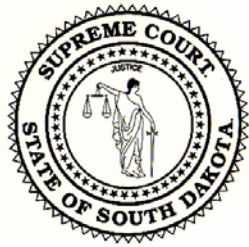


Introduction to
The South Dakota
Supreme Court



and

Case Summaries for
Oral Arguments at the
March Term of the Court

to be held

March 19 through March 21, 2007

University of South Dakota
Vermillion, South Dakota



Supreme Court
STATE OF SOUTH DAKOTA

David Gilbertson
CHIEF JUSTICE

March 19, 2007

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

Ladies and Gentlemen:

Your Supreme Court welcomes you to our March term.

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

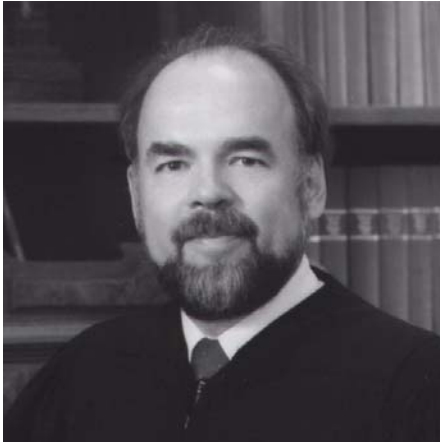
Sincerely yours,

A handwritten signature in cursive script, appearing to read "David Gilbertson".

David Gilbertson
Chief Justice

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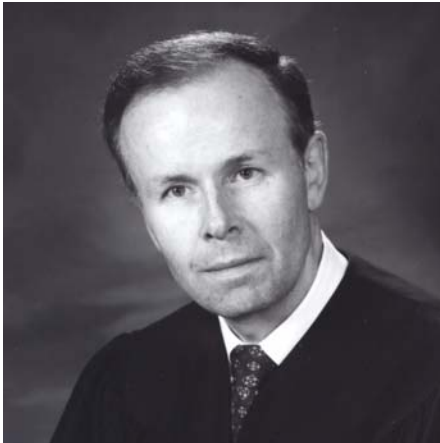
Chief Justice David Gilbertson

Chief Justice Gilbertson, a native of Sisseton, was elected to a 4-year term as Chief Justice by the members of the Supreme Court in September 2001 and was re-elected to a second 4-year term as Chief Justice by the members of the Supreme Court in June 2005. He was appointed to the Supreme Court in April 1995 to represent the Fifth Supreme Court District and was retained by the voters in the 1998 and 2006 general elections. Chief Justice Gilbertson received his undergraduate degree from South Dakota State University in 1972 and his Juris Doctor from the University of South Dakota School of Law in 1975. He engaged in private practice from 1975 until his appointment to the circuit court bench in 1986. During this time he also served as Roberts County Deputy State's Attorney and as City Attorney for the City of Sisseton. He is Past President of the South Dakota Judges Association; and is a member of the Glacial Lakes Bar Association, the Brown County Bar Association and the South Dakota Bar Association. He is a member of the Conference of Chief Justices and chairs its Committee on Tribal/State Relations. He is also a member of the Board of Directors of the National Conference of Chief Justices. He serves on the Judicial-Bar Liaison Committee of the State Bar Association and has served as a Court Counselor at South Dakota Boys State since 1995. Born October 29, 1949, he and his wife Deborah, have four children.



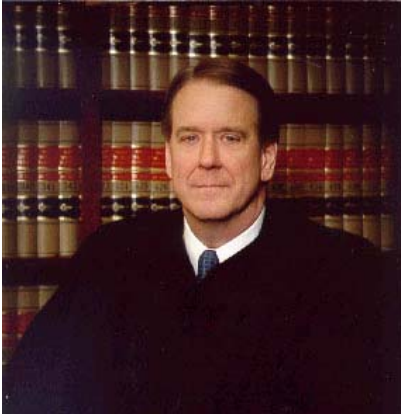
Justice Richard W. Sabers

Justice Sabers was born in Salem on February 12, 1938. He received his B.A. degree from St. John's University in Collegeville, Minnesota in 1960 and, after graduation, served two years as a lieutenant with the U.S. Army Corps of Engineers in the United States and in Germany. He attended the University of South Dakota School of Law, where he was associate editor of the Law Review. He received his law degree in 1966 and enjoyed an active career as a trial lawyer in Sioux Falls for almost twenty years. He was a partner with the law firm of Moore, Rasmussen, Sabers and Kading at the time of his appointment to the Supreme Court in 1986. Justice Sabers was retained by the voters in 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 ten grandchildren.



Justice John K. Konenkamp

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



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

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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.



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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 Michele Munson (Supreme Court Law Clerk), Hilary Williamson (Justice Meierhenry), Jennifer Williams (Justice Konenkamp), William Haugen (Chief Justice Gilbertson), Natalie Turnquist (Justice Sabers), and Jenna Howell (Justice Zinter).

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

Supreme Court

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

Court terms held throughout the calendar year.

Has appellate jurisdiction over circuit court decisions.

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

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

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

Circuit Court

Circuit Court services available in each county seat.

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

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

The Supreme Court Process

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

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

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

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

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

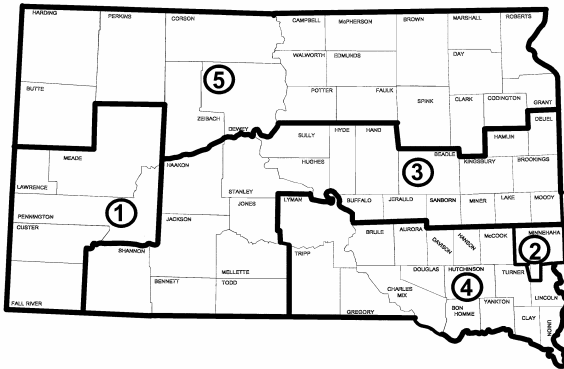
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench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

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

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

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

South Dakota Supreme Court Appointment Districts
Effective July 1, 2001



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

Courtroom Protocol

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

Your cooperation is appreciated.

DO

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

DO NOT

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

Supreme Court of South Dakota
March 2007 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. Mulligan

On October 15, 2002, Richard Goldade was shot in his home in Mobridge. His girlfriend, Nicole Mulligan, claimed that the gun, a .357 revolver, went off accidentally as she was handing it to him. Richard died a few hours later.

Nicole told police that she found the gun in a closet when she was looking for towels in order to give the dogs a bath. She said that she had forgotten that the gun was there, but felt it when reaching for the towels. She indicated that she was concerned that the couple's three year-old son might find the gun, since the child was beginning to climb. Nicole said that she wanted Richard to lock the gun in the gun cabinet, so she took it, covered it with a towel so that their son could not see it, and intended to give it to Richard. As she was approaching Richard or handing the gun to him, it went off hitting Richard in his spine. He died that evening.

Police responded to the 911 call regarding the shooting. An officer at the scene picked up the gun and emptied the unfired bullets. He put the bullets in his pocket, but then could not remove them while wearing latex gloves. Therefore, the officer handled the bullets without gloves, which may have destroyed any fingerprint evidence on the bullets.

Nicole was indicted on December 30, 2003, on alternative counts of first degree murder and first degree manslaughter. She was tried in January, 2006. During jury selection, a *Batson* challenge was raised because the State struck all the Native American jurors. The trial court found sufficient race-neutral reasons for the challenges to the potential jurors. During trial, the State offered evidence of Nicole's use of Richard's name to amass large credit card debt without his knowledge. The State also presented

evidence that Nicole forged Richard's signature on checks she made out to herself. The State contended that the impending discovery of this evidence moved Nicole to act.

Nicole was found guilty of first degree manslaughter. She was sentenced to thirty-five years in the state penitentiary with seventeen years suspended. She was also ordered to pay restitution for the money she stole from Richard and his medical and death related expenses. Nicole appeals her conviction raising the following issues:

1. Whether there was sufficient evidence of criminal intent to support the conviction of first degree manslaughter.
2. Whether, in the absence of an admission or conviction, the trial court's order requiring Nicole to make restitution for the theft of Richard's property constituted an illegal sentence.
3. Whether Nicole's constitutional rights of due process and equal protection were violated when the state removed all of the Native American jurors from the jury.
4. Whether the trial court abused its discretion and committed prejudicial error in refusing Nicole's proposed jury instruction on spoliation of evidence.

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

Mr. Richard A. Sommers, Ms. Melissa E. Neville, Attorneys for Appellant Nicole Mulligan

Papke v. Harbert et al.

On September 3, 2002, seventy-five year old Adeline Papke was outside watering her flowers when her left knee gave out and she collapsed. She was taken to the emergency room and admitted for further evaluation. Dr. Thomas Harbert, an orthopedic surgeon, examined Papke and recommended total knee replacement for both knees. On October 7, 2002, Dr. Harbert and his partner, Dr. Mark Harlow, performed the surgery.

After the surgery, Papke experienced complications when both her knees dislocated. Casts were put on her legs, extending from her thighs to her toes. She also had a revision, or redo, surgery scheduled. After the second surgery, Papke was admitted into a nursing home for rehabilitation. The nursing home noticed multiple pressure ulcers on her right and left heels. Dr. Harbert also identified the presence of black eschar, which is like a hard crust or scab, in the same area as the ulcerations. He sent her to see a specialist, but the ulcerations did not heal. Her left leg eventually had to be amputated above the knee. She continued to receive treatment on her right leg until it was also amputated above the knee.

Papke brought suit against Dr. Harbert, Dr. Harlow, and Aberdeen Orthopedics & Sports Medicine. She claimed that Dr. Harbert and Dr. Harlow committed medical malpractice when they failed to properly diagnose her condition and provided her medical treatment below the standard of care resulting in both her legs being amputated. A jury trial was held from January 24-27, 2006. The jury returned a verdict finding defendants not liable. Papke filed a motion for a new trial, alleging that the court erred when it instructed the jury on the physician's duty of care and when it admitted certain expert testimony. The court denied her motion.

Papke appeals presenting three issues for review:

1. The court erred when it gave instruction 16 to the jury.
2. The court erred when it admitted previously undisclosed expert testimony on the issue of causation.
3. The court erred when it admitted scientifically unreliable expert testimony on the issue of causation.

Defendants filed a notice of review asserting two issues for review:

1. The court erred when it allowed Papke to enter into evidence the amount charged for her medical expenses rather than the amount actually paid by Medicare and Medicaid.
2. The court erred when it denied defendants' motion to compel production of a report reviewed by Papke's expert.

Mr. Scott N. Heidepreim, Mr. Ronald A. Parsons, Jr., Mr. Brendan V. Johnson, Mr. Chet Groseclose, Attorneys for Appellant Adeline Papke

Mr. Reed Rasmussen, Ms. Julia M. Dvorak, Attorneys for Appellees Thomas Harbert, M.D.; Mark Harlow, M.D.; and Aberdeen Orthopedics & Sports Medicine

Dillon v. Weber

Farrell Dillon was charged with twelve counts of first degree rape and criminal pedophilia. The matter proceeded to a jury trial and Dillon was represented by attorney Richard Bode. Dillon was found guilty of five counts of first degree rape and three counts of criminal pedophilia. He was sentenced to 175 years in the penitentiary. In his direct appeal from those convictions, three of the first degree rape convictions were vacated because they violated the prohibition against double jeopardy and the case was remanded for re-sentencing. Dillon was then sentenced to 115 years in the penitentiary.

In this habeas corpus proceeding, Dillon collaterally challenges the constitutionality of those convictions. He alleges that his trial counsel was ineffective for a number of reasons, including failing to raise the double jeopardy issue, failing to do basic research of the law, stipulating to inadmissible evidence, appearing unprepared, failing to present impeachment evidence or expert witnesses to attack the credibility of the witnesses and failing to offer asserted exculpatory evidence. Dillon also contends that trial counsel was suffering from mental illness at the time of the trial. Based on these allegations, Dillon maintains he was deprived of his right to receive effective assistance of counsel and a fair trial. The habeas court found that although there were errors made by trial counsel, those errors did not rise to the level of constitutionally ineffective assistance of counsel depriving Dillon of a fair trial.

Dillon appeals that decision raising the following issues:

1. Whether Dillon's trial counsel made errors, which were so serious that he was not functioning as counsel guaranteed by the Constitution.
2. Whether Dillon's trial counsel's errors seriously prejudiced Dillon's case to the extent that they deprived him of a fair trial.

Ms. Stephanie E. Pochop, Attorney for Petitioner and Appellant Farrell Dillon

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

Veith v. O'Brien

This case is based on a medical malpractice complaint filed by Darrel Veith against Dr. Peter O'Brien and Sioux Valley Clinic Corporation d/b/a Surgical Associates. The complaint arises from gastric bypass surgery that Dr. O'Brien performed on Veith on November 13, 2001. Veith's complaint for the surgery alleges negligence and failure to obtain informed consent against Dr. O'Brien and Sioux Valley Clinic.

Following a jury trial, a general verdict was entered on December 8, 2005, in favor of Dr. O'Brien and Sioux Valley Clinic. Veith raises seven issues on appeal:

1. Whether the circuit court abused its discretion by allowing Dr. O'Brien to testify to his "track record" with gastric bypass surgery.
2. Whether the circuit court abused its discretion by not granting Veith a mistrial after allowing Dr. O'Brien's attorney to question Veith's expert witness about whether Sioux Valley *Hospital* (distinguished from Sioux Valley *Clinic* and NOT involved in the lawsuit) was negligent in permitting Dr. O'Brien to perform a certain type of gastric bypass surgery at its facility.
3. Whether there was error by the circuit court in allowing Dr. O'Brien's attorney to question a witness, called by Veith, about another lawsuit against Dr. O'Brien after the circuit court had granted Dr. O'Brien's request to prohibit any questioning or the introduction of any evidence in that regard.

4. Whether the circuit court abused its discretion by allowing a physician, who had treated Veith following his surgery, to testify about the nature and cause of the matter for which Veith sought treatment.
5. Whether the circuit court abused its discretion by inaccurately instructing the jury included legally inaccurate jury instructions, and whether there was error by the circuit court in refusing an instruction that distinguished Veith's negligence and informed consent claims.
6. Whether the circuit court erred in allowing Dr. O'Brien's attorney's comments about Veith's expert witness during his closing argument.
7. Whether the circuit court abused its discretion by not allowing Veith to admit all of his billed medical expenses into evidence.

Dr. O'Brien raises one issue on review:

1. Whether the circuit court abused its discretion by allowing Veith to call a witness to counter Dr. O'Brien's testimony that all his patients receive a booklet explaining the gastric bypass surgery he performs.

Mr. Ronald A. Parsons, Jr., Mr. Steven M. Johnson, Ms. Kimberly J. Lanham, Attorneys for Plaintiff and Appellant, Darrel R. Veith

Mr. Edwin E. Evans, Ms. Melissa C. Hinton, Attorneys for Defendants and Appellees, Peter O'Brien, M.D. and Sioux Valley Clinic, Corp. d/b/a Surgical Associates

State v. Johnson

Fred Earl Johnson was charged with and convicted of attempted murder and aggravated assault for shooting his estranged wife in the head. On the morning of September 30, 2004, in Baltic, South Dakota, passersby stopped to investigate an SUV sitting at the end of a driveway with the driver's side door opened. They found Johnson's former girlfriend, Cassandra Breen, lying over the console with her head in the passenger's seat. Breen's son was in a car seat in the back of the vehicle. They called 911.

An Emergency Medical Technician (EMT), who arrived on the scene "saw that [Breen] had an injury to her forehead with some blood and some whitish material coming from her forehead." The EMT questioned the injured Breen about what had happened. Breen told the EMT that she had been hit in the forehead with a hammer by "Fred." In the ambulance on the way to the hospital, she further identified her assailant's last name as "Johnson." After arriving at the hospital, doctors determined that Breen sustained a gunshot wound to her forehead. Breen survived the gunshot wound but suffered physical complications including paralysis in her left foot.

Later on the morning of the incident at approximately 8:15 a.m., Turner County Sheriff Byron Nogelmeier, at the request of the Minnehaha County Law Enforcement Office, located Johnson at his home in Monroe, South Dakota. Sheriff Nogelmeier informed Johnson that he was responding to instructions from Minnehaha County to arrest Johnson for aggravated assault against Breen. Although Johnson was not placed under arrest, he was told that he needed to be questioned either at his residence or somewhere else. Johnson, whose vehicle was inoperable, agreed to ride with Sheriff Nogelmeier to the Turner County Sheriff's Office in Parker, approximately ten miles away. Johnson's children

accompanied Johnson in the sheriff's vehicle because they were too young to stay home alone. Sheriff Nogelmeier did not advise Johnson of his *Miranda* rights at that time.

In Parker, Johnson and his children were placed in an interrogation room until Johnson's ex-wife arrived to pick up the children. Minnehaha County Sheriff's Detective Phillip Toft subsequently arrived. Before Detective Toft began questioning Johnson, he advised him of his *Miranda* rights. However, Johnson interrupted Detective Toft, stating that he wanted to cooperate and talk with law enforcement. Consequently, Detective Toft did not finish advising Johnson that anything Johnson said could be used as evidence against him. At the conclusion of the questioning, Detective Toft informed Johnson that he had probable cause to arrest him but wanted to continue speaking with him in Sioux Falls. Johnson agreed and was transported to the law enforcement center in Sioux Falls, where he was placed in an interrogation room. Detective Toft once again told Johnson that he was not under arrest and advised him of his *Miranda* rights. Johnson was then questioned for approximately three hours but made no confession. At the conclusion of the questioning, Johnson was placed under arrest.

Johnson was charged with attempted murder, three counts of aggravated assault, and commission of a felony while armed with a firearm. Johnson sought to have the statements he made to law enforcement suppressed because he was not advised of his *Miranda* rights in Parker, arguing this failure made his subsequent statements to law enforcement inadmissible. The trial court denied the motion and a jury trial was held. The jury returned a guilty verdict for attempted murder, one count of aggravated assault, and committing a felony while armed with a firearm. Johnson was sentenced to 65 years imprisonment. Johnson appeals and raises the following issues:

1. Whether the trial court violated Johnson's right against double jeopardy when it convicted and

sentenced Johnson for attempted murder and aggravated assault.

2. Whether the trial court erred when it denied Johnson's motion to suppress the statements he made to law enforcement on September 30, 2004.
3. Whether the trial court abused its discretion when it limited Johnson's cross-examination of Breen.

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

Mr. Bryan G. Hall, Attorney for Appellant Fred Earl Johnson

Gallagher v. PAM Oil, Inc.

PAM Oil, Inc. is a wholesale distributor of automotive parts. Pete and Mado Pederson began the company in 1962. In 1991, their son, Bill Pederson, became president of the company. In 2000, he decided to retire and asked his friend Cliff Olson if he would be interested in purchasing the business. Olson and E. Lanning Cocks initially purchased 25% of the holding company that owned PAM, with an option to purchase the remaining 75% of the holding company at a later date.

After the purchase, Cocks became the company's new president. Cocks then offered Gary Gallagher a job with PAM. At the time, Gallagher was living in Washington and was asked to relocate to Sioux Falls. On August 19, 2002, he signed an employment agreement accepting the position as vice president of organizational development. Included in the agreement were multiple terms of his employment. He also received and signed a non-compete agreement, whereby it stated that he was an at-will employee.

In November 2002, Cocks was terminated by PAM and Bill Pederson repurchased the 25% previously sold to Cocks and Olson. Pederson also resumed his position as president of the company. At this time, Pederson believed that Gallagher was not meeting the expectations of his employment. According to Pederson, Gallagher was hired to turn PAM around, and Pederson was not seeing results. Therefore, on August 11, 2003, PAM terminated Gallagher.

Gallagher brought suit against PAM, alleging that he was wrongfully terminated. He asserted that he was promised employment for three to five years and was promised the position of president. Because of these promises, he claimed that PAM was estopped, or prevented, from terminating him at that time. He also alleged that he was significantly damaged by his termination. In turn, PAM

asserted that Gallagher was an at-will employee, and, therefore, could be terminated at any time for any reason. A jury trial was held and a verdict returned in favor of Gallagher. The jury awarded Gallagher \$220,874.01 in damages for his wrongful termination.

PAM appeals asserting that the trial court erred when it:

1. refused to apply the statute of frauds;
2. denied PAM's motion for summary judgment on the issue that Gallagher was an at-will employee;
3. denied PAM's motion in limine precluding Gallagher from introducing prejudicial and irrelevant evidence;
4. refused to give PAM's requested jury instruction on:
 - a) the requirement of an individual's consent to the terms of a contract they signed;
 - b) the meeting of the minds in contract formation; and
 - c) promissory estoppel and oral agreements;
5. refused to grant PAM's motion for summary judgment on the issue of promissory estoppel and alleged oral agreements; and
6. failed to deduct the unemployment compensation Gallagher received from the jury's damages award.

Mr. Thomas W. Clayton, Attorney for Appellee Gary Gallagher

Ms. Robin J. Houwman, Attorney for Appellant PAM Oil, Inc.

Johnson v. Johnson

Lois and Leonard (Pete) Johnson were married on October 20, 1972. In February 2004, Lois filed for divorce. Both agreed to waive claims to alimony or other spousal support, and their children are adults, so there are no child custody, child support or visitation issues. The issues on appeal solely concern the court's division and valuation of certain property.

As an employee of the Department of Veteran's Affairs, Lois enrolled in the Civil Service Retirement System (CSRS), which is a defined benefit retirement program. By opting to participate in the CSRS, Lois became ineligible for Social Security benefits. Pete, on the other hand, is a self-employed farmer who currently receives Social Security benefits. The court included the present day value of Lois' CSRS benefits in the marital property division but excluded Pete's Social Security. Although Lois concedes that Social Security benefits are not a divisible asset, she contends that the trial court should have offset Pete's Social Security or her hypothetical Social Security from the value of her CSRS benefits.

During the marriage, Pete and Lois were involved in an automobile accident. Both brought suit against the tort-feasor, and a jury returned a verdict for nearly \$900,000. The jury partitioned \$106,500 for Lois's loss of consortium claim and the balance for Pete's personal injuries. Pete and Lois received a net payment of \$480,786.93. With this money, they paid off the mortgage on the farm and interest on an operating loan, provided gifts to their children, bought cattle and invested.

Lois argued that the entire personal injury award should be denoted marital property, but the court divided the award using the analytical approach. Those portions of the

personal injury award representing compensation for past wages, medical expenses, or other items that diminished the marital estate were deemed marital property. However, compensation for purely personal losses, such as pain and suffering was treated as separate property. Thus, the portion of the award for Pete's physical injuries and pain and suffering was treated as his separate property, and the portion for Lois' loss of consortium was deemed her separate property. The remainder was included in the marital estate.

Lois also disputes several property valuations. First, she claims the court erred in accepting Pete's experts' valuations of Lois' CSRS benefits as well as livestock, feed and machinery. Second, Lois claims that Pete spent over \$3,000 on gifts for his girlfriend that dissipated the marital estate, but the trial court valued the gifts at \$567. Finally, the court accepted Pete's value of his checking account, despite dispute by Lois that a higher value was appropriate.

The trial court awarded a net estate of \$1,349,784 to Pete and \$506,687 to Lois. The court also ordered Pete to make a \$300,000 cash equalizing payment to Lois.

Lois appeals, raising four issues:

1. Whether the trial court erred in denying an offset of Pete's Social Security against Lois' CSRS benefits.
2. Whether the trial court abused its discretion when it distributed portions of the personal injury settlement as separate property instead of including the entire award in the marital estate.
3. Whether the trial court erred in valuing the checking accounts, Lois' CSRS, the livestock, feed and machinery and Pete's gifts to his girlfriend.

4. Whether the court's net property division was an abuse of discretion.

Ms. Victoria M. Duehr, Attorney for Appellant Lois F. Johnson

Mr. Richard A. Johnson, Attorney for Appellee Leonard P. Johnson

State v. Stevens

In July 2004, Officer Kraig Wood received information that Wayne Stevens had been involved in an altercation with Troy Klug, who shortly thereafter went missing. Officer Wood believed that this altercation was related to Klug's disappearance and to drugs. On July 28, 2004, Officer Wood interviewed Stevens about the altercation and his association with Klug. Stevens admitted that he and Klug had a disagreement over \$300 that Klug owed him, but denied any involvement in Klug's disappearance. According to Officer Wood, \$300 is the street value of a one-eighth ounce of methamphetamine. Nonetheless, Officer Wood did not investigate Stevens any further after the July 28 interview. The missing persons investigation on Klug, however, continued.

Five months later, on January 14, 2005, Officer Wood decided to conduct a search of Stevens's trash, which was set out from his residence in a receptacle by the curb for collection. Officer Wood had advised the garbage collector to pick up Stevens's trash and drive a few blocks where he would obtain it from the employee. After the trash was collected Officer Wood and another investigator sorted through it, looking for drug-related items. The officers found an empty pen body containing a white substance, which was later determined to be methamphetamine hydrochloride. The officers also found two pieces of mail with Stevens's name and address, indicating the trash was collected from his residence.

Based on the trash search and the information from the July 28 interview, Officer Wood obtained a search warrant to search Stevens's home. During the search of his home, officers found methamphetamine and drug paraphernalia. Stevens was indicted for possession of a controlled substance and possession of drug paraphernalia.

He moved to suppress the evidence alleging that law enforcement had no reasonable suspicion to search his trash. He also claimed that because the trash search lacked reasonable suspicion there was no probable cause to issue the search warrant. The circuit court suppressed the evidence, concluding that (1) Stevens had a limited privacy interest in his trash, (2) the officers lacked reasonable suspicion for the trash search, and (3) the search of his home lacked probable cause.

The State appeals, asserting that Stevens had no expectation of privacy in his discarded trash, and, in the alternative, reasonable suspicion existed to support the trash search.

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

Ms. Brandy M. Rhead, Attorney for Appellee Wayne R.
Stevens

Keifer v. Miller

Lanette Keifer and Myron Miller were never married, but had a daughter, C.M., born on January 9, 1996. On February 25, 2005, Miller was convicted of sexual contact with a child under sixteen. He sexually abused Keifer's eldest daughter, who is not Miller's child. He was sentenced to fifteen years in the penitentiary, with five years suspended. Prior to his sentencing, he had filed a motion with the circuit court to establish his and his family's visitation with C.M. C.M.'s attorney also proposed that the court order visitation with Miller's mother (Grandmother) and Miller. 999

At the visitation hearing, the court told the parties that it was going to decide visitation for Miller, Grandmother and Miller's wife (Stepmother). Counsel for Keifer objected, claiming that Stepmother had no right to have visitation with C.M. The court told Keifer that C.M. had a bond with Stepmother and Stepmother has certain legal obligations to C.M. Therefore, the court ruled that its visitation order would include Miller, Grandmother and Stepmother.

The final visitation order was issued on April 5, 2006. It stated that "Grandmother or Stepmother" would have monthly visits with C.M. during the school year, corresponding with three- to four-day weekend school breaks. Because certain breaks fall on holidays, "Grandmother or Stepmother," for the 2005-2006 school year, would have visitation with C.M. over Easter and Memorial Day. Thanksgiving holiday was to alternate between the parties, with "Grandmother or Stepmother" having Thanksgiving in even numbered years. "Grandmother or Stepmother" also would have the last five days of C.M.'s Christmas holiday. C.M. would visit "Grandmother or Stepmother" the last seven days in June and the first fourteen days in July in even numbered years. Finally, "Grandmother or

Stepmother” was ordered to arrange for quarterly visits with Miller at the penitentiary.

Mother appeals the court’s visitation order, asserting two issues:

1. Did the court have the authority to award visitation to Stepmother?
2. Did the court abuse its discretion when it awarded the Grandmother such extensive visitation with C.M.?

Ms. Debra D. Watson, Attorney for Appellant Lanette A. Keifer

Mr. Kent R. Hagg, Attorney for Appellee Myron A. Miller

Ms. Jean M. Cline, Attorney for Child C.M.

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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