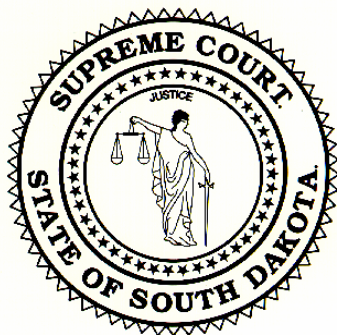


**Introduction to
The South Dakota
Supreme Court**



**and
Case Summaries for
Oral Arguments at the
September/October Term of the Court
to be held
September 29 through October 1, 2008
South Dakota State University
Brookings, South Dakota**



Supreme Court
STATE OF SOUTH DAKOTA

David Gilbertson
CHIEF JUSTICE

September 29, 2008

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

State Capitol Building

Pierre, South Dakota 57504-5070

(605) 773-6254

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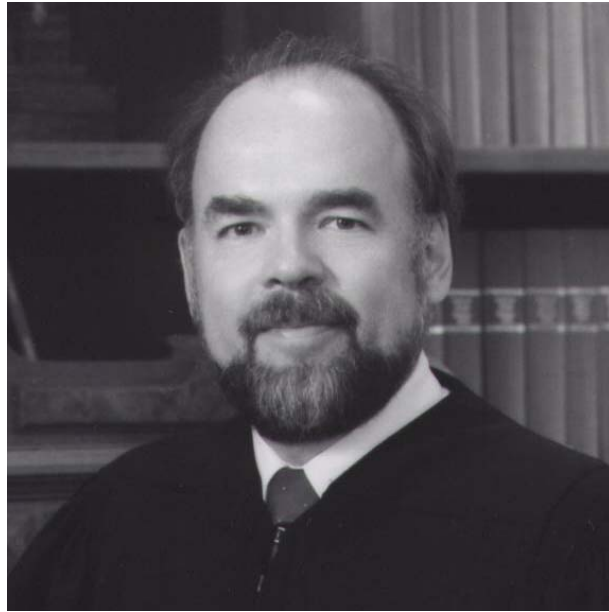
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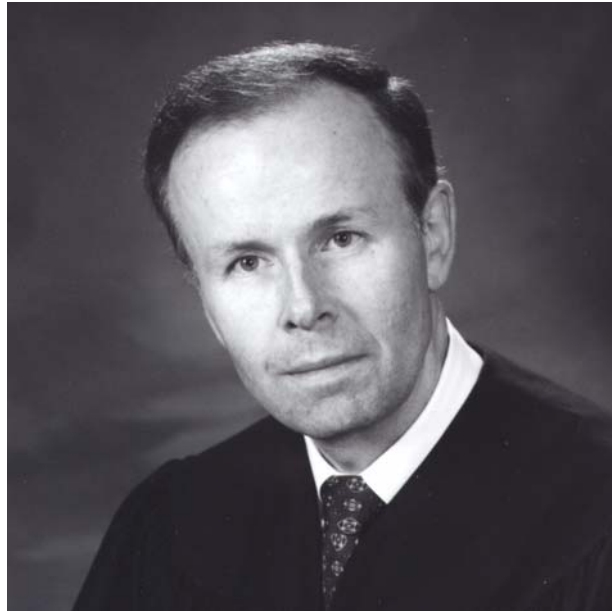
Chief Justice David Gilbertson

Chief Justice Gilbertson was elected to a 4-year term as Chief Justice by the members of the Supreme Court in September 2001 and was re-elected to a second 4-year term as Chief Justice by the members of the Supreme Court in June 2005. He was appointed to the Supreme Court in April 1995 to represent the Fifth Supreme Court District and was retained by the voters in the 1998 general election and the 2006 general election. Chief Justice Gilbertson received his undergraduate degree from South Dakota State University in 1972 and his Juris Doctor from the University of South Dakota School of Law in 1975. He engaged in private practice from 1975 until his appointment to the circuit court bench in 1986. During this time he also served as a deputy state's attorney and as an attorney for several municipalities and school districts. He is past President of the South Dakota Judges Association; and is a member of the Glacial Lakes Bar Association, the Brown County Bar Association and the South Dakota Bar Association. He is a member of the Conference of Chief Justices and chairs its Committee on Tribal/State Relations. He was a member of the Board of Directors of the National Conference of Chief Justices from 2005-2007. In 2006, he was the recipient of the distinguished Service Award from the National Center for State Courts for his defense of judicial independence. He serves on the Judicial-Bar Liaison Committee of the State Bar Association and has served as a Court Counselor at South Dakota Boys State since 1995. Born October 29, 1949, he and his wife Deborah, have four children.



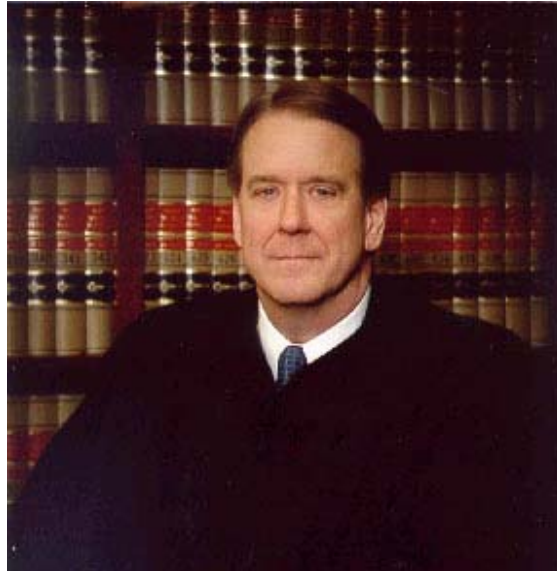
Justice Richard W. Sabers

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



Justice John K. Koenkamp

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



Justice Steven L. Zinter

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



Justice Judith K. Meierhenry

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



Clerk of the Supreme Court

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



Supreme Court Law Clerks

Law Clerks are employed by the Court to assist the justices with research and writing of opinions on the cases under consideration. In the photograph above, from the left, are David Barari (Supreme Court Law Clerk), Annie Horner-Taylor (Justice Meierhenry), Jennifer Williams (Justice Konenkamp), Marie Ruetters (Chief Justice Gilbertson), Jennifer Keating (Justice Sabers), and Sara Larson (Justice Zinter).

**Summary of Jurisdictions
for the South Dakota
Court System**

Supreme Court

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

Court terms held throughout the calendar year.

Has appellate jurisdiction over circuit court decisions.

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

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

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

Circuit Court

Circuit Court services available in each county seat.

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

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

The Supreme Court Process

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

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

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

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

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

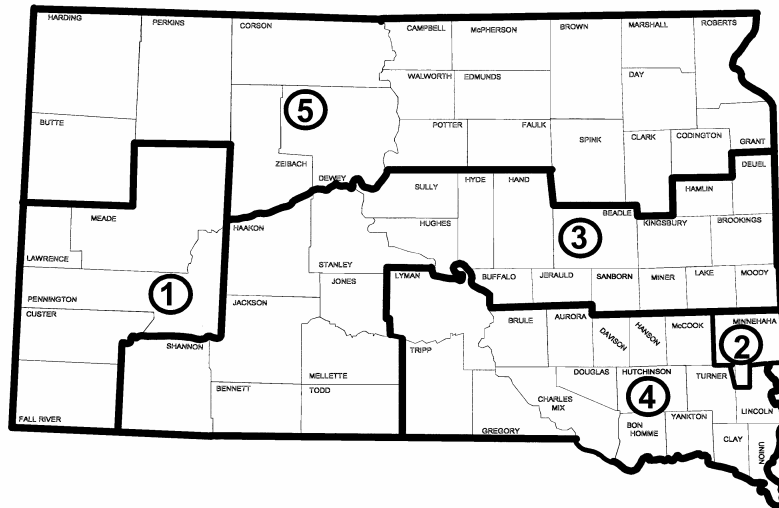
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench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

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

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

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

**South Dakota Supreme Court Appointment Districts
Effective July 1, 2001**



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

Courtroom Protocol

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

Your cooperation is appreciated.

DO

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

DO NOT

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

Supreme Court of South Dakota
September/October 2008 Term

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

Case Summaries

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

Secretary of State v. Promising Future

Promising Future, Inc. (PFI) is a for-profit South Dakota corporation formed September 14, 2006, by an unnamed third party and Roger W. Hunt, an attorney and State Congressional Representative from Brandon, South Dakota. The unnamed third party, who is PFI's sole shareholder, provided PFI with \$750,000. Thereafter, PFI made three \$250,000 contributions to South Dakotans for 1215/VoteYesforLife.com (VoteYesforLife), a ballot question committee organized to support the adoption of House Bill 1215. House Bill 1215 was the abortion prohibition law that was referred and voted upon at the November 7, 2006, general election.

On November 3, 2006, Secretary of State Chris Nelson (Secretary) informed Hunt that SDCL 12-25-19.1 and 12-25-13.1 require PFI to file campaign finance reports setting forth the name, address, and place of employment of any individual who provided funds to PFI, which in turn were reported as contributions by VoteYesforLife. Hunt filed pre-election and supplemental campaign finance reports under protest, identifying the \$750,000 PFI gave to VoteYesforLife, but refused to disclose the identity of the source that gave the money to PFI. The Secretary filed a declaratory judgment action, asking the court to declare that PFI, Hunt, and the unnamed third party created a ballot question committee, therefore mandating disclosure of the unnamed third party.

PFI and Hunt filed a Motion to Dismiss, which was denied by the circuit court. Upon filing their answer, PFI and Hunt filed a Motion for Judgment on the Pleadings, or alternatively, for Summary Judgment. The circuit court granted this motion and dismissed the case after finding that "the actions of the Defendants and the unnamed third party failed to create a ballot question committee under then

SDCL 1-25-1(1A).” Secretary now appeals to this Court, raising the following issue:

Whether Hunt, the unnamed third party, and PFI formed a ballot question committee under South Dakota law.

Mr. Lawrence E. Long, Attorney General, Mr. Jeffrey P. Hallem, Assistant Attorney General, Attorneys for Plaintiff and Appellant, Secretary of State Chris Nelson

Mr. Steven W. Sanford, Mr. Shawn M. Nichols, Attorneys for Defendants and Appellees, Promising Future, Inc. and Roger W. Hunt

State v. Suhn

Marcus J. Suhn was convicted of Disorderly Conduct for yelling profanities at a passing police car in Brookings, South Dakota. He appeals his conviction and contends that his utterances are protected speech under the First and Fourteenth Amendments to the United States Constitution. The State argues that Suhn's utterances are unprotected speech because they fall under the "fighting words" exception to First Amendment protection.

The occurrence took place at approximately 2:00 a.m. on September 2, 2007, as Officer David Gibson of the Brookings Police Department patrolled Main Street in Brookings. Many bar patrons, including Suhn, were gathering outside the bars on the sidewalk because the bars in downtown Brookings closed at that time.

As the patrol car passed the sidewalk, Suhn yelled at the patrol car: "F...ing cop, piece of shit. You f...ing cops suck. Cops are a bunch of f...ing assholes." Officer Gibson identified Suhn as the person making the statements.

Officer Gibson immediately left the patrol car and walked to where Suhn stood with his back to the patrol car. As Officer Gibson attempted to gain Suhn's attention, Suhn ignored him until Officer Gibson grabbed Suhn's arm. Officer Gibson arrested Suhn for Disorderly Conduct based on profane comments directed at the officers. Suhn appeals raising the following issue:

Whether the trial court's application of the disorderly conduct statute to Suhn's utterances amounted to an abridgement of speech protected by the First Amendment.

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

Mr. Robert G. Fite, Attorney for Appellant, Marcus J. Suhm

Gul v. Center for Family Medicine

Samina Gul, M.D. (Gul) was a medical resident at the Center for Family Medicine (CFM) in Sioux Falls. Similar to an apprenticeship, medical residents receive their medical degree and practice under the supervision of fully licensed doctors before receiving their own medical license.

Gul's residence program was designed to last three years. Residence contracts are written for one year and then are renewed for the next year. Gul and CFM's first-year contract ran from June 2004 until June 30, 2005.

During her first year of residence, Gul's performance did not meet CFM's expectations. On December 30, 2004, Gul received a "Notice of Unsatisfactory Performance," which put her on probation. On April 27, 2005, Gul was told by Dr. Earl Kemp, the director of the Sioux Falls Family Medicine Residency Program, that her contract would not be renewed for a second year. Gul received a letter, "Notice of Non-Renewal," explaining the Resident Oversight Committee's (ROC) decision. Further, it recommended "[a]rranging special educational experiences in May and June of 2005," and mentioned "close supervision anticipated in a special remedial rotation in May. . ." Later, Gul was asked to turn in her keys, badge and pager. Her rotations were assigned to other residents.

Gul appealed the decision to the ROC. A right to appeal her dismissal was described in CFM's "Residents Manual," which is referred to in her employment contract. The residents manual provides as follows:

When a resident is being considered for dismissal, the Program Director or designee shall notify the resident, in writing, of the charges and of the

proposed dismissal. The resident may request a hearing before the ROC. . . . At the hearing, the Program Director or designee will state the reason or reasons for the recommendation for dismissal and be permitted to present any evidence. The resident shall be given the opportunity to respond and present his/her own evidence. A majority vote of the voting members of the ROC present is required for dismissal. . . .

The ROC voted to uphold its decision. Gul appealed to the Graduate Medical Education Committee and CFM's Board of Directors. Both groups upheld the ROC's decision to not renew Gul's contract.

Gul left CFM sometime in early May 2005. However, she was not found to have "quit" her job by the SD Department of Labor when she applied for unemployment.

Subsequently, Gul was unable to secure a new residency and, therefore, could not get a medical license. Gul brought suit against CFM and Dr. Kemp, claiming ROC had already decided to terminate their relationship *before* the hearing, not afterward, as described in the Residents Manual. She alleged that this was both a breach of contract and a violation of due process. She further alleged defamation.

The trial court granted CFM and Dr. Kemp's motions for summary judgment. The court found Gul was a student and not an employee of CFM and was "afforded all due process to which a medical resident is entitled." The court also found that Gul had received adequate notice prior to the Notice of Non-Renewal, so that CFM had not breached the

contract. Finally, the court ordered CFM to pay Gul her last month's salary under the contract.

On appeal, Gul argues that the trial court erred in granting summary judgment on her breach of contract and due process claims.

Mr. Shawn M. Nichols, Attorney for Plaintiff and Appellant,
Samina Gul, M.D.

Mr. R. Alan Peterson, Mr. Steven J. Morgans, Ms. Dana Van
Beek Palmer, Attorneys for Defendants and
Appellees, Center for Family Medicine

State v. Noteboom

Aaron Noteboom appeals his conviction for Driving under the Influence of Alcohol. Noteboom claims that law enforcement officers stopped his vehicle in violation of his right against unreasonable search and seizure as provided by the United States and South Dakota Constitutions.

On September 24, 2006, at approximately 2:00 a.m., Deputy Sheriff Troy Strid observed automobile headlights on 274th Street in Corsica, South Dakota. Corsica Chief of Police Marty Banghart also noticed the headlights from a separate location. Both officers saw the headlights disappear near some storage buildings in the area where the lights were spotted. Both officers approached the area to investigate.

Recent rains allowed Officer Strid to observe fresh tire tracks going into the private property area of the storage buildings. Officer Strid entered the private property and noticed a vehicle parked behind one of the buildings. The driver of the vehicle immediately turned on the vehicle's headlights and headed back to 274th Street. As the vehicle pulled out onto 274th Street, Officer Banghart stopped the vehicle.

After making the stop, Officer Banghart observed that the driver of the vehicle, Aaron Noteboom, was intoxicated. Officer Banghart subsequently arrested Noteboom for Driving under the Influence of Alcohol. Noteboom argues that the stop was unconstitutional because the officers did not have reasonable suspicion to stop him and that evidence obtained from the illegal stop should be suppressed.

Both officers testified that they did not observe Noteboom violate any traffic laws or engage in criminal activity. The officers justified the stop based on the time of night, the characteristics of the area, the location of

Noteboom's vehicle and its abrupt departure. The trial court determined that the officers had reasonable suspicion to stop the vehicle and denied Noteboom's motion to suppress the evidence.

Noteboom appeals, raising the following issue:

Whether the stop, detention, and subsequent search of Noteboom and his property violated Noteboom's constitutional rights.

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

Mr. Timothy R. Whalen, Attorney for Appellant, Aaron
Noteboom

Discover Bank v. Stanley

Joseph Stanley applied for and was issued a credit card from Discover Bank in March 1996. Stanley made charges and purchases on the account until sometime in calendar year 1997. A statement claiming the balance due on the account as \$1,718.02 was received by Stanley sometime in 1997. Stanley did not dispute the charge within sixty days as required by Discover's disputed charge policy. Stanley believed that he owed something for the charge he later claimed were made by an unauthorized and unknown person. Stanley claimed he paid over \$8,600.00 on the account, but due to finance charges and late fees, Stanley was never able to pay off the account.

Stanley eventually disputed the charge in 2004 and 2005 prior to Discover filing legal action in the matter on March 8, 2005. Stanley continued to request verification of the original charges. Discover, however, never provided copies of account statements prior to June 15, 1998.

After limited discovery, Discover moved for summary judgment. Discover failed to file a statement of undisputed material facts with its motion for summary judgment and affidavit. Stanley resisted the motion and argued that Discover's failure to provide a statement of undisputed material facts was fatal to its motion per the requirements of SDCL 15-6-56. Stanley also argued that Discover's inability to substantiate the original charge to the account raised a genuine issue of material fact as to whether Stanley had made the original charge in 1997 upon which the account balance was based, and whether he owed the money in question. The circuit court granted Discover's motion for summary judgment and entered an order of judgment against Stanley in the amount of \$6,565.41 for principle, prejudgment interest of \$1,331.32, plus court costs and

service fees in the amount of \$67.10, for a total judgment of \$7,963.83. Stanley raises the following issues on appeal:

1. Whether a moving party in a motion for summary judgment is required to provide a statement of undisputed material facts.
2. Whether a genuine issue of material facts was in dispute when Discover provided no proof that Stanley made the original charges to the Discover credit card.

Mr. Robert A. Martin, Attorney for Plaintiff and Appellee,
Discover Bank

Mr. Casey N. Bridgman, Attorney for Defendant and
Appellant, Joseph Stanley

State v. Madsen

On January 12, 2007, private security guards employed by the Flandreau Santee Sioux Tribe at the Royal River Casino Hotel in Flandreau, South Dakota, detected the strong odor of raw marijuana emanating from room 302. The security guards conducted a ruse to gain entry into the hotel room by covering the peep hole, knocking, and asking to enter the room in response to a noise complaint. The door was answered by Benjamin Carter, a friend of the Defendant Henry Madsen. Madsen was the only person in room 302 who was registered as a guest at the hotel. Carter allowed the security officers into the room. The security officers found a marijuana bud the size of a quarter on the floor of the room, and placed Madsen, Carter, and a third male in the room into hotel issued handcuffs and called the local police department.

Flandreau city police officer Mike Eisenbarth conducted a pat down search of all three men before removing the hotel's handcuffs and placing the detainees in police department handcuffs. Eisenbarth found six nine-millimeter pistol rounds and \$2,500.00 in cash on Madsen. Based on the security officers' description of the odor of marijuana, their discovery of the marijuana bud, Eisenbarth's independent identification of the bud as being marijuana, and the items found on Madsen by police, a search warrant was issued for the hotel room and Madsen's car. After a warrant was issued, Eisenbarth searched room 302 and discovered a bag by Madsen's bed which contained eight baggies of raw marijuana, two packets of methamphetamine, one spoon, four knives, and a Chinese throwing star. A search of Madsen's car revealed some hypodermic needles, a container filled with a suspicious white substance, and a bottle of pills without a prescription label. Finally, Madsen's urine sample was tested and

confirmed he had cocaine, methamphetamine, and marijuana in his system.

Madsen's pretrial motion to suppress all evidence collected was denied by the circuit court. Madsen's renewed motion to suppress the evidence was also denied. After a bench trial on the matter, Madsen was convicted and sentenced. Madsen raises two issues on appeal:

1. Whether the circuit court erred by denying Madsen's motion to suppress and motion to reconsider based on its conclusion of law that the hotel security personnel were not working as agents of law enforcement.
2. Whether the circuit court erred by denying Madsen's motion to suppress and motion to reconsider based on its conclusion of law that Benjamin Carter's inability to consent to the search of the hotel room did not invalidate the search by hotel security personnel.

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

Mr. Jack Der Hagopian, Attorney for Defendant and
Appellant, Harry Madsen

State v. Reay

In the first week of February 2006, Brad Reay's wife, Tami, told him that she wanted a divorce. She also told their twelve-year-old daughter, Haylee. Reay knew Tami had been seeing another man. He did not want the divorce. On February 8, 2006, Tami went missing. Two days later, her nude body was discovered near the Oahe Dam. Her throat had been slashed, and she had been stabbed repeatedly.

Reay was charged with killing Tami. His defense at trial was that their daughter, Haylee, actually killed Tami and that he only helped to cover it up. He testified that the night Tami was killed, he found Haylee standing by Tami's dead body holding a knife. According to Reay, Haylee had blood on her face and hands. He further testified that Haylee was "catatonic," did not appear to know what she had done, and must have been sleepwalking. Reay testified that to cover up what Haylee had done, he washed the blood from Haylee, cleaned the scene, planted a condom on Tami, hid evidence, dumped Tami's body by the Missouri River, lied to law enforcement during their investigation, and tried to point the finger at Brian Clark, the man Tami had been seeing.

In support of his defense that he did not kill Tami, but Haylee did, Reay asked the court to give the jury an instruction that stated, "Any person who committed the act charged without being conscious thereof is incapable of committing such crime." He requested this instruction based on his theory that when Haylee stabbed her mother she was not conscious at the time, and thus, could not be legally responsible for the crime. Reay asserted that the instruction would have lessened the impact of him claiming his daughter killed Tami and allowed him to argue that he was guilty of some crime other than murder. The court rejected the instruction.

During trial, Reay objected to the admission of numerous pieces of evidence, ranging from knives, clothing, tarps, letters, documents, bed sheets alleged to be bloody, and swabs of spots claimed to have contained blood. Reay claimed that the State failed to establish a chain of custody when it did not offer testimony from the custodian at the State Crime Lab responsible for the care and custody of the evidence. According to Reay, the State's chain of custody was not sufficient to ensure that the evidence remained in an unaltered state. The court, however, concluded that a sufficient chain of custody was established and admitted the evidence.

Reay also objected when the State attempted to argue that although it never compared Haylee's DNA to the DNA collected, it could exclude the presence of Haylee's DNA because the State knew the DNA profiles of her parents. According to Reay, this testimony violated the court's discovery order that required the State to disclose the opinions of its testifying experts prior to trial. The opinion that the presence of a child's DNA could be excluded based on parents' DNA profiles, Reay argued, was an opinion not disclosed prior to trial, justifying a mistrial. The court allowed the testimony and denied Reay's request for a mistrial.

Tami's mother, Ms. Burns, testified at trial. It was alleged that Ms. Burns told a social worker that Haylee was normally an emotional child and on the day of Tami's murder she was particularly calm. In response to this, the State asked Ms. Burns whether she previously had a similar situation take place in her family and if she saw people's reactions at that time. Reay objected, claiming that the testimony was prejudicial and irrelevant. The court, however, overruled his objection and allowed the testimony. The court also overruled Reay's hearsay objection when the State admitted a box of Vivarin into evidence and had Reay read the warning label on the back of the box.

A jury found Reay guilty of first degree murder and the court sentenced him to life in prison without the possibility of parole. He appeals asserting that the court erred when it

1. determined that a proper chain of custody had been established for various pieces of evidence and admitted that evidence;
2. failed to give his theory of the defense instruction;
3. allowed Ms. Burns to testify that she had previously gone through a similar experience in her family;
4. denied his request for a mistrial because of the State's discovery order violation; and
5. admitted the box of Vivarin over his hearsay objection.

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

Mr. Timothy J. Rensch, Attorney for Defendant and Appellant, Brad Reay

Clough v. Nez

Lorraine Nez is the biological mother of her five-year-old daughter C.C., born May 26, 2003. On June 10, 2003, Nez and Keith Clough signed, under oath, a voluntary acknowledgment of paternity that expressly indicated Clough was the biological father. Thereafter, Clough, and often times Clough's girlfriend, Lee Ann Strenstrom (Lee Ann is also Nez's half sister), took care of C.C. for the first four years of her life. During this time, Nez provided no support for C.C., and Nez's contact with C.C. was limited and infrequent.

In 2004, Clough was charged with simple assault against Lee Ann. Shortly after his arrest, Clough's mother took C.C. from Sioux Falls to live with her in Mission. Nez went to Clough's mother's house with the police demanding that C.C. be returned, but Clough's mother refused. C.C. subsequently returned to Sioux Falls to again live with Clough. In 2005, Clough and C.C. moved to Rapid City.

On September 21, 2006, Clough commenced this suit. He asked for full legal and physical custody of C.C. In response, Nez denied that Clough was C.C.'s father, and she, too, asked the trial court for full legal and physical custody of C.C.

Nez also asked the court to order DNA tests to determine whether Clough was the father. Clough objected to that request because the time for contesting paternity under a statute of limitations had expired. The trial court ruled that in 2004 the South Dakota Supreme Court declared that statute of limitations for contesting paternity unconstitutional. The trial court therefore ordered Clough to take a DNA test. The test indicated that Clough was not C.C.'s biological father.

On the day of the custody trial, Clough conceded that he was not the biological father and withdrew his claim for custody, yet he requested that the court award him visitation rights with C.C. Nez objected to Clough's request for visitation.

The court ruled that even though Nez was a fit biological mother, and even though Clough was not the biological father, visitation would be allowed because: Clough cared for C.C. for most of her life; extraordinary circumstances existed that require the relationship between Clough and C.C. be continued; and discontinuing the relationship would be highly detrimental to C.C. The trial court ultimately awarded Clough visitation rights that included a full weekend each month, extended summer visitation, and alternate holidays.

Nez appeals the trial court's award of visitation to Clough, a non-parent. Nez argues that exceptional circumstances were not shown and the trial court failed to give deference to her wishes as the biological parent. Nez argues that without these showings, a non-parent has no legal right to visitation.

Clough also appeals. He objects to the trial court's award of custody to Nez. Clough argues that under the paternity document signed by both parties, he is the presumptive or legal father, and therefore, he is entitled to custody. Because Nez did not challenge paternity within the time allowed by the statute of limitations, Clough argues the DNA test was improper and he should continue to be the presumed father.

Ms. Patricia A. Meyers, Mr. Stephen C. Hoffman, Attorneys
for Plaintiff and Appellee Keith Clough

Mr. Dana L. Hanna, Attorney for Defendant and Appellant
Lorraine Nez

State v. Onken

Kasey L. Onken and Heather Thomas had two children during the course of their relationship: J.O., the victim, was born on August 14, 1997, and A.O. was born on May 14, 1999. In August 2004, J.O. and A.O. began having regular contact with Onken, which continued until December 3, 2004.

During this August to December 3, 2004 timeframe, J.O. claims that on several occasions Onken came to where she was sleeping, took off her clothes, and forced her to have sexual intercourse with him. She explained that Onken “put his private part into her private part and sticky, white or yellow stuff would come out of his private part.”

J.O. said that the first time Onken did this to her was the night before her seventh birthday, and he repeated the act every time he had visitation with J.O. and A.O. J.O. said Onken did this to her at least five times. A.O., who was four at the time, was present in the room during these occurrences and “woke up because the bed was moving” and “creaking.” A.O. stated that when he saw Onken’s body “going up and down” on top of J.O., he “tried to push him off.” A.O. testified that Onken would “finally [get] off” J.O. and leave the room. J.O. stated that the last time Onken did this to her was the weekend of December 3, 2004, which was the last time Onken had visitation with J.O. and A.O. The termination of visitation was based on other reasons, however.

J.O. explained that V.B., a friend of hers from daycare, was the first person she told what her father was doing to her. V.B. told J.O. to tell her mother about this. J.O. told V.B. that she was scared to tell anyone else. J.O. said that V.B. told her, “If you are scared to tell your mom, then just tell your brother to tell her.”

On Thanksgiving Day 2005, Thomas, J.O., A.O, and Thomas's youngest son were driving to Chamberlain to spend the holiday with Thomas's family. Thomas and A.O. were in the front of the car, while J.O. and the baby were in the back seat. Thomas testified that out of nowhere, A.O. said, "[Onken] had S-E-X with J.O." Thomas explained that when she looked at J.O. in the rearview mirror, she "saw the look on [J.O.'s] face," and she just knew it was true.

On November 30, 2005, J.O. was interviewed by Lora Hawkins, a forensic interviewer with Child Advocacy Center of the Black Hills at Black Hills Pediatrics in Rapid City. J.O. explained the events that occurred during the August to December 3, 2004 timeframe. Importantly, during this interview J.O. indicated she had confided in her daycare friend V.B., and that V.B. was the "very first person she told what happened."

On June 8, 2006, Onken was indicted for five counts of criminal pedophilia and, in the alternative, five counts of sexual contact with a child under sixteen. A Part II Information for Habitual Offender was also filed against Onken. On May 15, 2007, Onken filed Defendant's First Motion for Discovery, requesting, among other things, any evidence that could be used to prove that Onken was not guilty. Onken also requested V.B.'s and other individuals' Department of Social Services records. Although the circuit court ordered the release of records for the other individuals, it did not include V.B.'s records in its order. Defense counsel was not provided with any information regarding V.B., other than what J.O. said about V.B. during the interview with Hawkins. In fact, defense counsel told the court that the State did not believe V.B. existed.

A two-day jury trial was conducted for the charges of criminal pedophilia and sexual contact with a child under sixteen. During the trial, the defense questioned at least three of the State's witnesses, including J.O., about V.B.

J.O. testified that V.B. was her friend from daycare. The State never questioned J.O. or any other witness about V.B.

At the close of the State's case-in-chief, defense counsel argued that the State violated the discovery request by failing to provide any information regarding V.B. The defense felt that information regarding V.B. was important because V.B. had also asserted molestation allegations against an adult. In the defense's opinion, V.B. may have imputed her knowledge regarding her personal experiences to J.O., and therefore, assisted J.O. in forming the allegations against Onken. The court asked the State to obtain an address for V.B. and provide it to defense counsel, but that if defense counsel was going to interview V.B., he needed to do it before the start of the second day of trial.

On the second day of trial, the court inquired whether defense counsel interviewed V.B. Defense counsel acknowledged that the State provided V.B.'s phone number, but that defense counsel did not contact V.B. because it was 5:30 P.M., his staff was gone, and he "wasn't going to make a phone call like that to a girl that had possibly been molested." When the court asked defense counsel what relief he is looking for, he indicated that Onken would like a continuance. The court denied the request for a continuance and resumed the trial.

At the close of the evidence, the court allowed defense counsel to review V.B.'s DSS records. The court said it would reconsider the request for a continuance depending on the information found in the records. After providing this opportunity, the court decided that although there may have been some information in V.B.'s DSS records helpful to Onken's case, it was not going to grant a continuance.

Ultimately, the jury found Onken guilty of one count of sexual contact with a child under sixteen, and acquitted him of all other charges. Onken was also found guilty of being a habitual offender at his January 25, 2008, court trial

for the Part II Information. Onken was sentenced to fifteen years in the South Dakota State Penitentiary, six of which were suspended. Onken now appeals to this Court, and the issue is framed as follows:

Whether the circuit court abused its discretion in denying a continuance to allow Onken time to interview V.B. to gather potential exculpatory evidence in support of his defense.

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

Mr. Bryan T. Andersen, Pennington County Public Defender's Office, Attorney for Defendant and Appellant, Kasey Onken

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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