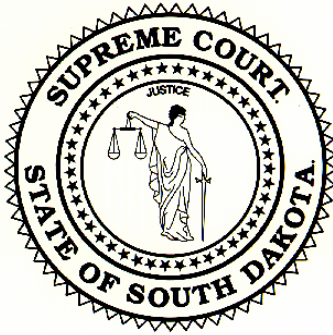


Introduction to
**The South Dakota
Supreme Court**



and

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

to be held

October 2 through October 4, 2006

Washington Pavilion

Sioux Falls, South Dakota



Supreme Court
STATE OF SOUTH DAKOTA

David Gilbertson
CHIEF JUSTICE

October 2, 2006

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

Ladies and Gentlemen:

Your Supreme Court welcomes you to our October term.

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

Sincerely yours,

A handwritten signature in cursive script, reading "David Gilbertson".

David Gilbertson
Chief Justice

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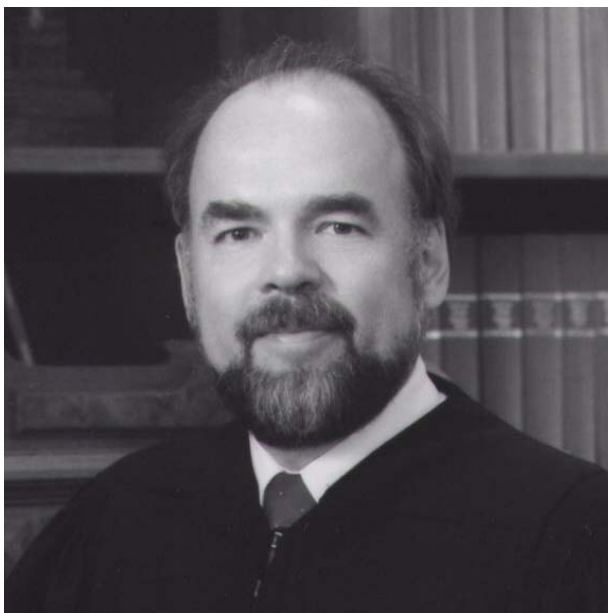
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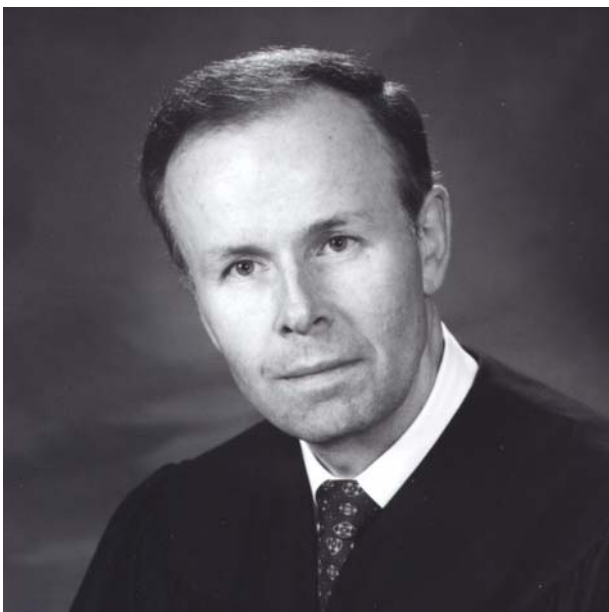
Chief Justice David Gilbertson

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 general election. Chief Justice Gilbertson received his undergraduate degree from South Dakota State University in 1972 and his Juris Doctor from the University of South Dakota School of Law in 1975. He engaged in private practice from 1975 until his appointment to the circuit court bench in 1986. During this time he also served as Roberts County Deputy State's Attorney and as City Attorney for the City of Sisseton. He is Past President of the South Dakota Judges Association; and is a member of the Glacial Lakes Bar Association, the Brown County Bar Association and the South Dakota Bar Association. He is a member of the Conference of Chief Justices and chairs its Committee on Tribal/State Relations. He is also a member of the Board of Directors of the National Conference of Chief Justices. He serves on the Judicial-Bar Liaison Committee of the State Bar Association and has served as a Court Counselor at South Dakota Boys State since 1995. Born October 29, 1949, he and his wife Deborah, have four children.



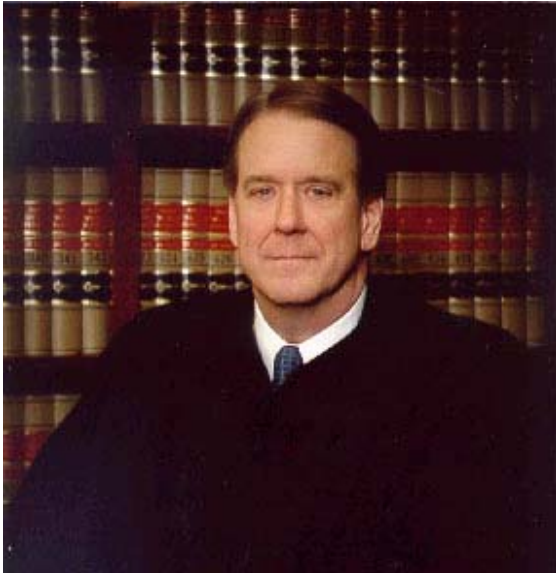
Justice Richard W. Sabers

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



Justice John K. Konenkamp

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



Justice Steven L. Zinter

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



Justice Judith K. Meierhenry

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



Clerk of the Supreme Court

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



Supreme Court Law Clerks

Law Clerks are recent law school graduates employed by the Court for a one-year appointment to assist the justices with research and writing of opinions on the cases under consideration. In the photograph above, from the left, are Michele Munson (Supreme Court Law Clerk), Hilary Williamson (Justice Meierhenry), Jennifer Williams (Justice Koenkamp), William Haugen (Chief Justice Gilbertson), Natalie Turnquist (Justice Sabers), and Jenna Howell (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-eight judges elected from within their circuits for eight-year terms. Vacancies filled by the Governor, who appoints replacements from a list of candidates recommended by the Judicial Qualifications Commission.

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

The Supreme Court Process

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

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

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

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

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

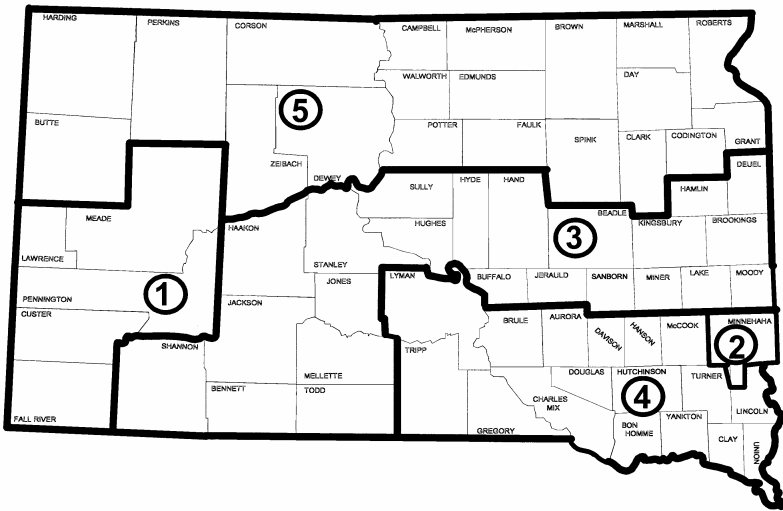
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench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

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

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

Justice Konenkamp was appointed in 1994 from District One. Justice Sabers was appointed in 1986 from District Two. Chief Justice Gilbertson was appointed in 1995 from District Five. Each of these justices were retained in the November 1998 general election. Justice Zinter was appointed in 2002 from District Three. Justice Meierhenry was appointed in 2002 from District Four. All five justices will stand for retention election in November, 2006.

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

Your cooperation is appreciated.

DO

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

DO NOT

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

Supreme Court of South Dakota
October 2006 Term

Nine cases are scheduled for oral argument during this term. For these cases, attorneys are permitted to appear before the Court to emphasize certain points of the case, and respond to the Court's questions. In addition to these oral arguments, numerous other cases will be considered by the Court during this term without further argument by the attorneys. These cases are on the Court's "non-oral" calendar. After hearing oral arguments each day, the Court considers several non-oral cases.

Case Summaries

The case summaries on the following pages have been prepared only for the cases scheduled for oral argument. The case number, date and order of argument appear at the top of each summary.

Matter of J.D.M.C.

Mother and Father were married in Sisseton, South Dakota, on December 27, 2002. Mother is an enrolled member of the Sisseton Wahpeton Oyate Tribe (SWO) and Father is a non-Indian. The couple had two daughters, J.D.M.C. and T.J.C., who are both enrolled members of SWO. When Mother and Father divorced in 2005, the parties shared joint legal and physical custody of both children, but the children resided with Father in Sisseton while Mother lived in Biloxi, Mississippi.

In the summer of 2005, T.J.C. died when Father accidentally left her in the car while he went to work in Browns Valley, MN. Father was investigated but no criminal charges were filed. Mother filed an abuse and neglect petition in Tribal Court, alleging J.D.M.C. was abused and neglected and sought protective custody pending a child protection investigation. The Tribal Court entered an ex-parte emergency custody order making J.D.M.C. a ward of the Tribal Court. The State Circuit Court would not grant comity to the emergency custody order.*

The SWO's Child Protection Program (CPP) filed an emergency custody petition and Mother filed an abuse and neglect petition in Tribal Court to remove J.D.M.C. from Father's custody. Father appeared specially to contest jurisdiction. While the Tribal Court found J.D.M.C. did not reside on the reservation, it found she was a ward of the Tribal Court. Therefore, the Tribal Court found it had

* Black's Law Dictionary defines comity as "[a] practice among political entities (as nations, states, or courts of different jurisdictions), involving . . . mutual recognition of legislative, executive, and judicial acts."

jurisdiction and issued an order for emergency custody (order).

SWO then filed a motion to enforce the order in the State Circuit Court. Father filed a motion for a comity hearing and motion to invalidate the order. At the hearing, Father argued the Tribal Court had no jurisdiction to enter the order since none of the parties had ever resided or been domiciled on the reservation. SWO contended the Tribal Court had exclusive jurisdiction under the Indian Child Welfare Act (ICWA), since J.D.M.C. was declared a ward of the Tribal Court. After the hearing, the State Circuit Court found the order was entitled to Full, Faith, and Credit under ICWA; and SDCL 1-1-25, the comity statute, was preempted by ICWA. In the alternative, the State Circuit Court found that the order met the requirements of South Dakota's comity statute.

Father appeals, raising the following issues:

1. Whether the State Circuit Court erred in determining the Tribal Court had subject matter jurisdiction.
2. Whether the State Circuit Court erred in determining the order was not subject to comity under SDCL 1-1-25 because the comity statute was preempted by ICWA.
3. If SDCL 1-1-25 is not preempted, then whether the circuit court erred in concluding SWO had fulfilled their burden of proving the comity factors had been met.
4. Whether the State Circuit Court erred in determining that SWO was not required to provide notice to the South Dakota Attorney General pursuant to SDCL 15-6-24(c), regarding its challenge to SDCL 1-1-25.

Mr. Gordon P. Nielsen, Mr. William J. Janklow, Attorneys
for Appellant Father

Ms. Jessica L. Ryan, Ms. Karen Gangle, Attorneys for
Appellee Sisseton Wahpeton Oyate

Ms. Danelle Daugherty, Attorney for Intervener Appellee
Mother

State v. Runge

During the evening of January 5, 2005, Duane L. Runge (Runge) stopped at the 22nd Avenue fire station in Brookings, South Dakota looking for his friend Jeremy Jensen (Jensen), a volunteer fireman. Runge was told by another volunteer fireman, Jayson Lenander (Lenander), that Jensen was out on an emergency call. During this conversation, Lenander observed that Runge appeared to be intoxicated. After Runge departed, the fireman contacted the Brookings Police Department (BPD). He reported that an unidentified individual, who appeared to be intoxicated, had stopped at the fire station looking for Jensen and had then driven away in a pickup. A description of the pickup and license plate number was given to BPD.

When Jensen returned from the emergency call, he was told to call BPD. By the time he called, BPD had run the license plate and determined the pickup belonged to Runge. The BPD dispatcher asked Jensen if he knew Runge, and if so, where he might be headed. Jensen indicated he knew Runge and that he may have gone to Jensen's apartment. Police officers were dispatched to the apartment.

When the officers arrived at the apartment, they found Runge's pickup still running in the parking lot. The officers went to Jensen's apartment and knocked on the door, which was opened by Jensen's girlfriend, Jessica Hougland (Hougland). Hougland lived at the apartment. Officer Collins (Collins) asked if Runge was there. Hougland responded that he was and went to get Runge, who had been in one of the bedrooms. The officers entered the apartment. Runge, who was a friend of Jensen's and had previously lived at the apartment, appeared drinking a beer. Collins asked Runge to step outside. Runge complied and accompanied the officers to their patrol car. After an interview and field sobriety test, Runge was arrested for DUI – third offense.

Runge was convicted and sentenced to 18 months in the South Dakota State Penitentiary. He raises the following issues on appeal:

1. Whether Runge had a reasonable expectation of privacy at the apartment to challenge the constitutionality of a search and seizure at that residence.
2. Whether Runge voluntarily consented to his removal from the apartment and confinement in the patrol car.
3. Whether law enforcement had valid consent from Hougland to enter the apartment.
4. Whether Runge could be seized from the apartment based on the reasonable suspicion that he had been driving while intoxicated.

Mr. Lawrence E. Long, Attorney General, Ms. Katie L. Hansen, Assistant Attorney General, Attorneys for Appellee State of South Dakota

Mr. Robert G. Fite, Attorney for Appellant Duane L. Runge

Fuller v. Croston, et. al.

This is an appeal from the circuit court's grant of summary judgment concerning statutory property disclosure requirements, breach of contract and misrepresentation. Ivan R. Fuller (Fuller) expressed interest in purchasing James and Patricia Croston's (Crostons) home in Sioux Falls, South Dakota. Before executing a purchase agreement, Fuller received Crostons' property condition disclosure statement. The disclosure statement indicated that the home had not experienced any water penetration problems and there were no cracks in the interior walls. However, Crostons were aware of prior water penetration problems and cracks in the basement prior to completing the disclosure statement.

Prior to closing, Fuller and the Crostons walked through the home together. At this time, Crostons orally informed Fuller there were two or three prior instances of water in the basement years ago. They assured Fuller, however, that the addition of a sun room to the home eliminated these problems. The Crostons maintained that they did not disclose this information in the disclosure statement because their real estate agent, Janey Johnson (Johnson) of Coldwell Banker GKR & Associates, told them it was not necessary if it happened a long time ago and the problem had been fixed. Johnson denied these allegations.

Fuller hired a professional inspection service to conduct an inspection of the home prior to closing. The inspection revealed that the garage roof was sagging, there was a small horizontal crack and minor bowing on the north and south foundation walls, and the north wall had been patched and there was no new cracking. The inspection also revealed signs of past dampness in the basement.

Based upon this inspection, the Crostons and Fuller executed an addendum to the purchase agreement. In the addendum, the Crostons agreed to jack and add a support beam to the garage roof before closing, as recommended in the inspection report. Crostons hired a contractor to complete this task. Fuller personally inspected the roof and confirmed that the sagging was eliminated.

About a year and a half after closing, Fuller experienced water penetration in the basement. When Fuller hired a contractor to fix the water problem, the contractor noticed evidence of major water damage in the past. The contractor blamed the water infiltration on the existence of cracks in the foundation and bowing of the walls. At the same time, the garage roof began sagging once again. Fuller hired an engineer and contractor to fix this problem. They informed Fuller that the prior work to the garage did not fix the sagging problem, but in fact, made the problem worse.

Fuller brought suit against the Crostons, Johnson and Coldwell Banker GKR & Associates alleging breach of contract, negligence and fraudulent concealment. The circuit court granted summary judgment in favor of Crostons and the other defendants. The court concluded that Fuller was aware of prior water damage based on Crostons' oral disclosures and was aware of cracking based on the inspection report. As a result, the court concluded there was sufficient disclosure of the problems in the house. Fuller appeals raising three issues:

1. Whether the circuit court erred in concluding that there was no genuine issue of material fact on the issue of whether the Crostons' disclosure complied with the statutory requirements of SDCL ch. 43-4.

2. Whether the circuit court erred in concluding that there was no genuine issue of material fact on the issue of breach of the purchase agreement addendum.
3. Whether the circuit court erred in concluding that there was no genuine issue of material fact as to whether Johnson is liable for misrepresentation and/or nondisclosure under SDCL 36-21A-148 and 36-21A-134.

Mr. Patrick J. Glover, Attorney for Appellant Ivan R. Fuller

Mr. Steven W. Sanford, Mr. Stephen C. Landon, and Mr. Michael A. Henderson, Attorneys for Appellee Coldwell Banker GKR & Associates and Janey Johnson

Mr. Patrick L. Sealey and Mr. Joel D. Vos, Attorneys for Appellees James and Patricia Croston

**Matter of the Dissolution of Midnight Star
Enterprises, L.P.**

Midnight Star Enterprises, L.P. (Midnight Star) is a limited partnership which operates a gaming, on-sale liquor restaurant in Deadwood, South Dakota. The owners of Midnight Star consist of: Midnight Star Enterprises, Ltd. (MSEL) as the general partner, owning 22 partnership units; Kevin Costner (Costner), owning 71.50 partnership units; and Francis and Carla Caneva (Canevas), owning 3.25 partnership units each. Costner is the sole owner of MSEL and essentially owns 93.5 partnership units.

The Canevas managed the operations of Midnight Star. According to MSEL, it became concerned about the Canevas' management and voiced concerns. Communications between the Canevas and the other partners broke down and MSEL decided to terminate the Canevas' employment. MSEL inquired whether the Canevas would participate in an amicable disassociation, but the Canevas declined.

MSEL then chose to dissolve Midnight Star pursuant to Article X, Section 10.1 of the Limited Partnership Agreement and brought a Petition for Dissolution. In order to dissolve, the fair market value of Midnight Star had to be assessed. MSEL hired Paul Thorstenson (Thorstenson), an accountant, to determine the fair market value. MSEL alleged the Canevas solicited an "offer" from Ken Kellar (Kellar), a Deadwood casino, restaurant, and hotel owner, which MSEL claimed was contrary to the provisions of the partnership agreement.

At an evidentiary hearing, Thorstenson determined the fair market value was \$3.1 million based on the hypothetical transaction standard of valuation. Kellar testified he offered \$6.2 million for Midnight Star. MSEL

argued Thorstenson used the proper valuation standard and Kellar's offer did not establish the fair market value. The circuit court disagreed and found Kellar's offer of \$6.2 million was the fair market value of Midnight Star. The circuit court ordered the majority owners to buy the business for \$6.2 million within 10 days or the court would order the business to be sold on the open market.

MSEL appeals, raising the following issues:

1. Whether the circuit court erred in finding the fair market value of Midnight Star was the actual offer price and not that of a hypothetical transaction.
2. Whether the circuit court exceeded its powers by ordering a forced sale of Midnight Star.

Mr. Michael P. Reynolds, Attorney for Appellant Midnight Star Enterprises, LTD

Mr. Richard A. Pluimer, Attorney for Appellees Carla and Francis Caneva

State v. Berhanu

On January 7, 2005, at approximately 10:00 p.m. in a Wal-Mart parking lot, Alemu Berhanu drove his vehicle into Abraham Sandal, who was walking towards the store for his evening work shift. The impact propelled Sandal onto the hood of Berhanu's car. Sandal fell off and became caught underneath the car. As Sandal was trapped, Berhanu kept driving forward. He continued to drive until he ran into a car occupied by George Zahn, who was parked in front of the Wal-Mart store waiting for his wife to return. After the collision, Zahn was pinned inside his vehicle, which was sandwiched between Berhanu's car and the Wal-Mart store. Sandal remained trapped underneath Berhanu's car.

Berhanu got out of his car and began to walk away from the scene. Moments later, a citizen who witnessed Berhanu driving into Sandal stopped him until law enforcement came. Berhanu was arrested and charged with (1) attempted first-degree murder of Sandal, (2) aggravated assault on Sandal, (3) aggravated assault with a dangerous weapon against Zahn, and (4) violation of a protection order. After a trial, the jury found Berhanu guilty on all charges. The court sentenced him to twenty-five years for the crimes against Sandal, fifteen years for the crimes against Zahn, and one year for violating the protection order. The fifteen year and twenty-five year sentences were to be served consecutively, with the one year sentence to be served concurrently. The court also ordered Berhanu to reimburse Sandal in the amount of \$458,084.94 for his medical expenses.

Berhanu appeals claiming:

1. There was not sufficient evidence to support the jury's verdict that he was guilty beyond a reasonable doubt of all charges, but especially attempted first degree murder and aggravated assault against Zahn.
2. That his twenty-five year and fifteen year sentences to be served consecutively amount to cruel and unusual punishment.

Mr. Lawrence E. Long, Attorney General and Ms. Ann C. Meyer, Assistant Attorney General, Attorneys for Appellee State of South Dakota

Mr. Scott B. Carlson, Attorney for Appellant Alemu Berhanu

Eischens v. Wayne Township

On November 10, 1998, the Eischens' home in Wayne Township near Sioux Falls caught fire. They called 911, and the call was received by the Wayne Volunteer Fire Department and the Sioux Falls Fire Department. The Wayne and Sioux Falls Fire Departments had a "mutual aid agreement," stating that they would assist each other in fighting fires. Wayne informed Sioux Falls that it would not need its assistance. When Wayne arrived at the Eischens' residence, the tanker truck was not primed so it could not immediately pump water. Apparently, Wayne also did not have an adequate ladder, a saw with a wood cutting blade, or an axe, which caused problems in fighting the fire. Mr. Eischen assisted in priming the truck and providing some equipment. At one point, Mr. Eischen took a hose from a firefighter to direct it at the fire. It appears that there were some problems between Mr. Eischen and the fire department because the Wayne Fire Chief told Mr. Eischen that he was going to be arrested for interference. The house and its contents were ultimately destroyed.

Mr. Eischen sued Wayne Township and Wayne Fire Department for: (1) refusing assistance from the Sioux Falls Fire Department; (2) failing to have sufficient equipment to fight the fire; (3) failing to adequately train its firefighters; (4) failing to have a plan requiring the utilization of the Sioux Falls Fire Department in fighting structure fires; and (5) preventing Mr. Eischen from fighting the fire.

The circuit court granted summary judgment dismissing all theories of liability against Wayne Fire Department except for Eischens' claims concerning (1) the condition, type, and availability of the Fire Department's equipment; and (2) the inadequate training of the firefighters. However, after allegations that Eischens' counsel took no further action to prosecute this lawsuit for

eighteen additional months, the circuit court also dismissed these remaining claims for failure to prosecute.

Eischens have appealed to this Court raising the following issues:

1. Whether the dismissal for failure to prosecute was proper.
2. Whether the circuit court should have issued findings of fact and conclusions of law in ruling on the motion for dismissal for failure to prosecute.
3. Whether partial summary judgment was properly granted dismissing Eischens' claims that: (a) Wayne Fire Department should not have refused assistance from the Sioux Falls Fire Department; (b) Wayne Fire Department should have had a plan requiring the utilization of the Sioux Falls Fire Department in fighting structure fires; and (c) Wayne Fire Department should not have prevented Mr. Eischen from fighting the fire himself.
4. Whether Wayne Fire Department owed a legal duty to Eischens that would make it liable for the problems encountered in providing this fire fighting assistance.
5. Whether Wayne Fire Department was immune from Eischens' suit.

Mr. Aaron D. Salberg, Attorney for Appellants Paul, Sharon, Jim, John and Eric Eischen

Mr. Douglas M. Deibert, Attorney for Appellees Wayne Township and Wayne Township Volunteer Fire Department

State v. Carothers

On October 3, 2003, four-year-old S.T. came into the bathroom where her mother, M.T., was folding laundry and proceeded to tell her that Derrick Carothers had touched her in her vaginal area. Carothers had been staying with the family and babysat S.T. while Mother went out of town from October 1, 2003 to October 2, 2003.

That same day, Mother took S.T. to the local medical clinic where she was examined and questioned by law enforcement officers. At this time, police officers asked Carothers to accompany them to the police station. Prior to being questioned for approximately 85 minutes, Carothers was told he was free to leave at any time. Carothers never confessed to having any sexual contact with S.T. A few days later, S.T. was taken to A Child's Voice where she gave a social worker further details of Carothers' sexual contacts.

On November 26, 2003, a grand jury indicted Carothers on three offenses: Sexual Contact with a Child Under Sixteen, Kidnapping, and Criminal Pedophilia. Carothers unsuccessfully challenged the indictment based on evidentiary violations in the grand jury proceeding. The trial court denied Carothers' Motion to Suppress the statements he made to police officers because Carothers had voluntarily met with the police and the interrogation had not been custodial in nature. The trial court also admitted the State's exhibits referencing Carothers' previous felony convictions and incarceration. At the State's request, the trial court required Carothers to show the jury his tattoos for purposes of identification.

At the time of trial, S.T. was six years old. The trial court found that she was competent to testify. However, her out of court statements recounting the sexual contact to law enforcement and the social worker were deemed

inadmissible. On intermediate appeal, the South Dakota Supreme Court reversed the trial court on this issue.

The jury subsequently found Carothers guilty of Sexual Contact with a Child Under Sixteen and Criminal Pedophilia. In a separate trial, Carothers was found to be a habitual criminal. At this trial, all of Carothers' prior convictions were submitted to the jury. The trial court then determined how many offenses had occurred after the jury returned the verdict forms. Carothers was sentenced to life in prison. Carothers appeals, raising the following issues:

1. Whether the criminal indictment should have been dismissed based upon prosecutorial misconduct.
2. Whether the minor child, S.T., was competent and available to testify at trial.
3. Whether the trial court erred in allowing into evidence testimonial statements made by S.T. to law enforcement and A Child's Voice.
4. Whether SDCL 19-16-38 is unconstitutional.
5. Whether Carothers' statement to law enforcement officers should have been suppressed.
6. Whether the State's Attorney's improper statements and argument require a new trial.
7. Whether information contained in the State's exhibits unfairly prejudiced Carothers.

8. Whether the trial court abused its discretion in ordering Carothers to display physical evidence in the presence of the jury.
9. Whether the jury should have been instructed to make a determination if a conviction was a felony under South Dakota or United States law at the time of conviction and whether a prior conviction was a crime of violence.
10. Whether the trial court abused its discretion in overruling Carothers' objection to the number of verdict forms submitted to the jury.

Mr. Sean M. O'Brien, Attorney for Appellant Derrick E. Carothers

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

McDowell v. Citigroup, Inc., et. al.

In December 1991, almost fifteen years ago, Pamela McDowell suffered a work-related injury while employed by Citibank of South Dakota, a subsidiary of Citigroup, Inc. Citigroup's workers' compensation insurance carrier at that time was Planet Insurance Company. Planet paid McDowell workers' compensation benefits. In 1993, McDowell was still being treated for her injury, and she claimed because of her injury she was permanently and totally disabled. Thereafter, McDowell, Citigroup, and Planet entered into a "Compromise Agreement" settling her workers' compensation claim. McDowell received a lump sum payment and promised to release all past, existing, and future claims against Planet and Citigroup. Citigroup and Planet then agreed that they would pay McDowell's future medical obligations connected to her work-related injury.

Following this agreement, Planet contracted with Crawford & Company, a third-party claims administrator, to process McDowell's future medical claims. At some point in 1996, McDowell complained that her medical bills were not being timely paid. She argued that because her bills were not paid, her medical care provider refused to continue treating her. As a result, in 2000, McDowell filed a petition with the Department of Labor arguing that Crawford and Citigroup have unreasonably delayed paying her medical bills, which is a failure to comply with the terms of the settlement agreement. Also in 2000, McDowell and her husband filed a petition for voluntary Chapter 7 Bankruptcy. One requirement in a bankruptcy proceeding is that McDowell must identify any potential tort claims on her bankruptcy schedules. She did not include a potential tort claim against Citigroup or Crawford.

In 2004, McDowell filed the present lawsuit against Citigroup and Crawford. She claimed that they unreasonably and unjustifiably delayed their obligations under South Dakota's Workers' Compensation laws to make payments for her necessary medical bills. In response, Citigroup and Crawford argued that because McDowell did not disclose her bad faith claim in her bankruptcy proceeding, she should not be allowed to file a lawsuit based on conduct related to "pre-bankruptcy" medical bills. The circuit court agreed and granted partial summary judgment dismissing claims related to bills dated prior to McDowell's bankruptcy filing. However, the court allowed McDowell to amend her complaint and identify alleged post-bankruptcy conduct. In her amended complaint, McDowell alleged, based on certain post-bankruptcy conduct, Citigroup and Crawford were liable for bad faith, intentional infliction of emotional distress, negligent infliction of emotional distress, and punitive damages. Crawford and Citigroup filed another motion for summary judgment. This time, they argued that she failed to present evidence in support of her allegations. The circuit court granted the motion, dismissing all of McDowell's claims.

McDowell appeals claiming the circuit court erred when it granted summary judgment.

Mr. Chet Groseclose, Attorney for Appellant Pamela McDowell

Mr. Steve Sanford and Mr. Michael A. Henderson, Attorneys for Appellee Crawford & Company

Mr. Lon J. Kouri and Mr. Scott R. Swier, Attorneys for Appellees Citigroup, Inc. and Citibank of South Dakota, NA.

Gilbert v. Flandreau Santee Sioux Tribe

Helen Gilbert was employed by the Flandreau Santee Sioux Tribe as an education coordinator from November 13, 2000 to August 10, 2004. The Tribe's political activity policy prohibited employees from engaging in political activities during work hours or using tribal equipment or property for political activity. During work hours, Gilbert wrote a letter on tribal stationery to the Tribe's Executive Committee criticizing the appointment of the Tribe's Secretary. The letter also criticized several other tribal employees in the performance of their duties as well as other personal issues.

The Tribe decided to suspend Gilbert for violating the political activity policy, but Gilbert refused to accept the suspension. Accordingly, Gilbert was discharged. Gilbert subsequently filed a claim for unemployment insurance (UI) benefits with the South Dakota Unemployment Insurance Division. The Division initially determined that the conditions surrounding Gilbert's separation from employment did not disqualify her from receiving UI benefits under SDCL 61-6-14 and that the Tribe's experience-rating account was subject to charge under SDCL 61-5-29.

The Tribe appealed the determination. After a hearing on the matter, the referee denied Gilbert UI benefits based on its finding that she had been discharged for work-connected misconduct. Gilbert appealed the referee's decision to the circuit court. She claimed that a finding of misconduct based on the letter constituted a violation of her constitutional right to freedom of speech.

The circuit court affirmed the referee's decision. The court concluded that there was no relationship between the letter and Gilbert's position as education coordinator and that the information contained in the letter was not a matter

of public concern. Gilbert appeals and raises the following issue:

Whether the circuit court erred when it affirmed the Department of Labor's determination that Gilbert's letter to her employer, the Flandreau Santee Sioux Tribe, constituted misconduct disqualifying her from unemployment insurance benefits and its determination that the letter was not constitutionally protected free speech under the United States and/or the South Dakota Constitution.

Mr. Todd D. Epp, Attorney for Appellant Helen Gilbert

Mr. Rollyn Samp, Attorney for Appellee Flandreau Santee Sioux Tribe

Glossary of Terms

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

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

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

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

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

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

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

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

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

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

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

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

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