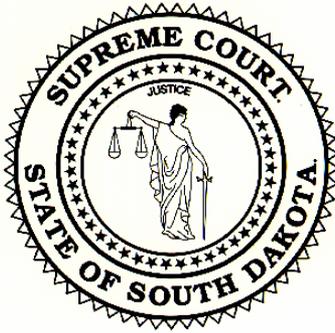


Introduction to  
**The South Dakota  
Supreme Court**



and

**Case Summaries for  
Oral Arguments at the  
October Term of the Court**

to be held

**October 1 through October 3, 2007**

**Black Hills State University**

**Spearfish, South Dakota**





*Supreme Court*  
STATE OF SOUTH DAKOTA

*David Gilbertson*  
CHIEF JUSTICE

October 1, 2007

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

Ladies and Gentlemen:

Your Supreme Court welcomes you to our October 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,

A handwritten signature in cursive script, reading "David Gilbertson".

David Gilbertson  
Chief Justice

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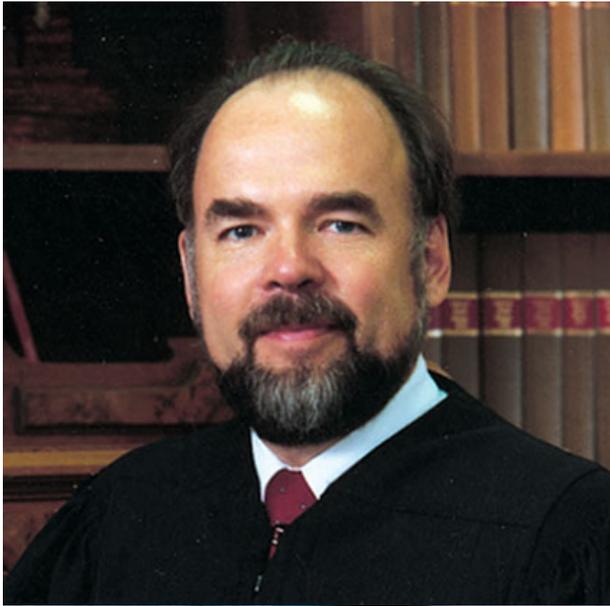
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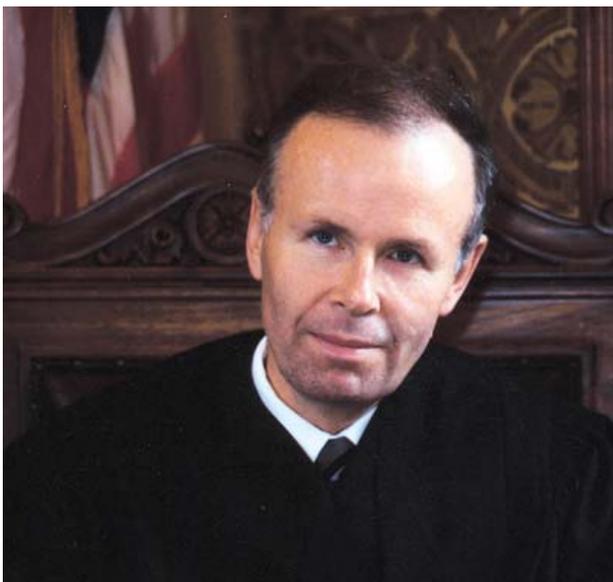
## **Chief Justice David Gilbertson**

Chief Justice Gilbertson, a native of Sisseton, was elected to a 4-year term as Chief Justice by the members of the Supreme Court in September 2001 and was re-elected to a second 4-year term as Chief Justice by the members of the Supreme Court in June 2005. 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 and 2006 general elections. 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 Roberts County Deputy State's Attorney and as City Attorney for the City of Sisseton. 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 is also a member of the Board of Directors of the National Conference of Chief Justices. 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.



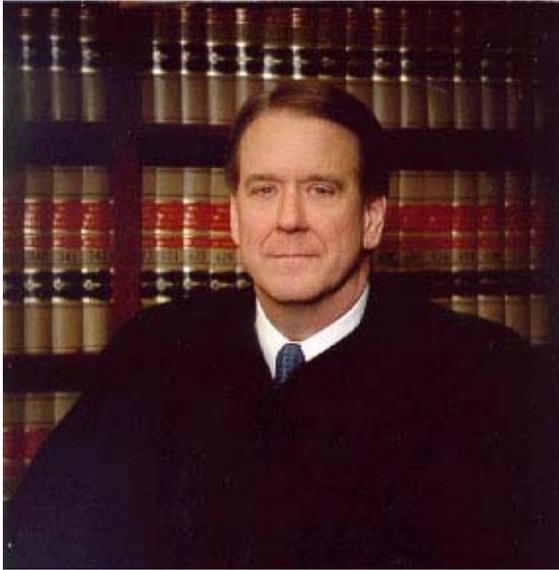
### **Justice Richard W. Sabers**

Justice Sabers was born in Salem on February 12, 1938. He received his B.A. degree from St. John's University in Collegeville, Minnesota in 1960 and, after graduation, served two years as a lieutenant with the U.S. Army Corps of Engineers in the United States and in Germany. He attended the University of South Dakota School of Law, where he was associate editor of the Law Review. He received his law degree in 1966 and enjoyed an active career as a trial lawyer in Sioux Falls for almost twenty years. He was a partner with the law firm of Moore, Rasmussen, Sabers and Kading at the time of his appointment to the Supreme Court in 1986. Justice Sabers was retained by the voters in a statewide retention election three times, in 1990, 1998 and 2006. Justice Sabers was a member of the South Dakota Trial Lawyers' Association, the American Bar Association, and was President of the Second Judicial Circuit Bar in 1982-83. Justice Sabers lives in Sioux Falls. He and his late wife Colleen have three children, Steven, Susan and Michael. In June 2000 he married Ellie Schmitz, who has three children, Jason, Joseph and Ann. Together they have twelve grandchildren.



### ***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 State Bar of South Dakota, American Legion, Pennington County Bar Association, and a Director in the American Judicature Society. Justice Konenkamp and his wife, Geri, are former foster parents for the Department of Social Services. Justice Konenkamp serves on a number of boards advancing the improvement of the legal system and the protection of children. Justice Konenkamp and his wife have two adult children, Kathryn and Matthew.



*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.



***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.



*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 Ryan Mohr (Supreme Court Law Clerk), Amy Gundlach-Evans (Justice Meierhenry), Jennifer Williams (Justice Konenkamp), William Haugen (Chief Justice Gilbertson), Natalie Turnquist (Justice Sabers), 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 and 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 thirty-nine 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](http://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.

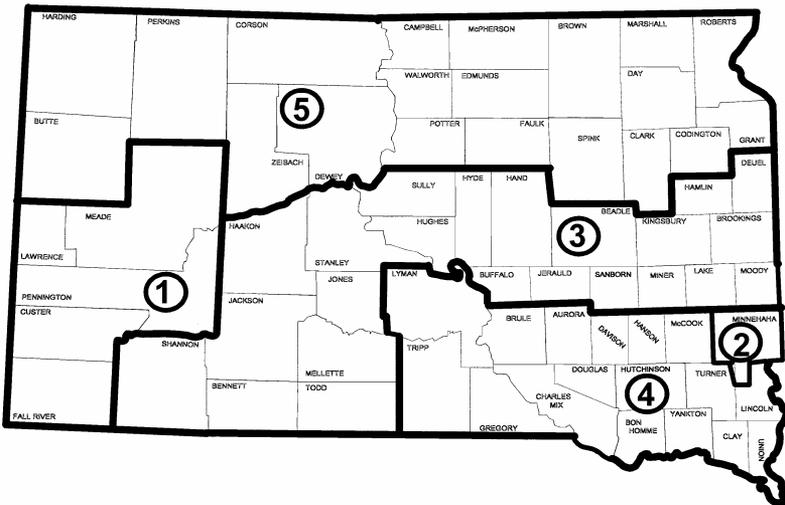
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench 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 Sabers was appointed in 1986 from District Two. 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. Each of these justices was 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**

<b>Courtroom Protocol</b>
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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  
October 2007 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.

<b>Case Summaries</b>
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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.

**Lloyd One Star et al. v. St. Francis Mission et. al.**

Lloyd One Star and Marian Sorace, along with other plaintiffs not a party to this appeal, filed a civil complaint in June of 2004 against St. Francis Mission, Wisconsin Province of the Society of Jesus, Diocese of Rapid City, and Sisters of St. Francis, Denver, Colorado. The complaint alleged that One Star and Sorace were physically and sexually abused in the 1960's by various priests, brothers and sisters working at the St. Francis Mission School and that the defendants had breached their fiduciary duty, were negligent and liable for the acts of the priests, brothers and sisters that committed the abuse. One Star and Sorace maintain that they were threatened not to disclose the abuse and that they did not realize the true significance of the abuse until 2002 and more fully in 2006.

Sisters of St. Francis filed a motion for summary judgment asserting One Star and Sorace did not meet the applicable time limit to file a claim arising from the sexual abuse. The circuit court denied the motion and the Supreme Court granted Sisters of St. Francis an intermediate appeal to challenge that ruling. On appeal, Sisters of St. Francis raises the following issues:

1. When does a claim for childhood sexual abuse accrue under SDCL 26-10-25?
2. Whether One Star and/or Sorace timely commenced this action against Sisters of St. Francis.
3. Whether the claims of One Star and Sorace were tolled against Sisters of St. Francis for fraudulent concealment.

4. Whether the claims of One Star and Sorace were tolled against Sisters of St. Francis by virtue of a class action lawsuit filed by One Star and others against the United States of America.

Ms. Sheila S. Woodward and Mr. Michael F. Marlow,  
Attorneys for Appellant Sisters of St. Francis

Mr. Gregory A. Yates, Attorney for Appellees One Star and  
Sorace

**Zephier, et al. v. Catholic Diocese of Sioux Falls, et al.**

Seventy-two Plaintiffs brought suit against four Defendants: the Catholic Diocese of Sioux Falls, Blue Cloud Abbey, the Sisters of the Blessed Sacrament, and the Oblate Sisters of the Blessed Sacrament. Plaintiffs alleged that all Defendants were responsible for mental, physical, and sexual abuse allegedly suffered between 1947-1954 and 1958-1973 while Plaintiffs were students at St. Paul's School in Marty, South Dakota, on the Yankton Sioux Reservation.

Defendants moved to dismiss by summary judgment, which the trial court granted to all Defendants. In its order, the trial court concluded that Plaintiffs filed their claims too late; that is, beyond the time allowed by the statute of limitations. In making its decision, the trial court ruled that at the summary judgment stage of the lawsuit, the Plaintiffs had the burden of demonstrating that an exception to the statute of limitations excused their late filing. The trial court concluded that Plaintiffs failed to meet that burden because they failed to set forth specific facts in their affidavits and failed to present sufficient evidence to support any exception to the statutes of limitation. As a result, all of Plaintiffs' claims were dismissed.

After the trial court granted Defendants' summary judgment, ten Plaintiffs moved to amend their complaint in order to show a timely filing by setting forth more specific facts of the abuse, such as when the alleged abuse took place and the identity of the abuser. Before the trial court's hearing and ruling on this motion to amend, nine Plaintiffs appealed the dismissal to the Supreme Court. The trial court later denied the motion to amend.

In their appeal to this Court, Plaintiffs raise the following issues:

1. Whether the trial court erred in granting summary judgment dismissing Plaintiffs' case because of their failure to file their claims within the time allowed by the statute of limitations; and
2. Whether the trial court abused its discretion in denying Plaintiffs' request to amend their complaint.

Mr. Gregory A. Yates, Attorney for Plaintiffs and Appellants,  
Sherwyn Zephier, et al.

Mr. Jeremiah D. Murphy, Mr. Charles Goldberg, and Mr.  
Eric V. Hall, Attorneys for Defendants and Appellees  
Catholic Diocese of Sioux Falls

Mr. Michael J. Ford, Mr. Dyan J. Ebert and Ms. Heidi N.  
Thoennes, Attorneys for Defendants and Appellees  
Oblate Sisters of the Blessed Sacrament

Mr. Eric Schulte and Mr. Robert Stich, Attorneys for  
Defendants and Appellees Blue Abbey

Mr. Thomas J. Welk and Mr. Christopher W. Madsen,  
Attorneys for Defendants and Appellees Sisters of the  
Blessed Sacrament

**State v. Gard**

Rex Gard (Gard) was a contractor in Wyoming doing business as Planet Builders. Gard befriended Dr. Barry Smith (Smith) from Spearfish, South Dakota. In 2003, Smith hired Gard to finish building his home after Smith had problems with his contractor. Gard moved to South Dakota with his Planet Builders crew and finished the construction on Smith's home.

According to the State, after Gard completed Smith's home he "wanted further projects." The State claims Gard came up with the idea of building townhouses, while Gard claims it was a mutual decision. In any event, Smith and Dr. Rick Little (Little) took steps to form a corporation, S & L Enterprises, in order to construct houses for profit.

S & L Enterprises never fully developed. The State claims Gard was unhappy about being left out of the partnership because he and his company, Planet Builders, would be doing all the construction work. Gard convinced Smith and Little to include him and hire Planet Builders to do the construction. Thereafter, the group formed Dakota Development Properties (Dakota Development). Gard owned 30% of the company, while Smith and Little each owned 35%.

Smith and Little purchased two lots in the Sandstone Addition in Spearfish, South Dakota. Dakota Development planned to build a duplex on one lot, and the company obtained a construction loan through BankWest for the project. There was conflicting testimony regarding how Gard was to be paid. Gard claims he was to receive payment through the construction loan, while Smith testified that Gard agreed to receive 30% of the project once it was sold, plus equity in the company. Little testified he thought Gard would receive payment through Planet Builders, plus 30% of

the profit after the sale of the duplex, and equity in the company.

In February or March of 2004, Dr. Smith was diagnosed with cancer. Little became responsible for most of the day-to-day operations of the corporation. Little testified that Gard was to invoice for construction expenses and Little would write corporation checks to pay the invoiced amounts. However, in July of 2004, the construction loan was almost depleted, the work by Planet Builders cost more than the original estimate, and Little discovered a “stack of bills” in the corporation post office box that had not been paid. Some bills had been turned over to collection agencies. After Little discovered the late bills, Gard claims he told him to only invoice for labor and that Little would pay the other expenses and materials bills directly to the suppliers. According to Gard, he had already purchased \$17,000 in materials using checks from his personal accounts and was forced to stop payment on one of the checks due to Little’s new billing rule.

Little and Smith confronted Gard about the unpaid bills. He initially claimed the bills were paid or that it was an accounting error by his wife, Karen Jacks (Jacks).<sup>1</sup> Despite repeated attempts by Little and Smith to gain access to the checkbook, Gard refused. Smith and Little also discovered that Gard and Jacks had opened multiple accounts using the doctors’ personal information and signing their names.

Little testified that he received a phone call in September of 2004, where Gard admitted money was missing. However, he attempted to first blame Jacks and then Smith. Little informed the Spearfish police about the

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<sup>1</sup> Jacks was Gard’s girlfriend at the time the corporation was formed, and they later married.

missing money and detectives interviewed Jacks. During an interview, Jacks claimed they had permission to use the doctors' personal information and sign their names. Detectives obtained a warrant and seized computers and paperwork from Gard's home.

Gard was charged with two counts of grand theft by misappropriation of funds by contractor, subcontractor or supplier. He was indicted on the same counts. Three subsequent superceding indictments were filed, which resulted in Gard being charged with fourteen counts of grand theft, one count of conspiracy to commit grand theft, and seven counts of forgery.

A jury convicted Gard of thirteen counts of theft, six counts of forgery, and the sole count of conspiracy to commit grand theft. At sentencing, the judge consolidated all of the theft convictions into one count. Gard admitted to a Part II habitual offender information, which enhanced all counts. He was sentenced to the maximum enhanced penalty for all counts and the sentences were to run consecutively on all counts, except the conspiracy and one forgery count. This resulted in a 65-year prison sentence. Gard appeals and raises the following issues:

1. Whether the court erred by not dismissing the grand theft charges because Gard was an owner of Dakota Development and unable, as a matter of law, to steal from it.
2. Whether the court erred by denying Gard's motion to consolidate the forgery charges.
3. Whether the court erred by not dismissing the forgery charges because the element of intent was absent.

4. Whether the court erred by not dismissing the forgery charges involving Lowe's and Knecht's, because all elements of the crime were not proved.
5. Whether Gard's sentence of 65 years in prison, effectively a life sentence, fails to consider the question of rehabilitation and constitutes cruel and unusual punishment within the purview of the United States and South Dakota Constitutions.

Mr. Thomas E. Adams, Attorney for Defendant and Appellant Rex Gard

Mr. Lawrence E. Long, Attorney General, Mr. Frank Geaghan, Assistant Attorney General, Attorneys for Appellee State of South Dakota

**Tosh v. Schwab**

The Aberdeen police suspected Steven Tosh in the kidnapping and rape of a six-year-old girl. Tosh, who consistently claimed innocence, alleges that the police knew he suffered from a mental disorder, yet they improperly pursued him as a suspect. He specifically alleges that the police continued to interrogate him and eventually placed him under 24-hour surveillance, 7 days a week. Furthermore, he alleges that without his consent, the police drilled holes in the taillight of his vehicle for the purpose of surveillance. In January of 2000, the real perpetrator of the kidnapping and rape was discovered and ultimately convicted.

Tosh subsequently brought a suit for damages (including punitive damages) against three of the Aberdeen officers, alleging they were guilty of intentional infliction of emotional distress and intentional destruction of private property (Tosh's vehicle).

The trial court dismissed the emotional distress claim and request for punitive damages sought against all officers, but granted Tosh damages against two of the officers for the destruction of his vehicle. Tosh appeals the trial court's dismissal of the other claims. Some of the issues on appeal include:

1. Whether the trial court erred in excluding expert testimony regarding proper police procedure in conducting surveillance and interrogation.
2. Whether the trial court erred in dismissing Tosh's claims for intentional infliction of emotional distress.

3. Whether the trial court erred in excluding expert testimony regarding Tosh's emotional distress.
4. Whether the trial court erred in prohibiting the jury from deciding the issue of punitive damages.

Mr. Drew C. Johnson, Attorney for Plaintiff and Appellant  
Steven Tosh

Mr. Jack Hieb, Attorney for Defendants and Appellees  
Kenneth Schwab et al.

**Marschke v. Wratishlaw**

Marschke lives in South Dakota. Wratishlaw lives in Montana, and owns Montana Muscle & Classics LLC (MMC). MMC is licensed to sell used cars.

Marschke owned a Fiat 850 Spyder as a teenager and hoped to buy another. In May 2005, he found a 1971 Spyder owned by Wratishlaw on eBay. MMC's Website was linked to eBay and a toll free telephone number was also displayed. Marschke did not bid on the car. Instead, he called MMC's toll free number to inquire about the car.

Marschke offered to purchase the car for \$3,300. Wratishlaw accepted. Wratishlaw sent Marschke an e-mail requesting his full name, address and telephone numbers so that a purchase agreement could be mailed to him. Marschke wire-transferred a \$500 down payment to Wratishlaw's bank account in Montana. Marschke then wired the balance of the purchase price. Wratishlaw mailed the unsigned purchase agreement to Marschke, which he signed and mailed back to Wratishlaw. Wratishlaw then signed the agreement at the office of MMC in Stevensville, Montana.

Afterwards, Wratishlaw referred Marschke to a motor carrier. Marschke then made arrangements to transport the car from Stevensville to Billings, Montana. Marschke signed a transport agreement with the carrier and paid the cost by credit card. From Billings, the car was towed to Rapid City by Tom Renner, Marschke's employer.

When Marschke received the car, it was not in the condition he expected. Marschke filed a summons and complaint against Wratishlaw and MMC in South Dakota. Wratishlaw filed a motion to dismiss the complaint arguing that South Dakota lacked personal jurisdiction over him and MMC. MMC was not incorporated, headquartered or licensed to do business in South Dakota and did not

maintain offices or employees in the state. Further, Wratlaw did not own real estate or maintain bank accounts in South Dakota. He did not manufacture, distribute or sell products within the state nor had he previously sold a car here and in this case did not deliver the car to South Dakota. Essentially, Wratlaw and MMC had no connection with South Dakota, but for the one isolated sale of the 1971 Fiat to Marschke. Wratlaw's motion to dismiss was granted.

Marschke appeals raising the following issue:

Whether the trial court erred in granting Wratlaw's motion to dismiss for lack of personal jurisdiction.

Ms. Murl L. Woods, Attorney for Appellant Marschke

Mr. Thomas E. Simmons and Pamela Snyder-Varns,  
Attorneys for Appellee Wratlaw

**North Star Mutual Insurance Company v.  
Peterson et al.**

This case is the result of an accidental shooting in a vehicle that happened during a hunting trip on November 24, 2001. North Star Mutual Insurance Company (North Star) filed an action in court seeking a judgment that they were not liable to pay for injuries Mitchell (Mitch) Peterson sustained when a lever action rifle discharged in the backseat of a truck. North Star provided Peterson Farms family partnership with an umbrella insurance policy that specifically excluded coverage of auto accidents. Milbank Insurance Company (Milbank) provided the Petersons with an automobile policy. After trial, the court held that North Star's policy did not cover the bodily injury resulting from the shooting incident; however, the incident did fall under the term "auto accident" in Milbank's policy. The central issue hinges on whether the events leading to Mitch's injuries were properly within the term "auto accident" as defined by the Milbank policy.

On Friday, November 23, 2001, Brad, Lenny, Danny, Jeb and Mitch Peterson went deer hunting. Jeb brought Brad's .30-.30 lever action rifle with him. That night a neighbor, Leo Minske, put the rifle in the back seat of Brad's pickup. The lever action was open. If the lever was later closed, the hammer would be fully cocked and the rifle would be capable of firing if the trigger and lever were depressed. The rifle was loaded.

The next day, after hunting, the Peterson family had lunch at Brad's residence. They decided to go back hunting and got in the pickup to drive to the bale blind. Mitch and Jeb got in the backseat where the rifle was located. Jeb noticed that the gun barrel was pointed toward Mitch's leg and he repositioned the rifle. Hunting clothing was on top of the rifle that could have caught on the trigger and caused it

to pull. The rifle went off and struck Mitch's left ankle and the bullet also grazed his right ankle. How, or if the lever was closed, and if the rifle had moved before Jeb and Mitch got into the truck is disputed.

Brad, Lenny and Danny are partners in Peterson Farms, a South Dakota partnership. Peterson Farms had insurance policies with North Star and with Milbank. North Star filed suit seeking a declaration from the court that Peterson Farms' umbrella policy did not cover Mitch's bodily injuries because their auto policy was not listed on the Declaration's page. Milbank also asked the court to determine that the Peterson Farms' automobile policy did not cover the shooting incident.

After a trial, the court held that neither of the North Star policies covered the shooting incident but the Milbank auto policy did. The court found the shooting occurred in connection with the use of the pickup on a hunting trip and during the loading or unloading of the pickup, and that the predominant cause of the accident came from the use of the pickup.

Peterson Farms' insurance policy with Milbank covered "auto accidents." The trial court held that the shooting accident was an "auto accident" under the terms of the insurance policy and Milbank was required to pay damages for Mitch's bodily injuries. Milbank argued this was not an "auto accident" and was not covered by the policy issued to Peterson Farms.

Milbank appeals raising the following issue:

Whether the circuit court erred in holding that the shooting incident of November 24, 2001, was the result of an "auto accident" as that term is used in the Milbank insurance policy.

Mr. Robert B. Anderson, Attorney for Defendant and  
Appellant Milbank Insurance Company

Mr. Michael J. Schaffer, Attorney for Plaintiff and Appellee  
North Star Mutual Insurance Company

Mr. Rodney Freeman, Jr., Attorney for Defendants and  
Appellees Peterson

**Andrushchenko v. Silchuk**

On December 29, 2002, Ivan and Lyuba Silchuk (Silchuk) invited Alex and Natalya Andrushchenko (Andrushchenko) and their three-year-old son, Dennis, over to their home for lunch. Many of the facts surrounding the events at this lunch are in dispute. What is known is that Dennis, who was upstairs with the Silchuk's children but not playing with them, entered the Silchuk's master bathroom. The master bath had a whirlpool tub. Dennis placed toys and other objects in the bathtub and turned on the hot water. It is unknown whether Dennis intentionally entered the bathwater or whether he slipped into the bathtub; nevertheless, Dennis suffered severe burns from bath water that was approximately 160 degree F. The municipality's building code recommended a thermostat setting of no higher than 120 degrees F.

Dennis received extensive treatment for his burns, culminating in plastic surgery. Andrushchenko filed suits in negligence against the Silchuks, Metzger Construction, Inc., the builders of Silchuk's home, and M&M Plumbing-HVAC, L.C., the installers of the water heater thermostats. Andrushchenko sued Silchuk under a theory of negligence for failure to meet the standard of ordinary care and as the owner of the land on which Dennis was injured, alleging that Silchuk failed to provide safe premises for a social guest. Andrushchenko alleged negligence by both Metzger and M&M in setting the thermostats on the water heaters above the recommended 120 degrees F.

Silchuk, Metzger and M&M filed motions for summary judgment after discovery. Andrushchenko filed affidavits in opposition to summary judgment and the Silchuks and Metzger objected. The trial court sustained the objections and refused to consider several affidavits, including police reports and water heater manuals. The

motions for summary judgment were all granted in favor of the defendants.

Andrushchenko appeals and raises the following issues:

1. Whether the trial court erred by not considering exhibits attached to Affidavits in Opposition to Summary Judgment.
2. Whether the trial court erred in granting summary judgment because material facts were in dispute that required resolution by a jury, including:
  - a. Whether the trial court erred in holding Silchuk owed no legal duty to Andrushchenko under a negligence theory and/or based on Andrushchenko's status on land as a social guest.
  - b. Whether the trial court erred in holding Metzger owed no legal duty to Andrushchenko.
  - c. Whether the trial court erred in holding M&M owed no legal duty to Andrushchenko.

Mr. Rollyn H. Samp, Attorney for Plaintiffs and Appellants  
Andrushchenko et al.

Mr. William C. Garry and Mr. Shawn M. Nichols, Attorneys  
for Appellees Silchuk

Mr. Roy A. Wise, Attorney for Appellee Metzger Construction

Mr. Mark D. O'Leary, Attorney for Appellee M & M

**State v. Tiegen**

On July 12, 2004, Troy Klug went to the home of Cynthia Kindall to purchase drugs and thereafter disappeared. It was alleged that Klug owed money to Kindall and Tory Tiegen for past drug purchases. After Klug's disappearance, on the early morning of July 14, 2004, Tiegen showed up at Tell Cook's home with Kindall's vehicle. According to Cook, Klug was in the trunk of Kindall's vehicle, duct taped and stripped naked except for his boxer shorts. Cook stated that Tiegen was ranting about snitches and people owing money. Cook could tell Klug was still alive because he heard moaning and groaning when, according to Cook, Tiegen beat him.

After a lengthy investigation into Klug's disappearance, Tiegen was charged with, among other things, the kidnapping of Klug. Klug still has not been found. At Tiegen's trial, the State entered into evidence statements made by Kindall, who was not available to testify because she was found incompetent to stand trial for her own charges and was receiving mental health care. Nevertheless, the State claimed that Kindall's statements were admissible because they were made in furtherance of the conspiracy to kidnap Klug. The State also entered into evidence incriminating letters written by Tiegen to Cook, while Cook and Tiegen were in the Pennington County jail.

A jury found Tiegen guilty of kidnapping and he was sentenced to 100 years in the penitentiary. He appeals claiming:

1. His right to a speedy trial under the Sixth Amendment to the United States Constitution and Article VI, section 7 to the South Dakota Constitution was violated;

2. His right to counsel was violated because law enforcement used Cook to elicit statements from him while he was incarcerated;
3. The court erred when it allowed Kindall's statements to be admitted under SDCL 19-16-3(5);
4. One cannot have a conspiracy with someone who is found unfit to stand trial;
5. He was denied his right to cross examine a witness when Kindall's statements were entered into evidence; and
6. His 100-year sentence is grossly disproportionate because the court used murder-related facts, which were not part of the kidnapping charge.

Mr. Lawrence E. Long, Attorney General and Mr. Frank Geaghan, Assistant Attorney General, Attorneys for Plaintiff and Appellee State of South Dakota

Mr. Kevin S. Lewis, Attorney for Defendant and Appellant  
Tory Tiegen

**First National Bank v.  
South Dakota Banking Commission et al.**

First Western Bank Sturgis (First Western) filed an application with the South Dakota Banking Commission (Commission) to establish a branch bank in Lead, South Dakota. First Western has two branch banks located in Deadwood, South Dakota. First National Bank of Ft. Pierre, South Dakota, (First National) intervened before the Commission contesting First Western's application for a Lead branch. A hearing was held on the application and one member of the Commission disqualified himself from participating based on his affiliation with First Western. Following that hearing, the Commission granted the application to establish a First Western branch in Lead. First National appealed that decision to the circuit court. The circuit court affirmed the Commission's decision. First National appeals raising the following issues:

1. Whether the Commission's approval of First Western's application should be reversed.
2. Whether the Commission abused its discretion and whether its findings are clearly erroneous, arbitrary, capricious and unsupported by the evidence.
3. Whether the evidence supported granting First Western's application under South Dakota case law and SDCL 51A-3-9.
4. Whether the Commission's decision is contrary to South Dakota case law on branch banking.
5. Whether the failure of Commission members to disqualify themselves lead to an unacceptable risk of actual bias.

6. Whether First Western failed to satisfy the requirements of SDCL 51A-3-9 in its application to establish a branch bank.

Mr. Brad A. Sinclair and Mr. Randall Turner, Attorneys for  
Appellant First National Bank of Ft. Pierre

Mr. Gerald P. Laughlin, Mr. John S. Zeilinger and Mr.  
Thomas E. Lee, Attorneys for Appellee First Western  
Bank Sturgis

## 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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## NOTES

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