

LEGAL ISSUES

ISSUE I

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING THE DEFENDANTS' DAUBERT MOTION TO EXCLUDE THE EXPERT OPINION OF DR. JOHN R. GEHM WHO OPINED THAT THE TREATMENT OF TOSH BY THE THREE DEFENDANTS AMOUNTED TO EXTREME AND OUTRAGEOUS MISCONDUCT.

The trial court granted the defendants' Daubert motion excluding all of Dr. Gehm's testimony. [See Memorandum Decision (APP 1-18; RA 349)].

MOST RELEVANT CASES

SDCL 19-15-2;

Daubert vs. Merrill Dow Phar., Inc., 509 US 579 (1993);

First Western Bank Wall vs. Olson, 2001 SD 16;

State vs. Guthrie, 627 NW 2d 401 (SD 2001).

ISSUE II

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY DENYING TOSH'S MOTION TO AMEND SCHEDULING ORDER DATED JANUARY 26, 2005 (RA 447).

The trial court denied Tosh's Motion, which sought leave to employ the services of a second expert, even though a trial date had not yet been set and did not start until September 18, 2006, the trial court's rationale being that granting the defendants' Daubert motion, prohibiting Tosh's

first expert from testifying at a later trial, was not "good cause" for granting a continuance.

MOST RELEVANT CASES

SDCL 15-6-16;

Annette vs. American Honda Motor Company, 548 NW 2d 798 (SD 1995);

Duncan vs. Pennington Co, Housing Authority, 382 NW 2d 425 (SD 1986).

ISSUE III

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (RA 185) ON THE CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS BASED UPON THE 24/7 SURVEILLANCE OF TOSH FOR ALMOST A MONTH.

The trial court granted the defendants' motion striking this causes of action from the case, based on the court's belief that the 24/7 surveillance was proper police conduct, contrary to the expert opinion of Dr. John R. Gehm. [See Memorandum Decision (APP 1-18; RA 349).]

MOST RELEVANT CASES

Baldwin vs. First Nat'l Bank, 362 NW 2d 85 (SD 1985);

Tibke vs. McDougall, 479 NW 2d 898 (SD 1992);

Wilson vs. Great Northern Ry. Co., 157 NW 2d 19 (SD 1968).

ISSUE IV

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN PROHIBITING RHONDA FLIEHS, A MENTAL HEALTH PROFESSIONAL, WHO TREATED TOSH FOR EMOTIONAL DISTRESS BECAUSE OF THE CONDUCT OF THE THREE DEFENDANTS, FROM TESTIFYING ABOUT HER FINDINGS AND OPINIONS.

The trial court granted the defendants' motion to prohibit Rhonda Fliehs from testifying about any of her findings or opinions that were not found verbatim in her office notes from her sessions with Tosh.

MOST RELEVANT CASES

SDCL 15-6-26(b)(4);

Chavez vs. Loiseau Construction, Inc., 2006 WL 2382330

(D.S.D.);

Stormo vs. Strong, 469 NW 2d 816 (SD 1991).

ISSUE V

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY PROHIBITING TOSH FROM SUBMITTING THE QUESTION OF PUNITIVE DAMAGES TO THE JURY FOR 1) INTENTIONAL INFLECTION OF EMOTIONAL DISTRESS AND 2) INTENTIONAL DAMAGE TO PRIVATE PROPERTY.

The trial court granted the defendants' motion prohibiting the submission of the issue of punitive damages to the jury for those two causes of action finding that Tosh did not prove malice.

MOST RELEVANT CASES

SDCL 21-3-2;

Bass vs. Happy Rest, Inc., 507 NW 2d 313 (SD 1993);

Kjerstad vs. Ravellette Pub., Inc., 517 NW 2d 419 (SD 1994);

Vreugdenhill vs. First Bank of S.D., 467 NW 2d 756 (SD

ISSUE VI

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY ALLOWING PIONK TO TESTIFY THAT HE JUSTIFIED DAMAGING TOSH'S VEHICLE BECAUSE HE READ AN "ARTICLE."

Over the objection of Tosh's attorney, the trial court allowed Pionk to testify that he read an "article" justifying this conduct.

MOST RELEVANT CASES

SDCL 19-16-1;

SDCL 19-16-22;

Schrader vs. Tjarks, 522 NW 2d 205 (SD 1994).

ISSUE VII

WHETHER THE TRIAL COURT COMMITTED REVERSIBLE ERROR BY GRANTING PIONK'S MOTION TO AMEND VERDICT ON THE ISSUE OF INTENTIONAL DAMAGE TO PRIVATE PROPERTY.

The trial court granted the defendant's motion taking away from Tosh the verdict rendered by the jury against Pionk for intentionally damaging Tosh's automobile.

MOST RELEVANT CASES

SDCL 15-6-50(b);

Virchow vs. University Homes, Inc., 699 NW 2d 499 (SD
2005).