

**Introduction to**

**The South Dakota**

**Supreme Court**



**and**

**Case Summaries for**

**Oral Arguments at the**

**September/October Term of the Court**

**to be held**

**September 30 through October 2, 2013**

**Black Hills State University**

**Spearfish, South Dakota**



*Supreme Court*  
STATE OF SOUTH DAKOTA

*David Gilbertson*  
CHIEF JUSTICE

September 30, 2013

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

Ladies and Gentlemen:

Your Supreme Court welcomes you to our September/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,

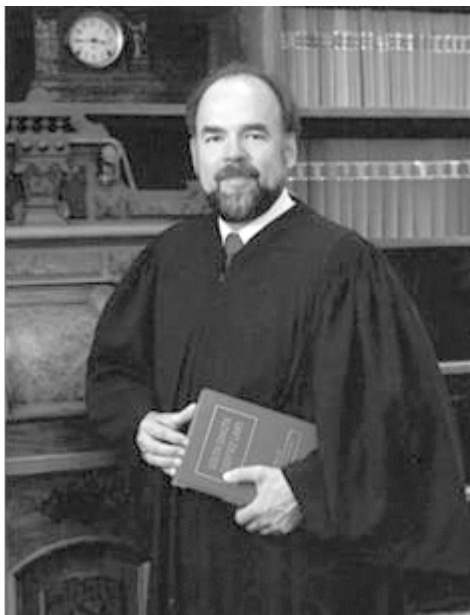
A handwritten signature in cursive script, reading "David Gilbertson".

David Gilbertson  
Chief Justice

# Table of Contents

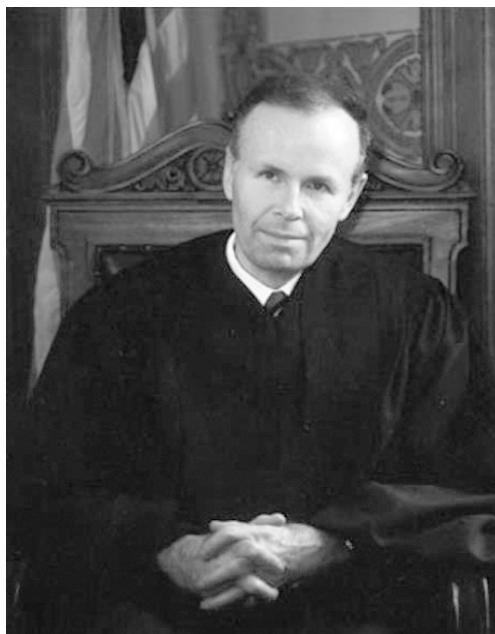
<b><u>Title</u></b>	<b><u>Page</u></b>
Chief Justice David Gilbertson .....	1
Justice John K. Konenkamp .....	2
Justice Steven L. Zinter .....	3
Justice Glen A. Severson.....	4
Justice Lori S. Wilbur .....	5
Clerk of the Supreme Court.....	6
Supreme Court Law Clerks .....	7
Summary of Court Jurisdictions.....	8
Supreme Court Process .....	9
Map of Appointment Districts .....	11
Courtroom Protocol .....	12
Case Summaries for this Term of Court:	
<b><u>Monday, September 30, 2013</u></b>	
State v. Diaz .....	14
Lewis v. Sanford Med. Ctr.....	17
Hewitt v. Felderman .....	21
<b><u>Tuesday, October 1, 2013</u></b>	
Niesche v. Fox.....	24
State v. Toben.....	27
Brosnan v. Brosnan .....	30
<b><u>Wednesday, October 2, 2013</u></b>	
Gabriel v. Bauman et al. ....	33
State v. Thomason .....	36
Pieper v. Pieper .....	40
Glossary of Terms .....	43

*The justices have extended an invitation to the public to attend any of the Court's sessions. To assist with the Supreme Court visit, persons in attendance must abide by proper courtroom etiquette. The Supreme Court employs security methods to insure the well-being of all who attend its proceedings and all attending the morning court sessions will be requested to pass through a metal detector. Backpacks and book bags should not be brought, and other bags and purses are subject to inspection and search by security personnel.*



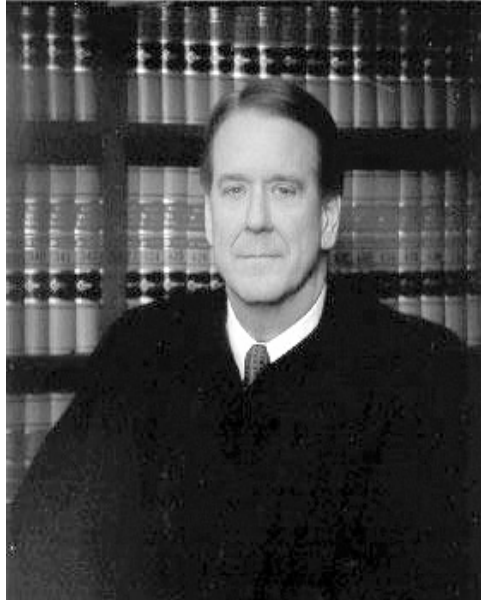
### ***Chief Justice David Gilbertson***

Chief Justice Gilbertson was elected to a 4-year term as Chief Justice by the members of the Supreme Court in September 2001, was re-elected to a second 4-year term as Chief Justice by the members of the Supreme Court in June 2005, a third 4-year term in June 2009 and a fourth 4-year term in June 2013. 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 Committees on Tribal/State Relations and the Task Force on Politics and Judicial Selection. 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. He and his wife Deborah have four children.



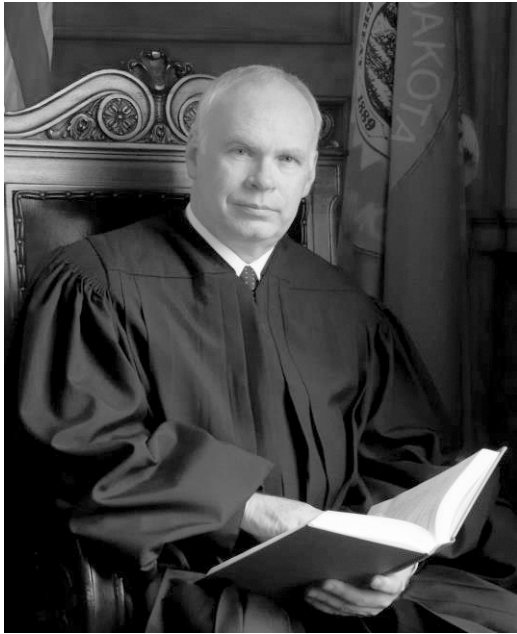
### ***Justice John K. Konenkamp***

Justice Konenkamp, born October 20, 1944, represents the First Supreme Court District, which includes Custer, 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 by former Governor Walter Dale Miller 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 National Advisory Council of the American Judicature Society, an organization devoted to addressing the problems and concerns of the justice system. Justice Konenkamp and his wife, Geri, are former foster parents for the Department of Social Services. Justice Konenkamp has served on a number of boards advancing the improvement of the legal system, including the South Dakota Equal Justice Commission and the Alternative Dispute Resolution Committee. Justice Konenkamp and his wife have two adult children, Kathryn and Matthew and five grandchildren.



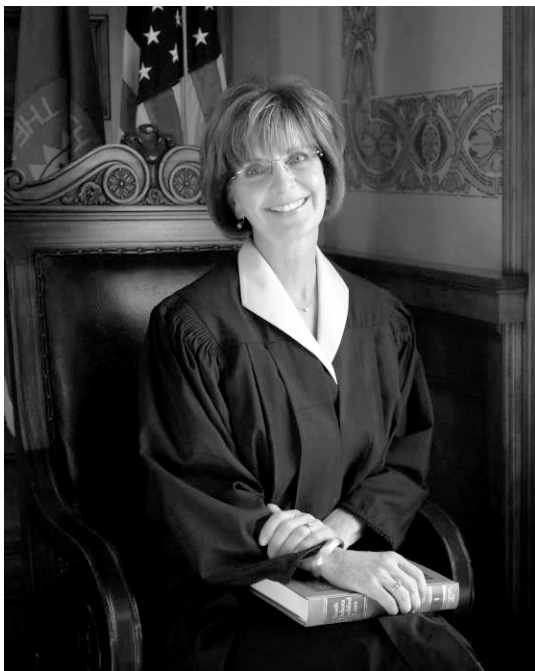
### ***Justice Steven L. Zinter***

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 daughters and three grandchildren.



### ***Justice Glen A. Severson***

Justice Severson, born in 1949, represents the Second Supreme Court District, which includes Minnehaha County. He served in the South Dakota Air National Guard from 1967-1973. He attended the University of South Dakota receiving a B.S. in 1972 and the University of South Dakota, School of Law receiving a Juris Doctor degree in 1975. He was a member of the Fingerson and Severson Law Firm from 1983 to 1992 and served as the Huron City Attorney from 1977-1992 and a Beadle County Deputy States Attorney in 1975. He was appointed as Circuit Judge in the Second Circuit in 1993 and served as Presiding Judge from 2002 until his appointment to the Supreme Court. Justice Severson was appointed to the Supreme Court in 2009 after sixteen years on the trial bench. He is a member of the American Bar Association, South Dakota Bar Association and Second Circuit Bar Association. He was a member South Dakota Board of Water and Natural Resources (1986-1992) and has served on a number of other boards and commissions. Justice Severson and his wife Mary have two adult children, Thomas and Kathryn.



***Justice Lori S. Wilbur***

Justice Wilbur represents the Fourth Supreme Court District, which includes the counties of Aurora, Bon Homme, Charles Mix, Clay, Davison, Douglas, Gregory, Hanson, Hutchinson, Lincoln, McCook, Turner, Union and Yankton. She attended the University of South Dakota receiving a Bachelor of Arts degree in 1974 and the University of South Dakota, School of Law, receiving a Juris Doctor degree in 1977. She served as a law clerk for the South Dakota Supreme Court for Honorable Laurence J. Zastrow; was an assistant Attorney General; General Counsel, South Dakota Board of Regents; Staff Attorney, South Dakota Legislative Research Council; and Legal Counsel, South Dakota Bureau of Personnel. She is a member and past President of the South Dakota Judges Association, past member and Secretary of the Judicial Qualifications Commission and a member of the Rosebud Bar Association. She served as a Law-Trained Magistrate Judge, Sixth Circuit 1992-1999; Circuit Court Judge, Sixth Circuit, 1999-2011; and Presiding Judge, Sixth Circuit, 2007 – 2011. Justice Wilbur, and her late husband Brent, have two adult daughters and one grandson.





### *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.

## ***2013-2014 Supreme Court Law Clerks***

Anthony James Franken	Chief Justice Gilbertson
Jennifer Williams	Justice Konenkamp
Joseph Cooch	Justice Zinter
Eric J. Cleveringa	Justice Severson
Krista L. Tschetter	Justice Wilbur
Jared Tidemann	Law Clerk for the Supreme Court
Caleb Veldhouse	Law Clerk for the Supreme Court

## **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 forty-one 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: <http://ujs.sd.gov/>

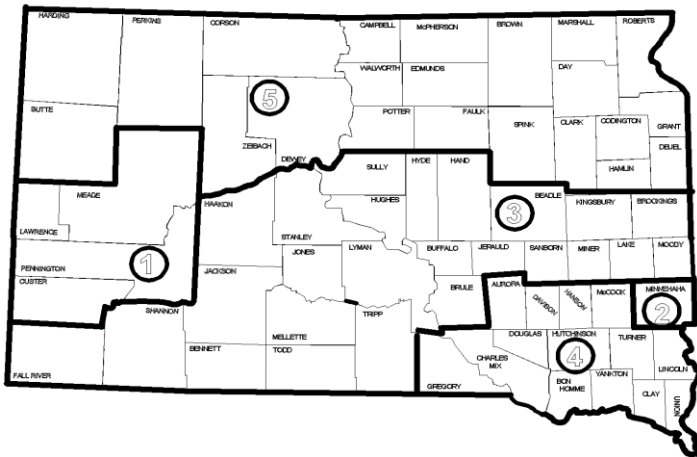
In addition to its appellate jurisdiction, the Supreme Court has its own area of "original" jurisdiction. It is also responsible for a wide range of administrative duties involving the personnel and procedures of the court system and the professional conduct of attorneys throughout the state.

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

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

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 Severson was appointed in 2009 from District Two. Justice Wilbur was appointed in 2011 from District Four. Chief Justice Gilbertson and Justices Konenkamp and Zinter were each retained in the November 2006 general election. Justice Severson was retained in the November 2012 general election.

*Effective January 23, 2012*



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

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

Your cooperation is appreciated.

**DO**

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

**DO NOT**

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

**Supreme Court of South Dakota**  
**September/October 2013 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.

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



**State v. Diaz**

On November 10, 2009, Jasmine Guevara's badly burned body was found in the trunk of her car in Hanson County, South Dakota. An autopsy revealed that she had been burned alive. The investigation led law enforcement to 15-year-old Maricela Diaz.

Diaz is a Mexican citizen who moved to Indiana when she was 11 years old. During her residency in Indiana, Diaz was a victim of sexual abuse, which resulted in the birth of her child at the age of 14. In October 2009, leaving her child behind, she ran away from Indiana with Alexander Salgado, then 20 years old and the father of her child, and came to South Dakota. At this time, Diaz was a ward of the state of Indiana and in its legal custody. Before coming to South Dakota, Diaz had dropped out of the 9th grade. Her primary language is Spanish, but she does speak limited English.

Diaz was taken to the Mitchell police department for questioning on November 12, 2009. While at the police department, but before the questioning began, the police contacted Diaz's mother, who was still living in Indiana. Her mother was told Diaz was safely in police custody, that Diaz was a possible witness in an investigation, and that the police needed the mother's permission to talk with Diaz. Diaz's mother consented to the request to question Diaz. The telephone conversation with the mother was held in Spanish.

Diaz was at the police department for approximately four and a half hours before she confessed to murdering Jasmine Guevara. One and a half hours were spent questioning Diaz. She was given food and multiple restroom breaks and was given her Miranda rights in both English and Spanish. Diaz stated she did not understand her Miranda rights when it was spoken to her in English. After hearing the rights in Spanish, Diaz stated she understood. The questioning was conducted in Spanish.

Diaz was charged by amended juvenile petition with First Degree Murder, First Degree Murder – Felony Murder, and First Degree Arson. In juvenile court, Diaz filed a motion to suppress her statements to law enforcement. The juvenile court denied Diaz’s motion to suppress finding that Diaz voluntarily, knowingly, and intelligently waived her Miranda rights and that her statements were made voluntarily. The State moved to transfer the case to adult court. After a transfer hearing, the juvenile court transferred Diaz to adult court in the First Judicial Circuit of South Dakota.

The Hanson County grand jury indicted Diaz on six counts: (1) First Degree Murder, (2) Conspiracy to Commit First Degree Murder, (3) First Degree Murder – Felony Murder (Arson), (4) First Degree Arson, (5) First Degree Murder – Felony Murder (Kidnapping), and (6) Second Degree Aggravated Kidnapping.

In circuit court, Diaz again filed a motion to suppress her statements made to law enforcement. The circuit court reopened the suppression motion. The circuit court found Diaz's statements to be in violation of her Miranda rights and therefore inadmissible. In particular, the circuit court found Diaz's statements to be voluntary, but that she did not knowingly and intelligently waive her Miranda rights.

The State now intermediately appeals to this Court, raising one issue:

Whether the circuit court erred in suppressing Diaz's statements.

Mr. Marty J. Jackley, Attorney General, Ms. Sherri Sundem Wald, Deputy Attorney General, and Mr. Douglas P. Barnett, Assistant Attorney General, Attorneys for Plaintiff and Appellant State of South Dakota

Mr. Douglas M. Dailey and Mr. Chris A. Nipe,  
Attorneys for Defendant and Appellee Maricela Nicolasa Diaz

**Lewis v. Sanford Medical Center**

On September 24, 2007, Lisa Lewis was admitted to Sanford Medical Center (Sanford) for a laparoscopic gastric band procedure. After admission, Lisa was prepared for surgery. Connie Bowar, a certified registered nurse anesthetist and an employee of Sanford, was assigned to assist the anesthesiologist. As part of the pre-surgery procedure, Bowar inserted an orogastric (i.e., mouth to stomach) tube into Lisa. This tube was inserted to remove air and other contents from Lisa's stomach. However, Bowar mistakenly attached the tube to the oxygen supply rather than the suction device, causing Lisa's stomach to fill with oxygen. Sanford admitted that Bowar's mistake was negligent.

The mistake was not discovered until after the surgeon, Dr. Peter O'Brien, made his first incision into Lisa's abdomen. Having observed that something was wrong, Dr. O'Brien made four to five more incisions into Lisa's abdomen to investigate whether the stomach had been perforated and to ensure that there wasn't any contamination inside the abdominal cavity. He did not find a major perforation or contamination, but he decided to abort the surgery because even a small stomach perforation could lead to an infection on an inserted lap band.

Soon after the aborted surgery, Lisa began to have problems with her heart. Lisa was seen by Dr. Scott Pham, a Sanford cardiologist, who diagnosed Lisa

with sick sinus syndrome and symptomatic bradycardia. He recommended the immediate implantation of a pacemaker, which was implanted the following day, September 26, 2007.

After the aborted surgery and before the pacemaker procedure, Lisa complained of neck, back, shoulder, leg, and abdominal pain. She was given medication to relieve the pain. After the pacemaker procedure, Lisa continued to have neck, back, and abdominal pain, and was given medication to help relieve the pain. Lisa was discharged from Sanford on September 27, 2007.

Lisa continued to experience medical problems after her discharge, and she sought subsequent treatment at Sanford for an array of medical issues. Lisa attributes many of these treatments to her pacemaker. The parties, however, disagree as to what caused the need for the pacemaker.

Lisa's expert, Dr. Carl Adams, testified that Lisa's need for the pacemaker and the complications associated with it were a direct result of the aborted surgery. Dr. Adams also testified that the subsequent treatment relating to the pacemaker continued until September 2011.

Sanford's expert, Dr. Charles Brown, testified that Lisa's need for a pacemaker was not caused by Sanford's negligence. Instead, Dr. Brown testified that Lisa's need for a pacemaker was due to a pre-existing heart condition, not caused by Sanford's negligence.

Lisa commenced this suit on October 7, 2010. Before trial, Sanford moved for summary judgment, arguing that Lisa's claim that Sanford caused her need

for the pacemaker was barred by the two-year medical malpractice statute of limitations. Sanford also argued that the type of continuing treatment Lisa received after the aborted surgery did not toll the statute of limitations. The circuit court denied the motion, finding that genuine issues of material fact existed as to when continuing treatment associated with the negligence ended. The case proceeded to trial.

After a five-day trial, the jury returned a verdict in favor of Sanford, concluding that Lisa did not suffer any damages legally caused by Sanford's negligence. Because this decision disposed of the case in favor of Sanford, the jury did not consider the statute of limitations question.

Lisa moved for a new trial, arguing that the jury could not award zero damages, as there was no dispute that Sanford's negligence caused abdominal incisions and associated pain. The trial court granted a new trial on all issues, including the question of damages for incisional pain and the question whether the need for a pacemaker and related problems were caused by Sanford's negligence. Sanford appeals.

We address the following issues on appeal:

1. Whether the trial court abused its discretion in granting a new trial.
2. If a new trial was properly granted, whether the trial court erred in denying Sanford's motion for summary judgment based on the statute of limitations.

Mr. Steven M. Johnson, Mr. Ronald A. Parsons, Jr., and  
Ms. Shannon R. Falon, Attorneys for Plaintiff  
and Appellee Lisa Lewis

Ms. Melissa C. Hinton and Mr. Vince M. Roche,  
Attorneys for Defendant and Appellant Sanford  
Medical Center

**Hewitt v. Felderman**

Peggy Hewitt was involved in two separate rear-end collision accidents that were the subject of the trial court action below. Hewitt was in the front vehicle during both accidents. The first accident occurred in the morning hours of January 11, 2007. Hewitt was stopped at a stop sign off the Benson Road exit of I-229 in Sioux Falls when she was rear-ended by Dwight Berens. Berens admitted being at fault in the accident.

Following the first accident, Hewitt complained of pain and numbness in her head, neck, and left arm. She was diagnosed with spinal sprain and strain injuries which aggravated a pre-existing condition. Hewitt received treatment from a chiropractor and other medical specialists to deal with pain and range of motion problems. She was receiving treatment on a regular basis at the time of the second accident.

The second accident occurred at approximately 7:30 a.m. on June 27, 2008. Hewitt's son, Micah Hewitt, was driving Hewitt's 2006 Grand Prix westbound in the passing lane on I-229 with Hewitt in the passenger seat. Near the 26th Street bridge, a deer came out of the grassy area near an off-ramp. Hewitt's son braked, but was unable to avoid a collision with the deer. While the Hewitt vehicle was slowing or stopped, it was struck on the passenger side of the rear bumper by a 2005 Ford Expedition driven by Shelli Rae Felderman.



Felderman was given a citation for following too closely and paid the fine without objection. Before and during trial, Felderman admitted to the uncontested citation, but maintained that she was not negligent in causing the accident. Hewitt filed suit against both Berens and Felderman for injuries sustained in the two accidents. The two lawsuits were combined in a single, four-day jury trial held December 11-14, 2012.

At the close of the case, Hewitt moved for a directed verdict on the issue of negligence. The trial court denied the motion. The jury found Berens liable in the 2007 collision, and awarded Hewitt \$60,000 against Berens for past and future medical expenses and pain and suffering arising from the first accident. The jury found Felderman negligent in causing the 2008 collision. However, when asked “Was Shelli Felderman’s negligence a legal cause of plaintiff’s injuries or damages, if any?” the jury responded, “Answer, no.” The jury accordingly awarded no damages to Hewitt against Felderman.

After trial, Hewitt filed a motion for a new trial on damages, arguing insufficiency of evidence to support the verdict and inadequate damages. Hewitt also filed a motion for attorney’s fees and costs arguing that Felderman’s failure to admit negligence unnecessarily increased the time and cost associated with bringing the case to trial. The court denied these motions. Felderman moved to recover specific costs and disbursements, as the prevailing party, in the amount of \$2,883.57. The court also denied this motion, finding that neither party prevailed.

Hewitt appeals raising the following issues:

1. Whether the trial court abused its discretion by denying Hewitt's Motion for Directed Verdict as to Felderman's negligence.
2. Whether the trial court abused its discretion by denying Hewitt's Motion for New Trial on the issue of damages.
3. Whether the trial court abused its discretion by denying Hewitt's Motion for Attorney's Fees and Costs.

Felderman raises the following issues for review:

1. Whether the trial court abused its discretion by refusing to award Felderman costs and disbursements under SDCL 15-7-37, as the "prevailing party."
2. Whether the trial court abused its discretion in admitting testimony regarding Hewitt's potential future need for a medical procedure called rhizotomy.

Ms. Stephanie R. Amiotte, Attorney for Plaintiff and  
Appellant Peggy Hewitt

Ms. Melanie L. Carpenter, Attorney for Defendant and  
Appellee Shelli Rae Felderman

**Niesche v. Fox**

Robert and Mary Lou married each other for a second time in 1972, and remained married until Mary Lou's death in March 2007. Mary Lou had three children from a previous marriage. Robert had no children.

Robert acquired three quarters of land prior to his marriage to Mary Lou. After their marriage, Robert acquired three more quarters. These six quarters totaled 960 acres. All the land was titled in Robert's name.

In 2005, a contract for deed to sell 160 acres was entered into with Spink Hutterian Brethren, Inc. (Brethren). An option contract was also entered into with Brethren to purchase the remaining 800 acres. Soon after, Robert and Mary Lou signed a warranty deed conveying the 160 acres to Brethren. The deed was held in escrow until the contract was fully paid.

In 2006, Robert created a revocable trust. He was the sole trustor and trustee. The trust provided that Mary Lou would receive \$60,000 annually if Robert died before her. It also initially left a one-eighth remainder interest in the land to her children. On the day the trust was created, Robert and Mary Lou signed a warranty deed conveying the 960 acres to the trust. The land was ultimately sold outright, or by contract deed, to Brethren. In August 2007, Robert amended the trust to exclude Mary Lou's children.

Throughout their marriage, Mary Lou and Robert signed various documents together relating to the land (e.g., promissory notes, mortgages, contracts, and deeds). Mary Lou's daughter, Laurel Niesche, argues that these documents establish that Mary Lou and Robert held the land as joint owners. Robert disagrees. He contends that the documents were needed to establish clear title not subject to her homestead or potential homestead interest in the land, not because she was a joint owner.

Niesche also argues that Robert agreed to a verbal request from Mary Lou that half the land would go to her children. Robert disputes this point. He also contends that even if true, such an agreement cannot form the basis of a claim because the agreement was not in writing.

Finally, Niesche alleges that Robert dominated the marriage, particularly the property transactions, and he was controlling of Mary Lou, to the point that she did whatever Robert asked. Robert denies these allegations.

In 2010, Niesche filed this suit, asserting claims for breach of marital and fiduciary duties, fraud and deceit, intentional interference with inheritance, and unjust enrichment, along with claims for punitive damages and attorney's fees. She later added claims for constructive trust and estoppel, and sought to set aside the warranty deed to the trust. Robert filed a motion for summary judgment on all claims, which the circuit court granted. Niesche appeals.

We address the following issues on appeal:

1. Whether Mary Lou and Robert's marriage created a confidential and fiduciary relationship that required Robert to prove that he did not improperly obtain sole title to the land.
2. Whether the circuit court erred in concluding that Mary Lou had no ownership interest in the 960 acres.
3. Whether the circuit court erred in dismissing Niesche's claims for breach of marital and fiduciary duties, fraud and deceit, intentional interference with inheritance, unjust enrichment, punitive damages, attorney's fees, constructive trust, estoppel, and to set aside the deed.

Mr. Robert A. Martin, Attorney for Plaintiff and  
Appellant Laurel Niesche

Mr. Michael J. Schaffer and Mr. Paul H. Linde,  
Attorneys for Defendant and Appellee Robert L.  
Fox

**State v. Toben**

The 2012 Legislature passed a bill, with an emergency clause, that made the possession of certain synthetic cannabinoids illegal. On February 23, 2012, the governor signed the bill into law. SDCL 34-20B-14.

The Chicago Avenue Bar in Goodwin, South Dakota, owned by Phil Plunkett, openly sold synthetic marijuana from its establishment. Plunkett ordered the synthetic marijuana and then listed on a whiteboard the various brands and types for sale and the price. His employees sold the substance over the counter and included the money from the sales in the cash register.

Concerned that illegal synthetic marijuana was being sold out of the bar, agents from the Division of Criminal Investigation made multiple controlled purchases at the bar. In particular, on March 6, 2012, Agent Neuharth, through a controlled purchase, obtained two packages of synthetic marijuana from employee Jason D. Toben. The two packages purchased were analyzed at the state laboratory by Chemist Roger Matheson, who later testified that the one package contained substance AM 2201 and the other contained MAM 2201, both substances made illegal by the new law.

Toben was arrested and charged with two counts of unauthorized possession of a controlled substance, one count of unauthorized possession or distribution of

a controlled substance, and one count of unauthorized possession or distribution of a controlled substance in a drug free zone. At trial, Toben's defense was that he was unaware that the packages contained AM 2201 or MAM 2201, and therefore, he could not have "knowingly" possessed a Schedule I substance.

At the conclusion of the trial, the jury was instructed, without objection by Toben, that:

The word "knowledge" or "knowingly" (or any derivative thereof) means only a knowledge that the facts exist which bring the act or omission within the provisions of any statute. It does not require knowledge of the unlawfulness of the act or omission. (Instruction 12)

And, in a separate instruction, not objected to by Toben, the jury was informed that:

In the crime of unauthorized possession of controlled substance, as alleged in counts one and two, the defendant must have criminal intent. To constitute criminal intent it is not necessary that there should exist an intent to violate the law. When a person intentionally does an act which the law declares to be a crime, the person is acting with criminal intent, even though the person may not know the conduct is unlawful. (Instruction 13)

During jury deliberations, the jury submitted the following question to the circuit court:

Is there further definition of the statement “it does not require knowledge of the unlawfulness of the act or omission,” does this refer to the knowledge of the law, or knowledge of committing a legal/illegal act?

The court instructed the jury to consider the instructions as a whole and declined to give further guidance. The jury convicted Toben on all four counts.

Toben appeals asserting the circuit court committed plain error when it gave the jury misleading and incomplete jury instructions on what is required to prove “knowing possession” of a controlled substance.

Mr. Marty J. Jackley, Attorney General, and Ms.  
Bethanna M. Feist, Assistant Attorney General,  
Attorneys for Plaintiff and Appellee State of  
South Dakota

Mr. Steve Miller, Attorney for Defendant and Appellant  
Jason D. Toben



**Brosnan v. Brosnan**

Elizabeth Audiss and Jesse Brosnan were married in August 2003. During their marriage, the parties had two children: J.J.B. and J.E.B.

In 2009, the couple divorced. Judge Arthur L. Rusch awarded the divorce on the grounds of extreme cruelty, based on incidents of domestic violence committed by Jesse. Because Elizabeth and Jesse were unable to work together to make decisions for their children, Elizabeth was awarded sole legal custody of the children. The divorce decree did not include a moving restriction.

Elizabeth married Jonnathan Audiss in February 2011. The couple, J.J.B., and J.E.B. resided in Sioux City, Iowa, where Jonnathan was employed in the construction industry. Approximately one year after the marriage, Jonnathan lost his job. After briefly looking for a new job in the area, Jonnathan accepted a sales position in California.

In mid-February 2012, Elizabeth served Jesse with a notice of intent to relocate and indicated that she, Jonnathan, and the children intended to relocate to California in March 2012. On February 29, 2012, Elizabeth emailed Jesse and indicated that she intended to move “in less than 2 weeks.”

After a hearing on Elizabeth’s motion to relocate, the trial court issued a memorandum decision in May 2012 that provided the factors it believed to be critical in determining whether Elizabeth had met her burden

in establishing that the relocation request was in the best interests of the children. In the memorandum decision, the trial court expressed its concern with whether Jonnathan could financially provide for the family in California, and subsequently, required Elizabeth to submit evidence of two months of payments showing that Jonnathan was earning what he had testified he expected to earn in California. At a second hearing in July 2012, Elizabeth presented evidence that Jonnathan had received the anticipated earnings from his employer in California.

In August 2012, the trial court entered its findings of fact and conclusions of law based on both the May 2012 memorandum decision and the hearing in July 2012. The trial court determined that the relocation request was in the best interests of the children. The trial court also concluded that both parties were reasonable in their respective positions regarding the relocation motion and neither party unreasonably increased the time spent on the case. The trial court awarded Elizabeth \$3,500 in attorney fees.

Jesse raises the following issues for our review:

1. Whether the trial court erred in (i) failing to exclude exhibits and testimony that related back to pre-divorce events; and (ii) relying on that inadmissible evidence to re-litigate issues previously adjudicated by Judge Rusch.
2. Whether the trial court abused its discretion in granting Elizabeth's motion to relocate with the children to California.

3. Whether the trial court erred in ordering Jesse to pay Elizabeth's attorney fees arising from Elizabeth's relocation motion.

Ms. Elizabeth Rosenbaum, Attorney for Plaintiff and  
Appellee Elizabeth Ann Brosnan n/k/a Elizabeth  
A. Audiss

Mr. Alex Hagen, Attorney for Defendant and Appellant  
Jesse John Brosnan

**Gabriel v. Bauman, et al.**

Tim Bauman is a volunteer firefighter for the Chester Fire Department in the Chester Rural Fire Protection District (Chester Fire). On the 4th of July in 2007, Bauman and his wife, Cheryl, were at a celebration in Wentworth, South Dakota. While there, Bauman received a page from Chester Fire directing him to respond to a fire. Bauman and Cheryl left the celebration in Bauman's personal pickup. Bauman, speeding, activated his hazard lights and drove toward the fire hall. When Bauman was traveling south on Lake County Road 15, he came over a hill and saw a north-bound vehicle positioned to make a left-hand turn where the road intersects with Horizon Heights Road. Cheryl also saw the vehicle and said, "Oh, no, don't go, don't go," and then, "Oh, thank God, they're not going to go." Bauman later explained that although he slowed his vehicle near the intersection, for which he had the right of way, the north-bound vehicle driven by Areyman Gabriel turned directly in front of Bauman. Bauman slammed on his brakes, but could not avoid the collision. Bauman struck the vehicle driven by Gabriel, injuring both Gabriel and his passenger, Mandi Gronseth.

Gabriel brought suit against Bauman and Chester Fire asserting that Bauman was negligent and Chester Fire was vicariously liable for Bauman's negligence. Gabriel further alleged that Chester Fire negligently trained Bauman and failed to equip his vehicle appropriately. Gabriel amended his complaint

after this Court declared, in *In re Certification of Question of Law*, 2010 S.D. 16, 779 N.W.2d 158, that SDCL 20-9-4.1 protects Bauman from liability unless his conduct was willful, wanton, or reckless. Gabriel alleged that Bauman willfully, wantonly, or recklessly continued to drive at an excessive speed after observing vehicles looking to turn and making no attempt to stop until ninety-six feet before the collision. Bauman and Chester Fire moved for summary judgment asserting that Bauman's conduct was not willful, wanton, or reckless as a matter of law. Chester Fire further asserted that SDCL 20-9-4.1 protected it from liability against Gabriel's negligent training and equipment claims. At the conclusion of the hearing, the circuit court orally granted Bauman and Chester Fire summary judgment. It ruled that "[t]here was nothing beyond the speed of Mr. Bauman that was a factor in this accident from his conduct[.]" and based on the law, "speed alone is insufficient." The court further found that "the training and equipment issue[s]" with Chester Fire "were not willful, wanton, or reckless[.]"

Gabriel appeals asserting the circuit court erred when it granted summary judgment to Bauman because (1) the cases interpreting the repealed guest statute are not controlling law, (2) speed alone may constitute willful, wanton, or reckless conduct, and (3) there are additional circumstances beyond Bauman's speed to support a finding that Bauman acted willfully, wantonly, or recklessly. Gabriel further claimed that the court erred when it granted summary judgment to Chester Fire because its administrative decisions related to training and equipment provisions do not meet the "during an emergency" requirement of SDCL 20-9-4.1.

Mr. Peter J. Bendorf and Mr. Gary W. Schumacher,  
Attorneys for Plaintiff and Appellant Areyman E.  
Gabriel

Mr. Michael L. Luce and Ms. Lisa M. Prostrollo,  
Attorneys for Defendant and Appellee Tim J.  
Bauman

Mr. Michael J. Schaffer and Mr. Paul H. Linde,  
Attorneys for Defendants and Appellees Chester  
Rural Fire Protection District and Chester Fire  
Department

**State v. Thomason**

In 2004, Ken Thomason and his wife Kim Thomason entered into a contract for deed to purchase the Gold Town Hotel in Lead, South Dakota. To help with costs, Thomasons asked Kim's mother, Barbara Langlois, for financial help. Starting in 2005, Langlois began loaning Thomasons money in varying amounts. In December 2005, the sellers of the Hotel were threatening to take back the Hotel if a deficient amount was not paid. Thomasons asked Langlois for more money, this time \$50,000. Langlois agreed to the loan only if Thomasons gave Langlois a quitclaim deed to the Hotel for security. Thomasons gave Langlois a quitclaim deed, and Langlois gave Thomasons the money. At that time, Langlois did not record the deed.

In 2006, the sellers of the Hotel were again complaining about missed payments and threatened foreclosure. Langlois agreed to help Thomasons pay off the remaining amount on the contract. Langlois loaned Thomasons \$328,133.01 to complete the purchase. As a result the Thomasons were given a warranty deed in their name. Langlois helped Thomasons by retaining the assistance of an attorney—Brad Schreiber—and by being present during the negotiations. Langlois even helped Thomasons record the deed and paid the filing fee.

With the Hotel now in Thomasons name, running it became a family affair. Ken Thomason's son, Dale, contributed labor and money. Langlois contributed

additional loans and purchased goods for remodeling and maintenance. The working relationship, however, began to deteriorate. Langlois became frustrated that her loans were not being paid back. Eventually, Langlois complained to her attorney who told her to record the quitclaim deed she had in possession, which she did. Langlois then served an eviction notice on Thomasons.

Spurred by the eviction notice, Thomasons and Langlois entered into negotiations. The negotiations resulted in a Letter of Intent/Agreement that was signed by the parties. The Letter stated, in part, that Thomasons would obtain a loan and out of that loan immediately pay Langlois \$200,000. Then, further payments would be negotiated. As per the agreement, Langlois would provide Thomasons a quitclaim deed in order to clear up the title. Langlois did provide Thomasons with the quitclaim deed, but she never received the money.

Unable to obtain a loan, Thomasons entered into a lease to buy back agreement with a Sioux Falls businessman. The agreement required Thomasons to give the businessman a warranty deed on the property in return for a set amount of money. Thomasons would be able to stay on the property and run the business as long as payments were made. Ultimately, Thomasons collected \$206,687.12 from the transaction.

Langlois, however, did not receive the amount agreed to in the Letter of Intent/Agreement. And when Langlois went to Thomasons to demand that money, Thomasons were gone. Thomasons had left to the



Dominican Republic where they stayed for four years. Thomasons claim they had the vacation planned for a while. Before they left, Thomasons retained the services of Attorney Scott Armstrong to manage their affairs. Armstrong advised Thomasons not to pay Langlois the amount she demanded because Armstrong had concerns about the disputed amount and the legal effect of the quitclaim deed.

Upset that she was not paid, Langlois contacted the Lead Police Department and filed a complaint. A Grand Jury indicted Thomasons for Aggravated Grand Theft by Deception and a superseding indictment added an aiding and abetting charge, and a second count of Aggravated Grand Theft by Obtaining Property Without Paying. Kim Thomason pleaded guilty to a reduced charge. A jury convicted Ken Thomason of Aggravated Grand Theft by Deception, and he was sentenced to 25 years in the South Dakota Penitentiary.

Ken Thomason appeals, arguing the trial court erred by:

1. Refusing to grant his Motion for Judgment of Acquittal because he claims the element of “property of another” was not satisfied;
2. Failing to instruct the jury regarding the defense of advice of counsel because he claims he was merely following his attorney’s advice; and
3. Instructing the jury that it could consider defendant’s flight as it related to consciousness of guilt.

Mr. Marty J. Jackley, Attorney General, and Mr. Craig  
M. Eichstadt, Assistant Attorney General,  
Attorneys for Plaintiff and Appellee State of  
South Dakota

Mr. Ellery Grey, Attorney for Defendant and Appellant  
Ken Thomason

**Pieper v. Pieper**

Todd and Nicole Pieper were married on May 23, 1998. They had two children during the marriage, B.P. in 2004 and T.P. in 2008. Starting in 2008, Nicole alleges that Todd had had inappropriate sexual contact with B.P. Todd denies the allegations.

Nicole reported the alleged abuse to the police and Department of Social Services. Social Services told Nicole to bring B.P. to Child's Voice where physicians evaluated B.P. The physicians could not confirm that Todd had sexually abused B.P.

Nicole also claims that she witnessed Todd sexually abuse B.P. Nicole reported the incident to the Minnehaha County Sheriff's Department. B.P. made statements to the police about potential sexual abuse. And the police again referred B.P. to Child's Voice. There, B.P. made additional statements that indicated sexual abuse. A physical examination could not confirm that sexual abuse occurred. B.P. began counseling with Michele VanDenHul. After the counseling sessions where B.P. made statements indicating sexual abuse, VanDenHul opined that any visitation with Todd would cause B.P. serious trauma.

At the end of 2008, Todd was arrested for first degree rape. Shortly thereafter, Nicole initiated divorce proceedings and obtained a protection order denying Todd visitation. Todd was tried in Minnehaha County. The jury returned a verdict of not guilty and Todd was released from jail on November 17, 2009.

After his release, Todd requested visitation. The motion was heard on February 19, 2010, at which Todd was granted supervised visitation of T.P. A month later after hearing testimony, the circuit court reversed the granting of supervised visitation.

On February 11, 2011, the circuit court held a trial to settle the divorce issues. The circuit court granted a divorce and concluded Todd was entitled to half of Nicole's pension that existed on February 2, 2011, not the value on the day Nicole filed for divorce. The circuit court also granted Nicole sole physical custody and continued the protection order denying visitation, but stated a desire to obtain reunification between Todd and the children. The circuit court was not clearly convinced that the abuse occurred.

B.P. was then ordered to receive counseling with Sarah Alexander. Alexander set up a plan for reunification. Other experts disagreed with Alexander's recommended approach. Eventually, the circuit court ordered visitation between Todd and the two children, with Alexander's consent and supervision.

After Alexander issued her recommendations, Todd moved for primary custody. The circuit court denied Todd's motion but did dismiss the protection order.

Nicole appeals, raising the following issues:

1. Whether the circuit court abused its discretion by granting Todd Pieper visitation.
2. Whether the circuit court abused its

discretion by allegedly delegating authority to a social worker.

3. Whether the circuit court erroneously valued Nicole Pieper's retirement.

Ms. Michele A. Munson, Attorney for Plaintiff and  
Appellant Nicole L. Pieper

Mr. Steven G. Haugaard, Attorney for Defendant and  
Appellee Todd C. Pieper

## **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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