

Introduction to
The South Dakota
Supreme Court



and
Case Summaries for
Oral Arguments at the
October Term of Court
October 4 and October 5, 2022
University of South Dakota School of Law
Vermillion, South Dakota

Steven R. Jensen
CHIEF JUSTICE



Supreme Court
STATE OF SOUTH DAKOTA

October 4, 2022

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

Ladies and Gentlemen:

Your Supreme Court welcomes you to our October Term of Court.

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,

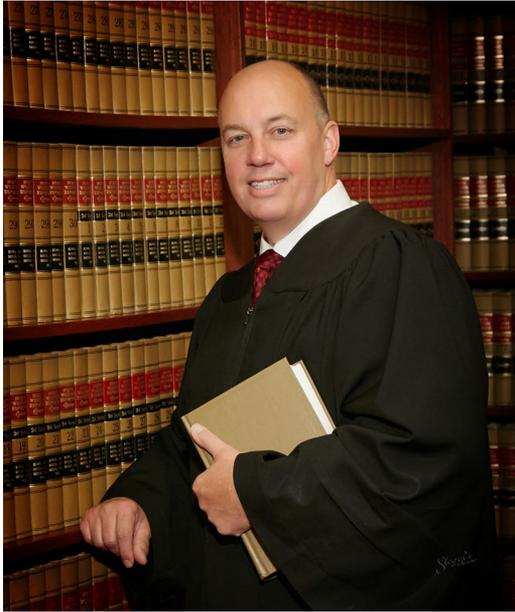
A handwritten signature in blue ink, appearing to read "Steven R. Jensen". The signature is written in a cursive style and is positioned above the printed name of the Chief Justice.

Steven R. Jensen
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 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.

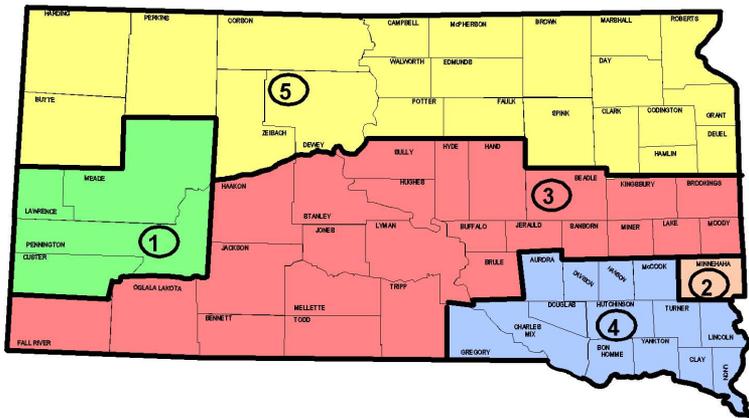
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench 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.

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 Jensen was appointed in 2017 from District Four, Justice Kern was appointed in 2014 from District One, Justice Salter was appointed in 2018 from District Two, Justice DeVaney was appointed in 2019 from District Three, and Justice Myren was appointed in 2021 from District Five.

South Dakota Supreme Court Appointment Districts
Effective January 23, 2012



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

Courtroom Protocol

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

Your cooperation is appreciated.

DO

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

DO NOT

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

Supreme Court of South Dakota
October 2022 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.

Case Summaries

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

Estate of Robert T. Lynch v. Kevin Lynch

This appeal concerns the scope of this Court's bright-line rule from *Bienash v. Moller*, which prohibits an attorney-in-fact accused of self-dealing from introducing oral extrinsic evidence (i.e., testimony about what the principal said about the transactions at issue) that the principal had verbally authorized self-dealing where the Power of Attorney (POA) document establishing the fiduciary relationship did not. In this case, the circuit court allowed Kevin Lynch to testify about discussions he had with his late father, Robert Lynch (Bob), and for the jury to consider that testimony. Bob's estate (Estate) argues that the rule from *Bienash* applies here because the POA covers all actions Kevin took with respect to Bob's finances and that the circuit court should not have allowed Kevin to testify about any verbal agreement with Bob. Kevin argues that the circuit court correctly determined this case is not like *Bienash* because the money was not a gift, but rather compensation from an ongoing farming partnership that existed for many years before the POA was created, and many of the transactions at issue did not involve the use of a POA.

Bob was a farmer in the Vermillion area. He was survived by three children. Carleen lives in Switzerland, Ann lives in North Carolina, and Kevin lives and farms in Vermillion.

Bob and Kevin worked together on the farm in an arrangement that evolved over the years as Kevin took on increased responsibilities. When Bob retired from farming in 1995, he and Kevin had a 60/40 crop-share and cattle-share partnership. Bob moved off his farm in 2006.

In 2007, Bob signed a POA appointing Kevin as his attorney-in-fact. In February 2008, Bob completed paperwork to allow Kevin to write checks from his account for his convenience. That May, Bob went to the bank by himself and changed his checking account to a joint account with Kevin, granting him the right of survivorship.

In 2010, Bob executed a Will that provided for 51% of his farm real estate to go to Kevin and for each surviving daughter to receive a 24.5% share. The Will further provided for all of Bob's farm machinery, equipment, grain, and livestock to go to Kevin, along with his pickup and truck. The rest of the Estate would be split equally among the children. Bob explained in his Will that he left more to Kevin "because he stayed home to help me on the farm. He has also helped me considerably in my problems in daily living as I have aged. I further have the specific intention of continuing on the farming heritage in the Lynch family."

Bob moved into a nursing home in September 2011. In 2012, a neighboring family began leasing the tillable acres on Bob's farm. The cash rent covered Bob's nursing home expenses. Kevin continued to maintain and repair the house and non-tillable acres. He claimed that, in exchange, Bob agreed at that time to pay Kevin a \$30,000 annual fee and all the income from the calves produced annually from their cattle.

From 2011 on, Kevin issued and signed checks to himself from the joint checking account. Some of the funds paid for Morton buildings on Kevin's land, machinery, and equipment. Kevin also cashed a certificate of deposit and used the funds to buy a mid-sized pickup.

Bob passed away in March 2018. His Will designated Kevin and Ann as co-personal representatives of his Estate. At the time of Bob's death, the joint bank account had a balance of \$112,296.13, \$110,000 of which Kevin transferred to the Estate at Ann's direction. Kevin voluntarily stepped

down as a co-personal representative in anticipation of litigation Ann planned to bring against him.

In August 2018, Ann sued Kevin on behalf of the Estate, claiming fiduciary fraud, breach of fiduciary duty, conversion, and elder exploitation. Kevin counterclaimed for conversion as well as setoff, unjust enrichment, and quantum meruit for labor and expenses provided to Bob and the Estate.

Both parties sought partial summary judgment. The circuit court denied the Estate's motion in its entirety. The circuit court granted Kevin's motion, in part, as to elder exploitation before July 1, 2016, because the cause of action did not exist before then. The circuit court decided that parol evidence was admissible to support Kevin's claim that Bob had authorized various transactions, and genuine issues of fact existed as to whether Kevin breached his fiduciary duty to Bob. The court also determined that fact issues existed as to whether Kevin had fiduciary duties outside the POA. Finally, the circuit court determined that the POA did not expressly authorize self-dealing and that, although Kevin was permitted to give himself gifts up to the federal gift tax exclusion amount, he did not.

Prior to trial, the circuit court denied the Estate's motion in limine to exclude parol evidence supporting Kevin's claims that Bob authorized the challenged transactions. At trial, the circuit court declined to give certain jury instructions offered by the Estate concerning claims of breach of fiduciary duty by Kevin. The court also declined to give certain jury instructions offered by Kevin concerning his authority to annually gift monies to himself under the POA. At the close of evidence, the circuit court denied the Estate's motion for judgment as a matter of law and granted Kevin's motion on the joint account conversion claim. The jury returned a verdict in favor of Kevin on all counts.

The Estate raises the following issues on appeal:

1. Whether the circuit court erred by considering oral extrinsic evidence in denying the Estate summary judgment.
2. Whether the circuit court erred by considering oral extrinsic evidence when the POA did not authorize self-dealing in clear and unmistakable terms.
3. Whether the circuit court erred by giving a jury instruction that the POA fiduciary relationship might not apply to all interactions between Bob and Kevin.
4. Whether the circuit court erred by allowing the jury to consider oral extrinsic evidence as part of Kevin's defense against the Estate's breach of fiduciary duty claims.
5. Whether the circuit court erred by refusing to instruct the jury that a fiduciary breached his fiduciary duty when he used his position to enrich the value of property that will eventually devolve to him.
6. Whether the circuit court erred in granting Kevin's motion for judgment as a matter of law regarding ownership of the joint checking account.

Kevin seeks review of the following issue only if this Court reverses:

Whether the circuit court erred in holding the POA did not expressly authorize self-dealing up to a certain annual amount and by not instructing the jury to deduct the annual amount from any damages.

Mr. Michael J. Schaffer, Attorney for Appellant Estate Robert T. Lynch

Ms. Pamela R. Reiter, Mr. Ronald A. Parsons, Jr., and Ms. Sara E. Show, Attorneys for Appellee Kevin Lynch

Brockley v. Ellis

In 2015, the Brockleys (the plaintiffs) received a judgment against Clarence Griffin and others (the defendants) in an amount exceeding \$1.5 million. In 2017, the circuit court entered a charging order that directed that any distributions of Clarence Griffin's interest in a South Dakota limited liability company (LLC) should be paid directly to the Brockleys until the judgment was satisfied.

The LLC was created in 2011 and had two members with equal ownership, Clarence Griffin and Michael Trucano. The LLC owned a hotel and casino in Deadwood, South Dakota. Shortly before entry of the \$1.5 million judgment, Clarence Griffin transferred his ownership interest in the LLC to his wife (Kimberly Griffin) and himself as tenants by the entirety. A tenancy by the entirety is a unique type of concurrent ownership that only exists between married couples. It guarantees that each spouse has rights of survivorship (i.e., when one dies, the other receives total ownership), and that creditors of one spouse cannot attach property owned in a tenancy by the entirety. Both Kimberly and Clarence Griffin were domiciled in Florida at this time. Shortly after the \$1.5 million judgment, Michael Trucano transferred his interest in the LLC to the Michael J. Trucano Living Trust. By the time the charging order was entered, Kimberly and Clarence Griffin held 50% of the LLC as tenants by the entirety, and the Michael J. Trucano Living Trust held the other 50%.

In December 2019, the LLC agreed to sell the hotel and casino. In July 2020, the LLC agreed to redeem the ownership interest held by the Michael J. Trucano Living Trust in exchange for 50% of the proceeds from the sale of the hotel and casino. On December 29, 2020, at the closing for the sale of the hotel and casino, the LLC redeemed the 50% ownership interest in the LLC held by the Michael J. Trucano Living Trust by paying the trust half the proceeds from the sale of the hotel and casino. Clarence Griffin passed away a couple weeks before the closing, leaving Kimberly Griffin with sole ownership of the LLC after the closing. The proceeds that the LLC received from the sale were sent to the LLC's account at a Florida bank. Later, these funds were distributed to Kimberly Griffin as the sole member of the LLC.

In April 2021, the Brockleys filed a motion for an order to show cause requesting that Michael Trucano, the Michael J. Trucano Living Trust, the LLC, Kimberly Griffin, and the Estate of Clarence Griffin: (1) be held in contempt for violation of the charging order; (2) be required to pay the remaining amount due from the \$1.5 million judgment; and (3) pay the attorney fees of the Brockleys.

Civil contempt has four requirements: (1) the existence of an order; (2) knowledge of the order; (3) ability to comply with the order; and (4) willful or contumacious disobedience of the order. The circuit court determined that the parties did not disobey the order in a willful or contumacious manner. The Brockleys appeal the circuit court's orders denying their request for a finding of contempt.

The Brockleys raise several issues on appeal:

1. Whether South Dakota recognizes the ability of non-residents of South Dakota to hold personal property interests as Tenants by the Entirety under the laws of the non-resident's domicile.
2. Whether Clarence Griffin's transfer of his interest in the LLC to Kimberly Griffin and himself included his distributional interest in the LLC.
3. Whether the charging order was disobeyed in a willful or contumacious manner.

Mr. Jon W. Dill, Attorney for Appellants Mark and Annesse Brockley

Mr. Richard Pluimer, Attorney for Appellees Michael Trucano and Michael J. Trucano Living Trust

Mr. Cesar A. Juarez, Mr. Aaron T. Galloway, Mr. Haven L. Stuck, and Ms. Dana Van Beek Palmer, Attorneys for Appellees Hickoks Hotel & Suites, LLC, Kimberly Griffin, and Estate of Clarence Griffin

**Jeffrey Powers v. Turner County Board of Adjustment
et al.**

Steve and Ethan Schmeichel and Norway Pork Op, LLC (Intervenors) sought a conditional use permit (CUP) from the Turner County Board of Adjustment (the Board) for a concentrated animal feed operation (CAFO). They first applied for a CUP for a CAFO that would house 7,400 head of swine in 2018, consisting of 5,400 sows and 2,000 hogs over 55 pounds. CAFOs are categorized as Small, Medium, or Large based on the number and size of the animals. This plan was for a Large CAFO. The Board voted in favor of granting a CUP to Intervenors, and local landowners Jeffrey K. Powers and Vicky Urban-Reasonover (Appellants) filed a petition for a writ of certiorari with the First Judicial Circuit Court pursuant to SDCL 11-2-61. The circuit court dismissed that petition for lack of standing, and this Court reversed and remanded, holding that Appellants had introduced sufficient evidence that a fact finder could reasonably find they had established standing.

Before that action was resolved on remand, Intervenors filed another CUP application with the Board in 2020 for the same type of CAFO. The Board granted the CUP, and Appellants again petitioned for a writ of certiorari. Intervenors were permitted to intervene over Appellants' objection. The earlier action was dismissed as moot.

Following a bench trial, the circuit court found that Appellants had standing but affirmed the Board's decision to grant the CUP as consistent with South Dakota law. The Board and Intervenors each filed motions requesting attorney fees pursuant to SDCL 11-2-65. The circuit court denied attorney fees, finding them inappropriate where there had been a legitimate controversy for the parties to resolve in court.

Appellants argue that the circuit court correctly applied SDCL 11-2-61 to determine they had standing. They argue that the Board was predisposed to approve the second CUP application and may have been influenced by the presence of an interested member even if he did not vote. They further argue the Board failed to consider the criteria required, namely the proposed CAFO's plan for setback from homes, odor control, and any past permit violations by the operator. They argue that the Board improperly delegated its authority to calculate the appropriate setback to its administrator and that Ms. Urban-Reasonover's land would be within the setback based on their calculation of how many piglets would be born annually.

Intervenors argue that they submitted their second CUP application after 2020 amendments to SDCL 12-2-1.1 took effect, and that the circuit court should have found Appellants lack standing based upon the statutory requirements to qualify as aggrieved persons. They argue that Appellants' expert testimony should not have been admitted. They dispute Appellants' calculation regarding piglets, arguing that the relevant figure for calculating the setback is based on a moment in time, and not the total number of animals passing through the facility annually.

Appellants raise the following issues on appeal:

1. Whether their due process rights were violated when the Board granted Intervenors a CUP.
2. Whether the Board erred when it granted Intervenors a CUP.

Intervenors and the Board seek review of the following issue by notice of review:

Whether Appellants have standing to challenge the Board's actions.

Intervenors also seek review of the following additional issue by notice of review:

Whether the circuit court abused its discretion by denying Intervenors' motion for attorney fees under SDCL 11-2-65.

Mr. Mitchell A. Peterson and Mr. Michael L. Snyder,
Attorneys for Appellants Jeffrey K. Powers and Vicky
Urban-Reasonover

Mr. Douglas M. Deibert, Attorney for Appellee Turner
County Board of Adjustment

Mr. Brian J. Donahoe, Attorney for Appellees Steve and
Ethan Schmeichel and Norway Pork Op, LLC

Manegabe Chebea Ally v. Darin Young

Manegabe Chebea Ally lived with his girlfriend and her two children, C.K. age 5 and M.K. age 16 months. On December 24, 2012, Ally was babysitting the two children while their mother went to work. After feeding the children lunch, Ally stated that he put the children down for a nap in separate bedrooms. Since the children's mother had packed up M.K.'s crib, intending to replace it with a toddler bed, Ally put M.K. in an adult bed. Ally later told investigators that, after approximately an hour, he went to wake up C.K. from her nap. While doing so, Ally stated he heard M.K. cry out from the other bedroom. Ally went to M.K. and found him unconscious at the foot of the bed with his head against the footboard. Despite medical intervention, M.K., who had sustained a massive skull fracture, succumbed to his injuries, passing away the following day.

On January 9, 2013, Ally was indicted for one count of first-degree murder, one count of second-degree murder, and four counts of first-degree manslaughter. A jury trial commenced on February 18, 2014. At trial, the State argued that Ally inflicted M.K.'s head injury with a fist or other object. Ally maintained his innocence throughout the case, presenting his theory that M.K. sustained his head injury by falling off the bed. The State called Dr. Kenneth Snell, the Minnehaha County Coroner, who testified that M.K.'s head injuries were inconsistent with Ally's story. Dr. Snell testified that M.K. sustained four impacts, which would be inconsistent with an accident. The defense called expert witnesses, Dr. Ophoven and Dr. Van Ee. Dr. Ophoven

testified that a single impact caused M.K.'s fatal skull fracture, and the areas Dr. Snell characterized as other impacts were actually hemorrhages resulting from coagulopathy. Dr. Van Ee, a biomedical engineer, testified that there was sufficient force from an accidental fall from a bed to cause M.K.'s head injury.

On February 27, 2014, the jury found Ally guilty on four counts of first-degree manslaughter, acquitting him of the first- and second-degree murder charges. The circuit court sentenced Ally on one count of first-degree manslaughter to serve 40 years in the penitentiary, with 20 years suspended. Ally filed a direct appeal to this Court raising several issues. The Court summarily affirmed Ally's conviction in January 2016.

Ally filed a pro-se application for habeas corpus on March 31, 2016. Ally was appointed counsel and filed an amended petition on September 17, 2018, alleging he received ineffective assistance of counsel at his criminal trial. The State filed a return to the amended petition. After four evidentiary hearings, two subsequent hearings, and further amendments to the pleadings, the circuit court granted Ally habeas corpus relief, finding Ally's trial counsel was constitutionally deficient in four respects: (1) the defense oversold their theory of the case during opening statements; (2) the defense failed to play the entirety of Ally's three interviews with law enforcement, in which he consistently maintained his innocence during rigorous interrogation; (3) the defense failed to call Dr. Ophoven in sur-rebuttal; and (4) the defense failed to disclose a video that was shared with and relied on by Dr. Van Ee, which after exploring this lack of disclosure on cross-

examination, allowed the State to imply the defense hid evidence and lacked credibility.

The circuit court subsequently granted Respondent, penitentiary Warden Darin Young, a certificate of probable cause to appeal the circuit court's decision to this Court. Young appeals arguing the circuit court erred in granting Ally habeas corpus relief based on ineffective assistance of counsel.

Mr. Mark Vargo, Attorney General and Mr. Matthew W. Templar, Assistant Attorney General, Attorneys for Appellant Darin Young

Mr. Mark Kadi, Attorney for Appellee Manegabe Chebea Ally

***In re Termination of Parental Rights over I.A.D.,
L.J.D., and C.M.D.***

Mother and Father are the natural parents of three minor children, I.A.D., L.J.D., and C.M.D. Mother and Father were married in 2011, but divorced in 2017 when the youngest child, C.M.D, was approximately two years old. Father admitted that he has a history of substance abuse and criminal activity that has affected his relationship with Mother and the children. He also admitted to perpetrating domestic abuse against Mother. The record does not disclose a written custody or visitation agreement, but according to Father, from February 2019 to July 2020, he exercised regular visitation with the children, and from January 2020 to July 2020, the children stayed overnight with him every other weekend.

In August 2020, Mother stopped allowing Father visitation with the children, and in response, Father sent Mother a letter requesting a legal, written visitation schedule. In her written reply, Mother noted concerns with past visits and requested that Father address twenty-six issues before Mother would resume visitation. Among other issues, Mother requested that Father take a drug test before each visit; sign a release giving his parole officer permission to provide information to Mother; remove any firearms from his possession; not leave the children alone at events or at home and not have the children babysit other children; take anger management classes; allow the children to talk freely; and start paying child support and his share of the children's expenses. Father claimed that after

receiving this letter, he began looking for an attorney to assist him in obtaining visitation with the children. Mother claimed that Father did not attempt to visit the children after receiving this letter.

In June 2021, Mother petitioned the circuit court to terminate Father's parental rights, citing SDCL 25-6-4 and provisions in SDCL chapter 25-5A as support. In the petition, Mother alleged it would be in the children's best interests to terminate Father's parental rights and that, pursuant to SDCL 25-6-4, the court could waive Father's consent because he involved the children in furtherance of his criminal activity for which he was later convicted; he continued to commit crimes after being released on parole; he abandoned the children for the eight months preceding the petition; and he has not paid child support. Father opposed the petition, asserting that he does not desire to voluntarily relinquish his parental rights and that his consent cannot be deemed waived.

The circuit court held a hearing on the merits of Mother's petition, during which Mother, Father, and other witnesses testified. At the conclusion of the hearing, the court directed the parties to submit briefing on the merits and on the question of what statutory authority would allow the court to involuntarily terminate Father's parental rights. After considering the post-hearing submissions, the court issued findings of fact and conclusions of law, concluding that it does not have authority under SDCL chapter 25-5A to grant Mother's petition to terminate Father's parental rights against his wishes. In the court's view, SDCL chapter 25-5A only allows a parent to request termination of the parental rights of another parent when there is consent by the respondent parent

or waiver of consent by virtue of the respondent parent's actions pursuant to SDCL 25-6-4 and a corresponding adoption. The circuit court alternatively held that even if it had authority to grant Mother's request, termination would not be appropriate because Mother's petition did not substantially comply with the requirements of SDCL chapter 25-5A and Mother did not meet her burden of proof that the court could deem Father's consent waived pursuant to SDCL 25-6-4. Finally, the court concluded that termination would not be in the children's best interests.

Mother appeals, asserting that: (1) SDCL chapter 25-5A may be used to terminate Father's parental rights; (2) her petition complied with SDCL chapter 25-5A; (3) Father's consent could be deemed waived pursuant to SDCL 25-6-4; and (4) it would be in the children's best interests to terminate Father's parental rights.

Mr. Edward S. Hruska III, Attorney for Appellant
R.J.D.

Mr. Aaron P. Pilcher, Attorney for Appellee C.A.D.

State v. Malcolm

In the summer of 2019, Lee Malcolm and J.C. lived together with Malcolm's mother in her Watertown home. On October 27, 2019, Malcolm and J.C. went to the Watertown Walmart to fill J.C.'s prescription of Baclofen, a muscle relaxer. After filling the prescription, the two began drinking beer and liquor and continued consuming alcohol until early the following morning.

Malcolm and J.C. eventually returned home and went to sleep in their upstairs bedroom. However, throughout the morning, Malcolm testified that they would wake up and discuss her concern that Malcolm did not pay enough attention to her. Malcolm claims that he asked J.C. what she wanted him to do and she replied that she wanted him "to make love" to her.

Malcolm went to the bathroom and showered before returning to the bedroom. Using a cell phone, Malcolm then proceeded to videotape himself sexually penetrating J.C. over the course of the next two hours. The videos reveal that J.C. snored, did not open her eyes, speak any words, or volitionally change her positioning throughout the encounter. After the encounter, Malcolm went back to sleep.

Early that afternoon, Malcolm woke up to find J.C. cold to the touch and unresponsive. He called 911 for emergency assistance, but, unfortunately, first responders were ultimately unable to revive J.C. Officers located various items including an empty pill bottle for the Baclofen prescription J.C. had filled the

prior day. A forensic pathologist conducted an autopsy and determined J.C. died as a result of a fatal combination of Baclofen and another drug, Hydroxyzine.

In the course of their investigation into J.C.'s death, police officers also seized the cell phone that contained the videos of Malcolm performing sex acts on J.C. the morning of her death. After reviewing the videos, Malcolm was charged with nine counts of third-degree rape in violation of SDCL 22-22-1(4) which prohibits the act of sexual penetration where the victim is incapable of consent because of any "intoxicating [or] narcotic . . . agent[.]" A jury found Malcolm guilty of all counts, and the circuit court sentenced Malcolm to fifty years in prison with fifteen years suspended.

Malcolm raises the following issues on appeal:

1. Whether the circuit court erred by determining Malcolm's theory that J.C. gave "advance consent" to the instances of sexual penetration before she became unable to give contemporaneous consent was a legally valid defense that could be supported by evidence and argument.
2. Whether the circuit court abused its discretion when it determined that evidence of prior specific instances of J.C.'s sexual behavior was inadmissible under SDCL 19-19-412.
3. Whether the circuit court committed plain error by not providing the jury with an instruction further defining the

intoxication element of third-degree rape under SDCL 22-22-1(4).

4. Whether the circuit court committed plain error by admitting video evidence of the charged conduct without first viewing the videos or balancing its probative force against its potential for unfair prejudice under SDCL 19-19-403.
5. Whether exceptional circumstances justify considering the merits of Malcolm's ineffective assistance of counsel claim on direct appeal.

Mr. Scott R. Bratland, Attorney for Appellant Lee Malcolm

Mr. Mark Vargo, Attorney General, Ms. Chelsea Wenzel and Ms. Jenny Jorgenson, Assistant Attorneys General, Attorneys for Appellee State of South Dakota

McGee v. Spencer Quarries

On June 30, 2018, Austin McGee lost control of his pickup while driving with his brother on Highway 45 north of Platte, South Dakota. The pickup left the road and rolled, and as a result, McGee suffered serious injuries, including permanent paraplegia. On October 2, 2018, he brought suit against Spencer Quarries, Inc., alleging that Spencer Quarries negligently left approximately 1,400 feet of exposed tack coat on the highway without posting proper warnings. Tack coat is described as a liquid asphalt emulsion that is applied between layers of new asphalt and, according to McGee, is known in the industry to be a hazard to the traveling public.

McGee amended his complaint in January 2020, adding as additional defendants the South Dakota Department of Transportation (DOT) and employees Jay Peppel, Kent Gates, and Kris Royalty. The DOT had entered into a contract with Spencer Quarries for the resurfacing of a segment of Highway 45, including where McGee’s accident occurred. Peppel was assigned to oversee the contract, and Peppel assigned Gates to supervise the project. Royalty, a road technician, was tasked with inspecting Spencer Quarries’s work each day. The contract incorporated the DOT’s Standard Specifications for Roads and Bridges 2015 (Standard Specifications). Relevant here, the Standard Specifications related to tack coat provided that “[t]ack application ahead of mat laydown shall be limited to the current day’s operation unless ordered or allowed by the [e]ngineer.” The Standard Specifications also required Spencer Quarries to “keep the portion of the project

used by public traffic in a condition that will adequately and safely accommodate traffic” and required the DOT to ensure Spencer Quarries acted in compliance. The project was further controlled by plan documents, which included a provision that a “Fresh Oil” sign be displayed “in advance of liquid asphalt areas” “[f]or tack and/or flush seal operations, when flaggers are not being used[.]”

This appeal concerns McGee’s allegations against the DOT and its employees (collectively referred to as the DOT). In his amended complaint, McGee alleged that the DOT breached the Standard Specifications when it failed to identify and correct Spencer Quarries’s failure to comply with the DOT’s Standard Specifications relating to the exposed track coat. The DOT denied liability and filed a motion to dismiss, asserting that McGee failed to identify a legal duty owed to him and that even if such a duty existed, sovereign immunity would bar the claims because the acts complained of were discretionary, rather than ministerial. In response, McGee asserted that sovereign immunity does not apply because specific DOT policies created mandatory duties, not discretionary. The circuit court granted the motion to dismiss as to employee Peppel because the court viewed his acts as discretionary, but the court denied the motion as to the DOT, Gates, and Royalty.

After the parties conducted additional discovery, the DOT filed a motion for summary judgment, again asserting that sovereign immunity bars McGee’s claims. The DOT also claimed that even if sovereign immunity does not apply, McGee’s claims fail as a matter of law because McGee did not plead an actionable duty, and

further, he is not a third-party beneficiary of the contract between the DOT and Spencer Quarries.

In its memorandum decision, the circuit court incorporated its prior decision denying the DOT's motion to dismiss and again held that the DOT is not entitled to sovereign immunity. In the court's view, the DOT employees' acts were ministerial because the DOT's Standard Specifications set a certain and definite standard, although some discretion could be exercised during implementation. The court further deemed inapplicable the DOT's third-party beneficiary argument because McGee's claims relate to the DOT's alleged breach of its ministerial duties created by the Standard Specifications and not a claim that he is entitled to the benefits of the contract between the DOT and Spencer Quarries. Ultimately, the court denied the DOT's motion for summary judgment.

The DOT petitioned for a discretionary appeal pursuant to SDCL 15-26A-13, which the Court granted. On appeal, the DOT asserts that summary judgment should have been granted because sovereign immunity bars McGee's suit, and alternatively, because McGee failed to plead an actionable duty owed by the DOT.

Mr. James E. Moore, Mr. Jacob R. Schneider, and Mr. Christopher A. Dabney, Attorneys for Appellants
Kent Gates, Kris Royalty, and the South Dakota
Department of Transportation

Mr. Ronald A. Parsons, Jr., Mr. Steven M. Johnson, and
Mr. Michael F. Marlow, Attorneys for Appellee
Austin McGee

Estate of Russell O. Tank

For most of his life, Russell Tank lived and farmed a sizeable estate in Britton, South Dakota. On May 25, 2016, Russell passed away at age 84, leaving behind four children: Arlo Tank, Renald (Renny) Tank, Sherri Tank, and Regina (Gina) Ellingson. Russell's last will and testament, executed on December 19, 2012, was offered for probate by Jason Bender, Russell's neighbor and long-time farm tenant, on June 6, 2016. The 2012 Will named Jason Bender as the Estate's sole heir and personal representative.

Russell prepared three wills during his lifetime that apply to this appeal. The first will was executed in 2001 and gave everything to his daughter Sherri, except for some vintage vehicles, while disinheriting his other three children. The second will, executed in 2004, disinherited Sherri and named Bender as the primary beneficiary and personal representative. In 2012, Russell revoked all prior wills and executed a final will, naming Bender as Russell's sole heir and personal representative and specifically disinheriting his four children.

Following the commencement of probate proceedings, Russell's children filed a petition challenging the 2012 Will's validity, alleging that Russell lacked testamentary capacity and that the Will resulted from insane delusion and undue influence. In 2018, Bender moved for summary judgment on the Children's petition. The circuit court granted Bender's motion, concluding that Russell did not lack testamentary capacity, did not suffer from insane

delusion and there was no evidence supporting a claim of undue influence.

The Children appealed the circuit court's order and in 2020, this Court reversed the circuit court's decision regarding undue influence.¹ This Court determined that summary judgment was not appropriate because material issues of fact existed regarding Sherri's claim that Russell's 2012 Will resulted from undue influence. On remand, the circuit court held a four-day jury trial on the undue influence claim. After four hours of deliberation, the jury unanimously concluded that Bender had unduly influenced Russell Tank's 2012 will.

After trial, Bender filed a renewed motion for judgment as a matter of law and, in the alternative, a motion for a new trial. At a hearing on these motions, the circuit court vacated the jury's verdict and granted Bender's motion for judgment as a matter of law and, alternatively, his motion for a new trial. Sherri appeals, raising several issues which we consolidate and restate as follows:

1. Whether the circuit court erred by granting a renewed post-verdict motion for judgment as a matter of law (Rule 50(b)) on grounds that were not earlier advanced in the motion made during trial per Rule 50(a).

¹*In re Estate of Tank*, 2020 S.D. 2, 938 N.W.2d 449.

2. Whether the circuit court erred by vacating the jury's verdict on grounds that there was insufficient evidence to establish the elements of Sherri's undue influence claim.
3. Whether the circuit court erred by granting, in the alternative, a new trial on grounds that there was insufficient evidence to support the jury's verdict.
4. Whether Sherri is entitled to post-trial relief, including an order reinstating the verdict, removing Bender as Personal Representative, and requiring him to repay the attorney fees awarded by the circuit court.

Mr. Daniel K. Brendtro and Mr. Robert D. Trzynka,
Attorneys for Appellant Sherri Castro (Tank)

Mr. Reed Rasmussen, Attorney for Appellee Jason
Bender

Glossary of Terms

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

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

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

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

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

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

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

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

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

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

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

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

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