

**Introduction to**  
**The South Dakota**  
**Supreme Court**



**and**  
**Case Summaries for**  
**Oral Arguments at the**  
**October Term of the Court**  
**to be held**  
**October 5 through October 7, 2015**  
**University of South Dakota**  
**Vermillion, South Dakota**

*Supreme Court*  
STATE OF SOUTH DAKOTA

*David Gilbertson*  
CHIEF JUSTICE

October 5, 2015

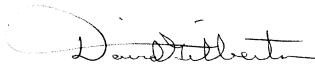
To our Guests Observing the  
October Term Hearings of the  
South Dakota Supreme Court

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,

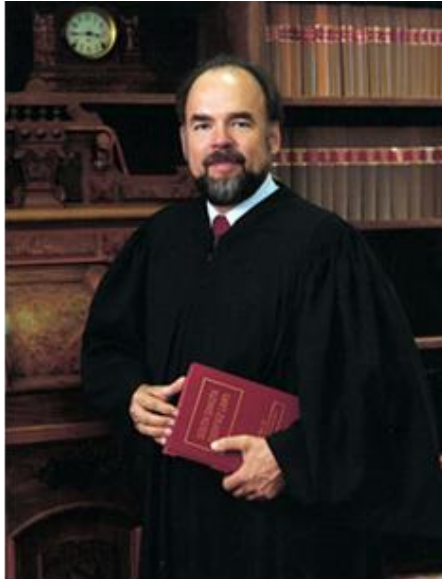


David Gilbertson  
Chief Justice

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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.*

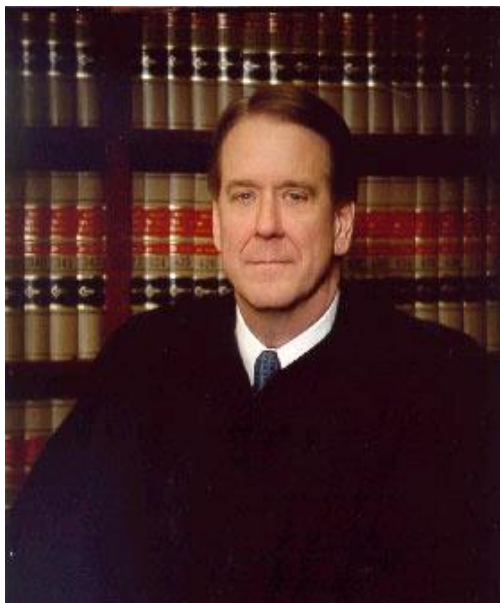


## ***Chief Justice David Gilbertson***

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 and a fourth 4-year term in June 2013. He was appointed to the Supreme Court in April 1995 to represent the Fifth Supreme Court District, which includes Brown, Butte, Campbell, Clark, Codrington, 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.

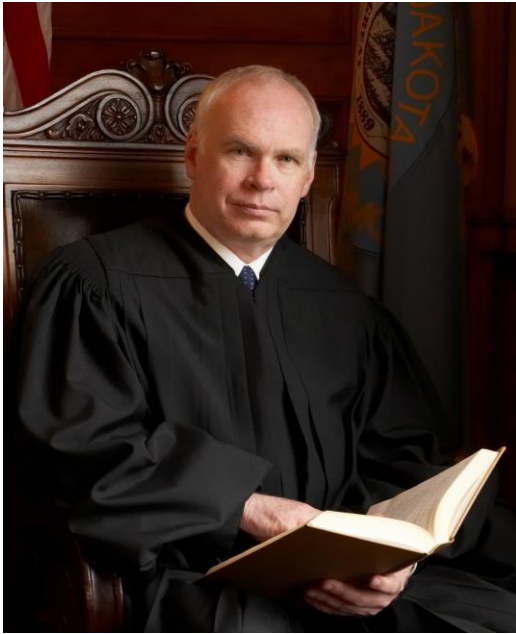
Chief Justice Gilbertson received his undergraduate degree from South Dakota State University in 1972 and his Juris Doctor from the University of South Dakota, School of Law in 1975. He engaged in private practice from 1975 until his appointment to the circuit court bench in 1986. He served as a Circuit Judge for the Fifth Judicial Circuit from 1986 until his appointment to the Supreme Court in 1995. He is past President of the South Dakota Judges Association and is President-Elect of the Conference of Chief Justices and will serve as its President for the 2015-16 term. He chairs its Committees on Tribal/State Relations and the Task Force on Politics and Judicial Selection. He was a member of the Board of Directors of the Conference of Chief Justices from 2005-2007. He is the Chair-Elect of the National Center for State Courts and will serve as its Chair for the 2015-16 term.

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. Since 2010 he has served as the state representative on the Criminal Rules Committee of the United States Courts. 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, Justice Zinter practiced law as 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. 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 to represent 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 2014. Justice Zinter is a member of the American Bar Association, the State Bar Association, and the South Dakota Judges Association. He was a past President of the South Dakota Judges Association and 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 four grandchildren.



### ***Justice Glen A. Severson***

Justice Severson, represents the Second Supreme Court District, which includes Minnehaha County. He attended the University of South Dakota receiving a Bachelor of Science in 1972 and the University of South Dakota, School of Law receiving a Juris Doctor degree in 1975. He was a member of the Fingerson and Severson Law Firm from 1983 to 1992 and served as the Huron City Attorney from 1977-1991 and a Beadle County Deputy States Attorney in 1975. He was appointed a Circuit Judge in the Second Circuit in 1993 and served as Presiding Judge from 2002 until his appointment to the Supreme Court.

Justice Severson was appointed to the Supreme Court in 2009 after sixteen years on the trial bench and was retained by the voters in 2012. He is a member of the American Bar Association, South Dakota Bar Association and Second Circuit Bar Association. He served in the South Dakota Air National Guard from 1967-1973. He was a member of the South Dakota Board of Water and Natural Resources (1986-1992) and has served on a number of other boards and commissions. Justice Severson and his wife Mary have two children, Thomas and Kathryn.



### *Justice Lori S. Wilbur*

Justice Wilbur, appointed to the Supreme Court on August 16, 2011, by Governor Dennis Daugaard, represents the Fourth Supreme Court District, which includes Aurora, Bon Homme, Charles Mix, Clay, Davison, Douglas, Gregory, Hanson, Hutchinson, Lincoln, McCook, Turner, Union, and Yankton counties. Justice Wilbur was retained by the voters in 2014. She attended the University of South Dakota receiving a Bachelor of Arts degree in 1974 and the University of South Dakota, School of Law, receiving a Juris Doctor degree in 1977. She served as a law clerk for the South Dakota Supreme Court for Honorable Laurence J. Zastrow; was an assistant Attorney General; General Counsel, South Dakota Board of Regents; Staff Attorney, South Dakota Legislative Research Council; and Legal Counsel, South Dakota Bureau of Personnel. She is a member and past President of the South Dakota Judges Association, past member and Secretary of the Judicial Qualifications Commission and a member of the Rosebud Bar Association. She served as a Law-Trained Magistrate Judge, Sixth Circuit 1992-1999; Circuit Court Judge, Sixth Circuit, 1999-2011; and Presiding Judge, Sixth Circuit, 2007 - 2011. Justice Wilbur has two daughters and two 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.





### ***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.



### ***2015-2016 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 photographs above are Christopher Dabney (Chief Justice Gilbertson), Aron Hogden (Justice Zinter), Michelle Oswald (Justice Severson), Jennifer Williams (Justice Wilbur), Ashlee Wendt (Justice Kern), and Tyler Coverdale (Supreme Court Law Clerk).

## **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.

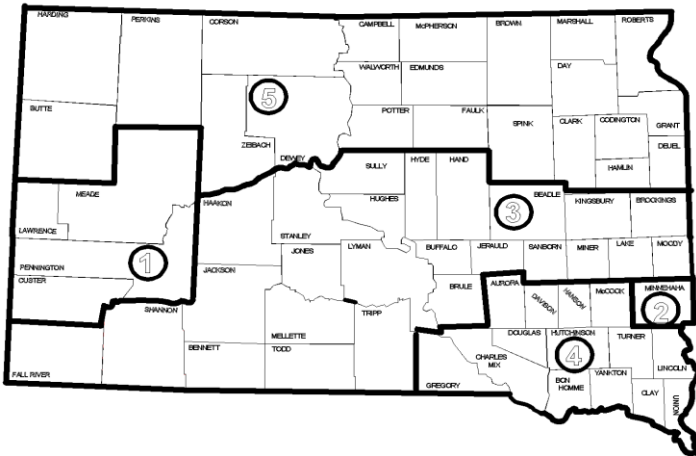
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench 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 Severson was appointed in 2009 from District Two. Justice Wilbur was appointed in 2011 from District Four. Justice Janine Kern was appointed in 2014 from District One. Chief Justice Gilbertson, Justice Zinter, and Justice Wilbur were each retained in the November 2014 general election. Justice Severson was retained in the November 2012 general election.

**South Dakota Supreme Court Appointment Districts**  
*Effective January 23, 2012*



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

<b>Courtroom Protocol</b>
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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 2015 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.

<b>Case Summaries</b>
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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.



**Nylen v. Nylen**

In 1991, Sioux City attorney Irene Schrunk (Schrunk) represented Mary Ellen Nylen (Mary Ellen) in a divorce. Over the years, Schrunk and Mary Ellen developed a friendship, and they communicated about various matters. Schrunk also provided legal services to Mary Ellen's husband, Mark.

Family problems developed, and in December 2013, Mary Ellen moved out of her California home. Mark later filed for divorce. Mary Ellen contacted Schrunk for legal advice and representation. Schrunk advised Mary Ellen, in early January 2014, that Schrunk could not represent her because Schrunk had represented Mark in the past.

On July 31, 2014, Molly and Brendon Nylen (Mary Ellen's adult children) sued Mary Ellen for declaratory relief. They alleged that in December 2013, Mary Ellen had gifted them personal property. Mary Ellen was also named in a restraining order case in California. Thus, Mary Ellen was defending three cases.

On November 18, 2014, Molly and Brendon's attorney deposed Mary Ellen in the gift dispute litigation. During the deposition, Mary Ellen was asked whether she had a current attorney-client relationship with Schrunk. Mary Ellen replied, "No." Mary Ellen was then asked, "And when you spoke with [Schrunk] most recently about either the divorce or the kids'

claims against you, she wasn't representing you?" Mary Ellen replied, "No." Mary Ellen also stated her purpose for contacting Schrunk was as a friend.

Phone records reflected numerous communications between Mary Ellen and Schrunk during a time that Molly and Brendon believed was important to the gift issue. Based on this and Mary Ellen's testimony during the deposition, Molly and Brendon subpoenaed documents and sought deposition testimony relating to communications Schrunk had with Mary Ellen from November 1, 2013 to December 31, 2014.

Mary Ellen moved to prohibit the discovery, arguing that the attorney-client privilege protected the communications. In an evidentiary hearing, Mary Ellen testified that her purpose in communicating with Schrunk was to obtain legal advice and representation. Mary Ellen acknowledged that she did not formally retain Schrunk, and Schrunk had not charged a fee. However, Mary Ellen testified that she had an expectation that the communications and documents would be confidential.

The circuit court found that Schrunk was not representing Mary Ellen during the relevant communications (between November 1, 2013 and December 31, 2014). However, the court ruled that because Mary Ellen contacted Schrunk not only as a friend, but also to seek legal assistance, the communications were privileged. Although the communications were privileged, the court further ruled that the privilege terminated on January 1, 2014. The

court observed that Schrunk told Mary Ellen that Schrunk could not represent her, and Mary Ellen admitted that she understood Schrunk could not represent her. The court reasoned that at that point, Mary Ellen could no longer have reasonably believed that communications with Schrunk would be for the purposes of facilitating legal services. Additionally, after reviewing the disputed documents *in camera*, the court observed that some of the documents involved privileged communications between Mary Ellen and her California and South Dakota attorneys. The circuit court ruled that, although those documents were privileged, Mary Ellen waived her privilege to the extent that she shared the documents with Schrunk—a third party outside of the attorney-client relationship. The court ordered disclosure of documents in accordance with this ruling. It also allowed the unsupervised deposition of Schrunk with respect to communications made after January 1, 2014.

Mary Ellen appeals the circuit court’s decisions, raising the following issues:

1. Whether the attorney-client privilege protected Mary Ellen and Schrunk’s communications that occurred between January 1, 2014, and November 2014.
2. Whether Mary Ellen waived the attorney-client privilege relating to documents involving her other attorneys because she sent the otherwise privileged documents to Schrunk.

Mr. Craig A. Kennedy, Mr. Steven L. Pier, and Mr.  
Thomas P. Reynolds, Attorneys for Defendant  
and Appellant Mary Ellen Nylen

Mr. David A. Tank, Ms. Angela E. Dralle, Mr. Daniel R.  
Fritz, and Ms. Nicole O. Tupman, Attorneys for  
Plaintiffs and Appellees Molly R. Nylen and  
Brendon W. Nylen

**State v. Smith (*In re* Minnehaha County Sheriff  
Mike Milstead)**

On September 30, 2014, Emily Lou Smith was arrested by Deputy Adam Zishka and charged with three counts of simple assault against a law enforcement officer; two counts of driving under the influence; and one count each of resisting arrest, obstructing a law enforcement officer, driving while suspended, and driving with an open container. In October 2014, Smith served a subpoena duces tecum on Minnehaha County Sheriff Mike Milstead requiring the production of “[a]ll disciplinary records/reprimands/complaints in regard to Deputy Adam Zishka from the Minnehaha County Sheriff[s] Department.”

Sheriff Milstead filed a motion to quash the subpoena on January 6, 2015, arguing the subpoena was “unreasonable and oppressive.” Smith subsequently filed a motion to compel the production of alleged *Brady* discovery material. During a hearing on January 13, 2015, Smith’s motion to compel was denied and Sheriff Milstead’s motion to quash the subpoena was denied in part. Sheriff Milstead was ordered to produce Deputy Zishka’s personnel file, including disciplinary records, complaints, and reprimands for the last five years for an *in camera* review by the circuit court. In its oral findings of fact and conclusions of law, the circuit court stated in part, “the defense does have a right to present a defense and a right to try and ascertain whether or not there is evidence that could be

relevant and could be admissible, so I do believe that I need to review the documents in-camera to make that ultimate determination and to resolve the issue in this case.”

Sheriff Milstead filed a Petition to appeal the order, which was granted, and now raises the following issues for our review:

1. Whether the circuit court erred in holding that information in a law enforcement officer’s personnel record is discoverable under SDCL 23A-14-5 (Rule 17(c)).
2. Whether the circuit court erred in ordering an *in camera* review of Deputy Zishka’s personnel file, including disciplinary records, complaints, and reprimands for the last five years.

Mr. Aaron McGowan, Minnehaha County State’s Attorney and Mr. Matthew J. Abel, Minnehaha County Deputy State’s Attorney, Attorneys for Plaintiff and Appellee State of South Dakota

Mr. Beau J. Blouin, Attorney for Defendant and Appellee Emily Lou Smith

Ms. Sara E. Show and Mr. Kersten A. Kappmeyer, Minnehaha County Deputy State’s Attorneys, Attorneys for Appellant Minnehaha County Sheriff Mike Milstead

**Zerfas v. AMCO Insurance Co.**

On December 2, 2011, at approximately 6:23 a.m., David Zerfas lost control of his vehicle when he swerved to avoid a deer carcass in the south-bound lane on Interstate 29 between Brookings and Sioux Falls, South Dakota. After he swerved, Zerfas’s vehicle crossed the median and was struck by oncoming traffic. Zerfas was fatally injured. The South Dakota Highway Patrol issued an accident report, noting that “[t]here were remains of a deer in the south bound lanes where tire marks show Vehicle 1 [Zerfas] swerved left and lost control.”

After the accident, Zerfas’s wife Stacey filed a claim with AMCO Insurance Company for uninsured motorist benefits. She alleged that the circumstances of the accident implicated AMCO’s policy coverage for damage caused by a hit-and-run driver. In particular, she asserted that Zerfas died while trying to avoid the deer carcass that had been negligently left in the lane of the interstate by an unidentified driver.

AMCO investigated Stacey’s claim and concluded that Stacey would not legally be entitled to recover for the loss caused by the unidentified driver of the vehicle that struck the deer because that unidentified driver had no legal duty to remove the carcass or to take other action. AMCO further concluded that Stacey failed to present competent evidence that the accident was in fact caused by a hit-and-run driver and not that Zerfas himself hit the deer. AMCO denied Stacey’s claim for uninsured motorist benefits.

After AMCO denied her claim, Stacey brought a breach of contract action against AMCO for its failure and refusal to pay uninsured motorist benefits. AMCO moved for summary judgment, and the circuit court held a hearing. At the conclusion of the hearing, the court orally granted AMCO's motion. It concluded that no duty existed under the circumstances on the part of the unidentified driver to remove the carcass from the road.

Stacey appeals the circuit court's order granting AMCO summary judgment asserting the following issue:

The court erred when it granted AMCO summary judgment because the hit-and-run driver owed a legal duty to Zerfas and a reasonable jury could conclude that the unidentified driver breached that duty when it killed a deer on the interstate and did not take action to prevent danger to others.

Mr. Seamus W. Culhane and Ms. Nancy J. Turbak  
Berry, Attorneys for Plaintiff and Appellant  
Stacey Zerfas

Mr. Kent R. Cutler, Mr. Brian Donahoe, and Ms.  
Kimberly R. Wassink, Attorneys for Defendant  
and Appellee AMCO Insurance Company



**State v. Plastow**

Alvin Plastow spent fifteen years in prison after pleading guilty to raping a five-year-old African American female (N.H.). After his release from prison, Plastow lived in a home with his girlfriend, Elizabeth Paige (mother of N.H.), Teerra Raglan, and S.G. (Raglan's three-year-old African American daughter). S.G.'s father, Michael Grace, frequently visited the home.

At some point, Grace observed Plastow stroking S.G.'s face while she was sitting on Plastow's lap. Grace became suspicious and telephoned Plastow, asking him if he had ever inappropriately touched S.G. Plastow admitted to having put his hand down S.G.'s pants, but claimed he did not penetrate her. After the telephone call, Grace asked S.G. where Plastow touched her, she pointed to her genitals, buttocks, and face.

Grace reported the conduct to the Sioux Falls Police Department. Thereafter, in Officer Billups's presence, Grace asked S.G. where Plastow had touched her. S.G. pointed to her genitals. At another point, S.G. approached Officer Billups and grabbed her genitalia, saying: "He touched me down here." Grace was also in possession of Plastow's phone. Grace gave the phone to Officer Billups and told him the phone had inappropriate pictures on it.

A few days later, Detective Bakke interviewed Plastow. During the interview, Plastow admitted a

number of things. He admitted that he had touched S.G.'s vagina twice—once when he was helping her in the bathroom and once in a bedroom; he admitted that he is attracted to children, especially black females; and he admitted that he struggled with thoughts of children after getting out of prison. Regarding the bathroom incident, Plastow admitted attaining an erection while placing his index finger in between S.G.'s vaginal lips. He also admitted to masturbating while thinking of this incident. Regarding the bedroom incident, Plastow admitted taking a picture of S.G.'s partially naked body. Plastow also admitted running his finger in between S.G.'s vaginal lips, but denied reaching S.G.'s "hole." Plastow saved the bedroom picture and admitted masturbating while viewing it. Finally, Plastow identified the pictures that would be on his phone, including the partially naked picture of S.G.

The State searched Plastow's phone and found a picture of S.G. in "Dora the Explorer" pajamas with pink polka dots. Another picture was of a pre-pubescent female's partially naked body from the waist to mid-thigh with her pants pulled down. The visible portions of the pants resemble the pink polka dot pajamas.

Child's Voice interviewed S.G. She confirmed the inappropriate touching; however, the corresponding physical examination could neither confirm nor refute rape.

The State charged Plastow with two counts of first-degree rape of a child less than 13 years of age;

and two counts of possession, manufacture, or distribution of child pornography. Plastow filed a pre-trial motion to sever the rape counts from the pornography counts. He also moved the court to suppress his confession, arguing the State could not present independent corroborating evidence showing the corpus delicti of rape.

The State indicated that S.G. would not testify; no representative from Child's Voice would testify; and S.G.'s father, Grace, would not testify. Following an evidentiary hearing, the circuit court severed the charges and suppressed Plastow's confession. The court ruled that "absent [Plastow's] admissions, the corpus delicti has not been shown."

The State appeals, raising the following issues:

1. Whether the trial court relied on an overly strict application of the corpus delicti rule when it suppressed Plastow's confession.
2. Whether the corpus delicti rule should be reformed or abandoned in South Dakota.

Mr. Marty J. Jackley, Attorney General, Mr. Jared C. Tidemann, and Mr. Paul Swedlund, Assistant Attorneys General, Attorneys for Plaintiff and Appellant State of South Dakota

Ms. Lyndsay DeMatteo, Attorney for Defendant and Appellee Alvin Plastow

**O’Neill v. O’Neill**

Brothers James Anthony O’Neill (Tony) and Richard Dean O’Neill (Rick) are co-owners of farming and ranching operations in Bennett County, South Dakota. Although Tony and Rick have farmed and ranched together since 1988, the brothers formally created two corporations in 1996: O’Neill Farms, Inc., and O’Neill Cattle Co., Inc. Tony is the president, treasurer, and a director of O’Neill Cattle Co.; Rick is the vice president and secretary, and a director. Rick is the president, treasurer, and a director of O’Neill Farms; Tony is the vice president, secretary, and a director. Each brother is a 50% shareholder in each corporation.

Tony approached Rick about dissolving their business relationship in 2011. Each corporation held assets including land and equipment. Although the brothers had not previously agreed in writing on how to divide the corporate property, they generally determined that they would divide the land first, then equipment, leases of their father’s land, cattle, tools, and then remaining assets and debt.

The brothers never reached complete agreement on the division of corporate assets, and Tony initiated a lawsuit in February 2012 asking the circuit court to divide the assets of O’Neill Cattle Co. and O’Neill Farms. Rick counterclaimed, seeking a preliminary

injunction, the enforcement of asset separation agreements, and a corporate accounting. The court found that the brothers had entered into enforceable agreements regarding the division of land and equipment. The court enforced those agreements and divided the remaining assets. The court also ordered Tony to pay \$450,000 in punitive damages to the two corporations.

Although the court ordered the parties to transfer certain assets, the court found that the parties agreed its order would not be considered a final judgment. Tony disputes that such agreement occurred. Instead of complying with the court's order, Tony filed a notice of appeal. The court held Tony in contempt. After the circuit judge expressed her belief that Tony had committed perjury, Tony asked the judge to recuse herself. The judge declined.

Tony raises the following issues on appeal:

1. Whether the circuit court erred in awarding punitive damages to the corporations.
2. Whether the circuit court erred in denying Tony's request for recusal.
3. Whether the circuit court erred by holding Tony in contempt for refusing to comply with its order.
4. Whether the circuit court erred in finding the land-separation agreement was credible and entitled to enforcement.

5. Whether the circuit court erred in finding that Rick did not lease land from Tony and Rick's father after the preliminary injunction hearing.

Mr. Scott R. Swier and Mr. Michael A. Henderson,  
Attorneys for Plaintiff and Appellant James  
Anthony O'Neill

Mr. Clint Sargent and Ms. Raleigh Hansman, Attorneys  
for Defendant and Appellee Richard Dean O'Neill

**Good Lance v. Black Hills Dialysis**

Vera Good Lance (Good Lance) was a resident of Shannon County (renamed Oglala Lakota County in May 2015), South Dakota. Shannon County's borders are entirely within the confines of the Pine Ridge Indian Reservation. Good Lance received dialysis services from Defendant Black Hills Dialysis, LLC at their Pine Ridge facility. Defendant LeEtta Brewer, through her employment at Black Hills Dialysis, cared for Good Lance during her treatment. During one of these dialysis sessions, Good Lance fell while being weighed in preparation for her treatment. Good Lance thereafter sued both Black Hills Dialysis and LeEtta Brewer (collectively, Appellees) in Shannon County. After the beginning of this suit, Good Lance died due to causes not related to the fall and was replaced in interest by Hilda Kills Small (Appellant), Good Lance's estate's special administrator.

Shannon County has no state courthouse or state court facilities. It therefore contracts all of its state court services out to neighboring Fall River County. All proceedings thus far in this case were at the Fall River County Courthouse in Hot Springs. At a trial scheduling conference for this case, a question arose between the parties about where the court should hold the trial and if they should use Fall River or Shannon County jurors. The circuit court advised the parties that it intended to hold the trial in Fall River County with Fall River County jurors, due to a standing order issued by then Presiding Seventh Circuit Judge Jeff Davis from 2009. This standing order was in response

to an executive order issued by the president of the Oglala Lakota Tribe that any service of process issued by a state court would be without effect within the boundaries of the Pine Ridge Reservation. Without being able to compel juror attendance through service of process, Judge Davis did not believe the court would be able to ensure fair trials for litigants. With the standing order in mind, the circuit court in this case allowed the parties to brief the issue, and Appellant made a *Motion to Summon Shannon County Jurors*.

Appellees opposed this motion, arguing that a state court does not have jurisdiction over Indians within the boundaries of the reservation, and thus would not have any method of compelling jurors to attend the trial. Appellant argued that the issue was one of venue, and that venue was proper in Shannon County due to the events giving rise to the claim having occurred there, and that juror attendance could be successfully compelled in accordance with the United States Supreme Court's holding in *Nevada v. Hicks*. Appellant also argued that Judge Davis's 2009 Standing order was unconstitutional under both the South Dakota and United States Constitutions, and that it violated South Dakota statutes regarding venue.

The circuit court ruled that the trial would take place in Fall River County with Fall River County jurors. The court reasoned that it was bound by this Court's decision in *State v. Cummings*. In *Cummings*, this Court differentiated between a tribal court attempting to exert jurisdiction over a state official (as was the case in *Hicks*) and the state attempting to exert jurisdiction over a tribal member within the confines of



the reservation. This Court in *Cummings* held that the language in *Hicks* was dicta as applied to the latter situation. The circuit court held that *Cummings* would not allow service of process in this case. Thus, the circuit court held that it would follow Judge Davis's standing order, and Fall River County jurors would be used.

The following issues are raised in this appeal:

1. Whether Appellant has standing to contest the validity of the standing order.
2. Whether the standing order violated South Dakota statutes or case law regarding venue.
3. Whether the standing order violated the right to a fair and impartial jury under the South Dakota and United States Constitutions.
4. Whether the circuit court would be able to compel juror attendance of Shannon County Residents.

Mr. Jon J. Lafleur and Mr. Charles Abourezk,  
Attorneys for Plaintiff and Appellant Hilda Kills  
Small, as Special Administrator of the Estate of  
Vera Good Lance

Mr. Gregory J. Bernard and Ms. Catherine LZ.  
Chicoine, Attorneys for Defendants and Appellees  
Black Hills Dialysis, LLC and LeEtta Brewer

**High Plains Resources v. Fall River County Board  
of Commissioners et al.**

High Plains Resources, LLC, sought approval of a petroleum contaminated soil farm from the Fall River County Board of Commissioners (Board). At the Board's meeting on March 25, 2014, it passed Resolution No. 2014-09, which approved the proposed facility. The minutes from the meeting were published in the Hot Springs Star on April 1, 2014, and in the Edgemont Tribune on April 2, 2014. Those minutes were also approved unanimously at the Board's next scheduled meeting on April 17, 2014.

Resolution No. 2014-09 was not referred to a public vote within the twenty days after its publication as required by statute. On June 19, 2014, the Board rescinded Resolution No. 2014-09 and passed Resolution No. 2014-16, which was substantially similar to Resolution No. 2014-09. On July 18, 2014, the voters of Fall River County filed a petition for a referendum of Resolution No. 2014-16. The Board approved placement of the Resolution on the November 4, 2014 general election ballot.

Before the election High Plains sought a writ of prohibition from the circuit court that would order the county to desist and refrain from counting the votes cast regarding Resolution No. 2014-16. High Plains asserted that the Board exceeded its authority by rescinding the original resolution because the statute

only allowed the Board to rescind approval of a solid waste facility if the size, location, and purpose of the facility had significantly changed. The circuit court granted an alternative writ of prohibition. The writ set aside the rescission of Resolution No. 2014-09 and ordered the county to desist and refrain from counting the votes regarding Resolution No. 2014-16. Finally, the writ ordered that the county show cause at a hearing as to why the circuit court should not absolutely restrain the county from any further proceedings. The circuit court held a hearing on October 31, 2014, and announced that its decision remained the same as prior to the hearing and it would grant a permanent writ of prohibition. The court did not enter findings of fact, conclusions of law, or its permanent writ at that time.

The Board subsequently sought special relief from the Supreme Court and moved this Court for a stay of the circuit court's alternative writ of prohibition. The Supreme Court granted the motion for stay as to all proceedings in the circuit court until December 1, 2014. However, the stay allowed the circuit court and parties to finalize the findings of fact, conclusions of law, and final writ contemplated at the October 31, 2014 hearing. Resolution No. 2014-16 appeared on the November election ballot, but the ballots were never counted. The circuit court filed its findings of fact and conclusions of law and issued the permanent writ of prohibition on November 21, 2014. On January 12, 2015, the Supreme Court entered an order quashing its previous order granting the motion for stay and dismissing the Board's application and motion for special relief.

The Board appeals the permanent writ, raising the following issues:

1. Whether High Plains has a plain, speedy, and adequate remedy in the ordinary course of law that precluded the issuance of a writ of prohibition regarding the referral of Resolution No. 2014-16?
2. Whether open meetings violations occurred that violated the passage of Resolution No. 2014-09?
3. Whether Resolution No. 2014-09 properly set forth the location, purpose, and size of the proposed petroleum contaminated soil farm?

Mr. Kenneth E. Barker and Mr. Timothy J. Vander Heide, Attorneys for Applicant and Appellee High Plains Resources, LLC

Mr. James G. Sword, Attorney for Respondent and Appellant Fall River County Board of Commissioners, and Sue Ganje, in her capacity as Fall River County Auditor only

**State v. Running Shield**

On November 6, 2012, a confidential informant approached law enforcement in Rapid City and indicated that the informant could purchase methamphetamine from Travis Maho and that he or she had done so in the past. The confidential informant told law enforcement that Maho currently resided on Haines Avenue but he also stayed at motels and hotels around Rapid City.

Law enforcement directed the confidential informant to arrange a controlled buy with Maho. On November 6, 2012, the informant met Maho at the Super 8 Motel in Rapid City and bought methamphetamine. On November 29, 2012, another controlled buy was arranged and successfully completed, this time at Maho's residence on Haines Avenue. The confidential informant told law enforcement that he or she always enters the residence from the alley way, as was done on this occasion. Further, the informant told law enforcement that Brandi White also lived at this house and that she used drugs, but the informant did not think that she was selling drugs.

On December 17, 2012, Maho was arrested during a traffic stop and taken into custody. Evidence of drug items and drug sales were found on Maho's person. In his car, law enforcement found a needle and plastic baggie that contained suspected methamphetamine. The next day law enforcement

contacted the confidential informant and learned that Maho had moved within the past few weeks from Haines Avenue to Anamosa Street. Law enforcement sought a search warrant of Maho's current and former residences and "any people present at the time the search warrant is executed that have a social nexus with Travis Allan Maho and Brandi Star White."

When law enforcement arrived at the residence on Haines Avenue, officers blocked the exits of the alley behind the house and initiated a stop of Running Shield's vehicle, which was in the alley. When Running Shield opened the door of his car, an officer could smell marijuana. The officer searched Running Shield and placed him in handcuffs. A search of the vehicle revealed bags of marijuana, a plastic case that contained a straw with residue, and a container with residue. The residue was determined to be methamphetamine. Thereafter, Running Shield was convicted of possession of a controlled substance and possession of marijuana.

Running Shield appeals raising the following issue:

Whether the affidavit in support of the warrant was sufficient to establish probable cause to search "any people present at the time the search warrant [was] executed."

Mr. Marty J. Jackley, Attorney General, and Mr. Jared  
C. Tidemann, Assistant Attorney General,  
Attorneys for Plaintiff and Appellee State of  
South Dakota

Mr. Todd A. Love, Attorney for Defendant and  
Appellant Antonio Running Shield

**Smizer v. Drey**

Dorothy and Harlan Smizer were traveling to church with their daughter and granddaughter on July 25, 2010, when a vehicle driven by seventeen-year-old Christina Drey collided with their vehicle at the intersection of 294th Street and 347th Avenue in Gregory County, South Dakota. The intersection is controlled by a yield sign on 294th Street and the speed limit on 294th Street is 65 mph. Christina explained that she knew of the yield sign, slowed to 35 mph at the intersection, and looked for oncoming traffic. However, a cornfield obstructed Christina’s view of oncoming traffic from 347th Avenue, and Christina did not see the Smizers’ vehicle until it was too late. Christina was cited for and admitted to a failure to yield in violation of SDCL 32-29-3.

The Smizers were seriously injured as a result of the accident and brought suit against Christina for compensatory damages, punitive damages, and attorney’s fees. This appeal concerns their claim for punitive damages. Punitive damages are authorized when a defendant “has been guilty of oppression, . . . actual or presumed, . . . or by willful and wanton misconduct, in disregard of humanity[.]” SDCL 21-3-2. The Smizers alleged that punitive damages were warranted because Christina acted intentionally, recklessly, and in disregard of the Smizers’ rights when she failed to yield at the intersection knowing that she had an obstructed view of oncoming traffic.



Christina filed a motion for partial summary judgment on the Smizers' claim for punitive damages and a motion for Rule 11 sanctions. A trial court may impose sanctions upon an attorney or any party for violating SDCL 15-6-11(b) (Rule 11). Here, Christina argued that the Smizers' claim for punitive damages lacks factual or legal support, and the Smizers brought the claim without conducting a reasonable investigation. Christina further asserted that the Smizers brought their claim merely to harass her and gain leverage in settlement negotiations.

After a hearing on both motions, the circuit court granted Christina's motion for partial summary judgment and motion for Rule 11 sanctions. It concluded that the "Smizers and their attorneys did not conduct any reasonable investigation in fact or law in bringing their claim for punitive damages." According to the court, "There is no evidence whatsoever that supports a claim for punitive damages." The court ordered that the Smizers pay Christina's "attorneys fees for the time and expense for defending against the punitive damages claim after discovery was completed, including preparing the motions and briefs on the issue of punitive damages, and arguing the motion to the court."

The Smizers appeal asserting the following issues:

1. The court abused its discretion when it found that the Smizers had neither legal nor factual support for their claim of punitive damages against Christina and granted Rule 11 sanctions.

2. The court abused its discretion when it improperly made inferences from the evidence in Christina's favor, required the Smizers to prove that Christina intended to harm them, and allowed Christina to rely on an affidavit in contradiction to her deposition testimony.

Mr. Michael D. Bornitz and Mr. Robert D. Tryzynka,  
Attorneys for Plaintiffs and Appellants Dorothy  
Smizer, in her individual capacity and as  
Personal Representative of the Estate of Harlan  
Smizer, Deceased

Mr. Ryland Deinert and Mr. Timothy A. Clausen,  
Attorneys for Defendant and Appellee Christina  
Drey

## 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.