

**Introduction to**

**The South Dakota**

**Supreme Court**



**and**

**Case Summaries for**

**Oral Arguments at the**

**October Term of Court**

**to be held**

**October 5 and October 6, 2021**

**University of South Dakota**

**Vermillion, South Dakota**



*Supreme Court*  
STATE OF SOUTH DAKOTA

*Steven R. Jensen*  
CHIEF JUSTICE

October 5, 2021

To our Guests Observing the  
October Term Arguments 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,

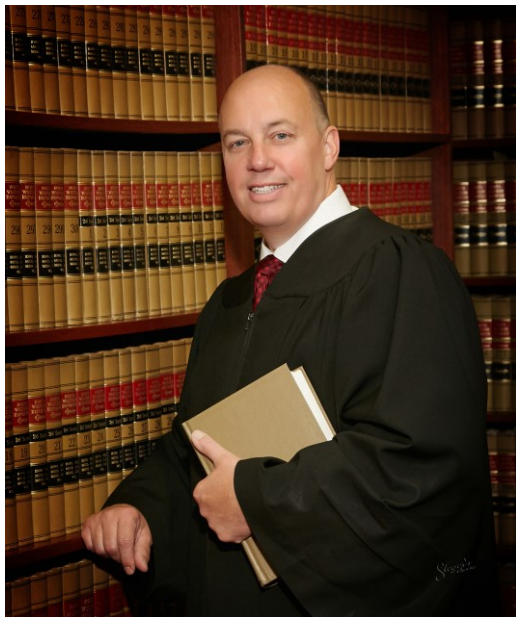
A handwritten signature in blue ink, appearing to read "Steven R. Jensen", is written over a light yellow rectangular background.

Steven R. Jensen  
Chief Justice

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*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 Steven R. Jensen***

Chief Justice Jensen was elected to a 4-year term as Chief Justice by the members of the Supreme Court in 2021. Chief Justice Jensen was appointed to the Supreme Court by Governor Dennis Daugaard and sworn in on November 3, 2017. Chief Justice Jensen represents the Fourth Supreme Court District consisting of Union, Clay, Yankton, Hutchinson, Hanson, Davison, Bon Homme, Douglas, Aurora, Charles Mix, Gregory, McCook, Turner and Lincoln Counties. Chief Justice Jensen grew up on a farm near Wakonda, South Dakota. He received his undergraduate degree from Bethel University in St. Paul, Minnesota in 1985 and his Juris Doctor from the University of South Dakota School of Law in 1988. He clerked for Justice Richard W. Sabers on the South Dakota Supreme Court before entering private practice in 1989 with the Crary Huff Law Firm in Sioux City, Iowa and Dakota Dunes, South Dakota. In 2003, Chief Justice Jensen was appointed as a First Judicial Circuit Judge by former Governor Mike Rounds. He became the Presiding Judge of the First Judicial Circuit in 2011. Chief Justice Jensen served as chair of the Unified Judicial System's Presiding Judges Council, president of the SD Judges Association, and has served on other boards and commissions. In 2009, Chief Justice Jensen was appointed as a Judicial Fellow to the Advanced Science and Technology Adjudication Resource Center in Washington D.C. Chief Justice Jensen and his wife, Sue, have three children.



***Justice Janine M. Kern***

Justice Kern, who was appointed to the Supreme Court on November 25, 2014, by Governor Dennis Daugaard, represents the First Supreme Court District, which includes Custer, Lawrence, Meade and Pennington counties. She received a Bachelor of Science degree in 1982 from Arizona State University and a Juris Doctor degree from the University of Minnesota Law School in 1985. Justice Kern worked in the Attorney General's office from 1985-1996 serving in a variety of capacities including the appellate division, drug prosecution unit and as Director of the Litigation Division. She was appointed a Circuit Court Judge in 1996 in the Seventh Judicial Circuit comprised of Custer, Fall River, Oglala Lakota and Pennington Counties and served 18 years on the trial court bench. She is a member of the American Law Institute, the National Council of Juvenile and Family Court Judges, the State Bar Association, the Pennington County Bar Association, the American Bar Association Fellows and past President of the South Dakota Judges Association. She served on the Council of Juvenile Services from 2004-2013 and on the Federal Advisory Committee on Juvenile Justice from 2004-2008 and on numerous other boards and commissions. Justice Kern and her husband Greg Biegler make their home in the beautiful Black Hills.



### ***Justice Mark E. Salter***

Justice Salter began as a member of the Supreme Court on July 9, 2018, following his appointment by Governor Dennis Daugaard. Justice Salter received a Bachelor of Science degree from South Dakota State University in 1990 and his Juris Doctor degree from the University of South Dakota School of Law in 1993. After clerking for a Minnesota state district court, he served on active duty in the United States Navy until 1997 and later served in the United States Naval Reserve. Justice Salter practiced law with the Sioux Falls firm of Cutler & Donahoe, where he became a partner before leaving in 2004 to return to public service with the United States Attorney's Office for the District of South Dakota. As an Assistant United States Attorney, Justice Salter focused on appellate practice and became the chief of the office's Appellate Division in 2009. He was appointed as a Circuit Court Judge by Governor Daugaard and served in the Second Judicial Circuit from 2013 until his appointment to the Supreme Court in 2018. Justice Salter served as the presiding judge of the Minnehaha County Veterans Treatment Court from its inception in 2016 until 2018. He also serves as an adjunct professor at the University of South Dakota School of Law where he has taught Advanced Criminal Procedure and continues to teach Advanced Appellate Advocacy. Justice Salter represents the Second Supreme Court District which includes Minnehaha County. He and his wife, Sue, have four children.



### ***Justice Patricia J. DeVaney***

Justice DeVaney was appointed to the Supreme Court by Governor Kristi Noem to represent the Third Supreme Court District. She was sworn in on May 23, 2019. Justice DeVaney was born and raised in Hand County and graduated from Polo High School in 1986. She received her Bachelor of Science degree in 1990 from the University of South Dakota, majoring in political science, and received her Juris Doctor degree from the University of Virginia School of Law in 1993. Justice DeVaney began her career of public service as an Assistant Attorney General in the South Dakota Office of Attorney General, where she practiced law from 1993 to 2012. She began her practice in the appellate division, then moved to the litigation division where she spent seventeen years as a trial lawyer, prosecuting major felony offenses as well as representing the State in civil litigation in both state and federal trial and appellate courts. During her tenure at the Attorney General's Office, she also handled administrative matters for state agencies and professional licensing boards. Justice DeVaney was appointed by Governor Dennis Daugaard as a Circuit Judge for the Sixth Judicial Circuit in 2012, where she presided over criminal, civil and juvenile proceedings, heard administrative appeals, and assisted as the second judge for the Sixth Circuit DUI/Drug Court. Justice DeVaney has served as the Secretary-Treasurer, and is currently the President-Elect, of the South Dakota Judges Association. She has also served on various other committees and boards in her professional capacity and in the Pierre community, where she resides with her husband, Fred, and their three children.



### ***Justice Scott P. Myren***

Justice Scott P. Myren, who was sworn in to represent the Fifth Supreme Court District on January 5, 2021, was appointed by Governor Kristi Noem. Justice Myren grew up on his family farm in rural Campbell County and graduated from Mobridge High School in 1982. He received a Bachelor of Science Degree, double majoring in history and political science from the University of South Dakota in 1985. He earned his Juris Doctorate from Rutgers University in 1988, where he was the Research Editor of the Rutgers Law Journal. Justice Myren practiced law in Denver, Colorado, before returning to South Dakota to work as a staff attorney for the South Dakota Supreme Court. He served as an administrative law judge for the Office of Administrative Hearings and magistrate judge for the Sixth Judicial Circuit. In 2003 he was appointed as a circuit judge for the Fifth Judicial Circuit by Governor M. Michael Rounds. He was re-elected to that position by the voters in 2006 and 2014. Chief Justice David Gilbertson appointed him the Presiding Judge for the Fifth Judicial Circuit in 2014. Justice Myren served as chair of the Unified Judicial System's Presiding Judges' Council and president of the South Dakota Judges' Association. He served on numerous committees, including the Court Improvement Program and Juvenile Detention Alternative Initiative, which he chaired. He was selected as a Judicial Fellow to the Advanced Science and Technology Adjudication Resource Center in Washington D.C., in 2009. He served on Governor Dugaard's South Dakota Criminal Justice Initiative workgroup and Juvenile Justice Reinvestment Initiative workgroup. He supervised the rural and urban pilot programs, which led to the implementation of Hope Probation across South Dakota. He served as Drug Court and DUI court judge for Brown County. He and his wife, Dr. Virginia Trexler-Myren, have two daughters. The Fifth Supreme Court District includes Harding, Butte, Perkins, Corson, Ziebach, Dewey, Campbell, Walworth, Potter, McPherson, Edmunds, Faulk, Brown, Spink, Marshall, Day, Clark, Coddington, Hamlin, Roberts, Grant, and Deuel counties.





### ***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.



### ***2021-2022 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 left to right, Keely Kleven (Supreme Court Law Clerk), Samuel Brieze (Justice Myren), Thomas Schartz (Justice Salter), Courtney Buck (Chief Justice Jensen), Gabrielle Metzger (Justice Kern), and Jennifer Williams (Justice DeVaney).

## **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.

Has 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 or her request, on issues involving executive power.

### **Circuit Court**

Circuit Court services are available in each county seat.

Counties are grouped into seven circuits, served by forty-four judges elected from within their circuits for eight-year terms. Vacancies are 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.

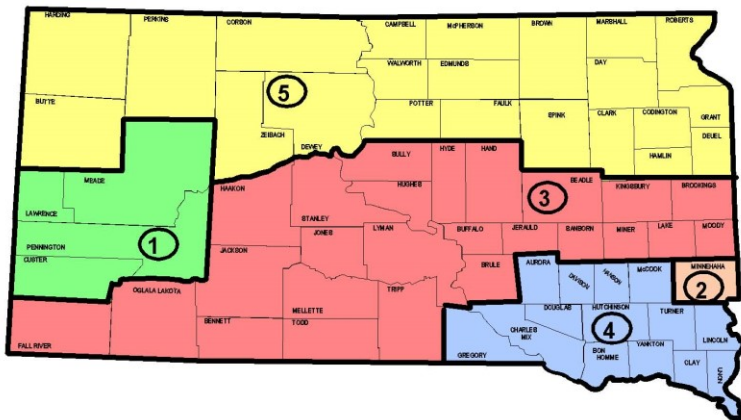
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench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

Chief Justice Jensen was appointed in 2017 from District Four, Justice Kern was appointed in 2014 from District One, Justice Salter was appointed in 2018 from District Two, Justice DeVaney was appointed in 2019 from District Three and Justice Myren was appointed in 2021 from District Five.

South Dakota Supreme Court Appointment Districts  
Effective January 23, 2012



**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 2021 Term**

Seven 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.



**Estate of Smeenk**

Denise L. Schipke-Smeenk and Neil Smeenk were married in 2000. This was the second marriage for Denise and Neil, and each had two children from their previous marriages. When Denise and Neil were married, Neil's primary asset was his family ranch that he acquired in 1989. Neil sold the family ranch pursuant to a contract for deed in 2011.

In 2017, Denise and Neil executed mutual wills and an agreement that the parties would not revoke or amend their wills without the other party's consent. The 2017 mutual wills provided that the estates were to go the surviving spouse, and upon the death of the surviving spouse, the estate would be split with 50% to Denise's children and 50% to Neil's children. Neil's will appointed Denise as the personal representative of his estate. On this same day, Neil also assigned one-half interest in the proceeds from the contract for deed for the ranch to Denise.

Neil and Denise's relationship began to deteriorate in the years following the 2017 will. In April 2019, their relationship hit a breaking point and Neil commenced a divorce action. Denise hired a divorce attorney, but she never filed an answer to the complaint. Neil also executed a new will (2019 Will) without seeking Denise's approval. The 2019 Will revoked all prior wills, expressly disinherited Denise, and appointed his son, Ryan, as the personal representative of his estate.

Neil died in June 2019. After Neil's death, the circuit court ordered formal probate of his 2019 Will and appointed Denise as the personal representative. Shortly thereafter, Denise began sending creditor notices pursuant to SDCL 29A-3-801.

On April 8, 2020, Denise, as personal representative, filed a motion asking the circuit court to order specific

performance of the agreement not to revoke the 2017 will and distribute Neil's estate in accordance with the 2017 will. The circuit court denied Denise's motion, holding that her creditor's claim was time-barred, not properly presented, and she was not entitled to specific performance of the agreement.

Denise, individually and in her capacity as personal representative, appeals the denial of her motion and raises the following issues:

1. Whether the circuit court erred by concluding that Denise's creditor claim was time-barred under SDCL 29A-3-801 and that she did not properly present her creditor claim under SDCL 29A-3-804.
2. Whether the circuit court abused its discretion by concluding that Denise failed to establish that she had an inadequate remedy at law and that she was not entitled to specific performance under SDCL 21-9-3.

Mr. Talbot J. Wieczorek and Ms. Katelyn A. Cook, Attorneys  
for Appellant Denise L. Schipke-Smeenck

Mr. John W. Burke and Ms. Kimberly S. Pehrson, Attorneys for  
Appellee Ryan Smeenck

**State v. Grassrope**

On March 7, 2020, Officer Conley received a call from dispatch at 2:46:02 a.m. informing him that a six-year-old child had called 911. In the initial call, the child gave the phone to his mother, and when dispatch asked the mother if there was an emergency, she hung up the phone. When dispatch called back, the child answered and said that “daddy was being mean to mom.” The child also informed dispatch that his dad was leaving to go to his car. Officer Conley, believing a domestic dispute might be occurring, responded to the apartment building from which the call had been placed. On his way to the apartment, dispatch further advised that according to the child, “dad was talking back and mom didn’t like it.”

Officer Conley arrived at the apartment building at 2:48:20 a.m. and saw a tan Chevy Malibu leaving the parking lot. He testified that he decided to follow the vehicle because he had very limited information and was not sure if the driver was a victim or the suspect, or if someone had been hurt. At 2:48:40 a.m., dispatch provided an update stating that the father’s vehicle was silver. Officer Conley initiated a traffic stop at 2:49:05 a.m. Daniel Grassrope was the only person in the vehicle. While speaking to Grassrope, Officer Conley testified that he immediately detected a strong odor of intoxicants. After further investigation, he placed Grassrope under arrest for driving under the influence (DUI) and driving while suspended.

Before trial, Grassrope made a motion to suppress all evidence obtained during the stop. Grassrope claimed his Fourth Amendment right against unreasonable search and seizure was violated when Officer Conley stopped his vehicle without a reasonable and articulable suspicion to initiate the stop. In response, the State asserted that Officer Conley had an objectively reasonable suspicion that Grassrope had engaged in

criminal activity. In the alternative, the State argued that Officer Conley's actions were lawful under the community caretaker doctrine. The circuit court granted Grassrope's motion.

The State appeals the following issue:

Whether the circuit court erred in concluding that the community caretaker doctrine did not apply to the facts of this case.

Mr. Daniel Haggard, Minnehaha County State's Attorney, Mr. Nicholas Michels, and Mr. Drew W. DeGroot, Deputy State's Attorneys, Attorneys for Appellant State of South Dakota

Mr. Christopher Miles, Attorney for Appellee Daniel Grassrope

**Ehlebracht v. Crowned Ridge Wind II, LLC and South  
Dakota Public Utilities Commission**

On July 9, 2019, Crowned Ridge Wind II, LLC, (Crowned Ridge) applied to the South Dakota Public Utilities Commission (PUC) for a permit to construct a 425-million-dollar wind turbine project in Deuel County near Goodwin. The proposed project contemplated constructing and operating 132 wind turbines with the capacity to produce 300.6 megawatts of wind-generated electricity.

Because of the size of the proposed project, Crowned Ridge needed approval from the PUC before beginning construction. The PUC conducted a series of hearings to receive public comment on Crowned Ridge's proposed project and determine the merits of its application. As part of that process, the PUC granted the requests of several individuals to appear as intervening parties. The intervenors include Garry Ehlebracht, Steven Greber, Mary Greber, Richard Rall, Amy Rall, and Laretta Kranz.

The Intervenors opposed the construction of the proposed Crowned Ridge project at the hearings, alleging that the wind turbines would produce unacceptable levels of ambient noise and would create a phenomenon known as "shadow flicker" whereby the rotation of the turbine's blades causes momentary disruptions of natural sunlight in and around their homes. Though the effects of noise and shadow flicker were seemingly included within easements purchased by Crowned Ridge from other area landowners who agreed to allow turbine locations on their land, the Intervenors argued that they were not participating in the project and would be unfairly impacted by the noise and shadow flicker.

After hearing testimony from the parties and receiving evidence, including expert opinions regarding the impact of the proposed project, the PUC approved Crowned Ridge's application and issued a permit allowing construction, subject to certain conditions. In its findings of facts and conclusions of law, the PUC determined that the noise and shadow flicker standards they set as a condition to granting the permit would not substantially impair the health, safety, or welfare of the nearby residents.

The Intervenor's appealed the issuance of the permit to the circuit court alleging: (1) the PUC abused its discretion because its approval did not correspond to any PUC standards for the maximum amount of noise and shadow flicker allowed for wind turbine facilities; (2) the PUC's approval of the permit was not authorized because it effectively granted an easement concerning the Intervenor's property, which is impacted by levels of noise and shadow flicker effects; (3) the PUC's approval of the permit constituted a taking under principles of due process for which the Intervenor's were entitled to just compensation; and (4) setting maximum standards for light and shadow flicker in the permit conditions foreclosed potential future claims by the Intervenor's under nuisance law.

The circuit court affirmed the PUC's issuance of the permit, concluding that the PUC was not required by statute to promulgate noise and light standards, that the PUC, having no authority as an administrative body to grant easements, did not grant Crowned Ridge a de facto easement when it issued the permit, that the Intervenor's' takings claim was unsupported by legal authorities, and that the Intervenor's' nuisance claim was not ripe.

The Intervenors raise the following issues on appeal:

1. Whether the PUC abused its discretion when it issued the permit without promulgating standards to establish maximum levels of noise and shadow flicker for wind turbine facility construction.
2. Whether the circuit court erred when it determined the issuance of the permit did not grant a de facto easement to Crowned Ridge over the Intervenor's land.
3. Whether the circuit court erred when it determined the issuance of the permit did not constitute a taking.
4. Whether the circuit court erred when it determined the nuisance claim was not ripe.

Mr. A.J. Swanson, Attorney for Appellant and Intervenor

Mr. Miles F. Schumacher and Mr. Brian J. Murphy, Attorneys  
for Appellee Crowned Ridge Wind II, LLC

Ms. Kristen N. Edwards and Ms. Amanda M. Reiss, Special  
Assistant Attorneys General, Attorneys for Appellee  
South Dakota Public Utilities Commission

**Endres v. Endres**

James (Jim) Endres created an irrevocable trust, the Endres Family Trust (the Trust), through a Declaration of Trust dated March 12, 1992. Jim's seven children were the beneficiaries of the Trust: Gregory Endres, Donald Endres, Ruth Parkhurst, Carol Waters, Judy Endres, Terry Endres, and Janet Endres. Jim was initially the Trust's only trustee. The Trust owned roughly 1,900 acres of farmland across three counties and had two sources of income: 1) rental income from tenants farming the Trust's land; and 2) payments to the Trust under the United States Department of Agriculture's (USDA) Conservation Reserve Program (CRP).

The Trust was modified in September 2009 to add Jim's wife, Maxine Endres, as a co-trustee. The Trust was again modified in May 2016 due to Jim's failing health, and he and Maxine were removed as co-trustees. Jim's seven children were designated co-trustees.

Terry Endres commenced litigation relating to the Trust in July 2017. Terry petitioned for court supervision of the Trust and to remove Donald, Gregory, Carol, Judy, and Ruth (majority faction) as co-trustees for breach of trust. Terry alleged, among other things, the majority faction failed to negotiate or declare invalid below market leases with Gregory and that the majority faction knew of misconduct amongst co-trustees but elected not to act. Specifically, Terry claimed Gregory, at the direction of Donald, improperly placed the CRP payments in his name and that Gregory farmed non-irrigated Trust land without paying rent and in violation of his lease. Various counterclaims and crossclaims followed.



Litigation spanned three years during which the CRP payments were directed back to the Trust and Gregory's leases with the Trust were terminated. The Trust entered new lease agreements at fair market value, and the rental income received by the Trust more than doubled. In May 2020, the Trust, and all co-trustees, executed a global settlement. Terry reserved the right to present his application for attorney fees to the court, which totaled approximately \$400,000.

Terry claimed he was entitled to attorney fees under two theories. First, Terry argued he was automatically entitled to attorney fees as a co-trustee under SDCL 55-3-13. Terry argued he "actually and properly incurred" the attorney fees and that his actions benefited the Trust. Second, Terry argued he was entitled to attorney fees as a beneficiary under SDCL 15-17-38. The majority faction opposed Terry's motion for attorney fees under both theories and relied upon Section 5.1.1.3 of the 2016 Trust modification, which required co-trustee approval to obtain legal services. The majority faction argued Terry did not have approval and that his actions did not benefit the Trust.

The circuit court determined Terry could not recover attorney fees under SDCL 55-3-13 as Terry acted without the majority's approval and because his expenses were not of actual benefit to the Trust. The court also held that Terry could not recover attorney fees as a beneficiary as there was no material benefit to the Trust.

Terry appeals, raising one issue which we restate as follows:

Whether the circuit court abused its discretion in denying Terry's application for attorney fees as a co-trustee under SDCL 55-3-13 and as a beneficiary under SDCL 15-17-38.

Ms. Pamela R. Reiter, Ms. Shannon R. Falon, and Mr. Ronald A. Parsons, Jr., Attorneys for Appellant Terry Endres

Mr. Thomas Welk and Mr. Jason R. Sutton, Attorneys for Appellees Donald Endres, Carol Waters, Judy Endres, and Ruth Parkhurst

Mr. Alex Hagen, Attorney for Appellee Janet Endres

Mr. Lee Schoenbeck and Mr. Joe Erickson, Attorneys for Appellee Gregory Endres

**Burgi v. East Winds Court, Inc.**

On September 3, 2017, Teresa Burgi’s minor son, K.B., was attacked by a dog while playing near their home in Yankton. K.B. was twelve years old at the time and had walked over to a neighbor’s trailer home where he and several other neighborhood children began playing basketball. At some point during their game, the basketball bounced into the neighbor’s lot and came to rest near where the neighbor’s dog was chained. K.B. attempted to retrieve the stray ball and was bitten in the face by the dog several times. As a result of the attack, K.B. suffered severe facial injuries that required major corrective surgery.

The dog, a pit bull named Marco, was owned by Teresa’s neighbor, Ronald Pasman. Pasman had adopted the dog from his daughter after she realized Marco’s imposing size made him unsuited for life in her one-bedroom apartment. On the day Marco arrived, Pasman affixed two “Beware of Dog” signs to the front of his trailer home.

According to Pasman, Marco spent much of his time within the confines of Pasman’s single-wide trailer home. However, Pasman occasionally allowed Marco outside, securing him to a body harness attached to a chain, which in turn was fastened to the front of Pasman’s trailer. Although Pasman stated he decided to adopt Marco primarily for personal protection, Pasman reported that Marco had never exhibited aggressive tendencies prior to the attack and was an otherwise well-tempered animal. However, at least one of Pasman’s neighbors disputed this claim, alleging that on several prior occasions Marco had strained at his chain and appeared to be attempting to attack her while she mowed her lawn.

Pasman and Teresa each rented mobile home lots from East Winds Court, Inc., which owns and manages the East

Winds Court trailer park. The terms of Pasman's lease with East Winds prohibited him from keeping vicious pets on the premises and stated that any violations of the lease terms would allow East Winds to terminate the lease.

Acting as K.B.'s guardian ad litem, Teresa commenced the current action against East Winds. As it relates to this appeal, Teresa alleges East Winds knew of Marco's dangerous propensities and acted negligently by allowing Pasman to keep Marco on his leased property in violation of his lease terms. The circuit court granted East Winds' motion for summary judgment, determining that East Winds did not possess knowledge of Marco's alleged dangerous propensities and therefore owed no duty to K.B. to prevent the attack.

Teresa has appealed and raises the following issue:

Whether the circuit court erred in granting summary judgment in favor of East Winds.

Mr. David J. King and Mr. Kirk D. Rallis, Attorneys for Appellant Teresa Burgi, individually, and as guardian ad litem for K.B.

Mr. Mark J. Arndt and Mr. Ryan W.W. Redd, Attorneys for Appellee East Winds Court, Inc.

**Peska Properties, Inc. v. Northern Rental Corporation**

Northern Rental Corporation (Northern) entered into a lease agreement with Peska Properties, Inc. (Peska Properties) for retail space in Sioux Falls, South Dakota. The lease was from June 1, 2012 to May 31, 2022. As part of the lease, Peska Properties loaned Northern \$50,000 to complete their buildout of the retail space, which was to be paid back as additional rent each month. Under the lease terms, if either party defaulted on the lease, the “prevailing party” in any proceeding would be entitled to attorneys’ fees and other costs.

Northern operated an Aaron’s store in the retail space until March 2017, when the store closed. After the store closed, Northern began looking for another tenant to sublease the property. During this time, Northern continued to make their payments under the lease. Northern received an offer in July 2019 from Mills Aftermarket Accessories, Inc. (Radco). This offer involved a lease term longer than what remained on Northern’s lease resulting in Peska Properties becoming involved in the negotiations. While negotiations between the parties were ongoing, Northern notified Peska Properties that they would stop making payments under their lease on July 31, 2019. Following Northern’s default, Peska Properties leased the retail space to Radco for seven years. The terms of the Radco lease included Peska Properties paying Radco \$25,000 for their buildout and rent being \$8.43 per square foot for the remainder of Northern’s lease and \$11.00 per square foot for the extended term of Radco’s lease.

Peska Properties brought suit against Northern for breach of contract and sought attorneys’ fees and costs. Northern admitted to breaching their lease agreement but denied the extent and nature of the damages claimed. At a court trial, Peska Properties presented evidence and argued that the circuit

court should determine their damages by using the difference between the rent amount Northern was supposed to pay for the remainder of their lease and the amount of rent Radco would pay during that time. Further, Peska Properties sought the amount due on Northern's buildout loan. Peska Properties also argued that Northern should repay them the \$25,000 paid to Radco for its buildout because Peska Properties would not have needed to expend that money but for Northern's breach. Northern presented evidence and argued that the circuit court should determine the damages by using a "blended rate," based on the average price per square foot Radco was paying under their lease. Northern argued this was appropriate because the circumstances of the breach caused Peska Properties to receive benefits and detriments. Additionally, Northern disputed being responsible for the \$25,000 Radco received because Radco was using some of the alterations Northern made to the property, which benefited Peska Properties by not paying more in buildout for a new tenant.

The circuit court concluded that the most reasonable manner to calculate damages in the case was by using a "blended rate" because it found the discrepancy between Radco paying \$8.43 per square foot for Northern's remaining lease term and then paying \$11.00 per square foot for their extended term to be unreasonable. The blended rate was based on the average per square foot cost paid by the new tenant over the entire term of the new lease. Further, the circuit court determined that Northern should pay a proportionate share of the \$25,000 buildout paid for Radco. This ratio was based on the proportion of the new lease that corresponded to the remaining amount of Northern's lease. Also, the circuit court concluded that there was no prevailing party under the lease terms and denied awarding attorneys' fees and costs.

Peska Properties appeals raising the following issues:

1. Whether the circuit court erred in determining the damages Peska Properties incurred under the lease.
2. Whether the circuit court abused its discretion in determining that Peska Properties was not the prevailing party and not awarding them attorneys' fees or costs.

Ms. Kasey L. Olivier, Ms. Ashley Miles Holtz, and Mr. Thomas J. Nicholson, Attorneys for Appellant Peska Properties, Inc.

Mr. Kent R. Cutler and Ms. Kimberly R. Wassink, Attorneys for Appellee Northern Rental Corp.

**Plains Commerce Bank v. Beck**

In 1999, Gary and Betty Beck created B&B Farms Trust. Gary and Betty put all their farmland into the trust, which was appraised at approximately \$3,659,000 in 2015. Gary and Betty are the primary beneficiaries of the trust, and their three children, Matthew Beck, Brian Beck, and Jamie Moeckly, are secondary beneficiaries. Matthew, their youngest child, is also the trustee for the trust.

The trust is an irrevocable spendthrift trust. Pursuant to the terms of the trust, Gary and Betty as primary beneficiaries were to receive the net trust income until their death. After their deaths, Matthew, Brian, and Jamie were to receive one-third each of the land in the trust.

In 2015, Matthew wanted to take out a personal loan from Plains Commerce Bank for \$1,855,000, but he didn't own sufficient personal property to collateralize a loan of that size. Plains Commerce Bank and Matthew agreed to use the land in B&B Farms Trust in the amount of \$800,000 and Matthew's personal property as collateral for the loan. This meant that Matthew gave Plains Commerce Bank an \$800,000 mortgage on the trust land.

Before accepting the mortgage, Plains Commerce Bank required Matthew to obtain written consent for the mortgage from Gary, Betty, Brian, and Jamie. The attorney who Gary and Betty hired to create their trust prepared the consent forms for the mortgage and Gary, Betty, Brian, and Jamie all signed the consent forms. Plains Commerce Bank accepted the consents and gave Matthew a personal loan for \$1,855,000.



In January 2018, Matthew defaulted on his loan payments and Plains Commerce Bank started an action to foreclose on the property he had mortgaged to get the loan. Jamie petitioned the court to intervene in the case on behalf of the trust. Jamie argued that Matthew, as trustee, engaged in improper self-dealing by mortgaging the trust property. The court granted Jamie's request to intervene for the trust.

Plains Commerce Bank has foreclosed on all of the personal real estate and property that Matthew pledged as collateral for the loan. Because Matthew still owes Plains Commerce Bank significant sums, the Bank seeks foreclosure on \$800,000 worth of the trust's property.

Jamie moved the court for summary judgment arguing that the mortgage on the trust's property was void and unenforceable because Matthew, as trustee, engaged in improper acts of self-dealing and that the mortgage was prohibited by a spendthrift provision in the trust. The court granted Jamie's motion for summary judgment and later ruled that Plains Commerce Bank had to pay Jamie's attorneys' fees from the case.

Plains Commerce Bank raises the following issues on appeal:

1. Whether the signed consents to mortgage provide Matthew, in his capacity as trustee, authority to mortgage trust property.
2. Could Plains Commerce rely only on the Certificate of Trust in lieu of the full Trust Agreement to accept the mortgage on trust property.

3. Did § 6.2 of the Trust Agreement give Matthew authority to mortgage trust property with the primary beneficiaries' consent.
4. Did § 4.1 of the Trust Agreement give Matthew authority to mortgage trust property when the loan was partially used to satisfy debt that existed when the trust was created.
5. Did the signed consents to mortgage alter or amend the Trust Agreement.
6. Did the court err in awarding attorneys' fees to Jamie.

Mr. Reed Rasmussen, Mr. Roger W. Damgaard, and Mr. Jordan J. Feist, Attorneys for Appellant Plains Commerce Bank

Mr. Kenneth L. Gosch and Mr. Joshua G. Wurgler, Attorneys for Appellee and Intervenor Jamie Moeckly

## **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.

## NOTES