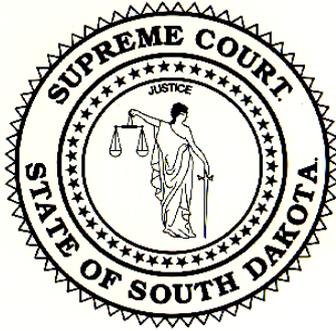


**Introduction to**  
**The South Dakota**  
**Supreme Court**



**and**  
**Case Summaries for**  
**Oral Arguments at the**  
**October Term of the Court**  
**to be held**  
**October 3 through October 5, 2011**  
**Dakota Wesleyan University**  
**Mitchell, South Dakota**



*Supreme Court*  
STATE OF SOUTH DAKOTA

*David Gilbertson*  
CHIEF JUSTICE

October 3, 2011

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

Ladies and Gentlemen:

Your Supreme Court welcomes you to our October term.

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

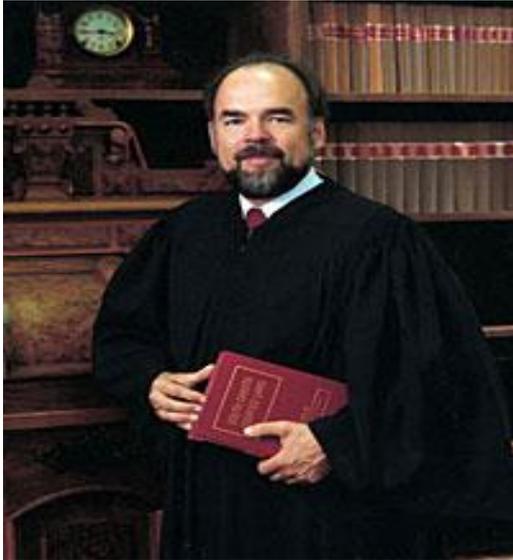
Sincerely yours,

A handwritten signature in cursive script that reads "David Gilbertson".

David Gilbertson  
Chief Justice

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## **Chief Justice David Gilbertson**

Chief Justice Gilbertson was elected to a 4-year term as Chief Justice by the members of the Supreme Court in September 2001, was re-elected to a second 4-year term as Chief Justice by the members of the Supreme Court in June 2005 and a third 4-year term in June 2009. He was appointed to the Supreme Court in April 1995 to represent the Fifth Supreme Court District and was retained by the voters in the 1998 general election and the 2006 general election. Chief Justice Gilbertson received his undergraduate degree from South Dakota State University in 1972 and his Juris Doctor from the University of South Dakota, School of Law in 1975. He engaged in private practice from 1975 until his appointment to the circuit court bench in 1986. During this time he also served as a deputy state's attorney and as an attorney for several municipalities and school districts. He is past President of the South Dakota Judges Association; and is a member of the Glacial Lakes Bar Association, the Brown County Bar Association and the South Dakota Bar Association. He is a member of the Conference of Chief Justices and chairs its Committee on Tribal/State Relations. He was a member of the Board of Directors of the National Conference of Chief Justices from 2005-2007. In 2006, he was the recipient of the distinguished Service Award from the National Center for State Courts for his defense of judicial independence. He serves on the Judicial-Bar Liaison Committee of the State Bar Association and has served as a Court Counselor at South Dakota Boys State since 1995. Born October 29, 1949, he and his wife Deborah have four children.



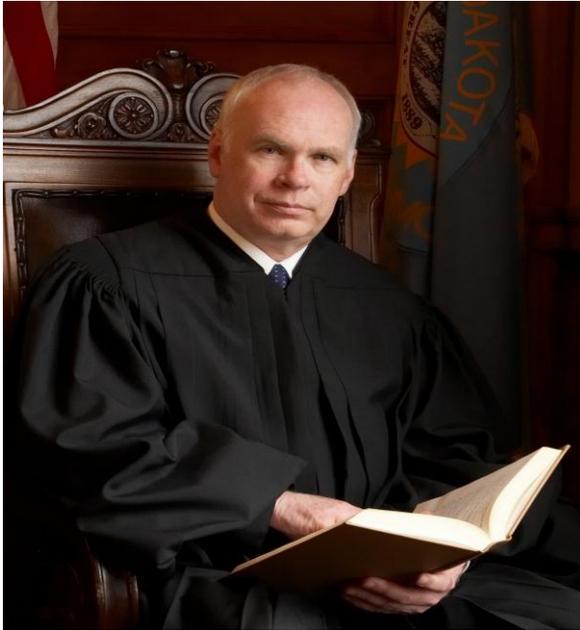
***Justice John K. Konenkamp***

Justice Konenkamp, born October 20, 1944, represents the First Supreme Court District, which includes Custer, Fall River, Lawrence, Meade and Pennington counties. After serving in the United States Navy, he attended the University of South Dakota, School of Law, graduating in 1974. He practiced in Rapid City as a Deputy State's Attorney until 1977. He then engaged in private practice until 1984 when he was appointed Circuit Judge. In May 1988, he became Presiding Judge of the Seventh Circuit. He was appointed to the Supreme Court in 1994 after ten years on the trial bench and was retained by the voters in the 1998 and 2006 general elections. He is a member of the National Advisory Council of the American Judicature Society, an organization devoted to addressing the problems and concerns of the justice system. Justice Konenkamp and his wife, Geri, are former foster parents for the Department of Social Services. Justice Konenkamp has served on a number of boards advancing the improvement of the legal system, including the South Dakota Equal Justice Commission, the Alternative Dispute Resolution Committee, and the Advisory Board for the Casey Family Program, a nationwide foster care provider. Justice Konenkamp and his wife have two adult children, Kathryn and Matthew and two grandsons, Jack and Luke.



*JUSTICE STEVEN L. ZINTER*

Justice Zinter, of Pierre, was appointed to the Supreme Court on April 2, 2002. He received his B.S. degree from the University of South Dakota in 1972 and his Juris Doctor from the University of South Dakota, School of Law in 1975. Upon graduation from law school, Justice Zinter practiced law as an Assistant Attorney General for the State of South Dakota. From 1978 to 1986 he was engaged in the private practice of law in Pierre. Justice Zinter also served as the Hughes County State's Attorney. He was appointed as a Circuit Judge in 1987 and served in that capacity until 1997. In 1997 he was appointed Presiding Judge of the Sixth Judicial Circuit and served in that capacity until his appointment to the Supreme Court. Justice Zinter is a member of the American Bar Association, the State Bar Association, and the South Dakota Judges Association. He was a past President of the South Dakota Judges Association and a past member of the Harry S. Truman Foundation along with a number of other boards and commissions. Justice Zinter and his wife Sandra have two children and grandsons, Jack and Sawyer.



*Justice Glen A. Severson*

Justice Severson, born March 9, 1949, represents the Second Supreme Court District, which includes Minnehaha County and the Northwest portion of Lincoln County. He served in the South Dakota Air National Guard from 1967-1973. He attended the University of South Dakota receiving a B.S. in 1972 and the University of South Dakota, School of Law receiving a Juris Doctor degree in 1975. He was a member of the Fingerson and Severson Law Firm from 1983 to 1992 and served as the Huron City Attorney from 1977-1992 and a Beadle County Deputy States Attorney in 1975. He was appointed as Circuit Judge in the Second Circuit in 1993 and served as Presiding Judge from 2002 until his appointment to the Supreme Court. Justice Severson was appointed to the Supreme Court in 2009 after sixteen years on the trial bench. He is a member of the American Bar Association, South Dakota Bar Association and Second Circuit Bar Association. He was a member South Dakota Board of Water and Natural Resources (1986-1992) and has served on a number of other boards and commissions. Justice Severson and his wife Mary have two adult children, Thomas and Kathryn.



***Justice Lori S. Wilbur***

Justice Wilbur represents the Fourth Supreme Court District, which includes the counties of Aurora, Bon Homme, Brule, Charles Mix, Clay, Davison, Douglas, Gregory, Hanson, Hutchinson, Lyman, McCook, Tripp, Turner, Union, Yankton and all but the Northwest portion of Lincoln County. She attended the University of South Dakota receiving a Bachelor of Arts degree in 1974 and the University of South Dakota, School of Law, receiving a Juris Doctor degree in 1977. She served as a law clerk for the South Dakota Supreme Court for Honorable Laurence J. Zastrow; was an assistant Attorney General; General Counsel, South Dakota Board of Regents; Staff Attorney, South Dakota Legislative Research Council; and Legal Counsel, South Dakota Bureau of Personnel. She is a member and past President of the South Dakota Judges Association, past member and Secretary of the Judicial Qualifications Commission and a member of the Rosebud Bar Association. She served as a Law-Trained Magistrate Judge, Sixth Circuit 1992-1999; Circuit Court Judge, Sixth Circuit, 1999-2011; and Presiding Judge, Sixth Circuit, 2007 – 2011. Justice Wilbur, and her late husband Brent, have two adult daughters.



*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.



### ***Supreme Court Law Clerks***

Law Clerks are employed by the Court to assist the Justices with research and writing of opinions on the cases under consideration. In the photograph above, from the left, are Mark Joyce (Supreme Court Law Clerk), J. Robert Schlimgen (Justice Wilbur), Lisa Slepnikoff (Justice Severson), Kathryn Rich (Chief Justice Gilbertson), Jennifer Williams (Justice Koenkamp), Kinsley Powers (Justice Zinter), and Jessica Fjerstad (Supreme Court Law Clerk).

## **Summary of Jurisdictions for the South Dakota Court System**

### **Supreme Court**

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

Court terms held throughout the calendar year.

Has appellate jurisdiction over circuit court decisions.

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

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

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

### **Circuit Court**

Circuit Court services available in each county seat.

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

Trial courts of original jurisdiction in all civil and criminal actions. Exclusive jurisdiction in felony trials and arraignments, and civil actions involving damages of more than \$10,000. Jurisdiction of less serious civil and criminal matters is shared with magistrate courts, over which the circuit courts have appellate review.

## **The Supreme Court Process**

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

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

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

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

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

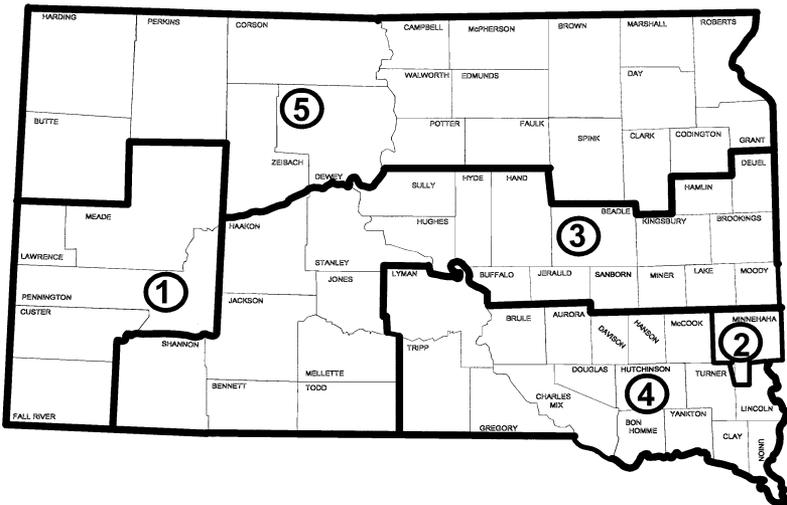
The five members of the Court (four justices and a chief justice) are responsible for making decisions as a group regarding appellate cases and other judicial business. It is not unusual, however, for one of the judges from the circuit court to be assigned to temporarily sit on the Supreme Court bench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

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

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

Justice Konenkamp was appointed in 1994 from District One. Chief Justice Gilbertson was appointed in 1995 from District Five. Justice Zinter was appointed in 2002 from District Three. Justice Severson was appointed in 2009 from District Two. Justice Wilbur was appointed in 2011 from District Four. Chief Justice Gilbertson and Justices Konenkamp and Zinter were each retained in the November 2006 general election.

### South Dakota Supreme Court Appointment Districts Effective July 1, 2001



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

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

Your cooperation is appreciated.

**DO**

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

**DO NOT**

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

## **Supreme Court of South Dakota October 2011 Term**

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

<h3><b>Case Summaries</b></h3>
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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.

**Adrian v. Vonk**

Multiple Ranchers in western South Dakota brought suit against the South Dakota Game, Fish, and Parks, the South Dakota Department of Agriculture, and the secretaries of those departments (collectively the State) for damages caused to their lands by prairie dogs. The prairie dogs are free roaming and traveled to Ranchers' lands from various neighboring public lands. Ranchers sought monetary and injunctive relief. Ranchers relied on multiple statutes to assert that the State had a duty to control and manage the prairie dog population on public lands, and its failure to do so created a nuisance and a taking of Ranchers' lands without just compensation. The State responded that Ranchers failed to comply with the notice provisions of SDCL 3-21-2, in that neither the Commissioner of Administration nor the Attorney General received notice of Ranchers' suit prior to Ranchers filing the action. The State further argued that Ranchers' claims are barred by the Supremacy Clause and the doctrine of sovereign immunity.

Ranchers and the State filed cross motions for summary judgment before the circuit court. After two hearings before the court, Circuit Judge A.P. Fuller granted Ranchers' motion for summary judgment, concluding that the State failed to comply with the mandates of SDCL 34A-8-7, SDCL 40-36-3.1, and SDCL 44-11-15. The court found that the notice provisions of SDCL 3-21-2 did not apply, and if they did, Ranchers substantially complied with the notice requirements. It further ruled that the Supremacy Clause and doctrine of sovereign immunity did not bar suit. The court denied the State's motion for summary judgment, and ordered a trial on damages. The State petitioned this Court for an intermediate appeal, which was denied.

For reasons unrelated to the case, Ranchers' suit was reassigned to Circuit Judge Janine M. Kern. After the State's petition for an intermediate appeal was denied, the State moved for Judge Kern to reconsider and vacate Judge Fuller's decision granting summary judgment to Ranchers. It claimed that "Judge Fuller's bench decision incorrectly ignored [the State's] sovereign immunity arguments, which should be and are dispositive of the case." Judge Kern held a hearing and concluded that she had the authority to reconsider Judge Fuller's decision because his decision only included a limited analysis of the issue of sovereign immunity and the State's other defenses. Judge Kern vacated the decision of Judge Fuller, granted the State summary judgment, and dismissed Ranchers' suit with prejudice.

Ranchers appeal. We consolidate and restate the issues.

1. Did Judge Kern have the legal authority to reconsider and vacate Judge Fuller's decision.
2. If Judge Kern had the authority, did she err when she granted the State's motion for summary judgment.

Mr. James P. Hurley Attorney for Plaintiffs and Appellants William Adrian et al.

Mr. Timothy M. Engel and Mr. Douglas A. Abraham, Attorneys for Defendants and Appellees Jeff Vonk et al.

**State v. Fisher**

On November 25, 2008, Christopher “Brian” Fisher moved into a mobile home with his girlfriend, Amanda Vensand. Amanda has two children, eight-year-old S.V. and fifteen-month-old P.V. On November 26, 2008, Brian agreed to babysit Amanda’s two children while Amanda went out with her friends.

A little before 5:00 a.m., Brian awoke to a “garble noise” coming from P.V. Brian attempted to contact both his sister and Amanda. When he was unable to reach them, Brian called 911. P.V. was transported to Avera McKennan hospital where he was treated by Dr. Solares. Despite repeated attempts at resuscitation, P.V. was pronounced dead at 6:07 a.m. After P.V. died, Dr. Solares examined P.V.’s body and noticed “retinal hemorrhages” and “petechial spots” on his face. These factors suggested to Dr. Solares that P.V. had sustained some sort of trauma.

Dr. Solares shared his findings with Dr. Free. Dr. Free is a board certified pediatric physician associated with Child’s Voice, a child advocacy center that evaluates children who may be victims of abuse or neglect. Dr. Free does not perform autopsies, sign death certificates, or assess cause of death. However, she has regularly given opinions based on autopsy reports and has consulted on over 500 cases for Child’s Voice. Based on the autopsy report of P.V., Dr. Free concluded that P.V.’s injuries were the result of abusive head trauma.

At approximately 7:15 a.m. on the morning of P.V.’s death, Brian was taken to the law enforcement center to be interviewed by Detective Bakke. The interview began with Detective Bakke reading Defendant his *Miranda* rights, which Brian waived. Detective Bakke proceeded to ask about P.V.’s behavior over the last forty-eight hours. Brian

explained that P.V. had fallen while roughhousing with older boys the day before. Brian also stated that P.V. had vomited on himself when Brian was putting him to bed. While Brian was giving him a bath, P.V. fell in the bathtub and hit his head on a toy boat. Brian suggested that these accidents may have caused P.V.'s injuries.

At 9:43 a.m., an hour into the interrogation, Detective Bakke took a twelve-minute break. At 9:55 a.m., Detective Bakke returned to the interrogation room and informed Brian that he had talked to the doctors who examined P.V. Detective Bakke told Brian that these doctors believed P.V.'s injuries were consistent with P.V. being shaken. Detective Bakke's suggested that Brian take a polygraph examination. Brian agreed. The polygraph test was administered at 11:52 a.m. and was completed at 1:31 p.m. The results of the polygraph test indicated that Brian was being deceptive.

At about 2:15 p.m., Detective Bakke brought a miniature doll into the interrogation room. Detective Bakke gave the doll to Brian and instructed him to demonstrate how he shook P.V. Brian initially refused but Detective Bakke insisted. Brian eventually took the doll and shook it. Brian confessed that he shook P.V. because he would not quit crying.

The interview lasted approximately six hours. Brian had two to three hours of sleep the night before and was emotional during much of the interview. Brian did not eat during the interview but was offered beverages. He was also given cigarettes and bathroom breaks.

Brian was charged with one count of murder in the second degree and one count of manslaughter in the first degree. Prior to trial, Brian filed a motion in limine, seeking to have the video of Brian's interview with Detective Bakke excluded from evidence. The court allowed the video of the interview to be admitted, provided that the image of the doll was redacted.

Brian also filed a *Daubert* motion in which he asserted that Dr. Free was not qualified to testify regarding her opinion of the cause of P.V.'s injuries. The trial court denied Brian's *Daubert* motion and allowed Dr. Free to testify. At trial, Dr. Free testified that she believed P.V.'s injuries were the result of abusive head trauma.

Brian was found guilty of manslaughter and sentenced to serve sixty years in the South Dakota State Penitentiary. Brian appeals his conviction, raising the following issues:

1. Whether the confession Brian made to Detective Bakke during the interrogation was voluntary.
2. Whether the redacted video of defendant shaking a doll was overly prejudicial and thus inadmissible.
3. Whether Dr. Free was qualified to testify about abusive head trauma.

Mr. Marty J. Jackley, Attorney General, Mr. Matt T. Roby, Assistant Attorney General, Attorneys for Plaintiff and Appellee State of South Dakota

Ms. Nicole Laughlin, Minnehaha County Public Defender's Office, Attorneys for Defendant and Appellant Christopher Brian Fisher

**Kevin Ronan, MD, and Patricia Ronan v.  
Sanford Health et al.**

In 2006, Dr. Kevin Ronan was an anesthesiologist practicing in Sioux Falls, South Dakota. Dr. Ronan vacationed in Phoenix, Arizona with friends from February 21 to 26. On the evening of March 8, Dr. Ronan began to feel ill. The next day he went to see his physician, who suspected Dr. Ronan had the flu.

Dr. Ronan's condition worsened and he went to the emergency room on March 10. He was seen by various physicians, including Dr. Bradley E. Hruby. Dr. Hruby initially denied Dr. Ronan's request for an infectious disease consult and later testified that Dr. Ronan denied any recent travel history. Dr. Ronan was admitted to the hospital and given antibiotics. He was referred to a specialist in infectious diseases. The specialist's diagnosis recognized that Dr. Ronan might have coccidioidomycosis (cocci), or "valley fever." Cocci is a fungal disease endemic in the southwestern United States. The specialist was unable to confirm the diagnosis, as tests for cocci often come back negative during the first few days of an infection.

Despite his failure to significantly improve, Dr. Ronan was released from the hospital. Dr. Ronan continued to suffer high fevers, chills, headaches, chest pains, rashes, and neck stiffness. Dr. Ronan was referred to more physicians, including another infectious disease specialist, Dr. Wendell Hoffman. Despite repeated inquiries by the Ronans, Dr. Hoffman did not immediately order diagnostic tests to determine if Dr. Ronan had cocci. Dr. Ronan's condition worsened and he began to develop breathing problems. After another visit to the emergency room, he was treated with steroids. His condition did not improve. Eventually, Dr. Richard Hardie, a pulmonologist, recommended a lung biopsy and ordered diagnostic blood tests. Dr. Ronan

ultimately had a lung biopsy before the results of the blood tests returned.

On March 28, Dr. Hoffman informed the Ronans that the blood tests confirmed that Dr. Ronan had cocci. Since his diagnosis, Dr. Ronan has continued to have severe medical problems. Dr. Ronan and his wife filed suit against Sanford Health and several of his treating physicians, alleging medical negligence in failing to properly and timely pursue a diagnosis. The Ronans also allege negligence in administering steroids to a patient with acute undiagnosed and untreated cocci.

In September 2006, the Ronans met with Becky Nelson, Chief Operations Officer, and Jeannie Schwarting, Risk Manager. Both women are nurses employed by Sanford. Patricia Ronan took notes at the meeting indicating that Schwarting and Nelson essentially apologized for the treatment Dr. Ronan had received and indicating that Dr. Hruby had “got the whole thing off on the wrong track and it snowballed.” The trial court excluded the statements made at the meeting under SDCL 19-12-14, which provides:

No statement made by a health care provider apologizing for an adverse outcome in medical treatment, no offer to undertake corrective or remedial treatment or action, and no gratuitous act to assist affected persons is admissible to prove negligence by the health care provider in any action for damages for personal injury or death alleging malpractice against any health care provider. Nothing in this section prevents the admission, for the purpose of impeachment, of any statement constituting an admission against interest by the health care provider making such statement.

Dr. John Galgiani was an expert witness for the Defendants. After Dr. Galgiani was retained as an expert witness, Dr. Ronan was referred to him for treatment. Dr. Galgiani cancelled the appointment before seeing Dr. Ronan. The Ronans were not permitted to impeach Dr. Galgiani with the cancelled appointment during trial. Ultimately, the jury returned a verdict in favor of Defendants.

The Ronans appeal, raising the following issues:

1. Whether the trial court erred in excluding evidence of a meeting between the Ronans and Sanford Health employees.
2. Whether the trial court erred in prohibiting the Ronans from impeaching a defense expert witness with evidence that the expert had cancelled a referral appointment with Dr. Ronan in order to serve as a defense expert.

Mr. Michael A. Henderson and Mr. Stephen C. Landon,  
Attorneys for Plaintiffs and Appellants Kevin Ronan,  
MD, and Patricia Ronan

Mr. Reed A. Rasmussen and Mr. Jeff L. Bratkiewicz,  
Attorneys for Defendants and Appellees Sanford  
Health et al.

**State v. Mays**

In the early morning hours of April 25, 2010, Justin Jarman left the Red Eye Bar in Sioux Falls, South Dakota. Witnesses reported seeing Jarman in an argument with another man outside the bar, apparently intoxicated and agitated. Eventually Jarman walked away from the man, on to the adjacent highway. Other witnesses reported seeing Jarman walking in the westbound traffic lane and having to swerve their vehicles to miss hitting him.

That same evening, Kevin Mark Mays joined friends at the Red Eye Bar. Mays agreed to drive some of the friends home because he had consumed the least alcohol. The rest of the friends were going to ride home with Benny Luna. Mays followed Luna's car out of the parking lot. As they were driving on the highway, Mays thought he saw something in the road and swerved. He did not stop because he believed he had missed the object or "barely nicked it." Luna pulled over farther up the road and Mays did too. One of Luna's passengers exited and came to explain to Mays she was upset because Luna had hit a deer and the windshield had broken, covering her in glass. Believing Luna had hit a deer, Mays continued driving people home.

Later in the evening, one of Mays's passengers was still upset about having possibly hit something so they drove back to the area to confirm it was a deer. Mays was not driving. By that time, law enforcement had arrived at the scene. Seeing the police cars, Mays and his friend attempted to leave, but were pulled over. Based on the events earlier in the evening, Mays was arrested for driving under the influence and felony hit-and-run.

Instead of hitting a deer, Luna and Mays had hit Jarman. Jarman died at the scene though the record is not clear when. On the autopsy report, cause of death was

“blunt chest trauma, motor vehicle/pedestrian impact.” The coroner determined that Jarman’s lethal injuries were the “crushing chest trauma with bilateral large hemothoraces which appear most consistent with having been sustained when the second vehicle rolled over the decedent.” In other words, while both Luna and Mays hit Jarman, it was the impact from Mays’s vehicle that killed Jarman.

Mays pleaded guilty to felony hit-and-run (SDCL 32-34-5) and driving with 0.08% or more alcohol by weight in the blood (SDCL 32-31-1(1)). Mays also admitted to a Part II Information alleging that he was a habitual offender as a result of his third DUI offense (SDCL 32-23-4). The trial court sentenced Mays to two years imprisonment for his third-offense driving under the influence and two years imprisonment for the felony hit-and-run offense, to be served consecutively. The court also ordered Mays and Luna to pay \$8,000.00 in restitution for Jarman’s funeral costs.

Mays appeals alleging the trial court erred in ordering restitution for Jarman’s funeral expenses. He argues there is not a sufficient causal connection between the crimes to which he pleaded guilty and the restitution ordered.

Mr. Marty J. Jackley, Attorney General, Mr. John M. Strohman, Assistant Attorney General, Attorneys for Plaintiff and Appellee State of South Dakota

Mr. Aaron D. Salberg, Minnehaha County Public Defender’s Office, Attorneys for Defendant and Appellant Kevin Mark Mays

**Iron Wing v. Catholic Diocese of Sioux Falls et al.**

D.Z. Iron Wing attended school at St. Paul's Indian School in Marty, South Dakota from 1953 through 1964. On October 8, 2008, he brought suit against the Catholic Diocese of Sioux Falls, the Blue Cloud Abbey, Fr. Francis Sutmueller, the Oblate Sisters of the Blessed Sacrament, and Sr. M. Frances Poitra (collectively, Defendants). He alleged that while he was at the school he was sexually abused by Sr. Poitra when he was ten years old until he was twelve years old, and by Fr. Sutmueller during his freshman and junior high school years.

Iron Wing's cause of action is controlled by SDCL 26-10-25, which provides a three-year statute of limitations commencing from "the time the victim discovered or reasonably should have discovered that the injury or condition was caused by the act" of childhood sexual abuse. Relying on this statute, Defendants moved for summary judgment asserting that the statute of limitations expired three years prior to October 8, 2008. Specifically, Defendants claimed that because Iron Wing had never forgotten about the alleged abuse and has always experienced anger toward the Catholic church, nuns, and priests because of the alleged abuse, Iron Wing reasonably should have discovered that his injury was caused by the alleged abuse more than three years prior to October 8, 2008. Iron Wing, on the other hand, maintained that he did not make the necessary causal connection between the abuse and his resulting anger until early 2009.

The trial court granted Defendants' motion for summary judgment, concluding that the statute of limitations expired because Iron Wing had always remembered the alleged abuse and knew he had hatred toward the church and nuns. Because of this knowledge, the court ruled that a reasonably prudent person in Iron Wing's

position would have sought out information regarding the cause of the hatred more than three years prior to October 8, 2008.

Iron Wing appeals asserting there is a genuine issue of material fact in dispute as to whether a reasonable person would have discovered the causal connection between an injury and the abuse under Iron Wing's circumstances, and that the court improperly held that anger is an injury for purposes of SDCL 26-10-25.

Ms. Rebecca L. Rhoades and Mr. Michael Shubeck, Attorneys  
for Plaintiff and Appellant D.Z. Iron Wing

Ms. Rochelle R. Sweetman and Mr. Michael L. Luce,  
Attorneys for Defendant and Appellee Catholic  
Diocese

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Defendant and Appellee Oblate Sisters

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Defendant and Appellee Blue Abbey

**State v. Jones**

Between March 28 and April 21, 2010, Chris L. Jones committed three forcible rapes and one kidnapping in Brookings, South Dakota. All crimes were committed at knifepoint.

The facts of the first two rapes are similar. Jones separately attacked each of the women on the South Dakota State University campus. Jones demanded that each woman turn over any money she had and then proceeded to forcibly digitally penetrate each victim.

The third rape occurred in Brookings but off of the SDSU campus. Jones approached the third victim outside of her apartment. He forced her into her car and directed her to drive to a parking lot. Victim attempted to escape by pulling into a driveway where there were lights on in the house. But when Jones threatened the victim with his knife, the victim left the driveway and followed his demands. Jones directed the victim to a deserted parking lot. Jones then forced the victim to give him oral sex and proceeded to vaginally and anally rape the victim. After Jones was finished raping the victim, he forced her to withdraw \$200 from her bank account to turn over to him.

The police investigation of the incidents led the police to suspect Jones. Jones was brought into the Brookings police station for questioning. Ultimately, Jones confessed. He was arrested and charged with robbery, attempted robbery, rape and kidnapping.

In a letter to defense counsel from Brookings County States Attorney Clyde Calhoun, the State offered Jones a plea agreement. In exchange for Jones' guilty pleas, the State agreed to recommend a sentence with a cap of 70 years and dismissal of five of the lesser charges. In the letter,

Calhoon stated that he did “not believe Judge Gienapp (the trial judge) ha[d] ever gone beyond that which the State has recommended as a cap.”

Jones entered guilty pleas in accordance with the plea agreement. The sentencing court imposed a sentence exceeding the State recommended cap of 70 years. Jones filed a Motion to Reconsider the Sentence. Jones argued that the State had violated the plea agreement. The court granted Jones’ motion. A second sentencing hearing was held. Jones’ counsel moved for a new sentencing judge. The motion was denied. At resentencing, a similar sentence was imposed.

Jones now appeals, raising the following issues:

1. Did the trial court violate defendant’s due process rights by denying defendant’s oral motion for a new sentencing judge at the second sentencing hearing.
2. Was defendant’s sentence unconstitutional under the United States or South Dakota Constitution.

Mr. Marty J. Jackley, Attorney General, Mr. Donald E. Tinklepaugh, Assistant Attorney General, Attorneys for Plaintiff and Appellee State of South Dakota

Mr. Rick A. Ribstein, Attorney for Defendant and Appellant Chris L. Jones

**Estate of Holznagel**

On April 11, 2006, Ethanuel James Holznagel's car entered into an intersection and collided with a recycling truck operated by John Ervin Cutsinger. Ethanuel died as a result of the collision. Ethanuel's parents, Wayne D. and Paula M. Holznagel, the personal representatives of Ethanuel's estate, commenced this civil action against Cutsinger and Cutsinger's employer Dependable Sanitation, Inc. The case was heard by a Davison County jury. The jury returned a verdict for Cutsinger and Dependable Sanitation. The Holznagels now appeal.

Ethanuel was a student at Mitchell High School. On the day of the accident, Ethanuel got in his car and left school for his lunch break. His family believes he was on his way home for lunch. Cutsinger was a driver for Dependable Sanitation. On the day of the accident, Cutsinger was out collecting recyclables with his co-worker and passenger Joe Fisher. Cutsinger was in an F-450 Super Duty Truck with an attached 30-40 feet long trailer to carry the recycling material.

Shortly after 11:00 a.m., Cutsinger approached the intersection of Gamble Street and 8th Avenue. At the intersection, Cutsinger came to a stop or a near complete stop. He began to make a wide right turn. An investigating officer testified that this wide right turn was necessary because of the size of Cutsinger's vehicle. Before Cutsinger could complete the turn, Cutsinger and Ethanuel's vehicles collided. Evidence was presented at trial that Ethanuel may have been speeding. Physical evidence was also presented indicating that Ethanuel was operating a portable CD player and leaning over on the passenger side until just before impact, suggesting that Ethanuel may not have been maintaining a proper lookout for other traffic.

After the collision, Cutsinger continued to work. He was later called into his supervisor's office and informed that Ethaniel had passed away as a result of the injuries he suffered in the collision. Cutsinger has admitted that he smoked marijuana when he returned home. Cutsinger has also admitted that he has smoked marijuana approximately 50 times before reporting to work. However, law enforcement found no indication that Cutsinger was under the influence of marijuana at the time of this accident.

At trial, Defendants' Cutsinger and Dependable Sanitation moved *in limine* to exclude any suggestion that Cutsinger was under the influence of marijuana or any other drug at the time of the accident. The motion also sought to exclude Cutsinger's prior misdemeanor conviction for marijuana possession. The trial court granted the motion pursuant to SDCL 19-2-3 (Rule 403). The statute provides:

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

The Holzmagels now appeal, raising the following issue:

Whether the trial court erred when it granted a Motion in Limine barring Plaintiffs from presenting evidence that Defendant Cutsinger was under the influence of marijuana at the time of the accident.

Mr. James A. Miskimins and Mr. James D. Taylor, Attorneys  
for Plaintiffs and Appellants Estate of Ethanuel  
James Holznagel and Wayne D. and Paula M.  
Holznagel

Mr. Michael L. Luce and Ms. Rochelle R. Sweetman,  
Attorneys for Defendants and Appellees John Ervin  
Cutsinger and Dependable Sanitation, Inc.

**State v. Walth**

On April 25, 2009, Lance Bosch and Detective Gries were working as security guards at Wiley's Tavern in Sioux Falls, South Dakota. Brett McClay, a disc jockey at Wiley's Tavern, notified Lance that he had witnessed a drug transaction take place in the bathroom of the bar. He identified Rylan "Wayne" Walth as the individual that allegedly sold the drugs. Lance approached Wayne to discuss the accusation. During this discussion, Wayne produced a cellophane wrapper that Lance determined smelled of marijuana.

Lance brought Wayne to Detective Gries, an officer with the Sioux Falls Police Department. Detective Gries was in plain clothes but had a set of handcuffs and a pistol in a holster on his hip. Lance handed the cellophane wrapper to Detective Gries and informed him that Wayne had been accused of selling drugs in the bathroom. Detective Gries smelled the wrapper and determined that it had a distinct odor of marijuana.

Detective Gries escorted Wayne outside the back door of the bar for questioning. Upon exiting the bar, Detective Gries identified himself to Wayne as a Sioux Falls Police Officer and showed him his police issued badge and identification card. Detective Gries then took Wayne's Iowa driver's license to verify his identity. Detective Gries questioned Wayne about what had occurred in the bathroom of the bar. Wayne admitted that he sold marijuana to a friend. Detective Gries asked Wayne if he had anymore drugs in his possession. Wayne stated that he did not. However, when Detective Gries posed the question a second time, Wayne reached in his pocket and pulled out several pills that he identified as ecstasy.

Detective Gries arrested Wayne for possession of a controlled substance and contacted Metro Communications to dispatch a transport officer to their location. While waiting for the transport officer to arrive, Detective Gries read Wayne his *Miranda* warnings and asked him if he would be willing to answer questions. Wayne agreed to answer the detective's questions and admitted to selling ecstasy to two separate people in the bathroom at Wiley's Tavern.

The Minnehaha County Grand Jury indicted Wayne on one count of possession with intent to distribute a schedule 1 drug and one count of simple possession of a controlled drug. Prior to trial, Wayne filed a motion to suppress the statements he made to Detective Gries. The trial court denied the motion after hearing the matter. Wayne waived his right to a trial by jury. The case proceeded to a court trial and Wayne was convicted of all charges.

Wayne appeals the trial court's denial of his motion to suppress and raises the following issues:

1. Whether the statements Wayne made to Detective Gries prior to his arrest were made while Wayne was in custody, thus requiring a *Miranda* advisement.
2. Whether the statements Wayne made to Detective Gries after he was read his *Miranda* rights were independently admissible.
3. Whether the physical evidence that Wayne handed to Detective Gries was inadmissible as fruit of a *Miranda* violation.

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

Ms. Nicole Laughlin, Minnehaha County Public Defender's Office, Attorneys for Defendant and Appellant Rylan "Wayne" Walth

**AFSCME Local 1025 et al. v.  
Sioux Falls School District et al.**

This appeal involves union grievances filed against the Sioux Falls School District (District) alleging that the District violated the parties' labor agreements when, for the 2008-2009 school year, the District provided a 2.5% wage increase (instead of a 3% increase) to non-teaching employees. The questions in the case are: (1) whether the grievances were filed too late; and if not, (2) whether the District correctly calculated the wage increases under the labor agreements and a change in State law. A more detailed explanation of the case follows.

Appellees AFSCME Local 1025 (Local 1025) and Sioux Falls Education Assistants Association (SFEAA) are unions representing non-instructional employees of Appellant District. Local 1025 and SFEAA had labor agreements with the District covering wages and other terms of employment for a six-year term from July 2007 through June 2013. In both agreements, salary increases for years two through six were to be at the "State Rate." The "State Rate" was defined in the agreements as "the 'Per Student Allocation' as defined in [SDCL] 13-13-10.1(4)." Per student allocation is the amount of money the State allocates on a per-pupil basis to all school districts for education funding each year. The agreements also stated:

If during the six-year term in the contract there is a change in the State funding formula for education, the District and the Union will meet to determine the effect on the salary portion of the agreement. The District and the Union agree to modify the contract definition of State Rate if other sources of revenues are added to the

State Rate Previous year “Per Student Allocation” to reflect the change in the formula, then calculating the percent difference between the previous year “Per Student Allocation” and the revised “Per Student Allocation.”

In 2008, the Legislature changed the per student allocation by amending SDCL 13-13-10.1(4) and enacting SDCL 13-13-10.6. As amended in 2008, SDCL 13-13-10.1(4) provided that the 2009 per student allocation would increase 3%. SDCL 13-13-10.6, however, provided that the 2009 per student allocation would increase by only 2.5% in the event a school district did not certify to the Secretary of Education that its average teacher salary and benefits would increase by at least 3% and that it would spend the additional .5% per student allocation on teacher salaries and benefits.

On April 8, 2008, the District called a meeting for all unions affected by the statutory changes, including Local 1025 and SFEAA. The District indicated it intended to increase non-instructional employee wages by 2.5% for fiscal year 2009. However, the District offered a 3% wage increase for employees represented by unions willing to execute a memorandum acknowledging that a 3% increase was not required by the terms of the parties’ labor agreements and that similar State restrictions on per student allocations would be treated in a certain way in future years. By April 18, Local 1025 notified the District that its members voted not to sign the memorandum, but Local 1025 also contended that its members were entitled to a 3% wage increase under its labor agreement. By April 23, SFEAA provided the District with a similar notification.

On May 12, the District certified to the State that the District would provide at least a 3% benefit increase for teachers and spend the additional .5% per student allocation on teachers. This certification complied with the requirements of SDCL 13-13-10.6 and allowed the District to

receive a 3% increase in the per student allocation under SDCL 13-13-10.1(4). On June 23, the District's Board of Education adopted a budget for fiscal year 2009 that included a 2.5% wage increase for employees represented by Local 1025 and SFEAA. The parties disagree whether the changes in the state statutes result in a 2.5% or 3% increase under the terms of the labor agreements.

The District's agreements with Local 1025 and SFEAA both contained a grievance procedure requiring a grievance to be filed within thirty days of an agreement violation or when, through reasonable diligence, the violation should have been discovered. Both Local 1025 (on June 18) and SFEAA (on July 10) filed grievances complaining of the 2.5% increase. The District denied both grievances, claiming that they were not filed on time. Local 1025 and SFEAA appealed to the South Dakota Department of Labor (Department). The Department agreed with the District and dismissed the grievances as untimely. Local 1025 and SFEAA then appealed to circuit court. The circuit court ruled that the grievances were timely, and the court sent the matter back to the Department to determine the appropriate wage increases. On remand, the Department concluded that SFEAA's and Local 1025's grievances were valid and the non-instructional employees were entitled to a 3% wage increase. The District then appealed to the circuit court. The circuit court affirmed the decision of the Department awarding a 3% wage increase.

The District now appeals to this Court, raising two issues:

1. Whether Local 1025's and SFEAA's grievances were timely.
2. Whether Local 1025 and SFEAA were entitled to a 3% wage increase for fiscal year 2009.

Ms. Linda Lea M. Viken, Attorney for Petitioner and  
Appellee AFSCME Local 1025

Mr. Shane E. Eden and Ms. Susan Brunick Simons,  
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School District

Ms. Anne E. Plooster, Attorney for Petitioner and Appellee  
Sioux Falls Education Assistants Association

## 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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