Introduction to

The South Dakota Supreme Court

and

Case Summaries for Oral Arguments at the March Term of the Court

to be held

March 20 through March 22, 2006

University of South Dakota

Vermillion, South Dakota

Supreme Court
STATE OF SOUTH DAKOTA

David Gilbertson
CHIEF JUSTICE

March 20, 2006

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

Ladies and Gentlemen:

Your Supreme Court welcomes you to our March term.

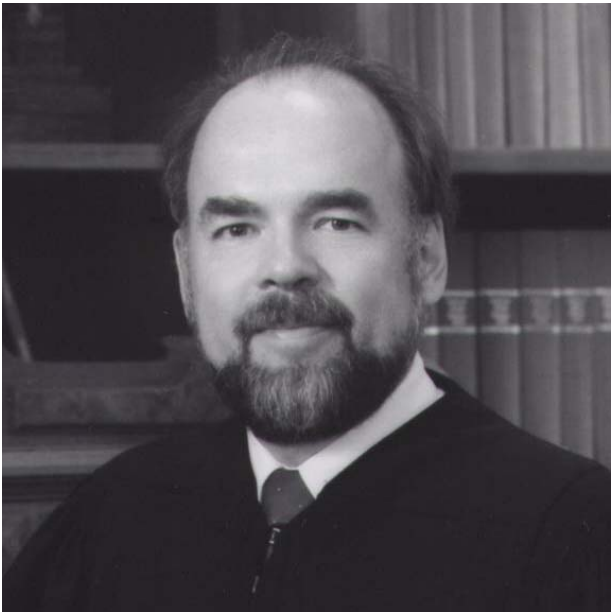
This brochure has been prepared as part of the continuing effort of the Supreme Court to promote increased public knowledge of the state judicial system. We hope it will assist you in understanding some of the functions of the Supreme Court, and make your observation of the Court hearings a more valuable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

Sincerely yours,

David Gilbertson
Chief Justice

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

Table of Contents



Chief Justice David Gilbertson

Chief Justice Gilbertson, a native of Sisseton, was elected to a 4-year term as Chief Justice by the members of the Supreme Court in September 2001 and was re-elected to a second 4-year term as Chief Justice by the members of the Supreme Court in June 2005. He was appointed to the Supreme Court in April 1995 to represent the Fifth Supreme Court District and was retained by the voters in the 1998 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 Roberts County Deputy State's Attorney and as City Attorney for the City of Sisseton. He is Past President of the South Dakota Judges Association; and is a member of the Glacial Lakes Bar Association, the Brown County Bar Association and the South Dakota Bar Association. He is a member of the Conference of Chief Justices and chairs its Committee on Tribal/State Relations. He is also a member of the Board of Directors of the National Conference of Chief Justices. He serves on the Judicial-Bar Liaison Committee of the State Bar Association and has served as a Court Counselor at South Dakota Boys State since 1995. Born October 29, 1949, he and his wife Deborah, have four children.

Justice Richard W. Sabers

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

Justice John K. Konenkamp

Justice Konenkamp, born October 20, 1944, represents the First Supreme Court District, which includes Custer, Fall River, Lawrence, Meade and Pennington counties. After serving in the United States Navy, he attended the University of South Dakota School of Law, graduating in 1974. He practiced in Rapid City as a Deputy States Attorney until 1977. He then engaged in private practice until 1984 when he was appointed a Circuit Judge. In May 1988, he became Presiding Judge of the Seventh Circuit. He was appointed to the Supreme Court in 1994 after ten years on the trial bench and was retained by the voters in the 1998 general election. He is a member of the State Bar of South Dakota, American Legion, Pennington County Bar Association, and a Director in the American Judicature Society. Justice Konenkamp and his wife, Geri, are former foster parents for the Department of Social Services. Justice Konenkamp serves on a number of boards advancing the improvement of the legal system and the protection of children. Justice Konenkamp and his wife have two adult children, Kathryn and Matthew.

Justice Steven L. Zinter

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

Justice Judith K. Meierhenry

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

Clerk of the Supreme Court

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

Supreme Court Law Clerks

Law Clerks are recent law school graduates employed by the Court for a one-year appointment to assist the justices with research and writing of opinions on the cases under consideration. In the photograph above, from the left, are Meghan Dilges (Supreme Court Law Clerk), Dylan Wilde (Justice Zinter), Andy Damgaard (Justice Sabers), Marie Ruettgers (Chief Justice Gilbertson), Jennifer Williams (Justice Konenkamp), and Rochelle Cundy (Justice Meierhenry).

Summary of Jurisdictions for the South Dakota Court System

Supreme Court

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

Court terms held throughout the calendar year.

Has appellate jurisdiction over circuit court decisions.

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

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

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

Circuit Court

Circuit Court services available in each county seat.

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

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

The Supreme Court Process

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

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

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

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

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

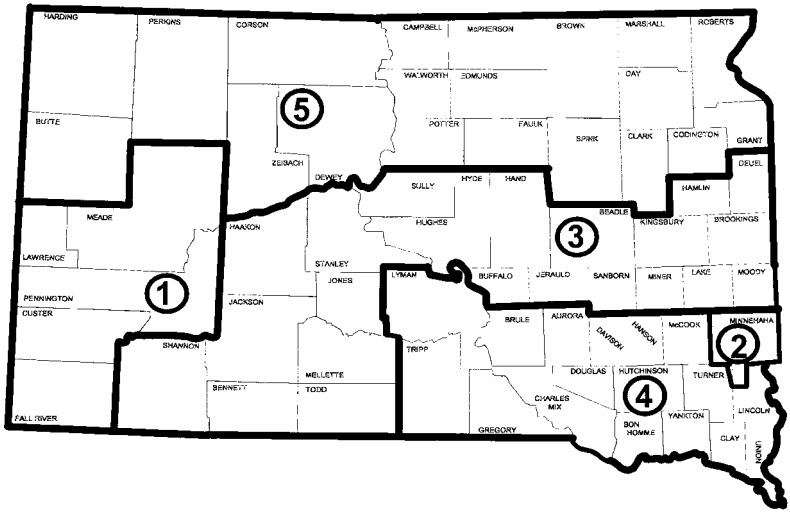
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench to assist in the decision-making process. Such an appointment may occur when a justice disqualifies himself because he might have, or appear 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 he makes himself 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. Justice Sabers was appointed in 1986 from District Two. Chief Justice Gilbertson was appointed in 1995 from District Five. Each of these justices were retained in the November 1998 general election. Justice Zinter was appointed in 2002 from District Three and will stand for retention election in 2006. Justice Meierhenry was appointed in 2002 from District Four and will also stand for retention election in 2006.

South Dakota Supreme Court Appointment Districts



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 insure that the lawyers presenting argument before the Court will not be unduly distracted and that the proper respect for the judiciary will be maintained.

Your cooperation is appreciated.

DO

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

DO NOT

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

Supreme Court of South Dakota
March 2006 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 considers 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.

John Doe VI v. Presbytery of Chicago

The Presbytery of Chicago is a corporation located in Chicago, Illinois. Presbytery owned and operated the San Marcos Youth Ministry in Chicago. In 1988, Presbytery employed Douglas Mason as the pastor of the Youth Ministry. Among other things, the Youth Ministry provided counseling and sponsored field trips for children.

John Doe VI alleged that on one field trip to Sisseton, South Dakota, Mason sexually abused him. Doe brought an action against Presbytery in Roberts County, South Dakota, alleging negligent hiring, supervision, and retention of Mason. Presbytery moved to dismiss based on a lack of personal jurisdiction and on the doctrine of *forum non conveniens*. After a hearing, the trial court denied Presbytery's motion to dismiss.

On appeal, Presbytery argues that all of the alleged negligent acts are employment decisions were made in Illinois and that Presbytery did not have sufficient contacts with South Dakota to satisfy due process. In response, Doe argues that Presbytery committed the tort of negligent supervision in South Dakota and that Presbytery's numerous field trips and purchases in South Dakota establish sufficient contacts with the state.

Presbytery also argues that South Dakota is not a convenient forum for the suit because both of the parties and nearly all of the evidence and witnesses are located in Illinois. Presbytery further points out that Doe previously filed a similar suit in Illinois, which is still pending. Presbytery ultimately contends that private and public interest factors do not warrant a proceeding in this state. Doe, however, responds that Presbytery's arguments do not overcome the presumption favoring a plaintiff's choice of

forum. Doe asserts that there is physical evidence in South Dakota and that potential eyewitnesses are likely citizens in the state. Doe submits that one primary witness, who was employed by Presbytery and knew about the sexual abuse, is now located in South Dakota. Doe finally contends that he should be permitted to proceed with both suits because the Illinois action may be dismissed due to that state's shorter statute of limitations.

These arguments raise the following issues:

1. Whether South Dakota has personal jurisdiction over Presbytery.

2. Whether the case should be dismissed under the doctrine of *forum non conveniens*.

3. Whether the case should be dismissed because an almost identical lawsuit involving the same parties was previously filed in Illinois.

Mr. Mark W. Haigh, Mr. Mitchell Peterson, Attorneys for Appellant Presbytery of Chicago

Mr. Paul I, Hinderaker, Mr. Devon C. Bruce, Attorneys for Appellee John Doe VI

Grajczyk v. Tasca

Jolene Grajczyk (Mother) and John Tasca (Father) are the biological parents of Joshua (Son). Mother, formally a resident of Texas, and Father, formally a resident of Florida, met in Mississippi while they were in the Air Force. Although there was a relationship between Mother and Father, they never married.

Son was conceived and born in Mississippi. In 1997, Mother and Son moved to South Dakota where they currently reside. Father resides in Indiana. Father has had some recent contact with Son, but Father has never been physically present in South Dakota.

As Son was approaching his eighteenth birthday, Mother commenced this action to establish paternity and entitlement to child support. Mother attempted to commence this action by providing the sheriff of Bartholomew County, Indiana, with a summons and complaint to serve on Father. At the time the sheriff served the summons and complaint, Father was allegedly living with his girlfriend and her two children. The sheriff's return of service indicates that the summons and complaint were "left with girlfriend." Father subsequently obtained a South Dakota attorney who filed a notice of appearance. A little over a month later, Father retained a new attorney who filed an answer asserting lack of "jurisdiction." However, the only specific jurisdictional defect mentioned was the failure to serve the summons upon Father. Approximately one week later, Father's attorney filed a motion to dismiss. This motion noted that Father was appearing specially to dismiss, again arguing a "lack of jurisdiction." Further details of the alleged jurisdictional defect were not disclosed. In subsequent briefing, Father the first time made the specific argument that the court lacked personal jurisdiction over a

nonresident putative father who has failed to pay child support.

The trial court held that neither the first lawyer's notice of appearance nor the second lawyer's answer or motion waived Father's right to challenge the sufficiency of service and personal jurisdiction. However, the trial court concluded that service of process was insufficient because the sheriff did not know who he served. The court further held that, notwithstanding the state's long arm jurisdiction statutes, the court did not have personal jurisdiction over Father because he did not have sufficient contacts with South Dakota to satisfy due process. Mother appeals, raising the following issues:

1. Whether Father waived his right to challenge the sufficiency of service of process and personal jurisdiction when his first attorney filed a notice of appearance without objecting to jurisdiction.

2. Whether Father waived his right to challenge the sufficiency of service and personal jurisdiction because the language in the answer and motion to dismiss was not sufficiently specific.

3. Whether the trial court erred in holding that the service of the summons and complaint was insufficient under South Dakota's statutes including:

   a) SDCL 15-6-4(e), which provides that "service may be made by leaving a copy at his dwelling house in the presence of a member of

his family over the age of fourteen years or if the defendant resides in the family of another, with a member of such age of the family with which he resides," and

b) SDCL 15-6-4(g), which requires that proof of service of the summons and complaint "must state the time, place, and manner of such service," and if served by the sheriff, such proof must be made by the sheriff's certificate.

4. Whether the trial court erred in holding that it did not have personal jurisdiction over a nonresident father to determine paternity and support under South Dakota's long arm statutes, including the Uniform Interstate Family Support Act. In deciding this issue, Mother asks this Court to conclude that its prior decision in *State ex rel. Murphy v. Basile*, 516 NW2d 663 (SD 1994) was wrongly decided.

Mr. Gregory P. Grajczyk, Attorney for Appellant Jolene Grajczyk

Mr. Chad C. Nelson, Attorney for Appellee John G. Tasca

Midcom, Inc. v. Oehlerking

This is an action to enforce a covenant not to compete brought by an employer, Midcom, Inc., against a former employee, Anthony Oehlerking. Midcom is in the business of designing, manufacturing, and selling transformers for use in the telecommunications industry. In 1994, Oehlerking began working for Midcom as a design engineer. He signed an agreement with the company that prohibited him from working for any other company that competes directly or indirectly with Midcom, anywhere it is in business, for at least two years after leaving the job. However, there was a clause that voided the restriction in the event Oehlerking was terminated by Midcom without cause. Over the course of ten years Oehlerking received multiple promotions and pay raises, but he also suffered one demotion and some loss of pay.

In 2004, Oehlerking resigned and accepted employment with a company that competes directly with Midcom. Midcom sought to enforce the covenant against Oehlerking, as it recognized him to be a key employee with knowledge of sensitive company information. Oehlerking, however, claimed that the covenant was void because he was constructively discharged. According to Oehlerking, Midcom gave him no choice but to resign by materially changing all aspects of his employment, so much that it created an intolerable work environment. Oehlerking also contended that the geographical limitation in the covenant was too broad to be applied against him. Lastly, he claimed that Midcom waived its right to enforce the covenant because it failed to seek enforcement of the same agreement against at least three other employees.

The trial court considered Oehlerking's constructive discharge argument, but held that demotion and loss of earnings did not amount to such. The court further held that Midcom did not waive its right to enforce the covenant, and the restrictions in the covenant were reasonable. After entering a judgment for Midcom, the court also awarded Midcom $18,360.05 in attorney's fees.

Oehlerking appeals raising the following two issues:

1. Did the trial court err in enforcing the covenant not to compete?

2. Did the trial court err in its award of attorney's fees?

Midcom raises one issue:

Does this Court have jurisdiction to address Oehlerking's appeal on the issue of the enforceability of the covenant not to compete?

Mr. Courtney R. Clayborne, Mr. Michael C. Loos, Attorneys for Appellant Anthony Oehlerking

Mr. Roberto A. Lange, Attorney for Appellee Midcom, Inc.

Dakota, Minnesota and Eastern Railroad Corporation v. Acuity

Julian Olson was a track inspector for Dakota, Minnesota and Eastern Railroad Corporation (DM&E) when he was severely injured in a vehicular accident on July 29, 1998. At the time of that accident DM&E had a business automobile insurance policy with Acuity Insurance Company (Acuity). Olson filed suit against DM&E under the Federal Employer's Liability Act (FELA) alleging DM&E negligently maintained the vehicle involved in this accident. DM&E eventually settled that lawsuit with Olson.

Before that lawsuit was settled, DM&E filed a declaratory action against Acuity seeking a determination that Acuity was obligated to defend and provide coverage for Olson's FELA action. In the declaratory action this Court determined that Acuity was not obligated to defend or indemnify DM&E in the FELA suit. This was based on an employee indemnification and employer liability exclusion in the insurance policy. However, prior to that decision DM&E filed this second action against Acuity. This action alleged that the settlement with Olson was covered under the uninsured motorist provision of the policy because an unidentified motorist was a cause of Olson's accident. A jury returned a verdict in favor of DM&E. Acuity appeals raising the following issues:

1. Whether the Acuity automobile liability policy provides DM&E coverage for the amounts paid in the settlement of Olson's FELA action.

2. Whether the trial court erred in denying Acuity's motion to dismiss this action based on the doctrines of res judicata and collateral estoppel.

3. Whether the trial court abused its discretion in denying Acuity's motion for summary judgment or a directed verdict on liability and, in the alternative, denying Acuity's motion for judgment notwithstanding the verdict or motion for new trial.

4. Whether DM&E was entitled to recover prejudgment interest.

5. Whether the trial court abused its discretion in granting DM&E's motion to compel discovery and denying Acuity's motion to quash subpoenas for attorneys James Moore and Gary Thimsen.

Mr. Gary P. Thimsen and Ms. Jennifer L. Wollman, Attorneys for Appellant Acuity

Mr. Brian J. Donahoe and Ms. Meredith A. Moore, Attorneys for Appellee DM&E

Weitzel v. Sioux Valley Heart Partners

Marc Weitzel, M.D., a cardiologist, was hired by Sioux Valley Hospital and Sioux Valley Heart Partners (hereinafter "SVH") on August 1, 1999. The parties signed several Staff Physician Agreements over the course of the next eleven months that eventually guaranteed a salary of not less than $500,000. Additionally, either party could cancel the Agreement with thirty days written notice. SVH also had the option to pay Dr. Weitzel ninety days base pay in lieu of notice, and could terminate employment immediately for specified reasons, including good cause.

The Agreement included three loans made by SVH to Dr. Weitzel: a $13,000 loan for medical school loan repayment, an incentive loan of $37,000, and a loan for $189,000. The loans were secured by a demand note that provided forgiveness for the installment payments as long as Dr. Weitzel continued to work at SVH for forty-eight months beginning August 1, 2001 through August 1, 2005. The Agreement defined four occurrences that would constitute default, including Dr. Weitzel's failure to remain employed at SVH. Any such occurrence would trigger immediate repayment of the entire loan balance.

A modification to the Agreement in February 2000 required Dr. Weitzel to comply with a code of conduct based on complaints by patients, nurses and physicians concerning his abrupt and abrasive manner. The Agreement was again modified on April 20, 2000, when Dr. Weitzel was accepted to a fellowship program in interventional cardiology in Minnesota, with a starting date of August 1, 2000. Prior to leaving for the fellowship, Dr. Weitzel signed another Agreement with SVH that provided him with a $36,000 stipend for living expenses at the rate of $3,000 per month. Finally, the Agreement also provided that Dr. Weitzel would

return to employment at SVH in August 2001 after completing his fellowship.

After Dr. Weitzel left for his fellowship, members of the cardiology group began hearing from referring physicians that they would not send patients to the SVH cardiology group if Dr. Weitzel was the scheduled on-call cardiologist. In late 2000, early 2001, Dr. Michael Nickell, president of Sioux Valley Clinic, made the decision that Dr. Weitzel would not return to the cardiology group upon completion of his fellowship. Kim Patrick, in house counsel for SVH, communicated the group's desires and Dr. Nickell's suggestion that it would be in Dr. Weitzel's and SVH's best interests for Dr. Weitzel to seek other employment, but never specifically stated that his employment had been terminated. Dr. Weitzel then secured a position in Oklahoma. He never made any payments on four the loans.

Dr. Weitzel brought suit against SVH alleging breach of contract and breach of good faith and fair dealing. He sought damages for breach of contract in the amount of ninety days base pay per the Agreement. Dr. Weitzel subsequently amended his complaint to allege fraud. SVH denied any liability to Dr. Weitzel, and counterclaimed for payment of the $241,583.36 in principal and interest outstanding on the loans.

On cross motions for summary judgment, the circuit court granted Dr. Weitzel's motion as to his breach of contract claim and declared the loans by SVH unenforceable and not in default. Damages for ninety days of base pay and pre-judgment interest in the amount of $171,358.24 were ordered to be paid to Dr. Weitzel by SVH.

SVH appeals raising the following issues:

1. Whether the circuit court erred when it granted Dr. Weitzel's motion for summary judgment on the breach of contract claim.

2. Whether the circuit court erred when it held the replacement demand note for $205,583.26 and the support loan demand note for $36,000 were unenforceable against Dr. Weitzel due to a lack of default.

By notice of review, Dr. Weitzel appeals the following issue:

Whether the circuit court erred when it dismissed Dr. Weitzel's fraud claim for lack of sufficient probative evidence.

Mr. Roberto A. Lange, Mr. Eric C. Schulte, Attorneys for Appellants Sioux Valley Heart Partners

Mr. James E. Moore, Attorney for Appellee Marc A. Weitzel

Nist v. Nist

Ted and Sally Nist were married on May 21, 1983. In September 1994, Ted filed for divorce. At trial on September 29, 1995, the parties presented evidence of the value of the martial property, which included Sally's Federal Civil Service Pension and Ted's pension through the Foreign Service Pension System. The court awarded the parties their respective retirement accounts. The parties waived the entry of findings of fact and conclusions of law and the court entered a judgment and decree of divorce. Subsequently, Ted signed a waiver of any entitlement to Sally's pension. Sally, however, refused to sign a reciprocal waiver of Ted's pension.

While preparing for retirement in 2005, Ted learned that because Sally refused to sign the waiver and because the divorce order did not address the issue, Sally was still entitled to a pro rata share of his retirement income. Therefore, Ted filed a motion to modify the judgment and decree of divorce. Ted asked the court to declare that Sally was not entitled to a portion of Ted's pension. Ted argued that the trial court did not intend for Sally to receive those benefits. In response, Sally asserted several defenses to Ted's motion and filed a motion to dismiss or, in the alternative, for judgment on the pleadings. In addition, Sally requested alimony in the amount of her pro rata share of Ted's pension should the court grant Ted's motion to amend. Sally also requested attorney's fees.

On April 19, 2005, the trial court held a hearing to consider the parties' motions. The trial court found that the judge who divided the parties' assets intended for Ted to keep his entire retirement. Thus, the court granted Ted's motion to amend the judgment and decree of divorce. It also denied Sally's requests for alimony and attorney's fees. Sally now appeals raising the following issues:

1. Whether Ted's motion to modify the order of the court regarding property division should have been dismissed based upon the affirmative defenses and motions filed by Sally.

2. Whether the trial court abused its discretion by amending the prior judgment thereby depriving Sally of her property rights under the former divorce decree and the Foreign Services Act.

3. Whether it was an abuse of discretion to deny Sally alimony after she was deprived of a portion of her property under the division.

4. Whether it was an abuse of discretion to deny Sally's request for attorney's fees.

Ms. Linda Lea M. Viken, Attorney for Appellant Sally J. Nist

Ms. Terri Lee Williams, Attorney for Appellee Theodore A. Nist

In the Matter of Steven J. Tinklenberg

Steven Tinklenberg was a licensed insurance agent and sold products for Pennsylvania Life Insurance Company (PLIC). He sold a PLIC life insurance policy to Albert Klein in 1980. Albert had low intellectual functioning, was disabled and lived with his sister Mary Klein. Mary assisted him with his daily functions. Albert was the insured on the policy and Mary was named as the owner and beneficiary. Thereafter, the owner and beneficiary on the policy changed to Tinklenberg after Mary signed a form provided by him. Albert died on February 24, 2000. Tinklenberg, as the owner and beneficiary of the policy, received $34,398.96 from PLIC. This amount included a deduction for a loan Tinklenberg had previously taken out on the policy. Tinklenberg also paid the funeral expenses for Albert.

A criminal action for theft involving the life insurance proceeds was filed against Tinklenberg and he was found not guilty. A complaint against Tinklenberg was also filed with the South Dakota Division of Insurance. Tinklenberg maintained that Albert wanted him to have the policy in appreciation for his help. Tinklenberg's license was eventually revoked following a hearing before a hearing examiner. The circuit court affirmed that decision. Tinklenberg appeals raising the following issues:

1. Whether the circuit court and the Division of Insurance erred in denying a motion to dismiss this license revocation proceeding because the applicable statute had been repealed.

2. Whether the circuit court erred in determining the Division of Insurance's decision was not made under irregularities in procedure.

3. Whether the circuit court erred when it entered its own findings of fact and conclusions of law, adopted the hearing examiner's and Division of Insurance's findings of fact and conclusions of law and affirmed the decision to revoke Tinklenberg's license.

Ms. Patricia de Hueck and Mr. Shannon Rigsby, Attorneys for Appellant Tinklenberg

Mr. Neil Fulton, Attorney for Appellee Division of Insurance

Schwaiger v. Avera Queen of Peace Health Services

Dr. Jim Schwaiger began working at Mitchell Radiological Associates, P.C., (MRA) in Mitchell, South Dakota, on April 27, 1998. While employed there, Schwaiger had medical staff privileges at the Mitchell hospital, Avera Queen of Peace (Avera). Schwaiger also performed radiological services at Avera pursuant to a contract between MRA and Avera.

During the summer and fall of 1998, Schwaiger allegedly made inappropriate comments to both staff and patients while performing radiological services at Avera. On December 29, 1998, K.C. DeBoer, Avera's Vice President of Professional Services, wrote a letter to Dr. Carey Buhler, the medical director of Avera's radiology department and a partner at MRA, concerning several alleged incidents of inappropriate behavior by Schwaiger. Buhler and another partner of MRA met with Schwaiger and discussed some of the incidents mentioned in DeBoer's letter. Schwaiger later learned that DeBoer's letter detailed other alleged incidents. Schwaiger also discovered that other hospital officials knew of and had discussed those incidents.

Shortly thereafter, Schwaiger ended his work at both Avera and MRA. He then sued Avera and asserted several claims, including defamation and breach of contract. Avera moved for summary judgment, and the trial court granted that motion as to all of Schwaiger's claims. Schwaiger appeals the grant of summary judgment on his claims of defamation and breach of contract. He presents the following issues:

1. Whether the trial court erred in concluding that there was no genuine issue of material fact on the issue of malice in connection with the qualified privilege for communications between interested persons.

1. Whether the trial court erred in concluding that there was no genuine issue of material fact as to whether Avera had breached the medical staff bylaws.

Mr. Robert A. Christenson, Mr. Jonathan K. Van Patten, Attorneys for Appellant Jim Schwaiger

Mr. Michael S. McKnight, Mr. Michael F. Tobin, Attorneys for Appellee Avera Queen of Peace Health Services

State v. Aaberg

On the evening of January 2, 2005, Sioux Falls Police Officer Nathan Kelderman was assisting another officer in taking a report for a stolen vehicle. Kelderman was sitting in his patrol car at approximately 10:00 p.m., when he observed (through his rear view and side view mirrors) a vehicle enter the parking lot of the Stoplight Lounge. The vehicle was driven by the defendant, Arvin Aaberg. At that time, the city streets and the parking lot were covered with ice.

Kelderman observed no traffic violations, erratic driving, or other signs that would lead him to believe Aaberg was impaired. Nonetheless, Kelderman continued to observe Aaberg after he parked his vehicle. Kelderman noticed Aaberg having difficulty exiting his vehicle. Aaberg walked towards the entrance of the lounge at a very slow pace and held his arms away from his body so as to keep his balance. At one point, Aaberg staggered "a little bit" and almost fell on the pavement. Based on these observations, Kelderman believed that Aaberg was under the influence of "something."

Kelderman stopped Aaberg before he reached the entrance and asked him if he had been drinking or if he had a medical condition. Aaberg responded by stating that he had a prosthetic leg. He also stated that he had consumed "some beer" earlier in the day. Kelderman required Aaberg to accompany him to his patrol car. No field sobriety tests were performed on account of the icy conditions and Aaberg's disability. Following the investigation, Aaberg was arrested for driving while under the influence of alcohol.

The State indicted Aaberg on two counts of driving while intoxicated in violation of SDCL 32-23-1. Aaberg filed a motion to suppress all evidence arguing that Kelderman

did not have reasonable suspicion to perform the initial stop. A suppression hearing was held before the magistrate court on April 7, 2005. The court found that Kelderman did not articulate any specific facts that would lead a reasonable police officer to believe that "criminal activity was afoot." As a consequence, the court held that there was no reasonable suspicion to stop Aaberg and ordered all evidence derived from the stop suppressed.

The State appeals, raising the following issue:

> Whether Kelderman had reasonable suspicion to stop Aaberg.

Mr. Lawrence E. Long, Attorney General, Mr. Steven R. Blair, Assistant Attorney General, Attorneys for Appellant State of South Dakota

Mr. Bryan G. Hall, Minnehaha County Public Defender's Office, Attorney for Appellee Arvin Allen Aaberg

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 insure that 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.

1,200 copies of this booklet were printed by the
Unified Judicial System
at a cost of approximately $.73 per copy.

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