

Although separate petitions were presented against each Petitioner, the charges are identical. As grounds for recall, the petitions allege:

Gross partiality, oppression and/or misconduct in directly and indirectly forcing the resignation of City Manager Jeff Weldon under duress (e.g. imminent termination if resignation was not acceptable) and against the will of the majority of voters;

Gross partiality, oppression and/or misconduct in actions and conduct resulting in multiple City of Yankton employees resigning or quitting their employment, undermining the City of Yankton's chosen form of city-management governance pursuant to SDCL Ch. 19-10 [sic] for personal gain.

(See Petition, Exs. A & B.)¹

Argument and Authorities

SDCL § 9-13-29 allows the registered voters of a municipality to recall elected officials for “misconduct, malfeasance, nonfeasance, crimes in office, drunkenness, gross incompetency, corruption, theft, oppression, or gross partiality.” However, the statute requires the petition set out the charges supporting recall with specificity. The statute provides that “[t]he petition shall contain a *specific* statement of the grounds on which removal is sought.”

The legislative purpose behind the requirement of specificity is obvious. Due process requires the Petitioners be advised of the charges against them. More

¹The petitions incorrectly cite SDCL Ch. 19-10 as the statutory basis for the municipal voters' rights to file a recall petition.

importantly, the electorate must be adequately informed of the charges so as to make an intelligent decision on how to vote in the recall process.

In this instance, the recall petitions merely repeat the statutory grounds for recall verbatim (e.g. “[g]ross partiality, oppression, and/or misconduct”). (Appl., Exs. A & B.) The petitions give no indication as to the manner in which Petitioners “forc[ed] the resignation of City Manager Jeff Weldon under duress.” (*Id.*) Nor do the petitions indicate what conduct of the Petitioners “result[ed] in multiple City of Yankton employees resigning or quitting their employment.” (*Id.*) The petitions merely parrot the text of the statute and generally allege “[g]ross partiality, oppression and/or misconduct.” (*Id.*)

Reading the allegations in the petitions underscores their failings. One should ask simple questions: In what manner were the Petitioner’s actions misconduct, grossly partial, or oppressive? The petitions contain no hint. How did the Petitioner’s gain personally from their actions? It cannot be divined from the petitions. Finally, how was the will of the majority of the voters subsumed?² No hint. It is obvious from the face of the petitions that they fail to allege specific “recallable” acts.

² The petitions seem to assert that the majority of Yankton voters had a voice in hiring the now departed city manager. Under SDCL § 9-10-3, hiring and firing a city manager is the exclusive province of the elected city council. The voters have no involvement.

Unfortunately, no South Dakota case has addressed the degree of specificity required by § 9-13-30. The only direct authority is a South Dakota Attorney General's Opinion, 1983 S.D. Op. Atty. Gen. 16. Asked to consider what constitutes a "specific statement" sufficient to satisfy the requirements of SDCL § 9-13-30, the Attorney General found, under South Dakota law, that "naked assertions" without factual examples did not meet the statutory requirement of a "specific statement." The recall petition was skeletal in its allegations, charging:

Since his election to the post of Mayor in May, 1982, 'Lynn' Oliff has exhibited personality characteristics inconsistent with the office of Mayor in that Mr. Oliff has on a continuing basis harassed and intimidated residents of New Underwood contrary to the best interests of these residents and of the community.

The Attorney General declared the petition insufficient, finding:

The conclusion is inescapable that the grounds relied upon in the New Underwood petition are general, not specific. It claims the mayor possesses negative 'personality characteristics' without identifying what they are. Further, the petition alleges the mayor has harassed and intimidated the residents of the city but does not describe how or when that was accomplished.

Id. Implicit in the Attorney General's Opinion is that recall petitions must provide a level of factual detail sufficient to spell out the charges on which the recall is founded.

While there are no reported cases construing the meaning of the specificity requirement in § 9-13-30, the terms "specific" and "specificity" and their synonyms are used elsewhere in South Dakota law, and there are other parallels. In *State v.*

Archambeau, 333 N.W.2d 807, 812 (S.D. 1983) the Supreme Court found a motion to hire a ballistics expert lacking in specificity. In prior decisions, the Court directed movants seeking experts at the cost of the state to “. . .set forth *specific* reasons which seem to make such services needed. . .” The motion in *Archambeau* simply stated “it is in the best interests of justice that this Court authorize the Defendant to hire at County expense a bullistics [sic] and fingerprint expert.” *Id.* at 812. The Court found that the motion lacked the specificity required by prior decisions. *Id.*

Specificity is one of the factors considered in determining if a statement is fact or opinion in a libel case. *Janklow v. Viking Press*, 459 N.W.2d 415, 423 (S.D. 1990). The Court in the *Janklow* case defined “specificity” to mean phrasing that is understandable and clear and not susceptible to another connotation. *Id.* Noting the importance of specificity, the Court adopted an earlier Eighth Circuit decision for the proposition “Specificity and verifiability thus function as limits on majoritarian bias and government intervention . . .” The court noted that the lack of specificity in publically laid charges invites decisions by “. . .exercising of personal dispositions regarding the contents of the statement, its author, or its subject. . . ,” the antithesis of reasoned decisions. *Id.* at 423.

In *St. Mary's Healthcare Ctr. of Pierre v. Hughes County*, 537 N.W.2d 366, 368 (S.D. 1995), the Court considered the specificity required in a hospitalization notice, finding that the term “bowel obstruction” was not specific enough to satisfy the notice

requirements of SDCL § 28-13-34.1. That statute mandates that the hospital inform the county of “the nature and degree of severity of the illness” of the patient, the fair implication being that the notice must be specific in its description of the circumstances. The Court held that “failure to use adequate specificity . . . is inconsistent with, and defeats the purpose of the detailed notification requirements of [the statute].” *Id.* The Court observed that the hospital’s approach “. . . turned what should be a substantive document providing valuable information. . . into a pro forma piece of paperwork.” *Id at 369.*

South Dakota courts have long recognized that specificity is required in pleadings charging a crime, and that fair notice cannot be satisfied without a degree of specificity. Although couched in slightly different terms, SDCL § 23A-6-7 (5) requires an indictment or information to be plead in a manner that affords a person of common understanding knowledge of what is intended. Cases construing the statute have long held that the allegations must be expressed with reasonable certainty and sufficient detail to apprise persons with what they are charged. *See State v. Smith*, 599 N.W. 2d 344 (S.D. 1999); *State v. Means*, 268 N.W. 2d 802 (1978).

SDCL § 15-6-9(b) deals with pleading allegations of fraud. “In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” In *Hinkelman v. Berringer*, 96 N.W.2d 174, 177 (S.D. 1959), the Supreme Court held

While the appellant is entitled to the benefit of an assumption of the truth of all well pleaded facts contained in [the] complaint, this does not include conclusions and general accusations of fraud. Such matters are not susceptible to general averment.

Put differently, the particularity requirement of § 15-6-9(b) forbids a party from alleging conclusory grounds in support of a fraud claim, just as the specificity requirement in SDCL § 9-13-30 requires more than conclusory allegations in recall petitions.

Other jurisdictions have addressed the question of what constitutes a “specific statement” for purposes of recall petitions. The Supreme Court of Georgia was asked to determine if recall petitions for the removal of officers on a county tax board were proper. The petitions alleged that the two county officers were “not properly and impartially discharging their duties and [were] discriminating in favor of certain citizens and against others.” *Brown v. Wetherington*, 300 S.E.2d 680, 682 (Ga. 1983). The Georgia statute allowed for recall petitions when an officer was “disqualified or [was] not properly and impartially discharging his duties or [was] discriminating in favor of certain citizens[.]” *Id.* at 683, n.2 (citing GA. CODE ANN. § 91A-1439). The court held that these allegations were not specific enough to provide the officials with notice of what they were being charged with.

Notice of charges against a public official must be ‘in terms sufficiently explicit as to enable [the public officer] to make an explanation...’ Mere vagaries or generalities are insufficient, and the notice must be ‘sufficiently specific and detailed to convey to the [officer] the substantial nature of the

charge without requiring speculation on his part as to the precise complaint he must answer.’

Brown, 300 S.E.2d at 682-83 (citation omitted).

In *Russell v. Henderson*, 603 P.2d 1132, 1136 (Okla. 1979), the Supreme Court of Oklahoma reviewed a petition seeking removal of a district attorney. The petition charged “seven counts of habitual or willful neglect of duty. . . and one count of gross partiality.” *Id.* at 1135. The court characterized the petition as “couched in terms of generalities and not supported by ultimate facts.” *Id.* at 1137. The *Russell* court held:

The petition must contain . . . a statement of the facts constituting the cause of action, in ordinary and concise language, and without repetition . . . The accusation must state the offense charged, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.”

In *Signers of Petition for Removal of Mack v. Mack*, 419 N.E.2d 1108, 1110-11 (Ohio App.2d. 1979), an Ohio Court found that a petition to remove a member of a county Board of Education “must be stated with specificity and set out with substantial certainty.” The court found that “while the charges . . . in the petitions need not conform to the technical niceties of a criminal indictment, the charges must be stated with specificity and set out with substantial certainty.” *Id.* at 1110. The Ohio statute enumerated the grounds for recall. The petition was essentially a restatement of the statutory grounds, tailored to fit the defendant board member, much like the petitions

here. The court in *Mack* held that the petitions were invalid because simply restating the statutory grounds failed to give notice of the allegations.

Legal and lay dictionaries define the word “specific,” as used in § 9-13-30. Specific means “[e]xplicitly set forth; definite” in the *Am. Heritage Dictionary of the English Language* (4th ed. 2007). Similarly, *Black’s Law Dictionary* 1406 (7th ed. 1999) provides that a thing is “specific” if it is “[o]f, relating to, or designating a particular or defined thing; explicit.” South Dakota law recognizes lay definitions, holding “[w]ords and phrases in a statute must be given their plain meaning and effect.” *Fair v. Nash Finch Co.*, 728 N.W.2d 623, 628 (S.D. 2007).

The petitions seeking to recall Petitioners do not contain specific statements which comply with § 9-13-30. Instead, the petitions make general allegations against Petitioners that do no more than summarily restate the language of the statute. (Exs. A & B.) In order to comply with the strictures of the recall statute, the petitions must provide *specific* examples of “[g]ross partiality, oppression and/or misconduct” on the part of Petitioners. (*Id.*) The petitions are clearly insufficient under South Dakota law.

To add to the factual confusion, the petitions state that the “[g]ross partiality, oppression and/or misconduct” could have either “directly or *indirectly*” caused the resignation of Weldon. Not only must Petitioners and the electorate guess what conduct *directly* led to the petitions, they must attempt to predict all the limitless ways the Petitioner’s could have *indirectly* incited the petitions. The public cannot determine from the generalities alleged the “specific” areas in which to consider the Petitioners’ behavior

and suitability for office. The allegations in the petitions simply are not “sufficiently explicit as to enable the [Petitioners] to make an explanation.” *Brown*, 300 S.E.2d at 1136.

“[I]t is essential that the civil requirement of fact pleading must be strictly applied.” *Russell*, 603 P.2d at 1136. In other words, in an action which seeks the removal of a public official from office, “naked assertions simply do not satisfy the statutory requirement.” 1983 S.D. Op. Atty. Gen. 16. The allegations contained in the petitions here are precisely the type of “naked assertions” that the Attorney General declared not to be in compliance with SDCL § 9-13-30.

In this case the petitions are nothing more than a recitation of the statutory grounds, in general language, accompanied by parsimonious and vague allegations. The allegations say nothing about the conduct charged, and afford no basis for defense or electoral decisions. They are examples of political rumor mongering, and ignore the plain dictates of the statutes governing recall elections.

Conclusion

The recall petitions employ broad and vague language which provides no indication as to the specific factual circumstances behind the recall effort. Thus, Petitioners do not have the requisite notice of the allegations against them which allows them to defend the unsubstantiated contentions contained in the petitions. City of

Yankton voters have no way in which to know the “specific” grounds upon which their duly elected officials are being recalled and to make a reasoned electoral decision.

Wherefore, Petitioners respectfully request that the Court grant the Petition for Writ of Prohibition and order Respondents to restrain from proceeding with the recall election scheduled for December 18, 2007.

Dated this _____ day of November, 2007.

WOODS, FULLER, SHULTZ & SMITH P.C.

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CERTIFICATE OF SERVICE

I certify that on the 19th day of November, 2007, I sent to Curt Bernard, Mayor of the City of Yankton, 416 Walnut Street, Yankton, South Dakota, 57078, and Al Viereck, City Finance Officer for the City of Yankton, 416 Walnut Street, Yankton, South Dakota, 57078, by hand delivery, a true and correct copy of the foregoing brief.

One of the Attorneys for Petitioners