought recovery against Bank on three counts: bad faith involving the 1985 wheat crop; breach of contract to advance the 1984 FLB payment; and failure to dispose of collateral in a commercially reasonable manner. VonEyes' claim was brought on for trial to jury. At the close of all of the evidence, the trial court directed a verdict in favor of Bank and against VonEyes on the issues of bad faith involving the 1985 wheat crop and the alleged breach of contract to advance the 1984 FLB payment. The jury returned a verdict in favor of Bank and against VonEyes on the remaining issue on commercially reasonable disposition.

VonEyes' second issue is bifurcated in their brief. First, they argue that there is a cause of action for the tort of the breach of the obligation of good faith dealing in commercial transactions under SDCL 57A-1-203.[3] Secondly, they argue that the trial court erred by directing a verdict against them on their claims under that theory. Bank's response, as to the first aspect, is that the trial court accepted VonEyes' argument and they were permitted to introduce evidence on that issue. That appears to be accurate. Bank has not asked for review on this issue, therefore, it is obviously not ripe for review. There is no settled law on that issue in South Dakota [4] and there is a split of authority elsewhere. We will therefore reserve judgment on that issue for another time when it is properly before us, briefed and argued by the respective sides. In the meantime, the existence of such a cause of action in tort is the law of this case only.

[4] We then turn to the second aspect of the issue. Did the trial court err in directing a verdict against VonEyes? VonEyes' claim of breach of the obligation of good faith is premised on two alleged violations. First, they contend that Bank, in violation of previous years' practices and agreements, had refused to advance monies to permit them to make the payment due FLB in November, 1984, which resulted in the FLB initiating foreclosure proceedings. Second, they allege that Bank refused to advance sufficient money to permit them to harvest their 1985 crop and even threatened them with prosecution if they utilized the proceeds from any of the crop to pay such harvesting expenses, as a result of which the crop rotted in the field.

When faced with a motion for directed verdict, the court accepts as true the evidence presented by the non-moving party and indulges all legitimate inferences in favor of the party against whom the motion is brought. *Kreager v. Blomstrom Oil Co.*, 379 N.W.2d 307 (S.D.1985); *Budahl v. Gordon & David Associates*, 323

3. SDCL 57A-1-203 provides:

Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement.

4. In this regard, we distinguish *Yankton Prod. Credit Ass'n v. Jensen*, 416 N.W.2d 860 (S.D. 1987), from the present action. In *Yankton Prod. Credit Ass'n*, the issue of bad faith was not properly before this court because the trial court had specifically found that Jensen had admitted there had been no bad faith exercised on the part of PCA. Nor was the issue decided in *Federal Land Bank of Omaha v. Jensens*, 415 N.W.2d 155 (S.D.1987).

N.W.2d 853 (S.D.1982); *Myers v. Quenzer*, 79 S.D. 248, 110 N.W.2d 840 (1961). The court must determine if there is any substantial evidence to sustain the cause of action. If there is such evidence as would allow reasonable minds to differ, the case must go to the jury. *Haggar v. Olfert*, 387 N.W.2d 45 (S.D.1986); *Sabag v. Continental South Dakota*, 374 N.W.2d 349 (S.D. 1985); *Lytle v. Morgan*, 270 N.W.2d 359 (S.D.1978).

What the trial court found, on directing the verdict in favor of Bank, was that VonEyes had not presented sufficient evidence to present the matter to the jury. Specifically, the court found that there was no evidence of consideration for Bank to continue to advance funds for the FLB payment and that Bank would have been placed in a worse position by releasing collateral to meet harvesting expenses. Further, the record indicates that many of VonEyes' allegations as to Bank's lack of good faith were unsubstantiated by any evidence that would indicate a lack of good faith. *See*, SDCL 57A–1–201(19). We affirm the trial court on this issue.

[5, 6] The third issue centers around the question of commercially reasonable disposition of the collateral. VonEyes first complain that the trial court excluded evidence of what they claim to be excessive fees charged by the truckers who loaded the livestock from VonEyes' yard and delivered the same to the auction yard pursuant to the sheriff's directions. Before trial Bank apparently sought, by motion in limine, to preclude VonEyes from presenting evidence on their claim that excessive trucking rates were charged. VonEyes apparently claimed the charges were three times that allowed by PUC regulations. The motion in limine is not a part of the record, nor is there any semblance of an order by the trial court sustaining the motion except as can be gleaned from a transcript of a telephonic motion hearing held prior to the date set for trial. It is difficult to determine from the transcript what the basis was for Bank's motion. The trial court noted that there was no motion in the file but it kept referring to a memorandum that apparently set out Bank's position on the motion. That memorandum is not a part of the record either. We do not wish to discourage courts and counsel from using telephone conference calls wherever possible, but it is simply sloppy trial practice to fail to properly make, notice, and file motions to be considered by the court. Nor is this a case where we can say that on a silent record we will presume that the trial court acted correctly. Bank cannot be permitted to gain by the deleterious practices of its counsel.

Bank suggests that the trial court granted the motion because payment of the trucking fees is beyond the control of Bank. That may have been the trial court's reason. In the transcript we find the court saying:

> I am going to grant your motion that it is correct and the sheriff controls those proceedings and actually, the creditor has no say in what the sheriff does. We run into that over here.

We are rather disturbed by the cavalier attitude Bank and the trial judge displayed toward VonEyes' complaint. We disagree with the thesis.

Bank, in proceeding as it did, was acting under authority of SDCL 57A–9–504 which provides that the proceeds of disposition shall be applied to the *reasonable* expenses of retaking. The statute further provides: "If the security interest secures an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency." SDCL 57A–9–504(2). In view of the fact that it was Bank that undertook this proceeding for possession of the collateral, it is Bank's responsibility to take such action as may be deemed necessary if the sheriff, or anyone acting in his behalf, authorized overpayment of trucking fees. That responsibility cannot be thrust upon the hapless debtor. The foregoing is not to say that there was indeed an excessive trucking charge made in this case; but rather to say that the issue is properly raised by VonEyes, although perhaps not in the right context. It is their contention that it is a factor to be considered in the

issue of commercially reasonable disposition of the collateral. In our opinion, however, the criteria for commercial reasonableness attach to the disposition or sale of collateral, not to the process of retaking. *Westgate State Bank v. Clark*, 231 Kan. 81, 642 P.2d 961 (1982), *cited with approval* in *Topeka Datsun Motor Co. v. Stratton*, 12 Kan.App.2d 95, 736 P.2d 82 (1987); *Leasing Service Corp. v. Diamond Timber Inc.*, 559 F.Supp. 972 (S.D.N.Y.1983). "... 'Once a creditor *has* possession he must act in a commercially reasonable manner toward sale, lease, proposed retention where permissible, or other disposition.' ..." *Farmers State Bank v. Otten*, 87 S.D. 161, 167, 204 N.W.2d 178, 181 (1973) (emphasis added). The amount of trucking charges is more properly to be considered by the trier of fact in the Bank's principal action for deficiency judgment. Preclusion of introduction of that evidence was error.

VonEyes then argue that there was insufficient evidence to support the jury's verdict upholding Bank's position that disposition of the property was otherwise commercially reasonable.

[7, 8] To support their claim of commercially unreasonable disposition, VonEyes advance four arguments. First, that the timing of the public sale of the cattle was unreasonable because the cattle would have brought a higher price if Bank had waited until the spring of 1986 to sell the cattle. (The cattle were sold in February 1986.) Secondly, an argument interrelated with the first argument, the seizure of the cattle, left them in a stressful state which reduced the proceeds at sale. Third, the cattle were sold on a per-pound slaughter basis, rather than as bred cattle, reducing the proceeds at sale. Finally, that the private sale of feed was made before all bids were received.

Commercial reasonableness of the sale of collateral is a question of fact. *United States v. Conrad Publishing Co.*, 589 F.2d 949 (8th Cir.1978); *John Deere Leasing Co. v. Fraker*, 395 N.W.2d 885 (Iowa 1986). It is not this court's function on appeal to weigh the evidence or to substitute this court's judgment for that of the jury. *Urban v. Wait's Supermarket Inc.*, 294 N.W.2d 793 (S.D.1980); *Robinson v. Mudlin*, 273 N.W.2d 753 (S.D.1979); *Nebraska Elec. Generation & Transmission Co-op v. Walkling*, 90 S.D. 253, 241 N.W.2d 150 (1976). "We must consider the evidence in the light most favorable to the prevailing party...." *Robinson*, 273 N.W.2d at 755. "The test is whether there is substantial, credible evidence which ... would tend to sustain a verdict." *Urban*, 294 N.W.2d at 795. "... 'The jurors are the exclusive judges of the weight of the evidence and the credibility of the witnesses * *.'" *Walkling*, 90 S.D. at 261, 241 N.W.2d at 155 (citation omitted).

A secured party's right to dispose of collateral under SDCL 57A-9-504(3) is subject to two requirements: (1) creditor must send notice of the sale, and (2) the method, manner, time, place, and terms of the sale must be commercially reasonable. VonEyes do not argue that notice was inadequate. In determining whether a sale is commercially reasonable

> '... "it is the aggregate of the circumstances in each case—rather than specific details of the sale taken in isolation—that should be emphasized in a review of the sale. The facets of manner, method, time, place, and terms cited by the Code are to be viewed as necessary, and interrelated parts of the whole transaction."'

First Bank v. Haberer Dairy & Farm Equip., 412 N.W.2d 866, 871 (S.D.1987) (citation omitted); *In re Zsa Zsa Ltd.*, 352 F.Supp. 665, 670 (S.D.N.Y.1972), *aff'd* 475 F.2d 1393 (2d Cir.1973). It is uncontested in the record that the cattle market was down at the time of the sale due to weather conditions and that VonEyes' cattle had wintered poorly. VonEyes had requested that Bank allow them to keep the cattle until spring as they had adequate feed to sustain the cattle until that time. However, Bank felt that it was in the best interests of all parties to repossess the cattle and sell as soon as possible. In *Massey Ferguson Credit Corp. v. Bond*, 176 Ga.App. 217, 335 S.E.2d 454 (1985), farm equipment was auctioned off at a

time when, as testified to by a dealer, the market for used farm equipment was "terrible." The court noted that the claim of commercially unreasonable sale established only that had the equipment been sold at another time it might have brought a better price. The court reiterated the established rule that, "the fact that a better price could have been obtained by a sale at a different time or in a different method ... is not of itself sufficient to establish that the sale was not made in a commercially reasonable manner." 176 Ga.App. at 217, 335 S.E.2d at 454; *Farmers Bank v. Hubbard*, 247 Ga. 431, 276 S.E.2d 622 (1981); SDCL 57A-9-507(2).

A bank is not an investor, but rather a lender with the right to define and limit the risks it will accept. *Sumner v. Extebank*, 88 A.D.2d 887, 452 N.Y.S.2d 873 (1982), *modified on other grounds*, 58 N.Y.2d 1087, 462 N.Y.S.2d 810, 449 N.E.2d 704 (1982). VonEyes' argument also ignores two factors: To continue to feed the cattle depletes the feed supply upon which Bank also had a lien and, more importantly perhaps, the interest continues to accrue daily during that interim. We agree that when a creditor finds itself in an insecure position, and without adequate assurances, it need not wait for a speculative better price.

[9, 10] VonEyes next argue that if the cattle had not been placed under such great stress, in the course of repossession, they would have brought a better price at sale. The evidence that the repossession of the cattle was extremely difficult, took hours, and caused stress to the cattle, is uncontroverted. We might also note that the cattle were held for the requisite three days and presumably some of the stress effects should have worn off. The risk of accidental loss or damage is on the debtor when the collateral is in the secured party's possession. SDCL 57A-9-207(2)(b). In *Adams v. Barnett Bank of Polk County*, 469 So.2d 250 (Fla.App.1985), appellant sought damages arising out of the loss and value of security due to alleged damage caused when it was repossessed. The court in *Adams* found that there was no evidence that the creditor, in hiring that third party, was guilty of some fault which foreseeably contributed to plaintiff's damages. In other words, a debtor is precluded from recovering for accidental loss or damage, and a claim for recovery of damages must allege acts or omissions of a nature rising to the level of gross negligence. The evidence here does not support such a finding.

[11, 12] VonEyes next claim that they were damaged because the cattle were not sold as bred cows. The manner in which collateral is sold can affect the price, but a low price is not conclusive proof that a sale has not been commercially reasonable. However, a large discrepancy between sale price and fair market value signals a need for close scrutiny of the sale's procedures. *Connex Press, Inc. v. International Airmotive Inc.*, 436 F.Supp. 51 (D.C.1977); *In re Zsa Zsa Ltd., supra*. VonEyes would have us adopt the view of the *Connex* court that a creditor possessing particular expertise with regard to the collateral must be held to a higher standard than one not so well versed in the trade. We believe, however, that the reasonableness of the manner of the sale in this instance is better viewed from the standpoint of preparation for sale. There is authority that when the cost of preparing the collateral for sale is small, in comparison to the additional price it is likely to generate, the creditor should spend the extra money. *Westgate State Bank*, 231 Kan. 81, 642 P.2d 961 (1982), *cited with approval* in *Topeka Datsun Motor Co. v. Stratton, supra*.

In support of the verdict, we note that three witnesses testified for Bank that the cattle were in generally poor condition prior to the repossession. The record further discloses that in order to sell the cattle as bred cattle, they would have had to be pregnancy tested at a cost of $3.00–$4.00 each. The auctioneer who sold the cattle testified that in his opinion the cattle would not have brought a better price had they been pregnancy tested. A bank officer also testified that the cattle were sold in a manner which would generate the most money.

[13] VonEyes next contend that the sale of feed was commercially unreasonable because the feed was sold two days after the bids were let out and that several requests for the feed came in after it had been sold. SDCL 57A–9–507(2) applies here as well. Private sealed bids are commercially reasonable and Bank is not required to wait for a better price. VonEyes do not claim that any of the later bids would have brought a higher price. Testimony indicates that the price received was within the realm of reasonableness.

We affirm the jury verdict that a commercially reasonable sale was held and conclude there is substantial credible evidence in the record to sustain such a verdict.

Finally, we consider VonEyes' claim that the trial court erred in allowing Bank attorney fees incurred in both the enforcement of the security agreement and the claim and delivery action. In their brief, VonEyes state that the trial court ruled that the South Dakota Supreme Court has ruled that attorney fees are recoverable pursuant to language in security agreement providing for such recovery. VonEyes' briefs do not specify where in the record this trial error occurred, and our review of the judgment and the various orders in the record does not reveal any allowance of attorney fees by the trial court. SDCL 15–26A–64 requires that whenever reference is made in the briefs to any part of the record, it shall be made to the particular part of the record, suitably designated, and to the specific pages thereof. Absent a specific order or judgment allowing attorney fees, or an adequate reference to the record for the trial judge's alleged ruling, we deem the issue waived.

We affirm the directed verdicts as to bad faith and breach of contract, and the jury verdict as to commercially reasonable sale, but we reverse and remand for a new trial that portion of the judgment granting Bank a deficiency judgment due to the error in precluding the evidence regarding excessive trucking charges. In the absence of an order or judgment for attorney fees, there can, of course, be no issue. If there is such an order or judgment that we are unaware of, VonEyes' failure to make adequate reference to the record waives the issue.

MILLER, J., concurs.

WUEST, C.J., concurs specially.

HENDERSON, J., concurs in part and dissents in part.

SABERS, Justice, dissents.

WUEST, Chief Justice (concurring specially).

I concur except for the comments regarding counsel.

HENDERSON, Justice (concurring in part, dissenting in part).

I join that aspect of the majority opinion which reverses on Issue III, namely, a failure of disposing of collateral in a commercially reasonable manner.

However, I join Justice Sabers' dissent in that I am firmly convinced that in small communities such as Miller, Hand County, South Dakota, customers of the bank should not sit on the bank's case as a juror. Hand County is primarily an agricultural county, and there are only two banks located in Miller, a community of less than 3,000 people. An interrelationship between a debtor and creditor-bank is very personal. There have been many bank foreclosures throughout the Midwest, and Hand County is no exception. Times in the agricultural community have been tough. It is very difficult for a juror to owe a bank a substantial amount of money and sit on a case in a free and open state of mind, oblivious to the debt. Bank officers would testify who do business with them. When one considers the meaning of "interest," as set forth in SDCL 15–14–6(5), it would reasonably encompass an interest in the outcome, and the depositors and the borrowers of the bank would have an interest in an outcome of the VonEye loan. Therefore, on challenge for cause for all of the jurors holding a customer relationship with this small-town bank, where customers know the officers very well, and the officers are keenly aware of their relationships with the

customers, and there is a direct bearing on the bank's fiscal soundness, not to mention its practices, five eventual jurors should have been stricken from the jury panel. By doing so, the VonEyes would have had, without any doubt whatsoever, a jury that had no alliance or allegiance with one of the parties to the lawsuit.

Also, I join Justice Sabers in his dissent on Issue II, namely, that the trial court should not have granted a directed verdict against the VonEyes on their cause of action pleaded for breach of an obligation of good faith concerning commercial transactions under SDCL 57A–1–203. Under the evidence presented in this case, there is a statutorily implied obligation of good faith. *First Nat'l Bank in Libby v. Twombly*, 689 P.2d 1226 (Mont.1984). Good faith is defined under SDCL 57A–1–201(19) as being "honesty in fact in the conduct or transaction concerned." Enough evidence was presented so that the jury should have been permitted to bring its collective judgment into play on the bank's general obligation of good faith. "Thus, there are over 50 years of compelling precedent that this reviewing Court must examine the evidence in the light most favorable to the nonmoving party on a motion for directed verdict and to give said nonmoving party the benefit of all reasonable inferences therefrom." *Lovell v. Oahe Elec. Coop.*, 382 N.W.2d 396, 406 (S.D.1986) (Henderson, J., dissenting).

SABERS, Justice (dissenting).

The majority opinion reverses on Issue III. I would also reverse on Issues I and II, because of:

1. The trial court's failure to allow jury challenges to all bank customers when raised by pretrial motion and in the course of voir dire.
2. The trial court's error in granting a directed verdict on VonEyes' cause of action for breach of the obligation of good faith dealing in commercial transactions pursuant to SDCL 57A–1–203.

1. *Bank Customers As Jurors*

The trial court should have granted VonEyes' request for a blanket challenge for cause to all depositors and borrowers of Bank on theories of a principal/agent relationship (SDCL 15–14–6(3)) and that those potential jurors had an interest in the action (SDCL 15–14–6(5)). Every prospective juror who is a customer at the bank is in a debtor/creditor relationship with that bank. In other words, either the bank owes them money or they owe the bank money. This debtor/creditor relationship is substantial even without considering the need for that potential juror to seek a loan in the future or an extension for loan payments. In the present economy, these were real probabilities, not just potential sources of prejudice against VonEyes or bias for the Bank.

As indicated, five of the twelve jurors had a debtor/creditor relationship with Bank. The fact that VonEyes challenged only one of these five for cause during trial is not crucial here as it was in *State v. Flack*, 77 S.D. 176, 89 N.W.2d 30 (1958). VonEyes challenged all of the bank customers for cause by pretrial motion, which was denied by the trial court. The right to challenge these bank customers as jurors has been preserved. To require VonEyes to again challenge four of these jurors in front of all of the jurors would require a useless act which would put them in even more disfavor with Bank's customers.

Under South Dakota law the trial judge must exercise his discretion in the selection of a jury. *Bartlett v. Gregg*, 77 S.D. 406, 92 N.W.2d 654 (1958) states that "The trial court knows the attorneys, usually most of the jury panel, and the type of community in which the trial is held." *Bartlett*, 92 N.W.2d at 659. The trial court is charged with the obligation to insure that the jury panel is fair and impartial. 47 Am.Jur.2d *Jury* § 23; *Irvin v. Dowd*, 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). This duty is even more crucial when the number of jurors who are bank customers will be so proportionately large that an impartial jury cannot be selected. *Olson v. City of Sioux Falls*, 63 S.D. 563, 262 N.W. 85 (1935). It is almost always wise for the trial court to err on the side of disqualification for even if the juror is wrongly removed, the worst

the court will have done in most cases is to have replaced one impartial juror with another. *State v. Ternes*, 259 N.W.2d 296 (N.D.1977).

The right to a jury trial means nothing if the jurors have an interest in the action or in the main question involved (Bank's liability). Jurors who are debtors and creditors of a bank should be excluded, especially where the number of jurors with connections to the bank exceeds forty percent of the entire jury and constitutes fifty percent of the number of jurors needed for a verdict. That VonEyes did not have a fair jury is evident from the following questions and answers of Juror Hurd, who sat as a juror over objection for cause.

> Counsel: Mr. Hurd, if at the conclusion of the evidence you felt that the VonEyes had established that their position should prevail, would the fact that you've had a business relationship with the bank make it difficult or uncomfortable with you as far as returning a verdict in favor of the VonEyes?
>
> Juror: Well, maybe a little bit uncomfortable. But—
>
> Counsel: It would cause you some problem in your mind as far as coming back and saying if you felt the evidence was justified, you know, that the bank was wrong in this case?
>
> Juror: Yeh, it could.
>
> Counsel: You feel that could influence your decision-making ability, Mr. Hurd?
>
> Juror: Maybe just a little bit.

No further showing should have been required in this case to dismiss Juror Hurd, and no further showing should be required to reverse and remand for a fair and impartial jury in the retrial.

2. *Obligation Of Good Faith*

SDCL 57A-1-203 provides: "Every contract or duty within this title imposes an obligation of good faith in its performance or enforcement." The trial court erred in granting a directed verdict on VonEyes' cause of action for breach of obligation of good faith because of questions concerning: 1) bad faith involving the 1985 wheat crop, 2) bad faith involving the refusal to advance a 1984 Federal Land Bank payment, 3) failure to dispose of collateral in a commercially reasonable manner, including the necessity for pregnancy testing eighty bred cows, 4) excessive trucking charges, 5) the timing of the public sale of the cattle, and 6) the reasonableness and timeliness of the repossession of the cattle which was extremely stressful to the cattle.

As stated by the majority opinion, "The court must determine if there is any substantial evidence to sustain the cause of action. If there is such evidence as would allow *reasonable minds to differ*, the case must go to the jury. *Haggar v. Olfert*, 387 N.W.2d 45 (S.D.1986); *Sabag v. Continental South Dakota*, 374 N.W.2d 349 (S.D. 1985); *Lytle v. Morgan*, 270 N.W.2d 359 (S.D.1978)." (emphasis added) It is obvious in this case that the evidence was such to allow reasonable minds to differ and therefore the case should have gone to the jury. It was reversible error for the trial court to direct a verdict under these circumstances.

In view of the reversible error on Issues I and II and the reversible error as decided by the majority opinion with respect to Issue III, all of the issues and questions should go back for a new and fair trial.

21-1-13.1. Interest on damages - Prejudgment interest.

Any person who is entitled to recover damages, whether in the principal action or by counterclaim, cross claim, or third-party claim, is entitled to recover interest thereon from the day that the loss or damage occurred, except during such time as the debtor is prevented by law, or by act of the creditor, from paying the debt. Prejudgment interest is not recoverable on future damages, punitive damages, or intangible damages such as pain and suffering, emotional distress, loss of consortium, injury to credit, reputation or financial standing, loss of enjoyment of life, or loss of society and companionship. If there is a question of fact as to when the loss or damage occurred, prejudgment interest shall commence on the date specified in the verdict or decision and shall run to, and include, the date of the verdict or, if there is no verdict, the date the judgment is entered. If necessary, special interrogatories shall be submitted to the jury. Prejudgment interest on damages arising from a contract shall be at the contract rate, if so provided in the contract; otherwise, if prejudgment interest is awarded, it shall be at the Category B rate of interest specified in § 54-3-16. Prejudgment interest on damages arising from inverse condemnation actions shall be at the Category A rate of interest as specified by § 54-3-16 on the day judgment is entered. This section shall apply retroactively to the day the loss or damage occurred in any pending action for inverse condemnation. The court shall compute and award the interest provided in this section and shall include such interest in the judgment in the same manner as it taxes costs.

Source:(1)

Amendments - 2003:(2)

CRST Law and Order Code 10-2-6(6)

In cases of tenancy of agricultural land where the tenant has held over and retained possession for more than sixty days after the expiration of his term without any demand of possession or notice to quit by the landlord or his successor in interest, the tenant shall be deemed to have the permission of the landlord or his successor to hold over for a full year under the same terms and conditions as the original tenancy, and such tenant shall not be guilty of an unlawful detainer for such period of his holding over.

Long Farm

Monthly Cash Flow (Agri-Business)
projected income for 11/01/96 to 10/31/97

Year 1

Name: Long Family Inc. R Long pres.

Date: 11/01/96

Month	November	December	January	February	March	April	May	June	July	August	September	October	Total
1996 calves sdv	$62,500	$5,875	$4,225	$7,575	$1,925	$3,275	$4,225	($9,525)	($175)	($1,825)	($3,475)	$198,575	$62,500
Cash receipts from L. O. C.	$10,000		$5,000		$3,000	$3,000	$2,000	$15,000					$68,000
Cash from 96 grain and 1997	$12,125	Sale of 96 grain wht and millet				200@whtX25buX$3.50					$17,500		$29,625
Cash from BIA int sub & CRP	$22,000	BIA int sub				CRP pmt						$44,000	$66,000
Cash from sale of yrlgs & adv 97 calves	$94,800	(360hdyrlgsX$520.00		&10hd95yrlgs		300hdcowsX90%X$330.00					$187,200	$89,100	$281,100
Cash from cattle purchase	$96,050												$96,050
Cash available:	$237,475	$5,875	$9,225	$7,575	$4,925	$6,275	$6,225	$5,475	($175)	($1,825)	$201,225	$331,675	$603,275
Operating Expenses:													$0
Car & Truck								$4,000					$4,000
Chemicals													$0
Conservation													$0
Custom Hire (machine work)													$0
Depreciation													$0
Employee Benefits													$19,800
Feed	$19,800	660hdX$.25 per hd fo 120days							400@cornX$25.00 per @				$4,000
Fertilizers		500@Corn&WhtX$8.00 $4,000											$0
Freight & Trucking													$12,800
Gasoline, Fuel & Oil	$700	$700	$700	$700	$700	$1,100	$1,700	$700	$700	$700	$1,700	$2,700	$0
Insurance (other than health)													$102,100
Interest - other	$87,000											$15,100	$0
Labor hired													$0
Pension & Profit-sharing													$0
Rent or lease (Eqmt. etc.)							$6,000						$23,000
Rent or lease (Animals, Land)	$17,000												$4,800
Repairs & Maintenance	$400	$400	$400	$400	$400	$400	$400	$400	$400	$400	$400	$400	$3,600
Seeds and plants							$3,600						$0
Storage and warehousing													$2,400
Supplies	$200	$200	$200	$200	$200	$200	$200	$200	$200	$200	$200	$200	$7,000
Taxes	$3,500						$3,500						$4,200
Utilities	$350	$350	$350	$350	$350	$350	$350	$350	$350	$350	$350	$350	$6,600
Veterinary, breeding, & medicine	$6,600												$0
Miscellaneous (specify)													
Total Cash Expenses	$135,550	$1,650	$1,650	$5,650	$1,650	$2,050	$15,750	$5,650	$1,650	$1,650	$2,650	$18,750	$194,300
OTHER DISBURSEMENTS:													$0
Capital expenditures													$96,050
Livestock purchases	$96,050	55hdstrX$325.00&55hdbfrsX$285.00				plus adv 260hdcalves 96							$80,547
BIA loan pmt &RB loan pmt												$80,547	$68,000
Loan repayment												$68,000	$148,547
Total Other Disbursements:	$96,050	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$148,547	$244,597
Total Cash Disbursements:	$231,600	$1,650	$1,650	$5,650	$1,650	$2,050	$15,750	$5,650	$1,650	$1,650	$2,650	$167,297	$438,897
TOTAL CASH, ENDING:	$5,875	$4,225	$7,575	$1,925	$3,275	$4,225	($9,525)	($175)	($1,825)	($3,475)	$198,575	$164,378	$164,378

8A

Name: Long Family Inc. & Long Bros

Monthly Cash Flow (Agri-Business)
projected cash flow 11/01/97 to 10/31/98

Year 2

Date: 11/01/97

Month	November	December	January	February	March	April	May	June	July	August	September	October	Total
Cash, beginning:	$164,378	$82,328	$80,428	$74,528	$72,628	$70,728	$68,428	$62,428	$48,128	$46,228	$44,328	$246,128	$164,378
Cash receipts from L. O. C.											$17,500		$0
Cash from sale of wht		200@whtX25buX$3.50									$187,200	$89,100	$17,500
Cash from sale of 97yrlgs&cad	98calves	360yrlgsX$520.00		300cowsX90%X$330.00								$44,000	$276,300
Cash from BIAint & emPMT	$10,000												$54,000
Cash from sales, OTHER													$0
Cash available:	$174,378	$82,328	$80,428	$74,528	$72,628	$70,728	$68,428	$62,428	$48,128	$46,228	$249,028	$379,228	$512,178
													$0
Operating Expenses:													$4,000
Car & Truck								$4,000					$0
Chemicals													$0
Conservation													$0
Custom Hire (machine work)													$0
Depreciation													$19,800
Employee Benefits													$4,000
Feed	$19,800	660HDx$25 PER HD FOR 120 DAYS	$4,000	500@x$8.00									$0
Fertilizers													$12,500
Freight & Trucking	$750	$750	$750	$750	$750	$1,150	$1,350	$750	$750	$750	$1,750	$2,250	$7,500
Gasoline, Fuel & Oil	$7,500												$0
Insurance (other than health)													$0
Interest - other													$0
Labor hired													$0
Pension & Profit-sharing													$23,000
Rent or lease (Equip, etc.)								$6,000					$6,000
Rent or lease (Animals, Land)	$17,000							$500	$500	$500	$500	$500	$2,400
Repairs & Maintenance	$500	$500	$500	$500	$500	$500	$500	$2,400					$0
Seeds and plants													$3,000
Storage and warehousing													$7,000
	$250	$250	$250	$250	$250	$250	$250	$250	$250	$250	$250	$250	$4,800
Taxes	$3,500						$3,500						$6,600
Utilities	$400	$400	$400	$400	$400	$400	$400	$400	$400	$400	$400	$400	$0
Veterinary, breeding, & medicine	$6,600												$100,600
Miscellaneous (specify)													
Total Cash Expenses:	$56,300	$1,900	$5,900	$1,900	$1,900	$2,300	$6,000	$14,300	$1,900	$1,900	$2,900	$3,400	
													$0
OTHER DISBURSEMENTS:													$35,750
Capital expenditures	$35,750												$0
Livestock purchases												$80,547	$80,547
Owner's withdrawal													$116,297
Loan BIA Oty & RB loan pmts													
Total Other Disbursements:	$35,750	$0	$0	$0	$0	$0	$0	$0	$0	$0	$0	$80,547	$216,897
Total Cash Disbursements:	$92,050	$1,900	$5,900	$1,900	$1,900	$2,300	$6,000	$14,300	$1,900	$1,900	$2,900	$83,947	$295,281
TOTAL CASH, ENDING:	$82,328	$80,428	$74,528	$72,628	$70,728	$68,428	$62,428	$48,128	$46,228	$44,328	$246,128	$295,281	$295,281

8A

JH. This summer, the summer of 1999, have you had cattle and machinery on the 2,225 acres?

R. Yes I have.

JH. And who has put up the hay crop this year?

R. We started to but we couldn't finish.

JH. Why was that?

R. Ah, I had some white people haying and they were threatened that they would be taken to state court if they hayed for me.

JH. And did they tell you who had made the threats to them?

R. Yes sir.

JH. Who had made the threats?

R. Mr. Maciejewski.

JH. Did that stop your haying operation?

R. Yes.

JH. And by putting up the hay, ah, what does that involve for us non-ranchers, farmers, is there any planting to it?

R. No.

JH. The hay comes back every year, it grows back every year?

R. Yes it does.

JH. So what do you do for this haying operation?

R. You, you have to get out and get it hayed and bailed and ah, put up for winter feed.

JH. And you cut it and put it in windrows.

R. Part of it yes before the operation got stopped.

JH. And then you let the sun and the wind dry the hay a little bit and then you bail it?

R. Yes sir.

JH. And the product of that operation is a large round bail?

R. Yes.

JH. What do you do with these round bails, why do you do this?

R. To feed the cattle in the winter.

JH. And you carry those off of the land and place them where you can feed the cattle with them during the winter?

JH. Here at Eagle Butte?

CS. Yes.

JH. Okay. And was Mr. Long correct in testifying that ah Harley Henderson and John Lemke um, tribal employees, deal with BIA guarantee loans?

CS. Yes.

JH. And they were present on various of these discussions?

CS. Yes.

JH. Also that Dennis Huber (H-u-b-e-r) of North and South Dakota North American Native of American of Economic Development was involved?

CS. Yes.

JH. And also Bret Maxon (M-a-x-o-n) the assistant to Dennis Huber of the North American Native American Economic Development Association?

CS. Yes.

JH. And there was a time when Stacey Johnston (J-o-h-n-s-t-o-n) ah, BIA employee was involved in, in some fashion with these talks?

CS. Yes.

JH. And during all those discussions, ah, was there any ah, objection by the BIA to the final loan agreement or the lease with option to purchase?

CS. There was, you want to repeat that again Jim?

JH. Did the, well the BIA was, the BIA was aware of all of these agreements that were talking about?

CS. Yes.

JH. And ah, the BIA guarantees in the loans to the Long corporation correct?

CS. Yes.

JH. And was there any objection made or registered by the BIA to what you were doing?

CS. No.

JH. Um, Bank of Hoven was aware in June of 1999 that um, Ronnie and Lila Long and Long Family Land and Cattle Company, Inc., were still in possession of the 2,225 acres correct?

CS. Yes.

JH. And that's the reason that ah, under tab 12, or exhibit P-12 ah, the Bank had its counsel send a letter to this Court requesting that the notice to quit be served?

DV. And then on the right hand side I see here were you've got cost a bale.

EM. Yes.

DV. It would cost you five dollars and fifty cents for each bale that's made?

EM. Yes.

DV. And ah, so your cost of making the bales was eleven hundred forty-four dollars?

EM. Yes, we added the cost to cut and also...

DV. Okay, your cost to cut in addition to that.

EM. Um Hm. (affirmative)

DV. Your total expenses were two thousand forty-six dollars and eighty-five cents?

EM. Yes.

DV. And you would take that figure then from the value of the hay which you valued at thirty-five dollars per ton?

EM. Um. Hm. (affirmative).

DV. And so the net ah, of that parcel there would be eight thousand one hundred sixty-two dollars and thirty cents.

EM. Yes.

DV. Is that correct? And that's how you figured all of the land then is that it?

EM. Yeah. Each quarter of land ah from the FSA pictures has a number of of farm acres on it and we figured it off of those farm acres, there may be more acres per quarter but that's what we figured it off of, that's why each quarter has a different figure on it.

DV. Okay and the total figure that you come up with Mr. Maciejewski on the top left hand corner (END TAPE 3, SIDE 1)

(TAPE 3, SIDE 2)

EM. ...that's what we figured it off of, that's why each quarter has a different figure on it.

DV. Okay. And the total figure that you come up with Mr. Maciejewski on the top left hand corner on the left hand side of the column there is how much for damages if you are not able to farm that for 1999.

EM. Forty-three thousand two hundred and sixty-three dollars.

DV. And ah, that figure would not, would not reflect the taxes that you would have to pay in?

EM. No. No.

DV. So after the taxes are off, what are the taxes approximately on parcel 1?

(2) a lay counselor hired, retained or appointed to represent another before any Court of the Cheyenne River 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 Cheyenne River 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 Cheyenne River 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 Cheyenne River 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 in which one or more non-Indian parties are 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 as nearly as possible 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.

CHEYENNE RIVER SIOUX TRIBAL COURT
CHEYENNE RIVER SIOUX TRIBE
CHEYENNE RIVER INDIAN RESERVATION

IN CIVIL COURT
IN GENERAL SESSION
APPELLATE COURT

****

BANK OF HOVEN, NOW KNOWN AS
PLAINS COMMERCE BANK,

Appellant,

vs.

LONG FAMILY LAND AND CATTLE
COMPANY, INC.-RONNIE AND LILA LONG,

Respondents

CERTIFICATE OF SERVICE FOR BRIEF OF RESPONDENTS, LONG FAMILY LAND AND CATTLE COMPANY, INC.-RONNIE AND LILA LONG

Appeal #03-002-A
R-120-99

****

The undersigned hereby certifies that on the 1st day of March, 2004, he served this original Brief of Respondents, Long Family Land and Cattle Company, Inc.-Ronnie and Lila Long, 4 copies upon Rhea Hall, Clerk of Small Claims/Appellate Division, Cheyenne River Sioux Tribe, and one copy upon David A. Von Wald and Kenneth E. Jasper, by depositing the same in the United States mail at Rapid City, South Dakota, postage prepaid, in envelopes addressed to said addressees, to wit:

Ms. Rhea Hall, Clerk
Claims/Appellate Clerk
P.O. Box 120
Eagle Butte, SD 57625

Mr. Kenneth E. Jasper
Attorney at Law
P.O. Box 2093
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Mr. David A. Von Wald
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which addresses are the last addresses of the addressees known to the subscriber.

BANGS, McCULLEN, BUTLER,
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BY: _____
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