

WEDNESDAY, MARCH 26, 2008
10:00 A.M.

NO. 2

#24244, #24254

PATRICIA KOSTEL,
Plaintiff and Appellee,

vs.

STEVEN B. SCHWARTZ, M.D., individually,
STEVEN B. SCHWARTZ, M.D., P.C., d/b/a
WEST RIVER NEUROSURGERY & SPINE,
a professional corporation,
Defendants and Appellants.

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Mr. Timothy Thomas
Mr. Gregory J. Bernard
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(FOR APPELLANTS)

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(FOR APPELLEE)

The Honorable A. Peter Fuller
Seventh Judicial Circuit
Pennington County

(CIV 02-1160)

NOTICE OF REVIEW FILED SEPTEMBER 12, 2006

20-20-10

APPELLANT'S BRIEF

STATEMENT OF THE ISSUES

- I. WHETHER DR. SCHWARTZ WAS ENTITLED TO TESTIFY TO TRAINING, EXPERIENCE AND KNOWLEDGE WITHOUT THREAT OF DISCLOSING TO THE JURY MULTIPLE MALPRACTICE ALLEGATIONS AND HOSPITAL AND BOARD INVESTIGATIONS?

The trial court ruled in the negative.

1. *Boomsma v. Dakota Minnesota & Eastern R.R. Corp.*, 2002 SD 106, 651 NW2d 238
2. *Heshelman v. Lombardi*, 454 NW2d 603 (MichApp 1990)
3. *Turgut v. Levine*, 556 A2d 720 (MdCtSpec App 1989)

- II. WHETHER DR. SCHWARTZ WAS PREJUDICED BY THE INTRODUCTION OF "OTHER BAD ACTS" AND AN UNREQUESTED "LIMITING INSTRUCTION" UNSUPPORTED BY THE EVIDENCE?

The trial court ruled in the negative.

1. *State v. Mattson*, 2005 SD 71, 698 NW2d 538
2. *Martinmaas v. Engelmann*, 2002 SD 85, 612 NW2d 600
3. *Sander v. Geib, Elston, Frost Prof'l Ass'n*, 506 NW2d 107 (SD 1993)
4. SDCL 19-9-12

- III. WHETHER AN "ANONYMOUS LETTER" SENT BY A COMPETITOR WHO BECAME AN EXPERT FOR MS. KOSTEL SHOULD HAVE BEEN ADMITTED?

The trial court ruled in the negative.

1. *Raverty v. Goetz*, 143 NW2d 853 (SD 1966)

IV. WHETHER DR. SCHWARTZ WAS PREJUDICED BY
INADEQUATE, IMPROPER JURY INSTRUCTIONS?

The trial court ruled in the negative.

1. *Magbuhat v. Kovarik*, 382 NW2d 43 (SD 1986)
2. *Shamburger v. Behrens*, 380 NW2d 659 (SD 1986)
3. *Mulder v. Tague*, 85 SD 844, 186 NW2d 884 (1971)
4. *Cornforth v. Borman's, Inc.*, 385 NW2d 645 (MichApp 1986)

V. WHETHER DR. SCHWARTZ WAS PREJUDICED BY THE
COURT'S *SUA SPONTE* PRECLUSION OF MS. KOSTEL'S
MENTAL HEALTH ISSUES RELEVANT TO BOTH
LIABILITY AND DAMAGES?

The trial court ruled in the negative.

1. *Lien v. McGladrey Pullen*, 509 NW2d 421 (SD 1993)
2. *Chnpkova v. Koh*, 985 F2d 79 (2dCir 1993)

VI. WHETHER DR. SCHWARTZ WAS PREJUDICED BY THE
TRIAL COURT'S EXCLUSION OF EVIDENCE OF WRITTEN-
OFF PORTIONS OF PLAINTIFF'S MEDICAL EXPENSES

The trial court ruled in the negative.

1. *Moorehead v. Crozer Chester Med. Ctr.*, 765 A2d 786 (Pa2001)
2. *Degen v. Bayman*, 241 NW2d 703 (SD 1976)
3. Restatement (Second) of Torts, § 911
4. SDCL 21-3-12

APPELLEE'S BRIEF

STATEMENT OF THE ISSUES

- I. WHETHER DR. SCHWARTZ WAS PROPERLY ALLOWED TO TESTIFY AS TO HIS TREATMENT OF MS. KOSTEL WITHOUT BEING SUBJECT TO CROSS-EXAMINATION REGARDING HIS HISTORY OF ADMITTED MALPRACTICE AND REQUIRED RETRAINING?

The trial court ruled in the affirmative.

1. *Martinmaas v. Engelmann*, 2002 SD 85, 612 NW2d 600
2. *Boomsma v. Dakota Minnesota & Eastern RR Corp*, 2002 SD 106, 651 NW2d 238
3. *Navarro de Cosme v. Hosp. Pavia*, 922 F2d 926 (1st Cir 1991)
4. *Block v. McVay*, 126 NW2d 808 (SD 1964)

- II. WHETHER THE TRIAL COURT PROPERLY ADMITTED SOME "OTHER ACTS" EVIDENCE AND EXCLUDED OTHERS AND INCLUDED AN INSTRUCTION PROPERLY INSTRUCTING THE JURY HOW TO USE SUCH EVIDENCE?

The trial court ruled in the affirmative.

1. *State v. Wright*, 1999 SD 50, 593 NW2d 792
2. *State v. Chapin*, 460 NW2d 420 (SD 1990)
3. *Sander v. Gieb, Elston, Frost Prof'l Ass'n.*, 506 NW2d 107
4. *United States v. Aranda*, 963 F2d 211 (8th Cir 1992)

- III. WHETHER AN IRRELEVANT DOCUMENT, ADMISSION OF WHICH WOULD HAVE REQUIRED ADMISSION OF VOLUMINOUS, SIMILARLY IRRELEVANT INFORMATION WAS PROPERLY EXCLUDED FROM TRIAL?

The trial court ruled in the affirmative.

1. SDCL § 19-12-2
2. *State v. Wiegers*, 373 NW2d 1 (SD 1985)

- IV. WHETHER WHEN THE INSTRUCTIONS ARE VIEWED AS A WHOLE, THE JURY WAS PROPERLY INSTRUCTED?

The trial court ruled in the affirmative.

- Shamburger v. Behrens*, 380 NW2d 659 (SD 1986)
Hansen v. Isaak, 19 NW2d 521 (1945)
Wells v. Howe Heating & Plumbing, Inc., 2004 SD 37, 677 NW2d 586

4. *Christenson v. Bergeson*, 2004 SD 113, 688 NW2d 421

V. WHETHER THE PSYCHOTHERAPIST-PATIENT RELATIONSHIP WAS PROPERLY PROTECTED BY THE EXCLUSION OF MENTAL HEALTH RECORDS WHICH WERE RELEVANT FOR NO PROPER PURPOSE?

The trial court ruled in the affirmative.

1. *Jaffee v. Redmond*, 518 US 1 (1996)
2. *State v. Weaver*, 2002 SD 76, 648 NW2d 355
3. *Kumho Tire Co., Ltd., v. Carmichael*, 526 US 137 (1999).
4. *Mora v. Saint Vincent's Catholic Medical Ctr. of New York*, 8 Misc3d 868 (NYSup 2005)

VI. WHETHER EVIDENCE OF BENEFITS CONFERRED UPON MS. KOSTEL BY A COLLATERAL SOURCE WERE PROPERLY EXCLUDED FROM TRIAL?

The trial court ruled in the affirmative.

1. *Moore v. Kluthe & Lane Ins. Agency Inc.*, 234 NW2d 260 (SD 1975)
2. *Lindholm v. Hassan*, 369 FSupp2d 1104 (DSD 2005)
3. Restatement (Second) of Torts § 920A

VII. WHETHER THE TRIAL COURT ERRED IN ITS APPLICATION OF THE PEER REVIEW STATUTES BY ALLOWING DR. SCHWARTZ TO USE THE PRIVILEGE AS BOTH A SWORD AND A SHIELD?

The trial court ruled in the negative.

1. *State v. Guthrie*, 2001 SD 61, 627 NW2d 401
2. *Trinity Med. Ctr. Inc. v. Holum*, 544 NW2d 148 (ND 1996)
3. SDCL § 36-4-43
4. *St. John's Reg'l Med. Ctr. V. Dally*, 90 SW3d 209 (CtAppMo 2002)

VIII. WHETHER STATEMENTS AND POSITIONS TAKEN BY DR. SCHWARTZ DURING PEER REVIEW WERE ADMISSIBLE AFTER THE COURT HELD DR. SCHWARTZ HAD WAIVED HIS PEER REVIEW PRIVILEGE?

The trial court ruled in the negative.

1. *Maynard v. Heeren*, 1997 SD 60, 563 NW2d 830
2. SDCL § 36-4-26.1

- IX. WHETHER BY HOLDING HIMSELF OUT TO MS. KOSTEL AS A COMPETENT NEUROSURGEON AND BY TAKING THE STAND AND TESTIFYING AS TO HIS TREATMENT OF MS. KOSTEL, DR. SCHWARTZ TOOK HIS CREDIBILITY AS A NEUROSURGEON WITH HIM, SUBJECTING HIMSELF TO EXAMINATION ON HIS SKILL, KNOWLEDGE AND JUDGMENT, INCLUDING HIS HISTORY OF WRONG-SITE SURGERY, MISREADING X-RAYS, AND THE STIPULATION PLACING HIS MEDICAL LICENSE ON PROBATION AND MANDATING RETRAINING IN THE AREAS OF NEUROSURGERY AND NEURORADIOLOGY?

The trial court ruled in the negative.

1. *Wells v. Howe Heating & Plumbing, Inc.*, 2004 SD 37, 677 NW2d 586
2. *Ward v. Epting*, 351 SE2d 867 (SC App 1986)
3. *State v. Edelman*, 1999 SD 52, 593 NW2d 419 (SD 1999)
4. *Navarro de Cosme v. Hosp. Pavia*, 922 F2d 926 (1st Cir 1991)

- X. WHETHER SUMMARY JUDGMENT WAS PROPER ON THE ISSUE OF DR. SCHWARTZ'S SKILL AND KNOWLEDGE AS HE HAD ADMITTED IN A PUBLIC DOCUMENT THAT HE NEEDED TO BE RETRAINED IN THE AREAS OF NEUROSURGERY AND NEURORADIOLOGY?

The trial court ruled in the negative.

1. *In re Schramm*, 414 NW2d 31 (SD 1987)
2. *Wildeboar v. South Dakota Junior Chamber of Commerce, Inc.*, 1997 SD 33, 561 NW2d 666

- XI. WHETHER MS. KOSTEL ESTABLISHED THAT A REASONABLE BASIS EXISTED TO BELIEVE DR. SCHWARTZ ACTED WITH MALICE WHEN DR. SCHWARTZ UNDERTOOK TO OPERATE ON MS. KOSTEL WITH THE KNOWLEDGE THAT DUE TO HIS INCOMPETENCE, INJURY WAS LIKELY TO OCCUR?

The trial court ruled in the negative.

1. SDCL § 21-1-4.1
2. *Berry v. Risdall*, 1998 SD 18, 576 NW2d 1
3. *Fjerstad v. Knutson*, 271 NW2d 8 (SD 1986)
4. *Holmes v. Wegman Oil Co.*, 492 NW2d 107 (SD 1992)

WHETHER BY TESTIFYING AT TRIAL INCONSISTENTLY WITH HIS
DEPOSITION TESTIMONY, DR. SCHWARTZ WAS SUBJECT TO
IMPEACHMENT WITH HIS DEPOSITION TESTIMONY?

The trial court ruled in the negative.

1. SDCL § 15-6-32

XIII. WHETHER MS. KOSTEL WAS ALLOWED TO CROSS-EXAMINE
DR. SCHWARTZ'S EXPERT ON HIS KNOWLEDGE OR LACK THEREOF
OF DR. SCHWARTZ?

The trial court ruled in the negative.

1. SDCL § 19-12-2

2. SDCL § 19-12-1