

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

425 North Dakota Avenue
Sioux Falls, SD 57104-2471

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January 31, 2013

John Hughes
224 North Phillips Ave. #200
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John Wilka
300 North Dakota Ave. #609
Sioux Falls, SD 57104

RE: *In the Matter of the Termination of Parental Rights Over
Baby [REDACTED], ADP. [REDACTED]*

Dear Counsel:

Petitioner's Motion for Termination of Parental Rights was held on December 17, 2012. Respondent appeared with counsel and objected to the proceedings. Respondent argued, among other things, that service by publication was deficient both legally and factually. Petitioner responded that because the time limit under SDCL 25-6-1.1 had run, any defect in service was inconsequential. The Court suggested that the matter be resolved through Summary Judgment and both parties agreed. The Court took the case under advisement to prepare a written decision.

THE FACTS

[REDACTED] ("Mother") and [REDACTED] ("Father") lived together for approximately one and a half years. Mother and Father were never married. After they separated in February of 2012, Mother informed Father she was pregnant and was planning on placing Baby [REDACTED] for adoption at birth. Father learned from Bethany Christian Services that Mother retained a private attorney. Father contacted an attorney, Dan Nichols, regarding his rights as a father; however, Father did not

commence any legal actions. Father heard a rumor that Mother had a miscarriage.

Baby [REDACTED] was born on September 27, 2012 at the Sanford Hospital in Sioux Falls, South Dakota. No man, including Father, acknowledged Baby [REDACTED] as his own by affirmatively asserting paternity by taking the actions required by SDCL 25-6-1 and 25-6-1.1. Father's name was not affixed to Baby [REDACTED]'s birth certificate within sixty days after her birth. Father did not commence a judicial proceeding claiming parental rights within sixty days after the birth of Baby [REDACTED]

On September 27, 2012, Mother placed Baby [REDACTED] for purposes of permanent adoption with a two-parent adoptive family chosen by her. Mother placed Baby [REDACTED] under the temporary guardianship and care of her attorney, John Hughes.

STANDARD OF REVIEW

Summary judgment is an extreme remedy, which is not intended as a substitute for a trial. *Discover Bank v. Stanley*, 2008 S.D. 111, ¶19, 757 N.W.2d 756, 762. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law." SDCL 15-6-56(c). "[T]he moving party has the burden of clearly demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." *Johnson v. Matthew J. Batchelder Co., Inc.*, 2010 S.D. 23, ¶ 8, 779 N.W.2d 690, 693 (additional citations omitted). All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party. *Id.* (additional citations omitted).

"A disputed fact is not 'material' unless it would affect the outcome of the suit under the governing substantive law in that 'a reasonable jury could return a verdict for the nonmoving party.'" *Gul v. Center for Family Medicine*, 2009 S.D. 12, ¶8, 762 N.W.2d 629, 633 (additional citations omitted). "When a motion for summary judgment is made and supported as provided in § 15-6-56, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in § 15-6-56, must set forth specific facts showing that there is a genuine issue for trial." *Dakota Industries, Inc. v. Cabela's.Com, Inc.*, 2009 S.D. 39, ¶14, 766 N.W.2d 510, 514 (quoting SDCL § 15-6-56(e)) (emphasis in original). "Also, "[e]ntry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's

case, and on which that party will bear the burden of proof at trial." *Id.* ¶10 (additional citations omitted).

In reviewing a trial court's ruling on a motion for summary judgment, the South Dakota Supreme Court is not bound by the trial court's factual findings, but, rather, must undertake an independent review of the record. *State Farm Auto. Ins. Co. v. Gertsema*, 2010 S.D. 8, ¶8, 778 N.W.2d 609, 613 (additional citations omitted). Further, the South Dakota Supreme Court will only affirm a grant of summary judgment if all legal questions have been decided correctly by the lower court. *Advanced Recycling Systems, LLC v. Southeast Properties Ltd. Partnership*, 2010 S.D. 70, ¶10, 787 N.W.2d 778, 783 (additional citations omitted).

LAW, ANALYSIS, AND DECISION

SDCL 15-6-56(c) sets forth the proceedings for summary judgment. The Statute states:

The motion and supporting brief, statement of undisputed material facts, and any affidavits, and any response or reply thereto shall be served within the dates set forth in § 15-6-6(d).

(1) A party moving for summary judgment shall attach to the motion a separate, short, and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried. Each material fact in this required statement must be presented in a separate numbered statement and with appropriate citation to the record in the case.

(2) A party opposing a motion for summary judgment shall include a separate, short, and concise statement of the material facts as to which the opposing party contends a genuine issue exists to be tried. The opposing party must respond to each numbered paragraph in the moving party's statement with a separately numbered response and appropriate citations to the record.

(3) All material facts set forth in the statement that the moving party is required to serve shall be admitted unless controverted by the statement required to be served by the opposing party.

The judgment sought shall be rendered forthwith 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 a judgment as a matter of law.

SDCL 25-6-1.1 sets forth the notice requirements for a father of an illegitimate child. The Statute "eliminates notice requirements for a father of an illegitimate child unless he (1) is known and identified by the mother or (2) has acknowledged the child as his own by affirmatively asserting paternity within sixty days of the child's birth." *Matter of Baby Boy K.*, 1996 S.D. 33, 546 N.W.2d 86, 90. The South Dakota Supreme Court stated:

Clearly, there is some persuasive authority to support the time frame set forth in SDCL 25-6-1.1. In addition, we recognize the State's compelling interest in providing unwanted and unclaimed newborn children with stable, caring homes. Balancing this interest against the father's opportunity interest in his illegitimate child, we conclude the sixty-day window of time after the child's birth comports with due process requirements.

Id. at 99. The Court went on to conclude that the facts of the *Baby Boy K* case did not warrant an exception to the sixty-day time period even though mother failed to tell father of her pregnancy and she misrepresented to the court that she did not know the father's identify. *Id.* Likewise, this court also concludes that the facts of this case do not warrant an exception to the sixty-day time period.

Here, Father's case is similar to the father's case in *Baby Boy K.*, 1996 SD at ¶50.: (1) Father did not provide emotional or financial support to Mother during her pregnancy; (2) Father did not make any attempts to contact Mother and/or determine whether she was still pregnant, and instead relied on gossip through "the rumor mill" that "sounded like [Mother] had miscarried". [REDACTED] Affidavit ¶ 5. Father further relied on other people telling him that Mother was not pregnant and was drinking; and (3) Father did not take immediate legal action to file a paternity claim in order to preserve his due process interest in Baby [REDACTED]. Instead, Father "tried to pursue [his] legal rights as a father". *Id.* His attorney "expressed how it was almost impossible to obtain a court order [for a paternity test] until the child was born". *Id.* Father also "discussed sending [Mother] legal letters informing her she needed to contact [him] when the baby was born"; however, Father did not send these letters as it was expensive and had no legal purpose. *Id.*

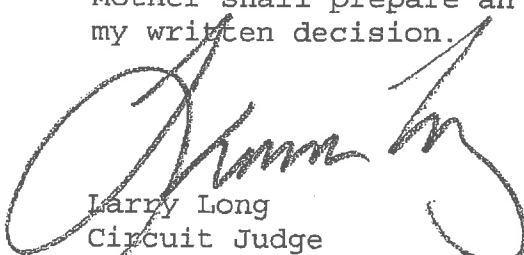
Father also contacted the hospitals but they would not contact him without a court order. *Id.* In these attempts to take immediate legal action, Father failed to follow-through on "commencing a judicial proceeding claiming a parental right". SDCL 26-6-1.1. "The law 'does not require either a trial judge or a litigant to give special notice to nonparties who are presumptively capable of asserting and protecting their own rights.' " *Baby Boy K.*, 1996 SD at ¶50. In this case, Father was capable of asserting and protecting his parental rights by commencing a paternity action during Mother's pregnancy. SDCL 25-8-12, in relevant part, states: "The proceeding to determine paternity may be instituted during the pregnancy of the mother or after the birth of the child." (Emphasis added).

Father was entitled to due process as guaranteed by the South Dakota and United States constitutions. *Id.* at ¶ 69. He received due process through notice of the hearing by publication of the summons. *Id.* Therefore, Father "received his due process rights through legal publication" and this court has "jurisdiction to determine his parental rights to the child under SDCL 25-6-1.1". *Id.*

In this case, there are no set of facts presented by Mother or Father that give rise to any genuine issues. Father did not affirmatively assert paternity within sixty days of Baby [REDACTED]'s birth. Because the sixty day limitation had passed, Petitioner was under no legal obligation to give any notice at all. Thus, any alleged defect in the notice is a nullity. Father's attempt to stop the adoption of Baby [REDACTED] was futile because it was past the sixty day time period as set forth in SDCL 25-6-1.1. Therefore, summary judgment is granted.

CONCLUSION

Mother's Motion for Summary Judgment is GRANTED. Counsel for Mother shall prepare an Order consistent with and incorporating my written decision.



Larry Long
Circuit Judge