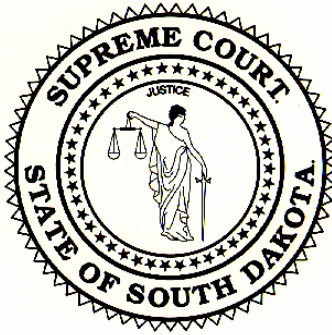


Introduction to
**The South Dakota
Supreme Court**



and

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

to be held

March 26 through March 28, 2008

University of South Dakota

Vermillion, South Dakota



Supreme Court
STATE OF SOUTH DAKOTA

David Gilbertson
CHIEF JUSTICE

March 26, 2008

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

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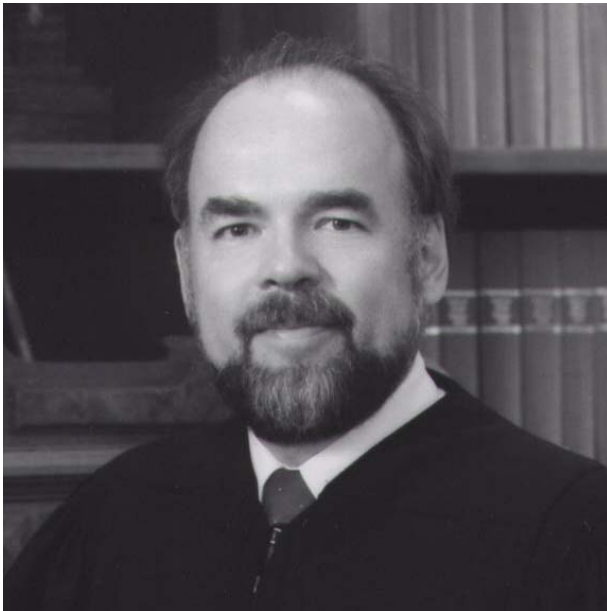
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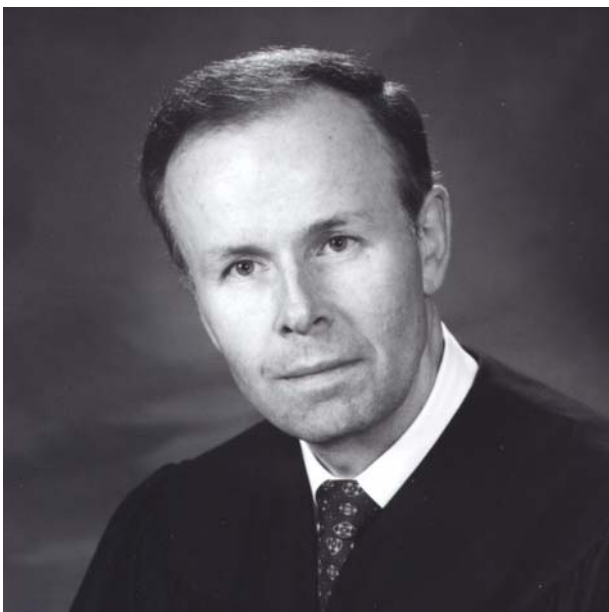
Chief Justice David Gilbertson

Chief Justice Gilbertson, a native of Sisseton, was elected to a 4-year term as Chief Justice by the members of the Supreme Court in September 2001 and was re-elected to a second 4-year term as Chief Justice by the members of the Supreme Court in June 2005. He was appointed to the Supreme Court in April 1995 to represent the Fifth Supreme Court District and was retained by the voters in the 1998 and 2006 general elections. Chief Justice Gilbertson received his undergraduate degree from South Dakota State University in 1972 and his Juris Doctor from the University of South Dakota School of Law in 1975. He engaged in private practice from 1975 until his appointment to the circuit court bench in 1986. During this time he also served as Roberts County Deputy State's Attorney and as City Attorney for the City of Sisseton. He is Past President of the South Dakota Judges Association; and is a member of the Glacial Lakes Bar Association, the Brown County Bar Association and the South Dakota Bar Association. He is a member of the Conference of Chief Justices and chairs its Committee on Tribal/State Relations. He is also a member of the Board of Directors of the National Conference of Chief Justices. He serves on the Judicial-Bar Liaison Committee of the State Bar Association and has served as a Court Counselor at South Dakota Boys State since 1995. Born October 29, 1949, he and his wife Deborah, have four children.



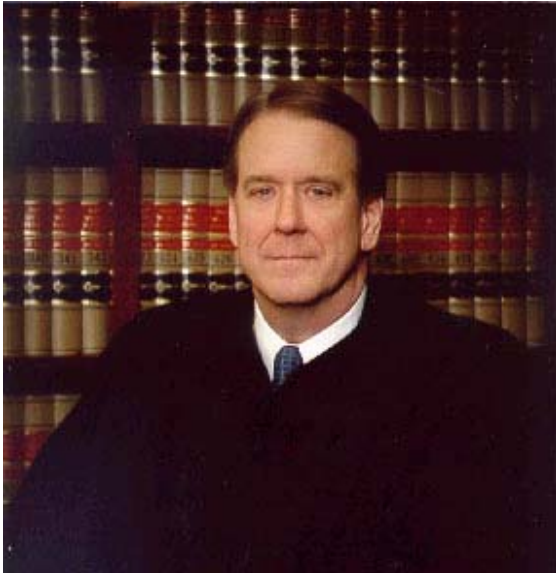
Justice Richard W. Sabers

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



Justice John K. Koenkamp

Justice Koenkamp, born October 20, 1944, represents the First Supreme Court District, which includes Custer, Fall River, Lawrence, Meade and Pennington counties. After serving in the United States Navy, he attended the University of South Dakota School of Law, graduating in 1974. He practiced in Rapid City as a Deputy State's Attorney until 1977. He then engaged in private practice until 1984 when he was appointed Circuit Judge. In May 1988, he became Presiding Judge of the Seventh Circuit. He was appointed to the Supreme Court in 1994 after ten years on the trial bench and was retained by the voters in the 1998 and 2006 general elections. He is a member of the State Bar of South Dakota, American Legion, Pennington County Bar Association, and a Director in the American Judicature Society. Justice Koenkamp and his wife, Geri, are former foster parents for the Department of Social Services. Justice Koenkamp serves on a number of boards advancing the improvement of the legal system and the protection of children. Justice Koenkamp and his wife have two adult children, Kathryn and Matthew.



Justice Steven L. Zinter

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



Justice Judith K. Meierhenry

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



Clerk of the Supreme Court

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



Supreme Court Law Clerks

Law Clerks are employed by the Court to assist the justices with research and writing of opinions on the cases under consideration. In the photograph above, from the left, are Ryan Mohr (Justice Meierhenry), Amy Gundlach (Supreme Court Law Clerk), Jennifer Williams (Justice Konekamp), William Haugen (Chief Justice Gilbertson), Natalie Turnquist (Justice Sabers), and Sara Larson (Justice Zinter).

Summary of Jurisdictions for the South Dakota Court System

Supreme Court

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

Court terms held throughout the calendar year.

Has appellate jurisdiction over circuit court decisions.

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

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

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

Circuit Court

Circuit Court services available in each county seat.

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

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

The Supreme Court Process

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

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

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

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

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

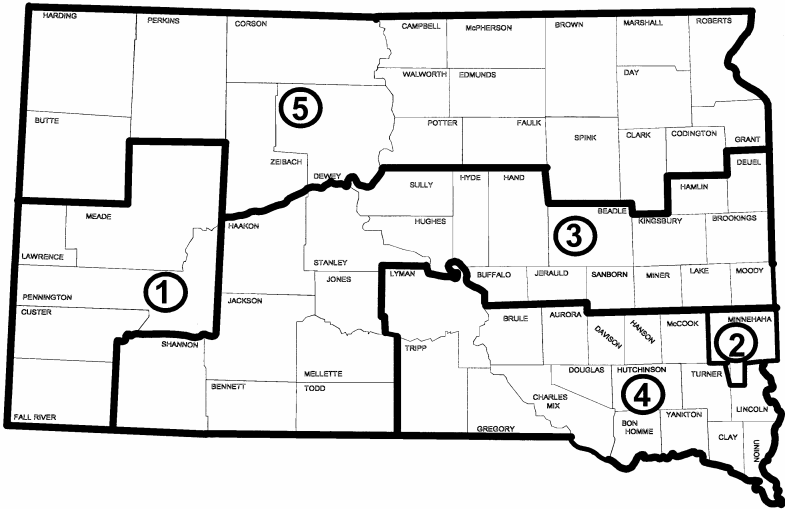
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench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

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

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

Justice Sabers was appointed in 1986 from District Two. Justice Konenkamp was appointed in 1994 from District One. Chief Justice Gilbertson was appointed in 1995 from District Five. Justice Zinter was appointed in 2002 from District Three. Justice Meierhenry was appointed in 2002 from District Four. Each of these justices was retained in the November 2006 general election.

South Dakota Supreme Court Appointment Districts Effective July 1, 2001



**In the Supreme Court
of the
State of South Dakota**

Courtroom Protocol

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

Your cooperation is appreciated.

DO

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

DO NOT

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

Supreme Court of South Dakota
March 2008 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.

Progressive Halcyon v. Philippe

Sylvia Ruhr (Ruhr) and Carol Wellnitz (Wellnitz) were employed by Beverly Healthcare Center (BHC) in Milbank, South Dakota. On February 13, 2006, they were both at work. Their shifts ended at approximately 10:30 p.m. The two left the facility through the usual exit and proceeded across the adjacent BHC parking lot to their respective vehicles. Wellnitz exited the facility first, reaching her vehicle ahead of Ruhr. Wellnitz backed out of her parking space and struck and injured Ruhr as she continued to her parked vehicle.

Her injuries being accidental, Ruhr collected benefits from BHC's workers' compensation insurance provider. Ruhr then filed a claim with Wellnitz's auto liability insurer, Progressive Halcyon Insurance Co. (Progressive), seeking an additional recovery from Wellnitz's auto liability coverage. Pursuant to South Dakota's workers' compensation statute, BHC, as Ruhr's employer, was immune from further liability due to Ruhr's receipt of workers' compensation benefits. Wellnitz and Progressive then filed a declaratory judgment action seeking a determination that the employer immunity provided under the statute also extended to Wellnitz as an employee of BHC. The circuit court concluded that the statutory standard applied to establish Ruhr's eligibility for workers' compensation benefits also applied to establish that at the time of the accident Wellnitz too was an employee of BHC and thereby entitled to immunity from liability.

On March 31, 2007, Ruhr died. On July 23, 2007, Roxanne Philippi (Philippi), personal representative of Ruhr's estate, was substituted in this action. Philippi appeals raising the following issue:

Whether at the time of the injury causing accident, Wellnitz was an employee of BHC within the meaning of South Dakota's workers' compensation statute such that Ruhr's personal injury claim filed with Progressive, Wellnitz's auto liability insurance provider, was precluded.

Mr. Mark J. Arndt, Attorney for Plaintiffs and Appellees,
Progressive Halcyon

Mr. David R. Strait, Attorney for Defendant and Appellant,
Roxanne Philippi

Kostel v. Schwartz

In March 2002, Patricia Kostel (Kostel) consulted with Dr. Steven B. Schwartz (Dr. Schwartz), a neurosurgeon, in regard to a back problem. Following an examination of Kostel and review of her medical records, Dr. Schwartz recommended that she undergo a one-level spinal fusion. When Dr. Schwartz operated on Kostel he also performed two additional fusions. However, Kostel's condition deteriorated after surgery and she filed a medical malpractice suit against Dr. Schwartz. The jury returned a verdict for Kostel and awarded her damages of \$551,962.96.

Dr. Schwartz raises six issues on appeal:

1. Whether the trial court abused its discretion when it prevented Dr. Schwartz from testifying about his training, experience and knowledge without opening the door to inquiry into other malpractice suits and disciplinary proceedings.
2. Whether the trial court abused its discretion when it allowed Kostel to ask Dr. Schwartz questions about other alleged "bad acts" and when it instructed the jury that Dr. Schwartz's answers to those questions could be used only for limited consideration.
3. Whether the trial court abused its discretion when it refused to admit an anonymous letter sent to Kostel by a competitor of Dr. Schwartz and non-testifying expert for Kostel.
4. Whether the trial court abused its discretion in the way it instructed the jury.

5. Whether the trial court abused its discretion by suppressing evidence about Kostel's psychological health.
6. Whether the trial court erred when it excluded evidence that portions of Kostel's medical bills were "written off" by Medicare.

Kostel raises seven issues by notice of review:

1. Whether the trial court erred when it allowed Dr. Schwartz to shield information about his surgical performance that he had disclosed to a peer review committee.
2. Whether the trial court erred by refusing to admit statements made by Dr. Schwartz to the peer review committee when the court had ruled that the statements were not privileged information.
3. Whether the trial court abused its discretion by not allowing Kostel to question Dr. Schwartz about his knowledge, skill and judgment and surgeries performed on other patients.
4. Whether Kostel was entitled to summary judgment based on information in an agreement that Dr. Schwartz entered into with the State disciplinary board.
5. Whether the trial court abused its discretion by refusing to instruct the jury that it could award punitive damages.

6. Whether the trial court abused its discretion when it prevented Kostel from questioning Dr. Schwartz about contradictory statements pertaining to a change that he made to her surgical report.
7. Whether the trial court abused its discretion when it prevented Kostel from questioning Dr. Schwartz's expert about his level of familiarity with Dr. Schwartz's knowledge and skill.

Mr. G. Verne Goodsell and Mr. Matthew E. Naasz, Attorneys
for Plaintiff and Appellee, Patricia Kostel

Mr. Lonnie R. Braun, Mr. Timothy Thomas, Mr. Gregory J.
Bernard, Attorneys for Defendant and Appellant, Dr.
Steven B. Schwartz

Mousseau v. Schwartz

On June 5, 2001, Diane Mousseau (Mousseau) consulted with Dr. Steven B. Schwartz (Dr. Schwartz), a Rapid City, South Dakota neurosurgeon, in regard to pain in her back and lower extremities. Following his examination of Mousseau, Dr. Schwartz determined that the source of her pain was pressure on nerves branching off the spinal cord caused by a degenerative condition involving several of her lumbar vertebrae. Dr. Schwartz performed surgery to correct the problem the next day.

Within two months, Mousseau was experiencing renewed pain in her back and lower extremities. On October 10, 2001, Mousseau underwent another examination with Dr. Schwartz, at which time he recommended fusion surgery to correct slippage in a vertebral segment that had been involved in the prior, less invasive surgery. Dr. Schwartz performed the procedure on November 1, 2001. After the surgery Mousseau continued to suffer from pain in her back and lower extremities.

Mousseau filed a medical malpractice suit against Dr. Schwartz alleging that he had failed to provide the requisite standard of care in her treatment. Thereafter, the South Dakota State Board of Medical and Osteopathic Examiners (the “Board”) brought disciplinary proceedings against Dr. Schwartz. Dr. Schwartz entered a stipulation with the Board whereby he agreed to have his license placed on probationary status due to malpractice. As a condition of the probation, Dr. Schwartz agreed to undergo remedial training in his chosen field. Additional conditions of the

probation included that he not practice medicine except as necessary to fulfill his training requirements and that following successful completion of the training, he not practice outside a group setting for a minimum of five years.

At trial, Mousseau sought to introduce evidence of Dr. Schwartz's licensure probation to show that at the time she was treated by Dr. Schwartz, he lacked the knowledge and skill necessary to deliver the requisite standard of care. In addition, she sought to admit evidence of the probation to challenge Dr. Schwartz's testimony at trial. However, the trial court refused to admit any evidence pertaining to the probation.

Mousseau raises one issue on appeal:

Whether the trial court abused its discretion by excluding evidence of the Board's disciplinary proceeding brought against Dr. Schwartz due to malpractice, including the sanctions and conditions imposed pursuant to his licensure probation.

Mr. Michael C. Loos and Mr. Glen H. Johnson,
Attorneys for Plaintiff and Appellant, Diane
Mousseau

Mr. Lonnie R. Braun, Jr. and Timothy L. Thomas,
Attorneys for Defendant and Appellee, Dr. Steven
B. Schwartz

Carpenter v. Rapid City Red Dogs, Inc.

Chad Carpenter signed a contract to play indoor football for the Rapid City Red Dogs (Red Dogs), a member of the National Indoor Football League (NIFL). While playing for the Red Dogs in a NIFL game, Carpenter injured his neck, suffering a wedge compression fracture. The injury prevented Carpenter from working four weeks and he incurred \$5,461.95 in medical bills.

At the time of Carpenter's injury, neither the Red Dogs nor the NIFL were insured under the workers' compensation laws of South Dakota. Carpenter sued both the Red Dogs and the NIFL for damages resulting from the injury to his neck, asserting South Dakota Workers' Compensation law as support. Although the circuit court entered a default judgment against the Red Dogs, the circuit court also granted the NIFL's motion for summary judgment exempting it from liability for Carpenter's injuries. The circuit court's order granting summary judgment cited the terms of Carpenter's contract with the Red Dogs, which expressly stated the Red Dogs, not the NIFL, was responsible for carrying workers' compensation insurance for players.

Carpenter appeals the circuit court's judgment granting the NIFL's motion for summary judgment. Carpenter contends that due to the NIFL's control over the game, the Red Dogs and the players, the NIFL had an implied contract with Carpenter making the NIFL and the Red Dogs joint employers of Carpenter. Carpenter claims that as a joint employer, the NIFL was statutorily required to cover him with workers' compensation insurance. Carpenter further claims that the circuit court's reliance on the contract was erroneous, because state law prevents employers from expressly or impliedly waiving their statutory duty to insure employees.

The NIFL claims that it did not have any contract with Carpenter, express or implied. Further, the NIFL argues that it did not exercise any control over Carpenter nor did it have any authority to terminate or hire him; therefore, it cannot be considered Carpenter's employer.

Carpenter raises the following issue on appeal:

Whether Carpenter was an employee of the NIFL at the time he sustained his neck injury.

Mr. Michael J. Simpson, Attorney for Plaintiff and Appellant, Chad Carpenter

Mr. Dennis W. Finch, Attorney for Defendant and Appellee, NIFL

State v. Quartier

In May 2006, Sioux Falls narcotics officers were executing a search warrant to search Jose Navarro and his apartment. The warrant also authorized the officers to search a gray pickup truck and a black Lincoln Navigator. The narcotics officers requested assistance while waiting for the vehicles to arrive at the premises, and they enlisted the help of other Sioux Falls police officers. As they waited, Detective Walsh, a narcotics officer, witnessed a red van, which was not listed on the warrant, stop outside Navarro's residence. Navarro exited the apartment building and spoke briefly with the occupants of the van. Walsh did not see anything exchanged between Navarro and the occupants. Approximately an hour after the van left, it again returned to the residence. Although Walsh did not personally witness this second stop, he received the information from other members of the surveillance team at the scene. Walsh then directed the assisting Sioux Falls police officers to stop the van. Officer Garden stopped the van, indicating that he believed Walsh told him the reason for the stop was that Navarro was inside. Walsh denied this was the reason he requested the stop. Instead, Walsh believed he had reasonable suspicion for the stop because the vehicle may have been involved in drug trafficking.

Navarro was not in the van. Ryan Quartier, a passenger in the van, possessed a suspended driver's license. A search of Quartier incident to his arrest for the license violation produced a glass pipe, which tested positive for methamphetamine. Quartier filed a motion to suppress all evidence derived from the stop, asserting it was an unconstitutional search and seizure. The issue before the trial court was whether Walsh had reasonable suspicion to stop the van.

Quartier argued that the van's stop at and return to Navarro's house did not constitute reasonable suspicion that criminal activity was afoot. The State argued that a van returning to the area under surveillance for drug activity created a reasonable suspicion because drug purchases happen quickly, and sometimes, in two stages. In the alternative, the State argued that even if Walsh did not have reasonable suspicion, Garden was justified in stopping the van because he reasonably, although mistakenly, believed that Navarro – the subject of the search warrant – was inside the van.

The trial court denied Quartier's motion to suppress, concluding that Walsh had reasonable suspicion to stop the van and that Walsh's reasonable suspicion was imputed to Garden. In the alternative, the trial court concluded that Garden had an objective and reasonable belief that Navarro was in the van, and therefore, the stop was valid.

At the conclusion of a court trial, Quartier was found guilty. He was sentenced to five years in the state penitentiary, all of which was suspended. He now appeals to this Court.

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

Mr. Steve Cowan, Minnehaha County Public Defender's Office, Attorney for Defendant and Appellant, Ryan Eldon Quartier

State v. Hayen

On February 19, 2007, at approximately 7:30 p.m., Wade Hayen was driving his black Ford Ranger in Sioux Falls. Hayen's vehicle had a valid, temporary, thirty-day dealer license permit, as the vehicle had recently been purchased. Officer Flogstad, traveling behind Hayen, noticed that the vehicle had a license permit but was unable to view the expiration date of the permit because a box in the back of the truck obstructed the officer's view. The officer pulled Hayen over to investigate the temporary permit.

While Flogstad approached Hayen's vehicle on the driver's side, he walked past the vehicle's visible and valid temporary permit. Flogstad proceeded to the driver-side window and requested Hayen's driver's license and proof of insurance. Hayen provided his driver's license but had difficulty locating his proof of insurance. After this initial contact with Hayen, Flogstad then stepped back and investigated the temporary permit. In order to view the permit, Flogstad did not have to move any of the items in the vehicle's bed nor did he have to position himself behind the vehicle.

After receiving Hayen's license, Flogstad returned to his patrol vehicle and ran a warrant and driver's license check on Hayen, which revealed an outstanding warrant for Hayen's arrest. Flogstad arrested Hayen and searched his person and vehicle. The search revealed methamphetamine residue and drug paraphernalia in Hayen's coat pocket. The State charged Hayen with possession of a controlled drug or substance and possession of drug paraphernalia.

Hayen moved to suppress the evidence revealed in the search, contending it was the fruit of an unlawful detention. Specifically, Hayen argued that Flogstad lacked reasonable suspicion to continue to hold and investigate Hayen after the

officer objectively could have viewed the temporary permit. The circuit court granted Hayen’s motion to suppress stating: “at the time that Officer Flogstad asked for [Hayen’s] license and proof of insurance, there was no objective evidence that a traffic violation had occurred or was occurring.”

The State now brings an intermediate appeal raising the following issue:

Whether a law enforcement officer has the authority to request a driver’s license and proof of insurance after the purpose of the traffic stop has been objectively dispelled.

Mr. Lawrence E. Long, Attorney General, Mr. Craig M. Eichstadt and Mr. Andrew Knecht, Assistant Attorneys General, Attorneys for Plaintiff and Appellant, State of South Dakota

Mr. Brendan V. Johnson and Ms. Kimberly J. Lanham, Attorneys for Defendant and Appellee, Wade Hayen

Estate of Smid

Ronald W. Smid was married to Delores Smid until her death on September 17, 1996. The couple had four children. During the marriage, the couple purchased a home with money Delores inherited from her parent's estate. After her death, Ronald continued to live in this home. Ronald was diagnosed with cancer in 1997.

Ronald met Audrey Smid and later married her on March 16, 1999. Audrey was aware of Ronald's cancer diagnosis. During the marriage, they lived in the same home purchased with a portion of Delores' inheritance.

In January of 2003, Ronald's son, Dale Smid, became concerned about his father's failing health and the plans for his father's estate. Dale spoke with attorney Roy Wise about meeting with his father and getting his affairs in order. Wise agreed to meet with Ronald.

Wise met with Ronald and Audrey and Audrey's brother, Darwin Bettman, on January 24, 2003. Dale alleged that during this meeting, Bettman told Wise that he was familiar with estate planning matters and his attorney was Ken Gosch. Wise testified that he assumed Darwin was helping Audrey with this matter and legal counsel was available through her brother. Wise wanted to conduct the meeting with Ronald alone, but Ronald desired Audrey to be there the entire time.

During this meeting, Ronald informed Wise that he wanted the marital home to go to his and Delores' children. However, he wanted Audrey to be able to live in the home as long as she wished, with the intention that ownership would pass to his children upon his death. Wise told Ronald and Audrey that the best way to fulfill these wishes was to create a trust and transfer the ownership of the marital home to the trust, with a life estate in Audrey. He also explained that

the trust should require the real estate taxes, insurance, and upkeep expenses remain Audrey's responsibility while she lived in the home. According to Wise, Audrey wanted to fulfill her dying husband's wishes.

Wise asked Ronald about any other important assets that should be considered to get his final affairs in order. Ronald indicated Audrey should be the beneficiary of his IRA and receive some savings bonds. Audrey volunteered to complete the change of beneficiary paperwork. Ronald indicated his sons should receive his gun collection and Delores' jewelry should go to their daughters. Additionally, Audrey gave Wise a box containing important documentation regarding his assets. Wise reviewed each document and prepared a list. Audrey was with Wise during this entire process, although she alleges she never reviewed any document or received the detailed list of assets.

On January 27, 2003, Audrey called Wise and said Ronald decided to proceed with the trust for the marital home. Wise drafted the trust documents and met with Ronald and Audrey on January 29, 2003. During this meeting, Wise explained the trust documents. Audrey and Ronald signed the trust documents and the deed, which transferred ownership of the house to the Ronald W. Smid Revocable Trust (Trust). While the Trust documents specifically declared Audrey would be waiving her statutory rights as surviving spouse, Wise did not discuss them with her. Audrey did not obtain counsel prior to signing the documents. Ronald passed away on January 30, 2003.

Informal probate proceedings were commenced in April of 2006 and Audrey was appointed personal representative of the estate. Audrey continued to live in the marital home after Ronald's death, but due to a sewer maintenance problem that she claimed cost \$5,000 to repair, Audrey sold and moved out of the marital home. Audrey sued Dale as trustee for the Trust, claiming the marital home proceeds should be removed from the trust and placed

in the probate estate because the waiver of her surviving spouse statutory rights* was not enforceable. Dale counterclaimed for specific performance of the trust. Audrey claimed she did not voluntarily waive her surviving spouse statutory rights, she only signed the trust agreement to “avoid probate” and her waiver was a result of fraud, mistake or undue influence. The circuit court found against Audrey, finding she voluntarily waived her rights and concluded the waiver was enforceable. It ordered the marital home proceeds to be distributed in accordance with the trust.

Audrey appeals raising the following issues:

1. Whether the circuit court erred when it found the trust agreement and Audrey’s waiver enforceable under SDCL 29A-2-213.
2. Whether the circuit court erred when it found Audrey’s waiver was not obtained through fraud, undue influence or mistake; and therefore, the circuit court erred when it found the revocable trust agreement was not voidable.
3. Whether the revocable trust agreement is subject to rescission.

* The surviving spouse rights that Audrey alleges she is entitled to are:

1. Intestate share of \$100,000 plus one-half of any balance above that amount in the estate provided in SDCL 29A-2-102;
2. Family allowance of us to \$18,000 in one year provided in SDCL 29A-2-402; and
3. Homestead allowance of \$30,000 provided in SDCL 29A-2-402.

Ms. Kimberly Dorsett, Attorney for Defendant and Appellee,
Dale Smid, as Trustee of Ronald W. Smid Revocable
Trust

Mr. Drew C. Johnson, Attorney for Plaintiff and Appellant,
Audrey E. Smid

**Gruhlke v. CU Mortgage Direct, LLC,
Sioux Empire Federal Credit Union, Inc., and David
Bednar**

Becky Gruhlke was employed as a senior mortgage underwriter at CU Mortgage. David Bednar originated mortgages for the company and was the chief operating officer. According to Gruhlke, Bednar asked her to submit false and misleading information to investment mortgage companies in order to secure financing for certain home loans. Gruhlke claimed that when she refused to participate, Bednar “yelled at her and tried to intimidate her into complying with his requests.” She asserted that she then told her direct supervisor about Bednar’s conduct, but nothing was done in response. Ultimately, CU Mortgage chose not to renew Gruhlke’s employment contract with the company.

After her contract was not renewed, Gruhlke brought suit against CU Mortgage and Bednar alleging that she was wrongfully discharged, the company breached the employment contract, and Bednar tortiously interfered with her business/contract relationship with CU Mortgage. This appeal concerns only her suit against Bednar for tortious interference. One tortiously interferes with a business/contract relationship when he or she induces or otherwise causes a third person not to perform and the other person suffers injury as a result. In this case, Gruhlke (the other person) claims that CU Mortgage (the third person) would have renewed her employment contract had Bednar not induced the company otherwise.

In response to Gruhlke’s suit, Bednar filed a motion to dismiss. He argued that South Dakota does not recognize a cause of action for tortious interference of a business/contract relationship against an officer or agent of the company. According to Bednar, this is because there is no third person to be influenced when he was acting as an agent of the

company. Gruhlke, however, argues that Bednar acted outside the scope of his employment when he persuaded CU Mortgage to terminate her employment contract, because she would not comply with his requests that she file false and misleading information.

The circuit court dismissed Gruhlke's suit against Bednar. It determined that Bednar, as an officer of CU Mortgage, could not tortiously interfere with Gruhlke's business relationship with CU Mortgage. Gruhlke appeals requesting that this Court declare that an officer or agent of a company can tortiously interfere with a business/contract relationship when that officer or agent's actions are outside the scope of his or her employment.

Mr. Richard D. Casey and Mr. Ryland Deinert, Attorneys for
Plaintiff and Appellant, Becky Gruhlke

Mr. Gary P. Thimsen, Attorney for Defendants, CU Mortgage
Direct, LLC and Sioux Empire Federal Credit Union

Mr. Eric Schulte, Attorney for Defendant and Appellee,
David Bednar

FIN-AG, INC. v. PIPESTONE LIVESTOCK AUCTION

**FIN-AG, INC. v. SD LIVESTOCK SALES OF
WATERTOWN, INC.**

This case involves a reconsideration of two appeals arising out of separate but related actions for conversion. Following the first oral argument, this Court failed to reach a majority vote to either affirm or reverse. Therefore, in accordance with SDCL 15-24-4, we ordered that the cases be reheard. We specifically requested the parties to rebrief the application of the Food Security Act and a statute of limitations issue.

The conversion actions were commenced by Fin-Ag, Inc., an agricultural lender, against two public livestock auction barns: Pipestone Livestock Auction Market, Inc., and South Dakota Livestock Sales of Watertown, Inc. (collectively, "Sale Barns"). Fin-Ag alleged that it had a perfected security interest in cattle delivered to the Sale Barns under the name C&M Dairy. C&M Dairy was a business name used by members of the Berwald family. Fin-Ag's effective financing statement, filed with the South Dakota Secretary of State, listed the Berwalds as debtors but did not list C&M Dairy. Because C&M Dairy was not listed as a debtor, Sale Barns sold the cattle and sent the sale proceeds to C&M Dairy without making Fin-Ag a joint payee. C&M Dairy and/or the Berwalds did not send the proceeds to Fin-Ag as required by the security agreement and note. Following Berwalds' bankruptcy, Fin-Ag commenced these actions contending that the Sale Barns converted the cattle because Fin-Ag had a security interest in the cattle, Berwalds were listed as debtors on Fin-Ag's effective financing statement, and Sale Barns failed to remit the sale proceeds to Fin-Ag.

In Fin-Ag's action against Pipestone, the circuit court granted summary judgment in favor of Fin-Ag on some sales and in favor of Pipestone on other sales. In Fin-Ag's action against SD Livestock, the circuit court granted summary judgment in favor of Fin-Ag. Sale Barns and Fin-Ag appeal the circuit courts' adverse rulings.

The difference between the circuit courts' rulings was principally due to different interpretations of the Food Security Act (FSA). Although both cases involve the same debtors, owners and lender, one circuit court concluded the FSA protected the Sale Barns from Fin-Ag's conversion claim, and the other circuit court concluded that the FSA provided no protection. The circuit courts differed in their interpretation of who was the "seller" (C&M Dairy or the Berwalds) for purposes of notice of the security interest, and who was the "seller" that created security interest in the cattle.

Also at issue in Fin-Ag's case against Pipestone is whether Fin-Ag complied with a state statute that requires a lender to "offer" to file a criminal complaint against the debtor before commencing a conversion action. In this case, Fin-Ag made an offer to the Sale Barn to file a criminal complaint, but did not make an offer to a law enforcement agency. The question is whether Fin-Ag's offer was sufficient.

The cases further involve an issue whether sale proceeds are protected by the FSA, as well as a number of state law issues relating to the requirements of an action for conversion of cattle.

Mr. Jason W. Shanks and Mr. Jonathan K. Van Patten,
Attorneys for Plaintiff and Appellee, Fin-Ag, Inc.

Mr. Michael J. Schaffer and Mr. E. Lawrence Oldfield,
Attorneys for Defendants and Appellants, Pipestone
Livestock Auction Market, Inc. and South Dakota
Livestock Sales of Watertown, Inc.

Glossary of Terms

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

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

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

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

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

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

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

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

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

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

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

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

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