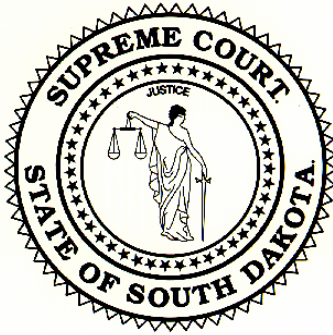


**Introduction to
The South Dakota
Supreme Court**



**and
Case Summaries for
Oral Arguments at the
March Term of the Court
to be held
March 23 through March 25, 2009
University of South Dakota
Vermillion, South Dakota**



Supreme Court
STATE OF SOUTH DAKOTA

David Gilbertson
CHIEF JUSTICE

March 23, 2009

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,

A handwritten signature in cursive script that reads "David Gilbertson".

David Gilbertson
Chief Justice

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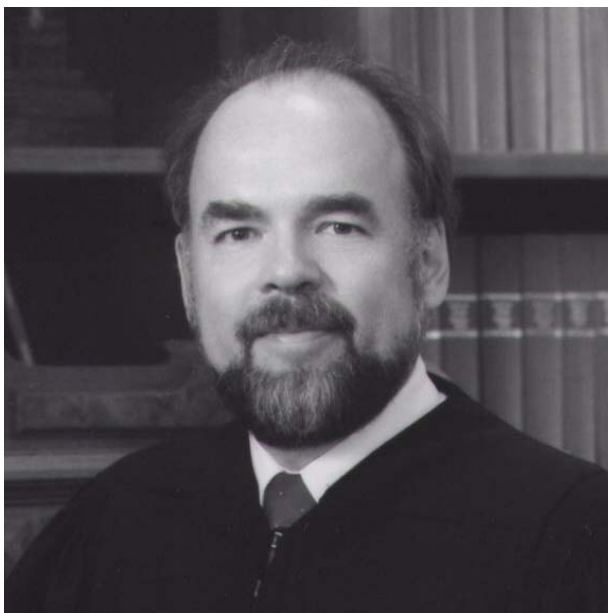
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Chief Justice David Gilbertson

Chief Justice Gilbertson 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 and the 2006 general election. Chief Justice Gilbertson received his undergraduate degree from South Dakota State University in 1972 and his Juris Doctor from the University of South Dakota, School of Law in 1975. He engaged in private practice from 1975 until his appointment to the circuit court bench in 1986. During this time he also served as a deputy state's attorney and as an attorney for several municipalities and school districts. He is past President of the South Dakota Judges Association; and is a member of the Glacial Lakes Bar Association, the Brown County Bar Association and the South Dakota Bar Association. He is a member of the Conference of Chief Justices and chairs its Committee on Tribal/State Relations. He was a member of the Board of Directors of the National Conference of Chief Justices from 2005-2007. In 2006, he was the recipient of the distinguished Service Award from the National Center for State Courts for his defense of judicial independence. He serves on the Judicial-Bar Liaison Committee of the State Bar Association and has served as a Court Counselor at South Dakota Boys State since 1995. Born October 29, 1949, he and his wife Deborah have four children.



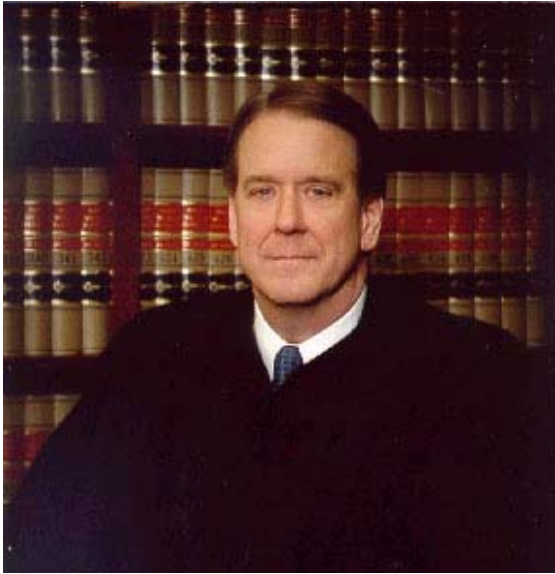
Justice Richard W. Sabers

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



Justice John K. Konenkamp

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



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 and a grandson, Jack.



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 David Barari (Supreme Court Law Clerk), Annie Horner-Taylor (Justice Meierhenry), Jennifer Williams (Justice Koenekamp), Marie Ruetters (Chief Justice Gilbertson), Jennifer Keating (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 are subject to statewide electoral approval three years after appointment and every eight years thereafter. Retirement at age seventy.

Court terms held throughout the calendar year.

Has appellate jurisdiction over circuit court decisions.

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

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

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

Circuit Court

Circuit Court services available in each county seat.

Counties grouped into seven circuits, served by 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.

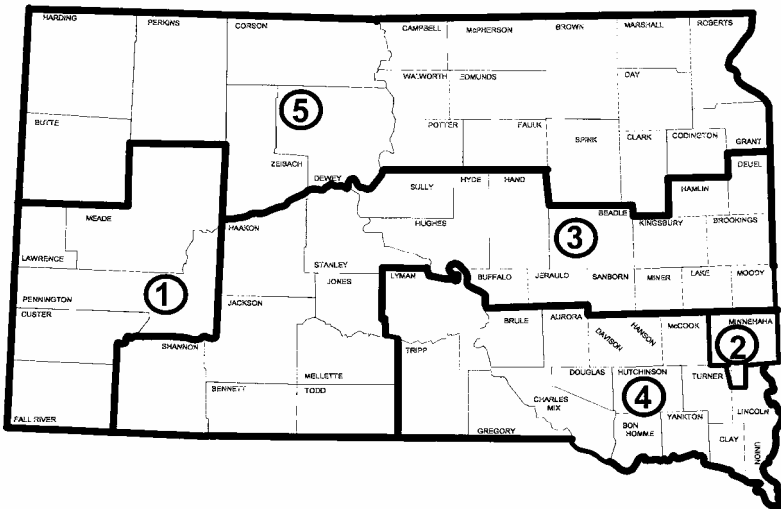
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench 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 2009 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.

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| 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.

State v. Klaudt

Ted Klaudt, a former state legislator, and his wife, Connie Klaudt, provided foster care for children placed within their home by the State of South Dakota. The Klaudts resided on a farm near Walker, South Dakota.

A.M., a fifteen-year-old female, was placed with the Klaudts in April of 2003. She and Ted grew close over time. In late 2004, A.M. commented to Ted that she never wanted to have children and that she may as well have her uterus removed. Upon hearing this, Ted developed an egg donation scheme, complete with a lengthy egg donator application, allowing Ted to perform certain ovary examinations and breast measurements, supposedly to determine if she qualified to be an egg donator. To heighten her interest, Ted told A.M. of the potential to make up to \$10,000 per buyer by selling her eggs to infertile women. Under the belief that this scheme was real, A.M. allowed Ted to perform the required exams on eight to ten occasions, all at times when A.M. was 17 or 18 years old. Three of the instances are the subject of this case as they occurred in Ted's hotel room at the Capitol Inn in Pierre, while Ted was serving as a state legislator.

In conjunction with these exams, A.M. received numerous emails, either forwarded by Ted or directly from an individual named Terri Linee, who supposedly was an agent of an egg donation agency. The emails, which began in the latter part of 2004, strongly and repeatedly encouraged A.M. to complete the required exams. These emails, which echoed many of the conversations A.M. had with Ted, were in fact written by Ted, and there was no such person as Terri Linee.

Ultimately, A.M. told her biological mother about the egg donation scheme. DCI was contacted and an

investigation ensued. The investigation revealed a previous report about an egg donation scheme involving another of Ted's foster daughters, J.S.

J.S. arrived at the Klautdt home in 2002, at the age of 15. Although J.S. did not become very close to Ted, she developed a strong relationship with Ted's wife, Connie. In March of 2006, J.S. told her friend's mother that two months earlier (at which time J.S. was 19 years old) Ted performed a test on her to see if she was fertile enough to donate her eggs. The incident occurred at the Capitol Inn in Pierre. After informing Ted of this report and hearing how this would hurt Ted, the family, and especially Connie, J.S. recanted the story and the investigation was eventually dropped. After A.M.'s claims were made in early 2007, and after A.M. spoke with J.S., J.S. acknowledged that her previous report was true.

In 2007, Ted was charged with four counts of second degree rape in Hughes County. Three of the counts stemmed from A.M.'s allegations and the last count related to J.S.'s allegation. At trial, three other girls testified that Ted performed or attempted to perform the same exams upon them. They testified that Ted used the same method of persuasion to allow him to perform these exams: so they could possibly qualify for egg donation and earn money.

Second degree rape is defined as "an act of sexual penetration accomplished with any person . . . [t]hrough the use of force, coercion, or threats of immediate and great bodily harm against the victim or other persons within the victim's presence, accompanied by apparent power of execution[.]" SDCL 22-22-1(2).

The jury convicted Ted on all four counts. He was sentenced to four consecutive eleven-year terms in the penitentiary. Ted appeals to this Court, raising two issues:

1. Whether he was deprived of due process and a meaningful opportunity to present a complete defense, when the trial court refused to give the proffered theory of defense instructions, and when, individually and/or together, those instructions were a correct statement of the law and were supported by the facts of the case.
2. Whether a judgment of acquittal as to counts I – III [counts involving A.M.] should have been granted, and whether there is sufficient evidence to sustain the ensuing convictions, when the alleged victim admitted under oath that she agreed, allowed, wanted, and consented to the penetration, and when she admitted Ted did nothing to deprive her of her free will.

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

Mr. Timothy J. Rensch, Attorney for Defendant and Appellant, Ted Klautd

Guthrie v. Weber

William Guthrie was convicted of murdering his wife in 2000, and sentenced to life in prison. In 2001, his appeal to this Court was affirmed. *State v. Guthrie*, 2001 SD 61, 627 NW2d 401. Guthrie petitioned the circuit court for a writ of habeas corpus, collaterally attacking his conviction. He asserted that he was denied his constitutional right to a fair trial because his trial attorney failed to move to suppress evidence that was illegally seized from his church computer and that the State's use of an investigative subpoenas duces tecum to gather evidence of the crime constituted an unlawful search and seizure.

On May 15, 1999, Guthrie's wife, Sharon, was found unconscious and face down in the bathtub of their home. Guthrie had called 911, but Sharon could not be resuscitated. The cause of Sharon's death was not conclusively determined. The pathologist declared that it was either a suicide or homicide based on the presence of debilitating and toxic levels of Temazepam, a sleep aid medication. Guthrie, a Presbyterian minister, became the suspect. During the investigation, the Beadle County State's Attorney issued a number of subpoenas duces tecum on several drug stores in the Huron area. The subpoenas directed the drug stores to turn over Guthrie's prescription records. Guthrie's records revealed that he had a prescription filled for Temazepam several times shortly before his wife's death.

Guthrie now claims that the subpoenas, issued under SDCL 1-26-9.1, were unlawful because that statute does not grant the State's Attorney power to obtain evidence for a criminal investigation in such a manner. He further contends that his trial counsel was ineffective for failing to move to suppress the evidence seized with the subpoenas. The habeas court held that the subpoenas violated Guthrie's Fourth Amendment rights. However, the court ruled that

the prescription records would have been inevitably discovered, and if not, the use of the records was insignificant at trial in light of the overwhelming evidence of Guthrie's guilt.

Guthrie next asserts that Agent Jerry Lindberg's affidavit in support of a search warrant did not provide probable cause for the search of Guthrie's church computer. The twelve-page affidavit requested, among other things, permission to seize the computer located at Guthrie's church "for evidence of any conspiracy between [Guthrie] and his love interest, Debbie Christensen." The search warrant was issued and the computer seized. A forensic examination of the computer revealed that it had been used for searches on subjects related to drowning and household accidents. In particular, the computer was used to look for information on certain drugs including Temazepam.

Guthrie contends that the affidavit lacked any basis in fact, or a nexus, for the court to reasonably conclude that the computer would contain evidence of a conspiracy between Guthrie and Christensen. According to Guthrie, the affidavit made no mention of potential computer-based communications between him and Christensen and merely requested the right to seize the computer to see if there was evidence of a conspiracy. The habeas court disagreed and concluded that the affidavit in support of the warrant provided sufficient probable cause. The court found that although the computer was only mentioned once in the affidavit, "evidence of a potential conspiracy and intimate relationship between Guthrie and Christensen is prevalent throughout the affidavit."

Guthrie appeals asserting:

1. The affidavit in support of the search warrant did not establish probable cause to seize and search the church computer.
2. The State's use of a subpoena duces tecum constituted an unlawful search and seizure in violation of the Fourth Amendment of the United States Constitution and article VI, section 11 of the South Dakota Constitution.

Mr. Michael J. Butler, Attorney for Petitioner and Appellant,
William Guthrie

Mr. Lawrence E. Long, Attorney General, Ms. Sherri
Sundem Wald, Deputy Attorney General, Attorneys
for Respondent and Appellee, Douglas Weber,
Warden, South Dakota State Penitentiary

Longchamps v. Ephgrave

On March 8, 2007, Mistie Joella Sanchez gave birth to a son, Fidel Salvador Longchamps (Appellants), at Sanford Medical Center in Sioux Falls. Mistie was attended by Pamela Ephgrave, M.D., and labor and delivery nurses Kellyna Warnke and Sandra Thomas. Fidel was unresponsive at birth and died two days later.

The two nurses were employees of Sanford Medical Center. Dr. Ephgrave (Appellee) was employed by Sanford Clinic, a separate entity. Sanford Health, as the non-profit corporate umbrella entity for both employers, was the sole corporate member of both Sanford Clinic and Sanford Medical Center. The Davenport Law Firm served as legal counsel for Sanford Health and all its constituent entities, including Sanford Clinic and Sanford Medical Center.

Following Fidel's death, Sanford Health's peer review committee reviewed the case as was standard practice for any unexpected death.

Dr. Ephgrave, Nurse Warnke, Nurse Thomas, and Risk Manager Schwarting participated in the peer review meeting. The meeting and process were designed to monitor, evaluate, and recommend actions to improve the delivery and quality of services within the hospital. Also in attendance, as per Sanford Health's standard practice, was Mark Haigh, an attorney with the Davenport Law Firm. Attorney Haigh was hired to represent Sanford Medical Center and Sanford Clinic and their employees in the peer review process concerning the care provided to Mistie and Fidel, and provide legal advice during the process.

In August 2007, Appellants filed suit against Sanford Clinic and Dr. Ephgrave, but not against Sanford Medical Center, Nurse Warnke, or Nurse Thomas. Davenport Law Firm was hired to represent both Sanford Clinic and Dr.

Ephgrave. Attorney Haigh was assigned the case by the firm.

On March 11, 2008, Appellants' counsel advised Attorney Haigh he wanted to take the depositions of all medical providers involved in the labor and delivery, including Dr. Ephgrave, Nurse Warnke, and Nurse Thomas. The nurses were to be deposed as non-party fact witnesses. Attorney Haigh scheduled the depositions. He then met in advance with Dr. Ephgrave, Nurse Warnke, and Nurse Thomas to prepare them for their respective depositions.

The depositions of Nurse Warnke and Nurse Thomas were taken on April 28, 2008. Appellants' counsel asked the nurses what they had discussed when they met with Attorney Haigh. Attorney Haigh objected on the basis of attorney-client privilege and instructed the nurses not to answer.

Appellants filed a motion to compel to determine the substance of the communications between Attorney Haigh and the nurses. Appellants contended these *ex parte* communications, outside the context of normal discovery procedures, were in regard to Appellants' medical treatment. Thus, Appellants contend the *ex parte* discussions were in violation of the medical privilege in SDCL 19-2-3, exceeded the limited waiver in SDCL 19-13-11, and should have been conducted pursuant to the South Dakota rules of civil procedure. Appellants' motion was denied. Appellants appeal raising the following issue:

In a civil action, may physicians or other medical personnel who are non-party, fact witnesses in the case, engage in *ex parte* communications with defense counsel regarding their patient's medical treatment under the attorney-client privilege when that privilege is in direct conflict with the medical privilege.

Mr. Steven M. Johnson, Mr. Ronald A. Parsons, Jr. and Ms.
Pamela R. Bollweg, Attorneys for Appellants,
Longchamps

Mr. Mark W. Haigh and Ms. Melissa C. Hinton, Attorneys
for Appellee, Ephgrave

Russo v. Takata Corp.

On April 15, 1999, Natasha Pendergrass, age sixteen at the time, was driving her mother's 1996 Geo Tracker to school with her then ten-year-old sister Jessica Russo (Appellees). On Highway 385 near Hill City, South Dakota, the sisters were in a rollover accident. Natasha was thrown across the front seat, partially ejected from the vehicle, pinned under the Tracker, and died at the scene. Jessica was thrown into the back seat but was not physically injured in the crash.

Suit was brought against Takata Corporation and TK Holdings (Appellants), the manufacturers of the Tracker's seatbelts. Appellees' theory was that Natasha and Jessica buckled their seatbelts before the crash, but that the seatbelts simultaneously unlatched due to inertial forces during the rollover.

Takata denied Appellees' claims, alleged that the girls did not buckle their seatbelts before the crash, and that Natasha failed to maintain control over the vehicle. Takata also denied that simultaneous inertial unlatching of the Tracker's seatbelts was possible in real world accidents.

Upon receiving a jury summons, one of the prospective jurors, Juror Flynn, did not recognize Takata by name or product line and wondered "what they did." He conducted two Google searches on his home computer that returned each company's home page. The searches revealed that Takata "was a seat belt and airbag manufacturer," and that TK Holdings "was the American subsidiary of Takata." Juror Flynn was not asked directly during voir dire if he had prior knowledge of Takata, and he did not offer any information regarding his searches.

Three-quarters of the way through six hours of deliberations Juror Flynn responded to a question about whether Takata had notice of previous claims of seat belt malfunction by telling another juror of his prior Google searches. Flynn also stated that he had not seen any law suits on either webpage during his searches. At least five other jurors either heard the comment or were made aware of the comment during jury deliberations.

The jury returned a verdict for Takata. Appellees filed a motion for new trial alleging Juror Flynn's misconduct required reversal because the information was extrinsic, against the evidence introduced at trial, and against the jury's instructions. After a hearing, the trial court concluded that Flynn's comments constituted impermissible outside information brought into the jury's deliberations and granted the motion for new trial.

Takata appeals raising the following issues:

1. Does a remark made by a juror during deliberations, based on information that the juror knew before jury selection and that could have been ascertained by reasonable voir dire, constitute "extraneous information" upon which a trial court can set aside a verdict under SDCL 19-14-7.
2. Did the trial court use the proper test in a civil case for a finding of prejudice necessary to grant a motion for new trial based on "extraneous information" brought to the jury's attention.
3. Did a juror's remarks prejudice the jury's verdicts against the two appellees.

Mr. George J. Nelson, Mr. Kevin King and Mr. Peter King,
Attorneys for Appellees, Russo

Ms. Patricia A. Meyers, Mr. David R. Kelly and Mr. Wayne
D. Struble, Attorneys for Appellants, Takata
Corporation

McCcollam et al. v. Cahill

Kelly and Michelle McCollam entered into a contract for deed with Neil Cahill to purchase Cahill's property. McCollams contend that they should be allowed to rescind the contract because Cahill did not properly disclose an alleged "snake problem" on the property. Cahill counter-sued for specific performance of the contract for deed. The trial court granted Cahill's request for specific performance. McCollams now appeal.

During the summer of 2005, McCollams purchased a house near Mobridge, South Dakota from Cahill. After taking possession of the property, McCollams alleged that they began to see bull snakes in and around the house. A few days after moving into the house, McCollams testified that they encountered a snake in the hallway on the main level of the house. In addition, McCollams testified that two weeks later another snake was found in the middle of the living room floor. McCollams testified that additional snakes were found in the garage, around the house, and on the property. In July of 2006, McCollams ceased monthly payments on the property and did not remit \$100,000 to Cahill, as required by the contract. On October 24, 2006, McCollams commenced an action for rescission of the contract.

As part of the sale of property, South Dakota requires a seller to complete a disclosure statement. The disclosure statement includes several questions about the property including the existence of defects, damage, or termite infestations. The questions include a general inquiry as follows: "Are there any other problems that have not been disclosed above?" McCollams contend that this inquiry required Cahill to disclose snake problems.

After hearing evidence from both parties, the court determined that between 1973 and 2005, Cahill only discovered one bull snake in the house. Other witnesses testified on Cahill's behalf that Cahill kept the property and the lawn in very good condition and that they saw few snakes on the property. The court determined that McCollams only saw two snakes in the house and that some snakes were seen in the yard in 2006. The court further discounted testimony of one of McCollams' witnesses who claimed he had seen numerous snakes in the basement when Cahill owned the house.

The trial court concluded that McCollams had failed to prove that Cahill had knowledge of an alleged "snake problem" and that discovering one bull snake in the house during Cahill's thirty year occupancy was not a disclosure required by law. The court denied McCollams' request for rescission and granted Cahill's application for specific performance. McCollams raise two issues on appeal:

1. Whether the trial court properly granted specific performance of the contract for deed.
2. Whether the trial court properly denied rescission of the contract for deed.

Mr. John W. Burke, Attorney for Plaintiffs and Appellants,
Kelly B. McCollam and Michelle M. McCollam

Mr. Kenneth L. Gosch, Ms. Melissa E. Neville, Attorneys for
Defendant and Appellee, Neil D. Cahill

**McGuire v. Curry and
Park Jefferson Speedway, Inc./Mollet**

This appeal asks whether a business has a duty of ordinary care in the hiring, retention, and supervision of its underage employees, employees who have unmonitored access to alcohol, become drunk on the job, and cause injury to members of the general public on property adjacent to the business's property.

On August 16, 2003, Dean Curry, an employee of the Park Jefferson Speedway, Inc. (the Speedway) left work an hour after his shift ended. It was approximately 12:45 a.m. Curry, in his personal pickup, drove around the Speedway track a couple times, cut through a ditch, and entered a road bordering the Speedway's property. Not seeing a northbound motorcycle driven by Chris Mollet, on which Catherine McGuire was a passenger, Curry crashed into the motorcycle. Curry was drunk, speeding, and driving on the wrong side of the road. The accident seriously injured McGuire.

McGuire brought suit against the Speedway and Curry. She alleged that Curry was negligent in the operation of his vehicle and the Speedway negligently hired, retained, and supervised Curry. Unbeknownst to the Speedway, Curry had a history of alcohol abuse and would drink regularly on the job. Curry, hired as a "runner," was given a key to the cabinet storing alcohol and afforded unmonitored access to the Speedway's alcohol. Curry stated that he would drink from the beginning of his shift until the end. On the evening of the accident, Curry drank two beers, four vodka drinks, two whiskey and cokes, and rum. After his shift, while still in the Speedway's parking lot, Curry drank a 32-ounce beer.

The Speedway twice moved for summary judgment claiming, among other things, that it owed no duty to McGuire because the accident happened off the Speedway's property and was not caused while Curry was using any property of the Speedway. In response, McGuire asserted that the Speedway had a duty (1) under SDCL 35-4-79 to supervise its underage employees who had unmonitored access to alcohol during work, and (2) based on the common law duty of ordinary care in the hiring and supervision of employees.

Ultimately, the court granted the Speedway's motion for summary judgment, concluding that the Speedway owed no duty to McGuire under the law related to negligent hiring, retention, and supervision. The court based its conclusion on the fact that the accident happened off the Speedway's property and did not involve any property of the Speedway. The court also rejected McGuire's claim that SDCL 35-4-79 created a duty on the part of the Speedway, because the statute was designed to protect minors and not the public at large.

McGuire appeals asserting that the court erred when it granted the Speedway's motion for summary judgment on the claim of negligent hiring, retention, and supervision.

Mr. Ronald A. Parsons, Jr., Mr. Grant G. Alvine and Mr. David J. King, Attorneys for Plaintiff and Appellant, Catherine McGuire

Mr. William C. Garry and Mr. Shawn M. Nichols, Attorneys for Defendant, Dean Curry

Mr. James W. Redmond, Attorney for Defendant and Appellee, Park Jefferson Speedway

Ms. Susan M. Sabers, Attorney for Third Party Defendant and Appellant, Christopher Mollet

State v. Wright

In August of 2004, Daphne Wright lived in Sioux Falls with her girlfriend, Sallie Collins. They initially lived in Jackie Chesmore's home, but Collins moved out in September. Both Collins and Wright were deaf, and Collins moved into an apartment complex known within the deaf community as the "deaf apartments." While living there, Collins became friends with Darlene VanderGiesen, who was also deaf.

Wright became jealous of the friendship between VanderGiesen and Collins, and Wright also thought VanderGiesen was trying to destroy Wright's relationship with Collins. On February 1, 2006, Wright set up a meeting with VanderGiesen at a Pizza Hut, allegedly to plan a Valentine's Day surprise for Collins. Wright admitted meeting VanderGiesen at Pizza Hut's parking lot that evening at 6:00 p.m. VanderGiesen was not seen again. Two days later, VanderGiesen's father reported that his daughter was missing.

While police were investigating VangerGiesen's disappearance, Chesmore and Wright voluntarily drove together to the Sioux Falls law enforcement center to be interviewed. There the police employed the use of a certified sign language interpreter for Wright's interview. The police interviewed Wright from 10:49 a.m. until 12:54 p.m., at which time the State acknowledges that Wright unequivocally asked for a lawyer. Wright remained at the law enforcement center in the interrogation room without a lawyer, however, from 12:54 p.m. until 6:10 p.m., while police officers obtained and executed a search warrant for Wright's home and vehicle. At the conclusion of the search, Wright left the law enforcement center. Wright was never advised of her *Miranda* rights.

Wright was arrested and subsequently charged with murder in the first degree (premeditated murder), murder in the second degree (felony murder), and aggravated kidnapping in connection with VanderGiesen's death.

Prior to trial, a psychologist recommended and Wright requested the use of a Certified Deaf Interpreter (CDI) to interpret the testimony to Wright consecutively, rather than simultaneously. The trial court denied Wright's request. Instead of employing a CDI to interpret consecutively, the court provided five certified sign language interpreters and employed "real time" captioning, in which every word the court reporter transcribed was projected onto a computer screen for everyone to observe. Separate interpreters were provided for counsel and for the court proceedings. At Wright's request, the trial was also videotaped.

The State offered evidence at trial regarding the officers' execution of the search warrant, which included blood, bone and tissue samples from Wright's vehicle and the basement of Wright's home. The State laboratory confirmed the presence of VanderGiesen's D.N.A. in these samples.

The jury returned a verdict of guilty on all three counts, but declined to recommend the death penalty. Wright was sentenced to life imprisonment without the possibility of parole on the first degree murder and kidnapping convictions. No sentence was imposed on the felony murder conviction.

Wright appeals raising the following issues:

1. Whether the trial court abused its discretion in denying Wright's motion to suppress statements made during the interview at the law enforcement center.

2. Whether the trial court should have granted Wright's request for consecutive interpretation during the trial and provided a CDI.
3. Whether the trial court's system of selecting jurors, in which African-Americans were under-represented, violated Wright's constitutional rights.
4. Whether the trial court erred in allowing evidence of a prior altercation concerning Wright, VanderGiesen, and Collins.
5. Whether there was sufficient evidence to support the jury's verdicts of felony murder and premeditated murder.
6. Whether Wright's kidnapping conviction violates double jeopardy.
7. Whether cumulative error denied Wright a fair trial.

Mr. Lawrence E. Long, Attorney General, Ms. Meghan N. Dilges, Assistant Attorney General, Attorneys for Plaintiff and Appellee, State of South Dakota

Ms. Traci Smith, Office of the Minnehaha County Public Defender, Attorney for Defendant and Appellant, Daphne Wright

Klutmans v. Sioux Falls Storm

On February 25, 2002, seventeen-year-old Gaylen Klutman, his younger brother, and their father attended a promotional event for the Sioux Falls Storm. The Sioux Falls Storm is an indoor arena football team. The team plays on synthetic turf that is installed at the Sioux Falls Arena for each event. During the promotional event children were allowed on the field to participate in an informal game of touch football and a football clinic. While participating in the game of touch football Gaylen suffered a severe knee injury requiring extensive surgery. He alleged his injury was caused when his foot was caught under the synthetic turf while running on the field. Gaylen filed this negligence lawsuit against the Sioux Falls Storm. Prior to trial, the complaint was amended to include Gaylen's parents as parties to the lawsuit. The jury awarded Gaylen and his parents \$500,000 in damages. The Sioux Falls Storm appeals raising the following issues:

1. Whether it was prejudicial error for the trial court to grant a motion to amend the complaint adding Gaylen's parents.
2. Whether the trial court erred in limiting testimony of the Sioux Falls Storm expert witness relating to synthetic turf and the cause of Gaylen's injury.
3. Whether the trial court erred by not instructing the jury on the contributory negligence defense.

4. Whether the trial court erred in admitting evidence of subsequent remedial measures taken by the Sioux Falls Storm.
5. Whether the trial court erred in denying a motion for new trial based on newly discovered evidence concerning the extent of Gaylen's injuries.
6. Whether there was sufficient evidence to support the jury verdict.

Mr. James W. Redmond, Attorney for Appellant, Sioux Falls Storm

Mr. Jack Der Hagopian, Mr. Michael W. Strain, Attorneys for Appellees, Klutmans

State v. Blackburn

Tad Blackburn is charged and awaiting trial for First Degree Murder, or in the alternative, Second Degree Murder, in the death of his girlfriend, Tamara Magic. Prior to trial, Blackburn moved to suppress statements that he made to police during an interrogation. The trial court granted his motion and suppressed portions of the interrogation. The trial court determined that Blackburn's statements to police were inadmissible because Blackburn's Fifth and Fourteenth Amendment rights to counsel had been violated. The State of South Dakota sought permission to appeal the trial court's suppression order. The Supreme Court granted the State's request for this intermediate appeal.

The incident that gives rise to the murder charge against Blackburn occurred on November 8, 2007, in Rapid City, South Dakota. Late that evening the police and an ambulance responded to an emergency call at the home of Tamara Magic. There they found Magic dead with multiple stab wounds and head trauma. The police sought Blackburn as a suspect.

Blackburn was stopped by law enforcement driving Magic's vehicle at approximately 1:00 a.m. on November 9. The officer who stopped Blackburn determined that he had been drinking and was wanted for questioning in Magic's murder. The officer transported Blackburn to the police station for questioning.

The police interviewed Blackburn twice. The first interview occurred at approximately 2:00 a.m. on November 9 and a second interview at approximately 10:00 a.m. on November 10. During the first interview, Blackburn repeated that he was drunk, that he would not answer any questions until he was sober, and that he wanted a lawyer. Blackburn did not waive his *Miranda* rights during the first

interview and made no admissions. The trial court determined that any statements made by Blackburn during the first interview were inadmissible for any purpose at trial.

The morning of November 10, Blackburn requested to see Investigator Matt Sargent. At the beginning of the second interview, Investigator Sargent read Blackburn his *Miranda* rights, and then asked if Blackburn understood the rights:

Sargent: Keeping these rights in mind, do you wish to talk to us now?

Blackburn: Yes.

Sargent: K.

Blackburn: I mean I'd like, I'd like there to be a lawyer present just so I don't . . . step myself over the deep end or nothing else, but I mean at this point I really don't see why there needs to be one because I, I, really I want to know what you guys know. I was drunker an' . . . the other night when I was talking to you. I was high on . . . cocaine and I really don't remember a whole lot of what I told you the other night, but I need to know what's going on, what so we can, . . . , damage control. So what, what do they know Matt?

Blackburn then proceeded to admit that he stabbed and hit Magic. After Blackburn's admissions, the officer asked Blackburn:

Sargent: I gotta ask you a question about a comment you made. You said you wanted to get a hold of your mom so you can get a lawyer.

Sargent: Right. I just want to make sure that you're not telling me that you want to stop this.

Blackburn: No, no.

Sargent: Ok.

Blackburn: That, I'm, I'm, I'm not telling you that Matt. I just know that somewhere along the time and the proceedings.

Sargent: Oh definitely.

Blackburn: You know, I'm, I'm gonna need a lawyer. And I don't want, I don't want a PD man.

Sargent: K. So that's the basis of that comment, is you don't want a PD though?

Blackburn: Yeah, yeah it's, it's, it's, I'm not trying to stop the conversation.

The trial court determined that at this point Blackburn clarified that he did not desire an attorney immediately.

As a result of that determination the trial court found Blackburn's statements prior to the clarification inadmissible based on a violation of his Fifth and Fourteenth Amendment rights. The court found that Blackburn's statements made after his clarification were admissible.

The State appeals, raising the following issue:

Whether the trial court erred in suppressing statements that defendant made during his second interview with the police.

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

Mr. Paul R. Winter, Attorney for Defendant and Appellee,
Tad Aaron Blackburn

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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