Introduction to

The South Dakota Supreme Court

and Case Summaries for Oral Arguments at the March Term of the Court to be held March 22 through March 24, 2010

University of South Dakota Law School

Vermillion, South Dakota

Supreme Court
STATE OF SOUTH DAKOTA

David Gilbertson
CHIEF JUSTICE

March 22, 2010

To our Guests Observing the
March Term Hearings of the
South Dakota Supreme Court

Ladies and Gentlemen:

Your Supreme Court welcomes you to our March term.

This brochure has been prepared as part of the continuing effort of the Supreme Court to promote increased public knowledge of the state judicial system. We hope it will assist you in understanding some of the functions of the Supreme Court, and make your observation of the Court hearings a more valuable and enjoyable experience.

Sincerely yours,

David Gilbertson
Chief Justice

State Capitol Building Pierre, South Dakota 57501-5070 (605) 773-6254

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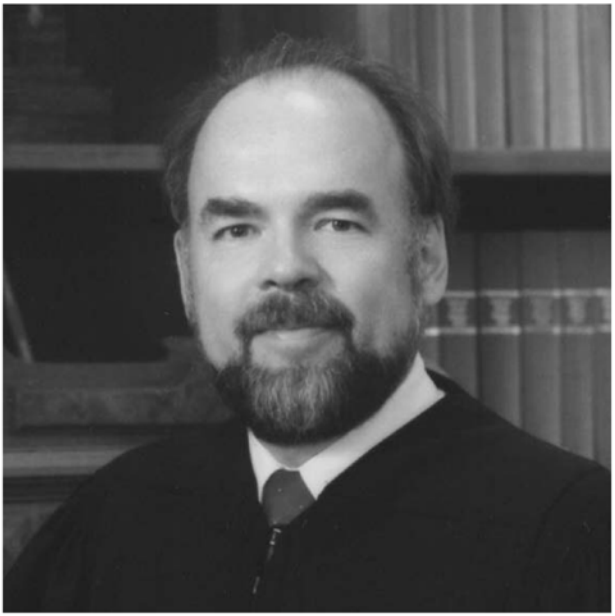
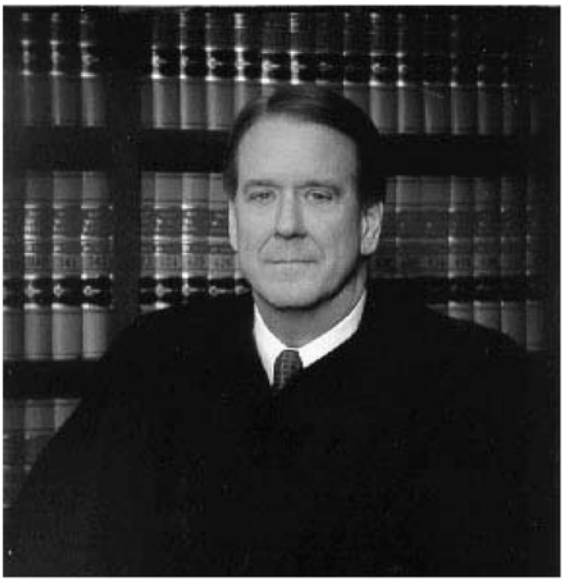


Chief Justice David Gilbertson

Chief Justice Gilbertson was elected to a 4-year term as Chief Justice by the members of the Supreme Court in September 2001, was re-elected to a second 4-year term as Chief Justice by the members of the Supreme Court in June 2005 and a third 4-year term in June 2009. He was appointed to the Supreme Court in April 1995 to represent the Fifth Supreme Court District and was retained by the voters in the 1998 general election and the 2006 general election. Chief Justice Gilbertson received his undergraduate degree from South Dakota State University in 1972 and his Juris Doctor from the University of South Dakota, School of Law in 1975. He engaged in private practice from 1975 until his appointment to the circuit court bench in 1986. During this time he also served as a deputy state's attorney and as an attorney for several municipalities and school districts. He is past President of the South Dakota Judges Association; and is a member of the Glacial Lakes Bar Association, the Brown County Bar Association and the South Dakota Bar Association. He is a member of the Conference of Chief Justices and chairs its Committee on Tribal/State Relations. He was a member of the Board of Directors of the National Conference of Chief Justices from 2005-2007. In 2006, he was the recipient of the distinguished Service Award from the National Center for State Courts for his defense of judicial independence. He serves on the Judicial-Bar Liaison Committee of the State Bar Association and has served as a Court Counselor at South Dakota Boys State since 1995. Born October 29, 1949, he and his wife Deborah have four children.

Justice John K. Konenkamp

Justice Konenkamp, born October 20, 1944, represents the First Supreme Court District, which includes Custer, Fall River, Lawrence, Meade and Pennington counties. After serving in the United States Navy, he attended the University of South Dakota, School of Law, graduating in 1974. He practiced in Rapid City as a Deputy State's Attorney until 1977. He then engaged in private practice until 1984 when he was appointed Circuit Judge. In May 1988, he became Presiding Judge of the Seventh Circuit. He was appointed to the Supreme Court in 1994 after ten years on the trial bench and was retained by the voters in the 1998 and 2006 general elections. He is a member of the National Advisory Council of the American Judicature Society, an organization devoted to addressing the problems and concerns of the justice system. Justice Konenkamp and his wife, Geri, are former foster parents for the Department of Social Services. Justice Konenkamp has served on a number of boards advancing the improvement of the legal system, including the South Dakota Equal Justice Commission, the Alternative Dispute Resolution Committee, and the Advisory Board for the Casey Family Program, a nationwide foster care provider. Justice Konenkamp and his wife have two adult children, Kathryn and Matthew and two Grandsons, Jack and Luke.

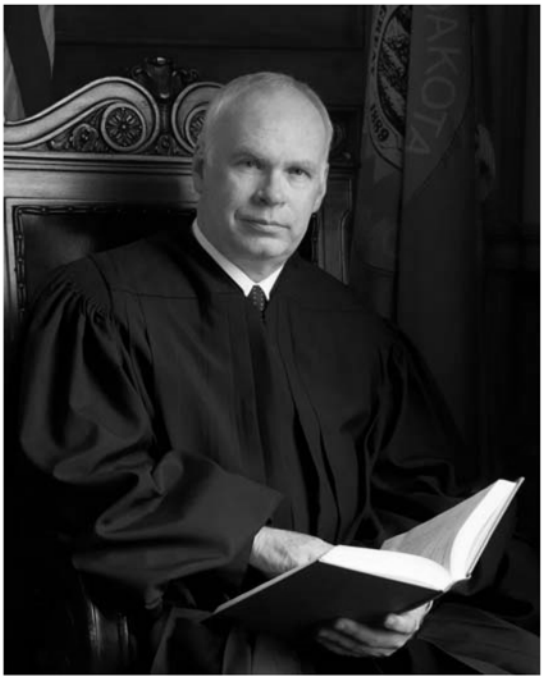


Justice Steven L. Zinter

Justice Zinter, of Pierre, was appointed to the Supreme Court on April 2, 2002. He received his B.S. degree from the University of South Dakota in 1972 and his Juris Doctor from the University of South Dakota, School of Law in 1975. Upon graduation from law school, Justice Zinter practiced law as an Assistant Attorney General for the State of South Dakota. From 1978 to 1986 he was engaged in the private practice of law in Pierre. Justice Zinter also served as the Hughes County State's Attorney. He was appointed as a Circuit Judge in 1987 and served in that capacity until 1997. In 1997 he was appointed Presiding Judge of the Sixth Judicial Circuit and served in that capacity until his appointment to the Supreme Court. Justice Zinter is a member of the American Bar Association, the State Bar Association, and the South Dakota Judges Association. He was a past President of the South Dakota Judges Association and a past member of the Harry S. Truman Foundation along with a number of other boards and commissions. Justice Zinter and his wife Sandra have two children and a grandson, Jack.

Justice Judith K. Meierhenry

Justice Meierhenry was born January 20, 1944. She received her B.S. degree in 1966, her M.A. in 1968, and her J.D. in 1977 - all from the University of South Dakota. She practiced law in Vermillion from 1977 to 1978 and was appointed by Governor Janklow in 1979 to the State Economic Opportunity Office. She was then appointed as Secretary of Labor in 1980 and Secretary of Education and Cultural Affairs in 1983. She was a Senior Manager and Assistant General Counsel for Citibank South Dakota in Sioux Falls from 1985 to 1988. In 1988 she was appointed by the late Governor George S. Mickelson as a Second Circuit Court Judge and in 1997 was named Presiding Judge of the Second Judicial Circuit. Justice Meierhenry was appointed to the Supreme Court by Governor Janklow in November 2002. She was retained by the voters in the 2006 general election. She is the first woman to be appointed to the Supreme Court in South Dakota. Justice Meierhenry is a member of the South Dakota Bar Association, the Second Circuit Bar Association, the Clay-Union Bar Association and the National Association of Women Judges. She served as President of the South Dakota Judges Association and was a member of the South Dakota Civil Pattern Jury Instruction Committee. Justice Meierhenry and her husband Mark live in Sioux Falls. They have two children and seven grandchildren.



Justice Glen A. Severson

Justice Severson, born March 9, 1949, represents the Second Supreme Court District, which includes Minnehaha County and the Northwest portion of Lincoln County. He served in the South Dakota Air National Guard from 1967-1973. He attended the University of South Dakota receiving a B.S. in 1972 and the University of South Dakota, School of Law receiving a Juris Doctor degree in 1975. He was a member of the Fingerson and Severson Law Firm from 1983 to 1992 and served as the Huron City Attorney from 1977-1992 and a Beadle County Deputy States Attorney in 1975. He was appointed a Circuit Judge in the Second Circuit in 1993 and served as Presiding Judge from 2002 until his appointment to the Supreme Court. Justice Severson was appointed to the Supreme Court in 2009 after sixteen years on the trial bench. He is a member of the American Bar Association, South Dakota Bar Association and Second Circuit Bar Association. He was a member South Dakota Board of Water and Natural Resources (1986-1992) and has served on a number of other boards and commissions. Justice Severson and his wife Mary have two adult children, Thomas and Kathryn.

Clerk of the Supreme Court

Shirley Jameson-Fergel is the Clerk of the South Dakota Supreme Court. It is the function of this office to assist the Supreme Court, and especially the Chief Justice, in the organization of the correspondence, exhibits, and other documentation related to the formal activities of the Supreme Court. This includes monitoring the progress of appeals; scheduling oral arguments before the Court; recording Court decisions, orders and directives; and controlling their release and distribution. The Clerk's office is also responsible for the management of all legal records of the Court, compiling appellate statistics, and documenting and disseminating Court rules.

Supreme Court Law Clerks

Law Clerks are employed by the Court to assist the justices with research and writing of opinions on the cases under consideration. In the photograph above, from the left, are Kyle Wiese (Supreme Court Law Clerk), Meghann Joyce (Justice Severson), Derek Nelsen (Justice Meierhenry), Marie Ruettgers (Chief Justice Gilbertson), Jennifer Williams (Justice Konenkamp), and Sara Larson (Justice Zinter).

Summary of Jurisdictions for the South Dakota Court System

Supreme Court

Five Justices appointed by the Governor from judicial appointment districts are subject to statewide electoral approval three years after appointment and every eight years thereafter. Retirement at age seventy.

Court terms held throughout the calendar year.

Has appellate jurisdiction over circuit court decisions.

Has original jurisdiction in cases involving interests of state. Issues original and remedial writs.

Has rule-making power over lower court practice and procedure, and administrative control over the Unified Judicial System.

Renders advisory opinions to the Governor, at his request, on issues involving executive power.

Circuit Court

Circuit Court services available in each county seat.

Counties grouped into seven circuits, served by forty-one judges elected from within their circuits for eight-year terms. Vacancies filled by the Governor, who appoints replacements from a list of candidates recommended by the Judicial Qualifications Commission.

Trial courts of original jurisdiction in all civil and criminal actions. Exclusive jurisdiction in felony trials and arraignments, and civil actions involving damages of more than $10,000. Jurisdiction of less serious civil and criminal matters is shared with magistrate courts, over which the circuit courts have appellate review.

The Supreme Court Process

The judicial system of South Dakota has two levels. The circuit courts are the lower courts through which criminal prosecutions and most civil lawsuits are processed. The South Dakota Supreme Court is the state's highest court and the court of last resort for parties who seek to change adverse decisions of the circuit court. The Supreme Court is the final judicial authority on all matters involving the legal and judicial system of South Dakota.

When an individual involved in a legal action is convinced that the judge in the circuit court has made an error in deciding the law of the case, that party may bring the case to the Supreme Court for a remedy. This is called an "appeal" and the court hearing the appeal is called the "appellate" court. The party bringing the appeal is an "appellant" and the other party - usually the party who was successful in the lower court - is the "appellee." Most of the work of the Supreme Court involves its appellate jurisdiction.

In an appellate action, the Court may decide to hear "oral arguments" in the case, in which both parties are permitted to come before the Court and give a short presentation (an argument) to support their position in the case. There is no trial, the lawyers do not confront each other, and the Court does not take testimony from witnesses. Usually, the attorneys for the parties involved stand before the Court and speak for twenty minutes to emphasize or clarify the main points of the appeal. The members of the Court may ask questions or make comments during the lawyer's presentation. After hearing the oral arguments, the Court

discusses the case and one justice is assigned to write the opinion in the case. Other justices may write concurring or dissenting opinions to accompany the majority opinion, all of which are published as formal documents by the West Publishing Company in the North Western Reporter. The Court's opinions are also available online at: www.sdjudicial.com.

In addition to its appellate jurisdiction, the Supreme Court has its own area of "original" jurisdiction. It is also responsible for a wide range of administrative duties involving the personnel and procedures of the court system and the professional conduct of attorneys throughout the state.

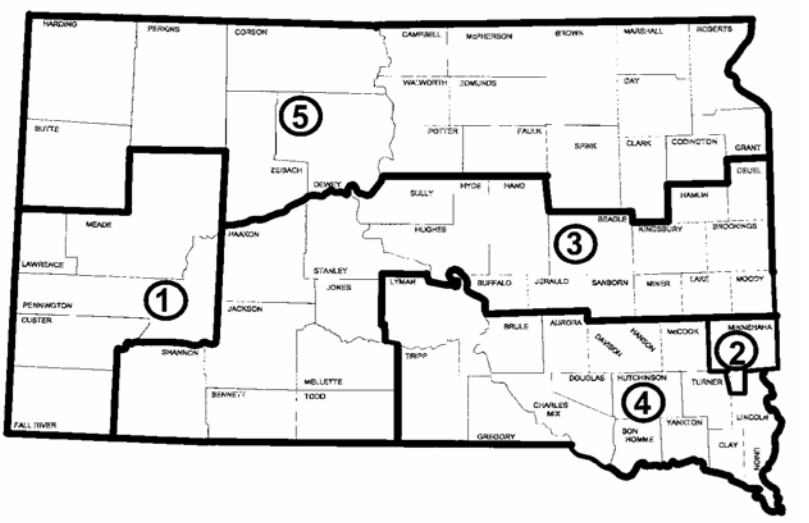
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench to assist in the decision-making process. Such an appointment may occur when a justice is disqualified. A justice may be disqualified when the justice appears to have a conflict or personal involvement in a case, or if there is a vacancy on the Court caused by the illness or departure of a justice.

All of those who sit on the Supreme Court must be licensed to practice law in the state and permanent justices must be voting residents of the district from which they are appointed at the time they take office. There is no formal age requirement for those who serve on the Court, but there is a statutory requirement that a justice must retire shortly after reaching the age of seventy. A retired justice, if available, may be called back to temporary judicial service in any of the state's courts.

Under the terms of a constitutional amendment passed by the voters in November 1980, vacancies on the Supreme Court are filled by Governor's appointment. This appointment must be made from a list of two or more candidates recommended by the Judicial Qualifications Commission. All Supreme Court justices must stand, unopposed, for statewide approval or rejection by the electorate in a retention election. For newly appointed justices, the retention vote is held at the next general election following the third year after appointment. After the first election, justices stand for retention election every eighth year.

Justice Konenkamp was appointed in 1994 from District One. Chief Justice Gilbertson was appointed in 1995 from District Five. Justice Zinter was appointed in 2002 from District Three. Justice Meierhenry was appointed in 2002 from District Four. Justice Severson was appointed in 2009 from District Two. Chief Justice Gilbertson and Justices Konenkamp, Zinter and Meierhenry were each retained in the November 2006 general election.

South Dakota Supreme Court Appointment Districts
Effective July 1, 2001



In the Supreme Court
of the
State of South Dakota

Courtroom Protocol

The following list of Do's and Don'ts was prepared for the benefit of anyone attending one of the Court's sessions. Your cooperation in observing proper Courtroom protocol will assure that the lawyers presenting argument before the Court will not be unduly distracted and that the proper respect for the judiciary will be maintained.

Your cooperation is appreciated.

DO

- Remove caps/hats before entering the Courtroom
- Enter the Courtroom prior to the commencement of an argument
- Stand when the Justices enter and leave the Courtroom
- Listen attentively
- Turn cell phones off before entering the Courtroom

DO NOT

- Bring food, drinks, cameras or recording equipment into the Courtroom
- Enter or leave the Courtroom during the course of an argument
- Chew gum or create any distraction
- Engage in any conversation once an argument begins

Supreme Court of South Dakota
March 2010 Term

Nine cases are scheduled for oral argument during this term. For these cases, attorneys are permitted to appear before the Court to emphasize certain points of the case and respond to the Court's questions. In addition to these oral arguments, numerous other cases will be considered by the Court during this term without further argument by the attorneys. These cases are on the Court's "non-oral" calendar. After hearing oral arguments each day, the Court will consider several non-oral cases.

Case Summaries

The case summaries on the following pages have been prepared only for the cases scheduled for oral argument. The case number, date and order of argument appear at the top of each summary.

Zahrbock/Anson v. Star Brite Inn

On December 23, 2004, Eleshia Zahrbock, Peyton Gerry, Justin Zahrbock, and Jonette Anson (Anson) suffered carbon monoxide poisoning while guests at the Star Brite Inn in Yankton, South Dakota. Within a few weeks of the accident, Anson was contacted by Zahrbocks about hiring an attorney to represent them in a suit against Star Brite Inn. Attorney Chad Swenson was retained by the Zahrbocks and Anson to represent them after describing his prior experience with carbon monoxide injury litigation and his familiarity with an expert witness in the field. A few weeks after the initial meeting with Swenson, Anson received a draft of a complaint that included Zahrbocks, Gerry, and Anson as plaintiffs. Anson believed that Swenson had filed the complaint and that the lawsuit had been commenced.

As early as March 2005, Anson began having trouble getting Swenson to return her calls. On March 14, 2005, Anson wrote Swenson a letter complaining that she had tried to reach him numerous times and it appeared that Swenson was not getting her messages. She was able to speak with Swenson once in either April or May of 2005, and met with him in person in the fall of 2005. Swenson assured her both times that he was negotiating a settlement with the Star Brite Inn. Thereafter, Anson attempted to contact Swenson at least twice a month via telephone. She left messages with the office secretary through the fall of 2006, but then was only able to reach an answering machine. In the fall of 2006, Anson was in Sioux Falls and stopped by Swenson's office in an effort to reach him. She arrived around 2 p.m. in the afternoon, found the office door locked, but did not think anything was amiss. Anson continued to call and leave messages for Swenson one to two times per month over the course of the next eleven to twelve months. Finally, in August of 2007, Anson discovered Swenson's number had been disconnected. She immediately called every Chad

Swenson in the Sioux Falls telephone directory but failed to reach him.

Anson's work took her to Colorado for three months immediately following her discovery that Swenson's telephone number had been disconnected. She planned to make further attempts to reach Swenson or retain another attorney when she returned to South Dakota. In January 2008 shortly after returning from Colorado, Anson received a letter from Nichole Carper in her capacity as counsel for Zahrbocks in a suit against Star Brite Inn advising her that Swenson had been disbarred by the South Dakota Supreme Court in June 2007. After retaining Carper, Anson learned the statute of limitations had expired on her claim and that Swenson, contrary to what he told Anson, had never filed a complaint. Anson attempted to amend Zahrbocks' complaint to include her as a plaintiff under a theory of equitable tolling. Star Brite Inn resisted. The trial court dismissed Anson's claim as barred by the statute of limitations. Anson appeals raising one issue:

> Despite a finding of extraordinary circumstances, did the trial court err when it found Anson did not exhibit reasonable and good-faith conduct sufficient to apply the doctrine of equitable tolling and permit her claim despite the expiration of the statute of limitations.

Ms. Nichole Carper and Mr. Manuel J. de Castro, Jr., Attorneys for Appellant Jonette Anson

Mr. Daniel R. Fritz and Ms. Dana Van Beek Palmer, Attorneys for Appellee Star Brite Inn

State v. Sound Sleeper

On January 29, 2009, at 1:30 p.m., Rapid City Detective Kelvin Masur was in the parking lot of the Exxon gas station on 634 East North Street investigating a beer theft case. Masur took note of a man leaving the gas station carrying a case of beer and a brown bag containing what Masur believed to be a large bottle of beer. The man got into the passenger side, front seat of a waiting vehicle. Once the man was seated in the vehicle, he took the bottle from the brown bag and held it up in the air as if to show it to the other occupants of the vehicle. As the man brought the bottle down out of Masur's sight, the man made a motion that appeared to Masur as though the man had opened the bottle. Masur was concerned that what he had observed was a violation of SDCL 35-1-9.1, South Dakota's open-container law.

The vehicle exited the parking lot and Masur followed in his unmarked gold Dodge Stratus. Masur did not engage the red and blue lights on the unmarked car's visor or attempt to stop the vehicle. Instead, he called dispatch for a marked patrol car. However, before the patrol car could be dispatched, the vehicle pulled into a parking lot and came to a stop. Masur did not observe the driver commit any traffic violations at any time.

Masur pulled into the lot and parked behind the vehicle. Masur, in plain clothing, exited his unmarked car, approached the driver's side window, and identified himself as a police officer. Masur's sole purpose for approaching the vehicle was his observations of the passenger at the Exxon gas station. Masur asked the driver for his driver's license.

The driver of the vehicle, Alvin R. Sound Sleeper, provided Masur with a South Dakota identification card rather than a driver's license. As the conversation

continued, Masur determined that Sound Sleeper's driver's license was under suspension. He also determined shortly after requesting Sound Sleeper's license that the bottle contained beer but had not been opened as the seal was still intact. Shortly after engaging Sound Sleeper in conversation, Masur also noted Sound Sleeper's eyes were glassy, and that his breath smelled of alcohol. Sound Sleeper was arrested for driving under the influence after failing field sobriety tests. A blood test showed his blood alcohol content by weight was .123.

Sound Sleeper filed a motion to suppress the evidence alleging Masur did not have a valid basis for the traffic stop. Sound Sleeper moved to suppress all evidence seized as a result of the stop, contending it was obtained in violation of the Fourth Amendment. After a hearing on the motion, the circuit court concluded that Masur had a reasonable and articulable suspicion that a crime was being committed, namely a violation of the open container law, SDCL 35-1-9.1. The circuit court also concluded that Masur did not stop the vehicle, but rather approached it after Sound Sleeper brought it to a stop in a parking lot. Masur subsequently identified another violation had occurred, driving a motor vehicle without a valid driver's license in violation of SDCL 32-12-22, which then led to the discovery of evidence of driving under the influence. Finally, the circuit court concluded Masur had a valid, lawful reason to stop and approach the driver, and denied Sound Sleeper's motion to suppress.

Sound Sleeper appeals, raising the following issues:

1. Whether the officer had reasonable suspicion to approach the occupants of the vehicle to investigate an open container violation.

2. Whether the officer had reasonable suspicion to seize and question Sound Sleeper, the driver of the vehicle when it was the passenger the officer observed with the beer bottle.

Mr. Marty J. Jackley, Attorney General, Mr. Craig M. Eichstadt, Assistant Attorney General, Attorneys for Plaintiff and Appellee State of South Dakota

Mr. Paul Pietz, Pennington County Public Defender's Office, Attorneys for Defendant and Appellant Alvin R. Sound Sleeper

Perdue, Inc. v. Rounds

In 2003, the Legislature authorized the Department of Corrections (DOC) to acquire land for the construction of a minimum-security prison in the Black Hills. In early 2009, after multiple sites were considered and rejected, the DOC offered House Bill 1271 (HB 1271) for the purchase of land near Elk Vale Road in Rapid City. After considerable public opposition, the Legislature rejected the Elk Vale Road site. The Legislature also amended HB 1271 to require that "*[p]rior to purchasing any property* with the proceeds of the revenue bonds described in section 1, the secretary of the Department of Corrections shall conduct public meetings. . . ." (Emphasis added.) HB 1271 passed on February 24, 2009 in the House, on March 10 in the Senate, and was signed by Governor M. Michael Rounds on March 12, 2009.

On March 4, 2009, the DOC executed a purchase agreement with Ames & Lampy, LLC, for the purchase of land and buildings for the construction of the minimum-security prison. The agreement was contingent on HB 1271 passing. On April 29, 2009 and May 18, 2009, the DOC held public meetings to solicit input from and share information with neighboring landowners, businesses and school administrators regarding the Ames & Lampy site. Perdue, Inc., a South Dakota corporation with a furniture manufacturing business located just south of the Ames & Lampy site, objected to the location selected. On July 1, 2009, Perdue brought suit against the State and its agencies for injunctive and declaratory relief. Perdue argued that the DOC violated HB 1271 when it executed the purchase agreement prior to holding the required public meetings.

The circuit court held a hearing on July 9, 2009, and denied Perdue's request for a preliminary injunction, which Perdue did not challenge. Thereafter, the court held a trial on Perdue's declaratory judgment action. At trial, Perdue

maintained the DOC *purchased* the property at the moment it executed the purchase agreement, which violated HB 1271 because the purchase was done before the public meetings were held. The DOC and State responded that the execution of a purchase agreement is only an agreement to purchase at a future date, and therefore, no *purchase* occurred prior to the public meetings.

The circuit court held that HB 1271 had not been violated by the execution of a purchase agreement. It denied Perdue's request for declaratory relief. Perdue appeals asserting that the court erred when it held that HB 1271 was not violated and that it abused its discretion when it denied Perdue admission of certain evidence.

Mr. Gary D. Jensen, Attorney for Appellants Perdue, Inc.

Mr. Marty J. Jackley, Attorney General, Ms. Roxanne Giedd, Deputy Attorney General, Ms. Patricia Archer, Assistant Attorney General, Attorneys for Appellees M. Michael Rounds and Tim Reisch

State v. Danielson

Trent Danielson was a mechanic at Rocket Lube in Spearfish, South Dakota. Danielson was fired for entering into a private agreement to fix the transmission on a customer's 1950 Studebaker truck outside of his employment with Rocket Lube. The customer alleged that Danielson billed him for work not actually performed. Danielson was charged with grand theft for overbilling customers, receiving checks to which he was not entitled, and taking automobile parts from Rocket Lube.

At trial, Danielson testified that he performed work on the transmission of the 1950 Studebaker truck. A jury subsequently found him not guilty of grand theft. After the trial, the State investigated whether Danielson testified truthfully. The State consulted expert witnesses who inspected the transmission at issue. These experts concluded that no work had been performed. The State charged Danielson with perjury, arguing that he testified untruthfully at trial concerning the work he performed on the 1950 Studebaker truck.

The circuit court dismissed the State's perjury charge because it found that the issue of whether Danielson performed work on the transmission was tried at the original grand theft trial. The circuit court concluded that collateral estoppel barred the ensuing perjury charge. On this basis, the State was foreclosed from bringing a perjury charge against Danielson.

The State appeals the circuit court's order dismissing the perjury charge and raises the following issue:

1. Whether the State of South Dakota is precluded from bringing a perjury prosecution after an acquittal on a grand theft charge.

Mr. John H. Fitzgerald, Attorney for Appellant State of South Dakota

Mr. John R. Frederickson and Ms. Francy E. Foral, Attorneys for Appellee Trent Danielson

American Family v. Robnik

Shirley Hunter purchased homeowner's insurance from American Family Insurance for a home she owned in Rapid City. The American Family policy provided that American Family would pay compensatory damages for which Hunter became legally liable because of bodily injury or property damage caused by an "occurrence." An "occurrence" was defined as "an accident" which resulted in bodily injury or property damage. The policy did not define "accident." The policy specifically excluded liability coverage for property damage caused intentionally or under contract.

Hunter subsequently listed the home for sale, and Heather Robnik made an offer to purchase. In December 2003, Hunter completed a seller's property disclosure statement on which she answered "no" to the following question: "Are you aware of any problems with the sewer blockage or backup, past or present?" Hunter also indicated that the "plumbing and fixtures" were "working" and that the "sewer system/drains" were "working."

Robnik purchased the home and discovered that the basement shower drain had been capped, the basement toilet had been removed, and the toilet location in the basement had been capped. Robnik installed a new toilet and uncapped the basement shower drain. In January 2005, Robnik encountered backed-up sewage and standing water. Robnik also alleged that in August 2006, she found the basement sink full of feces and sewage. Robnik alleged that she sustained personal property damages and severe emotional distress as a result of the sewage backups.

Robnik sued Hunter in February 2007, alleging that Hunter made false statements in the disclosure statement. Robnik's suit was based on alternate theories of negligent misrepresentation and deceit. American Family intervened

in the action. The case was tried to the court, Judge Thomas Trimble presiding. At the conclusion of the evidence, Robnik dismissed her claim for deceit and all allegations of intentional misconduct. The circuit court entered findings of fact and conclusions law ruling that Hunter committed the tort of negligent misrepresentation. The court also found that Hunter's negligent misrepresentation had proximately caused property damage and bodily injury to Robnik. In August 2008, the circuit court rendered a money judgment to Robnik for those damages.

In February 2008, before the underlying tort case had been resolved, American Family brought this declaratory judgment action against Hunter and Robnik. American Family sought a declaration that it had no duty to defend or indemnify Hunter for any amount awarded to Robnik in the tort case. Both American Family and Robnik moved for summary judgment. The circuit court, Judge John Delaney, granted American Family's motion and denied Robnik's motion. Notwithstanding Judge Trimble's finding that Hunter committed negligent misrepresentation, Judge Delaney concluded that Hunter's statements in the disclosure statement were intentional acts. The court also concluded that the false *statements* did not "cause" Robnik's injuries. Consequently, Judge Delaney concluded that American Family's policy did not provide coverage, and American Family did not have a duty to defend or indemnify Hunter for the statements made in the disclosure statement regarding the sewer system and plumbing, matters that were litigated in the underlying lawsuit.

Robnik appeals arguing:

1. Negligent representation is an "accident/occurrence" that is covered under American Family's policy.

2. The policy's exclusions for intentional injuries and damage incurred under contract are inapplicable because Judge Trimble found that the damages arose from Hunter's negligent misrepresentations.

3. Because Judge Trimble found that Hunter committed the tort of negligent misrepresentation and that the negligent misrepresentation caused Robnik's damages, those findings are res judicata and cannot be relitigated in American Family's declaratory judgment action.

Mr. Douglas M. Deibert, Attorney for Plaintiff and Appellee American Family

Mr. Michael A. Wilson, Attorney for Defendant and Appellant Heather Robnik

Reinfeld v. Hutcheson

On December 9, 2004, Falyn Reinfeld and H.L. Hutcheson were involved in an automobile accident at the intersection of Dakota Avenue and 26th Street in Sioux Falls, South Dakota. Hutcheson stopped at a stop sign on Dakota Avenue. He waited to cross 26th Street and proceeded south through the intersection when another motorist waved him through. Hutcheson's view of eastbound traffic on 26th Street was obstructed by vehicles in the westbound lane of 26th Street. Reinfeld was traveling east on 26th Street. Hutcheson struck Reinfeld's vehicle as Reinfeld entered the intersection. Reinfeld gripped her steering wheel to brace for impact and hit her head on the driver's side window. Neither driver reported any injuries to the officer who responded to the scene of the accident.

Reinfeld began experiencing headaches and pain in her neck and shoulders within hours of the accident. Reinfeld saw Dr. Richard Plummer the day after the accident. Dr. Plummer imposed work and lifting restrictions and prescribed physical therapy and pain medications. An MRI conducted on January 7, 2005, revealed disk bulging at C5-C6 with no significant nerve impingement. Reinfeld's condition failed to improve, and Dr. Plummer referred Reinfeld to Drs. Jerry Blow and Steven Guse. Drs. Blow and Guse treated Reinfeld using pain medications, physical therapy, trigger point injections, and neuromuscular electrical stimulation. On March 30, 2005, Dr. Guse determined that Reinfeld had reached maximum medical improvement. Dr. Guse assigned Reinfeld a 5% permanent whole-person impairment rating and imposed a permanent overhead lifting restriction of no more than 40 pounds. Despite having reached maximum medical improvement, Reinfeld continued to receive medical treatments from Dr. Guse and chiropractic care from Dr. Bruce Johnson.

In September 2007, Reinfeld brought this lawsuit against Hutcheson for negligence in connection with the accident. Prior to trial, Hutcheson admitted that his negligence caused the accident, but disputed the nature and extent of Reinfeld's injuries. The case proceeded to trial for the sole purpose of determining Reinfeld's damages. By special verdict, the jury found that Hutcheson's negligence was the legal cause of Reinfeld's injuries and awarded Reinfeld $18,791.63 in past medical expenses and $11,054,30 in future chiropractic care expenses. The jury awarded no damages for past disability, future disability, past pain and suffering, future pain and suffering, lost wages, or lost earning capacity. Reinfeld moved for a new trial on the basis that the jury's award of damages for past and future medical expenses, but not pain and suffering, was inadequate and inconsistent with the evidence presented at trial. The trial court granted Reinfeld's motion for a new trial. Hutcheson appeals.

On appeal, Hutcheson raises the following issues:

1. Whether the trial court abused its discretion by granting Reinfeld's motion for a new trial.

2. Whether the trial court abused its discretion by entering an order for a new trial on all damages claims.

3. Whether the trial court abused its discretion by allowing Rick Ostrander, a vocational consultant, to testify to Reinfeld's total lost earning capacity.

Reinfeld also raises an issue for this Court's consideration:

1. Whether the trial court abused its discretion by declining to instruct the jury that the terms "impairment" and "disability" are synonymous.

Ms. Jennifer L. Wollman, Attorney for Defendant and Appellant H.L. Hutcheson

Mr. Clint Sargent, Attorney for Plaintiff and Appellee Falyn Reinfeld

Lawrence County v. Miller, et al.

In September 2007, Lawrence County (County) filed a petition to condemn approximately 206 acres belonging to Cherie L. Miller, Milton E. Mitchell, and Helen B. Neufeld as co-executors of the estate of Elvin E. Mitchell, and Cris Miller (Owners) for an airport improvement project. The 206 acres were part of a larger parcel of approximately 515 acres of land owned by Owners. The 206 acres were condemned for construction of a runway extension for the Black Hills Clyde Ice Airport.

Both parties hired appraisers who considered the "before" and "after" value of the complete 515-acre tract from which the 206 acres were taken. Owners' appraiser concluded the value of the taking was $1,683,000. Owners' appraiser did not consider any diminution in the value of the remaining 309 acres in the event the airport were to permit Category "C" and "D" level aircraft to use the runway and impose height restrictions at some point in the future. County's appraiser also did not consider any future diminution of the remaining 309 acres for height restrictions. County's appraisal for the condemned 206 acres was $1,173,058. Trial on the amount of damages for the taking was scheduled for April 2, 2009.

On November 5, 2008, County filed a motion for partial summary judgment on the alleged effect of the project on Owners' remaining 309 acres. County asked in its motion "that any claim of taking by alleged or supposed loss of use by reason of alleged height restrictions or any other collateral impact of the runway extension project be dismissed." It further sought an order precluding Owners from arguing or offering evidence of any such claim at the jury trial to determine the value of the 206 condemned acres. County also sought to preclude the admission of any additional expert witnesses or reports as parties were

required to disclose expert witnesses by March 31, 2008, and any extension would delay the trial beyond the scheduled date.

Owners resisted the motion and hired Clyde Pittman, a national expert in determining structural height limitations resulting from FAA regulations, to evaluate the impact of the runway expansion on the remaining 309 acres. His report indicated that the extension of the runway would enable the use of Category "C" level aircraft, which would enlarge the circling area by an additional 0.2 nautical miles from the runway. If County eventually expanded the airport for the use of Category "D" level aircraft, the circling area would extend 2.3 nautical miles from the runway. Pittman's report further indicated such an expansion would extend completely over the entire remaining 309 acres. He further opined the expansion would also subject the 309 remaining acres to actual physical invasion of aircraft arriving at and departing from the airport. Federal Aviation Administration regulations would in turn impose height limitations on the remaining 309 acres. However, no evidence was presented by Owners of the diminution in value of the remaining 309 acres due to height restrictions that might be imposed in the future.

The trial court granted County's motion and Pittman's report was not considered by the jury in determining the value of the condemned 206 acres. The trial court concluded that Pittman's report was conjecture and speculative due to the lack of any specific plans by County regarding whether Category "C" and "D" aircraft would be permitted to use the airport in the future. It further concluded that Owners' evidence of possible future airspace intrusion were "mere general allegations" and did not set forth specific facts to show genuine material issues for trial existed on the issue of the collateral impact on the runway extension project.

Owners appeal raising the following issues:

1. Is a government's restriction of a landowner's use of airspace a compensable taking under the United States Constitution or the South Dakota Constitution.

2. Does a trial court have jurisdiction to determine and deny just compensation for private property taken or damaged by condemnation but not described in a petition filed under SDCL Ch. 21-35.

3. Whether expert testimony describing the likely adoption of local ordinances that restrict the use of airspace adjacent to land condemned for an airport expansion present a genuine issue of material fact that a compensable taking of that airspace has occurred.

4. Is the issue of just compensation ripe for determination before the final adoption of ordinances that restrict a landowner's use of airspace adjacent to property condemned for an airport expansion.

5. Must the nonmoving party facing a motion for summary judgment demonstrate the presence of a genuine issue of material fact even though the moving party has made no attempt to demonstrate the absence of any genuine issue of material fact.

Mr. Thomas E. Brady and Mr. Bruce Outka, Attorneys for Plaintiff and Appellee Lawrence County

Mr. Kenneth E. Barker and Mr. Michael A. Wilson, Attorneys for Defendants and Appellants Miller, et al.

State v. Julio Juarez-Ralios

Defendant Julio Juarez-Ralios, while using the name "Antonio," met E.C. in 2005 in Sioux Falls, South Dakota. The two dated and had a sexual relationship for two months. They lost contact with each other until 2007 when they both attended a "Spanish Dance." Defendant telephoned E.C. later that evening and asked if he could stay at her home as he did not have a ride home. E.C. allowed Defendant to stay on her couch. He left the next morning without incident.

While attending a "Spanish Dance" on March 8, 2008, E.C. saw Defendant again and they exchanged cell phone numbers. Defendant called E.C. in the early morning hours of March 9, and once again asked if he could stay at her home. E.C. let Defendant into her home and provided him with the use of her couch. E.C. retired to her bedroom with her one-year-old child. Defendant entered E.C.'s bedroom, sat on her bed and spoke with her a few minutes before asking for sex. E.C. declined. Defendant then held E.C. down on the bed and despite her protests and resistance, raped her while she and her child cried. Defendant called a taxi and was taken to another residence in Sioux Falls. E.C., crying hysterically, hyperventilating, and struggling to speak, called 911 within three minutes of the sexual assault. E.C. named "Antonio" as the assailant.

Police determined that Defendant had called a taxi and located him. Once located, Defendant identified himself to police as "Jamie Cruz Wilkens," and provided a picture identification card in that name with his likeness. Police showed E.C. Defendant's picture identification card, along with the cards of two other male occupants of the residence. E.C. was able to identify "Antonio" from the photo as her assailant. E.C. was transported to the emergency room where she was examined by a physician, and a rape kit examination was performed.

Defendant was arrested and taken to the law enforcement center for questioning. While in custody, Defendant spoke in English. Detective Olson of the Sioux Falls police department arrived forty-five minutes after Defendant and advised Defendant of his Miranda rights. Defendant never indicated he did not understand Detective Olson, and nodded affirmatively when asked if he understood his rights. When asked if he would waive his rights and speak with Detective Olson, Defendant replied: "I don't know. I don't know why I'm here though." When asked a second time, Defendant replied similarly and attempted to explain that he was visiting a friend. Detective Olson stopped him and made a third waiver request; Defendant replied "Okay." Detective Olson asked a fourth time in order to clarify the answer; Defendant once again attempted to explain about his friend. Detective Olson stopped him and asked if Defendant wished to waive his rights, to which Defendant replied: "Yeah."

While in custody, Defendant gave his name as "Wilkens," initially denied being with any woman that evening, denied having had sex, claimed to be from Puerto Rico, and denied knowing E.C. Detective Olson told Defendant of the rape allegations and that a search warrant to collect DNA evidence from his person was being sought. Defendant then changed his story. He claimed a random woman called him on his cousin's cell phone and wanted him to come over for sex and he did. Defendant claimed he could not remember the woman's name or address. He also claimed that after they started having sex, the woman said no, so he stopped.

Detective Olson took a break from the interview and left Defendant in the interrogation room. Defendant was seen on the video monitor taking a cell phone from his pocket and deleting numbers off of it. Detective Olson confronted Defendant, who admitted removing numbers. Defendant then requested and received a glass of water. He next requested to use the restroom. Defendant was warned not to

wash his hand in order to recover any physical evidence under the search warrant. After returning to the interrogation room, Defendant was observed on video spitting onto his hands, rubbing his hands together, and then on his pants. He then poured water from a drinking glass onto his hands and attempted to wash them off. Officers returned to the room and told him to stop, and ended the interview.

Defendant was charged with one count of rape in the second degree. He entered a not guilty plea and trial was scheduled. Defendant filed a motion to suppress his statements to police during the custodial interrogation. Defendant claimed that his statements were not voluntary and that he did not knowingly or intelligently waive his rights because he was unable to understand the meaning of the word "waiver." The motion to suppress was denied. Defendant also sought exclusion of a recording of the 911 call made by E.C., the videotape of Defendant's interrogation, and the testimony of the emergency room physician who treated E.C. Defendant's motion was denied. Defendant's offer of proof during trial of testimony by E.C.'s estranged mother that E.C. was overly dramatic and had made a prior rape accusation, was also denied.

Defendant appeals raising the following issues:

1. Whether the trial court erred in denying defendant's motion to suppress.

2. Whether the trial court erred when it denied Defendant's motion to exclude the 911 call, the interrogation video, and the treating emergency room physician's testimony, as well as denied Defendant's offer of proof.

Mr. Marty J. Jackley, Attorney General, Ms. Sherri Sundem Wald, Deputy Attorney General, Ms. Meghan N. Dilges, Assistant Attorney General, Attorneys for Plaintiff and Appellee State of South Dakota

Mr. Jeff Larson, Minnehaha County Public Defender's Office, Attorney for Defendant and Appellant Julio Juarez Ralios

Unruh v. De Smet Insurance

Dorothy and Henry Lentsch were injured in a motor vehicle accident caused by the negligence of a driver insured by De Smet Insurance Company ("De Smet"). Unruh Chiropractic Clinic ("Unruh") treated Lentsches for their accident-related injuries. Prior to treatment, Lentsches executed assignments of the "proceeds" of their personal injury claims against the negligent driver. The assignments were limited to the extent chiropractic services were provided. The assignments gave Unruh a right to the proceeds from any settlement De Smet paid on behalf of the negligent driver.

Unruh served notices of the assignments on De Smet. The notices informed De Smet that if Lentsches had any unpaid chiropractic services, De Smet "must include" Unruh as a payee on any settlement checks. Lentsches' son, as attorney-in-fact for his parents, subsequently settled their claims and executed releases. The releases provided that the Lentsches would be responsible for paying their medical care providers. Thereafter, De Smet delivered the settlement checks directly to the Lentsches, and Unruh was not made a joint payee.

Unruh contacted Lentsches and demanded that they pay their outstanding balances due for the chiropractic services provided. Lentsches refused. Unruh then demanded payment from De Smet. De Smet also refused.

Unruh sued De Smet, seeking to enforce the assignments. De Smet brought the Lentsches into the lawsuit as third-party defendants. Unruh and De Smet filed cross motions for summary judgment. A magistrate court granted summary judgment in favor of Unruh and against De Smet. The court acknowledged that an assignment of a "claim" for personal injuries is invalid and unenforceable

under the common law. The court, however, concluded that an assignment of "proceeds" is distinguishable from the common-law prohibition on the assignment of claims. Therefore, the magistrate court concluded that Lentsches' assignments of proceeds were valid and enforceable.

De Smet appealed to the circuit court, arguing that assignments of proceeds violate public policy. The circuit court acknowledged a split authority in other states regarding the validity of assignments of proceeds of personal injury claims. The circuit court followed those authorities distinguishing between assignments of proceeds and assignments of claims. The court also found that there was no public policy reason to preclude an assignment of proceeds. It therefore held that the assignments in this case were valid, and it affirmed the magistrate court.

De Smet now appeals to this Court. The Court must determine the validity of assignments of proceeds of personal injury claims.

Mr. James R. Even, Attorney for Plaintiff and Appellee A. Unruh Chiropractic Clinic

Mr. Larry M. Von Wald, Attorney for Defendant and Appellant De Smet Insurance Company of South Dakota

Glossary of Terms

Affirm - When the Supreme Court "affirms" a circuit court's action, it declares that the judgment, decree or order must stand as decided by the circuit court.

Appeal - The Supreme Court's review of a circuit court's decision in a lawsuit. The Supreme Court does not consider new evidence or listen to witnesses. Rather, it reviews the record of a case and applies the proper law to determine if the circuit court's decision is correct.

Appellant - The person who takes an appeal from the circuit court to the Supreme Court. (In other words, the person who does not agree with the result reached in circuit court.)

Appellee - The person in a case against whom an appeal is taken; that is, the person who does not want the circuit court's decision reversed. Sometimes also called the "respondent."

Brief - A document written by a person's attorney containing the points of law which the attorney desires to establish, together with the arguments and authorities upon which his legal position is based. The brief tells the Supreme Court the facts of the case, the questions of law involved, the law the attorney believes should be applied by the Court and the result the attorney believes the Court should reach.

Defendant - The person sued by the plaintiff or prosecuted by the state in the circuit court.

Oral Argument - An opportunity for the attorneys to make an oral presentation to the Supreme Court when the appeal is considered. Oral arguments also give the Court an opportunity to ask the attorneys questions about the issues raised in their briefs.

Plaintiff - The person who brings a lawsuit in the circuit court.

Record - All the papers filed in a circuit court case including any transcripts. This includes the original complaint, motions, court orders and affidavits and exhibits in the case.

Remand - The Supreme Court "remands" an appealed case back to the circuit court for some further action. For example, the Supreme Court might remand a case to the circuit court and require that court to hear additional evidence and make further factual findings that are important in deciding the case.

Reverse - When the Supreme Court "reverses" a circuit court decision, it finds that a legal error was made and requires that the decision be changed.

Transcript - A document that contains a verbatim account of all that was said in a circuit court case by the parties, the attorneys, the circuit judge, and any witnesses. The transcript is prepared by the court reporter and it is reviewed by the Supreme Court as part of the appeal process.

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