**IN THE SUPREME COURT**
**OF THE**
**STATE OF SOUTH DAKOTA**

---

Appeal No. 26682

---

MEGAN RUSCHENBERG, JESSICA CORNELIUS, and HEATHER RENSCH,
Plaintiffs and Appellants,

vs.

DAVID ELIASON, in his individual capacity and as an owner and employee of ANNABELLE'S ADULT SUPER CENTER OF SOUTH DAKOTA, LLC, and OLIVIA'S OF SOUTH DAKOTA, LLC, d/b/a OLIVIA'S ADULT SUPER STORE; and ANNABELLE'S ADULT SUPER CENTER OF SOUTH DAKOTA, LLC and OLIVIA'S OF SOUTH DAKOTA, LLC d/b/a OLIVIA'S ADULT SUPER STORE
Defendants and Appellees.

---

Appeal From The Circuit Court , Second Judicial Circuit
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE STUART L. TIEDE
CIRCUIT COURT JUDGE

---

# APPELLANTS' BRIEF

---


**ATTORNEYS FOR APPELLANTS:**
Aaron D. Eiesland
Johnson Eiesland Law Offices, P.C.
P.O. Box 6900
Rapid City, SD 57709-6900

Manuel J. de Castro, Jr.
de Castro Law Office
400 N. Main Ave. #205
Sioux Falls, SD 57104

**ATTORNEYS FOR APPELLEES: ANNABELLE'S AND OLIVIA'S**
Michael C. Luce
Murphy, Goldammer & Prendergast
P.O. Box 1535
Sioux Falls, SD 57101

**ATTORNEY PRO SE**
David Eliason
401 S. Phillips Ave, #3
Sioux Falls, SD 57104


---


Notice of Appeal Filed April 26, 2013

## TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF CASES ..... iii

APPENDIX ..... v

JURISDICTIONAL STATEMENT ..... 1

STATEMENT OF LEGAL ISSUES ..... 1

**ISSUES**

1. SHOULD THE TESTIMONY AND EVIDENCE PERTAINING TO MEGAN RUSCHENBERG'S ABORTION HAVE BEEN EXCLUDED? 1

2. SHOULD THE COURT HAVE GRANTED THE PLAINTIFFS A NEW TRIAL BASED UPON KEITH JOHNSON'S FALSE STATEMENT AT TRIAL AND VIOLATION OF HIS OWN MOTION IN LIMINE? ..... 1

3. WAS THE JURY IMPROPERLY INSTRUCTED AS TO THE LEGAL THEORIES AGAINST THE LLC'S? ..... 2

STATEMENT OF THE CASE ..... 2

ARGUMENT ..... 8

**Issue 1: SHOULD THE TESTIMONY AND EVIDENCE PERTAINING TO MEGAN RUSCHENBERG'S ABORTION HAVE BEEN EXCLUDED?** ..... 8

**Issue 2: SHOULD THE COURT HAVE GRANTED THE PLAINTIFFS A NEW TRIAL BASED UPON KEITH JOHNSON'S FALSE STATEMENT AT TRIAL AND VIOLATION OF HIS OWN MOTION IN LIMINE?** ..... 13

**Issue 3: WAS THE JURY IMPROPERLY INSTRUCTED? .....** 16

CONCLUSION ..... 20

CERTIFICATE OF COMPLIANCE .....22

CERTIFICATE OF PROOF OF FILING .....23

CERTIFICATE OF SERVICE .....23

**TABLE OF CASES**

Bensen v. Gobel,
1999 SD 38, 593 N.W.2d 402 (1999) .....17, 19, 20

Burns v. McGregor Electronic,
955 F.2d 559 (1992).....17, 19

Faragher v. City of Boca Raton
524 U.S. 775 (1998).....17, 18

Harter v. Plains Ins. Co., Inc.,
1998 SD 59, ¶32, 579 N.W.2d 625, 633 .....8, 16

Kaarup v. Schmitz, Kalda and Associates,
436 N.W.2d 845, 850 (S.D. 1989) .....1, 9

Kaiser v. University Physicians Clinic,
2006 SD 95, P29, 724 NW2d 186, 194 .....1, 7

Kjerstad v. Ravellette Publications, Inc.,
517 NW2d 419 (SD 1994) .....2, 7, 16

Kuper v. Lincoln-Union Elec. Co.,
1996 SD 145, 557 NW2d 748 .....2, 20

Loen v. Anderson,
2005 SD 9 (S.D. 2005).....2, 14

Nichols v. Am. Nat'l Ins. Co.,
154 F.3d 875, 884-885 (8th Cir. (Mo.) 1998).....1, 10

Nickerson v. G.D. Searle & Co.,
900 F.2d 412, 418 (1st Cir. 1990).....1, 11

Pickett v. The Colonel of Spearfish, et al.,
209 F.Supp.2d 999, (2001) .....17, 19

Picotte v. Pasion, et al.,
98-cv-04147, doc #101, U.S. Dist. Ct., Western District of South Dakota 2001 ..17, 18, 19

Roe v. Wade,
410 U.S. 113, 116 (U.S. 1973).....9

Schoon v. Looby,
2003 SD 123 (S.D. 2003).....2, 8

State v. Guthrie,
2001 SD 61, P30, 627 NW2d 401, 415 .....6

State v. Janklow,
2005 SD 25, P42, 693 NW2d 685, 699 .....2, 7, 8

State v. Packed,
2007 SD 75, P24, 736 NW2d 851, 859 .....6

Veith v. O'Brien,
2007 SD 88, P25 (S.D. 2007) .....7

**Other Authorities**:

SDCL § 15-6-59.....13

SDCL § 19-12-3.....9, 10, 11, 12

SDCL § 19-12-12.....7, 15, 16

## JURISDICTIONAL STATEMENT

The Ruschenberg Summons and Complaint, the Cornelius Summons and Complaint, and the Rensch Summons and Complaint in this matter were duly and personally served upon Defendants on the eleventh day of June, 2009. Clerk's Index, #1, Appendix 006, (Summonses) and Clerk's Index, #13, Appendix 001, (Complaints). A jury trial was held on March 12, 2013 to March 15, 2013. On March 15, 2013, the jury entered a verdict for Defendants. Clerk's Index #437, Appendix 006. Notice of Entry of the Judgment was entered on March 29, 2013. Clerk's Index, #443, Appendix 004.

Plaintiffs' Notice of Appeal in accordance with SDCL 15-26A-3(1), Appendix 007, was timely filed with the Minnehaha County Clerk of Courts on April 26, 2013. Clerk's Index, #483, Appendix 003.

## STATEMENT OF LEGAL ISSUES

4. SHOULD THE TESTIMONY AND EVIDENCE PERTAINING TO MEGAN RUSCHENBERG'S ABORTION HAVE BEEN EXCLUDED?

Plaintiffs assert that the trial court improperly concluded "No."

Kaarup v. Schmitz, Kalda and Associates, 436 N.W.2d 845

Nichols v. Am. Nat'l Ins. Co., 154 F.3d 875 (8th Cir. (Mo.) 1998)

Nickerson v. G.D. Searle & Co., 900 F.2d 412 (1st Cir. (Mass.) 1990)

5. SHOULD THE COURT HAVE GRANTED THE PLAINTIFFS A NEW TRIAL BASED UPON KEITH JOHNSON'S FALSE STATEMENT AT TRIAL AND VIOLATION OF HIS OWN MOTION IN LIMINE?

Plaintiffs assert that the trial court improperly concluded "No."

Kaiser v. University Physicians Clinic, 2006 SD 95 724 NW2d 186

Kjerstad v. Ravellette Publications, Inc., 517 NW2d 419 (SD 1994)

Schoon v. Looby, 2003 SD 123 (S.D. 2003)

Loen v. Anderson, 2005 SD 9 (S.D. 2005)

6. WAS THE JURY IMPROPERLY INSTRUCTED AS TO THE LEGAL THEORIES AGAINST THE LLC'S?

Appellant asserts that the trial court improperly concluded "No."

State v. Janklow, 2005 SD 25 (S.D. 2005)

Kuper v. Lincoln-Union Elec. Co., 1996 SD 145, 557 NW2d 748

## STATEMENT OF THE CASE

### Pleading History

This action was brought in three separate actions the Second Judicial Circuit, Minnehaha County, State of South Dakota before Judge Stuart Tiede by Plaintiffs Megan Ruschenberg, Jessica Cornelius and Heather Rensch, ("Plaintiffs") each individually against Defendant David Eliason, ("Eliason") for Rape, Stalking, Assault, Battery, False Imprisonment, Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, and Defendants Annabelle's Adult Super Center of South Dakota, LLC, ("Annabelle's") and Olivia's of South Dakota, LLC, d/b/a Olivia's Adult Super Store, ("Olivia's") with additional allegations of Negligent Training and Supervision and Negligent Infliction of Emotional Distress. In the relevant portion of their Complaints, Plaintiffs alleged that Eliason, during the course of all three Plaintiffs' employment at Annabelle's and Olivia's, had systematically used his position as an owner of both stores, and as an managing supervisor of both stores, to threaten, intimidate, harass, batter,

assault, and in the case of Cornelius and Ruschenberg forcibly rape the Plaintiffs. Pursuant to stipulation, on August 5, 2010, Circuit Court Judge Patricia Riepel ordered that all three cases be consolidated. Clerk's Index #35, Appendix 006

## Facts

In 2005, Defendant David Eliason, and Keith Johnson formed Annabelle's Adult Super Center of South Dakota, LLC and opened an adult store under the name of Annabelles Adult Super Store in Tea, South Dakota. In 2007, Eliason, his wife Renee, and Keith Johnson formed Olivia's of South Dakota, LLC and opened an adult store under the name Olivia's Adult Superstore in Sioux Falls, South Dakota. For both stores, Eliason acted as part owner and full time manager. T.T. pg. 160, ln. 14-24, Appendix 011, and pg. 164, ln. 10-16. Appendix 012. The Defendant limited liability companies will be referred to in this brief as the "LLC's."

In April 2007, Plaintiff Megan Ruschenberg was hired to work at Annabelle's. T.T. pg. 362, ln. 9 through pg. 366, ln. 7, Appendix 013 - 017. At that time she was 20 years old. Her duties were to serve as a cashier and maintain the sales area. In the Summer of 2007, the process began to set up the physical location for Olivia's Adult Superstore. Megan was tasked with setting up the sales floor. T.T. pg. 367, ln. 16 through pg. 370, ln. 9, Appendix 018 - 021. In June 2007, Megan was forced by Eliason into a back room of Olivia's and raped. T.T. pg. 381, ln. 12, through pg. 387, ln. 22, Appendix 022 - 028. She was threatened with physical violence if she reported the rape. T.T. pg. 386, ln. 3, through pg. 387, ln. 19, Appendix 027 - 028, and pg. 388, ln. 19-22, Appendix 029. Eliason told her that he has a man named LeRoy that takes care of his

"problems". T.T., pg. 379, ln. 17, through pg. 380, ln. 4, Appendix 030 - 031. In July 2007, Megan was again forced into the back room of Olivia's and raped. Again she was threatened with physical violence if she reported the rape. T.T. pg. 389, ln. 3, through pg. 392, ln. 22, Appendix 032 - 035.

Megan became pregnant as a result of the rape. Eliason wanted her to have the child and have it adopted by himself and his wife. T.T. pg. 393, ln 2, through pg. 394, ln. 20, Appendix 036 - 037. Megan did not want to go through the pregnancy. Eliason wrote an LLC check to Megan for $450 to pay for the abortion procedure. T.T. pg. 394, ln. 21, through pg. 395, ln. 11, Appendix 037 - 038. Unable to bear the thought of carrying the fetus to term, Megan had an abortion. T.T. pg. 393, ln. 4-12, Appendix 039.

In July of 2007, Jessica Cornelius, age 22, was hired to work as a cashier at Annabelle's. T.T. pg. 227, ln. 18, through pg. 230, ln. 21, Appendix 040 - 043. During her employment at Annabelle's, Jessica was repeatedly sexually harassed by Eliason in the form unwanted physical touching, unwanted sexual propositioning, and rape. She was held in the windowless office of Annabelle's and forcibly raped by Eliason. T.T. pg. 236, ln. 1, through pg. 247, ln. 13, Appendix 044 - 055. She too was threatened with physical violence by Eliason from his "hitman". T.T. pg. 247, ln. 17, through pg. 248, ln. 18, Appendix 055 - 056.

In September of 2007, Heather Rensch, age 20, was hired to work as a cashier at Annabelle's. T.T. pg. 449, ln. 2-16, and pg. 450, ln. 16 through pg. 453, ln. 5, Appendix 057 - 061. During the next three months, Heather was repeatedly sexually harassed in the form of unwanted touching and propositions of sex. T.T. pg. 456, ln. 18 through pg. 462,

ln. 20, Appendix 062 - 068. During Heather's work one day, Eliason used a sexual device called a Violet Wand on her which emits an electrical shock, and burned her arm with the device. T.T. pg. 463, ln. 2-25, Appendix 069. Eliason did not deny shocking Heather with the violet Wand. T.T. pg. 495, ln. 20, through pg. 496, ln. 15, Appendix 070 - 071.

Later in 2007, after Heather returned from North Carolina, Jessica told Heather that she had been raped by Eliason. Jessica and Heather then contacted Megan about Eliason. She stated she had also been raped. Despite the death threats of Eliason, the three women quit figuring he could not get all of them before he was caught. T.T. pg. 250, ln. 22, through pg. 251, ln. 11, Appendix 072 - 073. The women reported the information to police and had a police escort to attempt to collect their final paychecks. T.T. pg 252, ln. 18 through pg. 254, ln. 16, Appendix 074 - 076. Eliason chose young women to work in his stores that had very limited resources and could be easily intimidated. He is a large man who stands approximately 6'4" tall.

Protection orders were sought by Jessica and Megan. After a lengthy hearing, Judge Kathleen Caldwell granted the protection orders in May 2008. T.T. pg. 252, ln. 22, through pg. 255, ln. 13, Appendix 074 - 077. Civil suits were initiated by each woman. Clerk's Index #13, Appendix 001. The cases were consolidated by agreement of the parties and brought jointly to trial. Clerk's Index #58, Appendix 004.

Prior to trial, now before Judge Stuart Tiede, Plaintiffs sought to exclude the fact that Megan had an abortion. T.T. pg. 15, ln. 3 through pg. 17, ln. 1, Appendix 078 - 080. This motion was improperly denied. T.T. pg. 17, ln. 2-23, Appendix 080. Prior and

during trial, Plaintiffs requested the jury be instructed under the 'proxy' or 'alter ego' rule that the intentional torts of the owner and highest supervising manager, Eliason, are attributable to the LLC's. T.T. pg. 3, ln. 13 through pg. 14, ln. 19, Appendix 081 - 092. The Court refused these instructions. T.T. pg. 14, ln. 20-21, Appendix 092. During trial, LLC's part owner, Keith Johnson, made a false statement that Eliason had been tried and acquitted of rape. T.T. pg. 203, ln. 1-2, Appendix 093 This statement was further in violation of his own motion in limine. The trial court then issued a corrective instruction that introduced further error into the proceedings. T.T. pg. 214, ln. 4-21, Appendix 094.

As a direct result of several errors by the trial court and misconduct by the LLC owner, a defense verdict was rendered. Clerk's Index #439, Appendix 003. Plaintiff's filed this timely appeal. Clerk's Index #483, Appendix 003. Plaintiffs now appeal upon the following issues and seek the following relief:

**1. The Trial Court's Denial of Plaintiff's Motion in Limine to Exclude Megan's Abortion.**

A trial court's determination to admit or exclude evidence is reviewed under an abuse of discretion standard. "We afford broad discretion to [circuit courts] in deciding whether to admit or exclude evidence." State v. Packed, 2007 SD 75, ¶24, 736 NW2d 851, 859 (citations omitted). "When a [circuit] court misapplies a rule of evidence, as opposed to merely allowing or refusing questionable evidence, it abuses its discretion." State v. Guthrie, 2001 SD 61, ¶30, 627 NW2d 401, 415 (internal citation omitted).

The introduction of the abortion issue poisoned the jury pool as to listening to evidence presented by Plaintiffs and caused irreparable damage to all Plaintiffs. Plaintiffs request a remand for retrial with the evidence of the abortion excluded from the proceedings.

**2. The Trial Court Improperly Denied Plaintiffs' Motion for Mistrial**

The denial of a motion for mistrial is reviewed under an abuse of discretion standard. "The trial court's evidentiary rulings are presumed correct and will not be overturned absent a clear abuse of discretion. 'An abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against reason and evidence.' " Kaiser v. University Physicians Clinic, 2006 SD 95, ¶29, 724 NW2d 186, 194 (internal citations and quotations omitted). "The denial of a motion for mistrial is reviewed under an abuse of discretion standard." State v. Janklow, 2005 SD 25, ¶42, 693 NW2d 685, 699 (citing State v. Ball, 2004 SD 9, ¶16, 675 NW2d 192, 197 (citations omitted)), Veith v. O'Brien, 2007 SD 88, ¶25 (S.D. 2007). "In order for a violation of a motion in limine to serve as the basis for a new trial, the order must be specific in its prohibitions, and violations must be clear." Kjerstad v. Ravellette Publications, Inc., 517 N.W.2d 419, 426 (SD 1994).

The LLC's requested a motion in limine as to criminal charges and history which was granted as to all parties. The LLC's owner, Johnson violated this order by making a false statement of acquittal of his former business partner Eliason. The order and violation were clear and caused irreparable harm as the only repair was a further violation of SDCL § 19-12-12.

> Error is prejudicial if it most likely has had some effect on the verdict and harmed the substantial rights of the moving party. As we have stated: '[A] new trial may follow only where the violation has prejudiced the party or denied him a fair trial. Prejudicial error is error which in all probability produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it.'

Schoon v. Looby, 2003 SD 123, ¶18 (S.D. 2003), quoting Harter v. Plains Ins. Co., Inc., 1998 SD 59, ¶32, 579 N.W.2d 625, 633. Plaintiffs request reversal of the trial court and remand for a new trial.

**3. The Trial Court Improperly Instructed the Jury**

The Supreme Court of South Dakota's standard of review for refusal to give a jury instruction is reviewed under an abuse of discretion standard.

> We review a trial court's refusal of a proposed instruction under an abuse of discretion standard. The trial court has broad discretion in instructing the jury. Jury instructions are satisfactory when, considered as a whole, they properly state the applicable law and inform the jury. Error in declining to apply a proposed instruction is reversible only if it is prejudicial, and the defendant has the burden of proving any prejudice.

State v. Janklow, 2005 SD 25, ¶25 (S.D. 2005). Plaintiffs request that the trial court's decision refusing to instruct on the 'proxy' rule be reversed and a new trial be ordered with proper instruction as to the law.

## ARGUMENT

**Issue 1: SHOULD THE TESTIMONY AND EVIDENCE PERTAINING TO MEGAN RUSCHENBERG'S ABORTION HAVE BEEN EXCLUDED?**

> We forthwith acknowledge our awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspires. One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes

> toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.
>
> Roe v. Wade, 410 U.S. 113, 116 (U.S. 1973).

A fair trial cannot be had when evidence is admitted to illegitimately persuade the jury. "As used in SDCL 19-12-3, the term 'prejudice' does not mean damage to the opponent's case that results from the legitimate probative force of the evidence; rather it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." Kaarup v. Schmitz, Kalda and Associates, 436 N.W.2d 845, 850 (S.D. 1989) (citing State v. Dokken, 385 N.W.2d 493 (S.D. 1986)). This is precisely what occurred when the abortion issue was interjected into the trial.

The action was heard before a jury on March 12, 2013 through March 15, 2013. Prior to trial, the Plaintiffs filed a motion in limine to exclude evidence of the abortion as highly prejudicial. T.T. pg. 15, ln. 12 through pg. 17, ln. 1, Appendix 078 - 080. Defendants argued primarily about the timeliness of the motion and the fact that the abortion was disclosed in pleadings. T.T. pg. 15, ln. 12, through pg. 16, line 11, Appendix 078 - 079. The trial court found that the abortion was relevant to "whether or not the tort was committed, whether it has caused any damages, and the nature and extent of those damages." T.T. pg. 17, ln. 10-12, Appendix 080. Further, the trial court stated "there may be issues of credibility." T.T. pg. 17, ln. 13-14, Appendix 080. The trial court then denied the motion without discussion of the danger of the likelihood of the prejudicial effect of the evidence, rather it stated "I think the sensitive nature of it can be handled through voir dire, if necessary,...." T.T. pg. 17, ln. 19-20, Appendix 080.

This precise issue of the admission of evidence of an abortion has found to be inadmissible and a trial court's admission of the evidence required a new trial. In a sexual harassment case Nichols v. Am. Nat'l Ins. Co., 154 F.3d 875 (8th Cir. (Mo.) 1998), the trial court was faced with whether to admit evidence of a plaintiff having an abortion. In Nichols, the plaintiff had disclosed the abortion in an answer to interrogatories. Nichols, 154 F.3d at 885. The plaintiff filed a motion in limine which was denied. Id. at 884. The testimony was admitted and a verdict was rendered in favor of the defendant. Id. at 878. The Eighth Circuit Court of Appeals found the admission of the abortion evidence to be error, reversed the trial court and remanded the case for a new trial. Id. at 890.

The Nichols case is strikingly similar to the case before this court. In Nichols, the defense argument that the abortion was disclosed in a pleading was rejected as the plaintiff is required to truthfully answer discovery questions. Id. at 885. In the present case, the information was placed in the Complaint, however, the mere fact a statement is made in a complaint does not trump the Rules of Evidence, in this instance SDCL § 19-12-3 (Rule 403). The information would have been disclosed at the depositions of Megan, David Eliason and Nichole West (Stoll).

The Eighth Circuit applied the Rule 403 balancing test and found very little probative value to the evidence. Id. Further, it found that the evidence was highly prejudicial; a finding even in excess of the Rule 403 standard of "*danger* of prejudicial effect." Id. (emphasis added).

In making its finding on the obvious prejudicial effect of the abortion evidence, the Eighth Circuit further cited with approval the case of Nickerson v. G.D. Searle & Co., 900 F.2d 412 (1st Cir. (Mass.) 1990). In Nickerson the plaintiff sought to elicit testimony from a defense medical expert that he had worked in an abortion clinic, had written articles on abortion and that he was qualified in abortion procedures rather than intra-uterine devices (IUD). Nickerson, 900 F.2d at 419. The trial court held that the issue of Dr. Grimes' work in with abortion was inadmissible and that it would "poison the jury." Id. The Eighth Circuit, in reviewing the trial court's decision stated:

> In making its ruling the court obviously had in mind the fierce emotional reaction that is engendered in many people when the subject of abortion surfaces in any manner.

Id. The Eighth Circuit then upheld the trial court's exclusion of the evidence. Id. at 419.

In the present action, the trial court recognized that the abortion evidence was "sensitive" but failed to address the danger of undue prejudicial effect. SDCL § 19-12-3. Here the Plaintiff was waiving all right to recover for the cost of the abortion and voluntarily waiving the right to emotional damages strictly from the abortion. No Defense witnesses argued that the abortion was a cause of Ruschenberg's emotional damages. Therefore, there was nearly no probative value.

During pre-trial proceedings, Defendants never questioned that there was an abortion. They just wanted to have the fact of the abortion entered into evidence in front of the jury. During closing arguments, Defendants questioned why Megan never offered any proof of the abortion to be entered into evidence. T.T. pg. 614, ln. 3-5, Appendix 095. These intellectually inconsistent positions highlight the true purpose for the

Defendants desire to include abortion evidence; to illegitimately persuade the jury the Plaintiff had an abortion and was a bad person. This tactic should have been prevented by the exclusion of the abortion evidence altogether under SDCL § 19-12-3.

As a result of this Court's ruling, Plaintiffs were forced to address a significant portion of the time-limited *voir dire* to the abortion issue. As was brought out during *voir dire*, this moral issue completely dominates any legal positions concerning abortion. One of the potential jurors stated they would "try to be as impartial as I could." T.T. pg. 56, ln. 16-22, Appendix 096. The juror himself stated he understood how the Plaintiff would feel nervous after his comment. T.T. pg. 57, ln. 14-19, Appendix 097. Unsurprisingly, each juror agreed they would follow the law and be fair.

Without question, every juror has 'prejudged' the issue of abortion. Every person has thought about the issue and taken a side. It has been a topic of political elections and statewide votes. The controversy over the legality of having an abortion has been a constant issue in the courts arising from the actions of the South Dakota state legislature to limit abortions. For years, ongoing protests continue to occur outside Planned Parenthood locations here in South Dakota. Absent bad weather, the protests go on every day. There are television episodes, talk radio and feature length movies addressing the issue. The decision to admit this evidence not only tainted the opinions of the jurors against Megan, but also likely tainted the jury's opinion of Jessica and Heather. The topic likely also tainted some juror's opinions of the Plaintiffs' attorneys for even representing a person who had an abortion. It is unlikely that any other issue can evoke such a strong response in a person as the abortion issue can.

What was the probative value of testimony on Megan's abortion? There was nothing presented to the jury that could possibly outweigh the prejudice of bringing abortion into a trial about a man's sexual abuse of his employees. Especially since the Defendants did not offer any evidence regarding damages or credibility as it concerned the abortion.

An alienation of affection suit against Eliason was excluded from trial because it would be too prejudicial to Eliason. Yet, Megan's abortion was allowed to be put into evidence without applying the balancing test, assuming it more probative than prejudicial.

Because there is no practical way to cure this defect; no practical way in less than 90 minutes of *voir dire* to get jurors to set aside their long-standing personal beliefs on abortion and determine the issues of the case on its merits rather than the highly emotional and religious issue of abortion, Plaintiffs were denied a fair trial. Granting of a new trial is warranted under SDCL § 15-6-59.

**Issue 2: SHOULD THE COURT HAVE GRANTED THE PLAINTIFFS A NEW TRIAL BASED UPON KEITH JOHNSON'S FALSE STATEMENT AT TRIAL AND VIOLATION OF HIS OWN MOTION IN LIMINE?**

Prior to trial, the LLC's brought a motion in limine to exclude any reference to criminal charges against Keith Johnson. T.T. pg, 21, ln. 1-14, Appendix 098. The Plaintiffs did not oppose the motion. T.T. pg, 22, ln. 10-17, Appendix 099. During the presentation and discussion of the motion, it was expanded to cover the Plaintiffs' criminal history, if any, and Eliason's criminal history. T.T. pg. 21, ln. 9-14, Appendix 098. The trial court granted the motion without exception to anyone. T.T. pg, 22, ln. 18-

21, Appendix 099. Further, the trial court applied the Rule 403 test and found the civil alienation of affections action against Eliason to be highly prejudicial and excluded from the trial. T.T. pg, 22, ln. 22-25, through pg. 23, ln. 1, Appendix 099 -100.

> Motions in limine are heard in advance of trial and seek a court order requiring the parties not to discuss or disclose certain facts that the court deems to be prejudicial. Motions in limine have long been favored by this Court. The purpose of these motions is to prevent prejudicial information from reaching the ears of the jury. See Luce v. United States, 469 U.S. 38, 41, 83 L. Ed. 2d 443, 105 S. Ct. 460 (1984). This is based on the recognition that when prejudicial matters are brought before the jury no amount of objection or instruction can entirely remove the harmful effect. Kjerstad v. Ravellette Publications, 517 N.W.2d 419, 426 (SD 1994). "Once the question is asked, the harm is done." Id.

Loen v. Anderson, 2005 SD 9, ¶8 (S.D. 2005)

During Plaintiffs' *voir dire*, a potential juror asked whether there were any criminal charges against Defendant Eliason. T.T. pg. 90, ln. 9-10, Appendix 101. The juror was told the he must determine this case on the issues presented from the stand and under the law as given by the Court. T.T. pg. 90, ln. 11-21, Appendix 101. Prior to his *voir dire*, Eliason asked the trial court in a bench conference if he could mention he was not charged with a crime. While there is no transcript of the bench conference, the contents are recorded in later discussion with the court. T.T. pg. 219, ln. 18 through pg. 220, ln. 7, Appendix 102 - 103. He was told he could not. Later that first day of trial, Eliason's partner Keith Johnson made the statement that he found out about the allegations against Defendant Eliason when he heard that Defendant Eliason was tried for rape and found not guilty. T.T. pg. 203, ln. 1-2, Appendix 104. In addition to being a false statement, the testimony is a direct violation of the LLC's own motion in limine.

Even if the statement had been true, the testimony would have been in violation of SDCL § 19-12-12.

After Plaintiffs' objection to the testimony, the jury was excused for in excess of 15 minutes while Plaintiffs made their motion for new trial. T.T. pg. 203, ln. 7 through pg. 213, ln. 12, Appendix 104 - 114. During this time, the jury was left to consider Mr. Johnson's statement as true. The Court denied Plaintiffs' motion, T.T. pg. 223, ln. 1-2, Appendix 115, and then ordered the testimony stricken and the jurors were advised that criminal charges had not been brought and a not guilty verdict had not been rendered. T.T. pg. 214, ln. 4-21, Appendix 094. This instruction was insufficient to un-ring the bell and in fact interjected further error. The non-existence of criminal charges is just as unduly prejudicial as the existence of criminal charges.

Clearly the jurors had already considered whether criminal action had taken place to be of importance in their decision. The existence or non-existence of a plea of not guilty or no contest is not admissible in a civil case. SDCL § 19-12-12. The prejudicial effect of charges, the lack of charges, pleas of no contest and not guilty or a finding of not guilty under the higher criminal standard of proof lay the foundation for SDCL § 19-12-12. Only a finding of guilt by a criminal jury using the beyond a reasonable doubt standard can in limited circumstances be relevant in a civil action. Logic and the law dictate then if a false statement of non-existent charges and a finding of not guilty to the non-existent charges is inadmissible. Rather than remedying the error, the corrective instruction added additional error in that it highlighted the lack of charges which itself was inadmissible testimony.

The order of the trial court excluding mentions to criminal records was clear. An attorney is responsible to ensure his witnesses know the evidentiary rulings of the trial court. Mr. Johnson's false statement about a criminal record unequivocally violated the trial court's ruling on Mr. Johnson's own companies' motion in limine. No mistake is tolerable as the topic is too prejudicial to be instructed around. The order was specific, and Johnson's violation was clear, thus reversal and a new trial is warranted. Kjerstad v. Ravellette Publications, Inc., 517 N.W.2d 419, 426 (SD 1994).

"[A] new trial may follow only where the violation has prejudiced the party or denied him a fair trial." Harter v. Plains Ins. Co., Inc., 1998 SD 59, ¶32, 579 N.W.2d 625, 633. It is be apparent to any observer that Plaintiffs suffered extreme prejudice by not only the false testimony and the violation of the motion in limine, but also the corrective instruction which itself was a violation of SDCL § 19-12-12. "Prejudicial error is error which in all probability produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it." Id. The jury found for the Defendants despite undisputed facts such as that Eliason readily admitted to burning Heather's arm with the Violet Wand. If this jury was capable of finding against Heather on an admitted assault, it clearly was suffering under the prejudices caused by errors highlighted previously. Plaintiffs request that this Court reverse the denial of Plaintiffs' motion for new trial and remand for new trial.

**Issue 3: WAS THE JURY IMPROPERLY INSTRUCTED**?

During discovery a ruling was issued which held that the intentional torts alleged against Eliason would not be imputed upon the LLCs. Clerk's Index #262, 264, and 266,

Appendix 004. Prior to trial, Plaintiffs challenged this decision as being an inaccurate statement of the law. T.T. pg. 7, ln. 23 through pg. 8, ln. 24, Appendix 085 - 086. From opening statement through closing argument, the LLCs argued and elicited testimony that the corporations are not responsible for the intentional conduct of their owner on the business premises against its employees. This position is directly contrary to the United States Supreme Court's decision in Faragher v. City of Boca Raton 524 U.S. 775 (1998), the South Dakota Supreme Court's decision in Bensen v. Gobel, 1999 SD 38, 593 N.W.2d 402 (1999), the Eighth Circuit Court of Appeals in Burns v. McGregor Electronic, 955 F.2d 559 (1992) and finally the Federal District Court for the State of South Dakota in Picotte v. Pasion, et al., 98-cv-04147, doc #101, U.S. Dist. Ct., Western District of South Dakota 2001, Appendix 116, and Pickett v. The Colonel of Spearfish, et al., 209 F.Supp.2d 999, (2001).

In the United States Supreme Court decision of Faragher, the Supreme Court held that an owner and president of a corporation of the like is the "proxy" of the corporation and his conduct is impugned upon the corporation. Faragher, 524 U.S. 775, 788-792. While Faragher is a Title VII case, the Supreme Court recognized the 'proxy' responsibility by analyzing the common law agency principles. In it's discussion, the Supreme Court found the 'proxy rule' to be universal although different courts had reached the same conclusion through differing means. Id. at 789.

> A variety of reasons have been invoked for this apparently unanimous rule. Some courts explain, in a variation of the "proxy" theory discussed above, that when a supervisor makes such decisions, he "merges" with the employer, and his act becomes that of the employer. See, e.g., Kotcher v. Rosa and Sullivan Appliance Ctr., Inc., 957 F.2d 59, 62 (CA2 1992) ("The

> supervisor is deemed to act on behalf of the employer when making decisions that affect the economic status of the employee. From the perspective of the employee, the supervisor and the employer merge into a single entity"); Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1316 (CA11 1989) ("When a supervisor requires sexual favors as a quid pro quo for job benefits, the supervisor, by definition, acts as the company"); see also *Lindemann & Grossman* 776 (noting that courts hold employers "automatically liable" in quid pro quo cases because the "supervisor's actions, in conferring or withholding employment benefits, are deemed as a matter of law to be those of the employer"). Other courts have suggested that vicarious liability is proper because the supervisor acts within the scope of his authority when he makes discriminatory decisions in hiring, firing, promotion, and the like. See, e.g., Shager v. Upjohn Co., 913 F.2d 398, 405 (CA7 1990) ("[A] supervisory employee who fires a subordinate is doing the kind of thing that he is authorized to do, and the wrongful intent with which he does it does not carry his behavior so far beyond the orbit of his responsibilities as to excuse the employer") (citing Restatement § 228). Others have suggested that vicarious liability is appropriate because the supervisor who discriminates in this manner is aided by the agency relation. See, e.g., Nichols v. Frank, 42 F.3d 503, 514 (CA9 1994). Finally, still other courts have endorsed both of the latter two theories. See, e.g., Harrison, 112 F.3d at 1443; Henson, 682, F.2d at 910.

Faragher, 524 U.S. 775, 790-91.

In Picotte v. Pasion and APO Enterprises, Civ. 98-4147, Southern Division of the United States Federal District Court for the State of South Dakota, Federal Judge Andrew W. Bogue, in his Memorandum Opinion, Appendix 116, analyzed the precise issue of whether a corporation was responsible for the harassment and unwelcome sexual contact of an owner of that business. Judge Bogue cited the Faragher decision in finding that Peter Pasion, as the owner and top supervisor of plaintiff Picotte was the “proxy” or “alter ego” of the corporation and that his acts would necessarily bind the corporation. Picotte, Civ. 98-4147, pp. 4-5. This decision held true for both the Title VII claims and the state law claims presented in the action.

Just as in Picotte, at the relevant time, Eliason was an owner of both Annabelle's and Olivia's and acted as the top supervisor of the Plaintiffs at each business. His actions in sexually harassing and assaulting the Plaintiffs are necessarily imputed upon the corporation if the jury finds such actions to have occurred. The position is both logically and legally consistent. When the jury is instructed to the contrary, there can only be confusion and misdirection.

In the case of Pickett v. The Colonel of Spearfish, et al., 209 F.Supp.2d 999, (D.S.D. 2001), a supervisor was held to not be the alter ego of the corporation as he lacked the required control over the business. Pickett, 209 F.Supp.2d at 1005. In the present action, Eliason was not only a supervisor, but a significant stakeholder in the business. Essentially, there was no one of greater authority in the business, only equals or less.

Likewise, the Eighth Circuit Court of Appeals in Burns v. McGregor Electronic, 955 F.2d 559 (1992) followed a 'proxy rule.' In Burns, the Eighth Circuit found that since a portion of the sexual harassment conduct was perpetrated by the owner of the company, Paul Oslac, that the corporation was imputed with the knowledge of the harassment. This case later resulted in a finding by the Eighth Circuit that the plaintiff was sexually harassed and directed judgment verdict against the defendant. Burns v. McGregor Elec. Indus., 989 F.2d 959, 966 (8th Cir. (Iowa) 1993).

In South Dakota state courts the issue of 'alter ego' or the 'proxy rule' has arisen. This Court has followed the same rational set forth previously in this brief in the case of Bensen v. Gobel, 1999 SD 38, 593 N.W.2d 402 (1999). The Court cited with approval 6

*Larson*, Workers' Compensation Law § 68.22, in finding that a supervisor failed to reach the standard of the 'alter ego' of the corporation. Bensen, 1999 SD 38 ¶ 18. For such a finding, a company actor must have been "so dominant in the corporation that he could be deemed the alter ego of the corporation under the ordinary standards governing disregard of corporate entity." *Larson*, Workers' Compensation Law § 68.22 at 13-130. In the case currently before this Court, Eliason is completely dominant in the company as he is both the owner and highest supervisor of both LLCs. Accordingly, the jury should have been properly instructed. "A court's failure to give a requested instruction that properly sets forth the law constitutes error." Kuper v. Lincoln-Union Elec. Co., 1996 SD 145, P32, 557 NW2d 748, 758 (citing Bauman v. Auch, 539 NW2d 320, 323 (SD 1995)). Plaintiffs request this Court reverse the trial court's denial of Plaintiffs' jury instruction on the 'proxy rule' and remand this case for a new trial incorporating Plaintiffs' Proposed Jury Instructions 30-50-10, 30-50-30, 30-50-80, 30-50-110, 30-50-140 and 30-200, Appendix 128 through 133.

## CONCLUSION

While there has unlikely ever been a perfect trial, the errors and irregularities in this action went far beyond re-instruction to the jury. A trial must be fair to all parties; it certainly was not to the Plaintiffs. If the goal of the legal system is to do justice, then justice should be done in this case.

For the reasons set forth in this brief, Plaintiffs' urge this Court to enter a decision:

1. Finding the introduction of the abortion issue into the proceedings was improper and an abuse of the trial court's discretion;
2. Finding that the LLCs violated the trial court's motion in limine on criminal backgrounds of the trial participants and settled state law stated when Keith Johnson testified in court that Eliason had been found not guilty in a criminal proceeding when in fact that was no criminal proceeding. Such testimony was unduly prejudicial and impacted the outcome of the trial;
3. Finding the trial court abused its discretion in not granting Plaintiffs' motion for new trial based upon the LCC's false statement and violation of its own motion in limine;
4. Finding that the trial court misinstructed the jury as to the joint liability of the LLC's and Eliason for the intentional torts of Eliason;
5. Reversing the jury's verdict in favor of the Defendants;
6. Reversing the trial court's denial of Plaintiffs' motion in limine on the abortion issue;
7. Reversing the trial court's denial of Plaintiffs' motion for new trial; and,
8. Remanding the action for retrial with direction that the abortion issue is inadmissible and incorporating instructions that the intentional acts of Eliason are imputed upon the LLC's.

Dated this _____ day of August, 2013.

_____

AARON D. EIESLAND
Attorney At Law
Johnson Eiesland Law Offices, PC
4020 Jackson Boulevard
Rapid City, SD 57702
(605) 348-7300

And

Manuel J. de Castro, Jr.
deCastro Law Office PLLC
400 N. Main Ave., Suite 205
Sioux Falls, SD 57104

**Attorney for Plaintiffs and Appellants**

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

---

No. 26682

---

MEGAN RUSCHENBERG, JESSICA CORNELIUS, and HEATHER RENSCH,

Plaintiffs and Appellants,

vs.

DAVID ELIASON, in his individual capacity and as an owner and employee of ANNABELLE'S ADULT SUPER CENTER OF SOUTH DAKOTA, LLC, and OLIVIA'S OF SOUTH DAKOTA, LLC, d/b/a OLIVIA'S ADULT SUPER STORE,

Defendants and Appellees.

---

APPEAL FROM THE CIRCUIT COURT,
SECOND JUDICIAL CIRCUIT, MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE STUART L. TIEDE,
CIRCUIT COURT JUDGE

---

# BRIEF OF APPELLEES ANNABELLE'S ADULT SUPER CENTER OF SOUTH DAKOTA, LLC and OLIVIA'S OF SOUTH DAKOTA, LLC, d/b/a OLIVIA'S ADULT SUPER STORE

---


Aaron D. Eiesland
Johnson Eiesland Law Offices, P.C.
P.O. Box 6900
Rapid City, SD 57709-6900

-and-

Manuel J. de Castro, Jr.
De Castro Law Office
400 N. Main Ave. #205
Sioux Falls, SD 57104
*Attorneys for Appellant*

Michael L. Luce
Lisa M. Prostrollo
Murphy, Goldammer
& Prendergast, LLP
P.O. Box 1535
Sioux Falls, SD 57101-1535
*Attorneys for Appellees Annabelle's and Olivia's*

David Eliason
401 S. Phillips Ave., #3
Sioux Falls, SD 57104
*Attorney Pro Se*


---

NOTICE OF APPEAL FILED APRIL 26, 2013

---

## TABLE OF CONTENTS

**TABLE OF AUTHORITIES** ..... iii

**INITIAL STATEMENT** ..... 1

**JURISDICTIONAL STATEMENT** ..... 1

**STATEMENT OF ISSUES** ..... 1

**I. Did the trial court err in denying Appellants' motion in limine to exclude evidence of Ruschenberg's abortion?** ..... 1

**II. Did the trial court err in denying Appellants' motion for mistrial?** ..... 2

**III. Did the trial court err in rejecting Appellants' proposed jury instructions regarding the "proxy rule?"** ..... 2

**STATEMENT OF THE CASE** ..... 2

**STATEMENT OF FACTS** ..... 5

**ARGUMENT** ..... 15

**I. The trial court properly denied Appellants' motion in limine to exclude evidence of Ruschenberg's abortion** ..... 15

**A. The trial court correctly applied SDCL 19-12-3 (Rule 403) in ruling that evidence of Ruschenberg's abortion was admissible** ..... 17

**B. The trial court's decision to admit evidence of Ruschenberg's abortion did not constitute prejudicial error** ..... 22

**II. The trial court properly denied Appellants' motion for mistrial** ..... 23

**A. The trial court's denial of Appellants' motion for mistrial did not constitute prejudicial error** ..... 24

**III. The trial court properly instructed the jury and rejected Appellants' proposed jury instructions regarding the "proxy rule"** ..... 29

**A. Appellants intentional tort claims were not asserted against Annabelle's and Olivia's** ..... 29

**B. The "proxy rule" is inapplicable because Eliason was not the "alter ego" of Annabelle's or Olivia's……...31**

**C. The trial court's rejection of Appellants' proposed jury instruction regarding the "proxy rule" was not prejudicial error……..33**

**CONCLUSION ..... 33**

**REQUEST FOR ORAL ARGUMENT..... 34**

**CERTIFICATE OF SERVICE ..... 35**

**CERTIFICATE OF COMPLIANCE ..... 36**

## TABLE OF AUTHORITIES

**Cases**

*Bensen v. Gobel*, 1999 S.D. 38, 593 N.W.2d 402……31

*Bertelsen v. Allstate Ins. Co.*, 2013 S.D. 44, 833 N.W.2d 545 ..... 29, 33

*Burns v. McGregor Electronic,* 955 F.2d 559 (8th Cir. 1992)..... 31

*Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998) ..... 31

*JAS Enterprises, Inc. v. BBS Enterprises, Inc.*, 2013 S.D. 54, 835 N.W.2d 117..... 15

*Kansas Gas & Elec. Co. v. Ross,* 521 N.W.2d 107 (S.D. 1994)..... 32

*Nichols v. American Nat. Ins. Co.,* 154 F.3d 875, 885 (8th Cir. 1998)……17, 18

*Nickerson v. G.D. Searle & Company*, 900 F.2d 412 (1st Cir. 1990) ..... 21

*Orrison v. City of Rapid City*, 74 N.W.2d 489 (S.D. 1956)..... 30

*Osloond v. Osloond,* 2000 S.D. 46, ¶13, 609 N.W.2d 118 ..... 32

*People v. Nash*, 908 N.Y.S.2d 708 (N.Y.A.D. 2 Dept. 2010) ..... 19

*Pickett v. The Colonel of Spearfish, et al.,* 209 F.Supp.2d 999 (D.S.D. 2001)..... 31

*Sander v. Geib, Elston, Frost Professional Ass'n,* 506 N.W.2d 107 (S.D. 1993)..... 16, 23

*St. John v. Peterson,* 2011 S.D. 58, 804 N.W.2d 71 ..... 22

*State v. Anderson,* 1996 S.D. 46, 546 N.W.2d 395..... 24, 29

*State v. Asmussen,* 2006 S.D. 37, 713 N.W.2d 580 ..... 16

*State v. Dill*on, 2010 S.D. 72, 788 N.W.2d 360..... 28

*State v. Guthrie,* 2001 S.D. 61, 627 N.W.2d 401..... 16

*State v. Kvasnicka*, 2013 S.D. 25, 829 N.W.2d 123 ..... 16, 24, 28

*State v. Lemler,* 2009 S.D. 86, 774 N.W.2d 272..... 24, 28

*State v. Maves,* 358 N.W.2d 805 (S.D. 1984)……28

*State v. Pasek,* 2004 S.D. 132, 691 N.W.2d 301……..……...….26

*State v. Phair*, 2004 S.D. 88, 684 N.W.2d 660…….... 23, 24, 27, 29

*Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, 764 N.W.2d 47... 15, 16, 22, 23

*Turner v. Burlington Northern R. Co.*, 771 F.2d 341 (8th Cir. 1985)……..…….30

*Western States Land & Cattle Co., Inc. v. Lexington Ins. Co.*, 459 N.W.2d 429 (S.D. 1990)……..30

**Statutes**

SDCL 19-12-1..... 17

SDCL 19-12-3..... 17

SDCL 15-6-15(a) ..... 30

SDCL 15-6-8(a) ..... 30

SDCL 47-34A-301……..……..31

SDCL 19-12-12……...……...24

## PRELIMINARY STATEMENT

Appellant Megan Ruschenberg will be referred to individually as "Ruschenberg." Appellant Jessica Cornelius will be referred to individually as "Cornelius." Appellant Heather Rensch will be referred to individually as "Rensch." Appellee David Eliason will be referred to as "Eliason." Keith Johnson will be referred to as "Johnson." Appellee Annabelle's Adult Super Center of South Dakota, LLC will be referred to as "Annabelle's." Appellee Olivia's of South Dakota, LLC d/b/a Olivia's Adult Super Store will be referred to as "Olivia's."

Citations to the Ruschenberg settled record as reflected by the Clerk's Index will be designated as "CR," citations to the Rensch settled record will be designated as "Rensch CR," and citations to the Cornelius settled record will be designated as "Cornelius CR." Citations to the trial transcript will be designated as "T.T." Citations to Appellants' Brief will be designated as "Br. Appellants." Citations to the appendix of Appellants' Brief will be designated as "Br. Appellants App." Citations to the appendix of this brief will be designated as "App."

## JURISDICTIONAL STATEMENT

Appellees have no objection to Appellants' Jurisdictional Statement.

## STATEMENT OF ISSUES

**I. Did the trial court err in denying Appellants' motion in limine to exclude evidence of Ruschenberg's abortion?**

The trial court denied Appellants' motion in limine to exclude evidence of Ruschenberg's abortion.

- *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, 764 N.W.2d 474
- *JAS Enterprises, Inc. v. BBS Enterprises, Inc.*, 2013 S.D. 54, 835 N.W.2d 117

- SDCL 19-12-1
- SDCL 19-12-3

**II. Did the trial court err in denying Appellants' motion for a mistrial?**

The trial court denied Appellants' motion for a mistrial.

- *State v. Pasek*, 2004 S.D. 132, 691 N.W.2d 301
- *State v. Phair*, 2004 S.D. 88, 684 N.W.2d 660
- *State v. Dillon*, 2010 S.D. 72, 788 N.W.2d 360, 369
- *State v. Maves,* 358 N.W.2d 805, 809 (S.D. 1984).

**III. Did the trial court err in rejecting Appellants' proposed jury instructions regarding the "proxy rule?"**

The trial court rejected Appellants' proposed jury instructions regarding the proxy rule.

- *Bensen v. Gobel*, 1999 S.D. 38, 593 N.W.2d 402
- *Osloond v. Osloond*, 2000 S.D. 46, 609 N.W.2d 118, 122
- *Bertelsen v. Allstate Ins. Co.,* 2013 S.D. 44, 833 N.W.2d 545
- *Orrison v. City of Rapid City*, 74 N.W.2d 489 (S.D. 1956)
- SDCL 47-34A-301
- SDCL 15-6-8
- SDCL 15-6-15

## STATEMENT OF THE CASE

This appeal arises out of three separate complaints filed simultaneously by Appellants Megan Ruschenberg, Jessica Cornelius and Heather Rensch in the Second Judicial Circuit, Minnehaha County, South Dakota in June 2009. (CR 2-13; App. 25-36; Cornelius CR 2-14; App. 12-24; Rensch CR 2-12; App. 1-11). In their complaints,

Appellants alleged that Eliason committed several acts of sexual misconduct against them while acting as manager of Annabelle's and Olivia's.

Rensch's complaint alleged several causes of action against Appellees, as well as other defendants. The causes of action against Eliason included: (1) invasion of privacy; (2) intentional infliction of emotional distress; (3) false imprisonment; (4) battery; (5) assault; (6) stalking; and (7) contributing to the delinquency of a minor. None of these causes of action were asserted against Annabelle's or Olivia's. *Id*. Rensch also asserted a punitive damage claim solely against Eliason based the intentional torts alleged in her complaint. The only causes of action Rensch asserted against Annabelle's and Olivia's were negligent infliction of emotional distress and negligent training and supervision. Ruschenberg and Cornelius's complaints contained the same causes of action asserted by Rensch, with the exception of contributing to the delinquency of a minor. Ruschenberg and Cornelus also alleged two additional causes of action against Eliason for kidnapping and rape. No other claims were asserted against Annabelle's or Olivia's. (CR 2-13; App. 25-36; Cornelius CR 2-14; App. 12-24; Rensch CR 2-12; App. 1-11).

Appellants' respective actions were consolidated in an order filed August 10, 2010 by the Honorable Patricia C. Riepel. (CR 29-35; Br. Appellants App. 006; App. 37-43). On December 22, 2010, Annabelle's and Olivia's filed a motion for summary judgment, arguing that they were not liable for the alleged misconduct of Eliason under the doctrine of respondeat superior because Eliason was not acting in the course of his employment when the alleged misconduct took place. (CR 182-184; App. 44-46). During the summary judgment hearing, Appellants confirmed that their intentional tort

causes of action were not directed at Annabelle's or Olivia's. Instead, these claims were asserted exclusively against Eliason. (CR 265-266; App. 47-48).

Following the hearing, the trial court entered an order dated January 31, 2011. (CR 265-266; App. 47-48). In this order, the trial court noted that Appellants were not asserting any intentional tort claims against Annabelle's or Olivia's and ordered that Appellants' intentional tort claims remained only to the extent they were asserted against Eliason in his individual capacity. *Id*. The trial court denied the motion for summary judgment as to Appellants' claims against Annabelle's and Olivia's for negligent infliction of emotional distress and negligent training and supervision. *Id*.

The fact that Appellants were not asserting any intentional tort claims against Annabelle's or Olivia's was again discussed during the pretrial conference. (T.T. 10:14-23; App. 63). Appellants' counsel confirmed during the pretrial conference that Appellants were not asserting any intentional tort claims against Annabelle's or Olivia's. *Id*. Appellants also did not allege that any intentional tort claims were being asserted against Annabelle's or Olivia's in their proposed Statement of the Case, which Appellants submitted to the trial court along with their other proposed preliminary jury instructions.[1] (T.T. 10:23-25; App. 63; T.T. 11:1-4; App. 64).

Nevertheless, on the first morning of trial, Appellants changed their position and sought to argue to the jury that Annabelle's and Olivia's were liable for the alleged intentional torts of Eliason under the "proxy rule." (T.T. 7:23-25; 8:1-24; App. 61-62).

[1] Throughout the trial transcript, Annabelle's and Olivia's are often referred to by the generic term "corporation." However, it is undisputed that these businesses were member managed limited liability companies. (T.T. 541:19-25; 542:1-12; App. 169-170). Such businesses are governed by the Uniform Limited Liability Company Act, SDCL 47-34A.

Appellants proposed various jury instructions on this "proxy rule," and argued that their position changed because Appellants' counsel did some "additional research." (T.T. 11:5-19; App. 64). Although Appellants' position was directly contrary to Judge Riepel's previous summary judgment, Appellants did not seek to vacate the judgment. Instead, Appellants argued in passing that Judge Riepel's summary judgment was wrong, without ever submitting a motion to the trial court to vacate or reconsider the judgment. (T.T. 8:11-16; App. 62).[2] The trial court rejected Appellants' proposed instructions on the "proxy rule," and noted that it would be prejudicial and unfair to allow the Appellants to argue that Annabelle's and Olivia's were liable for Appellants' intentional tort claims against Eliason. (T.T. 10:14-25; 11:1-4; App. 63-64; T.T. 14:20-21; App. 65; T.T. 474:5-9; App. 159).

A jury trial was held from March 12 to March 15, 2013 before the Honorable Stuart Tiede. (CR 438-439; App. 49-50). Following deliberation, the jury returned a verdict in favor of Appellees after completing a special verdict form. (T.T. 649:20-25; 650:1-25; 651:1-22; App. 180-182). Appellants filed a motion for new trial. After carefully considering this motion and reviewing the evidence, the trial court issued a detailed ruling denying Appellants' motion.[3] (App. 56-60) This appeal followed. (CR 484-488; App. 51-55).

## STATEMENT OF FACTS

Annabelle's is a business located in Sioux Falls that sells various adult movies, clothing, and various other sexual products. Olivia's is a similar business located in Tea,

[2] Appellants are not appealing Judge Riepel's summary judgment. (CR 484-488; App. 51-55).
[3] Appellants are not appealing Judge Tiede's denial of their motion for new trial. (CR 484-488; App. 51-55).

South Dakota. In 2007, Eliason and his wife held minority ownership interests in Annabelle's and Olivia's, and Eliason helped to manage both businesses. (T.T. 160:14-24; App. 73; 190:15-19; App. 76). Keith Johnson was the majority owner of Annabelle's and Olivia's. (T.T. 160:14-24; App. 73; T.T. 190:15-19; App. 76; T.T. 274:3-14; 106).

This lawsuit involves the claims of three former employees of Annabelle's and Olivia's: Megan Ruschenberg, Heather Rensch and Jessica Cornelius ("Appellants"). (CR 2-13; App. 25-36; Cornelius CR 2-14; App. 12-24; Rensch CR 2-12; App. 1-11). All three of these Appellants quit working at Annabelle's and Olivia's on the same day. (T.T. 485:9-11; App. 161). They contacted the police together to report Eliason's alleged crimes and, subsequently, they each applied for a protection order against Eliason.[4] (T.T. 277:5-12; App. 109). The Appellants then got together with an attorney and others to "reenact" what they alleged happened. (T.T. 508:12-24; App. 167). Finally, the Appellants commenced their lawsuits against Appellees within the same month, each of them asserting similar causes of action. (CR 2-13; App. 25-36; Cornelius CR 2-14; App. 12-24; Rensch CR 2-12; App. 1-11)

This case exemplifies how a dispute is to be resolved through a jury determination. Over the course of the three-day trial, the jury heard evidence that likely made them uncomfortable. Nonetheless, the trial judge instructed the jury to fairly consider the evidence, and to evaluate the credibility of witnesses based upon the law and the evidence presented. The jury did so, and returned a verdict in favor of the defendants, despite the fact that two of the defendants (Annabelle's and Olivia's) were adult

[4] Although Rensch joined Cornelius and Ruschenberg in applying for a protection order, she later abandoned her application because she was "too busy." (T.T. 483:5-12; App. 160).

entertainment businesses, and one of the defendants (Eliason) represented himself. The facts presented to the jury will now be described, beginning with the claims of the individual Appellants.

## I. Megan Ruschenberg

Ruschenberg began working as an employee at Annabelle's and Olivia's in 2007. (T.T. 362:4-11; App. 114). She alleges that on June 14, 2007, Eliason made a comment that Ruschenberg was "sexy and he couldn't figure [her] out." (T.T. 378:8-10; App. 115). Ruschenberg testified that no one else was present when this comment was made (T.T. 378:14-16; App. 115). Despite testifying that the comment made her uncomfortable, Ruschenberg did not confront Eliason and make it clear that such comments were inappropriate. (T.T. 378:17-21; App. 115). Nor did she report the incident to anyone at Annabelle's or Olivia's because she "just kind of sluffed it off." (T.T. 378:19-21; App. 115).

Ruschenberg testified that in June 2007, Eliason forced her into a back room in Olivia's and raped her. (T.T. 381:6-12; App. 118; T.T. 385:1-9; App. 119). Although Ruschenberg was able to recall the date Eliason allegedly commented that she was "sexy," she was unable recall the date the rape occurred. (T.T. 411:7-11; App. 135).

At the time of the alleged rape, Ruschenberg was living with Matthew Tobin. (T.T. 411:23-25; 412:1-20; App. 135-136). She did not say anything to Matthew about the rape that evening. (T.T. 412:21-24; App. 136). Nor did she go to any medical facility to have a rape kit administered. (T.T. 413:5-8; App. 137).

Ruschenberg never contacted a counseling service or crisis center. (T.T. 413:9-12; App. 137). She also did not report the rape to anyone at Annabelle's or Olivia's. *Id.*

Most importantly, she did not call the police. (T.T. 413:13-15; App. 137). Ruschenberg testified that she did not report the rape to the police because she believed Eliason could use his money to "affect the integrity of the Sioux Falls Police Department." (T.T. 413:13-24; App. 137).

Despite allegedly being forcibly raped by Eliason, Ruschenberg returned to work the next day and continued working. (T.T. 389:6-7; App. 121). Ruschenberg testified that a month after the first rape occurred, Eliason again forced her into the back room of Olivia's and raped her. (T.T. 390:3-25; 391:1-6; App. 122-123). The second rape allegedly occurred in the same location as the first rape, and under nearly identical circumstances. (T.T. 415:12-18; App. 139; T.T.437:20-24; App. 148). During both of the alleged rapes, a co-worker of Ruschenberg's was present at the store, but Ruschenberg did not scream or tell this co-worker about the fact that she had just been raped. (T.T. 390:16-17; App. 122).

Ruschenberg did not report the second rape to anyone at Annabelle's or Olivia's. She did not contact a counseling service or crisis center. (T.T. 415:23-25; App. 139). Nor did she tell her family, friends, significant others, clergy, or anyone else in a position of trust that she had been raped. (T.T. 416:8-15; App. 140). She did not call the police. (T.T. 392:3-4; App. 124).

Ruschenberg went back to work the day after the second alleged rape. (T.T. 392:8-11; App. 124). She did not talk about the rape with any of her co-workers. (T.T. 414:1-4; App. 138). She did not report the rape to the female manager who had initially trained her, Nichole West. (T.T. 414:5-9; App. 138). Nor did she report the rape to the

majority owner of Annabelle's and Olivia's, Keith Johnson. (T.T. 414:6-9; 414:22-24; App. 138; T.T. 425:7-12; App. 147).

Ruschenberg testified that she became pregnant as a result of the rape. (T.T. 393:2-7; App. 125). Despite allegedly fearing that Eliason would have her killed, Ruschenberg testified that she voluntarily approached Eliason following the rape to discuss her pregnancy. (T.T. 394:1-13; 394:17-24; App. 126). Ruschenberg went on to testify that she decided to have an abortion, and that she accepted $450 from Eliason so that she could have the procedure.[5] (T.T. 395:5-9; App. 127).

Ruschenberg could not remember the date she had the abortion, or the location of the Planned Parenthood facility in Sioux City where she went to have the procedure. (T.T. 393:9-12; App. 125; T.T. 416:20-24; App. 140). She presented no records of the abortion at trial. However, Ruschenberg did testify that she completed certain medical forms before having the abortion. (T.T. 417:21-25; App. 141). One of these forms asked whether her pregnancy was the result of a rape. (T.T. 418:14-17; App. 142). Ruschenberg indicated that her pregnancy was not the result of a rape. (T.T. 418:21-25; App. 142). Consequently, no DNA testing was performed on the fetus, and the authorities in Sioux City were not notified. (T.T. 419:1-6; App. 143).

Despite allegedly being forcibly raped by Eliason on two separate occasions, becoming pregnant as a result of the rape, and undergoing an abortion to terminate the pregnancy, Ruschenberg continued working at Olivia's and Annabelle's. (T.T. 395:15-16; App. 127). In fact, in October of 2007, Ruschenberg agreed to travel with Eliason to

[5] Ruschenberg testified that she accepted $400 from Eliason for the abortion, and $50 for gas money to travel to Sioux City. (T.T. 395:5-9; App. 127). Thus, Ruschenberg claimed that Eliason intimidated her into not reporting the rapes by bragging about his influence in Sioux Falls, yet he willingly gave her gas money to travel out of the state.

North Carolina so that she could help him open a new Annabelle's store. (T.T. 395:24-25; 396:1-3; App. 127-128) While in North Carolina, Ruschenberg testified that she stayed in the same hotel room as Eliason for eleven days. (T.T. 397:20-25; App. 129).

Ruschenberg testified that on the second or third night of their stay in North Carolina, Eliason forced her onto the bed and raped her a third time. (T.T. 398:18-25; 399:1-6; App.130-131). Ruschenberg testified that she did not leave North Carolina after she was allegedly raped by Eliason. Instead, she stayed with Eliason for the remainder of the trip. (T.T. 397:23-25; App. 129). Ruschenberg did not report the third rape to the North Carolina police because she allegedly believed Eliason "had friends everywhere in the country."[6] (T.T. 420:25; 421:1-10; App. 144-145). After returning to South Dakota, Ruschenberg continued to work at Annabelle's and Olivia's until all three Appellants quit at the same time in the end of November. (T.T. 400:9-11; App. 132).

**II. Jessica Cornelius**

Cornelius testified that she began working as an employee at Annabelle's in September of 2007, although she occasionally worked at Olivia's as well. (T.T. 232:2-4; App. 85). Cornelius testified that Eliason made several comments of a sexual nature to her while she was working at Annabelle's and Olivia's. (T.T. 231:2-12; App. 84; T.T. 237:4-13; App. 86; T.T. 260:24-25; 261:1-25; 262:1-10; App. 96-98). She also testified that on one occasion, Eliason slapped her on the behind while she was working. (T.T. 238:14-18; App. 87). Cornelius never confronted Eliason to tell him that his alleged conduct was unacceptable. (T.T. 266:16-20; App. 99). Nor did she report his alleged

[6] When Ruschenberg later filled out a protection order application, she mentioned the two alleged rapes that occurred in South Dakota, but did not mention the alleged rape that occurred in North Carolina. (T.T. 424:1-12; App. 146).

conduct to either of the two female supervisors and managers at Annabelle's and Olivia's. (T.T. 267:1-3; App. 100).

On one occasion while she was working at Annabelle's, Cornelius testified that Eliason asked her to accompany him back to his office. (T.T. 244:1-10; App. 90). Cornelius testified that once the two of them were in his office, Eliason locked the door and forcibly raped her. (T.T. 246:11-24; App. 91). Cornelius could not recall the date that this alleged rape occurred. (T.T. 267:21-25; 268:1-2; App. 100-101).

Cornelius testified that while Eliason was preparing to rape her, a co-worker came to the door of the office. (T.T. 246:3-7; App. 91). Cornelius did not scream or seek help from this co-worker. She allegedly spoke with this co-worker after the rape, but did not tell the co-worker what happened.[7] (T.T. 268:15-18; App. 101). There was an alarm system near the cash register in Annabelle's that connected to the police department. (T.T. 287:10-15; App. 111). Cornelius did not sound this alarm after the alleged rape. *Id.*

Cornelius did not tell her roommate that she had been the victim of a rape. (T.T. 270:6-11; App. 102). Nor did she tell her mother, grandmother, friends, clergy or other relatives what had occurred. (T.T. 250:5-6; App. 93; T.T. 270:12-21; App. 102). Cornelius did not call the police. (T.T. 249:24-25; App. 92). In fact, Cornelius did not call the police until after she quit working some months later. She indicated that she was

[7] Cornelius did not take steps to avoid Eliason after the alleged rape, even when she was not working. Cornelius testified that she and a friend, who she considered a "second mom," went to Annabelle's on Halloween while Eliason was at the store. (T.T. 275:23-25; 276:1-3, 22-23; App. 107-108). Cornelius's friend had a conversation with Eliason that night, but Cornelius never indicated to her friend that Eliason had raped her. (T.T. 276:8-25; 277:1-4; App. 108-109).

afraid to call the police because Eliason knew "powerful" people. (T.T. 249:18-25; App. 92; T.T. 294:5-16; App. 112).

Cornelius did not tell anyone in a supervisory or managerial role at either Annabelle's or Olivia's that she had been raped until after she quit at the end of November. (T.T. 271:10-18; App. 103). Cornelius knew that Keith Johnson was the majority owner of Annabelle's and Olivia's, and she had spoken with him over the phone on several occasions. (T.T. 272:20-24; App. 104; T.T. 273:6-10; App. 105; T.T. 274:3-14; App. 106; T.T. 303:2-5; App. 113). Yet Cornelius never tried to call Johnson and alert him of Eliason's alleged conduct. (T.T. 273:12-23; App. 105).

Cornelius went back to work day after the alleged rape and continued working at Annabelle's and Olivia's until after she and the other Appellants quit in November 2007. (T.T. 250:11-13; App. 93).

**III. Heather Rensch**

In the fall of 2007, Rensch was hired to work as a cashier at Annabelle's. (T.T. 449:2-6; App. 151). Rensch testified that while she was working at Annabelle's, Eliason made inappropriate jokes and comments of a sexual nature. (T.T. 240:2-25; App. 88; 241:1-9; App. 89; T.T. 457:2-7; App. 152; T.T. 459:1-3; App. 153; T.T. 460:3-24; App. 154; T.T.464:6-16; App. 156; T.T. 494:18-21; App. 166). She also testified that on one occasion, Eliason demonstrated how a sex toy worked by placing it on her forearm. According to Rensch, the toy gave off an electric charge that left welts on her forearm.[8] (T.T. 463:9-15; App. 155).

[8] Rensch never told her boyfriend about this alleged incident, even though she testified that she trusted her boyfriend. (T.T. 489:25; 490:1-24; App. 162-163).

Rensch never reported these incidents to anyone at Annabelle's. (T.T. 491:14-16; App. 164). Even though Rensch testified that these incidents made her uncomfortable, in October of 2007, Rensch voluntarily agreed to travel with Eliason to North Carolina so that she could help him open a new Annabelle's store. (T.T. 465:7-13, 18-23; App. 157).

While she was in North Carolina, Rensch had an opportunity to speak with Johnson, the majority owner of Annabelle's, face-to-face. However, she did not mention anything to Johnson about Eliason's alleged conduct. (T.T. 491:17-25; 492:8-12; App. 164-165). In fact, it is undisputed that while the Appellants were working at Annabelle's and Olivia's, Johnson had no knowledge of the facts alleged in Appellants' complaints. (T.T. 531:2-7; App. 168).

**III. Trial Proceedings**

On the same day in 2007, Rensch, Cornelius and Ruschenberg all quit working at Annabelle's and Olivia's. (T.T. 485:9-11; App. 161). All three Appellants then called the police. (T.T. 277:5-12; App. 109; T.T. 401:14-15; App. 133). Shortly after contacting the police, Appellants each applied for a protection order against Eliason. (T.T. 252:22-25: 253:1-2; App. 94-95). Although Rensch joined Cornelius and Ruschenberg in applying for a protection order, she later abandoned her application because she was "too busy." (T.T. 483:5-16; App. 160).

At trial, other than their own testimony, Appellants did not call a single witness to corroborate their allegations. No former employee testified as to any type of misconduct, sexual harassment or rape by Eliason.[9] (T.T. 180:11-14; App. 75). In fact, two

[9] Annabelle's and Olivia's had significant turnover. Over the course of four to five years, they had over 100 employees. Yet Appellants did not call a single witness, aside from themselves, to corroborate their claims against Eliason. (T.T. 180:5-14; App. 75).

employees that previously worked for Annabelle's and Olivia's were called from the defense. (T.T. 550:13-20; App. 171; T.T. 564:7-9; App. 175; T.T. 565:9-13; App. 176). Both of these witnesses testified that they were unaware of a single instance in which Eliason mistreated or harassed any of the Appellants. (T.T. 557:22-25; App. 172; T.T. 558:22-25; App. 173; T.T. 559:1-3; App. 174; T.T. 567:16-23; App. 177; T.T. 568:2-9; App. 178; T.T. 569:9-15; App. 179).

The jury found Eliason's testimony credible, completed a special verdict form, and rendered a verdict in favor of Appellees. (T.T. 649:20-25; 650:1-25; 651:1-16; App. 180-182). Appellants now ask this Court to remand this case for a new trial based upon three rulings of the trial court.

First, prior to trial, Appellants moved to exclude evidence of Ruschenberg's abortion on the grounds that such evidence was overly prejudicial. (T.T. 15:9-25; 16:1-25; 17:1-23; App. 66-68). The trial court denied this motion, finding that the risk of prejudice did not substantially outweigh the probative value of the evidence. (T.T. 17:1-23; App. 68). Appellants contend this ruling was erroneous.

As their second ground for appeal, Appellants argue that the trial court erred in denying their motion mistrial, which they brought after Keith Johnson gave certain unsolicited testimony regarding Eliason's criminal history. Specifically, during trial, the following exchange took place between Johnson and counsel for the Appellants:

> Q: And the first time you're telling this jury you knew there was a problem with him was when the money wasn't right?
> A: I did not say that, sir.
> Q: Was it when you heard about the protection order?
> A: I heard about that he was going to court for the rape charge that he was not found guilty on.

(T.T. 202:21-25; 203:1-2; App. 77-78).

After considering the arguments of the parties, the trial court denied Appellants' motion for mistrial. (T.T. 223:1-2; App. 83). In doing so, the trial court recognized that Johnson was confused as to the nature of the prior protection order proceedings against Eliason, and that he did not intentionally mislead the jury. (T.T. 220:18-24; App. 81). To ensure that Appellants were not prejudiced by the testimony, the trial court gave a curative instruction, which directed the jury to base its decision exclusively upon the evidence presented at trial, and to "disregard any consideration of whether or not there are criminal charges filed, a trial or a conviction or acquittal." (T.T. 214:4-21; App. 80).

As their final ground for appeal, Appellants argue that the trial court erred in refusing to instruct the jury that Annabelle's and Olivia's were liable for the intentional torts of Eliason under the "proxy rule." (T.T. 10:14-25; App. 63; 11:1-4, 16-19; App. 64; 14:20-21; App. 65). In rejecting Appellants' proposed instructions, the trial court noted that Appellants were not asserting any intentional tort claims against Annabelle's and Olivia's, and they could not raise new claims by proposing jury instructions on the eve of trial. (T.T. 10:14-25; App. 63; 11:1-4; App. 64; 473:8-25; 474:1-21; App. 158-159).

## ARGUMENT

### I. The trial court properly denied Plaintiffs' motion in limine to exclude evidence of Ruschenberg's abortion.

In reviewing the trial court's denial of Appellants' motion in limine, this Court must engage in "a two-step process." *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶59, 764 N.W.2d 474, 491. First, this Court must determine whether the trial court's decision was an abuse of discretion. *JAS Enterprises, Inc. v. BBS Enterprises, Inc.*, 2013 S.D. 54, ¶21, 835 N.W.2d 117, 125 (noting that this Court "reviews a decision

to admit or deny evidence under the abuse of discretion standard," and that this standard "applies as well to rulings on motions in limine"). An abuse of discretion occurs only "when a trial court misapplies a rule of evidence, not when it merely allows or refuses questionable evidence." *Id*. (quoting *State v. Asmussen,* 2006 S.D. 37, ¶13, 713 N.W.2d 580, 586) (citing *State v. Guthrie,* 2001 S.D. 61, ¶30, 627 N.W.2d 401, 415).

Second, Appellants must show that the trial court's decision to admit evidence of Ruschenberg's abortion constituted "prejudicial error that 'in all probability' affected the jury's conclusion." *State v. Kvasnicka*, 2013 S.D. 25, ¶19, 829 N.W.2d 123, 128 (quoting *Supreme Pork, Inc.,* 2009 S.D. 20, ¶59, 764 N.W.2d at 491). As this Court explained in *Supreme Pork, Inc. v. Master Blaster, Inc.*,

> The rulings of the trial court are presumptively correct; *we have no duty to seek reasons to reverse.* The *party alleging error* must show prejudicial error. . . . To show such prejudicial error an appellant must establish affirmatively *from the record* that under the evidence the jury might and *probably would have returned a different verdict* if the alleged error had not occurred.

*Supreme Pork,* 2009 S.D. 20, ¶58, 764 N.W.2d at 491 (quoting *Sander v. Geib, Elston, Frost Professional Ass'n,* 506 N.W.2d 107, 113 (S.D. 1993) (emphasis in original).

In this case, Appellants have failed to show that the trial court misapplied a rule of evidence when it admitted evidence of Ruschenberg's abortion. Appellants have also failed to show that the jury "probably would have returned a different verdict" if the trial court had not admitted this evidence. *See id*. Indeed, the jury returned a verdict against Rensch and Cornelius, who were not involved in Ruschenberg's decision to have a abortion. Therefore, the trial court's denial of Appellants' motion in limine should be affirmed.

### A. The trial court correctly applied SDCL 19-12-3 (FRE 403) in ruling that evidence of Ruschenberg's abortion was admissible

In their brief, Appellants do not dispute that evidence concerning Ruschenberg's abortion is relevant under SDCL 19-12-1 (FRE 401). Instead, Appellants contend that the evidence is inadmissible under SDCL 19-12-3 (FRE 403), which states in pertinent part that "evidence may be excluded if its probative value is *substantially outweighed* by the danger of unfair prejudice . . . ." (Emphasis added.)

Appellants rely upon *Nichols v. American Nat. Ins. Co.* in support of their argument. 154 F.3d 875 (8th Cir. 1998). In *Nichols*, a former employee sued her employer, American National Insurance Company, for sexual harassment and constructive discharge in violation of Title VII of the Civil Rights Act of 1964. *Id.* at 878. At trial, the district court allowed American National to introduce evidence that the former employee had an abortion, and that having an abortion was against the employee's religious beliefs. *Id.* The jury entered a judgment for the employer, and the employee appealed. *Id.*

The Eighth Circuit Court of Appeals held that the district court erred in admitting evidence of the employee's prior abortion. *Id.* at 885. In so holding, the Court emphasized that the evidence of the employee's prior abortion had "very little probative value." *Id.* The Court explained:

> American National claimed it would be relevant on damages, but neither expert gave an opinion that the abortion had contributed to Nichols' emotional distress, only that it could have. . . . Furthermore, the abortion was remote in time. Nichols was limited to evidence from the years 1991 to 1993, and the abortion occurred in 1985 and was not shown to be related to her employment history at American National.

*Id.*

This case is readily distinguishable from *Nichols*. In this case, Ruschenberg alleged that she became pregnant because Eliason raped her, and that she had an abortion shortly after discovering she was pregnant. (T.T. 393:2-7; App. 125; T.T. 395:5-14; App. 127). Thus, Ruschenberg's abortion was not "remote in time." Rather, Ruschenberg's abortion was an integral aspect of her claims against the Appellees. So integral, in fact, that she expressly included allegations regarding the abortion in her Complaint. Paragraph 44 of Ruschenberg's Complaint alleges: "On or about August 2007, Ruschenberg discovered that she was pregnant due to Eliason's sexual assault of her. Ruschenberg told Eliason about it and he wrote a check to her and told her to go and get an abortion." (CR 9; App. 29).

By including allegations regarding the abortion in her Complaint, Ruschenberg acknowledged that the abortion was a relevant factual issue to be considered by the jury at trial. Because Ruschenberg included the abortion in her Complaint, she cannot now claim the abortion was irrelevant or overly prejudicial.

Appellants note that in *Nichols*, the defendants argued that evidence of the plaintiff's prior abortion was admissible because she disclosed the abortion in answering an interrogatory submitted by the defendant. The *Nichols* court rejected that argument. However, in doing so, the court emphasized that the plaintiff had a duty to answer the interrogatory, regardless of whether the answer was ultimately deemed admissible at trial. *See Nichols*, 154 F.3d at 885 ("The court focused on the fact that she had disclosed it herself, but she had a duty to answer the interrogatory even if the answer were not admissible at trial."). In this case, Ruschenberg was under absolutely no obligation to include allegations of the abortion in her Complaint. Ruschenberg voluntarily elected to

include these allegations in her Complaint because they were a highly probative element of her case against the Appellees.

In their brief, Appellants focus exclusively on the sensitive nature of the subject of abortion. In doing so, they fail to acknowledge the considerable probative value that evidence of Ruschenberg's abortion had in this case. *See People v. Nash*, 908 N.Y.S.2d 708 (N.Y.A.D. 2 Dept. 2010) (holding that evidence of a victim's pregnancy and abortion was admissible as evidence that sexual intercourse occurred while the victim was under 15 years of age, as evidence of the credibility of the victim as a witness, and as evidence of the intimacy between the defendant and the victim based on their encounters leading up to the abortion).

First, there was a significant question as to whether Ruschenberg's abortion even took place. Appellants never produced any medical records related to the abortion. When questioned about the procedure, Ruschenberg could not even recall when she had the abortion, or where the abortion clinic was located in Sioux City. (T.T. 393:4-10; App. 125; T.T. 416:20-24; App. 140). Eliason, in turn, denied ever giving Ruschenberg money so that she could have the abortion. (T.T. 167:22-24; App. 74)

Second, the only evidence presented at trial in support Ruschenberg's allegations of rape was her own testimony. Ruschenberg's credibility was therefore a key issue. To evaluate Ruschenberg's credibility, it was essential for the jury to consider evidence of her interaction with Eliason following the alleged rape.

Ruschenberg claimed she became pregnant after Eliason forcibly raped her. (T.T. 393:2-7; App. 125). She further claimed that she did not report the alleged rape because she was afraid Eliason would have her killed. (T.T. 379:22-25; 380:1; App. 116-117;

T.T. 388:11-16; App. 120). However, this testimony is completely at odds with Ruschenberg claim that she voluntarily approached Eliason following the alleged rape and the two of them had a cordial discussion about Ruschenberg's options regarding her pregnancy. (T.T. 393:13-25; 394:1-13, 17-24; App. 125-126).

According to Ruschenberg, Eliason offered to adopt her baby, or give her money for an abortion. (T.T. 394:14-16; App. 126). Ruschenberg alleged that she chose to accept money from Eliason so that she could have an abortion, and that she also accepted gas money from Eliason so that she could travel to Sioux City. (T.T. 395:5-9; App. 127). Thus, according to Ruschenberg, Eliason willingly gave her gas money to travel out of the state, even though Ruschenberg alleged that Eliason had influence in Sioux Falls, and that he used this influence to intimidate her into not reporting the rapes. Clearly, this contradictory testimony was highly relevant and admissible, and the jury was entitled to consider it when evaluating Ruschenberg's credibility.

Third, it was vital for the jury to consider whether Ruschenberg's alleged pregnancy was, in fact, the result of a rape. Ruschenberg's own testimony regarding the abortion indicated that it was not. Specifically, Ruschenberg testified that when she arrived at Planned Parenthood to have the abortion, she had to complete various forms. (T.T. 417:21-25; App. 141). One of the questions on these forms asked whether her pregnancy was the result of a rape. In completing the form, Ruschenberg indicated that her pregnancy *was not* the result of a rape. (T.T. 418:14-25; App. 142).

Ruschenberg's testimony that she indicated on a confidential medical form that her pregnancy was not the result of a rape was highly relevant evidence that bore directly on a crucial issue before the jury. Without the introduction of this

evidence, Appellees' ability to defend against Ruschenberg's claims would have been seriously compromised, and the jury would have been unable to fully and fairly evaluate Ruschenberg's credibility.[10]

Finally, Ruschenberg's testimony regarding her abortion was relevant in determining the extent of the damages she was entitled to recover for pain and suffering. Indeed, Ruschenberg testified that her pregnancy and subsequent abortion had an emotional and psychological effect on her. (T.T. 445:20-25; 446:1-16; App. 149-150). The jury therefore could not adequately evaluate the extent of the damage Ruschenberg suffered as a result of the alleged rape without considering evidence of her pregnancy and subsequent abortion. As the trial explained when it ruled on Appellants' motion in limine:

> It does seem to me that if there was interaction between one or more of the plaintiffs and the defendant, post these intentional torts as alleged by the plaintiffs, that that would all be relevant in assessing whether or not the tort was committed, whether it has caused any damages, and the nature and extent of those damages. . . . Furthermore, as Mr. Luce indicated, there may be issues of credibility.

---

[10] Appellants cite to *Nickerson v. G.D. Searle & Company*, in support of their argument that evidence of Ruschenberg's abortion is not admissible. 900 F.2d 412 (1st Cir. 1990). In *Nickerson*, a user of an intrauterine device brought a products liability action against the manufacturers of the device. *Id*. at 414. One of the defendant's expert witnesses had previously worked in abortion clinics. *Id*. at 418. The trial court ruled that plaintiff's counsel could not ask the defendant's expert about his prior experience in the field of abortion because such evidence was irrelevant and overly prejudicial. *Id*. The Court of Appeals affirmed. *Id*. at 419.

The facts of *Nickerson* are distinguishable from the facts of this case. In *Nickerson*, the expert's experience in the field of abortion was completely unrelated to his qualifications regarding intrauterine devices. *See id.* at 418. The evidence therefore had no probative value. In this case, evidence regarding Ruschenberg's abortion was extremely relevant to her claims against Appellees. The risk of prejudice therefore did not substantially outweigh the probative value of the evidence.

(T.T. 17:6-14; App. 68).

This Court has made it very clear that "Rule 403 is not simply a 'more than, less than' comparison; the test is whether the probative value is *substantially* outweighed by the danger of unfair prejudice." *Supreme Pork,* 2009 S.D. 20, ¶55, 764 N.W.2d at 490. Accordingly, "[t]he probative value is not required to 'measure up' to the prejudicial value. Quite the opposite is true; the prejudicial value must be shown to substantially outweigh the probative value." *Id*. ¶56.

In this case, the risk of prejudice certainly did not substantially outweigh the probative value of evidence regarding Ruschenberg's abortion. Indeed, the subject of abortion was addressed extensively during voir dire. Appellants had ample opportunity to move to strike any jurors who were unable to set aside their personal feelings and decide the case fairly and impartially. Moreover, evidence of Ruschenberg's abortion was inextricably linked to her claims against Appellees. By admitting evidence of the abortion, the trial court cannot be said to have committed "'a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.'" *St. John v. Peterson,* 2011 S.D. 58, ¶19, 804 N.W.2d 71, 77 (quoting *Supreme Pork, Inc.*, 2009 S.D. 20, ¶57, 764 N.W.2d at 490). Thus, the trial court did not abuse its discretion in denying Appellant's motion in limine.

### B. The trial court's decision to admit evidence of Ruschenberg's abortion did not constitute prejudicial error

Even assuming, *arguendo*, that the trial court abused its discretion in admitting evidence of Ruschenberg's abortion, Appellants must still show that the trial court's ruling constituted prejudicial error before this Court will reverse the ruling of the trial court. In order to establish prejudicial error, "an appellant must

establish affirmatively *from the record* that under the evidence the jury might and *probably would have returned a different verdict* if the alleged error had not occurred." *Supreme Pork,* 2009 S.D. 20, ¶58, 764 N.W.2d at 491 (quoting *Sander v. Geib, Elston, Frost Professional Ass'n,* 506 N.W.2d 107, 113 (S.D. 1993) (emphasis in original). Appellants have failed to meet this burden.

Ruschenberg was not the only plaintiff against whom the jury returned a verdict. The jury also returned a verdict against Cornelius and Rensch, who were not involved in Ruschenberg's decision to have an abortion. In fact, Ruschenberg did not even inform Cornelius or Rensch that she was planning to have an abortion. The jury therefore could not have been unfairly prejudiced against Ruschenberg's co-defendants.

During the course of the three-day trial on Appellants' claims, the jury heard extensive evidence on Appellants' claims, including testimony from each of the Appellants. After carefully considering the evidence, the jury found that the Appellants' testimony was not credible. Appellants have failed to establish that, in all likelihood, the jury would have returned a different verdict if the evidence of Ruschenberg's abortion had not been admitted. Therefore, Appellants have failed to show that the trial court committed prejudicial error.

**II. The trial court properly denied Appellants' motion for a mistrial**

In reviewing whether the trial court committed reversible error in denying Appellants' motion for mistrial, this Court must first determine whether the trial court abused its discretion. As this Court explained in *State v. Phair*, "[t]rial courts have considerable discretion not only in granting or denying a mistrial[,] but also in

determining the prejudicial effect of a witness' statements. Only when this discretion is clearly abused will this court overturn the trial court's decision." 2004 S.D. 88, ¶ 13, 684 N.W.2d 660, 665 (quoting *State v. Anderson,* 1996 S.D. 46, ¶ 21, 546 N.W.2d 395, 401 (additional quotation omitted). An abuse of discretion is defined as "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Kvasnicka*, 2013 S.D. 25, ¶17, 829 N.W.2d at 127-28 (quoting *State v. Lemler,* 2009 S.D. 86, ¶40, 774 N.W.2d 272, 286 (additional quotation omitted).

Even if this Court finds that the trial court erred in denying Appellants' motion for mistrial, this Court will not reverse the ruling of the trial court unless the error was prejudicial. *See Phair,* 2004 S.D. 88, ¶ 13, 684 N.W.2d at 665 ("To justify the granting of a mistrial, an actual showing of prejudice must exist."). Error is prejudicial when, in all probability, it "produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it." *Id*. (quoting *Anderson*, 1996 S.D. 46, ¶ 21, 546 N.W.2d at 401).

### A. The trial court's denial of Appellants' motion for mistrial did not constitute prejudicial error

Appellants argue that the trial court erred in denying their motion for mistrial because evidence regarding the lack of criminal charges was barred by a pretrial order entered by the trial court.[11] This is inaccurate. At no point prior to trial did Appellants file a motion in limine to exclude evidence regarding the lack of criminal charges against

[11] Appellants also argue that evidence of the lack of criminal charges against Eliason was inadmissible under SDCL 19-12-12 (FRE 410). However, SDCL 19-12-12 deals exclusively with pleas of guilty or nolo contendre. The statute clearly has no application here.

Eliason. Nor did they move to exclude evidence that Eliason was not convicted of any crimes associated with the allegations in Appellants' complaint.

Appellants note that Annabelle's and Olivia's filed a motion in limine to exclude evidence of Johnson's prior criminal history. Appellants contend that this motion in limine was expanded to cover "Eliason's criminal history." However, this contention is not supported by the record. (T.T. 21:1-25; 22:1-8; App. 69-70).

During the pretrial hearing on Annabelle's and Olivia's motion in limine to exclude evidence of Johnson's prior criminal history, Eliason asked that the motion extend to an alienation of affection lawsuit that had been brought against him. (T.T. 21:25; 22:1-8; App. 69-70). The trial court granted the motion in limine with respect to the alienation of affection claim against Eliason. (T.T. 22:22-25; 23:1; App.70-71). However, the trial court did not extend the motion in limine to cover Eliason's criminal history. *Id*.

Appellants emphasize that during voir dire, a juror inquired as to whether Eliason had been charged with a criminal offense, or whether he had ever been convicted. (T.T. 90:9-10; App. 72). Appellants' counsel instructed the juror that he must determine the case on the issues presented at trial based on the law as instructed by the Court. (T.T. 90:14-22; App. 72). During a bench conference that took place off the record, the trial court informed the parties that, during voir dire, they were not to discuss whether criminal charges were brought against Eliason. But the trial court never made a formal ruling regarding the admissibility of such evidence at trial. Therefore, at the time Johnson testified, there was no pretrial order in place precluding testimony regarding the lack of criminal charges against Eliason.

In *State v. Pasek,* this Court found that the lack of a pretrial order barring evidence was a significant factor to be considered in determining whether a trial court erred in denying a motion for mistrial. 2004 S.D. 132, 691 N.W.2d 301. In *Pasek,* a jury convicted the defendant of robbery in the first degree and three counts of grand theft. *Id*. ¶1-5. The defendant moved for a mistrial on the grounds that a witness testified regarding a prior robbery committed by the defendant in violation of a prior ruling of the trial court. *Id*. ¶14. The trial court denied the motion for mistrial and the defendant appealed. *Id*.

This Court held that the trial court did not abuse its discretion in denying the motion for mistrial. *Id*. ¶23. In so holding, this Court noted that it could find no record of the trial judge's ruling precluding testimony of the prior bank robbery, and the prosecutor's questions to the witness were not designed to elicit responses regarding the prior robbery. *Id*. ¶17 & 22.

In this case, as in *Pasek*, there is no record of the trial judge barring evidence regarding Eliason's criminal history. In addition, Counsel for Annabelle's and Olivia's did not solicit testimony from Johnson regarding the criminal charges against Eliason. Rather, Counsel for Annabelle's and Olivia's asked Johnson if he first learned of the allegations against Eliason when Appellants filed their applications for protection orders. (T.T. 202:21-25; App. 77; T.T. 203:1-6; App. 78). Johnson responded, "I heard about that he was going to court for the rape charge that he was not found guilty on." (T.T. 203:1-2; App. 78).

It is clear from Johnson's response to the question that he was confused as to the nature of the protection order proceedings against Eliason. Johnson certainly did not intend to mislead the jury with his testimony. As the trial court recognized in ruling on Appellants' motion for mistrial:

> I do not believe that Mr. Johnson deliberately injected the issue of the criminal acquittal, which was his testimony, something to the effect that Mr. Eliason was found not guilty of rape. I don't think he deliberately did that. I think that he was confused as to what a petition for protection order was and the nature of that proceeding.

(T.T. 220:18-24; App. 81).

In *State v. Phair,* this Court noted that "[a] witness' inadvertent comment on an excluded matter does not automatically result in a mistrial absent a showing of actual prejudice by the defendant." 2004 S.D. 88, ¶13, 684 N.W.2d 660, 665 (citation omitted). In *Phair*, the defendant moved for a mistrial after a witness testified concerning evidence that the trial court had deemed inadmissible. *Id*. ¶12-13. The trial court denied the motion. On appeal, this Court held that the trial court did not abuse its discretion in denying the defendant's motion for mistrial because the testimony at issue "was an isolated comment . . . that was unsolicited by the State," and after the defendant's counsel objected, the trial court admonished the jury to disregard the testimony. *Id*.

In this case, Johnson's testimony regarding Eliason's criminal record was not solicited by Annabelle's and Olivia's counsel. It was an isolated comment that was made inadvertently as a result of Johnson's confusion regarding the nature of the protection order proceedings. To ensure that Appellants would not be prejudiced by the comment,

the trial court gave a curative instruction to the jury.[12] (T.T. 214:4-21; App. 80). This curative instruction admonished the jury to disregard the witness's unsolicited testimony regarding Eliason's criminal history. The trial court further instructed the jury to base its decision exclusively upon the evidence presented at trial and to "disregard any consideration of whether or not there are criminal charges filed, a trial or a conviction or acquittal."[13] (T.T. 214:19-21; App. 80).

This Court has repeatedly declared that it must "presume that juries understand and abide by curative instructions." *State v. Dill*on, 2010 S.D. 72, 788 N.W.2d 360 (citing *State v. Maves,* 358 N.W.2d 805, 809 (S.D. 1984) (additional citations omitted). In this case, this Court must presume that the jury understood the curative instruction given by the trial court, and that the jury abided by the instruction when reaching its verdict. In light of this presumption, it cannot be said that the trial court's denial of Appellants' motion for mistrial was "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable." *Kvasnicka*, 2013 S.D. 25, ¶17, 829 N.W.2d at 127-28 (quoting *Lemler,* 2009 S.D. 86, ¶ 40, 774 N.W.2d at 286) (additional quotation omitted). Nor can

---

[12] In light of Johnson's testimony, the Court permitted Appellants to introduce evidence that the protective order was granted, and Appellants did so. (T.T. 221:20-23; App. 82; T.T. 406:15-20; App. 134).

[13] The trial court's curative instruction was certainly sufficient, as it was consistent with the instruction Appellants' counsel sought immediately following Johnson's testimony. Specifically, counsel for Appellants stated to the trial court:

> So I would ask the Court, number one, admonish the witness, and, number two, I think it's proper to instruct the jury at this time that the statement is incorrect, inaccurate and indeed false; that there was no rape charge that resulted in a not guilty verdict.

(T.T. 204:4-8; App. 79).

it be said that the trial court's denial of Appellants' motion for mistrial was harmful to Appellants' substantive rights. *See Phair,* 2004 S.D. 88, ¶ 13, 684 N.W.2d at 665 (quoting *Anderson*, 1996 S.D. 46, ¶21, 546 N.W.2d at 401). Therefore, the trial court's denial of Appellants' motion for mistrial did not constitute prejudicial error.

## III. The trial court properly instructed the jury and rejected Appellants' proposed jury instructions regarding the "proxy rule."

This Court's standard of review for jury instructions is well-established. Generally, "[a] trial court has discretion in the wording and arrangement of its jury instructions . . . ." *Bertelsen v. Allstate Ins. Co.,* 2013 S.D. 44, ¶41, 833 N.W.2d 545, 560 (quotation omitted). However, if a trial court gives erroneous jury instructions, it will constitute reversible error "if it is shown not only that the instructions were erroneous, but also that they were prejudicial." *Id*. "Erroneous instructions are prejudicial when in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party." *Id.*

### A. Appellants failed to assert intentional tort claims against Annabelle's and Olivia's

In their brief, Appellants do not acknowledge that Annabelle's and Olivia's filed a motion for summary judgment on December 22, 2010. (CR 182-184; App. 44-46). During the hearing on this motion for summary judgment, Appellants represented to the trial court that their intentional tort claims were not directed at Annabelle's or Olivia's. Instead, Appellants informed the trial court that these claims were asserted exclusively against Eliason.

In its summary judgment order, the trial court expressly noted that Appellees abandoned any intentional tort claim they might have asserted against Annabelle's and

Olivia's. (CR 265-266; App. 47-48). Appellants did not file a motion to vacate or reconsider the trial court's summary judgment order. In fact, during the pretrial conference, Appellants again represented to the trial court that they were not asserting intentional tort claims against Annabelle's or Olivia's. (T.T. 10:14-23; App. 63). It was not until the eve of trial that Appellants attempted to resurrect their intentional tort claims against Annabelle's and Olivia's by offering various jury instructions regarding the "proxy rule."

South Dakota law does not allow a plaintiff to assert new claims against a defendant through proposed jury instructions. *See* SDCL 15-6-8(a); *Turner v. Burlington Northern R. Co.*, 771 F.2d 341, 346 (8th Cir. 1985) (noting that jury instructions should be "confined to issues raised by the pleadings in a case"); *Orrison v. City of Rapid City*, 74 N.W.2d 489, 495 (S.D. 1956) (noting that "[t]he trial court should present to a jury only those issues which are raised by pleadings and which find support in the evidence"). Rather, such claims may only be raised through an amended complaint. In this case, the trial court did not grant Appellants' leave to amend their complaints. *See* SDCL 15-6-15(a). Nor did the trial court vacate Judge Riepel's summary judgment, which remains the law of the case. *Western States Land & Cattle Co., Inc. v. Lexington Ins. Co.*, 459 N.W.2d 429 (S.D. 1990) (holding that the parties were precluded from re-litigating issues decided in a prior summary judgment under the "law of the case" doctrine). Accordingly, Appellees respectfully request that this Court affirm the trial court's ruling on the grounds that any jury instruction regarding the "proxy rule" would have been beyond the scope of issues raised by the pleadings, as Appellants did not assert any intentional tort claims against Annabelle's and Olivia's.

### B. The "proxy rule" is inapplicable because Eliason was not the "alter ego" of Annabelle's or Olivia's

SDCL 47-34A-301 governs the liability of a limited liability company for the actions of a member. SDCL 47-34A-301(a)(2) provides: "An act of a member which is not apparently for carrying on in the ordinary course the company's business or business of the kind carried on by the company binds the company only if the act was authorized by the other members." Thus, under South Dakota law, a limited liability company is not liable for the acts of its member unless the member was acting in the "ordinary course of the company's business." Here, the intentional torts Appellants allege Eliason committed were outside the ordinary course of Annabelle's and Olivia's business. Therefore, Annabelle's and Olivia's are not liable for the alleged intentional acts of Eliason.

Despite this clear statutory authority, Appellants argue that Annabelle's and Olivia's are liable for the intentional torts of Eliason under the "proxy rule." In support of this argument, Appellants cite several cases involving harassment and/or discrimination claims under Title VII of the Civil Rights Act of 1964. *See Faragher v. City of Boca Raton*, 524 U.S. 775, 118 S.Ct. 2275 (1998); *Burns v. McGregor Electronic*, 955 F.2d 559 (8th Cir. 1992); *Pickett v. The Colonel of Spearfish, et al.,* 209 F.Supp.2d 999 (D.S.D. 2001). However, Title VII sets forth a unique standard for determining when an employer is liable for workplace harassment. This standard does not apply when Title VII is not at issue. Here, Appellants have not asserted claims for harassment or discrimination under Title VII. Therefore, the cases Appellants cite are inapplicable.

The only South Dakota authority Appellants cite in support of their argument is *Bensen v. Gobel*. 1999 S.D. 38, 593 N.W.2d 402. In *Benson*, a former employee argued that his supervisor was the alter ego of the corporation and, consequently, the

supervisor's actions could be imputed to the employer under the doctrine of respondeat superior. *Id.* ¶17. The trial court granted summary judgment in favor of the employer, and the employee appealed. *Id.* ¶7. This Court affirmed the ruling of the trial court. In doing so, this Court noted that in order for the corporation to be deemed vicariously liable for the actions of the supervisor, the supervisor must have been "so dominant in the corporation that he could be deemed the alter ego of the corporation *under the ordinary standards governing disregard of corporate entity."* *Id.* ¶18 (emphasis added).

The "ordinary standards" this court has applied when determining whether to pierce the corporate veil involve a two-prong test:

> 1) was there such unity of interest and ownership that the separate personalities of the corporation and its shareholders, officers or directors are indistinct or non-existent; and 2) would adherence to the fiction of a separate corporate existence sanction fraud, promote injustice or inequitable consequences or lead to an evasion of legal obligations.

*Osloond v. Osloond,* 2000 S.D. 46, ¶13, 609 N.W.2d 118, 122 (citing *Kansas Gas & Elec. Co. v. Ross,* 521 N.W.2d 107, 112 (S.D. 1994)).

In this case, Annabelle's and Olivia's existed separately from Eliason. There is absolutely no evidence that Annabelle's or Olivia's failed to maintain corporate legal formalities. Nor did Eliason comingle his assets with those of Annabelle's or Olivia's. *See Kansas Gas & Elec. Co.*, 521 N.W.2d at 112 (noting that in applying the first prong of the above test, this Court has considered "(i) the degree to which the corporate legal formalities have been maintained, and (ii) the degree to which individual and corporate assets and affairs have been commingled"). Most importantly, Eliason owned only a minority interest in Annabelle's and Olivia's. He did not have exclusive control over the

businesses. Under these facts, it cannot be said that Eliason was the "alter ego" of either Annabelle's or Olivia's.

### C. The trial court's rejection of Appellants' proposed jury instruction regarding the "proxy rule" was not prejudicial error

This Court has repeatedly recognized that even if a trial court gives erroneous jury instructions, this Court will not reverse unless it is shown that the erroneous instructions were prejudicial. "Erroneous instructions are prejudicial when in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party." *Bertelsen,* 2013 S.D. 44, ¶41, 833 N.W.2d at 560.

In this case, the jury found that Eliason did not commit the intentional torts alleged in Appellant's complaint. Therefore, as a matter of law, the jury could not have found that Annabelle's or Olivia's was liable under the "proxy rule." A jury instruction on the "proxy rule" would have had absolutely no effect upon the jury's verdict. For this reason, the trial court's decision not to instruct the jury regarding the "proxy rule" was not prejudicial error.

## CONCLUSION

This matter was fully litigated and tried to a jury over the course of the three-day trial. After considering all of the evidence, the jury found for the Appellees. Appellants have failed to show that the trial court committed reversible error. Therefore, Appellees respectfully request that this Court affirm the jury verdict in favor of Annabelle's and Olivia's. Appellees further request that this Court (1) affirm the trial court's denial of the Appellants' motion in limine to exclude evidence of Ruschenberg's abortion; (2) affirm the trial court's denial of Appellants' motion for mistrial; and (3) affirm the trial court's

instructions to the jury, including the trial court's rejection of Appellants' proposed jury instructions regarding the "proxy rule."

Dated at Sioux Falls, South Dakota, this ____day of October, 2013.

MURPHY, GOLDAMMER
& PRENDERGAST, LLP

Michael L. Luce
Lisa M. Prostrollo
101 North Phillips Avenue
Post Office Box 1535
Sioux Falls, SD 57101-1535
Telephone: (605) 331-2975
Facsimile: (605) 331-6473
E-Mail: lisa@mgplawfirm.com
mike@mgplawfirm.com
*Attorneys for Appellees*

## REQUEST FOR ORAL ARGUMENT

Appellees respectfully request oral argument.

Michael L. Luce

## CERTIFICATE OF SERVICE

The undersigned, the attorney for Appellees Annabelle's and Olivia's, hereby certifies that three true and correct copies of the foregoing *Brief of Appellees* were served by mail upon:

David Eliason
401 S. Phillips Ave., #3
Sioux Falls, SD 57104

*-and-*

Manuel J. de Castro, Jr.
de Castro Law Office
400 N. Main Avenue, Suite 205
Sioux Falls, SD 57104

Aaron Eiesland
Johnson Eiesland Law Office
PO Box 6900
Rapid City, SD 57709

on this ____ day of October, 2013.

_____
Michael L. Luce

## CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 9,189 words and 49,176 characters. I have relied on the word and character count of the word-processing program to prepare this certificate.

_____

Lisa M. Prostrollo

## CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that pursuant to SDCL 15-26A-79, she served the original and fifteen (15) copies of the above and foregoing Brief of Appellees on the Clerk of the Supreme Court by depositing the same this date in the United States mail, postage prepaid, at Sioux Falls, South Dakota, addressed as follows:

Shirley Jameson-Fergel
Clerk of the Supreme Corut
500 East Capitol Ave.
Pierre, South Dakota 57501-5070

on this ____ day of October, 2013.

_____
Lisa M. Prostrollo

## APPENDIX


| Tab | Description | Appendix Page |
|---|---|---|
| 1. | Complaint and Demand for Jury Trial – Heather Rensch | App. 1-11 |
| 2. | Complaint and Demand for Jury Trial – Jessica Cornelius | App. 12-24 |
| 3. | Complaint and Demand for Jury Trial – Megan Ruschenberg | App. 25-36 |
| 4. | Stipulation and Order for Consolidation | App. 37-43 |
| 5. | Defendants' Annabelle's and Olivia's Motion for Summary Judgment and Notice of Hearing | App. 44-46 |
| 6. | Summary Judgment Order | App. 47-48 |
| 7. | Judgment | App. 49-50 |
| 8. | Plaintiffs'/Appellants' Docketing Statement | App. 51-55 |
| 9. | Judge Tiede's E-mail Decision | App. 56-60 |
| 10. | Relevant Portions of the Trial Transcript | App. 61-182 |

**IN THE SUPREME COURT**
**OF THE**
**STATE OF SOUTH DAKOTA**

---

Appeal No. 26682

---

MEGAN RUSCHENBERG, JESSICA CORNELIUS, and HEATHER RENSCH,

Plaintiffs and
Appellants,

vs.

DAVID ELIASON, in his individual capacity and as an owner and employee of ANNABELLE'S ADULT SUPER CENTER OF SOUTH DAKOTA, LLC, and OLIVIA'S OF SOUTH DAKOTA, LLC, d/b/a OLIVIA'S ADULT SUPER STORE; and ANNABELLE'S ADULT SUPER CENTER OF SOUTH DAKOTA, LLC and OLIVIA'S OF SOUTH DAKOTA, LLC d/b/a OLIVIA'S ADULT SUPER STORE
Defendants and Appellees.

---

Appeal From The Circuit Court , Second Judicial Circuit
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE STUART L. TIEDE
CIRCUIT COURT JUDGE

---

# APPELLANTS' REPLY BRIEF

---


**ATTORNEYS FOR APPELLANTS:**
Aaron D. Eiesland
Johnson Eiesland Law Offices, P.C.
P.O. Box 6900
Rapid City, SD 57709-6900

Manuel J. de Castro, Jr.
de Castro Law Office
400 N. Main Ave. #205
Sioux Falls, SD 57104

**ATTORNEYS FOR APPELLEES:**
**ANNABELLE'S AND OLIVIA'S**
Michael C. Luce
Murphy, Goldammer & Prendergast
P.O. Box 1535
Sioux Falls, SD 57101

**ATTORNEY PRO SE**
David Eliason
401 S. Phillips Ave, #3

Sioux Falls, SD 57104

---

Notice of Appeal Filed April 26, 2013

## TABLE OF CONTENTS

TABLE OF CONTENTS ..... i

TABLE OF CASES ..... ii

ARGUMENT ..... 1

Issue 1: DENIAL OF PLAINTIFFS' MOTION IN LIMINE CONCERNING MEGAN RUSCHENBERG'S ABORTION ..... 1

Issue 2: PLAINTIFFS' MOTION FOR A NEW TRIAL BASED UPON KEITH JOHNSON'S FALSE STATEMENT AT TRIAL AND VIOLATION OF HIS OWN MOTION IN LIMINE SHOULD HAVE BEEN GRANTED? ..... 4

Issue 3: THE JURY SHOULD HAVE BEEN INSTRUCTED THAT INTENTIONAL TORTS OF OWNERS IN THE WORK ENVIRONMENT ARE THE ACTS OF THE COMPANY? ..... 6

CONCLUSION ..... 7

CERTIFICATE OF COMPLIANCE ..... 9

CERTIFICATE OF PROOF OF FILING ..... 9

CERTIFICATE OF SERVICE ..... 10

## TABLE OF CASES

Bensen v. Gobel,
1999 SD 38, 593 N.W.2d 402 (1999) ..... 6

Birchfield v. Birchfield,
417 N.W.2d 891, 893 (S.D. 1988) ..... 1

Burns v. McGregor Electronic,
955 F.2d 559 (1992) ..... 6

Faragher v. City of Boca Raton,
524 U.S. 775 (1998) ..... 6

Harter v. Plains Ins. Co., Inc.,
1998 SD 59, ¶32, 579 N.W.2d 625, 633 ..... 5, 6

Kjerstad v. Ravellette Publications, Inc.,
517 N.W.2d 419, 426 (SD 1994) ..... 2, 3, 5

Kuper v. Lincoln-Union Elec. Co.,
1996 SD 145, P32, 557 NW2d 748, 758) ..... 7

Pickett v. The Colonel of Spearfish, et al.,
209 F.Supp.2d 999, (2001) ..... 6

Picotte v. Pasion, et al.,
98-cv-04147, doc #101, U.S. Dist. Ct., Western District of South Dakota 2001, Appendix 1166

Other Authorities

SDCL § 19-12-12 ..... 6

*Larson,* Workers' Compensation Law § 68.22 at 13-130 ..... 7

Plaintiffs' Proposed Jury Instructions 30-50-10, 30-50-30, 30-50-80, 30-50-110, 30-50-140 and 30-200, Appendix 128 through 133 ..... 7

## ARGUMENT

Defendant Eliason has failed to respond to Plaintiff's Cornelius, Ruschenberg, and Rensch's appeal in the above-entitled case. Failure to respond to an appeal should be considered as "tantamount to an admission of appellee that appellant's appeal is meritorious and summarily reverse the appealed judgment." Birchfield v. Birchfield, 417 N.W.2d 891, 893 (S.D. 1988). This Court has not so found in any subsequent case, but the proposition is well worth considering in this action. Defendant Eliason contested each of this issues raised in Plaintiffs' appeal at trial, but now has abandoned them on appeal. Defendant Eliason chose not to pay his attorney and proceeded pro se in this case despite the fact he had attorneys working for him on other cases including one filed in the Fourth Circuit at the time of this trial. He had access to legal help and is to be held accountable for following the procedural rules of this Court. His decision to not follow those rules must have consequences. Therefore, Plaintiffs believe reversal on these grounds is warranted.

### Issue 1: DENIAL OF PLAINTIFFS' MOTION IN LIMINE CONCERNING MEGAN RUSCHENBERG'S ABORTION.

Prior to trial, Defendants made no formal explanation of the alleged probative value of the abortion evidence to the trial court. In the Corporate Defendants' Response Brief, Defendants engage in revisionist's history and argue that not only should the evidence be admitted, but the Plaintiffs should also prove the facts surrounding the abortion outside of the admitted testimony. In this revisionist history, a telling point is made, Defendants do not

make a single mention of the effect of the abortion evidence on the other Plaintiffs, Cornelius and Rensch. It is clear from the Defendants' argument that they fully intended to paint all the Plaintiffs with the same brush and improperly evoke the strongest of emotions of the jury to decide this case based on Pro-life or Pro-choice. A fair trial cannot be had when evidence is admitted to illegitimately persuade the jury. Kjerstad v. Ravellette Publications, Inc., 517 N.W.2d 419, 428 (SD 1994).

Defendants question Plaintiffs' short discussion of the probative value of the abortion evidence, however, it is the lack of the Defendants' discussion of the probative value at the time of the motion that is at issue. Defendants never offered the testimony as evidence of whether or not the abortion took place, the contents of the abortion forms or the contents of the medical records of the abortion procedure. These Defendants never made a request for any records of the abortion, yet now they complain that the Plaintiff did not gratuitously provide the information. Defendant Eliason merely joined with the LLC Defendants in their objection to the motion.

The more important question is the danger of unfair prejudice that the abortion issue can evoke. Without question abortion is one of the most sensitive topics to bring up in any setting. With abortion, heated debates are the norm. Defendants wanted this debate to occur in the jury room thereby misleading the jury down rabbit trails. The trial court made no appropriate finding of the probative value and spoke just as little to the danger of unfair

prejudice. The lack of discussion in the trial court's findings results in a record that can only produce one conclusion, the trial court failed to properly apply the 403 balancing test.

As to the question of whether the evidence had an improper effect on the jury, the only answer can be yes. For example, despite the fact that Defendant Eliason admitted to taking an electric shocking device, apparently used in sexual bondage, and shocking Plaintiff Rensch's arm to the point it left burn marks, the jury found against Rensch's claim for assault. What more clear evidence could there be of a prejudicial effect? The juror's minds were undoubtedly not on the facts of the case to reach their verdict. Likely they spent a majority of their time discussing the abortion issue rather than on the facts of whether the acts complained of occurred. As noted in Kjerstad, "the purpose of the motion in limine is to prevent prejudicial evidence from reaching the ears of the jury." Id. at 426.

Plaintiffs can comfortably believe that differing opinions of abortion exist in the staff, law clerks and the Justices of South Dakota Supreme Court just as they do in most every setting. Abortion touches people personally, politically and religiously. This case was not about whether or not Ruschenberg felt she was left with no choice but to abort this child. Not about her regrets of her choice. The case was not about the coloring of the other Plaintiffs by their affiliation with someone who had an abortion. This case was about harassment, sexual assault and false imprisonment. The jury should have been permitted to decide this case unencumbered and misled by the abortion issue.

Plaintiffs request this Court see through the post-trial justification and find that the issue of abortion should have never reached the jury's ears. Plaintiffs request a new trial be granted.

**Issue 2:** **PLAINTIFFS' MOTION FOR A NEW TRIAL BASED UPON KEITH JOHNSON'S FALSE STATEMENT AT TRIAL AND VIOLATION OF HIS OWN MOTION IN LIMINE SHOULD HAVE BEEN GRANTED.**

The position taken by Defendants in their response brief that the lack of charges against Eliason was not ruled upon for the trial is insupportable. In its brief, Defendant acknowledges that Eliason asked the trial court for permission to discuss the lack of charges against him. He unequivocally was told no. The LLC Defendants did not object to this ruling.

Despite Defendant LLC's own recognition that criminal charges should not be brought into the trial, Defendant permitted its owner to testify that he heard that Eliason was found not guilty of rape. The Defendants argue this was as a result of Johnson's confusion regarding the protective orders. A more dubious position cannot be taken.

At deposition Johnson was confused about a protection order versus a restraining order. Defendants try to expand this confusion to now include a criminal trial for rape. Regardless of the absurdity of the confusion, the protection orders were granted. Further, Eliason was never found not guilty of any charge as he was never tried.

Defense counsel spent the entire day before trial preparing this case and Mr. Johnson. Mr. Johnson sat through most of voir dire, opening statements and Defendant Eliason's testimony. During this time there were numerous breaks in which Defense counsel could have instructed his witness. It was not done. T.T. pg. 204 ln. 20 through pg. 205 ln. 1. Further, Defense counsel stated he did talk to Mr. Johnson before the trial regarding the protection order. T.T. pg. 205 ln. 18 through ln. 24. How there can be confusion between granted protection orders, which were injected into the trial by the LLC Defendants' counsel, and a non-existent acquittal of rape charges escapes all rational thinking. Mr. Johnson is an owner of adult bookstores in many states and as highlighted by his own motion in limine, has been before a court before. In fact, only a few minutes prior to his improper testimony, Mr. Johnson testified he saw an article about the protection order proceedings which led him to force Defendant Eliason out of the businesses. The assertion Mr. Johnson was confused is as baseless now as it was then.

Motions in limine can be brought both orally and in writing. Rulings of the trial court are binding on both parties. In this case, the lack of charges against Defendant Eliason was ruled inadmissible. The order was specific, and Johnson's violation was clear, thus reversal and a new trial is warranted. Kjerstad, 517 N.W.2d at 426.

Lastly, the curative instruction went far beyond correcting the misstatement by interjection the lack of charges against Eliason. This too is error. The specific order of the trial court to Mr. Eliason at the start of his voir dire was for him not to mention the lack of

criminal charges. In its curative instruction, the trial court not only stated that there was no finding of not guilty, but also that there was never any charges against Defendant Eliason. This instruction now placed the issue before the jury to consider why no charges were brought. This instruction was highly prejudicial and was brought to the Court's attention, yet no mistrial was granted. It is plain to see that the failure to grant the mistrial allowed the jury to color their opinions of the case with improper testimony.

"[A] new trial may follow only where the violation has prejudiced the party or denied him a fair trial." Harter v. Plains Ins. Co., Inc., 1998 SD 59, ¶32, 579 N.W.2d 625, 633. The Plaintiffs suffered extreme prejudice by not only the false testimony and the violation of the motion in limine, but also the corrective instruction which itself was a violation of SDCL § 19-12-12. "Prejudicial error is error which in all probability produced some effect upon the jury's verdict and is harmful to the substantial rights of the party assigning it." Id. Plaintiffs request that this Court reverse the denial of Plaintiffs' motion for new trial and remand for new trial.

**Issue 3: THE JURY SHOULD HAVE BEEN INSTRUCTED THAT INTENTIONAL TORTS OF OWNERS IN THE WORK ENVIRONMENT ARE THE ACTS OF THE COMPANY?**

Throughout the case the LLC Defendants argued and presented evidence with the intention of protecting Defendant Eliason from liability. Despite its actions, the LLC Defendants claim that the law does not recognize corporate responsibility for the intentional acts of its owners. Defendant has argued that Title VII law is inapplicable to the present

action. Plaintiffs have cited Faragher v. City of Boca Raton 524 U.S. 775 (1998), the South Dakota Supreme Court's decision in Bensen v. Gobel, 1999 SD 38, 593 N.W.2d 402 (1999), the Eighth Circuit Court of Appeals in Burns v. McGregor Electronic, 955 F.2d 559 (1992) and finally the Federal District Court for the State of South Dakota in Picotte v. Pasion, et al., 98-cv-04147, doc #101, U.S. Dist. Ct., Western District of South Dakota 2001, Appendix 116, and Pickett v. The Colonel of Spearfish, et al., 209 F.Supp.2d 999, (2001). All of these cases hold to the contrary.

In the present case, the only conclusion is that Defendant Eliason is completely dominant in the company as he is both the owner and highest supervisor of both LLCs. Accordingly, the jury should have been instructed he was to be treated as the alter ego of the companies. This logical conclusion is further supported by *Larson,* Workers' Compensation Law § 68.22 at 13-130. To conclude otherwise invalidates the settled worker's compensation law of South Dakota.

"A court's failure to give a requested instruction that properly sets forth the law constitutes error." Kuper v. Lincoln-Union Elec. Co., 1996 SD 145, P32, 557 NW2d 748, 758 (citing Bauman v. Auch, 539 NW2d 320, 323 (SD 1995)). Plaintiffs request this Court reverse the trial court's denial of Plaintiffs' jury instruction on the 'proxy rule' and remand this case for a new trial incorporating Plaintiffs' Proposed Jury Instructions 30-50-10, 30-50-30, 30-50-80, 30-50-110, 30-50-140 and 30-200, Appendix 128 through 133.

## CONCLUSION

A fair trial is the one thing everyone expects to be entitled to. A fair trial was not had in this case.

For the reasons set forth in this brief and Plaintiffs' initial Brief of Appellants, Plaintiffs' urge this Court to enter a decision:

1. Finding the introduction of the abortion issue into the proceedings was improper and an abuse of the trial court's discretion;
2. Finding that the LLCs violated the trial court's motion in limine on criminal backgrounds of the trial participants and settled state law stated when Keith Johnson testified in court that Eliason had been found not guilty in a criminal proceeding when in fact that was no criminal proceeding. Such testimony was unduly prejudicial and impacted the outcome of the trial;
3. Finding the trial court abused its discretion in not granting Plaintiffs' motion for new trial based upon the LCC's false statement and violation of its own motion in limine;
4. Finding that the trial court misinstructed the jury as to the joint liability of the LLC's and Eliason for the intentional torts of Eliason;
5. Reversing the jury's verdict in favor of the Defendants;
6. Reversing the trial court's denial of Plaintiffs' motion in limine on the abortion issue;
7. Reversing the trial court's denial of Plaintiffs' motion for new trial; and,

8. Remanding the action for retrial with direction that the abortion issue is inadmissible and incorporating instructions that the intentional acts of Eliason are imputed upon the LLC's.

Dated this ___ day of November, 2013.

_____

AARON D. EIESLAND
Johnson Eiesland Law Offices, PC
4020 Jackson Boulevard
Rapid City, SD 57702
(605) 348-7300

And

Manuel J. de Castro, Jr.
deCastro Law Office PLLC
400 N. Main Ave., Suite 205
Sioux Falls, SD 57104

**Attorney for Plaintiffs and Appellants**

## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with SDCL 15-26A-66(4). This brief eight (8) pages in length, exclusive of certificates of service, is typeset in Times New Roman and contains 2,380 words. The word processing software used to prepare this brief is Corel Word Perfect 9.0.

y:_____

Aaron D. Eiesland

## CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that pursuant to SDCL 15-26A-79 he served the original and fifteen (15) copies of the above and foregoing Appellants' Reply Brief on the Clerk of the Supreme Court by depositing the same this date in the United States mail, postage prepaid, at Rapid City, South Dakota, addressed as follows:

Shirley Jameson-Fergel
Clerk of the Supreme Court
500 East Capitol Ave.
Pierre, South Dakota 57501-5070

Dated this 5th day of November, 2013.

By:_____
Aaron D. Eiesland

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two true and correct copies of the Appellants' Reply Brief in the above entitled matter upon the Appellees by mailing, by U.S. Mail with all first class postage thereupon prepaid, to their attorney of record on the 5th day of November, 2013, to-wit:

Michael L. Luce
Murphy, Goldammer & Prendergast
P.O. Box 1535
Sioux Falls, SD 57101

David Eliason
401 S. Phillips Ave, #3
Sioux Falls, SD 57104

Dated this 5th day of November, 2013.

By:_____
Aaron D. Eiesland