

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



**and**  
**Case Summaries for**  
**Oral Arguments at the**  
**March Term of Court**  
**March 22 and March 23, 2023**

**South Dakota State University**

**Brookings, South Dakota**



*Steven R. Jensen*  
CHIEF JUSTICE

*Supreme Court*  
STATE OF SOUTH DAKOTA

March 22, 2023

To our Guests Observing the  
March Term Arguments of the  
South Dakota Supreme Court

Ladies and Gentlemen:

Your Supreme Court welcomes you to our March 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,

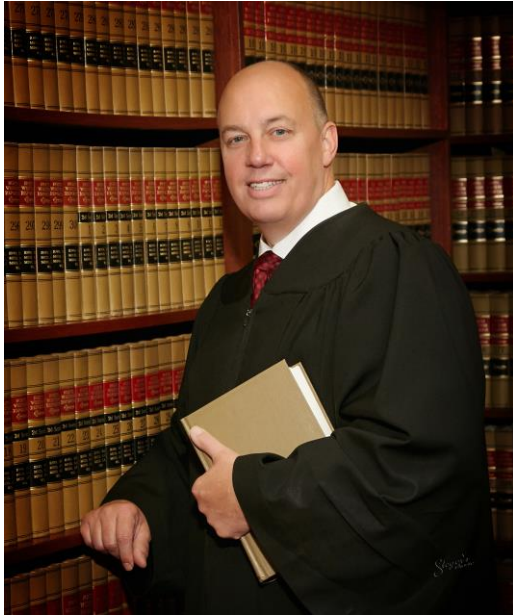
A handwritten signature in black ink, appearing to read "Steven R. Jensen".

Steven R. Jensen

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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 Steven R. Jensen***

Chief Justice Jensen was elected to a four-year term as Chief Justice by the members of the Supreme Court in 2021. Chief Justice Jensen was appointed to the Supreme Court by Governor Dennis Daugaard and sworn in on November 3, 2017. Chief 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. Chief 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 Crary Huff Law Firm in Sioux City, Iowa and Dakota Dunes, South Dakota. In 2003, Chief Justice Jensen was appointed as a First Judicial Circuit Judge by Governor M. Michael Rounds. He became the Presiding Judge of the First Judicial Circuit in 2011. Chief 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, Chief Justice Jensen was appointed as a Judicial Fellow to the Advanced Science and Technology Adjudication Resource Center in Washington D.C. Chief Justice Jensen and his wife, Sue, have three children.



***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 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 Knudson 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.



### ***Justice Patricia J. DeVaney***

Justice DeVaney was appointed to the Supreme Court by Governor Kristi Noem to represent the Third Supreme Court District. She was sworn in on May 23, 2019. Justice DeVaney was born and raised in Hand County and graduated from Polo High School in 1986. She received her Bachelor of Science degree in 1990 from the University of South Dakota, majoring in political science, and received her Juris Doctor degree from the University of Virginia School of Law in 1993. Justice DeVaney began her career of public service as an Assistant Attorney General in the South Dakota Office of Attorney General, where she practiced law from 1993 to 2012. She began her practice in the appellate division, then moved to the litigation division where she spent seventeen years as a trial lawyer, prosecuting major felony offenses as well as representing the State in civil litigation in both state and federal trial and appellate courts. During her tenure at the Attorney General's Office, she also handled administrative matters for state agencies and professional licensing boards. Justice DeVaney was appointed by Governor Dennis Daugaard as a Circuit Judge for the Sixth Judicial Circuit in 2012, where she presided over criminal, civil and juvenile proceedings, heard administrative appeals, and assisted as the second judge for the Sixth Circuit DUI/Drug Court. Justice DeVaney has served as the Secretary-Treasurer, and is currently the President-Elect, of the South Dakota Judges Association. She has also served on various other committees and boards in her professional capacity and in the Pierre community, where she resides with her husband, Fred, and their three children.



### *Justice Scott P. Myren*

Justice Scott P. Myren, who was sworn in to represent the Fifth Supreme Court District on January 5, 2021, was appointed by Governor Kristi Noem. Justice Myren grew up on his family farm in rural Campbell County and graduated from Moberg High School in 1982. He received a Bachelor of Science Degree, double majoring in history and political science from the University of South Dakota in 1985. He earned his Juris Doctorate from Rutgers University in 1988, where he was the Research Editor of the Rutgers Law Journal. Justice Myren practiced law in Denver, Colorado, before returning to South Dakota to work as a staff attorney for the South Dakota Supreme Court. He served as an administrative law judge for the Office of Administrative Hearings and Magistrate Judge for the Sixth Judicial Circuit. In 2003 he was appointed as a Circuit Judge for the Fifth Judicial Circuit by Governor M. Michael Rounds. He was re-elected to that position by the voters in 2006 and 2014. Chief Justice David Gilbertson appointed him the Presiding Judge for the Fifth Judicial Circuit in 2014. Justice Myren served as chair of the Unified Judicial System's Presiding Judges' Council and president of the South Dakota Judges' Association. He served on numerous committees, including the Court Improvement Program and Juvenile Detention Alternative Initiative, which he chaired. He was selected as a Judicial Fellow to the Advanced Science and Technology Adjudication Resource Center in Washington D.C., in 2009. He served on Governor Dugaard's South Dakota Criminal Justice Initiative workgroup and Juvenile Justice Reinvestment Initiative workgroup. He supervised the rural and urban pilot programs, which led to the implementation of Hope Probation across South Dakota. He served as Drug Court and DUI court judge for Brown County. He and his wife, Dr. Virginia Trexler-Myren, have two daughters. The Fifth Supreme Court District includes Harding, Butte, Perkins, Corson, Ziebach, Dewey, Campbell, Walworth, Potter, McPherson, Edmunds, Faulk, Brown, Spink, Marshall, Day, Clark, Coddington, Hamlin, Roberts, Grant, and Deuel counties.





### ***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.



### ***2022-2023 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: Joshua Liester, Law Clerk for the Supreme Court; Benjamin Schroeder, Law Clerk for Justice Myren; Zachary Schmidt, Law Clerk for Justice Salter; Jillian Smith, Law Clerk for Chief Justice Jensen; Caleb Vukovich, Law Clerk for Justice Kern; Jennifer Williams, Law Clerk for Justice DeVaney

## **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.

Has 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 or her request, on issues involving executive power.

### **Circuit Court**

Circuit Court services are available in each county seat.

Counties are grouped into seven circuits, served by forty-four judges elected from within their circuits for eight-year terms. Vacancies are 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 fifteen 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.



**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**  
**March 2023 Term**

Eight 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.



**Detmers v. Costner**

This is the second dispute arising out of a contract between Kevin Costner and Peggy Detmers to come before the Court, the first having been more than a decade ago.

In the early 1990s, Costner purchased real estate in Deadwood where he planned to open an international resort and casino called The Dunbar after his character in the movie *Dances with Wolves*. By oral agreement, he commissioned Detmers to sculpt 17 larger-than-life bronze figures consisting of 14 buffalo and 3 Lakota hunters on horseback for display at The Dunbar. Detmers was to be compensated with \$250,000, plus royalties from the sale of sculpture reproductions through The Dunbar's gift shop.

When The Dunbar had not been built by the late 1990s, Detmers stopped working on the sculptures. Following negotiations that led to a 2000 written contract, Detmers agreed to resume working for an additional \$60,000. The contract contemplated an arrangement for the sale of the sculptures "if The Dunbar [was] not built within ten (10) years or the sculptures [were] not agreeably displayed elsewhere[.]"

The Dunbar did not come to fruition. Instead, Costner developed Tatanka, a tourist attraction in the same location, and kept open the possibility that he would eventually open The Dunbar. Tatanka features Detmers's sculptures, an interactive museum, nature trails, and a gift shop. Detmers was involved in placing

the sculptures and spoke at Tatanka's grand opening in 2003.

In 2008, however, Detmers filed an action to require Costner to sell the sculptures, alleging that they were not "agreeably displayed elsewhere[.]" The court granted judgment in favor of Costner, holding that Tatanka was "elsewhere." The court also found Detmers's actions demonstrated her agreement with the arrangement "for the long term." This Court affirmed.

In the present dispute, Detmers alleged that Costner recently advertised the land where Tatanka is located for sale, indicating within the listing that he would relocate the sculptures. Pointing to language in our prior opinion referring to the parties' agreement "to permanent display of the sculptures at Tatanka[.]" Detmers argued that the explicit statement of Costner's intent to relocate the sculptures was an anticipatory repudiation of their agreement to permanent display. In the alternative, Detmers requested a declaratory judgment that closing Tatanka and relocating the sculptures would be a breach of their permanent display agreement.

Both parties moved for summary judgment, and the circuit court granted summary judgment in Costner's favor, determining that Detmers's claim was barred by the doctrine of res judicata because the parties had already asked the circuit court and this Court to interpret their obligations under the contract. The court entered alternative findings that the meaning of "permanent" intended in the prior proceedings was not eternal but "without fundamental change for a long time" and that Costner satisfied his obligation to display the sculptures by agreeably displaying them at Tatanka.

The court determined that the advertisement was not an unequivocal statement by Costner that he was refusing to display the sculptures at an agreeable location and that Detmers had committed an anticipatory repudiation of the same provision when she indicated her refusal in the prior litigation to agree to any display location besides The Dunbar. Finally, the court entered declaratory judgment in Costner's favor, finding that he fully performed and owed Detmers no continuing duty because she had no continuing rights regarding the location of the sculptures.

Detmers raises the following issues:

1. Whether the circuit court erred in concluding Detmers's claims are barred by the doctrine of res judicata.
2. Whether the circuit court erred in interpreting "permanent" as meaning something other than permanent, and whether Costner is judicially estopped from asserting otherwise.
3. Whether the circuit court erred when it held Costner was discharged from his agreement to permanently display the sculptures at Tatanka when he obtained Detmers's agreement to display them at that location.
4. Whether the real estate listing and statement concerning relocation of the sculptures is, as a matter of law, an anticipatory breach of the judicially

determined agreement to permanently display the sculptures at Tatanka.

Mr. Andrew R. Damgaard and Mr. A. Russell Janklow,  
Attorneys for Plaintiff and Appellant Peggy  
Detmers

Ms. Stacy R. Hegge, Ms. Catherine A. Seeley, and Mr.  
Daniel E. Ashmore, Attorneys for Defendant and  
Appellee Kevin Costner

**State v. Foshay**

A person cannot be tried or punished for violating a criminal law if they are “mentally incompetent to proceed.” The term is generally defined under South Dakota law as a mental or psychological condition that renders a person unable to understand the nature and consequences of the criminal case against them or unable to properly assist in their defense.

Steven Foshay was accused of having sexual intercourse with a 12-year-old in August 2016 when Foshay was 18 years old. He was subsequently charged with two counts of first-degree rape as well as two counts of sexual contact with a child less than sixteen years old.

Foshay’s attorney filed a motion seeking a court-ordered psychological examination to evaluate whether Foshay was competent to stand trial. The circuit court determined Foshay was mentally incompetent to proceed at a February 2017 competency hearing. The court committed him to the Human Services Center in Yankton in an effort to restore his competency.

Foshay remains committed. In the six-years since his original commitment, Foshay has received treatment at three facilities in South Dakota and there have been four competency review hearings before the circuit court. While each of these hearings has had the same result—a finding that Foshay remains incompetent to stand trial—each hearing has featured varying evidence as to Foshay’s competency. In particular, the opinions of psychologists and licensed counselors have ranged from

Foshay being competent to stand trial to him not being competent to stand trial along with different views about whether competency could be restored.

However, the last time any mental health professional testified that Foshay was competent to stand trial was in 2018, and in each of the three competency review hearings since that time, mental health professionals have agreed that Foshay is not competent to stand trial. In fact, at the most recent competency review hearing in 2021, the evaluator stated that Foshay would not likely gain competency in the foreseeable future, though the evaluator explained that some of Foshay's lack of progress was likely attributable to COVID-19 protocols that inhibited competency restoration efforts for Foshay and many other patients. Despite indicating a lack of optimism that he would gain competency in the foreseeable future, the evaluator stopped short of stating that Foshay would never become competent, noting that additional treatment sessions could improve the competency restoration effort for Foshay.

On November 16, 2021, Foshay's lawyer filed a motion to dismiss the charges against him. Foshay's attorney argued that there was no evidence that Foshay would regain competency in the foreseeable future, which would require the circuit court to dismiss the charges under SDCL 23A-10A-14. The circuit court denied the motion to dismiss, reasoning "there have been conflicting opinions from mental health professionals who have evaluated Foshay" and that the impact of COVID-19 protocols inhibited competency restoration efforts. Though the case had not reached a final judgment, the Supreme Court exercised its

discretion to grant Foshay's request for an intermediate appeal to consider the following issue:

1. Whether the circuit court erred in not determining that there is no substantial probability that the defendant will become competent to proceed in the foreseeable future.

Ms. Betsy Doyle, Attorney for Appellant Steven Michael Foshay

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

## **Bracken v. South Dakota Department of Labor and Regulation**

In 2012, Darcy Bracken and her husband opened the White Tail Ridge Bed and Breakfast in Custer County. The couple, with little assistance of others, carried out the daily affairs of the business, and the business's profits were Bracken's primary source of income.

In January 2020, the U.S. Department of Health and Human Services declared a public health emergency relating to the COVID-19 pandemic. Starting in February 2020, according to Bracken, new bookings at the business ceased and many existing bookings were cancelled. Furthermore, Bracken reported that her bed and breakfast business did not have any guests until the end of May 2020, though the business remained open. Bracken attributed the overall decline in guests to the pandemic.

In March 2020, Congress passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act, which included creating a temporary, state-administered "Pandemic Unemployment Assistance" (PUA) benefits program for unemployed individuals. Under the CARES Act, self-employed workers are considered unemployed if they "experienced a significant diminution of their customary or usual services because of the COVID-19 public health emergency." In South Dakota, the South Dakota Department of Labor (the Department) administered the PUA benefits program.



Bracken applied for PUA benefits and indicated that she was self-employed but became unemployed in March 2020 “as a result of COVID-19[.]” Responding to the application’s prompt to explain the unemployment situation, Bracken wrote, “I own a small bed and breakfast. The travel industry has been hit very hard by COVID-19 so we have no business due to it.” The Department determined Bracken was eligible for PUA benefits and, over the course of the next several months, issued a series of benefits payments to her totaling \$14,080.

In January 2021, the Department notified Bracken that her PUA benefits application was under review. Following its review, the Department determined that Bracken was *not* eligible for PUA benefits and considered the entire sum of benefits an overpayment that Bracken was required to repay. In the Department’s stated reasoning, Bracken was ineligible because she was “not considered unemployed.”

Bracken, representing herself, appealed the Department’s determination to the Department’s Reemployment Assistance Division. An administrative law judge (ALJ) affirmed the Department’s determination of overpayment. The ALJ found that Bracken’s business “regularly had guests each month” prior to the pandemic and had no guests until the end of May 2020[.]” but the ALJ concluded that “the reason for the loss of guests is because of indirect economic consequences from the COVID-19 public health emergency.”

Bracken requested a review of the ALJ’s decision from the Department, arguing, in part, that “[under] the CARES Act, I am not required to provide evidence that I

was directly affected by the pandemic, only that I met any [ ] criteria as stated in . . . the CARES Act[.]” Bracken pointed to an administrative rule that treated as unemployed “Self-employed individuals (including independent contractors and gig workers) who experienced a significant diminution of their customary or usual services because of the COVID-19 public health emergency.” The Department did not agree and summarily adopted the ALJ’s whole decision as its own. Bracken appealed the decision to the circuit court.

Bracken repeated her argument to the circuit court that she was not required to prove the pandemic was the direct cause of the business diminution. The Department countered stating, “Simply put, there is no evidence in the record that conclusively establishes that the bed and breakfast ‘experienced a significant diminution in [its] customary or usual services because of [ ] COVID-19.’” (Emphasis and first alteration in original). The circuit court affirmed the ALJ’s decision, reasoning “I don’t know how your business wouldn’t be affected by Covid, but based on the record I’ve reviewed I can’t make [ ] a clearly erroneous finding.”

Bracken raises the following issue on appeal to the Supreme Court:

1. Whether the ALJ erred in determining that Bracken was ineligible to receive PUA benefits because the business suffered, what the ALJ deemed to be, indirect economic consequences of the pandemic.

Mr. Eric Schulte, Attorney for Appellant Darcy Bracken

Mr. Seth Lopour and Ms. Courtney S. Chapman,  
Attorneys for Appellee South Dakota Department  
of Labor and Regulation

### **Estate of Rose Beadle**

Rose Beadle was over 90 years old and living in assisted living. Through a power of attorney, she had designated Travis Raguse as her attorney-in-fact for managing her finances. During this time, her investment accounts at Edward Jones specified that they were payable/transferable on death (P/TOD) to Travis and his brother, Truman Raguse. Travis was indicted for grand theft by embezzlement from Beadle. He pled no contest to the crime and was ordered to pay her over \$170,000 in restitution.

A conservator is a person or entity appointed by a court to manage a vulnerable person's estate and financial affairs. A guardian is a person or entity appointed by a court to be responsible for the personal affairs of a vulnerable person. Because Beadle could not handle her affairs, the circuit court appointed her nephew, Allen Riess, as her guardian and co-conservator and appointed G. Todd Garry, a public accountant with no interest in Beadle's finances, as her co-conservator. The conservators petitioned the circuit court to close the Edward Jones investment accounts and open new ones that did not include Truman and Travis as beneficiaries. Truman, Travis, and Edward Jones did not receive notice of the hearing on this petition. Nevertheless, the circuit court entered an order approving the request.

Subsequently, Beadle passed away. The guardian and co-conservators submitted their final accounting for the circuit court's final approval. The circuit court

approved that final accounting and entered an order terminating the guardianship/conservatorship. No one appealed that final order. Truman and Travis each attempted to appeal the circuit court's previous order removing them as beneficiaries on Beadle's investment accounts. The Supreme Court dismissed those appeals because they had been rendered moot by the unappealed final order, which approved the final accounting and terminated the guardianship/conservatorship.

When a person dies, that person's estate goes through probate court to transfer the estate's assets in accordance with that person's wishes. A personal representative is appointed to gather and administer the estate's assets and ultimately recommend the final distribution of the estate's assets according to the decedent's will or under statutory provisions if there is no will. A probate action was instituted to resolve Beadle's estate. Riess was appointed by the probate court to act as personal representative. Travis and Truman filed petitions asking the probate court to determine title to Beadle's Edward Jones investment accounts in their favor. Riess asked the probate court to deny that request by summary judgment and requested approval of his final accounting of the Estate's assets. The probate court granted summary judgment which denied the petitions of Travis and Truman. Travis and Truman appealed, and their appeals have been consolidated into one case.

Travis and Truman raise several issues on appeal:

1. Whether the order by the circuit court in the guardianship and conservatorship case that removed Travis and Truman as

beneficiaries was valid under SDCL 29A-5-420.

2. Whether the P/TOD beneficiary designations on the investment accounts should be restored and distributed accordingly.
3. Whether the Estate was entitled to judgment as a matter of law on Truman's and Travis's petitions to determine title to the investment accounts.
4. Whether the probate court erred when it held that the investment accounts were proper assets of the Estate to be distributed according to her will.
5. Whether legal positions taken by the Estate are contradictory and barred by judicial or quasi estoppel.

Mr. Chris A. Nipe, Attorney for Appellant Travis Raguse

Ms. Pamela R. Reiter and Mr. Ronald A. Parsons, Jr.,  
Attorneys for Appellant Truman Raguse

Mr. Gordon P. Nielsen, Attorney for Appellee Allen  
Riess, personal representative of the Estate

**State v. Smith**

Ramon Smith came from Minneapolis to Sioux Falls to visit his sister, Martece, and her girlfriend, Christina, and to purchase their Buick. Martece and Christina were involved in a Facebook feud with their former friend, Jasmine. The morning after Smith arrived, Jasmine was shouting Christina's name in the parking lot of the apartment complex where Martece and Christina lived.

A short while later, Smith, driving separately in the Buick, accompanied Martece and Christina when they went to Jasmine's apartment to confront her. Jasmine was not home, and Martece and Christina encountered Jasmine's brother, Joseph, instead. They returned to Martece and Christina's apartment, and Christina's brother came over. Christina's family lived in another unit of the same apartment complex. Christina allegedly received a Snapchat video message depicting Jasmine's brothers threatening them with a gun, which no one took seriously.

Soon, a group of men, including Joseph and Jasmine's other brothers, Josh, Jevon, and Zykey, gathered in the parking lot. Josh and Joseph entered the building and pounded on Christina's apartment door, yelling for them to come outside. Meanwhile, from the window of their apartment, Christina's parents recognized one of the men from work, and her father, Larry, went out to visit with him. Seeing this, and concerned about the situation escalating, Christina's brother left her apartment and went outside to encourage their father to go back inside his apartment.

Smith armed himself with a .40 caliber Smith & Wesson and went out to the parking lot. As Josh moved toward him, he adjusted the waistband of his shorts. Smith claims he thought Josh was reaching for a weapon, and he opened fire, shooting Jevon in the head, Josh in the shoulder, and Larry in the abdomen. The rest of the men scattered. Smith abandoned the weapon and left the scene, returning to Minneapolis, where he was arrested twelve days later. During an interview with law enforcement, he did not deny that he shot the men, but he claimed to have done so in self-defense.

All three men Smith shot were hospitalized. Jevon and Josh survived, but Larry passed away. Smith was charged with, among other counts, second-degree murder and first-degree manslaughter for Larry's death, and three counts of aggravated assault under each of two grounds for Joseph, Jevon, and Josh. He pleaded not guilty.

While the case against Smith was pending, the South Dakota Legislature passed a Stand Your Ground law that included a provision for statutory immunity when the use of force is justified under South Dakota law. Thereafter, Smith filed a motion to dismiss the prosecution under the immunity provision and requested an evidentiary hearing on the motion. The court denied the motion, determining that the statute had only prospective application.

Before trial, Smith also moved the circuit court to enter an order prohibiting the State from allowing witnesses to testify that Smith had been in prison, which the court granted. However, the court permitted testimony that Smith was prohibited by statute from



carrying a firearm, determining that information to be relevant to the reasonableness of his self-defense claim.

At trial, during questioning by the State, Christina began explaining that Smith had just been released from prison in Minnesota, in violation of the court pretrial ruling. The State immediately stopped her, there was a bench conference, and the court instructed the jury to disregard her testimony. The court denied Smith's motion for a mistrial. A law enforcement officer also testified, consistent with the court's pretrial ruling, that Smith was prohibited by statute to carry a firearm because of a prior conviction but did not discuss Smith's recent release from prison or the nature of his past felonies.

The jury returned a guilty verdict on all counts. Smith moved the court to set aside the verdict and enter a judgment of acquittal, and the court denied his motion. Smith was sentenced to life in prison without the possibility of parole for second-degree murder and to three consecutive 25-year sentences for the aggravated assaults. No sentences were imposed on the alternative counts.

Smith raises the following issues:

1. Whether the circuit court erred by not allowing a statutory immunity hearing and by not granting Smith's motion to dismiss based on statutory immunity.
2. Whether the circuit court abused its discretion by allowing the State to introduce evidence that Smith could not legally possess a firearm.

3. Whether the circuit court erred by not setting aside the verdict and entering a judgment of acquittal.
4. Whether the circuit court abused its discretion by not granting a mistrial.

Mr. Manuel J. de Castro, Jr., Attorney for Defendant  
and Appellant Ramon Smith

Mr. Marty J. Jackley, Attorney General and Mr.  
Stephen G. Gemar, Assistant Attorney General,  
Attorneys for Appellee State of South Dakota

### **Estate of Jerry L. Simon**

Jerry Simon, a fourth-generation rancher, owned and operated Simon Ranch, Inc., a family corporation located northwest of Faith, South Dakota. In September 2019, Jerry passed away leaving as survivors his daughter, DeLynn (Simon) Hansen, and his wife Lynda (Neumiller) Simon. Jerry's last will and testament, executed on December 3, 2003, was offered for probate by his designated personal representative and long-time friend, Steve Elgen. The Will named DeLynn Hansen as the sole devisee of all of Jerry's property.

DeLynn is the only child of Jerry's marriage to Judith Simon. Judith and Jerry were divorced in 1987. Jerry then married Penny Simon. The two were divorced in 2003. Following both divorce decrees, Jerry reacquired all shares of Simon Ranch, Inc.

In 2005, Jerry met Appellant Lynda (Neumiller) Simon while she was working at the First Gold Gaming Resort in Deadwood, South Dakota. Jerry and Lynda soon realized that they shared a common love for horses and soon began dating. Lynda began living on Jerry's ranch in 2009, and the two were married in 2011. Lynda assisted in the day-to-day management and operation of the ranch.

Over time, Jerry acquired more than 100 head of horses. At the time of the marriage, the horses were in Jerry's name through the American Quarter Horse Association (AQHA). In 2014, Jerry and Lynda acquired a joint tenancy membership AQHA for horses they purchased and for those raised from Jerry's breeding

stock. After Jerry's death, the Estate held a horse sale. The value of the horses that were owned in joint tenancy either retained or sold for Lynda's benefit totaled \$77,026.88. The horses owned by Jerry outside the joint tenancy relationship were sold for a total of \$109,250.00. Thus, during the five years that the AQHA joint tenancy account was in place, Lynda had acquired approximately 41.35% of the value of the horses on the ranch.

Additionally, Jerry changed the title on several motor vehicles, a flatbed trailer, and a camper to include Lynda. DeLynn was also named on the title of several of the conveyances. Following Jerry's death, Lynda acquired property valued at \$106,301.88 outside the Will through her joint ownership interest in the horses, vehicles, and other items. The total value of Jerry's estate is \$1,331,105.63, which is primarily comprised of real estate. The transfers Lynda received equaled approximately 7.99% of the value of Jerry's entire estate. She was not a beneficiary of life insurance policies, bank accounts, or other investments.

Because Lynda was omitted from the will, which was drafted before her marriage to Jerry, she petitioned the circuit court for an intestate share under SDCL 29A-2-301. SDCL 29A-2-301(a)(3) provides an exception to a subsequent spouse's entitlement to an intestate share if "[t]he testator provided for the spouse by transfer outside the will and the intent that the transfer be in lieu of a testamentary provision is shown by the testator's statements or is reasonably inferred from the amount of the transfer or other evidence."

If Lynda is entitled to an intestate share, she would receive the first \$100,000 of the estate plus 50%

of the remaining estate under SDCL 29A-2-102(2). Alternatively, Lynda would receive an elective share equaling 21% of the augmented estate per SDCL 29A-2-202.

The circuit court denied Lynda's petition for an intestate share, concluding that Jerry's creation of a joint tenancy AQHA membership provided for Lynda outside the Will and that Jerry intended the transfer of horses and other property to Lynda to be in lieu of the testamentary provisions in his Will. Lynda appeals, raising one issue which we restate as follows:

1. Whether the circuit court erred by denying Lynda's petition for an intestate share of the estate under SDCL 29A-2-301.

Mr. Elliot J. Bloom and Mr. Conor P. Casey, Attorneys  
for Appellant Lynda Simon

Mr. Michael W. Strain, Attorney for Appellee Estate of  
Jerry Simon

**State v. Banks**

Casey Bonhorst was killed by a single gunshot wound to the neck on February 26, 2020, while working as a delivery driver for Domino's Pizza. The ensuing investigation led law enforcement to Raymond Banks and Jahennessy Bryant. Both Banks and Bryant pleaded guilty to manslaughter in the first degree. Banks's plea agreement capped his potential sentence at 60 years in prison with additional time suspended, while Bryant's plea agreement capped his potential sentence at 25 years in prison with 25 additional years suspended.

Banks and Bryant offered conflicting stories regarding their respective roles in the crime. Bryant, who agreed to cooperate and testify for the State in conjunction with his plea agreement, testified at a pretrial hearing that it was Banks's idea to rob the pizza delivery man. Bryant maintains that while he stayed back and served as a lookout, Banks approached Bonhorst as he was walking back to his car after delivering a pizza to a residence. Bryant claims Banks pulled a gun on Bonhorst to rob him. Bryant described seeing Bonhorst pulling change from his pocket and throwing it at Banks while lunging toward him, at which time he heard two gunshots. Bryant then took off running.

According to Banks, the roles were reversed, with Banks serving as the lookout while Bryant approached Bonhorst and put the gun to his face. Banks maintains that it was Bryant who ended up shooting Bonhorst.

Prior to his sentencing hearing, Banks's attorney informed the circuit court and the State that he intended to offer testimony from a polygraph examiner at the sentencing hearing as mitigating evidence of Banks's role in the crime. Banks had taken a polygraph examination while incarcerated in jail that showed no indication of deception when he denied being the shooter.

The State objected to the introduction of the polygraph evidence, arguing that South Dakota has a per se rule against using polygraph evidence in any proceeding unless agreed upon by both parties. The circuit court determined that South Dakota law precludes the use of polygraph evidence due to its questionable reliability and ruled that the polygraph evidence would not be permitted at the sentencing hearing.

At the sentencing hearing, the circuit court considered the voluminous material compiled in presentence investigation reports regarding the underlying offense and the history and background of each defendant. Consistent with their plea agreements, the court sentenced Banks to 60 years in prison with an additional 20 years suspended, and sentenced Bryant to 25 years in prison with an additional 25 years suspended.

Banks appeals, raising the single issue of whether the circuit court abused its discretion by not allowing the polygraph evidence to be introduced at his sentencing hearing.

Ms. Kristi Jones and Mr. Manuel J. de Castro, Jr.,  
Attorneys for Appellant Raymond Banks

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



### **Implicated Individual**

This is the second time this matter has come before the Court. A criminal investigation resulted in the issuance of five separate search warrants, inventories, and supporting affidavits involving Denny Sanford (Implicated Individual). These documents were filed into a single file in the Minnehaha County Clerk of Court's office. Law enforcement requested, and the court issued, an order sealing the entire search warrant file. ProPublica and Argus Leader (Press) moved the circuit court to unseal the files. The State asked the court to keep the files sealed to maintain the integrity of the investigation, and Sanford asked the court to keep them sealed to protect his privacy and reputation. The court ruled that SDCL 23A-35-4.1 only permitted the court to seal the contents of the affidavits during the investigations, but the statute did not permit it to seal the contents of the warrants, return of the warrants, or inventories. The court further determined that its authority to seal the supporting affidavits lasted only until an indictment was filed or the investigation was terminated. We affirmed, holding that the "court's discretion to 'prohibit public access to information in a court record'" in SDCL 15-15A-13 is subject to applicable statutory law, which includes SDCL 23A-35-4.1.

Following the prior appeal to this Court, the Press moved the circuit court to unseal the supporting affidavits. Initially, the circuit court denied this motion based upon the State's representation that the investigation was still ongoing. Later, the State filed notice that it had completed its investigation, satisfying

one of the conditions that would trigger unsealing under SDCL 23A-35-4.1.

Sanford filed a motion to stay the unsealing, arguing that he should be allowed to view the affidavits and participate in their redaction pursuant to SDCL 15-15A-13. The Press filed another motion to unseal. The circuit court denied Sanford's request, noting that none of the situations that would extend the court's authority to exercise continued discretion applied and expressing its intent in any event to redact "personally sensitive or identifying information, which in this case consists of personal email addresses, home addresses, phone numbers, and birth dates."

Sanford appeals from the order unsealing the affidavits. The Press continues to support unsealing the affidavits. The State now supports unsealing the affidavits, noting that its interest in the affidavits remaining unsealed ended when it concluded its investigation and that public trust in law enforcement requires transparency. Sanford raises the following issue:

1. Whether the circuit court erred in denying Sanford's request to inspect the affidavits prior to their unsealing so that he may invoke his rights guaranteed by SDCL 15-15A-13, if necessary.

Ms. Stacy R. Hegge, Attorney for Appellant Denny Sanford

Mr. Jeff Beck, Attorney for Appellee ProPublica, Mr. Jon Arneson, Attorney for Appellee Argus Leader, and

Mr. Paul Swedlund, Solicitor General, Attorney  
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.

## NOTES

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