

Introduction to
The South Dakota
Supreme Court



and
Case Summaries for
Oral Arguments at the
March Term of the Court
to be held
March 24 through March 26, 2014
University of South Dakota School of Law
Vermillion, South Dakota

Supreme Court
STATE OF SOUTH DAKOTA

David Gilbertson
CHIEF JUSTICE

March 24, 2014

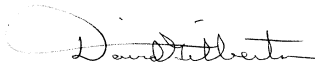
To our Guests Observing the
March Term Hearings of the
South Dakota Supreme Court

Ladies and Gentlemen:

Your Supreme Court welcomes you to our March term.

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

Sincerely yours,

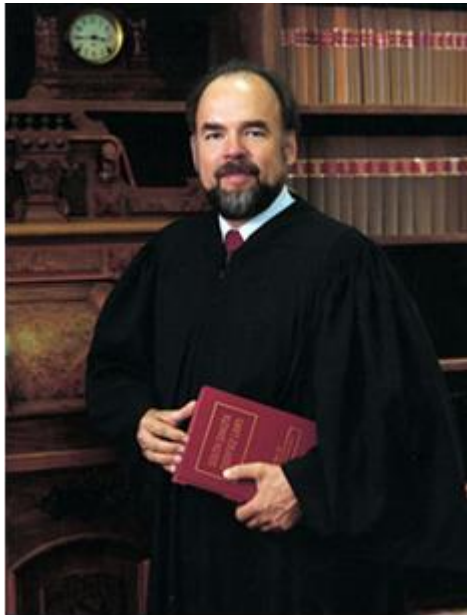


David Gilbertson
Chief Justice

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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 ensure 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.



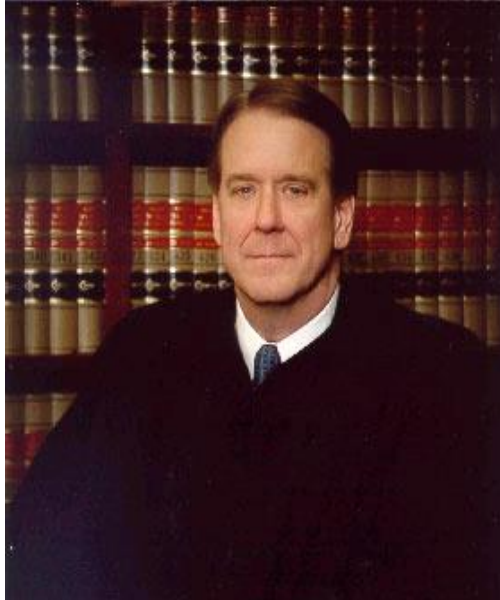
Chief Justice David Gilbertson

Chief Justice Gilbertson was elected to a four-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 the First Vice-President of the Conference of Chief Justices and chairs its Task Force on Politics and Judicial Selection/Compensation. 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.



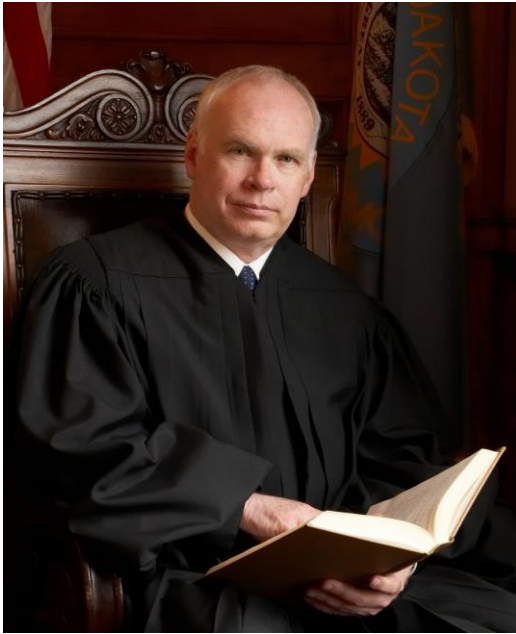
Justice John K. Konenkamp

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 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 of the 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, Brule, Charles Mix, Clay, Davison, Douglas, Gregory, Hanson, Hutchinson, Lincoln, Lyman, McCook, Tripp, 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 has two 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

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 left to right, Caleb Veldhouse (Supreme Court Law Clerk), Krista Tschetter (Justice Wilbur), Eric Cleveringa (Justice Severson), A.J. Franken (Chief Justice Gilbertson), Jennifer Williams (Justice Konenkamp), Joseph Cooch (Justice Zinter) and Jared Tidemann (Supreme Court Law Clerk).

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 \$12,000. 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.

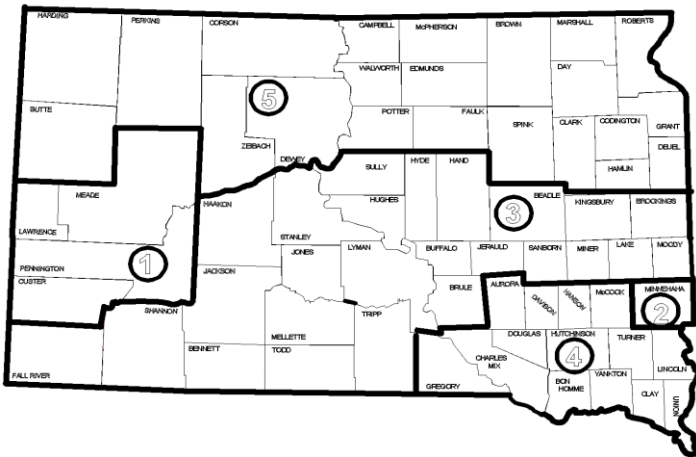
All of those who sit on the Supreme Court must be licensed to practice law in the state and permanent justices must be voting residents of the district from which they are appointed at the time they take office. There is no formal age requirement for those who serve on the Court, but there is a statutory 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.

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

Justice Konenkamp was appointed in 1994 from District One. 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.

South Dakota Supreme Court Appointment Districts

Effective January 23, 2012



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

Courtroom Protocol

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

Your cooperation is appreciated.

DO

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

DO NOT

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

Supreme Court of South Dakota
March 2014 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.

State v. Whistler

On March 9, 2012, Spearfish Police Officers Aaron Jurgenson and Colin Simpson pulled over a pickup being driven by Sean Whistler, because the pickup was traveling, in the dark, with only its running lights activated. When Officer Jurgenson spoke to Whistler in the patrol car, the officer suspected that Whistler had been drinking. The officer also smelled the odor of marijuana. After Whistler failed certain sobriety tests, Officer Jurgenson placed him under arrest. A search of Whistler revealed marijuana in one of his pants pockets and loose marijuana leaves in his coat pocket. In Whistler's pickup, Officer Simpson found marijuana leaves and a package of rolling papers. The officers took Whistler to the police station, where Whistler gave urine and blood samples. The test of his blood sample revealed a blood alcohol content of .221. The results of his urinalysis indicated the presence of a metabolite of cocaine and a metabolite of marijuana.

Whistler was indicted for DWI, possession of a controlled substance, possession of marijuana, ingestion of a substance other than alcohol for the purpose of becoming intoxicated, possession of a suspended license, and possession of paraphernalia. A jury trial was held on November 20, 2012. Officers Jurgenson and Simpson testified about the stop. A forensic examiner testified that the plant material retrieved from Whistler's person and pickup tested to be marijuana. A forensic chemist testified that Whistler's urine sample contained the metabolite for marijuana and 0.90 micrograms per milliliter of benzoylecgonine, the major metabolite of cocaine. The chemist explained that the

metabolite of cocaine could remain inside the body for approximately three days and that it is impossible to determine from a urinalysis how long ago someone had ingested cocaine.

At the close of the case, Whistler moved for a judgment of acquittal on all charges. The court denied Whistler's motion, except on the charges of possession of a suspended driver's license and possession of paraphernalia. During the settling of jury instructions, Whistler objected to Instruction 13, which stated: "Possession occurs if a person knowingly possesses an altered state of a drug or substance absorbed into the human body." He also objected to Instruction 17, which stated: "In a charge of knowing possession of a controlled substance, a positive urinalysis that reveals the presence of a controlled substance in a defendant's urine may be sufficient in and of itself to support a conviction." The court denied Whistler's objections and submitted the case to the jury. The jury returned a verdict of guilty on all charges. The court sentenced Whistler to four years in prison, suspended upon serving eighty days in jail and abiding by certain terms and conditions.

Whistler appeals asserting: (1) it is insufficient to sustain a conviction for possession of a controlled substance based solely on the presence of a metabolite of a controlled substance in one's urine, and (2) the circuit court impermissibly shifted the burden to Whistler to disprove knowing possession when the court erroneously instructed the jury with Instruction 13 and Instruction 17.

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

Mr. G. Matthew Pike, Lawrence County Public
Defender's Office, Attorneys for Defendant and
Appellant Sean Whistler

Isack v. Acuity

In March 2009, Thomas Glanzer's negligence caused a two-vehicle accident that seriously injured Terry Isack and Donald Walraven. Glanzer was acting in the course and scope of his employment with Hillside Hutterian Brethren, Inc.; Isack and Walraven were acting in the course and scope of their employment with Elite Drain & Sewer. Acuity, Elite Drain & Sewer's workers compensation insurer, paid workers compensation benefits to Isack.

For the personal injury claims, Isack retained attorney John Knight and Walraven retained Nancy Turbak Berry. Acuity retained attorney Charles Larson for its recovery and offset claim against any damages Isack recovered from Glanzer or Hillside.

In August 2009, Isack and Walraven individually sued Glanzer and Hillside for damages. Fearing a race to the courthouse because of a potential Hillside bankruptcy, Isack and Walraven agreed to cooperate in the litigation. The circuit court granted Acuity's motion to intervene in April 2010.

In late October 2010, Isack and Walraven settled with Hillside. Isack and Acuity also settled, while placing one-third of Acuity's reimbursement award into a trust account pending resolution of whether Isack's attorney (Knight) should receive that portion for his fees. The parties agreed that Isack would bring an action to resolve the issue.

Isack argues Larson did not contribute to the litigation and thus, Knight should receive all the fees from the settlement, including from Acuity's portion. Acuity argues Larson actively contributed to the litigation and thus, Knight should not receive fees out of Acuity's portion. After a trial on the matter in April 2013, Judge Robert L. Timm, Third Judicial Circuit, found Larson's contributions to be "de minimus" and awarded Knight 100% of the disputed fees.

Acuity appeals, raising the following issue:

Whether the circuit court erred by awarding Knight a one-third fee from the settlement portion allocated to Acuity.

Mr. Jon C. Sogn, Attorney for Plaintiff and Appellee
Deborah Isack

Mr. Rick W. Orr and Timothy M. Gebhart, Attorneys for
Defendant and Appellant Acuity

Hamilton v. Sommers et al.

Roger Hamilton, Mike Block, and Monte Amman gathered landowners' permission to place bee hives at 112 sites in northeast South Dakota. They quickly registered them with the South Dakota Department of Agriculture. Adee Honey Farms (Richard Adee) previously purchased the 112 sites from John Kelley. Kelley, however, never registered his sites.

Claiming the 112 sites as his, Adee sought to have the sites registered in his name at an administrative hearing. Adee was unsuccessful. Adee then sued Hamilton, Block, and Amman, jointly and severally, for interference with business relation and/or expectancy, unfair competition, and civil conspiracy.

Seeking representation, Hamilton, Block, and Amman met with attorneys Richard Sommers and Melissa Neville of Bantz, Gosch & Cremer, Prof. L.L.C. (collectively "Appellees"). During the meeting, Appellees inquired about insurance coverage. Hamilton stated he did not have coverage, though in fact he did. Appellees, however, did not inquire any further. Appellees also discussed the potential conflict of interest when representing multiple defendants. In the end, Hamilton, Block, and Amman all agreed to have Appellees represent them. A short time later, Block and Amman signed a conflict of interest waiver. Hamilton claimed he never received, signed, nor returned a conflict of interest waiver.

In July 2009, Adee offered to settle with Amman only. Amman told Hamilton, Block, and Appellees that he could not settle because he sold his business, including bee hive locations, to Whetstone Valley Honey, Inc. The sale undercut the defense's position that the bee sites could not be sold because landowners' permission was freely revocable at any time for any reason. With their trial theory undercut and after a disparaging pre-trial conference, Hamilton, Block, and Amman then settled with Adee, even though Hamilton showed reserve. Afterwards, Hamilton and Block retained separate counsel and subsequently did not comply with the settlement agreement.

In September 2010, Hamilton sued Appellees, alleging legal malpractice, breach of fiduciary duty, and negligent infliction of emotional distress. Hamilton based his claims on Appellees' alleged conflict of interest representing all the defendants and Appellees alleged failure to properly investigate whether he had insurance. Hamilton retained Minneapolis attorney David Lillehaug as an expert witness to testify about the standard of care. After his deposition, Lillehaug was appointed to the Minnesota Supreme Court. Lillehaug testified that the standard of care with respect to conflicts of interest is essentially a national standard. Ultimately, Lillehaug opined that Appellees breached that standard of care by: representing the defendants with a non-consentable conflict of interest, or if consentable, failing to obtain written consent from Hamilton; failing to withdraw and move for a continuance; and failing to identify Hamilton's insurance coverage.

Judge Kean struck Lillehaug's opinions for inadequate foundation and for failure to testify about the applicable standard of care. Judge Kean wrote that the governing standard of care is local, not national. Judge Kean then granted Appellees' motion for summary judgment finding Hamilton failed to bear his burden of producing evidence of proximate cause, breach of the standard of care, and damages sustained from the settlement.

Hamilton appeals, raising the following issues:

1. Whether the circuit court erred in striking Lillehaug's expert opinion.
2. Whether South Dakota should adopt a national standard of care for legal malpractice claims.
3. Whether the circuit court erred in finding collateral estoppel precluded litigation on the conflicted representation issue.
4. Whether the circuit court improperly weighed evidence as to the proximate cause of Hamilton's damages.
5. Whether the circuit court committed reversible error by denying a continuance after striking Lillehaug's testimony.

Mr. Timothy L. James and Mr. Dan Rasmus, Attorneys
for Plaintiff and Appellant Roger Hamilton

Mr. Thomas J. Welk, Mr. Jason R. Sutton, and Ms.
Meghan K. Woster, Attorneys for Defendants and
Appellees Richard A. Sommers and Melissa E.
Neville of Bantz, Gosch, & Cremer, Prof. L.L.C.

Ruschenberg et al. v. Eliason et al.

Annabelle's Adult Super Center of South Dakota, LLC (Annabelle's) and Olivia's of South Dakota, LLC (Olivia's) sell adult movies, clothing, and various other sexual products. Keith Johnson was the majority owner of Annabelle's and Olivia's. David Eliason was a minority owner and helped to manage both businesses.

In the spring of 2007, Megan Ruschenberg was hired as an employee to work at both Annabelle's and Olivia's. Ruschenberg alleged that after she was hired, Eliason made inappropriate comments to her and forcibly raped her on two occasions on business premises. Ruschenberg did not report the rapes to law enforcement or to anyone at Annabelle's or Olivia's. She also did not tell her roommate or seek medical care following the alleged rapes.

As a result of the second rape, Ruschenberg testified that she became pregnant. She testified that she approached Eliason about her pregnancy and that Eliason offered to adopt the child. Ultimately, Ruschenberg decided to have an abortion, and she testified that she accepted \$450 from Eliason so that she could have the procedure. Ruschenberg continued to work at Olivia's and Annabelle's.

After the first two alleged rapes, Ruschenberg agreed to travel with Eliason to North Carolina on a business trip. She alleged that Eliason raped her a third time while on this business trip. Ruschenberg did

not report the third rape to law enforcement or to anyone at Annabelle's or Olivia's.

In September 2007, Jessica Cornelius was hired as an employee at Annabelle's. During her employment, Cornelius alleged that Eliason made several comments of a sexual nature to her and that Eliason slapped her on her buttocks while she was working. She also alleged that Eliason forcibly raped her in his office at Annabelle's. Cornelius never informed law enforcement or anyone at Annabelle's of Eliason's conduct or the rape.

Also in the fall of 2007, Heather Rensch was hired to work as a cashier at Annabelle's. According to Rensch, Eliason made inappropriate jokes and comments of a sexual nature while at work. Rensch alleged that Eliason shocked her on her arm with a sexual toy and that the shock left welts on her forearm. Rensch never reported any of these incidents to anyone at Annabelle's.

Similar to Ruschenberg, Rensch agreed to accompany Eliason on a business trip to North Carolina. Rensch had the opportunity to speak with Johnson while in North Carolina, but Rensch did not inform him of Eliason's conduct. On the same day in November 2007, Rensch, along with Ruschenberg and Cornelius, quit working at Annabelle's and Olivia's.

Ruschenberg, Cornelius, and Rensch (Appellants) filed separate complaints alleging that Eliason had committed several acts of misconduct against them while acting as manager of Annabelle's and Olivia's. Appellants alleged several intentional tort claims against Eliason. Appellants also asserted negligent

infliction of emotional distress and negligent training and supervision causes of action against Annabelle's and Olivia's. The separate complaints were eventually consolidated by court order.

On December 22, 2010, Annabelle's and Olivia's filed a motion for summary judgment arguing that they were not liable for Eliason's alleged misconduct under the doctrine of respondeat superior. Judge Patricia C. Riepel dismissed the intentional tort claims asserted against Annabelle's and Olivia's, but determined that the intentional tort claims remained against Eliason in his individual capacity. In the order, the court noted that counsel for the Plaintiff acknowledged that the intentional tort causes of action were directed solely against David Eliason and were not being asserted against Annabelle's and Olivia's. Lastly, Judge Riepel denied Annabelle's and Olivia's motion for summary judgment as to Appellants' causes of action for negligent infliction of emotional distress and negligent training and supervision.

Judge Stuart L. Tiede presided over the jury trial, which was held from March 12 to March 15, 2013. Prior to trial, Appellants moved to exclude evidence of Ruschenberg's abortion on the grounds that such evidence was overly prejudicial. The circuit court denied the motion.

During trial, Appellants moved for a mistrial when Johnson gave certain testimony regarding Eliason's criminal history. The circuit court denied Appellants' motion for mistrial and recognized that Johnson was confused as to the nature of a prior protection order against Eliason. The circuit court also gave a curative instruction, which directed the jury to

base its decision on the evidence presented at trial, and to “disregard any consideration of whether or not there are criminal charges filed, a trial or a conviction or acquittal.”

Lastly, Appellants requested that the jury be instructed that Annabelle’s and Olivia’s were liable for Eliason’s intentional torts under the “proxy rule” or “alter ego rule.” The circuit court rejected Appellants’ proposed instructions.

Appellants raise the following issues for our review:

1. Whether the circuit court erred in denying Appellants’ motion in limine to exclude evidence of Ruschenberg’s abortion.
2. Whether the circuit court erred in denying Appellants’ motion for mistrial based upon Keith Johnson’s statement at trial.
3. Whether the circuit court erred in rejecting Appellants’ proposed jury instructions regarding the “proxy rule” or “alter ego rule.”

Mr. Aaron D. Eiesland and Mr. Manuel J. de Castro,
Jr., Attorneys for Plaintiffs and Appellants
Megan Ruschenberg, Jessica Cornelius and
Heather Rensch

Mr. Michael L. Luce and Ms. Lisa M. Prostrollo,
Attorneys for Defendants and Appellees
Annabelle's Adult Super Center of South Dakota,
LLC and Olivia's of South Dakota, LLC, d/b/a
Olivia's Adult Super Store

Mr. David Eliason, pro se Appellee

Siers v. Weber

With the assistance of counsel, Appellant Donovan Siers filed an amended petition for habeas corpus on May 31, 2013. The petition alleged the following: Siers was arrested in Minnehaha County for driving under the influence of alcohol on May 6, 2008. Siers refused to give a blood sample to police. Siers was subsequently placed in restraints and his blood was drawn without a warrant or his consent. The blood sample was analyzed and showed Siers to have had .22 percent by weight of alcohol in his blood. The blood sample was the primary evidence supporting Siers' conviction for driving under the influence. Siers pleaded guilty to the offense, and was later convicted and incarcerated for felony failure to appear arising from the driving under the influence conviction. Siers was represented by two attorneys from the Minnehaha County Public Defender's Office. The attorneys failed to fully and correctly advise Siers regarding the constitutionality of the seizure of blood evidence. Siers' petition alleged that had the attorneys challenged the seizure of Siers' blood without a warrant, the evidence would have been suppressed and the charges against him dropped. The failure of counsel to properly advise Siers was in violation of his due process rights.

At the time of Siers' arrest, South Dakota case law indicated that the destruction of blood alcohol evidence by natural dissipation in the body constituted an exigent circumstance in a driving under the influence arrest, allowing for a blood draw without a warrant. However, in 2013, the United States Supreme

Court held in *Missouri v. McNeely* that the natural dissipation of alcohol in the bloodstream does not present a per se exigent circumstance justifying nonconsensual blood testing in all driving under the influence arrests. Siers' cited *McNeely* to support his habeas petition.

The State moved to dismiss the habeas petition for failure to state a claim upon which relief could be granted. A hearing on the motion was held August 30, 2013. Siers argued *McNeely* should be given retroactive effect. He also presented statistical evidence that retroactive application would not be disruptive to the judicial system. The habeas court granted the State's motion to dismiss, but issued a certificate of probable cause, allowing Siers to appeal the *McNeely* issue to this Court.

The primary issue before this Court is whether the U.S. Supreme Court decision of *Missouri v. McNeely*, 133 S. Ct. 1552, should be retroactively applied to a habeas case arising before *McNeely*.

Mr. Mark Kadi, Attorney for Plaintiff and Appellant
Donovan Craig Siers

Mr. Marty J. Jackley, Attorney General, Ms. Kelly
Marnette and Mr. Jeffrey P. Hallem, Assistant
Attorneys General, Attorneys for Defendant and
Appellee Douglas Weber, Warden, South Dakota
State Penitentiary

Paul Nelson Farm v. Department of Revenue

Paul Nelson Farm is a South Dakota corporation which operates an all-inclusive hunting lodge near Agar, South Dakota. A typical hunting package at Paul Nelson Farm includes three days of pheasant hunting with the lodge's guides and dogs, overnight lodging, all meals and beverages, unlimited use of a private sporting clays range, ammunition, use of a shotgun, and five pheasants per day with accompanying bird-cleaning and packaging services. Guests are charged one amount for all items included in the package, with an option to shoot additional birds for an extra fee.

Paul Nelson Farm collected and timely remitted sales tax on each hunting package sold to its guests. However, when Paul Nelson Farm purchased food, non-alcoholic beverages, and ammunition, it did not pay sales or use tax on these items. The Department of Revenue conducted an audit on Paul Nelson Farm covering the period from November 2006 to October 2009. The Department determined that Paul Nelson Farm owed use tax and interest totaling \$29,428.06. The assessment included \$17,405.14 in tax and interest for unpaid use tax on food, non-alcoholic beverages, and ammunition. Paul Nelson Farm requested an administrative hearing to contest this portion of the assessment.

Paul Nelson Farm asserted that the food, beverages, and ammunition were not purchased for end

use by Paul Nelson Farm, but were instead purchased for resale to hunting lodge guests in its ordinary course of business. Accordingly, Paul Nelson Farm argued it was not required to pay use tax on those items. The Hearing Examiner rejected this reasoning, and the Department adopted the Examiner's proposed order requiring Paul Nelson Farm to pay use tax on all three items. Paul Nelson Farm appealed to the circuit court, which reversed in part. The circuit court held that Paul Nelson Farm was not required to remit use tax on the food it had purchased to be resold as part of a package to its guests, but was required to remit use tax on the beverages and ammunition.

On appeal, each party challenges in part the circuit court's decision. The question before this Court is whether Paul Nelson Farm is required to pay use tax on any or all of its purchases of food, beverages, and ammunition.

Mr. Justin Lee Bell, Attorney for Plaintiff and Appellee
Paul Nelson Farm

Mr. John T. Richter, Attorney for Defendant and
Appellant South Dakota Department of Revenue

State v. Boe

On January 21, 2013, Derek Boe shot a firearm through the window of a vehicle occupied by his girlfriend, Tabetha Key. Derek claimed he did not intend to fire the gun. He meant only to break out the window to get Tabetha's attention and motivate her to drive back to town. Earlier that evening, Derek and Tabetha had gotten into an argument when Tabetha would not leave Derek and his friends to have a "boys' night." Derek had tried to get Tabetha to leave, but she refused. At one point, Derek attached a chain between his suburban and Tabetha's vehicle and began to pull her vehicle. Tabetha responded by driving into Derek's suburban. After that collision, Tabetha drove away. Derek followed in his suburban. Tabetha drove into Derek's suburban again, which collision caused her vehicle to land in the ditch. Derek grabbed a gun that was in his suburban, exited the vehicle, and walked toward Tabetha's vehicle. Tabetha claimed that Derek was angry. Derek hit Tabetha's passenger window with the gun and it fired, shattering the window. Tabetha was injured by flying glass and metal fragments.

Derek was charged with attempted murder in violation of SDCL 22-4-1; SDCL 22-16-4, aggravated assault domestic violence in violation of SDCL 22-18-1.1(2), discharge of a firearm at an occupied structure or vehicle in violation of SDCL 22-14-20, and possession of a firearm by a prohibited person in violation of SDCL 22-14-15. The State filed a Part II Information alleging Derek to be a habitual offender.

Prior to trial, the State sought to introduce evidence of Derek’s 2002 conviction of aggravated assault domestic violence as “other act” evidence under SDCL 19-12-5 (Rule 404(b)). The conviction stemmed from an incident between Derek and Jenny Ponca, the mother of Derek’s four children. Derek and Jenny had gotten into an argument at a social gathering. Derek claimed he was intoxicated and only trying to show off in front of his friends. When Jenny tried to leave the gathering, Derek pointed a gun at Jenny and hit her on the head twice with the butt of the gun, giving Jenny a concussion. The State alleged that this prior incident was relevant to the current case to prove Derek’s motive, intent, and absence of mistake. Derek argued that the incident was too remote, not factually similar, and more prejudicial than probative. The court admitted the other act evidence over Derek’s objection.

The jury acquitted Derek of attempted murder, but convicted him on the remaining charges. Derek appeals asserting that the circuit court abused its discretion when it admitted the evidence of his prior conviction for aggravated assault and that there is insufficient evidence to support the jury’s verdict of aggravated assault domestic violence.

Mr. Marty J. Jackley, Attorney General, and Ms. Kelly Marnette, Assistant Attorney General, Attorneys for Plaintiff and Appellee State of South Dakota

Mr. Brad A. Schrieber and Ms. Joan Boos Schueller, Attorneys for Defendant and Appellant Derek Boe

**Stern Oil Company v.
Border States Paving Company, Inc.**

Plaintiff and Appellant, Stern Oil Company, is a business seeking payment for fuel and petroleum products it sold to Weatherton Contracting Co., Inc., a subcontractor on a state highway construction project on Highway 281. Border States was the prime contractor on the project. As required by SDCL 31-23-1, Border States furnished, and Liberty Mutual Insurance issued, a performance bond to ensure that suppliers on the project were paid.

Weatherton entered into its subcontract with Border States to supply crushed aggregate for the project. Weatherton supplied the aggregate in 2008. During that time, Stern Oil delivered fuel and petroleum products to Weatherton so it could perform its subcontract. Weatherton failed to pay Stern Oil for the fuel and petroleum products used. In 2009, Stern Oil obtained a default judgment against Weatherton for the unpaid bills.

Mistakenly believing its fuel and petroleum products were used for a different Weatherton project (an Aberdeen airport project), Stern Oil attempted to secure payment for its unpaid fuel bills by pursuing a bond claim against Upper Plains Contracting and its bond company. That action was timely filed. During that litigation, Stern Oil learned through discovery that its fuel and petroleum products had not been used for the Aberdeen airport project. Rather, its fuel and petroleum products were used in the Highway 281

project, where Border States was the prime contractor. Stern Oil subsequently sued Border States and Liberty Mutual Insurance.

The South Dakota Department of Transportation made final settlement on the project in January 2010. A state statute requires that suits brought to recover on a bond must be brought within one year of final settlement. Although the statute of limitations lapsed for Stern Oil to pursue a bond claim against Border States and Liberty Mutual Insurance, Stern Oil commenced suit in June 2011 on a theory that the statute of limitations should be waived or tolled. The suit also alleged that Border States was unjustly enriched and that Stern Oil was a third-party beneficiary of a payment agreement between Weatherton and Border States that required Border States to issue payments to Stern Oil.

In September 2012, the trial court granted summary judgment for Border States and Liberty Mutual Insurance on Stern Oil's bond claim. With dismissal of the bond claim, Liberty Mutual Insurance was dismissed as a party to the action. In May 2013, the trial court granted summary judgment for Border States on Stern Oil's remaining claims of unjust enrichment and third-party beneficiary breach of contract. Stern Oil now appeals to this Court, raising three issues:

1. Whether the trial court erred in granting summary judgment to Border States on Stern Oil's third-party beneficiary breach of contract claim.

2. Whether the trial court erred in granting summary judgment to Border States on Stern Oil's unjust enrichment claim.
3. Whether the trial court erred in granting summary judgment to Border States and Liberty Mutual Insurance on Stern Oil's bond claim.

Mr. Daniel K. Brendtro, Attorney for Plaintiffs and Appellants Stern Oil Company and State of South Dakota ex rel. Stern Oil Company

Mr. Thomas R. Olson, Attorney for Defendants and Appellees Border States Paving Company, Inc. and Liberty Mutual Insurance Company, as its Surety

State v. Nekolite

Donald Nekolite drove to a dance with his girlfriend. Each testified that Nekolite drank heavily at the dance. They testified that he later went to his truck to get a cigarette. He opened the passenger door and reached across to the driver's side to grab his cigarettes. In doing so, he bumped the gear shift, causing it to pop into neutral, and the truck rolled into another vehicle. They finally testified that Nekolite's girlfriend was the designated driver for that evening, and there is no dispute that she had not been drinking.

Officers arrived to investigate the accident and noticed that Nekolite was intoxicated. There is no dispute that his blood alcohol content was .284 percent by weight. In contrast to Nekolite's and his girlfriend's testimony, one of the officers testified that Nekolite told the officer "that [Nekolite] was behind the wheel and that he intended to leave and that he pressed the clutch in and rolled back into the [other] vehicle." Nekolite was arrested and charged with being in "actual physical control" of his truck while under the influence of alcohol.

Nekolite argued to the magistrate court that his conduct, as he and his girlfriend described it, did not constitute "actual physical control" of a vehicle under South Dakota law. The magistrate court disagreed and found Nekolite guilty. Nekolite appealed to the circuit court. The circuit court affirmed and also noted that because the magistrate court had not made specific

findings on credibility, the officer's testimony also supported the verdict. Nekolite now appeals to this Court.

The issue on appeal is:

Whether Nekolite's conduct constituted actual physical control of a vehicle. An included issue is whether the circuit court could consider the officer's testimony in resolving the appeal from the magistrate court.

Mr. Marty J. Jackley, Attorney General, and Ms.
Kirsten E. Jasper, Assistant Attorney General,
Attorneys for Plaintiff and Appellee State of
South Dakota

Mr. Michael E. Unke, Attorney for Defendant and
Appellant Donald Leon Nekolite

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.

Website for South Dakota Supreme Court Opinions: http://ujs.sd.gov/
