

Introduction to
The South Dakota
Supreme Court



and
Case Summaries for
Oral Arguments at the
October Term of the Court
to be held
October 1 through October 3, 2018
University of Sioux Falls
Sioux Falls, South Dakota

David Gilbertson
CHIEF JUSTICE

Supreme Court
STATE OF SOUTH DAKOTA



October 1, 2018

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

Ladies and Gentlemen:

Your Supreme Court welcomes you to our October Term.

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

Sincerely yours,

David Gilbertson
Chief Justice

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The justices have extended an invitation to the public to attend any of the Court's sessions. To assist with the Supreme Court visit, persons in attendance must abide by proper courtroom etiquette. The Supreme Court employs security methods to ensure the well-being of all who attend its proceedings and all attending the morning court sessions will be requested to pass through a metal detector. Backpacks and book bags should not be brought, and other bags and purses are subject to inspection and search by security personnel.

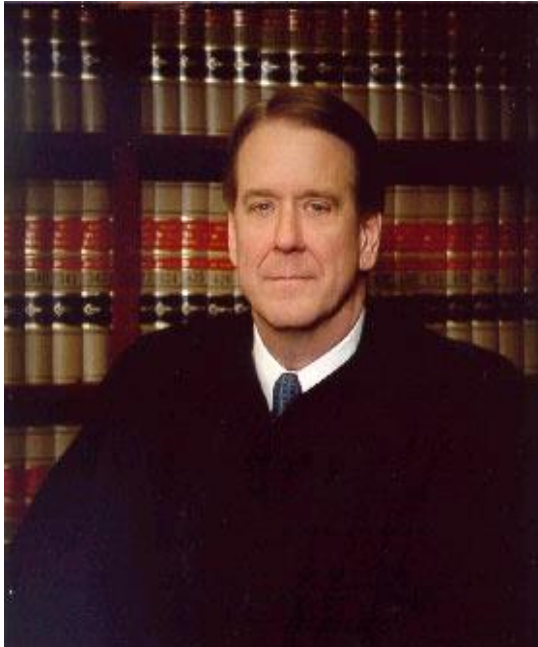


Chief Justice David Gilbertson

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

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

He served as President of the Conference of Chief Justices for the 2015-2016 Term. He has previously held the positions of Board Member, First-Vice President and President-elect and has chaired various committees. He also served as Chairman of the Board of Directors for the National Center for State Courts for its 2015-2016 Term. From 2010 to 2016 he served as the state court representative of the Criminal Rules Committee of the United States Courts. In 2006 he was the recipient of the Distinguished Service Award from the National Center for State Courts for his defense of judicial independence. He was the recipient of the "Grass Roots" Award by the American Bar Association in 2014 also for his defense of judicial independence. He is the past President of the South Dakota Judges Association. He also serves on the Judicial-Bar Liaison Committee of the State Bar Association and has served as a Court Counselor at South Dakota Boys State since 1995. Chief Justice Gilbertson and his wife Deb, have four children.



Justice Steven L. Zinter

Justice Zinter, of Pierre, was appointed to the Supreme Court on April 2, 2002 by former Governor William J. Janklow. He received his Bachelor of Science degree from the University of South Dakota and his Juris Doctor from the University of South Dakota School of Law. Upon graduation from law school in 1975, Justice Zinter was an Assistant Attorney General for the State of South Dakota. From 1978 to 1986 he was engaged in the private practice of law. Justice Zinter also served as the Hughes County State's Attorney from 1980-1986. He was appointed as a Circuit Judge in 1987 and served in that capacity until 1997. In 1997 he was appointed Presiding Judge of the Sixth Judicial Circuit and served in that capacity until his appointment to the Supreme Court. He was appointed from the Third Supreme Court District, which includes Beadle, Bennett, Brookings, Brule, Buffalo, Fall River, Haakon, Hand, Hughes, Hyde, Jackson, Jerauld, Jones, Kingsbury, Lake, Lyman, Mellette, Miner, Moody, Sanborn, Oglala Lakota, Stanley, Sully, Todd and Tripp counties. Justice Zinter was retained by the voters in 2006 and 2014. He is a member of the American Bar Association, the State Bar Association, and the South Dakota Judges Association. He is a past trustee of the Harry S. Truman Foundation along with a number of other boards and commissions. Justice Zinter and his wife have two children and five grandchildren.



Justice Janine M. Kern

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



Justice Steven R. Jensen

Justice Jensen was appointed to the Supreme Court by Governor Dennis Daugaard. He was sworn in on November 3, 2017. Justice Jensen represents the Fourth Supreme Court District consisting of Union, Clay, Yankton, Hutchinson, Hanson, Davison, Bon Homme, Douglas, Aurora, Charles Mix, Gregory, McCook, Turner and Lincoln Counties. Justice Jensen grew up on a farm near Wakonda, South Dakota. He received his undergraduate degree from Bethel University in St. Paul, Minnesota in 1985 and his Juris Doctor from the University of South Dakota School of Law in 1988. He clerked for Justice Richard W. Sabers on the South Dakota Supreme Court before entering private practice in 1989 with the Cray Huff Law Firm in Sioux City, Iowa and Dakota Dunes, South Dakota. In 2003, Justice Jensen was appointed as a First Judicial Circuit Judge by former Governor Mike Rounds. He became the Presiding Judge of the First Judicial Circuit in 2011. Justice Jensen served as chair of the Unified Judicial System's Presiding Judges Council, president of the SD Judges Association, and has served on other boards and commissions. In 2009, Justice Jensen was appointed as a Judicial Fellow to the Advanced Science and Technology Adjudication Resource Center in Washington D.C. Justice Jensen and his wife, Sue, have three children.



Justice Mark E. Salter

Justice Salter began as a member of the Supreme Court on July 9, 2018, following his appointment by Governor Dennis Daugaard. Justice Salter received a Bachelor of Science degree from South Dakota State University in 1990 and his Juris Doctor degree from the University of South Dakota School of Law in 1993. After clerking for a Minnesota state district court, he served on active duty in the United States Navy until 1997 and later served in the United States Naval Reserve. Justice Salter practiced law with the Sioux Falls firm of Cutler & Donahoe, where he became a partner before leaving in 2004 to return to public service with the United States Attorney's Office for the District of South Dakota. As an Assistant United States Attorney, Justice Salter focused on appellate practice and became the chief of the office's Appellate Division in 2009. He was appointed as a Circuit Court Judge by Governor Daugaard and served in the Second Judicial Circuit from 2013 until his appointment to the Supreme Court in 2018. Justice Salter served as the presiding judge of the Minnehaha County Veterans Treatment Court from its inception in 2016 until 2018. He also serves as an adjunct professor at the University of South Dakota School of Law where he has taught Advanced Criminal Procedure and continues to teach Advanced Appellate Advocacy. Justice Salter represents the Second Supreme Court District which includes Minnehaha County. He and his wife, Sue, have four children.



Clerk of the Supreme Court

Shirley Jameson-Fergel is the Clerk of the South Dakota Supreme Court. It is the function of this office to assist the Supreme Court, and especially the Chief Justice, in the organization of the correspondence, exhibits, and other documentation related to the formal activities of the Supreme Court. This includes monitoring the progress of appeals; scheduling oral arguments before the Court; recording Court decisions, orders and directives; and controlling their release and distribution. The Clerk's office is also responsible for the management of all legal records of the Court, compiling appellate statistics, and documenting and disseminating Court rules.



2018-2019 Supreme Court Law Clerks

Law Clerks are employed by the Court to assist the Justices with research and writing of the opinion on the cases under consideration. In the photograph above from left to right, Brigid Hoffman (Supreme Court Law Clerk), Jennifer Doubledee (Justice Salter), Lora Waeckerle (Justice Kern), Shad Christman (Chief Justice Gilbertson), Jennifer Williams (Justice Zinter), and Kristopher Reed (Justice Jensen).

Summary of Jurisdictions for the South Dakota Court System

Supreme Court

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

Court terms held throughout the calendar year.

Has appellate jurisdiction over circuit court decisions.

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

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

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

Circuit Court

Circuit Court services available in each county seat.

Counties grouped into seven circuits, served by forty-one judges elected from within their circuits for eight-year terms. Vacancies filled by the Governor, who appoints replacements from a list of candidates recommended by the Judicial Qualifications Commission.

Trial courts of original jurisdiction in all civil and criminal actions. Exclusive jurisdiction in felony trials and arraignments, and civil actions involving damages of more than \$12,000. Jurisdiction of less serious civil and criminal matters is shared with magistrate courts, over which the circuit courts have appellate review.

The Supreme Court Process

The judicial system of South Dakota has two levels. The circuit courts are the lower courts through which criminal prosecutions and most civil lawsuits are processed. The South Dakota Supreme Court is the state's highest court and the court of last resort for parties who seek to change adverse decisions of the circuit court. The Supreme Court is the final judicial authority on all matters involving the legal and judicial system of South Dakota.

When an individual involved in a legal action is convinced that the judge in the circuit court has made an error in deciding the law of the case, that party may bring the case to the Supreme Court for a remedy. This is called an “appeal” and the court hearing the appeal is called the “appellate” court. The party bringing the appeal is an “appellant” and the other party—usually the party who was successful in the lower court—is the “appellee.” Most of the work of the Supreme Court involves its appellate jurisdiction.

In an appellate action, the Court may decide to hear “oral arguments” in the case, in which both parties are permitted to come before the Court and give a short presentation (an argument) to support their position in the case. There is no trial, the lawyers do not confront each other, and the Court does not take testimony from witnesses. Usually, the attorneys for the parties involved stand before the Court and speak for twenty minutes to emphasize or clarify the main points of the appeal. The members of the Court may ask questions or make comments during the lawyer's

presentation. After hearing the oral arguments, the Court discusses the case and one justice is assigned to write the opinion in the case. Other justices may write concurring or dissenting opinions to accompany the majority opinion, all of which are published as formal documents by the West Publishing Company in the North Western Reporter. The Court's opinions are also available online at: <http://ujs.sd.gov/>

In addition to its appellate jurisdiction, the Supreme Court has its own area of "original" jurisdiction. It is also responsible for a wide range of administrative duties involving the personnel and procedures of the court system and the professional conduct of attorneys throughout the state.

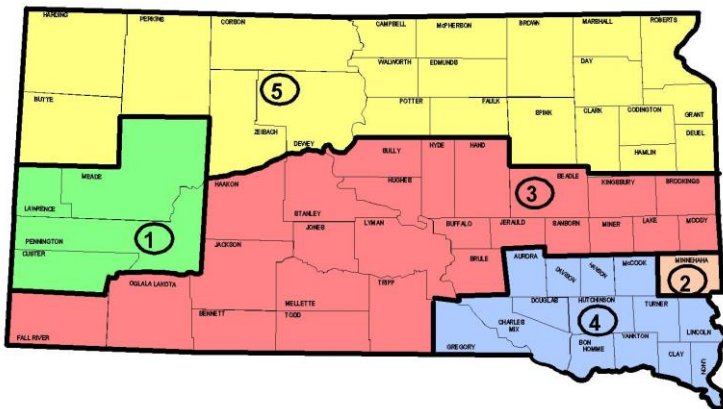
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench to assist in the decision-making process. Such an appointment may occur when a justice is disqualified. A justice may be disqualified when the justice appears to have a conflict or personal involvement in a case, or if there is a vacancy on the Court caused by the illness or departure of a justice.

All of those who sit on the Supreme Court must be licensed to practice law in the state and permanent justices must be voting residents of the district from which they are appointed at the time they take office. There is no formal age requirement for those who serve on the Court, but there is a statutory requirement that a justice must retire shortly after reaching the age of seventy. A retired justice, if available, may be called back to temporary judicial service in any of the state's courts.

Under the terms of a constitutional amendment passed by the voters in November 1980, vacancies on the Supreme Court are filled by governor's appointment. This appointment must be made from a list of two or more candidates recommended by the Judicial Qualifications Commission. All Supreme Court justices must stand, unopposed, for statewide approval or rejection by the electorate in a retention election. For newly appointed justices, the retention vote is held at the next general election following the third year after appointment. After the first election, justices stand for retention election every eighth year.

Chief Justice Gilbertson was appointed in 1995 from District Five. Justice Zinter was appointed in 2002 from District Three. Justice Kern was appointed in 2014 from District One. Justice Jensen was appointed in 2017 from District Four and Justice Salter was appointed in 2018 from District Two. Chief Justice Gilbertson and Justice Zinter were each retained in the November 2014 general election.

South Dakota Supreme Court Appointment Districts
Effective January 23, 2012



**In the Supreme Court
of the
State of South Dakota**

Courtroom Protocol

The following list of Do's and Don'ts was prepared for the benefit of anyone attending one of the Court's sessions. Your cooperation in observing proper Courtroom protocol will assure that the lawyers presenting argument before the Court will not be unduly distracted and that the proper respect for the judiciary will be maintained.

Your cooperation is appreciated.

DO

- Remove caps/hats before entering the Courtroom
- Enter the Courtroom prior to the commencement of an argument
- Stand when the Justices enter and leave the Courtroom
- Listen attentively
- Turn cell phones off before entering the Courtroom

DO NOT

- Bring food, drinks, cameras or recording equipment into the Courtroom
- Enter or leave the Courtroom during the course of an argument
- Chew gum or create any distraction
- Engage in any conversation once an argument begins

Supreme Court of South Dakota
October 2018 Term

Nine cases are scheduled for oral argument during this term. For these cases, attorneys are permitted to appear before the Court to emphasize certain points of the case and respond to the Court's questions. In addition to these oral arguments, numerous other cases will be considered by the Court during this term without further argument by the attorneys. These cases are on the Court's "non-oral" calendar. After hearing oral arguments each day, the Court will consider several non-oral cases.

Case Summaries

The case summaries on the following pages have been prepared only for the cases scheduled for oral argument. The case number, date and order of argument appear at the top of each summary.

Piper v. Young

Briley Piper, along with co-defendants Elijah Page and Darrell Hoadley, were charged with first-degree murder, kidnapping, first-degree robbery, first-degree burglary, and grand theft in the March 2000 beating death of Chester Allan Poage.

In January 2001, Piper entered guilty pleas on all five charges. The circuit court judge sentenced him to death on the first-degree murder conviction, life imprisonment on the kidnapping conviction, and consecutive maximum sentences on the robbery, burglary, and grand theft convictions. Page also pled guilty to all five charges and was also sentenced to death by a circuit court judge. Hoadley pled not guilty and requested a jury trial. A jury found Hoadley guilty, but could not reach a unanimous decision on the death penalty. Therefore, Hoadley was sentenced to life imprisonment without parole.

Piper's January 2001 death sentence was affirmed by the South Dakota Supreme Court in 2006 (*Piper I*). Piper applied for a writ of habeas corpus in 2006, arguing he was not properly informed of his right to have a jury decide whether to impose the death penalty. The Court agreed in 2009 (*Piper II*) and remanded the case back to the circuit court for resentencing by a jury.

On remand, Piper made a motion to withdraw his guilty pleas, which was denied. Following a three-day resentencing hearing in 2011, a jury returned a unanimous recommendation that the death sentence be

imposed based upon its finding of three aggravating circumstances. The killing was committed (1) to obtain items of value, (2) to eliminate Poage as a witness, and (3) involved torture and depravity of mind.

Piper's 2011 death sentence was again reviewed by the South Dakota Supreme Court, which affirmed the circuit court's denial of Piper's motion to withdraw his guilty plea because it was beyond the scope of the remand. The Court also held that Piper's death sentence was lawfully imposed by the 2011 jury (*Piper III*).

In 2014, Piper applied for a second writ of habeas corpus, arguing his original guilty pleas were not made knowingly and intelligently and therefore did not constitute a valid waiver of his Sixth Amendment right to a jury trial. He also alleged ineffective assistance of counsel regarding his guilty plea. Piper further argued his counsel was ineffective at his resentencing hearing for failing to (1) properly examine potential jurors, (2) investigate the State's witnesses, (3) appeal the court's denial of a mistrial after it allowed testimony regarding penitentiary privileges, and (4) object or appeal issues regarding the cross-examination of a defense witness. The circuit court denied Piper's second habeas petition, finding that the Court's holding in *Piper II* did not authorize the circuit court to withdraw Piper's guilty pleas. The circuit court also found Piper's ineffective assistance of counsel claims failed to meet his burden of proving that his counsel's representation fell below an objective standard of reasonableness subjecting him to unfair prejudice.

Piper appeals the circuit court's denial of his second writ of habeas corpus, raising the following issues:

1. Whether Piper's guilty plea is valid when it was not knowingly and intelligently made in violation of his Constitutional right to a jury trial.
2. Whether the State advanced inconsistent arguments during the separate sentencings of Piper and Page in violation of Piper's right to due process.
3. Whether Piper's counsel provided ineffective assistance in violation of his Sixth, Eighth, and Fourteenth Amendment rights.

Mr. Ryan Kolbeck, Attorney for Appellant Briley Piper

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

**Dollar Loan Center of South Dakota, LLC v.
South Dakota Department of Labor and
Regulation, Division of Banking**

In 2017, South Dakota voters approved an initiated measure (Initiated Measure 21) making it illegal for state-licensed money lenders to issue certain loans that include finance charges exceeding a 36% annual percentage rate. The law was codified in SDCL 54-4-44.

Dollar Loan Center of South Dakota is a state-licensed money lender. After the new law went into effect, Dollar Loan informed the Division of Banking that it intended to make loans using a new loan contract. The contract provided that Dollar Loan would cap the annual percentage rate at 36% but would impose late fees upon default by the consumer.

The Division audited Dollar Loan’s use of this new loan product, and the Division concluded that the new loan product did not comply with SDCL chapter 54-4. More specifically, the Division determined that Dollar Loan was issuing “short-term consumer loans” for which it was not licensed. The Division further determined that the *actual* annual percentage rate charged by Dollar Loan, after considering late fees, was in a range between 300% and 487%. The Division ultimately found that Dollar Loan’s product was “a device, subterfuge, or pretense to evade the requirements of SDCL 54-4-44.4.”

In September 2017, the Division issued a cease and desist and license revocation order against Dollar

Loan. The order declared void and uncollectable any loan originated by Dollar Loan after June 21, 2017. The order also revoked Dollar Loan's money lender licenses. Dollar Loan was directed to immediately cease engaging in the business of lending money in South Dakota and immediately surrender all South Dakota money lending licenses to the Division. The order was issued without a hearing; but the order provided that a hearing would be held before the South Dakota Banking Commission upon any aggrieved party's request. The Division later entered a stay that affected its order and requested a hearing before the Office of Hearing Examiners pursuant to SDCL Chapters 1-26 and 1-26D.

Although a hearing date was set by the Office of Hearing Examiners, and although Dollar Loan was given notice of the hearing, Dollar Loan appealed the Division's order to the circuit court before the hearing could be held. Dollar Loan alleged, among other things, that the Division's order was an appealable final order that violated Dollar Loan's right to due process. The State moved to dismiss the appeal, asserting that the circuit court lacked jurisdiction to consider the appeal because Dollar Loan had not exhausted its administrative remedies.

The circuit court dismissed Dollar Loan's appeal. It concluded it had no jurisdiction over the appeal because the Division's order was not a "final decision" and Dollar Loan had yet to exhaust its administrative remedies. The court also concluded that no exception to the exhaustion requirement applied. The court finally concluded that there was no jurisdiction to review the order as an "intermediate ruling" because that avenue for appeal requires the absence of an adequate remedy

on appeal of the final agency decision, and in this case, Dollar Loan would have an adequate remedy on review of the agency's final decision.

Dollar Loan appeals, raising the following issues:

1. Whether Dollar Loan was required to exhaust its administrative remedies.
2. Whether, in the alternative, exhaustion of administrative remedies was excused.
3. Whether the Division's order was immediately reviewable because the final agency action would not have provided Dollar Loan an adequate remedy.

Mr. Jack H. Hieb and Mr. Zachary E. Peterson,
Attorneys for Appellant Dollar Loan Center of
South Dakota, LLC

Mr. Marty J. Jackley, Attorney General, Mr. Paul E.
Bachand and Mr. Edward S. Hruska III, Special
Assistant Attorneys General, Attorneys for
Appellee State of South Dakota, Department of
Labor and Regulation, Division of Banking

Krsnak v. Brant Lake Sanitary District

The Brant Lake Sanitary District (the District) designed and constructed a treatment pond to service the increase in wastewater flow in the Brant Lake area. This new pond, referred to as the Brant Lake Sanitary District pond (BLSD pond), connected into two previously existing treatment ponds operated by the Chester Sanitary District.

Jimmy and Linda Krsnak own 8.27 acres of property approximately 675 feet North of the new pond and 1,100 feet from the existing ponds. Linda operates her business, Linda's Gardens, from the property. The Krsnaks also have a sixty-foot well on their land, which they use to water crops. They opposed construction of both the Chester Sanitary District and the BLSD ponds and brought several lawsuits hoping to stop the project.

The Krsnaks first filed a civil action challenging the Lake County Board of Adjustment's decision to grant a conditional use permit to the District. The circuit court dismissed their action. Next, the Krsnaks filed a petition for a writ of mandamus in circuit court which was also denied. On appeal, this Court affirmed the denial.

On May 31, 2012, the Krsnaks filed a complaint in circuit court seeking a declaratory judgment and bringing claims of inverse condemnation and nuisance. The Krsnaks contend that their private property was taken or damaged by the ongoing wastewater project without just compensation. They emphasized the impact of the District's treatment pond by relying on

their expert's appraisal, which concluded their property suffered a diminution in value of \$82,800. In drawing this conclusion, the appraiser noted the proximity of the new treatment pond to the Krsnaks' house, the odor, and the size of the pond. According to the report, these factors diminished the property's value and negatively impacted its marketability.

The District responded by filing a motion to dismiss the Krsnaks' complaint for failure to state a claim. It argued that the claims in the inverse condemnation and nuisance complaint alleged the same violations of state statutes, regulations, and internal guidelines alleged in the previous lawsuit that had already been appealed.

Although the circuit court denied the motion to dismiss, it acknowledged this Court's holding that Chapter 74:53:01 of the South Dakota Administrative Rules did not apply to the BLSA pond. Therefore, the circuit court limited the Krsnaks' ability to conduct discovery to whether the treatment pool was contaminating groundwater on their property. Additionally, the Krsnaks developed a theory that they suffered a unique injury by enduring the smell emanating from the BLSA pond because of its close proximity.

Following discovery, the District moved for summary judgment regarding the Krsnaks' inverse condemnation claim, arguing no evidence existed that the BLSA pond: (1) contaminated their property; or (2) injured them in a peculiar or distinct way compared to the public at large. It also moved for summary judgment on the nuisance claim alleging that the District acted within its statutory authority when it

constructed the BLSD pond because the pond fell outside the definition of a nuisance. Finally, the District requested summary judgment on Krsnaks' declaratory judgment claim because it presented no district issues of substantive law.

The circuit court agreed, granting the District's motion for summary judgment on all claims. First, the court held that the Krsnaks presented no evidence of water seepage impacting their property. It also noted that the impact of the sewage on Linda's Gardens was speculative based on the evidence presented. Finally, the court held that even if the Krsnaks suffered a heightened injury due to the smell of the treatment pond, their injury was not unique and failed to establish a nuisance.

The Krsnaks appeal, raising two issues that we consolidate as follows:

Whether the circuit court erred by granting the District's motion for summary judgment as to the Krsnaks' inverse condemnation and nuisance claims.

Mr. R. Shawn Tornow, Attorney for Appellants Jim and Linda Krsnak

Mr. Vince M. Roche and Mr. Joel R. Rische, Attorneys for Appellee Brant Lake Sanitary District

State v. Livingood

In 2007, a family relocated to the United States from a small country in eastern Africa. The family consisted of five members: L.B. (mother), K.G. (father), and their three minor daughters, E.G., O.G., and M.G.

At the end of December 2014 or beginning of 2015, the family moved in with Daniel Livingood. They occupied the upstairs of the small house in Sioux Falls while Livingood resided in the unfinished basement. At the time, E.G. was thirteen, O.G. was ten, and M.G. was six. Due to the house's small size, the three sisters slept together in the living room on the main floor. Meanwhile, their mother and father occupied the only bedroom.

A few months after the family moved in with Livingood, the police arrested him for violating his parole on an unrelated offense. After Livingood was incarcerated, E.G. told a trusted adult that Livingood was a child molester. This disclosure prompted the adult to report the possible abuse to the Department of Social Services. Consequently, in March 2015, all three children were interviewed at a forensic evaluation clinic in Sioux Falls known as Child's Voice.

During each of their interviews at Child's Voice, E.G., O.G., and M.G. all disclosed several instances in which Livingood engaged in inappropriate sexual behavior toward them. The eldest, E.G., reported that on one occasion, Livingood touched her leg while she was sleeping. O.G., the middle child, described witnessing Livingood masturbating in view of the

children. She also stated that on a different day, Livingood showed her a photo of his penis saved on his phone.

In addition to these incidents, two of the daughters recounted times when Livingood watched pornography in the basement downstairs. According to the children, he openly viewed the sexually-explicit material even though they could see the downstairs T.V. from the top of the stairs. Additionally, they described Livingood walking around upstairs wearing only a shirt without pants or underwear on.

Sometime in the summer or fall of 2015, the family moved to another rental property in Sioux Falls. Livingood remained in prison for violating parole until approximately October 2015. After his release from prison, Livingood started renting the apartment above the family's new residence. Although he did not live with the family, he frequently went inside the family's home and worked outside of it as the property's handyman.

In early March 2016, one year after E.G.'s initial disclosure, M.G. told a teacher about Livingood's inappropriate behavior. An investigation once again ensued, leading to a 10-count indictment against Livingood in March 2016. A five-day jury trial began on June 5, 2017. During trial, O.G. testified that Livingood watched pornography in view of her and her siblings. She also testified that he masturbated in her presence. However, when questioned about her pre-trial statements claiming Livingood showed her an image of his penis, she stated she could not remember. At the trial's conclusion, the jury convicted Livingood of three offenses committed against a single victim—O.G.

The jury found Livingood guilty of two counts of sexual exploitation of a minor and one count of contributing to the abuse, neglect, or delinquency of a minor.

Livingood appeals his conviction, raising two issues which we consolidate into a single question:

Whether the evidence was sufficient to sustain his convictions for sexual exploitation and contributing to the delinquency of a minor, O.G.

Mr. Michael J. Butler, Attorney for Appellant Daniel Livingood

Mr. Marty J. Jackley, Attorney General, and Mr. Craig M. Eichstadt, Assistant Attorney General, Attorneys for Appellee State of South Dakota

#28441,
#28453

TUESDAY, OCTOBER 2, 2018 – NO. 2

Cedar v. Johnson

Jerry and Leslie Cedar were married in 2000. In 2006, they moved to Wisconsin to help care for Leslie's father. In 2007, Leslie had an online affair over Facebook. Cedar eventually discovered the affair, but the marriage survived and the couple briefly attended couple's counseling. In 2013, Cedar went with a family friend to the Dakotas to work that year's crop harvest. During this time, Leslie and their son, Noah, remained in Wisconsin, but both Cedar and Leslie traveled to visit the other when time allowed. Cedar was offered a permanent job and the family moved near Fredrick, South Dakota in 2014.

In May 2015, Leslie worked fulltime at a restaurant in Fredrick owned by Bruce Johnson. Cedar also occasionally worked in the restaurant in the evenings. Around September 2015, Cedar started to believe Johnson was giving Leslie favorable treatment at work and went out of his way to see and talk with her at the restaurant. Cedar also noticed that Leslie was often texting Johnson after work and while at home. During this time, Cedar was also not allowed to check Leslie's phone and believed Leslie was trying to cover up her conversations with Johnson by saying she was talking to other people.

In November 2015, Leslie and Johnson began a sexual relationship and Leslie moved out of the marital home. In April 2016, Cedar filed an alienation of affections lawsuit against Johnson claiming that he was responsible for ending his marriage. During preparations for trial, Leslie claimed that in the early

fall of 2015 she also had an affair with Archibald Linthorne, known as Junior. Leslie and Junior both claimed the affair lasted approximately two weeks. Cedar disputes the affair happened and believes it was fabricated to assist Johnson at trial.

Prior to the start of trial, Johnson motioned for the case to be dismissed arguing alienation of affections violates public policy because it treats spouses like property. The circuit court denied Johnson's motion and the case proceeded to trial on September 28, 2017. Cedar's case consisted of witness testimony from himself, Johnson, Leslie, and a series of exhibits including Facebook posts and photos of the couple that he claimed showed Leslie had affection for him prior to the end of their marriage. During his testimony, Cedar expressed that he missed being married to Leslie and he had been "emotional" since he learned of her affair with Johnson. Leslie testified that her feelings for Cedar were complicated and she loved him but did not think she had affection for him. Johnson testified he knew Leslie was married but was not bothered by this since Leslie considered the marriage to be over and she was no longer emotionally attached to Cedar.

After Cedar rested his case, Johnson motioned for Judgment as a Matter of Law arguing there was no proof he intended to alienate Leslie's affections and Cedar presented no evidence of monetary damages. The court held there was enough proof to suggest Johnson sought to alienate Leslie; however, the court concluded Cedar was required to provide an estimated monetary amount for damages. The court granted Johnson's motion dismissing the case.

Cedar appealed the circuit court's ruling prompting Johnson to also request a review of the circuit court's holdings.

The parties raise the following issues on appeal:

1. Whether the circuit court was correct to require some showing as to the extent of Cedar's damages.
2. Whether the circuit court was correct to find there was a question of fact as to liability.
3. Whether the tort of alienation of affections should be ruled void as a violation of public policy.

Mr. Robert A. Christenson, Attorney for Appellant Jerry Cedar

Mr. Thomas J. Cogley, Attorney for Appellee Bruce Johnson

Zochert v. Protective Life Insurance Co.

Protective Life Insurance Co. (Protective) issued Ivan and Lenore Zochert a supplemental cancer insurance policy, intended to provide coverage for costs resulting from cancer treatment. To obtain benefits, the policy required written proof of loss to Protective “within 90 days after the occurrence or commencement of any loss covered by the policy.”

In early July 2012, a biopsy of tissue removed from Lenore’s breast revealed the presence of cancer. On August 14, she underwent a partial mastectomy and layered closure on her left breast. Two days later, Lenore was discharged from the hospital, but she was readmitted on August 31 due to complications from the procedure and was hospitalized until September 7.

On August 17, 2012, Ivan requested the claim forms required for filing a claim under the policy. Protective sent him a patient information form, physician statement form, and medical release form. Instructions on the patient information form requested that Ivan send a pathology report diagnosing Lenore’s cancer and all itemized bills from the treatment.

Ivan returned the forms and the billing summary from the August 14 mastectomy and layered closure, but not the original pathology report. The physician statement form, however, included the date of Lenore’s diagnosis. Protective processed the claim and sent Ivan a benefit check for the surgical procedure, but not for the other costs such as Lenore’s biopsy and hospital stays. After protracted communication between

Protective and Ivan’s counsel regarding what documentation was required and who was required to request and produce the documentation related to Lenore’s cancer treatment, Protective issued Ivan several more benefit checks. Protective sent Ivan a final check on September 2, 2014.

Ivan filed suit against Protective alleging breach of contract and breach of the duty of good faith and fair dealing by failing to conduct a reasonable investigation of the claim. Ivan also sought an award of attorney fees for what he argued was an “unreasonable and vexatious” failure to pay benefits. Both parties moved for summary judgment, and the circuit court granted Protective’s motion, finding that the language of the cancer policy was unambiguous, Protective made timely payments on the policy upon receipt of the proper documentation—namely itemized bills, and the amounts paid were in accordance with the policy.

Ivan Zochert appeals, raising the following issues:

1. Whether Protective breached its contract with the Zocherts.
2. Whether Zochert can sustain a claim of tortious bad faith.

Mr. Seamus W. Culhane and Ms. Nancy J. Turbak
Berry, Attorneys for Appellant Ivan Zochert

Mr. Edwin E. Evans, Mr. Ryan W. W. Redd, and Mr.
Mark W. Haigh, Attorneys for Appellee
Protective Life Insurance Co.

State v. Uhre

On June 30, 2015, E.B.'s parents left E.B., then four years old, and her older brother with their grandparents while they took an overnight trip. Waylon Uhre, E.B.'s adopted uncle, lived with E.B.'s grandparents. That evening, E.B. told her grandmother that Uhre made her perform a sexual act on him earlier that day. E.B.'s father contacted law enforcement the next day. A forensic interviewer with Children's Advocacy Center interviewed E.B. She told the interviewer that Uhre made her perform oral sex on him.

On July 7, 2015, Detective Bostrom with the Meade County Sheriff's Office called Uhre and requested a meeting to discuss E.B.'s allegations. Uhre told Bostrom he had spoken with an attorney and wanted to speak with the attorney again before meeting with Bostrom. Uhre stated that his attorney would contact Bostrom. Attorney Rohl called Bostrom six days later, inquiring if Bostrom intended to indict Uhre. Bostrom told Rohl he was still investigating the matter. Rohl testified that he advised Bostrom he was acting as Uhre's attorney during this conversation. Bostrom testified that Rohl never stated he represented Uhre nor did he tell Bostrom not to speak to Uhre. Two days later, Rohl advised Bostrom that he would not be representing Uhre in the matter.

Following E.B.'s allegations, her grandparents removed Uhre from their home. Tye Parsons was also living at the grandparent's home, but was not at the home on June 30, 2015. When Parsons returned, he

was told to move out. While packing, Parsons found a SD card in the threshold of Uhre's bedroom and packed it with his belongings. Parsons later retrieved the contents of the SD card and found pornographic images of children, including E.B. E.B.'s grandparents turned the SD card over to law enforcement.

On February 22, 2016—almost eight months later—Special Agent Garland with the South Dakota Division of Criminal Investigation interviewed Uhre at a friend's home. Uhre agreed to speak with Garland, but wanted the conversation to take place in the patrol car. Garland advised Uhre he did not have to speak with him and could discontinue the interview at any time. During the interview, Uhre admitted to several of E.B.'s allegations. Two days later, Uhre was charged by indictment with one count of first-degree rape, nine counts of sexual contact with a child, and twenty counts of possessing, manufacturing, or distributing child pornography. Prior to trial, the circuit court judge granted the State's motion to close the courtroom to the public during E.B.'s testimony, finding no alternative to protect E.B.'s interests based upon her age, psychological maturity, and the sensitive personal subject of her testimony. Also, after reconsidering its earlier ruling, the circuit court judge denied Uhre's motion to suppress his statements made to Special Agent Garland, finding the interrogation was voluntary and noncustodial in nature.

During the three-day trial, Uhre denied the allegations and told the jury he had been pressured into making a false confession, did not recognize the SD card, and had never taken any sexually explicit photographs or possessed child pornography. The jury found Uhre guilty on all counts. Uhre was sentenced to

80 years for first-degree rape, 15 years for each count of sexual contact with a child, and 10 years for each count of possessing, manufacturing, or distributing child pornography.

Uhre appeals his conviction, raising the following issues:

1. Whether the circuit court created structural error when it closed the courtroom to the public during E.B.'s testimony.
2. Whether the circuit court erred when it denied Uhre's motion to suppress the statements he made to Special Agent Garland.

Mr. Ellery Grey, Attorney for Appellant Waylon Uhre

Mr. Marty J. Jackley, Attorney General, and Ms. Ann Meyer, Assistant Attorney General, Attorneys for Appellee State of South Dakota

State v. Ledbetter

In 2016, Sara Inboden and Antonio Ledbetter were in a romantic relationship. In the autumn of that year, Inboden and Ledbetter ended their relationship; however, Inboden maintained contact with Ledbetter because she had become pregnant with his child.

On October 11, 2016, Ledbetter insisted on visiting Inboden. Inboden eventually agreed to let Ledbetter visit her apartment. When Ledbetter arrived, he demanded to be involved in Inboden's plans for the evening and when Inboden refused, he punched her in the face. Ledbetter continued to strike Inboden and slammed her head into the ground knocking her unconscious. While Inboden was unconscious, Ledbetter cut her right nipple off with a pair of scissors. When Inboden regained consciousness, Ledbetter attacked her again cutting off her left nipple and choking her until she passed out. When Inboden regained consciousness for a second time, she fled the apartment and sought help from law enforcement and medical personnel. Inboden suffered multiple injuries from the attack and required reconstructive surgery to repair the disfiguring injuries to her breasts.

On October 17, 2016, Ledbetter was indicted and pleaded not guilty to all charges. On August 14, 2017, the parties informed the court that they had reached a plea agreement, and Ledbetter's attorney requested a meeting with the court to determine if the plea agreement would be acceptable. A meeting between the prosecution, Ledbetter's attorney, and the court took place on August 15, 2017, wherein the parties discussed

the plea agreement. Under the terms of the agreement, Ledbetter would plead guilty to three counts of aggravated assault with a maximum of 30 years jail time. The court orally agreed with the plea agreement.

On August 18, 2017, Ledbetter appeared in court to enter the plea agreement and change his plea to guilty. Ledbetter read the plea agreement into the record, and the prosecution agreed with its terms. The court explained to Ledbetter that the three charges he was pleading to each carried a maximum of 15 years in prison and a \$30,000 fine. Ledbetter said he understood and pled guilty to all three charges.

On November 28, 2017, Ledbetter appeared in court for sentencing. Both Ledbetter and the prosecution presented arguments requesting prison sentences consistent with the plea agreement; however, the court stated it did not believe it was bound by the plea agreement and determined 15 years for each of the three counts was warranted and sentenced Ledbetter to 45 years in the penitentiary. Ledbetter objected, asking the court to reconsider its sentence, and arguing his plea was conditioned on the bargained-for sentencing cap and that he should have been allowed to withdraw his plea if the court was not going to follow the plea agreement. The court noted Ledbetter's objection and denied his request. On January 3, 2018, Ledbetter filed a motion to reconsider sentence which the court also denied.

Ledbetter appeals the circuit court's ruling raising, the following issues:

1. Whether the circuit court was bound by the plea agreement.
2. Whether the circuit court erred by failing to enter a sentence that conformed to the plea agreement.

Mr. David A. Stuart, Attorney for Appellant Antonio Ledbetter

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

State v. Swan

Appellant Michael B. Swan and his wife, Angelina Swan, resided in an apartment in Milbank. At approximately 4:00 a.m. on October 24, 2016, Swan called his longtime friend Duane Pollock and claimed he was unable to wake Angelina. Pollock arrived at Swan's apartment to check on Angelina, but was unable to detect a pulse. Pollock observed that Angelina's jaw was locked shut and that she had extensive bruising on her face and arms. Pollock contacted police and Officer Michael Morgan was dispatched to the scene. Officer Morgan observed that Angelina was cold, gray, stiff, and that her jaw was locked. He also noticed that Angelina had a black eye, bruising on the left side of her face and right hand, and blood in her nose.

Special agents from the South Dakota Division of Criminal Investigation led an investigation into Angelina's death and conducted two interviews with Swan. Swan explained that between 12:30 and 1:00 a.m. on October 24, Angelina was lying in her chair and that he had told her she should go to bed. Swan stated that Angelina kicked her foot at him because she did not want to go to bed. In response, Swan claimed "he gave the bottom of her foot a pop." Swan then assisted Angelina, who was experiencing back pain, to the bedroom to lie down. Swan told Agent Corey that he and Angelina "squabbled after she had gone to bed, but that's all, just husband and wife after so much time, just squabbling." Swan also stated that "[w]e didn't

really fight or anything like that, just squabbled.” He claimed the couple was not “cursing at each other or anything like that. It did get a little vocal when I was taking her to bed saying just lay down, get some sleep. That’s all.”

Swan claimed that after Angelina fell asleep, he checked on her periodically until about 2:00 a.m. When Swan claimed he could no longer hear Angelina snoring he went to check on her again but was unable to wake her. Swan said he slapped the side of Angelina’s face and attempted mouth-to-mouth resuscitation but that Angelina would still not wake up. Swan then called Pollock for help.

An autopsy revealed that Angelina had suffered a severe atlanto-occipital dislocation, also known as an internal decapitation. The coroner discovered hemorrhages on Angelina’s back, injuries to her face, and bruising on her abdomen, right buttock, right arm, right hand, right thigh, right knee, and inner left shin. The coroner concluded that Angelina’s death was caused by internal decapitation and that the injury was likely caused by stomping.

Swan was charged with second-degree murder. At trial, Swan asserted that he did not cause Angelina’s death, that her fatal injuries resulted from a fall, and that he and Angelina had not engaged in a violent altercation. Swan requested that the jury be instructed on the lesser-included offenses of first-degree and second-degree manslaughter. The circuit court denied the requested instructions.

Swan twice moved for judgments of acquittal. The circuit court denied both of Swan's motions, and he was convicted and sentenced to life imprisonment.

Swan appeals his conviction and sentence, asserting the following issues for review:

1. Whether the circuit court abused its discretion by refusing to instruct the jury on the lesser included offenses of first and second-degree manslaughter.
2. Whether there is sufficient evidence in the record to support Swan's conviction of second-degree murder.

Mr. Scott R. Bratland, Attorney for Appellant Michael B. Swan

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

Glossary of Terms

Affirm - When the Supreme Court “affirms” a circuit court’s action, it declares that the judgment, decree or order must stand as decided by the circuit court.

Appeal - The Supreme Court’s review of a circuit court’s decision in a lawsuit. The Supreme Court does not consider new evidence or listen to witnesses. Rather, it reviews the record of a case and applies the proper law to determine if the circuit court’s decision is correct.

Appellant - The person who takes an appeal from the circuit court to the Supreme Court. (In other words, the person who does not agree with the result reached in circuit court.)

Appellee - The person in a case against whom an appeal is taken; that is, the person who does not want the circuit court’s decision reversed. Sometimes also called the “respondent.”

Brief - A document written by a person’s attorney containing the points of law which the attorney desires to establish, together with the arguments and authorities upon which his legal position is based. The brief tells the Supreme Court the facts of the case, the questions of law involved, the law the attorney believes should be applied by the Court and the result the attorney believes the Court should reach.

Defendant - The person sued by the plaintiff or prosecuted by the state in the circuit court.

Oral Argument - An opportunity for the attorneys to make an oral presentation to the Supreme Court when the appeal is considered. Oral arguments also give the Court an opportunity to ask the attorneys questions about the issues raised in their briefs.

Plaintiff - The person who brings a lawsuit in the circuit court.

Record - All the papers filed in a circuit court case including any transcripts. This includes the original complaint, motions, court orders and affidavits and exhibits in the case.

Remand - The Supreme Court “remands” an appealed case back to the circuit court for some further action. For example, the Supreme Court might remand a case to the circuit court and require that court to hear additional evidence and make further factual findings that are important in deciding the case.

Reverse - When the Supreme Court “reverses” a circuit court decision, it finds that a legal error was made and requires that the decision be changed.

Transcript - A document that contains a verbatim account of all that was said in a circuit court case by the parties, the attorneys, the circuit judge, and any witnesses. The transcript is prepared by the court reporter and it is reviewed by the Supreme Court as part of the appeal process.

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