

Introduction to
The South Dakota
Supreme Court



and
Case Summaries for
Oral Arguments at the
October Term of the Court
to be held
October 2 through October 4, 2017
University of South Dakota Law School
Vermillion, South Dakota

David Gilbertson
CHIEF JUSTICE

Supreme Court
STATE OF SOUTH DAKOTA



October 2, 2017

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

Ladies and Gentlemen:

Your Supreme Court welcomes you to our October Term.

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

Sincerely yours,

David Gilbertson
Chief Justice

State Capitol Building

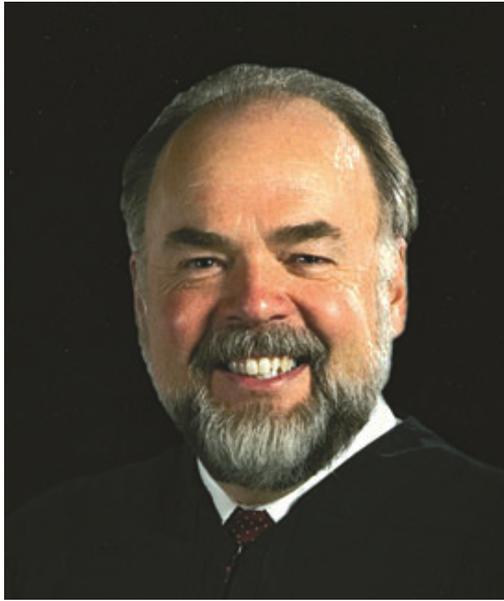
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The justices have extended an invitation to the public to attend any of the Court's sessions. To assist with the Supreme Court visit, persons in attendance must abide by proper courtroom etiquette. The Supreme Court employs security methods to ensure 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.

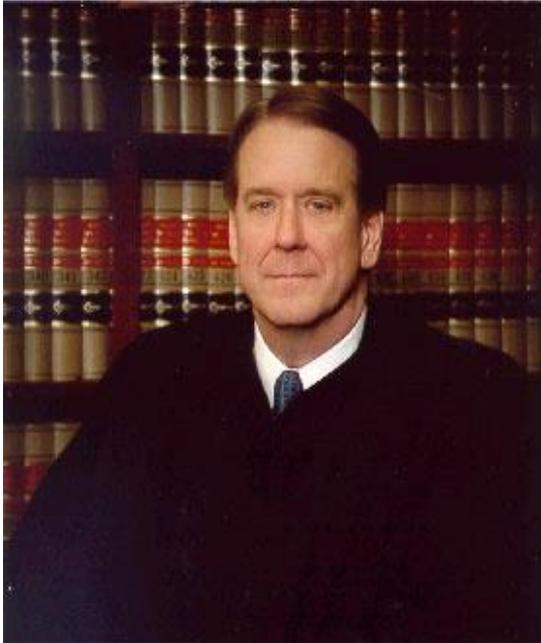


Chief Justice David Gilbertson

Chief Justice Gilbertson was elected to a 4-year term as Chief Justice by the members of the Supreme Court in September 2001, was re-elected to a second 4-year term as Chief Justice by the members of the Supreme Court in June 2005, a third 4-year term in June 2009, a fourth 4-year term in June 2013 and a fifth 4-year term in 2017. He was appointed to the Supreme Court in April 1995 to represent the Fifth Supreme Court District, which includes Brown, Butte, Campbell, Clark, Codington, Corson, Day, Deuel, Dewey, Edmunds, Faulk, Grant, Hamlin, Harding, Marshall, McPherson, Perkins, Potter, Roberts, Spink, Walworth and Ziebach counties, and was retained by the voters in the 1998, 2006 and 2014 general elections.

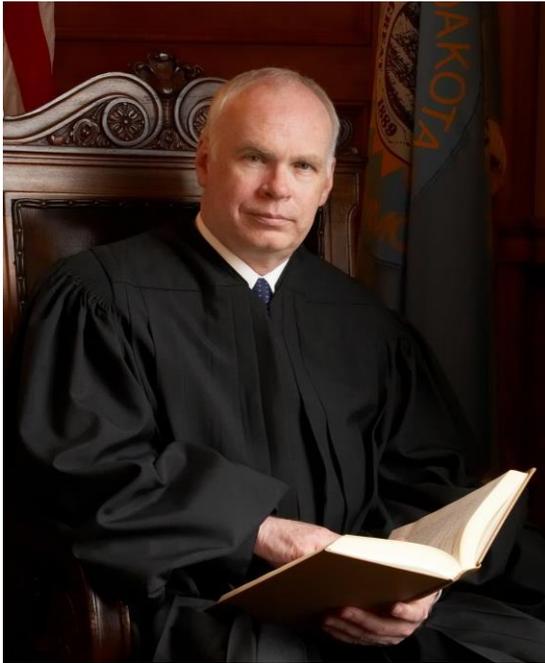
Chief Justice Gilbertson received his undergraduate degree from South Dakota State University in 1972 and his Juris Doctor from the University of South Dakota, School of Law in 1975. He engaged in private practice from 1975 until his appointment to the circuit court bench in 1986. He served as a Circuit Judge for the Fifth Judicial Circuit from 1986 until his appointment to the Supreme Court in 1995.

He served as President of the Conference of Chief Justices for the 2015-2016 Term. He has previously held the positions of Board Member, First-Vice President and President-elect and has chaired various committees. He also served as Chairman of the Board of Directors for the National Center for State Courts for its 2015-2016 Term. From 2010 to 2016 he served as the state court representative of the Criminal Rules Committee of the United States Courts. 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 was the recipient of the "Grass Roots" Award by the American Bar Association in 2014 also for his defense of judicial independence. He is the past President of the South Dakota Judges Association. He also 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. Chief Justice Gilbertson and his wife Deb, have four children.



Justice Steven L. Zinter

Justice Zinter, of Pierre, was appointed to the Supreme Court on April 2, 2002 by former Governor William J. Janklow. He received his Bachelor of Science degree from the University of South Dakota and his Juris Doctor from the University of South Dakota School of Law. Upon graduation from law school in 1975, Justice Zinter was an Assistant Attorney General for the State of South Dakota. From 1978 to 1986 he was engaged in the private practice of law. Justice Zinter also served as the Hughes County State's Attorney from 1980-1986. 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. He was appointed from the Third Supreme Court District, which includes Beadle, Bennett, Brookings, Brule, Buffalo, Fall River, Haakon, Hand, Hughes, Hyde, Jackson, Jerauld, Jones, Kingsbury, Lake, Lyman, Mellette, Miner, Moody, Sanborn, Oglala Lakota, Stanley, Sully, Todd and Tripp counties. Justice Zinter was retained by the voters in 2006 and 2014. He is a member of the American Bar Association, the State Bar Association, and the South Dakota Judges Association. He is a past trustee of the Harry S. Truman Foundation along with a number of other boards and commissions. Justice Zinter and his wife have two children and five grandchildren.



Justice Glen A. Severson

Justice Severson, represents the Second Supreme Court District, which includes Minnehaha County. He attended the University of South Dakota receiving a Bachelor of Science 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 1977-1991 and a Beadle County Deputy States Attorney in 1975. He was appointed a 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 and was retained by the voters in 2012. He is a member of the American Bar Association, South Dakota Bar Association and Second Circuit Bar Association. He served in the South Dakota Air National Guard from 1967-1973. 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 children, Thomas and Kathryn.



Justice Lori S. Wilbur

Justice Wilbur, appointed to the Supreme Court on August 16, 2011, by Governor Dennis Daugaard, represents the Fourth Supreme Court District, which includes Aurora, Bon Homme, Charles Mix, Clay, Davison, Douglas, Gregory, Hanson, Hutchinson, Lincoln, McCook, Turner, Union, and Yankton counties. Justice Wilbur was retained by the voters in 2014. 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 two grandchildren.



Justice Janine M. Kern

Justice Kern, who was appointed to the Supreme Court on November 25, 2014, by Governor Dennis Daugaard, represents the First Supreme Court District, which includes Custer, Lawrence, Meade and Pennington counties. She received a Bachelor of Science degree in 1982 from Arizona State University and a Juris Doctor degree from the University of Minnesota Law School in 1985. Justice Kern worked in the Attorney General's office from 1985-1996 serving in a variety of capacities including the appellate division, drug prosecution unit and as Director of the Litigation Division. She was appointed a Circuit Court Judge in 1996 in the Seventh Judicial Circuit comprised of Custer, Fall River, Oglala Lakota and Pennington Counties and served 18 years on the trial court bench. She is a member of the American Law Institute, the National Council of Juvenile and Family Court Judges, the State Bar Association, the Pennington County Bar Association, the American Bar Association Fellows and past President of the South Dakota Judges Association. She served on the Council of Juvenile Services from 2004-2013 and on the Federal Advisory Committee on Juvenile Justice from 2004-2008 and on numerous other boards and commissions. Justice Kern and her husband Greg Biegler make their home in the beautiful Black Hills.



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.



2017-2018 Supreme Court Law Clerks

Law Clerks are employed by the Court to assist the Justices with research and writing of the opinion on the cases under consideration. In the photograph above from left to right, Elliot Bloom (Supreme Court Law Clerk), Jesse Goodwin (Justice Kern), Jennifer Williams (Justice Wilbur), Christopher Dabney (Chief Justice Gilbertson), Shad Christman (Justice Severson), and Christopher Sommers (Justice Zinter).

Summary of Jurisdictions for the South Dakota Court System

Supreme Court

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

Court terms held throughout the calendar year.

Has appellate jurisdiction over circuit court decisions.

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

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

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

Circuit Court

Circuit Court services available in each county seat.

Counties grouped into seven circuits, served by 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.

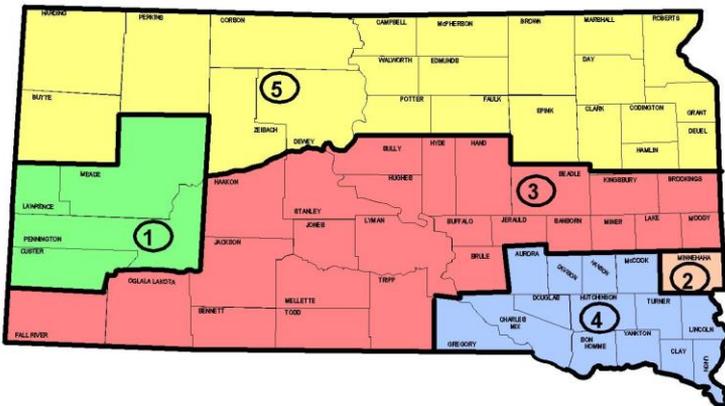
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench 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.

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. Justice Janine Kern was appointed in 2014 from District One. Chief Justice Gilbertson, Justice Zinter, and Justice Wilbur were each retained in the November 2014 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
October 2017 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.

#27736,
#27738

MONDAY, OCTOBER 2, 2017 – NO. 1

State v. Patterson

On October 9, 2013, Ashley Doohen left her two-year-old son T.R., in the care of Joseph Patterson, her boyfriend. Shortly after Doohen left the apartment she shared with Patterson, Patterson informed Doohen over the phone that T.R. was not breathing and unresponsive. Doohen told Patterson to hang up and call 911. Patterson attempted to call 911, but misdialed. He connected on the second attempt and informed the dispatcher that T.R. was choking on a fruit snack. Patterson told the dispatcher he had gotten the fruit snack out of T.R.'s mouth, but that T.R. was turning blue.

Doohen was away from her apartment for approximately 15 minutes. When she arrived back, she began performing CPR on T.R. Shortly thereafter, Sioux Falls Police Officer Cody Schulz arrived at the apartment to find Patterson near the entrance waiving and screaming. Patterson told Schulz that a child was choking, that the mother was doing CPR, and that Officer Schulz needed to help the child. When Officer Schulz reached the apartment, he had Doohen stop CPR so he could examine T.R. Officer Schulz did not notice any obstruction of T.R.'s airway, but did notice a sweet smell, and a sticky substance around T.R.'s mouth, appearing to be from candy.

Paramedics arrived moments later, and T.R. was taken to Sanford Medical Center. Officer Schulz then interviewed Patterson about the incident. Patterson claimed when Doohen left for the gym, he left T.R. alone

and went to the bathroom. Patterson also claimed that when he returned, he found T.R. lying slumped over and unresponsive on the couch. Patterson explained to the officer that he tried to assist T.R., and had removed a piece of gummy candy from the child's mouth. A piece of chewed gummy candy containing T.R.'s DNA was later retrieved from Doohen and Patterson's apartment.

When T.R. arrived at the hospital, a CT scan of the head revealed intracranial hemorrhaging. An examination of T.R.'s eyes further revealed widespread retinal hemorrhaging. Two days later, on October 11, 2013, T.R. was declared brain dead, and was removed from life support. An autopsy showed four subcutaneous hemorrhages on T.R.'s scalp, consistent with blunt force trauma.

Based upon T.R.'s injuries, Patterson was charged with second-degree murder, first-degree manslaughter, and aggravated battery of a child. On September 29, 2015, after a trial, a jury found Patterson guilty on all counts. On November 19, 2015, Patterson was sentenced to life imprisonment for second-degree murder, and 25 years to run concurrently for aggravated battery of an infant. The trial court did not issue a sentence for manslaughter, finding the murder and manslaughter convictions arose from the same conduct.

Patterson appeals his conviction, raising the following issues:

1. Whether the circuit court erred by permitting the State to present other acts evidence to the jury.
2. Whether the circuit court erred when it allowed the State to argue a factual theory of guilt and motive not supported by evidence.
3. Whether the circuit court erred by allowing the State to elicit expert opinions which were impermissibly intrusive.
4. Whether the circuit court erred by refusing to allow Patterson to present additional instances of alleged child abuse committed by a potential third-party perpetrator.
5. Whether the circuit court erred by failing to grant Patterson's motion for judgment of acquittal.

Mr. Ellery Grey and Mr. Michael J. Butler, Attorneys
for Appellant Joseph Patterson

Mr. Marty J. Jackley, Attorney General, Mr. Robert
Mayer, Deputy Attorney General, Mr. Paul
Swedlund and Mr. Grant M. Flynn, Assistant
Attorneys General, Attorneys for Appellee State
of South Dakota

**Montana-Dakota Utilities Co. v.
Parkhill Farms, LLC**

Montana-Dakota Utilities Co. and Otter Tail Power Co. (collectively, “Utilities”) are public utilities that provide electricity to customers in South Dakota, Minnesota, Montana, North Dakota, and Wyoming. The Utilities are members of the Midwest Independent Service Operator (“MISO”), which is a nonprofit organization created to regulate the planning, construction, and management of electricity transmission in the upper Midwest, including South Dakota. MISO, in turn, is subject to regulation and control by the Federal Energy Regulatory Commission (“FERC”). Under FERC guidelines, public utilities that participate in the interstate electricity market must provide open access to their transmission lines under nondiscriminatory rates and conditions to anyone else in the market.

As part of an ongoing effort to facilitate electricity generation and reliable service, MISO determined a high-voltage transmission line should be constructed running from Big Stone, South Dakota, to Ellendale, North Dakota. The total length of the line is 163 miles with only 10 of those miles located in North Dakota. Once MISO approved the line, the Utilities were required to construct it.

After more than a year of study, the Utilities chose a route for the transmission line and began negotiating with affected land owners. The Utilities sought permanent, 150-foot-wide easements for the

purpose of constructing the transmission line and support structures. The Utilities secured voluntary easements over 91% of the affected parcels and filed a condemnation action against the remaining landowners, including Parkshill Farms.

Parkshill Farms challenged the Utilities' power to take the easements, arguing that such easements were not taken for public use and that permanent easements were unnecessary. At the jury trial, Parkshill Farms' expert valued the easements at \$840,000, while the Utilities' expert valued them at only \$73,097. The circuit court declined Parkshill Farms' request to instruct the jury to consider "the most injurious use of the property reasonably possible under the easement" in determining the amount of compensation due. Ultimately, the jury awarded \$95,046 to the condemnees.

Parkshill Farms appeals, raising the following issues:

1. Whether the easements were taken for a public use.
2. Whether the easements were necessary.
3. Whether the circuit court abused its discretion by refusing Parkshill Farms' requested jury instruction.

Mr. N. Bob Pesall, Attorney for Defendants and
Appellants Parkhill Farms, LLC, Vera Parks,
Ordean Parks, and Reuben Parks

Mr. Thomas Welk, Mr. Jason Sutton, and Mr. Reed
Rasmussen, Attorneys for Plaintiffs and
Appellees Montana-Dakota Utilities Co. and
Otter Tail Power Co.

Jensen v. Menard, Inc.

On August 1, 2012, Ronald Jensen and Don Farnam, Ronald's brother-in-law, visited the Menards in Mitchell, South Dakota. After purchasing seven four-by-eight sheets of plywood, Ronald drove his pickup around back to the store's security shack to gain access to the lumberyard and load the sheets onto his truck. Instead of pulling into the bay, Ronald parked the truck parallel to the south side of the building. A Menards employee loaded the plywood onto a single-rail cart, placing the sheets so that they leaned against the rail at an angle, and pushed the cart to the rear of the pickup where Ronald and Don were waiting.

Ronald, having suffered severe injuries as a result of a car accident in 1977, could only perform light physical work. With the assistance of the Menards employee, Ronald began loading the plywood into the truck by gliding the sheets flat onto the pickup bed. After loading the first sheet of plywood, a strong, southward gust of wind began moving the cart. The employee unsuccessfully attempted to stop the cart with his elbow, and the plywood loaded on the cart tipped over onto the ground. Ronald, who was near the cart, lost his balance and fell, striking his head against either the plywood, the tailgate of the truck, or some other hard surface. The accident rendered Ronald unable to move or feel his arms and legs.

An ambulance took Ronald to the emergency room at Queen of Peace Hospital. Ronald underwent

surgery for cervical fractures and dislocations, but the accident left Ronald a quadriplegic. Additionally, Ronald required a tracheostomy so that he could be placed on a ventilator permanently. While undergoing rehabilitation, Ronald received a diagnosis of bladder cancer, after which he transferred to a long-term nursing facility in Lincoln, Nebraska. On January 31, 2013, Ronald passed away.

Before his death, Ronald and his wife Bonita sued Menard, Inc. Plaintiffs alleged that the Menards employee acted negligently in handling the plywood and failed to recognize unsafe weather conditions requiring additional safety precautions. Bonita also alleged a separate claim for loss of consortium. Menard, Inc. alleged affirmative defenses, including assumption of the risk and contributory negligence.

The circuit court conducted a four-day jury trial between October 31, 2016, and November 3, 2016. At the close of evidence, Plaintiff moved for a judgment as a matter of law on her claims against Menard, Inc. and as to its affirmative defenses of assumption of the risk and contributory negligence. The circuit court, overruling Menard, Inc.'s objection to a jury instruction for its failure to include assumption of the risk, found that Ronald neither perceived a risk nor should have. The jury then returned a verdict in favor of Plaintiff, and the circuit court entered a judgment against Menard, Inc. for \$2,295,971.97.

Menard, Inc. appeals, raising the following issues on appeal:

1. Whether the circuit court erred when it granted Jensen's motion for judgment as a matter of law as to Menard, Inc.'s affirmative defense of assumption of the risk.
2. Whether the circuit court erred when it refused to instruct the jury on Menard, Inc.'s affirmative defense of assumption of the risk.

Mr. William P. Fuller and Ms. Hilary L. Williamson,
Attorneys for Defendant and Appellant Menard,
Inc.

Mr. Scott G. Hoy and Mr. Michael W. Strain, Attorneys
for Plaintiff and Appellee Bonita Jensen,
Individually and as the Personal Representative
of the Estate of Ronald M. Jensen, deceased

State v. Hemminger

On January 7, 2015, at 2:02 a.m., John Hemminger called 911 to report that he had just been stabbed in the hand by Richard Hanley at Jessica Goebel's house and was on his way to the hospital. He also reported that someone should go to Goebel's home because Hanley could still be there. Hanley and Goebel were allegedly dating. Officers went to Goebel's home and found Goebel lying on the kitchen floor in a pool of blood, barely alive. The officers searched the home but did not find Hanley. They later learned that Hanley was at a hospital in Fort Yates being treated for an eye injury. Goebel ultimately died of her injuries, which included over 20 stab wounds.

Officers also went to the hospital to interview Hemminger. Sergeant Pickrel arrived first and took Hemminger's statement. Hemminger explained that he had gone to Goebel's home around 11:00 p.m. to retrieve his clothes. The two had recently ended their relationship. Hemminger claimed that while he was at Goebel's home, Hanley attacked him, pulled a knife, and threatened to kill him. Hemminger said that he gouged Hanley's eye during the attack, and Hanley took off running. Hemminger did not report that Goebel had a no-contact order entered against him or that the two had a rocky, sometimes violent relationship. He claimed that they had been talking all day via text messages and phone calls. The officer asked to look at Hemminger's phone. Hemminger replied, "Yes, go ahead." He entered the passcode and handed the phone to the officer. Later, Sergeant Pickrel told Hemminger

that he wanted to seize the phone. Hemminger replied, “No problem.” Hemminger again provided the passcode.

At approximately 4:00 a.m., additional officers entered Hemminger’s hospital room to interview Hemminger. Detective Gross read Hemminger his *Miranda* rights as a precaution. Hemminger again relayed what had happened that night. Detective Gross had concerns about Hemminger’s timeline. He told Hemminger that Goebel had made a 911 call around 6:00 p.m. reporting that Hemminger and another person were fighting inside her home. Hemminger denied being at Goebel’s home at that time and repeatedly referred to his cell phone as support. He provided the officers the passcode to his phone again and showed the officers how to determine when calls were made. Hemminger also agreed to let the officers take his clothing. Detective Gross obtained a buccal swab for DNA testing. As an officer was bagging Hemminger’s coat, she saw a knife handle in the pocket. The handle was bloody and had no blade. Later, officers discovered a knife blade with no handle in the sink at Goebel’s house.

The officers arrested Hemminger, and he was later indicted for first-degree murder. Prior to trial, Hemminger filed a motion to have the property seized from him returned or suppressed. He argued that he never consented to the officers’ seizure of his cell phone, clothing, or DNA, and if he had consented, he withdrew that consent three weeks later by written letter. The circuit court denied the motion. Hemminger also moved to suppress the officers’ warrantless seizure of his bloody boots, shirt, and jacket from his friend John

Roach's home. He claimed that he had an expectation of privacy in Roach's home. The court denied the motion.

After a trial, the jury found Hemminger guilty of first-degree murder, which carries a mandatory sentence of life in prison. The circuit court entered a judgment of conviction after denying Hemminger's motion for a new trial.

Hemminger appeals, raising the following issues:

1. Whether the circuit court erred when it denied Hemminger's motion to suppress the evidence seized from Hemminger at the hospital.
2. Whether the circuit court erred when it denied Hemminger's motion to suppress the evidence seized from Roach's residence.
3. Whether the circuit court abused its discretion when it permitted the State to introduce twenty-six autopsy photographs of the victim over Hemminger's objection.
4. Whether the circuit court abused its discretion when it denied Hemminger's motion for a new trial based on the claim that the State improperly shifted the burden to Hemminger during rebuttal closing argument.
5. Whether the evidence was insufficient to support the jury's verdict.

6. Whether the cumulative errors deprived Hemminger of his constitutional right to a fair trial.

Mr. William D. Gerdes, Mr. Jerald M. McNeary, Jr. and Mr. Thomas J. Cogley, Attorneys for Defendant and Appellant John Eric Hemminger

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

State v. Draskovich

After being convicted of driving under the influence of alcohol, Edward Draskovich went to the Minnehaha County Courthouse to ask whether his restricted driver's permit (work permit) had been approved and to collect bond he had posted. He spoke with April Allenstein, supervisor of the accounting division at the clerk's office, about his bond. Allenstein informed him that she could not release his bond because the judge had not signed it yet.

Draskovich then went to the criminal division to ask about his work permit. He returned to Allenstein's counter and said out loud: "Now I see why people shoot up courthouses." Before leaving the office, he said: "Not that I would." Allenstein alerted courthouse security.

Draskovich went upstairs to the court administration office to check on other documents. He spoke with Brittan Anderson, who told him he would have to get copies of documents from the clerk's office. Draskovich began complaining about Judge Salter not approving his work permit. Anderson informed Draskovich that the judge could not approve his work permit until Draskovich completed his treatment. According to Anderson, Draskovich responded: "Well that deserves 180 pounds of lead between the eyes." Draskovich then left the office. Anderson informed security of the incident. Draskovich was not stopped by security, but he was interviewed by a detective the next day. Draskovich expressed his frustration to the detective regarding various issues with court staff.

Draskovich was subsequently charged with threatening a judicial officer and disorderly conduct. At trial, both Allenstein and Anderson testified that they frequently saw Draskovich in the office and that he usually appeared angry and frustrated. Allenstein testified she was intimidated by Draskovich's statement in the accounting office. Anderson testified she was "shocked" and "surprised" by Draskovich's statement in the administration office and believed it was directed at Judge Salter. Judge Salter testified that he believed the statement was a threat to fire a gun between his eyes. He also testified that the statements concerned him and that he had "to be careful with everything" he did and with everything around him. Judge Salter also stated he had presided over Draskovich's appeal from magistrate court but had never been threatened by Draskovich before.

During closing arguments, Draskovich argued that his statements were not "true threats" but were instead protected speech under the First Amendment. The State argued the statements were threats that constituted unprotected speech. The circuit court rejected Draskovich's arguments and found him guilty of both counts.

Draskovich raises one issue on appeal: Whether his statements constituted protected speech under the First Amendment to the United States Constitution.

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

Mr. Beau J. Blouin, Minnehaha County Public
Defender's Office, Attorney for Appellant and
Defendant Edward James Draskovich

McDowell v. Sapienza

Joseph and Sarah Sapienza own property located in the McKennan Park Historical District in Sioux Falls. The Sapienzas' property is immediately to the south of the home of Pierce and Barbara McDowell. McDowells had lived in their home, which was on the state and national registers of historic places, since 1991. After Sapienzas purchased the property, they decided to raze the existing home and build a new one. The existing home was denominated as an intrusion into the historic neighborhood and a noncontributing property to the historical district.

The Sapienzas submitted a proposal for new construction to the Sioux Falls Board of Historical Preservation. The Board approved the proposal. The Sapienzas then applied for and received a building permit from the City, which indicated that the new home would comply with the City's thirty-five foot maximum height and five foot minimum side yard setback requirements. The Sapienzas then began construction of their new home.

The Sapienza home was constructed five feet from the property line bordering the McDowells' property. Because the McDowell home was two feet from the property line, which was the minimum setback requirement at the time the home was constructed in 1924, the two homes were seven feet apart. McDowells began expressing concerns with Sapienzas regarding the size of the home, which was approximately forty-

five feet tall. In May 2015, while the Sapienza home was still under construction, McDowells called the City fire inspector to request an inspection of the chimney for their wood-burning fireplace. The fire inspector advised McDowells that they could not use their fireplace because the eave of the Sapienza home was approximately ten feet above and six feet away horizontally from the top of the McDowells' chimney. The fire code required chimneys to extend at least two feet higher than any portion of any building located within ten feet but no higher than three feet above the highest point where the chimney passes through the roof.

After learning they could no longer use their wood-burning fireplace, McDowells sent a letter to Sapienzas demanding they cease and desist all construction or else McDowells would pursue legal action. Sapienzas continued construction, and McDowells commenced this action seeking injunctive and monetary relief. McDowells sued Sapienzas for negligence and nuisance, arguing that the Sapienza home violated state rules regulating the design, height, width, and proportion of new construction in historical districts, as well as the minimum setback requirements under Sioux Falls zoning ordinances. McDowells also sued the City for negligence and inverse condemnation, arguing the City negligently approved the building permit for a home that violated regulations and ordinances.

After a court trial, the circuit court granted an injunction in favor of McDowells. The court ordered that the Sapienzas would have to remodel their home to

comply with state regulations and city ordinances. The court also ruled the City could be found negligent but entered no judgment against the City.

Sapienzas appeal, raising the following issues:

1. Whether the circuit court erred in ruling that state regulations for historic districts applied to the Sapienza home, which was within a historic district but was not on the state or national register of historic places.
2. Whether the circuit court erred in ruling that the Sioux Falls chimney ordinance was a setback requirement that the Sapienzas violated.
3. Whether the circuit court abused its discretion in granting an injunction against Sapienzas.
4. Whether the circuit court entered sufficient findings of fact and conclusions of law to allow for meaningful review on appeal.
5. Whether the circuit court erred in denying Sapienzas' affirmative defenses of laches and assumption of the risk.

McDowells raise the following issue by notice of review:

1. Whether the circuit court erred in neglecting to include a finding that the City was liable to the McDowells.

The City raises the following issues by notice of review:

1. Whether the circuit court erred in ruling that the public duty doctrine did not bar McDowells' negligence claim against the City.
2. Whether the circuit court erred in failing to enter judgment in favor of the City.
3. Whether the circuit court entered sufficient findings of fact and conclusions of law to allow for meaningful review on appeal.

Mr. Ronald A. Parsons, Jr., Mr. Steven M. Johnson and Ms. Shannon R. Falon, Attorneys for Plaintiffs and Appellees Pierce and Barbara McDowell

Mr. Richard L. Travis and Mr. Adam R. Hoier, Attorneys for Defendants and Appellants Joseph and Sarah Sapienza

Mr. William C. Garry and Ms. Melissa R. Jelen, Attorneys for Defendant and Appellee City of Sioux Falls

State v. Bertram

To escape abject poverty, Leonila Stickney came to the United States from the Philippines in 2004 as the 22-year-old, mail-order bride of 73-year-old David Stickney. Leonila and David had one child together the same year. Every month, Leonila sent money to her family in the Philippines.

Leonila left David in 2008 and began a relationship with 56-year-old Russell Bertram. Several months into the relationship, the couple purchased \$920,000 in term-life-insurance policies on Leonila that named Bertram as sole beneficiary.

On October 24, 2009, Leonila accompanied Bertram on a pheasant-hunting trip. After shooting his legal limit, Bertram placed his loaded shotgun into the cab of his truck without engaging the weapon's safety. As Bertram swept the weapon across Leonila, it discharged into her torso. Bertram called 911 and drove Leonila to the Gregory County Hospital, where she was later pronounced dead.

David challenged Bertram's right to the insurance proceeds, alleging Bertram intentionally killed Leonila. Bertram underwent a unilateral polygraph test and allegedly passed. The parties settled: Leonila's estate received \$600,000 and Bertram kept \$320,000 plus \$82,000 in interest. Bertram promised the insurance proceeds would go to Leonila's family.

The shooting was initially investigated as accidental, but law enforcement soon became suspicious. Investigators eventually learned of the insurance policies, that Leonila was pregnant by another man, that Bertram suspected Leonila was unfaithful, and that Bertram gave little of the insurance proceeds to Leonila's family. Bertram's account of the shooting also varied between interviews.

Bertram was arrested in 2015 for first-degree murder. At trial, the circuit court refused to permit Bertram to impeach another witness's testimony by introducing the results of his polygraph test. But the court did permit the State to introduce evidence of Bertram's sexual liaisons with other women prior to Leonila's death.

Bertram was convicted and now appeals, raising the following issues:

1. Whether the circuit court erred in refusing to admit Bertram's polygraph evidence.
2. Whether the circuit court erred in admitting evidence of Bertram's sexual liaisons with other women leading up to Leonila's death.

Mr. Michael J. Butler, Mr. Clint L. Sargent and Raleigh E. Hansman, Attorneys for Appellant Russell Ray Bertram

Mr. Marty J. Jackley, Attorney General, and Paul S. Swedlund and Mikal G. Hanson, Assistant Attorneys General, Attorneys for Appellee State of South Dakota

Schott v. South Dakota Wheat Growers Ass'n

Dallas Schott, owner and operator of Corson County Feeders, Inc., sued South Dakota Wheat Growers Association (SDWG) alleging its agronomist, Jason Fees, incorrectly prescribed “Beyond” herbicide for Schott’s use on his 2014 sunflower crop. Beyond is designed to be applied only on “Clearfield” variety sunflowers, but Schott sprayed that prescribed herbicide on a non-Clearfield variety. As a result, 1,200 acres of Schott’s sunflower crop was destroyed.

Schott farms about 12,000 acres of land in north-central South Dakota. He started growing sunflowers on the advice of SDWG in 2008 or 2009. By 2014, Schott’s sunflower crop included a mixture of different sunflower varieties. These varieties are significant because they dictate the type of herbicide that may be used. TapOut is a herbicide used for non-Clearfield sunflowers. Beyond is the designated herbicide for Clearfield sunflowers.

SDWG provides agronomy services for growers that include recommending chemicals, seed varieties, and fertilizers. With these services, SDWG directs growers on what chemicals to use on what crops, how to mix the chemicals with surfactants and other additives, and when to apply the chemicals to a grower’s field. Because crop technology changes rapidly, Schott alleged that he always followed the recommendations provided by SDWG and its agronomist, Fees.

In December 2013, Fees developed a written pre-plan for Schott's 2014 crop of around 3,200 acres of sunflowers. Under the plan, Schott was apparently planning to plant both non-Clearfield and Clearfield sunflowers because the plan included ordering both TapOut and Beyond herbicide. Schott planted both types of sunflowers and later contacted Fees for a herbicide prescription. Fees prescribed Beyond, which as previously noted, was to be used only on Clearfield sunflowers. Within days of Schott's application of Beyond, 1,200 acres of his non-Clearfield sunflowers died.

Schott subsequently brought suit against SDWG for negligence, breach of contract, and breach of warranty. Schott alleged that SDWG prescribed the wrong herbicide. SDWG moved for summary judgment, alleging that Schott assumed the risk and was contributorily negligent. SDWG argued that: Fees did not tell Schott to spray Beyond on non-Clearfield sunflowers; Schott knew the difference between non-Clearfield and Clearfield sunflowers based on spraying previous years' crops without incident; and Schott was a licensed spray applicator who was responsible for reading the Beyond label that indicated it could only be used on Clearfield sunflowers. Schott denied knowing the difference between non-Clearfield and Clearfield sunflowers. He also argued he relied wholly on the advice of Fees and SDWG in planting and spraying his sunflowers.

The circuit court granted SDWG's motion for summary judgment. The court ruled that Schott had assumed the risk because he sprayed the crop himself; and, as a licensed applicator, he was required to follow the Beyond label.

Schott now appeals the circuit court's decision, raising the following issues:

1. Whether Schott had actual knowledge of the risk in damaging his sunflower crop.
2. Whether Schott had constructive knowledge of the risk in damaging his sunflower crop.
3. Whether Schott, as a licensed spray applicator, should be imputed with knowledge of the risk.

Ms. Melissa E. Neville and Mr. Justin M. Scott,
Attorneys for Plaintiffs and Appellants, Dallas
Schott and Corson County Feeders, Inc.

Mr. Michael L. Luce, Attorney for Defendant and
Appellee, South Dakota Wheat Growers
Association

Guardianship of Nelson

Dean Nelson operated a successful farming operation near Onida, South Dakota. He has four daughters from his first marriage: Georgia Hanson, Deborah Bouchie, Carol Nelson, and Angela Nix. Dean is married to Elizabeth Nelson.

On September 30, 2008, Dean and Elizabeth entered into a post-nuptial agreement, wherein they agreed to the disposition of Dean's property after his death. The agreement provided that Dean would not allow an agent to amend his will. Later in 2008, Dean made a will providing that, if Elizabeth were to survive Dean, one half of Dean's residuary estate would be held in trust for Elizabeth. Under the trust, Elizabeth was entitled to receive all net income, and as much of the principle as the trustees deemed necessary. If Elizabeth died, the remainder of the trust would pass in accordance with the other half of the residuary, which was to be distributed in equal shares to three of Dean's four daughters.

Dean had two subsequent estate plans drafted in September 2012 and February 2013. After drafting the 2013 plan, Dean was diagnosed with Alzheimer's. On April 18, 2013, a temporary conservator was appointed to oversee Dean's estate. The circuit court made the Conservator's appointment permanent in September of 2013.

The Conservator petitioned the circuit court to change Dean's February 2013 estate plan, proposing,

among other things, to replace the 2013 trust agreement with a newly drafted will. The new will would omit Elizabeth from the residuary estate and allowed for the entire residue to be distributed equally among Dean's four daughters.

On December 13, 2013, at a circuit court hearing, the Conservator, Dean's daughters, and Elizabeth instead stipulated to a compromise will. That will allowed Elizabeth to retain her one-half interest in the residue within a trust funded with contributions made before the payment of estate tax. The Conservator signed the compromise will on December 30, 2013.

On September 28, 2016, the Conservator again proposed a new will, changing the residuary clause to eliminate Elizabeth's trust (and thus her one-half interest in the residuary), and divide the entire residue equally among Dean's four daughters. The circuit court approved this will.

Elizabeth appeals, raising one issue: whether the circuit court erred in permitting the Conservator to adopt a new will eliminating Elizabeth's interest in the residuary estate.

Mr. James A. Power and Mr. Matthew P. Bock,
Attorneys for Appellant Elizabeth Nelson

Mr. Ronald A. Parsons, Jr., Attorney for Appellee Chet
Groseclose

Mr. Robert B. Anderson, Attorney for Appellee Dean A.
Nelson

Hon. Mark A. Moreno, Attorney for Appellee Georgia K.
Hanson as co-guardian of Dean A. Nelson

Ms. Margo D. Northrup, Attorney for Appellee Angela
L. Nix as co-guardian of Dean A. Nelson

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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