

TUESDAY, APRIL 22, 2008  
11:00 A.M.

NO. 3

#24710

JAMES SCOTT KIRLIN AND  
KRISTIN KIRLIN,  
Plaintiffs and Appellants,

v.

KIM HALVERSON,  
Defendant,

KELLY CAWTHORNE, AND PKJ, INC.  
D/B/A EMPIRE HVAC,  
Defendants and Appellees.

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(FOR APPELLANTS)

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(FOR APPELLEE KELLY CAWTHORNE  
AND PKJ, INC D/B/A EMPIRE HVAC)

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(FOR APPELLEE KELLY CAWTHORNE  
AND PKJ, INC D/B/A EMPIRE HVAC)

The Honorable William J. Srstka, Jr.  
Second Judicial Circuit  
Minnehaha County

(CIV 05-2536)

(DG 09-22-08)

20-20-10

## STATEMENT OF ISSUES

I. *Respondeat Superior* (Scope of Employment; Apparent Authority)

Was Defendant Halverson's assault on Plaintiff, James Scott Kirlin, although otherwise completely within the scope of employment, so violent as to be "unforeseeable" and, therefore, not within the scope of employment as a matter of law (or were there, instead, still genuine material issues of fact in need of resolution)?

The Circuit Court held in the affirmative that the assault was unforeseeable.

- (1) *Deuchar v. Foland Ranch, Inc.*, 410 N.W.2d 177 (S.D. 1987)
- (2) *Leafgreen v. American Family Mut. Ins. Co.*, 393 N.W.2d 275 (S.D. 1986)
- (3) *Skow v. Steele*, 49 N.W.2d 24 (S.D. 1951)
- (4) *Olson v. Tri-County State Bank*, 456 N.W.2d 132 (S.D. 1990)

## II. Tort

Alternatively, and whether or not the assailant (Halverson) may have departed from the scope of his employment due to the violent nature of his actions (a point denied by Plaintiffs), is there still a genuine material issue of fact on any theory brought against Cawthorne and PKJ, Inc. based on a tort duty arising under *Restatement (Second) of Torts*, §317 (negligent retention), negligent hiring, negligent supervision, or any other valid basis (*i.e.*, relationship, nexus, special relationship, situation, or circumstance, etc.) out of which a tort duty can arise?

The Circuit Court held in the negative.

- (1) *Barger for Wares v. Cox*, 372 N.W.2d 161 (S.D. 1985)
- (2) *Grand Aerie Fraternal Order of Eagles v. Carneyhan*, 169 S.W.3d 840 (Ky. 2005)
- (3) *Smith ex rel. Ross v. Lagow Const. & Developing Co., et al.*, 2002 S.D. 37, 642 N.W.2d 187
- (4) *Yunker v. Honeywell, Inc.*, 496 N.W.2d 419 (C.A. Minn. 1993)

## III. Civil Conspiracy

Did Plaintiffs present a triable genuine material issue of fact as to whether "Defendants Cawthorne, Halverson, and PKJ, Inc. ever conspired to take the unlawful action actually taken against Kirlin"?

The Circuit Court held in the negative.

- (1) *Nelson v. WEB Water Development Ass'n., Inc.*, 507 N.W.2d 691 (S.D. 1993)
- (2) *Garza v. City of Omaha*, 814 F.2d 553 (8<sup>th</sup> Cir. 1987)
- (3) *Setliff, III, M.D., P.C. v. Akins, M.D., et al.*, 2000 S.D. 124, 616 N.W.2d 878

#### IV. Punitive Damages

Did Plaintiffs fail to state a claim for punitive damages against Defendants Cawthorne and PKJ, Inc. on the grounds (a) that there was the lack of a viable underlying cause of action for compensatory damages, (b) that no genuine issues of material fact existed which could show "outrageous conduct or punishable conduct," and (c) in view of the evidence presented that Defendant Halverson's employment was "managerial"?

The Circuit Court held in the affirmative.

- (1) *Dahl v. Sittner*, 474 N.W.2d 897 (S.D. 1991)
- (2) *Brown v. Youth Services Intern. of South Dakota, Inc.*, 89 F.Supp.2d 1095 (D.S.D. 2000)
- (3) *Fullmer v. State Farm Ins. Co.*, 498 N.W.2d 357 (S.D. 1993)
- (4) *Olson v. Tri-County State Bank*, 456 N.W.2d 132 (S.D. 1990)