Introduction to

The South Dakota Supreme Court

and

Case Summaries for

Oral Arguments at the

October Term of the Court

to be held

October 6 through October 8, 2014

University of Sioux Falls

Sioux Falls, South Dakota

Supreme Court
STATE OF SOUTH DAKOTA

David Gilbertson
CHIEF JUSTICE

October 6, 2014

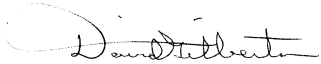
To our Guests Observing the
October Term Hearings of the
South Dakota Supreme Court

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,

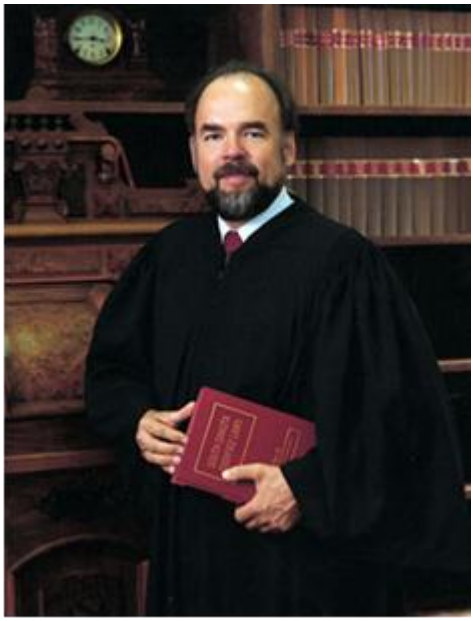


David Gilbertson
Chief Justice

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

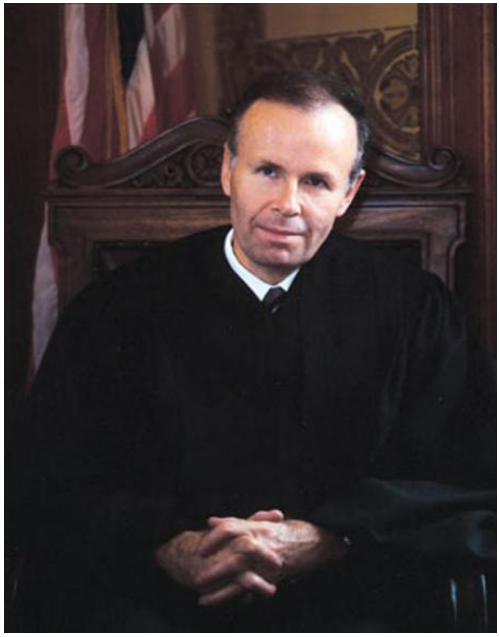
Table of Contents

The justices have extended an invitation to the public to attend any of the Court's sessions. To assist with the Supreme Court visit, persons in attendance must abide by proper courtroom etiquette. The Supreme Court employs security methods to ensure the well-being of all who attend its proceedings and all attending the morning court sessions will be requested to pass through a metal detector. Backpacks and book bags should not be brought, and other bags and purses are subject to inspection and search by security personnel.



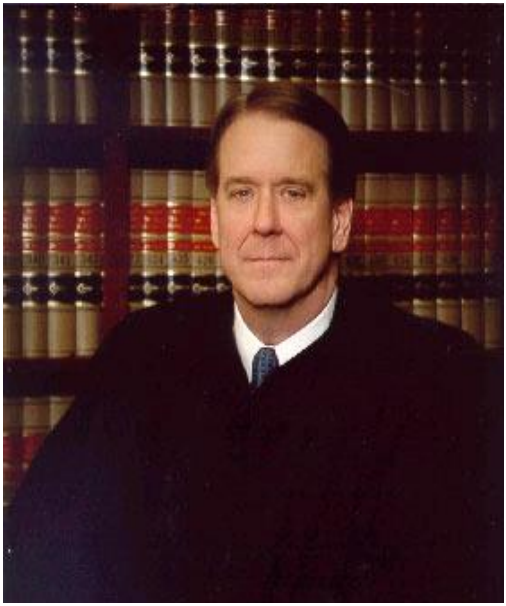
Chief Justice David Gilbertson

Chief Justice Gilbertson was elected to a four-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, a third 4-year term in June 2009 and a fourth 4-year term in June 2013. 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 the First Vice-President of the Conference of Chief Justices and chairs its Task Force on Politics and Judicial Selection/Compensation. 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. He and his wife Deborah have four children.



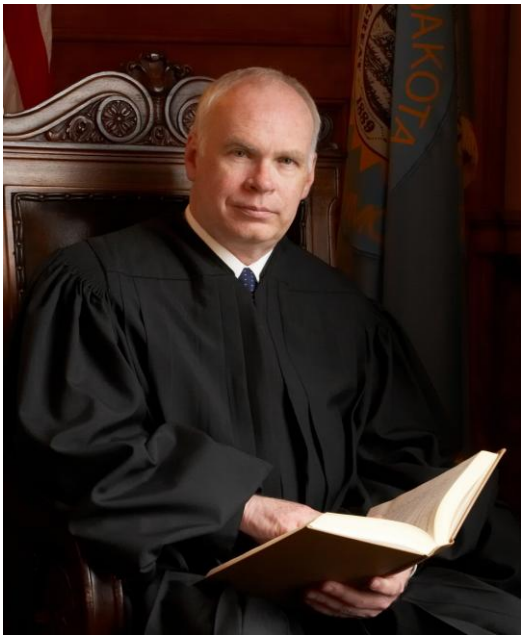
Justice John K. Konenkamp

Justice Konenkamp, born October 20, 1944, represents the First Supreme Court District, which includes Custer, 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 by former Governor Walter Dale Miller 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 and the Alternative Dispute Resolution Committee. Justice Konenkamp and his wife have two adult children, Kathryn and Matthew and five grandchildren.



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 have two daughters and three grandchildren.



Justice Glen A. Severson

Justice Severson, born in 1949, represents the Second Supreme Court District, which includes Minnehaha 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 as 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 of the 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.

Justice Lori S. Wilbur

Justice Wilbur represents the Fourth Supreme Court District, which includes the counties of Aurora, Bon Homme, Brule, Charles Mix, Clay, Davison, Douglas, Gregory, Hanson, Hutchinson, Lincoln, Lyman, McCook, Tripp, Turner, Union and Yankton. She attended the University of South Dakota receiving a Bachelor of Arts degree in 1974 and the University of South Dakota, School of Law, receiving a Juris Doctor degree in 1977. She served as a law clerk for the South Dakota Supreme Court for Honorable Laurence J. Zastrow; was an assistant Attorney General; General Counsel, South Dakota Board of Regents; Staff Attorney, South Dakota Legislative Research Council; and Legal Counsel, South Dakota Bureau of Personnel. She is a member and past President of the South Dakota Judges Association, past member and Secretary of the Judicial Qualifications Commission and a member of the Rosebud Bar Association. She served as a Law-Trained Magistrate Judge, Sixth Circuit 1992-1999; Circuit Court Judge, Sixth Circuit, 1999-2011; and Presiding Judge, Sixth Circuit, 2007 – 2011. Justice Wilbur has two daughters and one grandson.

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.

2014-2015 Supreme Court Law Clerks

Law Clerks are employed by the Court to assist the Justices with research and writing of the opinion on the cases under consideration. In the photograph above, from the left, are Harrison Hagg (Supreme Court Law Clerk), Jonathan Heber (Justice Wilbur), Michelle Oswald (Justice Severson), Christopher Dabney (Chief Justice Gilbertson), Jennifer Williams (Justice Konenkamp), and Brendan Pons (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 $12,000. 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: http://ujs.sd.gov/

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.

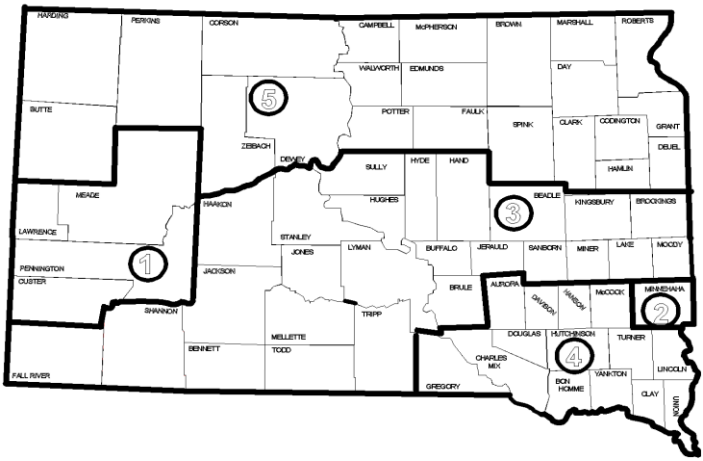
All of those who sit on the Supreme Court must be licensed to practice law in the state and permanent justices must be voting residents of the district from which they are appointed at the time they take office. There is no formal age requirement for those who serve on the Court, but there is a statutory 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 Severson was appointed in 2009 from District Two. Justice Wilbur was appointed in 2011 from District Four. Chief Justice Gilbertson and Justices Konenkamp and Zinter were each retained in the November 2006 general election. Justice Severson was retained in the November 2012 general election.

South Dakota Supreme Court Appointment Districts

Effective January 23, 2012



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
October 2014 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.

Engesser v. Young

On July 30, 2001, Oakley Engesser and Dorothy Finley left the Full Throttle Saloon in Finley's 1998 Corvette. On Interstate 90 and traveling over 100 mph, the Corvette crashed into a minivan, skidded into the median, and rolled several times. Engesser was ejected from the vehicle, and Finley was found lying over the passenger seat. Finley was dead at the scene. Engesser survived. He was later charged with vehicular homicide and two counts of vehicular battery. On August 30, 2001, a jury found him guilty on all charges. Engesser's convictions were affirmed by this Court in a 3-2 decision. *State v. Engesser*, 2003 S.D. 47, 661 N.W.2d 739.

Engesser maintains he was not driving when the Corvette crashed. Over the next twelve years, Engesser filed three petitions for habeas corpus relief in state court and two petitions in federal court. Although he obtained relief in his second state-court petition, this Court reversed in *Engesser v. Dooley*, 2008 S.D. 124, 759 N.W.2d 309. Engesser further obtained relief with his second federal-habeas corpus petition. That relief, however, was also reversed. *Engesser v. Dooley*, 686 F.3d 928 (8th Cir. 2012).

On March 29, 2013, Engesser filed a fourth petition for habeas corpus relief in state court. He alleged that newly discovered evidence, in consideration of the evidence previously presented, would show conclusively that he was not the driver at the time of

the crash. The State sought to dismiss the petition, asserting Engesser's claim was barred by the statute of limitations, he waived his claim of actual innocence by failing to raise it in a prior petition, and that the amended petition failed to state a claim upon which relief could be granted.

The habeas court recognized that SDCL 21-27-3.3 was amended in 2012, and provided that a successive petition for habeas corpus relief based on newly discovered evidence must be filed within two years of the date the "factual predicate of the claim or claims presented could have been discovered by due diligence." Although the court found certain evidence time barred, it ruled that the existence of Ramona Dasalla as an eyewitness was timely. The court further rejected the State's arguments that Engesser waived his claims or that he failed to state a claim upon which relief could be granted. Finally, the habeas court recognized actual innocence as a free-standing claim for habeas corpus relief, and that Engesser met his burden of proof by clear and convincing evidence that no reasonable juror would have found him guilty in light of the evidence as a whole, including the newly discovered evidence. The court granted Engesser's petition for habeas corpus relief and ordered a new trial.

The State appeals, asserting the following issues:

1. The habeas court erred when it exercised jurisdiction over an unrecognized form of habeas corpus relief that alleged nothing more than actual innocence.

2. The habeas court erred in finding that Engesser proffered appropriate evidence of his actual innocence.

3. The habeas court erred when it foreclosed the State's broader discovery of Engesser's previous habeas counsel's file from Engesser's previous habeas corpus proceedings.

Mr. Marty J. Jackley, Attorney General, and Paul S. Swedlund, Assistant Attorney General, Attorneys for Respondent and Appellant State of South Dakota

Mr. Ronald A. Parsons, Jr., Ms. Delia M. Druly and Mr. Michael J. Butler, Attorneys for Petitioner and Appellee Oakley Bernard Engesser

State v. Miland

On October 17, 2011, Deputy David Jacobs stopped a vehicle being driven by Samuel Miland in Canton, South Dakota, after observing a brake light out on the vehicle. Deputy Jacobs had been following Miland's vehicle after a clerk at a local convenience store had called and reported that she was nervous about Miland and his passenger's plans. After Deputy Jacobs stopped Miland's vehicle, he asked Miland to join him in the patrol car. Deputy Jacobs also spoke with Miland's passenger, which conversation made Deputy Jacobs suspicious. Deputy Jacobs called for backup. He also obtained Miland's consent to search the vehicle.

While other officers searched Miland's vehicle, Deputy Jacobs and Miland remained in Deputy Jacob's patrol car and engaged in general conversation. Deputy Jacobs later testified that he looked down for one moment, after which Miland "launched a brutal attack on" him. Miland punched Deputy Jacobs square between the eyes and on the nose, and continued to beat Deputy Jacob's face "as fast as he could and as hard as he could for," according to Deputy Jacobs, "I don't know how long." Deputy Jacobs further claimed that Miland tried to get his arm behind the officer's head and throat.

During the attack, Deputy Jacobs honked his horn, pressed the accelerator with his foot, and gained the attention of the officers conducting the search of Miland's vehicle. The officers could not get the driver's side door open. Deputy E.J. Kolshan, therefore, broke

the passenger side window open and pulled Miland out of the vehicle. Miland resisted restraint but was ultimately forced into submission through the efforts of multiple officers.

Deputy Jacobs was taken to the Canton hospital by ambulance. He was given an icepack and aspirin for his injuries and was discharged. The following day, he visited his local doctor, who took x-rays to determine the extent of his injuries. The x-rays revealed no fractures and he was directed to continue using ice and aspirin for his symptoms. Deputy Jacobs later testified that the altercation caused pain to his head, neck, back, and shoulders. He felt blood run into his mouth and eyes. He testified that eight months after the attack he still had "difficulty breathing through the left side of [his] nose, [had] reduced airflow, and [he] still suffer[s] from flashbacks, nightmares." He further testified that his nose is crooked, and he experienced insomnia, depression, and anxiety.

Miland was charged with possession of a controlled substance, aggravated assault against a law enforcement officer, and resisting arrest. He was also alleged to be a habitual offender. He pleaded not guilty to all counts and requested a bench trial. This appeal concerns the charge for aggravated assault, which is defined as "[a]ny person who: (1) Attempts to cause serious bodily injury to another, or causes such injury, under circumstances manifesting extreme indifference to the value of human life; . . . ." SDCL 22-18-1.1. At the close of the case, Miland moved for a judgment of acquittal asserting that the State failed to present sufficient evidence to prove serious bodily injury. The trial court denied the motion and found Miland guilty on all counts.

Miland appeals, asserting that the trial court misconstrued the elements necessary to establish aggravated assault under SDCL 22-18-1.1(1) and that there is insufficient evidence to sustain his conviction for aggravated assault.

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

Ms. Cynthia M. Berreau, Attorney for Defendant and Appellant Samuel D. Miland

Granite Buick GMC Inc. v. Ray et al.

Adam Ray and Scott Hanna were employees of Granite Buick GMC (Granite) and McKie Ford Lincoln (McKie) respectively. Granite and McKie are automobile dealerships. Both Ray and Hanna signed Non-Competition and Disclosure Agreements (the Agreement) during their employment as car salesmen. The Agreement provided that they could not work in the same type of business as the automobile dealerships for a period of one year if their employment terminated. Ray and Hanna later terminated their employment and started Gateway Autoplex (Gateway), a used car dealership.

Ray signed the Agreement under circumstances that he claimed made the Agreement not enforceable. Ray was given the Agreement, along with other employees, at a sales meeting. Ray alleged that before he signed the Agreement, Troy Claymore, Ray's supervisor, made the statement that the Agreement would only be enforced if employees made a lateral transition, but not if the employee had an opportunity to better oneself. Ray later signed the Agreement.

Hanna claimed that the Agreement was not enforceable due to a conversation he had with Mark McKie, the owner of McKie, after Hanna had signed the Agreement. Before leaving McKie, Hanna talked to Mark McKie about his departure. Hanna testified that he asked Mark McKie if he was going to come after Hanna in any way and if their families' relationship would be affected by him leaving. Mark McKie replied, "S***, no Scotty, that will never be the case."

Granite and McKie filed suits against Ray and Hanna to enforce the non-competition agreements. The two cases were consolidated.

The cases went to trial on the plaintiffs' claims for permanent injunctions enjoining Ray and Hanna from working in their new dealership. Ray and Hanna raised affirmative defenses contending that the Agreement was not enforceable. They relied on the defenses of fraudulent inducement, waiver, promissory estoppel, and equitable estoppel.

A jury returned a verdict in favor of defendants Ray, Hanna, and Gateway. Granite and McKie now appeal to this Court raising the following issues:

1. Whether the circuit court erred in determining that the defendants, in an action involving equitable claims and defenses, were entitled to a jury trial on their affirmative defenses.

2. Whether the circuit court erred by denying Granite's and McKie's Motions for a Judgment as a Matter of Law—motions to dismiss the affirmative defenses of fraud, waiver, and estoppel on the ground that Ray and Hanna had not proven sufficient facts to support those defenses.

3. Whether the circuit court erred by granting the defendants' application for taxation of costs and disbursements.

Mr. John K. Nooney and Mr. Robert J. Galbraith, Attorneys for Plaintiffs and Appellants, Granite Buick GMC, Inc. and McKie Ford Lincoln

Mr. Roger A. Tellinghuisen and Mr. Michael V. Wheeler, Attorneys for Defendants and Appellees Adam Ray, Scott Hanna, and Gateway Autoplex, LLC

Eagleman *et al.* v. WI Province *et al.*

Ten plaintiffs (the Plaintiffs), all over forty-years-old, alleged they were sexually abused when they were children attending the St. Francis Mission boarding school. According to the Plaintiffs, certain priests, brothers, and scholastics repeatedly raped and sexually abused them. The school was run by the Wisconsin Province of the Society of Jesus and the Rosebud Educational Society/St. Francis Mission (the Entities). The Plaintiffs brought suit against the Entities under SDCL 26-10-29, which provides that "childhood sexual abuse is any act committed by the defendant against the complainant who was less than eighteen years of age at the time of the act and which act would have been a violation of chapter 22-22 or prior laws of similar effect at the time the act was committed which act would have constituted a felony." SDCL 26-10-25 requires that "[a]ny civil action based on intentional conduct brought by any person for the recovery of damages for injury suffered as a result of childhood sexual abuse shall be commenced within three years of the act alleged to have caused the injury or condition, or three years of the time the victim discovered or reasonably should have discovered that the injury or condition was caused by the act, whichever period expires later." The Plaintiffs alleged that the Entities committed intentional criminal acts because they knew or should have known of the alleged abuse as early as the 1960s, intentionally abandoned their duty to protect them as children, and intentionally concealed the abuse, which intentional acts would have violated laws in effect during the time of the abuse.

The Entities jointly moved for summary judgment asserting that SDCL 26-25-10 precluded the Plaintiffs' suits, that the Entities were not "perpetrators who engaged in intentional conduct" under SDCL 26-25-10, and that the Entities did not fraudulently conceal the alleged abuse. After a hearing, the circuit court issued an incorporated memorandum decision, granting the Entities' motion for summary judgment.

Relying on this Court's decision in *Bernie v. Blue Cloud Abbey*, the circuit court ruled that a plain reading of SDCL 26-25-10 revealed that the statute only "applies to an individual who directly commits a criminal act." *See* 2012 S.D. 64, 821 N.W.2d 224. In regard to the Plaintiffs' claims that the Entities directly committed criminal acts by violating laws in effect during the time of the alleged abuse, namely that the Entities aided and abetted the abuse, the court found that because the Entities did not have the requisite mental culpability, "it is too much of a stretch to link the [Entities] to intentional felonious criminal conduct."

The court further found that the 2010 amendment to SDCL 26-25-10 applied retroactively against and statutorily barred the Plaintiffs' claims against the Entities. The amendment provides that "no person who has reached the age of forty years may recover damages from any person or entity other than the person who perpetrated the actual act of sexual abuse." Although the Plaintiffs insisted that the 2010 amendment is unconstitutional as a Bill of Attainder because the Legislature crafted the amendment specifically to target the Plaintiffs, the court ruled that because it was undisputed that all the Plaintiffs were

over forty years old when they sought to recover damages from the Entities, the Plaintiffs' claims were barred by SDCL 26-10-25.

Lastly, the court ruled that the Plaintiffs failed to present a material issue of fact in dispute to support their claims that the statute of limitations must be tolled under the theory of fraudulent concealment. The court found that "[t]here is no evidence in these cases that the [Entities] concealed anything from the Plaintiffs which would have prevented them from timely pursuing their claims." Moreover, according to the court, "the pleadings, depositions, and affidavits" revealed "that the Plaintiffs were aware of the alleged abuses and the fact that the abusers were clergy of the Catholic Church from the time the alleged abuses took place."

The Plaintiffs appeal asserting the following issues:

1. If the Legislature intended HB 1104 (the 2010 amendment to SDCL 26-25-10) to apply to pending litigation, it is unconstitutional as applied to these cases.

2. The Plaintiffs demonstrated that there is a genuine issue of material fact in dispute whether the Entities engaged in intentional criminal acts as defined by SDCL 26-10-29.

3. There is a genuine issue of material fact in dispute whether the Entities established that Plaintiffs discovered or should have discovered the alleged abuse sooner than three years prior to filing suit under SDCL 26-25-10.

4. There is a genuine issue of material fact in dispute whether the statute of limitations should be tolled because of the Entities' fraudulent concealment.

Mr. Gregory A. Yates and Mr. Michael Shubeck, Attorneys for Plaintiffs and Appellants for Appeals #26939 – #26943

Mr. Bryan Smith, Attorney for Plaintiffs and Appellants for Appeal #26944

Mr. Terry L. Pechota, Attorney for Defendant and Appellee Wisconsin Province of the Society of Jesus

Mr. Jeffrey G. Hurd, Attorney for Defendant and Appellee Diocese of Rapid City for Appeals #26939 and #26944

Mr. Gene R. Bushnell, Attorney for Defendant and Appellee Father Ken Walleman

Mr. Thomas G. Fritz and Ms. Barbara Anderson Lewis, Attorneys for Defendant and Appellee Rosebud Education Society/St. Francis Mission

Kustom Cycles, Inc. v. Bowyer

Clint Bowyer is a professional race-car driver who competes in NASCAR's Sprint Cup Series. Bowyer resides in North Carolina and travels to various states to compete in racing events. Bowyer is also a motorcycle enthusiast and has attended the Sturgis Motorcycle Rally on several occasions.

Kustom Cycles, Inc., owned by Brian Klock, is a South Dakota corporation operating in Mitchell, South Dakota. Kustom Cycles specializes in designing motorcycle parts and the customization of motorcycles.

Klock and Bowyer first encountered each other at a NASCAR race in Daytona, Florida, in 2008. Later that fall, around November 9, the two again encountered one another at a NASCAR track in Phoenix, Arizona. Although the parties dispute who originated the idea, the parties there agreed that Kustom Cycles would customize a motorcycle for Bowyer to match his Mercury automobile.

Bowyer purchased a 2009 Harley Davidson motorcycle from a dealership in Mankato, Minnesota. Kustom Cycles picked up the motorcycle and transported it to Mitchell. Kustom Cycles alleges that Bowyer, or his agents, made phone calls and sent text messages to Kustom Cycles in order to approve prospective designs and request pictures. It also alleges that Total Performance, Inc., who customized the Mercury, sent photos of the automobile to Kustom Cycles to aid in designing similar customizations.

Bowyer was never present in South Dakota at any relevant time.

In February, 2009, Kustom Cycles first delivered the motorcycle to Bowyer at his home in North Carolina. Bowyer was not satisfied, and Kustom Cycles returned the motorcycle to Mitchell for additional work. Shortly thereafter, the motorcycle was delivered, for a second time, to Bowyer in North Carolina. Kustom Cycles sent Bowyer a bill for the work. Bowyer refused to pay the bill, instead claiming that Klock proposed payment in the form of promotions, endorsements, and special access to NASCAR events. Kustom Cycles sued Bowyer in South Dakota for payment of the bill.

Bowyer unsuccessfully moved to dismiss the suit for lack of personal jurisdiction. He now appeals, raising one issue:

> Whether Bowyer had minimum contacts with South Dakota sufficient to justify specific jurisdiction.

Mr. Steven W. Sanford and Mr. Alex M. Hagen, Attorneys for Defendant and Appellant Clint Bowyer

Mr. Jack Theeler and Mr. Dustin J. Ludens, Attorneys for Plaintiff and Appellee Kustom Cycles, Inc.

McDonough v. Weber

On August 11, 2002, after consuming several beers with his friends, Chaske McDonough threw a beer bottle that crashed through a window in Mark Paulson's mobile home in Vermillion, South Dakota. Paulson came outside to investigate, and the two entered the home to look for damage. Two days later, officers discovered Paulson's body, which had been beaten and stabbed twice in the neck.

Several officers questioned McDonough at different times. Special Agent Todd Rodig of the South Dakota Division of Criminal Investigation interviewed McDonough on both August 15 and 16, 2002. McDonough denied any involvement in Paulson's death. Agent Rodig did not consider McDonough a suspect and never advised McDonough of his *Miranda* rights (i.e., the rights to counsel and to remain silent).

Later in the day of August 16, 2002, Detective Lowell Oswald approached McDonough and asked him to come to the station for additional questioning. McDonough reluctantly agreed. Detective Oswald wore plain clothes, drove an unmarked police car, and McDonough rode in the front seat without restraints. Deputy Sheriff Andy Howe interviewed McDonough for a little over an hour in a closed, unlocked room. Deputy Howe thanked him for coming, told him that he was free to leave, and promised that he would not be arrested at that time. Deputy Howe considered McDonough a suspect. McDonough initially denied involvement in Paulson's death but then confessed to

the killing. After the confession, Deputy Howe read the *Miranda* warning to McDonough for the first time and asked him to write his confession. McDonough complied, repeated his confession when arrested later in the evening, and again the next day. The Clay County grand jury indicted McDonough for second-degree murder.

McDonough's attorney did not attempt to suppress the initial confession because of the subsequent statements and because he believed the State would not offer a plea agreement if he attempted a suppression motion. McDonough pleaded guilty to first-degree manslaughter and was sentenced to 85 years (20 suspended). While entering his plea, McDonough asserted that he acted in self-defense. McDonough, who was abused as a child, claims that Paulson triggered his post-traumatic stress disorder by touching and propositioning McDonough and that he killed Paulson in self-defense.

McDonough's right to appeal expired. It is disputed whether or not McDonough's attorney advised him of his appellate rights. McDonough petitioned for a writ of habeas corpus and was denied. He now appeals, raising two issues:

1. Whether the record clearly presented a factual basis for his plea.

2. Whether his defense counsel was ineffective.

Mr. Marty J. Jackley, Attorney General, and Mr. Paul S. Swedlund, Assistant Attorney General, Attorneys for Respondent and Appellee State of South Dakota

Mr. Manuel J. de Castro, Jr., Attorney for Petitioner and Appellant Chaske McDonough

Expungement of Records for Taliaferro

Brandon Taliaferro was indicted on May 1, 2012, and September 14, 2012, for witness tampering, three counts of perjury, conspiracy to commit perjury, unauthorized disclosure of confidential abuse and neglect information, and obstructing law enforcement. Taliaferro entered a plea of not guilty to all seven charges. The charge of conspiracy to commit perjury was dropped before trial and dismissed afterward.

On January 7, 2013, a jury was empaneled and trial began for the six indictments. After the State of South Dakota rested its case on January 9, 2013, Special Prosecutor Michael Moore dismissed, with prejudice, the obstructing law enforcement charge against Taliaferro. Taliaferro made a Motion for Judgment of Acquittal on the five remaining indictments. The trial court granted the motion and entered a judgment of acquittal. In particular, the trial court found that the State presented insufficient evidence to support a finding of guilt beyond a reasonable doubt.

On July 15, 2013, Taliaferro filed a Motion for Expungement pursuant to SDCL 23A-3-27 to expunge the records of his arrest on all seven charges. The State filed a response opposing the motion on the basis that it would not consent under SDCL 23A-3-27(2). In addition, the State indicated that the alleged victims of Taliaferro's actions did not consent either. The Honorable Judge Gene Paul Kean granted the motion as to the five charges on which Taliaferro was

acquitted, but denied the motion as to the two dismissed charges of conspiracy to commit perjury and obstructing law enforcement. Taliaferro now appeals.

Taliaferro raises the following issue for review:

> Whether the trial court erred in denying the expungement of the two dismissed charges.

Mr. Marty J. Jackley, Attorney General, and Mr. Paul S. Swedlund, Assistant Attorney General, Attorneys for Respondent and Appellee State of South Dakota

Mr. Michael J. Butler, Attorney for Petitioner and Appellant Brandon Michael Taliaferro

Pete Lien & Sons, Inc. v. Zellmer

On April 6, 2007, Steve Zellmer, then president of GCC Dacotah, Inc. and vice president of GCC of America, signed and filed with Lawrence County Register of Deeds 14 placer mining claims. (A placer mining claim is filed by a person who discovers minerals on federal land and wants the rights to those minerals.) The claims cover 280 acres of U.S. Forest Service land in Lawrence County. There are 14 separate claims for the land because each claim covers only 20 acres. That same day, Gene Nelson, an employee of GCC, placed one discovery monument containing notices of the 14 claims on the northeast corner of the 280 acres.

On April 20, 2007, Sam Brannan, on behalf of Pete Lien & Sons, Inc., posted notices of location certificates on six placer mining claims covering some of the same 280 acres claimed by Zellmer. The area was staked with wooden posts on all corners of each 20 acre section along with side center posts and discovery monuments. Each discovery post had one notice of location attached to it, as opposed to Zellmer's method of including all notices on one monument on one corner of the entire property.

On February 13, 2012, Sam Brannan made discovery of eight more placer mining claims and marked their boundaries in the same manner as in 2007. These eight claims were also previously claimed by Zellmer. Both Zellmer and Pete Lien & Sons, Inc.,

now claim that they each have rights to the same 280 acres.

Pete Lien & Sons, Inc., filed a complaint in circuit court to quiet title to the land. It argued that Zellmer did not follow federal regulations or state law to mark properly its placer mineral claims. Zellmer alleged that only one monument is needed and that the notice of the 14 claims in that monument gave notice of its rights. Furthermore, Zellmer argued that anyone trying to claim the same land had constructive notice that Zellmer already claimed it because he had filed the claims with the county register of deeds. Therefore, no one else could claim those 280 acres.

The circuit court granted summary judgment to Pete Lien & Sons, Inc. The court found that federal regulations require the location of the placer mining claim to be staked and monumented at the corners of each 20 acre claim. Federal regulations provide that the procedure to stake and monument surface mining claims must also meet any state requirements that are not inconsistent with federal law. The court further found that South Dakota's law, SDCL 45-4-3, requires eight posts to mark the corners and center sides of each claim. The court found that Zellmer did not follow federal or state law to claim the minerals, and therefore Pete Lien & Sons, Inc. had rights to the land.

Zellmer & GCC appeal, raising the following issues:

1. Whether the circuit court erred by holding that Zellmer's claims to the land were invalid.

2. Whether notice of Zellmer's claims precluded Pete Lien & Sons, Inc. claim.

Mr. Larry M. Von Wald and Ms. Jessica L. Larson, Attorneys for Plaintiff and Appellee Pete Lien & Sons, Inc.

Mr. James S. Nelson and Mr. Kyle L. Wiese, Attorneys for Defendants and Appellants Steve Zellmer, Cesar Conde, Sunset Properties, LLC, GCC of America, Inc. and GCC Dacotah, Inc.

State v. Springer

On January 26, 1996, around 10:45 p.m., Shawn Springer and Paul Jensen called for a taxi to pick them up behind the Days Inn in Pierre, South Dakota. The taxi, driven by Michael Hare, arrived at approximately 11:00 p.m. Once in the taxi, Springer and Jensen instructed Hare to take them to Fort Pierre allegedly to go to a party. Springer and Jensen directed Hare to drive down a gravel road. Around this time, the taxi dispatcher called Hare on his cellphone. Hare answered the phone and left the line open during the following events. Hare stopped the taxi on the gravel road and Jensen, with a gun drawn, told Hare to get out of the taxi. Once in front of the taxi, Jensen demanded all of Hare's money, which amounted to just over $36. Jensen shot Hare once in the chest and Hare fell to the ground pleading, "Please God don't kill me!" Jensen executed Hare by firing two more shots into him, one on each side of his head. Hare died instantly.

Jensen grabbed what cash there was and Springer drove the taxi to the main road. A police car met them at the turn and a chase ensued. Springer crashed the taxi into a snowbank, and the police apprehended both suspects. At the time Jensen was fourteen years old and Springer was sixteen years old.

The State charged both Springer and Jensen with a litany of crimes, including first-degree murder, felony murder, kidnapping, assault, and burglary. While initially charged as juveniles, both cases were transferred to adult court. Springer reached a plea

agreement with the State. Springer agreed to plead guilty to kidnapping, which carried a maximum punishment of life imprisonment without parole, and to testify against Jensen. Springer testified against Jensen at Jensen's trial. The jury found Jensen guilty of first-degree murder and sentenced him to life without parole.

At Springer's sentencing hearing in October of 1996, the defense argued that Springer should receive around thirty years in prison because Springer was young, cooperated with the police, and could be rehabilitated. The State argued for a life sentence without parole because the State alleged that the scheme to rob and to shoot the taxi driver originated with Springer. The court sentenced Springer to 261 years in prison. The court told Springer that "in effect this is a life sentence." The court also informed Springer that he would be eligible for parole in thirty-three years on January 27, 2029, when Springer would be forty-nine years old.

After Springer's conviction became final, the United States Supreme Court decided three major cases: *Roper v. Simmons* (2005), *Graham v. Florida* (2010), and *Miller v. Alabama* (2012). *Roper* held that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders under the age of eighteen at the time of their crime. *Graham* held that the Eighth and Fourteenth Amendments forbid the imposition of life imprisonment without parole on juveniles for non-homicide crimes. Lastly, *Miller* merged the two cases and held that the Eighth and Fourteenth Amendments forbid sentencing schemes

that mandate life in prison without parole for juvenile homicide offenders.

In light of these three cases, Springer filed a motion with the circuit court on November 23, 2012, to correct what he believes was an illegal sentence. The State opposed his motion and maintained that Springer's sentence is and was legal.

On June 28, 2013, Judge Kathleen Trandahl conducted a hearing and ruled for the State. Judge Trandahl ruled that the sentence was legal because *Roper*, *Graham*, and *Miller* do not apply to term-of-years sentences where the defendant has the possibility of parole. Springer appeals to this Court.

The issue on appeal is:

> Whether Judge Trandahl erred in rejecting Springer's Motion to Correct the Illegal Sentence.

Mr. Marty J. Jackley, Attorney General, and Ms. Ann C. Meyer, Assistant Attorney General, Attorneys for Plaintiff and Appellee State of South Dakota

Ms. Jamie L. Damon, Attorney for Defendant and Appellant Shawn Cameron Springer

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.