IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27792

ESTATE OF RONALD E. JOHNSON,
by and through its Personal Representative,
LYNETTE K. JOHNSON, and
LYNETTE K. JOHNSON, Individually,

Plaintiffs and Appellants,

vs.

DOUGLAS WEBER, TROY PONTO,
DARIN YOUNG, CRYSTAL VAN
VOOREN, DENNY KAEMINGK,
LAURIE FEILER, TIMOTHY A. REISCH,
SOUTH DAKOTA DEPARTMENT OF
CORRECTIONS, STATE OF SOUTH
DAKOTA, and JOHN DOES 1-20,

Defendants and Appellees.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

THE HONORABLE MARK E. SALTER

APPELLANTS' BRIEF

NOTICE OF APPEAL FILED MARCH 16, 2016

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

JURISDICTIONAL STATEMENT[1]

The Estate of Ronald E. Johnson, by and through its Personal Representative, Lynette K. Johnson, and Lynette K. Johnson, individually (collectively "Johnson") appeal from a *Judgment* of the Second Judicial Circuit Court. *SR at 2842.* The *Judgment* was signed on February 16, 2016, and filed on February 16, 2016. *Id.* The Defendants served a *Notice of Entry of Judgment* on February 17, 2016. *Id. at 2844.* Johnson subsequently filed a *Notice of Appeal* on March 16, 2016. *Id. at 2871.* Jurisdiction in this Court is therefore proper under SDCL 15-26A-3.

STATEMENT OF THE ISSUES

I. WHETHER A JURY COULD CONCLUDE THAT THE DEFENDANTS' CONDUCT WAS EXTREME AND OUTRAGEOUS.

The circuit court held that no jury could conclude that the Defendants' conduct was extreme and outrageous for purposes of the Plaintiffs' claim for intentional infliction of emotional distress.

Wangen v. Knudson, 428 N.W.2d 242 (S.D. 1988).

Kjerstad v. Ravellette Pub. Co., 517 N.W.2d 419 (S.D. 1994).

Petersen v. Sioux Valley Hosp. Assoc., 491 N.W.2d 467 (S.D. 1992).

Bass v. Happy Rest, Inc. 507 N.W.2d 317 (S.D. 1993).

[1] Throughout this brief, the documents indexed and transmitted by the Minnehaha County Clerk of Courts, the settled record, will be referenced by using "SR" followed by the appropriate page number(s). The Appendix attached hereto will be referenced by using "APP" followed by the appropriate page number(s). The transcript from the summary judgment hearing will be referenced by using "TR" followed by the appropriate page number(s).

II. WHETHER THERE ARE NO GENUINE ISSUES OF MATERIAL FACT CONCERNING JOHNSON'S CLAIM FOR FRAUDULENT MISPRESENTATION.

The circuit court held that there is no genuine issue of material fact concerning certain of the elements of the Plaintiff's claim for fraudulent misrepresentation.

North American Truck & Trailer, Inc. v. M.C.I. Com. Serv., Inc., 2008 S.D. 45, 751 N.W.2d 710.

St. Paul Fire and Marine Ins. Co. v. Engelmann, 2002 S.D. 8, 639 N.W.2d 192.

Rumpza v. Larsen, 1996 S.D. 87, 551 N.W.2d 810.

Berbos v. Krage, 2008 S.D. 68, 754 N.W.2d 432.

SDCL 15-6-56(c).

III. WHETHER SOUTH DAKOTA SHOULD RECOGNIZE A PRIVATE CAUSE OF ACTION FOR VIOLATION OF THE DUE PROCESS CLAUSE FOUND IN ARTICLE VI, § 2 OF THE SOUTH DAKOTA CONSTITUTION.

The circuit court held that Johnson could not maintain a due process claim based upon Article VI, § 2 of the South Dakota Constitution.

Dorwart v. Caraway, 58 P.3d 128, 135 (Mont. 2002).

Hurley v. State, 143 N.W.2d 722 (1966).

Heitman v. State, 815 S.W.2d 681, 687-88 (Tex. Crim. App. 1991).

Egan Consolidated School District v. Minnehaha County, 270 N.W. 527 (S.D. 1936).

South Dakota Constitution, Article VI, § 9.

STATEMENT OF THE CASE

Johnson commenced this action after Correctional Officer Ron Johnson was murdered while on guard at the South Dakota Penitentiary. Johnson alleged violations of

Ron Johnson's rights under the United States Constitution (42 U.S.C. § 1983) and the South Dakota Constitution (Count III), and several common law claims. *SR at 2-25.* The DOC removed the action to United States District Court. *Id. at 34-61.* The District Court granted summary judgment in favor of the DOC on Johnson's § 1983 claim and remanded the state law claims. *Id. at 66-83.* Johnson appealed the dismissal of the § 1983 claim to the Eighth Circuit Court of Appeals, which affirmed. *Id. at 2816.*

Upon remand to the circuit court, the Defendants moved for summary judgment. *SR at 84-85.* The circuit court granted the Defendants' motion. *Id. at 2812-43.* This appeal followed.

STATEMENT OF THE FACTS

In 2003, Rodney Berget ("Berget") was given two life sentences and was returned to prison. *SR at 1215.* He immediately refused his housing assignment, went on a hunger strike, and demanded to be moved out of the maximum custody facility ("Jameson"). *Id. at 1216-23.* In direct violation of DOC policy, Warden Douglas Weber ("Weber") made a deal with Berget, whereby Berget ended his hunger strike in exchange for Weber moving him out of Jameson and into West Hall. *Id. at 1223, 1254.*

In July of 2006, Eric Robert ("Robert") was sentenced to 80 years in prison. *Id. at 1228.* He was ultimately assigned to West Hall where he met Berget. *Id. at 802, 1444-46, 1229.* In 2007, Robert attempted to escape and Berget was implicated in the plan. *Id. at 1231-34.* As a result, Robert was moved to Jameson and nothing happened to Berget. *Id.* In 2008, Robert sought a modification of his sentence, which was denied in 2009. *Id. at 1239, 1240, 1273-74.* In July of 2009, Robert went on a hunger strike and

demanded to be moved to the third floor of West Hall. *Id. at 1241, 1243.* Again, Weber violated DOC policy and agreed to move Robert. *Id. at 1242-43, 1254.* Approximately one month later, Berget packed up his belongings and demanded to be moved to a cell on the third floor of West Hall near Robert. *Id. at 1244, 1276-77.* Again, his demands were met and Berget was moved. *Id. at 1244-45.*

Throughout 2009, 2010, and 2011 the Defendants were informed by multiple sources that Berget and/or Robert were planning an escape – States Attorney Jesse Sondreal, Correctional Officer Chet Buie ("CO Buie"), Tim Henry, and David Tolley. *Id. at 1240, 1273-74, 2338-41, 2466-68, 2722-32, 2740-41.* Despite these warnings, and despite the fact that the placements themselves violated policy, Berget and Robert were not moved. *Id. at 802, 1444-46.* During this same timeframe, the Defendants asked another inmate, David Tolley, to spy on Berget and Robert and report back to them. *Id. at 2467-68.* Tolley was placed in the cell next to Berget and Robert. *Id. at 2466-68.* Tolley reported that they were in fact planning an escape and he requested to be moved before something happened. *Id.* Tolley was moved but Berget and Robert remained in their cells. *Id. at 802, 1444-46.*

After being placed in West Hall, Berget and Robert sought jobs that allowed them to move freely to and from West Hall. *Id. at 1756-57, 1698-99.* First, Robert obtained a job as a laundry cart pusher. *Id. at 1756-57.* On March 18, 2011, Berget obtained a job as a recycling orderly. *Id. at 811.* Three weeks after Berget secured that job, Berget and Robert killed Ron Johnson while he was on duty in the PI Building. *Id. at 1287-88.*

Thereafter, the Defendants issued an *After-Incident Report*, which was intended to be a comprehensive overview of what took place. *SR at 607.* The *After-Incident Report* affirmatively stated that DOC staff followed all policies and procedures. *Id. at 624.* The Defendants also participated in an audit conducted by the National Institute of Corrections ("NIC"). *Id. at 635.* The NIC issued a report and the Defendants issued a response. *Id. at 635, 655.* None of the reports disclosed the hunger strikes or any of substantive facts that contributed to Berget and Robert killing Ron Johnson. *Id. at 607, 635, 655.* The *After-Incident Report* did not mention any of the repeated warnings given to the Defendants by the sources listed above. *Id. at 607.*

Johnson contends that the Defendants' conduct substantially contributed to the death of Ron Johnson. *APP at C-2 – C-8.* Johnson has further demonstrated that the Defendants knew that their actions were indefensible and contributed to his death. *Id.* Faced with this situation, the Defendants chose to misrepresent the facts in an effort to avoid culpability and potential liability. *Id.* Their representations and conduct after the death of Ron Johnson caused damage and extreme emotional distress to Lynette Johnson. *Id.*

I. The crimes which led to Rodney Berget and Eric Robert's incarceration.

Berget and Robert were violent men. According to former States Attorney Jesse Sondreal, who prosecuted both men, Robert was the most violent and dangerous person he had ever seen, and Berget's criminal history was atrocious. *SR at 1271, 1274-75.*

A. Berget. During the early part of 2003, Berget assaulted Beatrice Miranda and threatened to kill her and/or her children if she told anyone. *SR at 1214.* After he

was charged with assault, Berget went to Ms. Miranda's home intending to torture and kill her. *Id. at 1214, 1272.* Upon arriving, Berget shot Ms. Miranda and her male friend. *Id. at 1214.* Believing he had killed them, Berget left and drove to a convenience store in Sturgis, where he kidnapped the female store clerk and raped her at gun point. *Id.* As a result of these crimes, Berget pled guilty to attempted first degree murder and kidnapping and was given two mandatory life sentences. *Id. at 1215, 1272.*

B. Robert.

In July of 2005, Robert impersonated law enforcement and "pulled over" a young woman (using flashing lights on his pickup) near Black Hawk. *SR at 1226.* He forced the woman into the trunk of her car; however, the woman had a cell phone and was rescued. *Id.* A search of Robert's pickup revealed that the pickup bed was covered by a topper which contained a mattress, a shovel, an axe, rope, a wooden club, and pornography. *Id. at 1226, 1272.* Robert pled guilty to kidnapping and was sentenced to 80 years. *Id. at 1227-28.*

II. Department of Corrections facilities and supervision.

The DOC's facilities in Sioux Falls (collectively "the Penitentiary") consists of the following:

- Jameson Annex (Units A, B & D) – A separate wholly-contained facility within the perimeter of the Penitentiary designated for maximum custody inmates. *SR at 574.*
- West Hall, East Hall, and Federal Hall (collectively "the Hill" or "SDSP") – Facilities within the perimeter of the Penitentiary designated for high-

medium custody inmates. *Id.*

- Jameson Annex (Unit C) – A separate facility located outside the perimeter of the Penitentiary designated for minimum custody inmates. *Id.*

DOC policy identifies Jameson (Units A, B & D) as the only DOC facility designated for maximum custody inmates. *Id.* DOC policy also requires that maximum custody inmates be subject to direct correctional supervision. *SR at 536, 574.* DOC staff have admitted that inmates housed in West Hall are not subject to direct correctional supervision. *Id. at 1698-99.*

The Pheasantland Industries Building ("PI Building") is also within the perimeter and contains a number of individual shops. *SR at 2342.* Although approximately 144 inmates typically worked in the PI Building, just one Correctional Officer was stationed there. *Id. at 451, 2341-42.* Notably, the same Correctional Officer would frequently leave the building for extended periods, such as to deliver/retrieve mail and transport packages to/from an Office located outside the perimeter. *Id. at 2342.* Inmates in the PI Building were unequivocally not subject to direct correctional supervision. *Id.*

III. Berget's time in the Penitentiary.

Berget was first sent to the Penitentiary at the age of 15 after he had escaped at least twice from the State Training School. *SR at 1207-08.* Berget proceeded to spend many of the following years in the Penitentiary due to multiple convictions, including for escapes and attempts to escape. *Id. at 1208.* In addition to his two escapes from the State

Training School, Berget escaped from the Penitentiary on three separate occasions.[2] *Id. at 1208-09.* Berget made other attempts to escape, and likewise engaged in escape-related activities on numerous further occasions.[3] In October of 2003, while he was awaiting sentencing for attempted first degree murder and kidnapping, Berget was caught participating in an escape attempt. *Id. at 1215.*

Upon returning to the Penitentiary in December of 2003, intake documentation was completed. Berget's criminal history revealed 11 felony convictions. *SR at 1216.* A psychological interview was performed; no mental health issues were identified by the physician. *Id. at 1216-17.* As for his custody level, Berget was given the highest scores possible in every applicable category, resulting in his Risk Score being 31 points (out of a possible 33 points). *Id. at 1217.* Inmates with a score between 22-33 points are maximum custody inmates; therefore, Berget was a maximum custody inmate and assigned to Jameson. *Id. at 1217.*

Thereafter, Berget proceeded to be a disciplinary problem. *SR at 1217-20.* Just two months after his return to the Penitentiary, Berget had received his third violation for refusing a housing assignment. *Id. at 1219.* Rather than being punished, Berget was moved out of Jameson. *SR at 801-04.* Because Berget was a maximum custody inmate, he could not be moved out of Jameson absent an "Administrative Decision" and a written

[2] Berget's escape from the Penitentiary in 1987 along with others has been referred to as the largest and greatest escape in South Dakota history." *SR at 1356, 1365, 1524, 1641.*
[3] By way of example: a razor blade was found in Berget's rectum; an exacto knife, hacksaw blades, extra winter clothing, and drill bits were found in his cell; red paint particles (used to cover up cut bars/locks) were found in his mattress; and cut steel mesh, cut iron bars, and obscured plexi-glass windows were found in areas where Berget had access. *SR at 1209-10, 1213-14.*

narrative providing the factual basis for the move. *SR at 534-583.* Neither were done; the move went unrecorded. *SR at 723-24, 534-83.* Due to this lack of required documentation, who authorized this move and the basis for the decision are unknown.

Berget continued to be a disciplinary problem and was written up frequently. *SR at 1300-50.* On June 2, 2004, Berget was taken to Health Services due to a hunger strike.[4] *SR at 1220.* Health Services concluded that the hunger strike was not the result of a mental health issue. *Id.* On June 9, Berget was evaluated by Dr. Robert Strayhan. *SR at 2500-01.* Dr. Strayhan confirmed that Berget's hunger strike was clearly an effort to change his housing, and noted that "he is making the calculated decision to go on a hunger strike to get moved," and "is refusing to eat in order to gain more favorable incarcerational status." *Id.*

Berget continued his hunger strike until June 10. *SR at 1222-23.* That day, Weber contacted Health Services and advised that Berget had "agreed" to start eating.[5] *Id.* Although the DOC's ethics code and policies prohibit making a deal with an inmate to end a hunger strike, Berget was moved to West Hall the following day.[6] *SR at 1221-23.*

On June 18, Berget was written up for a disciplinary infraction and placed back in Jameson. *SR at 1223.* On June 21, Berget went on another hunger strike. *Id. at 1223-24.* Berget stated his hunger strike was because he had been returned to Jameson: "just not

[4] Berget had previously gone on hunger strikes to get what he wanted. *SR at 1210-12.*
[5] Inexplicably, the documents preceding and following this *Progress Note* are blank. *SR at 1409-30.*
[6] According to DOC staff person Chad Stratmeyer, an agreement to move an inmate based on a hunger strike is not only a violation of policy, it violates the basic ethics of corrections. *SR at 1825.*

eating if I go back to Hill today I will start eating." *Id.* Berget prevailed – he was moved backed to West Hall the same day. *Id.*

As before, because Berget was a maximum custody inmate, he could not be moved out of Jameson absent an "Administrative Decision" and a written narrative providing the factual basis. *SR at 566, 1251-53.* However, no required paperwork was completed that would verify who made the decision to move Berget or the basis for the decision. *SR at 1225.* In fact, even despite additional disciplinary infractions, Berget continued to live in West Hall without written authorization for the next several months. *SR at 1225-1226.* As for the required factual justification, it stated simply: "'Other' is being used as a placement basis. Per Warden, this inmate will be housed in West Hall." *SR at 1226.*

In June of 2004, while Berget was in West Hall, Defendant Crystal Van Vooren sent an e-mail to all DOC Security Staff and Unit Management Staff stating that she wanted "to create a list of inmates that we consider our 'most dangerous.'" *SR at 1224.* Only two e-mail responses were provided in discovery and both identified Berget as one of the most dangerous. *Id.*

In the years that followed, Berget continued to have multiple disciplinary infractions, but he was never sent back to Jameson. *SR at 1300-50, 801-04.* On August 3, 2009, Berget "packed his property and went to the West Hall holding cell." *SR at 1244.* DOC staff was not able to convince Berget to return to his cell, and he was sent to disciplinary segregation and promptly engaged in a hunger strike. *Id.* The hunger strike

ended when Berget was moved to a cell on third floor of West Hall next to Robert.[7] *Id. at 1244-45.*

The DOC admits that those narratives which were completed are void of any factual basis justifying Berget being housed outside of Jameson. *SR at 1258.* Most state nothing more than that Berget is being housed in West Hall "per the Warden" or "per Senior Staff"; a few provide that Berget is in West Hall because he is "having a hard time adjusting to his crime." *SR at 532-33.* After Berget was placed in the cell next to Robert, no member of the Senior Staff ever signed their name on the required documentation approving Berget's placement. *SR at 1246, 1249.*

IV. Robert's time in the Penitentiary.

Robert arrived at the Penitentiary on January 6, 2006. *SR at 1228.* Robert's psychological interview did not identify any mental health issues. *Id. at 1228-29.* Robert was categorized as High Medium custody and was ultimately assigned to West Hall. *SR at 1229.*

In May of 2007, an inmate informed the DOC that Robert had cut a lock on the fan room door in the West Hall shower and intended to escape. *Id. at ¶108-112.* The following day, another inmate reported that he had overhead Robert talking to Berget about cutting the lock. *Id.* Robert challenged the charge and Berget wrote a letter on

[7] Records confirm that just weeks earlier Robert successfully obtained a transfer from Jameson to the third floor of West Hall by engaging in a hunger strike. *SR at 1241-43.* Inmate Henry reported to DCI that he informed DOC staff in 2009 that Berget and Robert were planning an escape and went on hunger strikes to obtain cells in West Hall near each other. *Id. at 2721-2725.*

Robert's behalf. *Id.* The DOC ultimately found that Robert had attempted to escape.[8] *Id.* Robert was reclassified as a maximum security inmate and moved to Jameson. Annex. *Id. at ¶117.*[9]

In the months that followed, Robert had several disciplinary infractions. *Id. at ¶¶121-31, 133.* In January of 2008, Robert advised DOC staff that "he needs to get back to the Hill." *Id. at ¶136-37.* In February, it was observed that Robert had "strong antisocial traits," and "ha[d] been getting more write ups each week."[10] *Id. at ¶¶141-43.* In May of 2008, Robert requested that he be transferred to his home state of Wisconsin. *Id. at ¶¶146-47.* The request was denied. *Id.* Later that same month, Correctional Officer Flick filed a report stating that a confidential informant had advised him that Robert was "after" him. *Id. at ¶148.* According to the report, Robert "was going to wait until after his Court date and depending what the outcome was he was going to blast [Flick]." *Id.*

In 2009, States Attorney Jesse Sondreal contacted the DOC about Robert and requested information concerning "any possible escape plans/write-ups and threats to assault staff." *Id. at ¶153-54.* Van Vooren indicated at that time that Robert's file contained "a 5-5 escape write-up from 07 and threats to staff in 08." *Id.* A contemporaneous DOC *Progress Report* advised that Robert's conduct "makes him a

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[8] At the same time, Berget was written up for two Major disciplinary infractions, but the charges were ultimately reduced. *SR at 1231-34.* The DOC never produced any documents explaining the reduction of the charges.

[9] The *Classification Custody Form* indicates that due to the Shower Room escape attempt, Robert would be "Max for 10 years."

[10] On March 11, 2008, Warden Weber expunged an infraction for refusing housing. *Id. at ¶143.*

security risk," and the DOC represented that Robert would "remain at the Jameson Annex Maximum Security Unit-D." *Id.* Prior to contacting the DOC, Sondreal had received a letter from Robert's cellmate (Michael Thomas), which prompted him to have Thomas interviewed by the South Dakota Division of Criminal Investigation ("DCI"). *Id. at* ¶¶*346-51*. Thomas reported that Robert talked about threatening to harm people in the future, including his sentencing judge, the prosecutor, other inmates and guards. *SR at 2483-84.* He also heard Robert ask Weber to be moved out of Jameson and to the Hill, and that Weber refused and told Robert that he was too dangerous to be moved. *Id.* Finally, Thomas met with special security and DCI on more than one occasion to discuss Robert, and also addressed the issues directly with Weber. *Id.* From his investigation, Sondreal concluded that there was credible information that Robert was planning an escape attempt that involved killing a DOC employee – and that is why he contacted the DOC, discussed the information with them, and sought any information that the DOC might have. *SR at 1493-95, 1498.*

In March of 2009, the court denied Robert's request to have his sentence reduced. *SR at 1240.* Shortly thereafter, Robert went on a hunger strike and, upon evaluation, indicated that he "continue[d] to be upset about being housed in Jamison Annex;" he requested that he be moved to West Hall "where there are greater work opportunities." *Id. at 1240-43.* According to Mental Health's notes, Robert's intent was "to get back to West Hall or to be transferred to a prison in Wisconsin . . . ." *Id.*

Robert demanded to speak with Weber. On June 18, Robert was cited for refusing to eat. *SR at 1241-42.* He stated: "I just want to talk to the Warden." *Id.* On

June 22, Robert indicated that his hunger strike was because he "wants to talk to Warden Weber." *Id. at 1242.* On June 23, he again requested to see Weber. *Id.* According to the physician's assistant, Robert "does not give any reason for his hunger strike, but indicates that he just wants to speak with the warden." *Id.* Weber met with Robert on June 23; Robert indicated that he "ha[d] discontinued hunger strike (ate lunch today), as he was able to talk to Warden, as requested." *Id.* He requested that he be moved to West Hall the following day, and maintained that he would continue eating. *Id. at 1242-43.* Robert was transferred to the third floor of West Hall the very next day. *Id. at 1243.*

Although the DOC flatly denies that a "deal" was made, Correctional Officer Andrew Hanson recalled the meeting. *SR at 2478-82.* According to CO Hanson, he was asked to move Robert into a separate room for a meeting with Weber; Weber came and met with Robert; after the meeting, Senior Staff instructed CO Hanson to retrieve a bottle of Ensure for Robert; and "immediately" after his meeting with Weber, Robert was moved out of Jameson and into West Hall.[11] *Id. at 2479-80.*

The required placement documents were not completed, and Robert's hunger strike infraction was expunged by Weber. *SR at 739-800, 1644.* In Weber's words, the hunger strike infraction was expunged "due to the fact that the inmate did eat; thereby, ending his hunger strike." *Id.*

Certain staff expressed disagreement with Robert being moved out of Jameson. *SR at 1539-40.* Case Manager Lisa Fraser typed a written narrative expressing her

[11] Part of the reason that CO Hanson left the DOC was because he "honestly believe[d] that it was simply a matter of time before someone was seriously injured based on these decisions." *SR at 2480.*

disagreement onto the DOC's computer system. *Id. at 1540.* Ms. Fraser later observed that her narrative was deleted. *Id. at 1554-55.* Once a narrative or entry is placed on the DOC's computer system, it will not automatically delete. *Id. at 1591-92.* The Defendants have provided no explanation for this spoliation of evidence.

As with Berget, the DOC admits that the narratives lack any factual basis justifying Robert being housed in West Hall. *SR at 1588.* Just like Berget, the narratives state nothing more than that Robert is being housed in West Hall "per Senior Staff," and housed in West Hall "due to his inability to adjust to housing at [Jameson]." *Id. at 599.*[12]

V. The DOC was aware that Berget and Robert were going to attempt an escape.

By August of 2009, the DOC had placed Berget and Robert just one cell apart (W085 and W089), allowing them to converse and plan on a daily basis. *SR at 584-88, 801-04.* According to Tolley, Berget and Robert were moved out of Jameson as part of deals to end hunger strikes. *APP at F-2.* Tolley stated that this fact was well known to unit management in West Hall and discussed on a regular basis. *Id.* He further reported that prior to Berget being moved to West Hall, Tolley was contacted by Unit Manager Brad Woodward. *Id.* In that discussion, Woodward specifically requested that Tolley change cells and move into the cell next to Berget on third floor so that he could keep an eye on Berget and Robert. *Id.* As a result of this arrangement, Tolley had a number of conversations with DOC staff regarding Berget and Robert. *Id.* Specifically, he had

[12] After Berget and Robert were moved to West Hall, they secured jobs. *SR at 643, 1734.* Robert became a "laundry cart pusher," allowing him to freely leave and return to West Hall. *Id. at 1756-57.* Meanwhile, Berget obtained an orderly position. *Id. at 811.* DOC staff admitted that Berget and Robert's jobs often permitted them to be without direct correctional supervision. *Id. at 1698-99.*

conversations with Woodward, Defendant Van Vooren, Joe Miller, Heather Veld, Pam Linneweber, and Mary Rodasky. *Id.* Tolley told them that Berget and Robert were clearly up to something and that they intended to escape. *Id.* Because of what Tolley had observed, he actually requested to be moved away from Berget and Robert as he did not want to be around them when they made their escape attempt. *Id. at F-3.* Based on his request, the DOC moved Tolley to a different cell. *Id.* Importantly, Tolley specifically recalls an exchange between Robert and Weber in which Robert threatened to kill Weber. *Id.*

Later that fall, another inmate, Henry, contacted Woodward and reported that Berget and Robert were planning an escape attempt. *SR at 2723-24, 1276-77.* Woodward said that he had relayed the information to Weber, Van Vooren, and DOC security head Tom Linneweber. *Id. at 2725.* Henry also expressed concern about the jobs that Berget and Robert had – they had complete freedom of movement in West Hall; they were virtually never in their cells except for counts, and even though Berget did not have a laundry position, he was going back and forth from West Hall to the PI Building all the time. *Id. at 2727-28.* Henry was told by DOC staff to mind his business. *Id.* Henry further told DOC staff that Berget and Robert had wanted cells next to each other. *Id. at 1277.* Henry relayed his concerns to Woodward on more than one occasion, and Woodward stated that he had spoken to Weber about the matter. *Id. at 2732.*

In August of 2010, Berget's cell was searched as part of a specific shakedown and the following items were found: 1 box cutter razor blade; 1 exacto knife razor blade, and 2 drill bits. *SR at 1307.* As a result, Berget was moved to disciplinary segregation. *Id. at*

801-07. Berget commenced yet another hunger strike. *SR at 1247-48.* When asked why he was not eating, and keeping in mind that Berget was serving a life sentence, Berget "[s]tate[d] he [wa]s fasting prior to leaving prison." *Id. at 1248.* Berget was back in West Hall within four days. *Id.*

In the summer/early fall of 2010, Woodward reported to CO Buie, a thirty-year veteran, that Weber had given him the following instruction: "Weber wants me to make sure Berget's in his cell every day before I go home." *SR at 2338.* Woodward also told CO Buie that Berget and Robert's names "were coming up all the time" during Senior Staff meetings with Weber. *Id.* It was clear to CO Buie that Weber and the DOC administration were aware of the threat created by Berget and Robert. *Id.*

During that same time, CO Buie observed that Berget and Robert were routinely together and it was obvious that they had "hooked up" by September of 2010. *Id.* To him, they were clearly watching the West Gate and people and/or vehicles coming into and going out. *Id.* CO Buie reported these observations to Woodward. *Id.* On one occasion, he point blank asked Weber: "When are you gonna lock these guys up?" Weber ignored him and did not respond. *Id.*

VI. Berget and Robert execute their plan.

On April 12, 2011, Berget and Robert took advantage of their particular placement in West Hall and their jobs to carry out their plan. Sometime after 10:00 a.m. they jumped Ron in the PI Building and proceeded to viciously beat him to death with a lead pipe, crushing his skull in multiple places. *SR at 1288.*

DCI commenced an investigation and interviewed numerous individuals. One

day after Ron's murder, Henry informed DCI of what he had reported to DOC staff. *SR at 2721*. In his statement, and without the benefit of any documents, Henry accurately recounted Berget and Robert's scheme over the course of the prior 18 months. *Id. at 1276-77, 2722-24.* States Attorney Jesse Sondreal was interviewed by a reporter the same day that Ron was murdered. *Id. at 1272, 1274-75, 1518-20.* Sondreal disclosed that in connection with Robert's request for a reduction of his 80-year sentence, he had learned that Robert was plotting to kill a prison employee in conjunction with an escape. *Id. 1516-29.* As a result, he had contacted the DOC and asked to speak with security. *Id. at 1489-91*. Sondreal testified that he still believed that Robert had been planning an escape and plotting to kill an employee. *Id. at 1493-94.*

VII. The DOC's *After-Incident Report*.

After Ron's murder, the DOC issued an *After-Incident Report*, which was intended to be a comprehensive overview of what took place. *SR at 2042, 2126.* The report made no reference to Berget's and Robert's hunger strikes and the role they played in their transfer out of Jameson; instead, the report represented that "[p]enitentiary staff followed all policies and procedures." *Id. at 435.* Similarly, the report made not a single reference to the DOC's repeated use of "Administrative Decision" to facilitate Berget and Robert's transfers to West Hall. *Id.*

The report was provided to Lynette Johnson, and was represented to her as an accurate statement of what led to her husband's death. *SR at 1785, 2042, 2052-53, 2126.* Since then, Lynette has learned that the Defendants not only facilitated Ron's murder, but went to great to lengths to cover up their conduct. This additional information has been

devastating to Lynette. Lynette has received counseling, and was ultimately evaluated by Nathan Szajnberg, M.D. *SR at 2745.* In a report, Dr. Szajnberg confirmed that Lynette has suffered extreme injuries and damages as a result of the Defendants' misrepresentations, and that these injuries and damages are distinct from the emotional trauma resulting from the death of her husband. *Id.* Dr. Szajnberg further confirmed that Lynette will incur pecuniary damage as a result of the Defendants' conduct. *Id. at 2752.*

Separately, Johnson retained corrections expert Jeffrey Schwartz, Ph.D. After extensively reviewing the matter, Dr. Schwartz concluded that (i) nearly all of the records confirm that Weber made a deal with Berget and Robert to end their hunger strikes, (ii) that multiple policies had been repeatedly and intentionally violated, and (iii) that the Defendants engaged in a cover-up to avoid accountability for their actions in conjunction with Ron Johnson's death. *APP at C-2 – C-8.* Dr. Schwartz also opined that while the *After-Incident Report* affirmatively stated that no policies were violated, the opposite was true and that, in fact, there were numerous intentional policy violations that contributed to Ron Johnson's murder. *Id.*

STANDARD OF REVIEW

This Court's standard of review for summary judgment is well settled:

> [This Court] must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. [This Court's] task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper.

Brandt v. County of Pennington, 2013 S.D. 22, ¶7, 827 N.W.2d. 871, 874 (quoting Jacobson v. Leisinger, 2008 S.D. 19, ¶ 24, 746 N.W.2d 739, 745).

ARGUMENT AND AUTHORITIES

Johnson's claims are based on the Defendants' conduct that contributed to the death of Ron Johnson and the Defendants' later efforts to cover up and misrepresent their involvement in the murder. In the circuit court's *Memorandum Opinion and Order*, it concluded that many of the facts "are truly undisputed." *SR at 2813.* This is an erroneous statement, and because the case was determined on summary judgment the error is crucial.

I. WHETHER A JURY COULD CONCLUDE THAT THE DEFENDANTS' CONDUCT WAS EXTREME AND OUTRAGEOUS.

While it is for the trial court to determine, in the first instance, whether a defendant's conduct may be reasonably regarded as extreme and outrageous, "[w]hen reasonable minds may differ, it is for the jury to determine . . . ." *Petersen v. Sioux Valley Hosp. Assoc., 486 N.W.2d 516, 519 (S.D. 1992).* And, "[t]he extreme and outrageous character of the conduct may arise from the actor's knowledge that the other is particularly susceptible to emotional distress by reason of some physical or mental condition or peculiarity. Actions which may not make an actor liable in one situation may make him liable in another." *Wangen v. Knudson, 428 N.W.2d 242, 248 (S.D. 1988).* Further, the relationship between the parties also has a substantial impact on the analysis. *Watts v. Chittenden, 22 A.3d 1214, 1221 (Conn. 2011). See also House v. Hicks, 179 P.3d 730, 737 (Or. 2008) ("The most important factor is whether a special*

relationship exists between a plaintiff and a defendant, such as an employer-employee [or] government officer-citizen . . . . A defendant's relationship to the plaintiff may be one that imposes on the defendant a greater obligation to refrain from subjecting the victim to abuse, fright, or shock than would be true in arm's-length encounters among strangers.").

Further, reckless conduct will support a claim for intentional infliction of emotional distress ("IIED"). In Petersen v. Sioux Valley Hosp. Assoc., 491 N.W.2d 467 (S.D. 1992), this Court stated: "While we adhere to the elements outlined in Tibke, we also adhere to Wangen and specifically find that the tort of intentional infliction of emotional distress encompasses liability for reckless infliction of emotional distress as stated therein." *Id. at 469.*

Importantly, when considering summary judgment on an IIED claim, a circuit court can infer an intent to inflict severe emotional distress from the evidence. *Bass v. Happy Rest, Inc. 507 N.W.2d 317, 323, n. 22 (S.D. 1993).* And, a party can rely upon a doctor's report to support his/her causal connection. *Id. at n. 22.* For example, in Bass v. Happy Rest, Inc., 507 N.W.2d 317 (S.D. 1993), this Court noted that the trial court had "found that there was sufficient evidence in the doctor's report for a jury to find that she suffered depression and other symptomatic emotional distress." *Id.* Finally, the actor's intent need not be limited to "caus[ing] the plaintiff severe emotional distress to be actionable. In Kjerstad v. Ravellette Pub. Co., 517 N.W.2d 419 (S.D. 1994), "[t]here was testimony that the plaintiffs caught Ravellette spying on them in the restroom through a hole in the wall." *Id. at 429.* According to this Court:

> This behavior presents a jury issue as to whether it was extreme and outrageous conduct. Although the trial court decided that there was no intent on the part of Ravellette to cause plaintiffs severe emotional distress, we are of the opinion that there was sufficient evidence to create a jury question as to whether or not Ravellette's conduct intentionally or recklessly caused the plaintiffs an extreme disabling emotional response.

Id.

In this case, the circuit court identified two bases for granting summary judgment on Johnson's IIED claim: (1) it concluded as a matter of law that the Defendants' conduct was not "extreme and outrageous;" and (2) it concluded that there was no showing that the Defendants prepared the *After-Incident Report* for the calculated purpose of causing serious mental distress to Lynette Johnson. The circuit court erred in both conclusions.

In Kjerstad, this Court reversed a directed verdict on the plaintiff's IIED claim. *Kjerstad, 517 N.W.2d at 419.* In that case, former employees simply alleged that their former employers spied on them while they were in the restroom. *Id. at 421.* This Court concluded that the singular allegation presented a jury issue as to whether the conduct was extreme and outrageous. *Id. at 429.* Similarly, in Bass, this Court found that the comments and conduct of an employer toward his employee presented a jury question on the plaintiff's IIED claim. *Bass, 507 N.W.2d at 323.*

The conduct in this case exceeds that found to be actionable in Kjerstad and Bass. The Defendants knew that Lynette Johnson was grieving not only from the loss of her husband, but also his violent murder while on the job. In neither Kjerstad nor Bass had the plaintiffs gone through anything close to the experience of Lynette Johnson. Further, in neither of those cases was the relationship between the parties similar to the present

case. In this case, the Defendants were both the employer and a government agency. Most importantly, if Johnson's allegations are accepted as true, as they must be, the Defendants' conduct in this case is substantially more egregious.

Finally, the circuit court erroneously required that Johnson show that the Defendants prepared the *After-Incident Report* in a calculated effort to cause her harm. This standard is plainly wrong. Again, this Court has clearly stated that reckless conduct leading to severe emotional distress is enough. *Petersen, 491 N.W.2d at 469; Kjerstad, 517 N.W.2d at 429; Bass, 507 N.W.2d at 322; Wangen, 428 N.W.2d at 248.*

II. WHETHER THERE ARE NO GENUINE ISSUES OF MATERIAL FACT CONCERNING JOHNSON'S CLAIM FOR FRAUDULENT MISPRESENTATION.

The Plaintiffs' *Complaint* asserted a claim for misrepresentation / nondisclosure, which requires the showing of the following six elements:

(1) The defendant made a representation as a statement of fact;

(2) The representation was untrue;

(3) The defendant knew the representation was untrue or he made the representation recklessly;

(4) The defendant made the representation with intent to deceive the plaintiff and for the purpose of inducing the plaintiff to act upon it;

(5) The plaintiff justifiably relied on the representation; and

(6) The plaintiff suffered damage as a result.

North American Truck & Trailer, Inc. v. M.C.I. Com. Serv., Inc., 2008 S.D. 45, ¶10, 751 N.W.2d 710, 714.

The circuit court's grant of summary judgment on Count VI was based upon its conclusion that there were no genuine issues of material fact as to the second portion of element (4), element (5), and element (6). According to the circuit court:

> Even if the court determined that questions of material fact existed as to whether the Defendant made an untrue factual statement, either knowingly or recklessly, and with the intent to deceive her, the record does contain evidence from which the court could similarly find issues of material fact as to the remaining elements of fraudulent misrepresentation.

SR at 2830. The circuit court erred.

Element (4). The circuit court found that "there is no evidence that the Defendants issued the Incident Report for the purpose of inducing Mrs. Johnson to act upon it." *SR at 2831*. That is not only an incorrect statement, but the circuit court failed to view "every reasonable inference" in favor of Johnson.

In order for summary judgment to be allowed, "[n]ot only must the facts be not in issue, but also there must be no genuine issue on the inferences to be drawn from those facts." *St. Paul Fire and Marine Ins. Co. v. Engelmann, 2002 S.D. 8, ¶15, 639 N.W.2d 192, 199.* The circuit court was required to view "'every reasonable inference'" most favorably toward Johnson as the nonmoving party. *Rumpza v. Larsen, 1996 S.D. 87, ¶9, 551 N.W.2d 810, 812.* And, if the circuit court had reasonable doubt as to whether a genuine issue of material fact existed, that doubt was required to be resolved against the Defendants. *Berbos v. Krage, 2008 S.D. 68, ¶17, 754 N.W.2d 432, 437.*

Deputy Secretary of Corrections Laurie Feiler testified that while it was originally unclear whether the *After-Incident Report* would be public, the DOC had told Lynette "early on" that it was "going to share the contents of the report with her." *SR at 2053.*

And, Secretary of Corrections Denny Kaemingk expected that Lynette Johnson would be able to "rely" upon the *After-Incident Report* with regard to what took place. *Id. at 1785.*

The Defendants had full knowledge of all of the facts leading up to the murder of Ron Johnson, specifically the Defendants' own role. The Defendants also expected that Lynette Johnson would rely on the *After-Incident Report* for an "accurate" and "transparent" account of the circumstances that resulted in her husband's murder. *SR at 1785, 2042, 2052, 2126.* And, it is irrefutable that the *After-Incident Report* failed to disclose many of the basic facts which actually lead to the death of Ron Johnson. Given these facts, a "reasonable inference" is that the Defendants prepared the *After-Incident Report* in part to conceal their significant role in the murder of Ron Johnson, and thereby deceive Lynette Johnson and induce her to refrain from blaming or otherwise seeking to hold the Defendants accountable for the murder of her husband. *Accord Restatement (Second) of Torts § 531 ("One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation . . . .").*

Element (5). The circuit court held that there is "no evidence" that Lynette Johnson "actually relied to her detriment upon the statements in the Incident Report." *SR at 2831.* That is incorrect.

Johnson's response to the *Defendants' Motion for Summary Judgment* included a detailed report prepared by Nathan Szajnberg, M.D. Dr. Szajnberg's report makes clear that Lynette Johnson relied to her detriment upon the representations contained in the *After-Incident Report* and, as a result, suffered injuries and damages. According to Dr.

Szajnberg, Lynette Johnson "clearly suffered extreme trauma both from the Defendants' involvement in the murder of her husband and their subsequent misrepresentations; yet, these injuries and damages are clearly distinct." *SR at 2752.* In Dr. Szajnberg's words:

> [Lynette Johnson's] sense of betrayal focuses on actions and omissions by the Warden and DOC both for what she alleges as intentional violations of policy (prior to his murder) that resulted in her husband's murder, and misrepresentations subsequent to the murder. She alleges that deliberate misinformation that has the appearance of a cover-up has aggravated her psychiatric state. Her perceived losses and betrayals are highly consistent with her psychiatric condition at present.

Id. She has "further losses from her subsequent discoveries of what she perceives and alleges as intentional violations of policy by the prison's Warden and other administrative staff and possible coverup [sic]." *Id. at 2753.* Dr. Szajnberg concluded that "[f]rom a clinical standpoint it is certainly foreseeable that the Defendants' involvement in her husband's murder and the nature of the alleged misrepresentations in this case would result in conditions consistent with those exhibited by the examinee." *Id.*

Notably, rather than discussing Dr. Szajnberg's report, the circuit court focused on Johnson's *Complaint* and referenced SDCL 15-6-9(b)'s heightened pleading requirement for claims of fraud, and then commented that Johnson's briefing "does not provide any greater clarity." *SR at 2831.* The circuit court made a misstep in at least three respects.

First, the evidence to be considered when ruling on a summary judgment motion is not limited to a plaintiff's *Complaint*. *See SDCL 15-6-56(c).*

Second, the Defendants did not argue that Johnson failed to sufficiently plead her

claim for misrepresentation in violation of SDCL 15-6-9(b).

Third, the circuit court's comment that Johnson's brief failed to "provide any greater clarity" on the issue of whether Lynette Johnson relied to her detriment upon the *After-Incident Report* is unfair. While a review of the Defendants' brief to the circuit court reveals myriad arguments, the Defendants did not seek summary judgment on the ground. Johnson should not be faulted for failing to extensively brief an element that the Defendants' did not brief and identify as a basis for summary judgment in the first instance. If the circuit court intended to rely upon element (4) as a grounds for summary judgment despite the Defendants not doing so, it should have notified Johnson and afforded her an opportunity to respond. *See Leonhardt v. Leonhardt, 2012 S.D. 71, ¶12, 822 N.W.2d 714, 717.* "A court should notify the parties when it intends to rely on a legal doctrine or precedents other than those briefed and argued by the litigants." *Id.*

Element (6). The circuit court concluded that there was no genuine issue of material fact as to whether Lynette Johnson suffered damage as a result of the Defendants' misrepresentations. A review of Dr. Szajnberg's report, however, makes clear that this finding was also erroneous. According to him, Lynette Johnson "clearly suffered extreme trauma both from the Defendants' involvement in the murder of her husband and their subsequent misrepresentations; yet, these injuries and damages are clearly distinct." *SR at 2752.*

III. WHETHER SOUTH DAKOTA SHOULD RECOGNIZE A PRIVATE CAUSE OF ACTION FOR VIOLATION OF THE DUE PROCESS CLAUSE FOUND IN ARTICLE VI, § 2 OF THE SOUTH DAKOTA CONSTITUTION.

Count III of Johnsons' *Complaint* included an allegation that the Defendants

violated Johnson's due process rights under Article VI, § 2 of the South Dakota Constitution ("State Constitution").[13] *SR at 20 ("[Ron Johnson] was deprived of rights, privileges and immunities secured by the United States Constitution and the South Dakota Constitution . . . . ").* Although this Court has not yet expressly held that a violation of Article VI, § 2 is self-executing and gives rise to a private cause of action for damages, there is support for such a conclusion in South Dakota case law as well as in case law from many other state and federal courts.

It is helpful to begin this discussion with the United States Supreme Court's decision in Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 91 S. Ct. 1999, 29 L. Ed. 2d 619 (1971). In that case, Bivens filed suit claiming that he suffered humiliation, embarrassment, and mental suffering as a result of unlawful conduct by federal agents. *Id. at 389-90.* The federal court dismissed Bivens' complaint on the grounds that it failed to state a cause of action, and the Court of Appeals affirmed. *Id. at 390.*

On appeal, the United States Supreme Court reversed and held that a federal cause of action under the Fourth Amendment for damages could be maintained. *Bivens, 403 U.S. at 397.* The federal agents contended that a federal constitutional cause of action was unnecessary to redress the invasion of his constitutional right. *Id. at 390.* The Supreme Court disagreed noting, among other things, that "An agent acting – albeit unconstitutionally – in the name of the United States possesses a far greater capacity for

[13] Article VI, § 2 of the South Dakota Constitution provides, in pertinent part: "No person shall be deprived of life, liberty or property without due process of law." *S.D. Constitution, Art. VI, § 2.*

harm than an individual trespasser exercising no authority other than his own." *Id. at 391-92.* The Supreme Court ultimately determined that Bivens' complaint stated a cause of action. *Id. at 397.*

Since Bivens, the United States Supreme Court has found that money damages are recoverable for violations of the Fifth Amendment's guarantee of due process as well as the Eighth Amendment's prohibition against cruel and unusual punishment.[14] Also since Bivens, courts have relied upon the reasoning in Bivens, English common law, and the Restatement Second of Torts to support a private cause of action for state constitutional violations.[15] For example, courts in Utah and New York have concluded that state constitutional rights in those states to be free from cruel and unusual punishment, unreasonable searches and seizures, and equal protection are self-executing and that damages for violations of those state constitutional rights are recoverable based on the English Common Law and Bivens.[16] Courts have also relied on Restatement (Second) of Torts for authority.[17]

In Dorwart v. Caraway, the Montana Supreme Court held that a cause of action for money damages is available for violations of provisions of Montana's state constitution, including the right to due process of law. *Dorwart, 58 P.3d at 137.* In doing so, the court utilized the reasoning in Bivens, English common law, and the

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[14] *See Carlson v. Green, 446 U.S. 14, 100 S.Ct. 1468 (1980).*
[15] *See Widgeon v. Eastern Shore Hosp. Center, 479 A.2d 921, 924 (Md. 1984); Dorwart v. Caraway, 58 P.3d 128, 135 (Mont. 2002).*
[16] *See Bott v. DeLand, 922 P.2d 732 (Utah 1996), limited by Spackman ex rel. Spackman v. Board of Educ., 16 P.3d 533 (Utah 2000); Brown v. State, 674 N.E.2d 1129 (N.Y. 1996).*
[17] *See Dorwart v. Caraway, 58 P.3d 128, 135 (Mont. 2002).*

Restatement Second of Torts. *Id. at 137.* In so holding, the Supreme Court of Montana noted that, by 1998, 21 states had recognized an implied cause of action for state constitutional violations, 3 additional states had signified that they would do so under certain narrow circumstances, a private cause of action had been recognized in a 25th state by federal courts, and 4 states had enacted statutes authorizing such causes of action. *Id. at 133 (citing Gail Donoghue & Jonathan I. Edelstein, Life After Brown: The Future of State Constitutional Tort Actions in New York, 42 N.Y.L. Sch. L. Rev. 447, n. 2 (1998)).*

Turning to South Dakota, this Court has recognized private causes of action under South Dakota's Constitution. In Hurley v. State, 143 N.W.2d 722 (1966), this Court recognized a private cause of action for a violation of our State Constitution's takings clause. In so finding, this Court noted:

> In the absence of an adequate remedy . . . s 13, Art. VI of our Constitution is deemed to be self-executing. * * * The legislature is not authorized to restrict the language or take from the citizen the protection the constitution has thrown around him and his property. This provision of the constitution is self-executing, and, if there was no law to carry it into effect, a court of equity would, in the exercise of its inherent power, provide some method for ascertaining the damages, if any, caused by the injury threatened.

Id. at 729. This Court has also recognized a private cause of action under Article XI, which provides that public property is exempt from taxation. *See Egan Consolidated School District v. Minnehaha County, 270 N.W. 527 (S.D. 1936); Appeal of Black Hills Indus. Freeport, Inc., 268 N.W.2d 489 (S.D. 1978).*

Given the preceding, Johnson asked the circuit court to follow the lead of the majority of the courts that have considered this issue and hold that Johnson may assert a private cause of action under Article VI, § 2 of the State Constitution. The circuit court,

however, rejected Johnson's argument. After noting that the Legislature has not created such a private right of action and that the circuit court lacked the authority to do so, the circuit court's analysis focused on two bases.

The circuit court first emphasized that South Dakota's due process clause is virtually identical to the due process clause found in the United States Constitution and commented that "the citizens of South Dakota do not have a constitutional right to a particular analytical test for a due process claim that might differ from other jurisdictions." *SR at 2836-37.* While the circuit is correct that the provisions are nearly identical, that is not Johnson's point. Johnson's point is while South Dakotans may not have a "right" to a particular analytical test (i) only this Court should determine the factors of that test, and, equally important (ii) this Court may elect to adopt a test different than that employed by the Eighth Circuit Court of Appeals.

If this Court elects to recognize such a private cause of action, research makes clear that this Court should <u>not</u> adopt the five-part "state-created danger" test employed by the District Court in the federal action. In 2002, the Montana Supreme Court observed that implied causes of action for state constitutional violations had been recognized in nearly one-half of the States in America. *Dorwart, 58 P.3d at 135.* Not surprisingly, however, the courts in these States have not adopted a uniform "test" for evaluation of state constitutional claims. Instead, as also observed by the Montana Supreme Court, "[t]he analytical framework for consideration of claims for violation of state constitutions varies from state to state." *Id.* More important, however, it is clear that those States which have recognized implied causes of action for state constitutional

violation have not been adopting the Eighth Circuit five-part test (or other comparable federal courts' tests) for evaluating § 1983 claims such as Johnson's. In that regard, it is worth noting that the Defendants did not identify a single jurisdiction (among those which have recognized a state constitutional claim) that requires that a defendant's conduct "shock the conscience" as required by the Eighth Circuit; nor has Johnson's research unearthed such a decision.

Johnson was able to locate two "tests" used by other States that contain some language comparable to certain elements of the Eighth Circuit's five-part test. The Supreme Court of Utah has held that a prisoner may not recover damages under the "rigor clause" of the Utah Constitution unless "his injury was caused by a prison employee who acted with deliberate indifference or inflicted unnecessary abuse upon him." *Bott v. DeLand, 922 P2d 732, 740 (Utah 1996).* And, claims for alleged violations of New York's constitutional prohibition of cruel and unusual punishment similarly requires deliberate indifference. *De La Rosa v. State, 662 N.Y.S.2d 921, 924 (N.Y. Ct. Cl. 1997).* Given that the various states which permit state constitutional claims have not adopted a uniform framework, and the fact that none of those states appear to have adopted the "shock the conscience" test, this Court should not adopt the five-part state-created danger test employed in the federal action.

Notably, even the federal Courts of Appeals do not adhere to the same state-created danger test. The state-created danger doctrine originated from DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 213 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). Since DeShaney, the federal Courts of Appeals have adopted

differing approaches for analyzing such cases. *Kennedy v. City of Ridgefield, 439 F3d 1055, 1074 (9th Cir. 2004).* The fact that the federal Courts of Appeals have not conformed to uniform state-created danger test – or even consistently apply those components of their tests which are similar – is further reason for this Court to not adopt the Eighth Circuits' five-part test.

Apart from the preceding, it should be noted that courts have observed that the Eighth Circuit's five-part state-created danger test is the most restrictive test that has been adopted by any federal Court of Appeals with regard to such claims. Other courts have noticed that the Eighth Circuit applies an overly stringent analysis with regard to the standard for shocking the conscience. Indeed, in a concurring opinion in the Arkansas Supreme Court's decision Repking v. Lokey, 377 S.W.3d 211 (Ark. 2010), Justice Ronald Scheffield noted that if the facts already presented to the Eighth Circuit in prior cases did not shock the conscience, that almost nothing will, and further stated that he was unable to locate any case in which the Eighth Circuit's conscience had actually been shocked.[18]

While there are many reasons why the Eighth Circuit's test should not apply, constitutional law dictates the following: South Dakota citizens are entitled to a full determination of whether their individual rights guaranteed to them by the State Constitution have been violated, as determined by a framework delineated by this Court. Common sense also supports this conclusion. Consider the following observation by a

[18] Commentators have also observed that the standard being used by the Eighth Circuit should be rejected. *See Rosalie Berger Levinson, Time to Bury the Shocks-The-Conscience Test, 13 Chap. L. Rev. 307 (2010).*

Texas Court of Appeals:

> Furthermore, the state courts are better able to approach state constitutional interpretation with a more innovative and responsive approach to local interests than the Supreme Court whose decisions bear the onus of nationwide applicability. The state court is best able to address the interests of the citizens of its state and balance those against the interests of that state as it does not have to operate from a national vision, seeking the lowest common denominator and considering all the variations from state to state. For example, the South Dakota Supreme Court determines the reasonableness of a search and seizure by balancing the need for the search against the scope of the particular intrusion. ***
>
> * * * In fact, over a century ago, the Supreme Court recognized the states' authority to depart from Supreme Court decisions. *Murdock v. City of Memphis, 87 U.S. (20 Wall.) 590, 22 L.Ed. 429 (1875).* There, the Supreme Court stated:
>
> > [t]he State courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise. *Id. at 626.* Independent interpretation of state constitutional provisions is especially important since the Supreme Court began *not* finding independent and adequate state grounds for decisions so as to prevent states from expanding, not limiting, federally guaranteed rights. Finally, failure to independently interpret the state constitution effectively repeals or renders moot the state constitutional provisions, and allows the Supreme Court, nine appointed justices who are not responsible to this state's electorate, to have the final say on our state constitutional rights.

Heitman v. State, 815 S.W.2d 681, 687-88 (Tex. Crim. App. 1991) (emphasis in original).

The second basis for the circuit court's ruling was that Johnson's due process claim is barred due to res judicata. That is incorrect. With regard to the four elements which must be present for res judicata to be implicated, Johnson concedes that there was a final judgment on the merits in an earlier action (element (1)) and that the parties are the same (element (3)). However, the record is clear that the question decided in the

former action is not the same as the one decided in this action (element (2)) and that there was not a full and fair opportunity to litigate the issues in the prior proceeding (element 4)). *See Farmer v. S.D. Dept. of Revenue and Regulation, 2010 S.D. 35, ¶ 9, 781 N.W.2d 655, 659.*

With regard to element (2), Johnson's State Constitution due process claim was not a "question decided" in the federal action. First, the District Court did not specifically address Johnson's State Constitution due process claim. Rather, the District Court granted the Defendants' motion for summary judgment on Johnson's § 1983 claim, but specifically stated that "the state law claims in Plaintiffs' complaint are remanded to state court." *SR at 83*. Second, given that South Dakota has not yet recognized such a cause of action, the fact that the District Court did not address Johnson's State Constitution due process claim, and the fact that no analytical framework has been adopted to evaluate such a claim, it cannot be said that Johnson's State Constitution due process claim was a "question decided in the former action."

Element (4) is not met because there are new facts that came to light after the District Court ruled and which it therefore did not have the benefit of. A cornerstone of res judicata is the requirement that "there was a full and fair opportunity to litigate the issues in the prior proceeding." *Farmer, 2010 S.D. 35, ¶ 9 (quoting Interest of L.S., 2006 S.D. 76, ¶ 22, 721 N.W2d 83).* When new facts arise *after* the prior proceeding, there could not have been a "full and fair opportunity" to litigate those facts, and the doctrine of res judicata may be not be applied. *See Lewton v. McCauley, 460 N.W.2d 728, 731 (S.D. 1990); Interest of L.S., 2006 S.D. 76, ¶ 50, 721 N.W.2d 83, 97.*

The circuit court was provided with new facts that were not part of the federal court proceeding. Specifically, the circuit court was provided with the affidavit testimony of Michael E. Thomas (discussed at page 15, supra), whose affidavit was received some six months after the District Court had ruled in the federal action. *SR at 68, 2483.* Because Thomas' testimony was not received until *after* the District Court ruled, there are new facts that were not litigated in the prior proceeding. Thus, res judicata is inapplicable.

CONCLUSION

Based upon the foregoing, Johnson respectfully requests that this Court reverse the circuit court's *Judgment*.

Dated this 12th day of July, 2016.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Appellants, by and through their counsel, respectfully request the opportunity to present oral argument before this Court.

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that *Appellants' Brief* complies with the type volume limitation provided for in SDCL 15-26A-66. *Appellants' Brief* contains 9,865 words and 49,836 characters. I have relied on the word and character count of our word processing system used to prepare *Appellants' Brief*. The original *Appellants' Brief* and all copies are in compliance with this rule.

/s/ John W. Burke .
John W. Burke

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of July, 2016, I sent to:

James E. Moore
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Sioux Falls, SD 57117-5027

via e-mail, a true and correct copy of the foregoing *Appellants' Brief* relative to the above-entitled matter.

/s/ John W. Burke .
John W. Burke

APPENDIX

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
COUNTY OF MINNEHAHA	:SS)	SECOND JUDICIAL CIRCUIT

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

ESTATE OF RONALD E. JOHNSON, by and through its Personal Representative, LYNETTE K. JOHNSON, and LYNETTE K. JOHNSON, Individually,	:	CIV. 12-1523
Plaintiffs,	:	
v.	:	
DOUGLAS WEBER, TROY PONTO, DARIN YOUNG, CRYSTAL VAN VOOREN, DENNY KAEMINGK, LAURIE FEILER, TIMOTHY A. REISCH, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, STATE OF SOUTH DAKOTA, and JOHN DOES 1-20,	:	JUDGMENT
Defendants.	:	

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In accordance with the Court's Memorandum Opinion and Order dated February 9, 2016, and filed on February 10, 2016, granting Defendants' motion for summary judgment, it is hereby

ORDERED AND ADJUDGED that Judgment is entered against Plaintiffs and in favor of Defendants on Plaintiffs' claims that were remanded to this Court by order of the United States District Court in *Estate of Ronald E. Johnson v. Weber*, Civ. 12-4084 (D.S.D.), dated May 15, 2014.

Dated this 16th day of February, 2016.

BY THE COURT:

MARK E. SALTER
CIRCUIT COURT JUDGE

ATTEST:

ANGELIA M. GRIES, CLERK

By _____
Deputy

FILED
FEB 16 2016
Minnehaha County, S.D.
Clerk Circuit Court

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
ESTATE OF RONALD E. JOHNSON, by and through its Personal Representative, LYNETTE JOHNSON, and LYNETTE JOHNSON, individually, Plaintiffs, vs. DOUGLAS WEBER, TROY PONTO, DARIN YOUNG, CRYSTAL VAN VOOREN, DENNY KAEMINGK, LAURIE FEILER, TIMOTHY A. REISCH, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, STATE OF SOUTH DAKOTA, and JOHN DOES 1-20, Defendants.	CIV 12-1523 MEMORANDUM OPINION AND ODRER

This matter is before the court upon the motion of the named Defendants ("the Defendants") for summary judgment. The court conducted a hearing on April 27, 2015. The parties were present at the hearing through their respective attorneys. Donald M. McCarty and John W. Burke represented Lynette Johnson in both of her litigating roles as the personal representative of the Estate Of Ronald E. Johnson and individually (collectively, "the Plaintiffs"). James E. Moore and James Power represented the Defendants.

In an August 17, 2015, order, the court sought supplemental briefing relative to the constitutional claim alleged in Count 3 of the Complaint. The court received the additional submissions on September 21, 2015.

After carefully considering all of the arguments advanced by counsel, and reviewing the authorities and the voluminous record, the court grants the Defendants' motion for summary judgment.

BACKGROUND

The facts of this case, many of which are truly undisputed, recount a human tragedy. On April 12, 2011, 24-year veteran Correctional Officer Ronald Johnson ("Mr. Johnson") was brutally murdered by Rodney Berget ("Berget") and Eric Robert ("Robert"), both inmates at the South Dakota State Penitentiary in Sioux Falls ("the Penitentiary"). As part of a failed escape plan, the two inmates attacked Mr. Johnson with a lead pipe, fracturing his skull. Once subdued, they covered Mr. Johnson's head in plastic wrap and removed his uniform. Robert, dressed in Mr. Johnson's correctional officer uniform, pushed a cart loaded with a box containing Berget toward the Penitentiary's West Gate.

Before long, the escape attempt unraveled, and both men were apprehended at the West Gate sally port. Authorities soon discovered Mr. Johnson who died as a result of his injuries. Robert and Berget were charged with first-degree murder, and each pled guilty. They were both sentenced to death. Robert was executed in 2012, and Berget remains on death row.

Because Mr. Johnson died while in the course and scope of his employment as a correctional officer, the estate received workers' compensation benefits under the provisions of South Dakota's workers' compensation statutes. Under the same statutory authority, Mr. Johnson's widow, Lynette Johnson ("Mrs. Johnson"), received survivor benefits.

In the aftermath of Mr. Johnson's murder, South Dakota Department of Corrections ("DOC") officials issued a reported entitled, "SD Department of Corrections After-Incident Report" ("the Incident Report"). The Incident Report was drafted and revised by several individuals, not all of whom are named as defendants. It was not required by statute or regulation, and the Defendants have suggested it was a unilateral effort to provide a transparent account of the murder.

The Plaintiffs claim the Incident Report was a purely self-serving document that incorrectly "portrayed RJ's murder as a tragic anomaly that could not have been predicted or prevented." Complaint at ¶¶ 92, 116. In the Plaintiffs' view, the Incident Report overlooked professional errors by DOC officials, including claims that officials failed to respond appropriately to information that Berget and Robert were dangerous men who were planning to escape. *See* Complaint at ¶ 91-92, 116. The Plaintiffs also allege that the DOC misled Mrs. Johnson in other communications about facts relating to her husband's death and whether he suffered. Complaint at ¶93.

On behalf of the her husband's estate and individually, Mrs. Johnson commenced this action, alleging three causes of action relating to Mr. Johnson's murder – wrongful death, a survival action, and a substantive due process claim under 42 U.S.C. § 1983. Mrs. Johnson has also brought additional claims for intentional infliction of emotional distress, negligent infliction of emotional distress, and misrepresentation or deceit, all stemming from the Incident Report.

The § 1983 claim supported an assertion of federal subject matter jurisdiction, and the Defendants removed the case to federal district court where it

was litigated in a summary judgment proceeding and decided adversely to the Plaintiffs. The initial decision was made by the Honorable Lawrence L. Piersol, United States District Judge, who determined there was insufficient evidence to support a violation of the United States Constitution's due process clause and that the Defendants were entitled to qualified immunity. *See Estate of Johnson v. Weber*, 2014 WL 2002881 (D.S.D., May 15, 2104). Judge Piersol's actual judgment granted summary judgment to the Defendants on the merits of "Plaintiffs' claim under 42 U.S.C. § 1983" and remanded to this court "[t]he remaining five state law claims." *See* clerk's record CIV 12-4084 (D.S.D.) at doc. 83.

The Plaintiffs appealed to the United States Eighth Circuit Court of Appeals which affirmed Judge Piersol's decision on May 4, 2015. The Plaintiffs did not file a petition for rehearing either by the three-judge panel which heard the case or by the entire court, sitting en banc. Nor did the Plaintiffs seek a writ of certiorari from the United States Supreme Court.

The Defendants have moved for summary judgment on all claims. They argue the claims are barred by the exclusivity provisions of South Dakota's worker's compensation law, by statutory immunity and on the merits.

Additional facts will be added as necessary.

AUTHORITIES AND ANALYSIS

A. Summary Judgment

The standard for a trial court's determination of summary judgment is well-settled:

> Summary judgment will be granted if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the

> affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law... A disputed fact is not material unless it would affect the outcome of the suit under the governing substantive law.... When a motion for summary judgment is made and supported as provided in § 15–6–56, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in § 15–6–56, must set forth specific facts showing that there is a genuine issue for trial.

Morris Family, LLC ex rel. Morris v. South Dakota Dept. of Transp., 2014 SD 97, ¶ 11, 857 N.W. 2d 865, 869 (quotations and embedded citations omitted); *see also North Star Mutual Ins. Co. v. Rasmussen*, 2007 SD 55 ¶ 14, 734 N.W.2d 352, 356 (a court determining a summary judgment motion must view the facts most favorably to the nonmoving party, resolving any reasonable doubts against the moving party).

Applying these principles, the court will address the parties' arguments and claims in turn.

B. The Plaintiffs' wrongful death and survival claims are barred by the workers' compensation exclusivity provisions of SDCL § 62-3-2.

South Dakota's workers' compensation statutes reflect a public policy determination by the Legislature for addressing on-the-job injuries and deaths. Our Supreme Court has explained this determination in the following terms:

> The purpose of the South Dakota Worker's Compensation Act is to provide an injured employee with an expeditious remedy independent of fault and to limit the liability of employers and fellow employees. There is an inherent trade-off in the worker's compensation scheme. The employee is guaranteed compensation if injured on the job but the employer's liability is limited in exchange for this certainty. The quid pro quo is liability for immunity. Therefore, [w]orker's compensation is the exclusive remedy for all on-the-job injuries to workers except those injuries intentionally inflicted by the employer.

Thompson v. Mehlhaff, 2005 SD 69, ¶11, 698 N.W.2d 512, 516-17 (quotation and embedded citations omitted).

The exclusivity of workers' compensation coverage is codified in SDCL § 62-3-2, which provides as follows:

> The rights and remedies granted to an employee subject to this title, on account of personal injury or death arising out of and in the course of employment, shall exclude all other rights and remedies of the employee, the employee's personal representatives, dependents, or next of kin, on account of such injury or death against the employer or any employee, partner, officer, or director of the employer, except rights and remedies arising from intentional tort.

SDCL § 62-3-2.

Plaintiffs who are seeking to invoke the intentional tort exception to workers' compensation exclusivity face a formidable challenge. "Every presumption is on the side of avoiding superimposing the complexities and uncertainties of tort litigation on the compensation process." *McMillin v. Mueller*, 2005 SD 41, ¶12, 695 N.W.2d 217, 221-22 (*citing Fryer v. Kranz*, 2000 SD 125, ¶ 9, 616 N.W.2d 102, 105).

Our Supreme Court's decisions describe an uncomplicated construction of the "intentional tort" text of SDCL § 62-3-2. "[I]ntent really means intent" under the provisions of the statute. *Harn v. Continental Lumber Co.*, 506 N.W.2d 91, 95 (S.D. 1993) (citations omitted). This plain-meaning interpretation yields a narrow construction of SDCL §62-3-2's intentional tort exception and an exceedingly broad view of workers' compensation exclusivity. Indeed, an employee can only maintain an action based on an employer's alleged tort where the "worker ... demonstrate[s] an actual intent by the employer to injure or a substantial certainty that injury will be the inevitable outcome of employer's conduct." *McMillin*, 2005 SD 41, ¶ 10, 695 N.W.2d at 222 (citation omitted).

In *McMillin* and other cases, our Supreme Court left no doubt that the relative level of culpability required to establish intentional conduct transcends all other types of employer fault:

> Unless the employer's action is a "conscious and deliberate intent directed to the purpose of inflicting injury," the lone remedy is workers' compensation. Moreover, even though the employer's conduct is careless, grossly negligent, reckless or wanton and even if that employer knowingly permits a hazardous work condition to exist, knowingly orders a claimant to perform an extremely dangerous job, or willfully fails to furnish a safe workplace, those acts still fall within the domain of workers' compensation.

McMillin, 2005 SD 41, ¶ 14, 695 N.W.2d at 222 (*quoting and citing Fryer*, 2000 SD 125, ¶8, 616 N.W.2d at 105) (embedded citations omitted).

The circumstances presented here, as tragic as they are, do not satisfy the intentional tort exception of SDCL § 62-3-2. Even when the record is viewed in the light most favorable to the Plaintiffs, it does not support the claim that the Defendants intentionally caused Mr. Johnson's death.[1]

This is true even though there is evidence which could suggest the DOC knew or should have known that Berget and Robert were good friends and were planning an escape with the relative flexibility that their DOC's security classifications permitted. For example, the record indicates that an inmate named David Tolley reported to DOC officials that the two were planning an escape. However, the April 12, 2011, escape attempt came more than a year after the report, and the lack of

[1] Our Supreme Court has identified three elements for determining whether an employer has acted intentionally. They include: "1) whether the employer had actual knowledge of the dangerous condition; 2) if there was a substantial certainty that injury was to occur; and 3) the employer still required the employee to perform." *McMillan*, 2005 SD 217, ¶15, 695 N.W. 2d at 222 (citation omitted). Here, the court's summary judgment analysis turns on the second element.

temporal proximity counsels against a finding that there was a substantial certainty that the "injury [would] be the inevitable outcome" of the DOC's failure to take some sort of action to restrict their movements of Berget and Robert, or relocate or reclassify them.

Beyond this, Robert did not have a history of escapes,[2] and, though Berget did, none of his prior escape efforts involved violence against correctional staff. Berget's last escape attempt occurred in 2003, and neither he nor Robert had an institutional disciplinary record for assaults against correctional staff members.[3] Both men had violent criminal histories, to be sure, but that fact does not necessarily distinguish them from many other inmates whose crimes of violence have resulted in lengthy prison terms.

The court has carefully considered the Plaintiffs' evidence that DOC officials failed to follow DOC policies and acted unwisely when assigning housing and jobs or allowing privileges to Robert and Berget. However, this evidence, though unflattering, does not satisfy the exceedingly narrow definition of intentional conduct. Indeed, even if the DOC's conduct was "grossly negligent, reckless or

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[2] Robert was disciplined for an incident in which he tampered with a door lock in a shower area of the Penitentiary. The violation has been described as an attempted escape, but the compromised door, it appears, led to another interior area of the prison.

[3] There is some evidence that then-Meade County States Attorney Jesse Sondreal notified DOC officials of an escape plan involving Robert that would involve violence toward a prison staff member. The evidence is not well-developed, but viewing it in its most favorable light, it does not create a genuine issue of material fact for the critical inquiry of whether there was a substantial certainty that a murder of a correctional officer was inevitable. The timeframe for Mr. Sondreal's knowledge, in appears from his deposition, was late 2008-early 2009 – over two years prior to the attempted escape and murder. Though this could be viewed as evidence of notice, it is not evidence of inevitability.

wanton" and led to a probability of injury, it would still fall short of intentional conduct resulting in a substantial certainty of an inevitable injury. *See McMillin*, 695 N.W.2d at 224. Under the exacting proof requirements of SDCL § 62-3-2, "[u]nless the employer's action is a 'conscious and deliberate intent directed to the purpose of inflicting injury,' the lone remedy is workers' compensation." *Id.* at 221 (*quoting Fryer*, 2000 SD 125, ¶ 8, 616 N.W.2d at 105.

Therefore, the factual disputes relating to how the DOC treated Berget and Robert and understood the risk they presented, though perhaps genuine, are not material because they cannot satisfy the narrow definition of intentional conduct required by SDCL § 62-3-2. *See* SDCL § 15-6-54(c). Accepting the truth of these facts for purposes of analyzing the Defendants' motion for summary judgment, the court determines that summary judgment is required given the demanding fault standard required by well-settled statutory and decisional law which the court considers to be binding and dispositive of the Plaintiffs' wrongful death and survival claims. *See Morris Family, LLC*, 2014 SD 97, ¶ 11, 857 N.W. 2d at 869 ("A disputed fact is not material unless it would affect the outcome of the suit under the governing substantive law.").[4]

C. The Plaintiffs' wrongful death and survival claims are also barred by statutory sovereign immunity.

"Sovereign immunity is derived from either the common law or statute." *Masad v. Weber*, 2009 SD 80, ¶ 11, 772 N.W.2d 144, 149. South Dakota's

[4] Because of the court's disposition of the other claims detailed below, it is unnecessary to determine whether they arise "on account of" Mr. Johnson's death. *See* SDCL § 62-3-2.

Constitution includes the common law concept of sovereign immunity and authorizes our Legislature to further define its contours, stating simply "[t]he Legislature shall direct by law in what manner and in what courts suits may be brought against the state." S.D. Const., Art. III, § 27.

The Legislature has, in fact, exercised its authority and expressly authorized, for instance, the partial waiver of sovereign immunity through the enactment of SDCL § 21-32-16. *See* SDCL § 21-32-16 ("To the extent such liability insurance is purchased... and to the extent coverage is afforded..., the state shall be deemed to have waived the common law doctrine of sovereign immunity...").

The Legislature has also expressly affirmed and refined the applicability of the doctrine of sovereign immunity for certain, discrete types of claims or injuries. Included among this list of injuries immunized from civil liability are injuries resulting from escaping prisoners:

> No person, political subdivision, or the state is liable for any injury resulting from the parole or release of a prisoner or from the terms and conditions of his parole or release or from the revocation of his parole or release, or for any injury caused by or resulting from:
>
> (1) An escaping or escaped prisoner...

SDCL § 3-21-9.[5]

Simply put, "[t]he [L]egislature has the power to define the circumstances under which a remedy is legally cognizable and those under which it is not." *Hancock v. Western South Dakota Juvenile Svcs. Ctr.*, 2002 S.D. 69, ¶ 15, 647

[5] The Defendants' assertion that SDCL § 3-21-9 provides for statutory – not sovereign – immunity is, in the court's view, only partially correct. Section 3-21-9 appears to contemplate sovereign and "non-sovereign" immunity.

N.W.2d 722 (citation omitted). Here, the Legislature has done precisely that and determined that injury claims resulting from escaping prisoners are not cognizable. In *Hancock*, our Supreme Court explained that the statutory sovereign immunity provisions of SDCL § 3-21-9 are "essential to protect the public decision-making process[.]" *Id.* (*quoting in part, Webb v. Lawrence Co.*, 144 F.3d 1131, 1140 (8th Cir. 1998)) (also considering the immunity provisions of SDCL §3-21-8).

Even without the Supreme Court's statement concerning SDCL § 3-21-9's justification, the unassailable truth still remains – the Legislature has spoken, and an elementary reading of the statute's text leads to the inescapable conclusion that the Plaintiffs' wrongful death and survival claims are barred by statutory immunity since the undisputed material facts demonstrate that Mr. Johnson was killed by "escaping" prisoners.

The Plaintiffs seek to avoid the operation of SDCL § 3-21-9 by offering several constitutional challenges, claiming first that SDCL § 3-21-9 violates the "open courts" provision of our Constitution. *See* S.D. Const., Art. VI, § 3. This argument, however, is foreclosed by precedent.

In *Hancock*, our Supreme Court rejected an open courts provision challenge to SDCL § 3-21-9 and affirmed the trial court's decision to grant summary judgment on the basis of statutory immunity. The Supreme Court resolved any tension between statutory sovereign immunity and the open courts provision in the following passage:

> Lest it be unclear from our earlier decisions, we now specifically hold that the "open courts" provision of our constitution is in no manner an abolition of the settled principle of sovereign immunity. Thus, Hancock

> cannot use the "open courts" provision to override an otherwise valid act of the Legislature.

Hancock, 2002 SD 69, ¶14, 647 N.W.2d at 725.

The Plaintiffs attempt to skirt the *Hancock* decision in favor of the Supreme Court's earlier decision in *Kyllo v. Panzer*, 535 N.W.2d 896 (S.D. 1995), arguing that the conduct of the Defendants was purely ministerial and, therefore, not protected. In *Kyllo*, however, the Supreme Court merely held that the dramatic and categorical extension of sovereign immunity by statute to *all* ministerial acts of *all* public employees was unconstitutional. *See Kyllo*, 535 N.W.2d at 903 ("The legislature does not have the authority to *wholly* abrogate such common-law actions guaranteed by the constitution.") (emphasis supplied). The *Kyllo* decision does not, in other words, foreclose the possibility that the Legislature could, in particular circumstances, immunize ministerial acts of particular employees.

Indeed, over a decade after the *Kyllo* decision, our Supreme Court held that the discretionary/ministerial distinction did not prevent operation of the immunity provisions in SDCL § 3-21-9. *See Unruh v. Davison County*, 2008 SD 9, ¶ 28, 744 N.W.2d 839, 848-849. Citing well-settled rules of statutory construction, the *Unruh* Court held:

> When a statute's language is clear, certain and unambiguous, our function confines us to declare its meaning as plainly expressed. Here, there is no ambiguity. The distinction between discretionary and ministerial acts is not applicable.

Id. (quotation and embedded citation omitted); *see also Clay v. Weber*, 2007 SD 45, ¶17, 733 N.W.2d 278, 285 (also rejecting ministerial/discretionary distinction for application of SDCL § 3-21-9).

Under the circumstances, the court determines that SDCL § 3-21-9 does not violate the open courts provision of the South Dakota Constitution. The Plaintiffs' other constitutional challenges to SDCL § 3-21-9 on equal protection and due process grounds are equally unsustainable.

In this regard, the Plaintiffs' equal protection clause challenge is brief and does not directly argue they are included in a protected or suspect class. Rather, they argue that the immunization of public entities and employees under SDCL § 3-21-9 arbitrarily creates a class of tortfeasors by exempting them from liability. However, the same criticism exists for every would-be claimant precluded from bringing an action because of the doctrine of sovereign immunity, and accepting the Plaintiffs' argument would effectively subject all sovereign immunity claims to constitutional challenge. Based upon the arguments presented here, there is no basis for such a determination and, more specifically, no basis to find the existence of a suspect or arbitrary classification.

In the absence of a protected classification, or the implication of a fundamental right, SDCL § 3-21-9 need only be supported by the existence of a rational relationship between the classification and a legitimate legislative purpose. *See City of Aberdeen v. Meidinger*, 89 S.D. 412, 233 N.W.2d 331, 333 (1975) (describing two-part analysis for equal protection claims). Here, the court has no difficulty finding the existence of a rational basis for SDCL § 3-21-9. *See Unruh*, 2008 SD 9, ¶ 27, 744 N.W.2d at 848 (although the Legislature expressly waived sovereign immunity to a limited degree in SDCL 21-32A-1, during the same legislative session, it enacted SDCL § 3-21-9 to address "a need to immunize,

through statute, torts arising from the operation and maintenance of jails and correctional facilities, and administration of prisoner release.").

For essentially the same reasons, SDCL § 3-21-9 does not violate South Dakota's Due Process Clause. *See* S.D. Const. Art. VI, § 2. A due process violation requires the absence of a real and substantial relation to the Legislature's purpose. Here, the statutory immunity contemplated in SDCL § 3-21-9, as the *Unruh* decision suggests, bears a real and substantial relationship to valid legislative purpose.

D. Constitutional sovereign immunity precludes all of the claims included in the Complaint.

As indicted above, our Constitution provides for sovereign immunity and allows for the Legislature to "direct by law in what manner and in what courts suits may be brought against the state." S.D. Const., Art. III, § 27. It follows that if the Legislature does not act to define how the State or a pubic agency may be sued, sovereign immunity has not been waived. Though the Legislature has expressly waived sovereign immunity to the extent the State obtains liability insurance, the undisputed material facts indicate the State and the DOC do not participate in the risk-sharing pool created by SDCL Chapter 3-22. Therefore, sovereign immunity remains intact for the State and the DOC for all of the claims listed in the Complaint.[6]

[6] Though the Complaint references individual defendants in their individual and official capacities, the claims, themselves, reference only the Department of Corrections.

The individual Defendants are included in the State's public entity pool for liability. Affidavit of James Moore at Ex. I, Memorandum of Liability Coverage ("PEPL Memo") at p. 1, ¶¶ I.A. & B. However, certain restrictions exclude liability "for bodily injury to an employee arising out of the course and scope of and in the course of employment by the state" and for "[f]or damages that are the result of a discretionary act or task." PEPL Memo at I.E.5. & 16.

Here, the wrongful death and survival actions are claims for the fatal bodily injury to Mr. Johnson that arose out of the course and scope of his employment. There is, therefore, no waiver of sovereign immunity for these claims, even if they implicate some or all of the individual Defendants, and they are barred.[7]

The claims would also be barred, along with the claims relating to the Incident Report, on the basis they involved discretionary conduct. At the heart of the Plaintiffs' claims is the overarching criticism that DOC officials failed to properly assess the threat posed by Robert and Berget when making decisions concerning where to house them, restrictions on their movement inside of the Penitentiary and how they could be employed. However, these decisions are indisputably discretionary:

> The Department of Corrections may establish and maintain facilities, programs, or services outside the precincts of the penitentiary proper and contract with other governmental entities for the care and maintenance of inmates committed to the penitentiary. However, the court may not order that an inmate be housed in any particular facility

[7] The Plaintiffs' argument that the intentional tort exception of SDCL §62-3-2 operates as a waiver of the doctrine of sovereign immunity is not supportable. The intentional tort exception does not, itself, provide a right of action against any employer, private or public, much less constitute a clear and express waiver of sovereign immunity. It simply provides an exception for workers' compensation exclusivity where an employer intentionally injures an employee.

> nor may the court order that an inmate be placed in a specific program or receive specific services. No inmate has any implied right or expectation to be housed in any particular facility, participate in any specific program, or receive any specific service, and *each inmate is subject to transfer from any one facility, program, or service at the discretion of the warden of the penitentiary*...

SDCL § 24-2-27 (emphasis supplied); *see also, Hancock*, 2002 SD 69, ¶15, 647 N.W.2d at 725 ("Immunity is critical to the state's evident public policy of allowing those in charge of jails to make discretionary decisions about prison administration without fear of tort liability.").

Further there was no discernible duty which required the DOC to write and publish the Incident Report. The fact that it did, what it decided to write, and what information it did not include were all discretionary determinations for which there has been no waiver of sovereign immunity. *See Truman v. Griese*, 2009 SD 8, ¶ 21, 762 N.W.2d 75, 80 (ministerial duty is "absolute, certain and imperative, involving merely the execution of a specific duty... or the execution of a set task ... with such certainty that nothing remains for judgment or discretion.") (citation and emphasis omitted). The Plaintiffs' argument that a DOC policy, like the civil law, requires honesty does not make the decisions regarding the Incident Report any less discretionary. Indeed, discretion and the editorial decision-making process are entirely compatible concepts and not mutually exclusive.

The Plaintiffs further argue that their intentional infliction of emotional distress and fraudulent misrepresentation claims survive the application of the doctrine of sovereign immunity because they are intentional torts. They are correct in their assertion that sovereign immunity does not apply to intentional torts. However, an analysis of the underlying facts of the intentional infliction of

emotional distress and misrepresentation claims reveals both are unsustainable as a matter of law.

E. The intentional infliction of emotional distress claim does not satisfy the requirement of extreme and outrageous conduct.

The elements of intentional infliction of emotional distress are:

> (1) an act by the defendant amounting to extreme and outrageous conduct; (2) intent on the part of the defendant to cause the plaintiff severe emotional distress; (3) the defendant's conduct was the cause in-fact of plaintiff's distress; and (4) the plaintiff suffered an extreme disabling emotional response to defendant's conduct.

Fix v. First State Bank of Roscoe, 2011 SD 80, ¶19, 807 N.W.2d 612, 618 (citing, *Anderson v. First Century Fed. Credit Union*, 2007 S.D. 65, ¶38, 738 N.W.2d 40, 51–52).

The South Dakota Supreme Court has held that the question whether the defendant's conduct was extreme and outrageous is initially determined by the trial court. *Fix*, 2011 SD 80, ¶ 20, 807 N.W.2d 612, 618 (citation omitted). The legal standard applied to this judicial determination is "rigorous:"

> Comment d to the Restatement (Second) of Torts § 46 (1965) explains that recovery is permissible only where the actor's conduct was "extreme and outrageous." Proof under this tort must exceed a rigorous benchmark. The conduct necessary to form intentional infliction of emotional distress *must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and be regarded as atrocious, and utterly intolerable in a civilized community*... The conduct is of a nature especially calculated to cause, and does cause, mental distress of a very serious kind.

Id. (citations, embedded citations and additional quotations omitted) (emphasis supplied).

Here, the statements and omissions from the Incident Report, even if self-serving and inaccurate, still do not meet the "rigorous benchmark" for extreme and

outrageous conduct. At most, the Incident Report was the DOC's parochial view of Mr. Johnson's murder that fell short of full disclosure.[8] It does not, however, represent the sort of conduct that exceeds "all possible bounds of decency" and must "be regarded as utterly intolerable in a civilized community." *Id.*

Further, there is no showing that the Defendants drafted and published the Incident Report in a calculated effort to cause Mrs. Johnson serious mental distress. Indeed, distilled to their essence, the Plaintiffs' own arguments claim the DOC preferred its partisan interests to a true effort of self-examination and deceived the larger public audience as well as Mrs. Johnson. This falls perceptibly short of the standard for intentional infliction of emotional distress.[9]

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[8] The parties' submissions infrequently refer to the DOC's response to a post-incident review by the National Institute of Corrections (NIC). However, the Complaint does not allege that the DOC response is a basis for the Plaintiffs' claims. Even if it were, however, it would not change the court's analysis. The Complaint does claim that "other communications" form the basis of the intentional and negligent infliction of emotional distress and misrepresentation claims, but the Plaintiffs have failed to identify what those communications are and who made them. *See Morris Family, LLC*, 2014 SD 97, ¶ 11, 857 N.W.2d 865, 869 (party opposing summary judgment "must set forth specific facts" showing the absence of a genuine issue of material fact.).

[9] The Plaintiffs' reliance upon *Ruple v. Brooks*, 352 N.W.2d 652 (S.D. 1984), is misplaced. In its subsequent decision in *Tibke v. McDougall*, 479 N.W.2d 898 (S.D. 1992), the Supreme Court rejected the *Ruple* Court's formulation of the tort of intentional infliction of emotional distress which had allowed a plaintiff to recover when the defendant's "act was unreasonable, and the actor should have recognized it as likely to result in emotional distress." *Ruple*, 352 N.W.2d at 654; *see Tibke*, 479 N.W.2d at 906-907 (abandoning *Ruple* test and adopting Restatement requirement of extreme and outrageous conduct).

F. The fraudulent misrepresentation claim is not supported by evidence of an intent to induce Mrs. Johnson's reliance or her justifiable reliance.

The elements of fraudulent misrepresentation include the following;

1) a defendant made a representation as a statement of fact;

2) the representation was untrue;

3) the defendant knew the representation was untrue or he made the representation recklessly;

4) the defendant made the representation with intent to deceive the plaintiff and for the purpose of inducing the plaintiff to act upon it; and,

5) the plaintiff justifiably relied on the representation; and

6) the plaintiff suffered damage as a result.

See North American Truck & Trailer, Inc. v. M.C.I. Com. Serv., Inc., 2008 SD 45, ¶10, 751 N.W.2d 710, 714; see also, *Delka v. Continental Cas. Co.*, 2008 SD 28, ¶30, 748 N.W.2d 140, 152; SD Pattern Jury Instruction 20-110-20.

While generally questions of fraud and deceit are questions of fact, summary judgment is proper where no evidence has been produced which would allow a jury to find the necessary elements of fraudulent misrepresentation. *Delka*, 2008 SD 28, ¶31, 748 N.W.2d at 152; *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 847-48 (S.D. 1990). This is such a case.

Even if the court determined that questions of material fact existed as to whether the Defendants made an untrue factual statement, either knowingly or recklessly, and with the intent to deceive her, the record does not contain evidence from which the court could similarly find issues of material fact as to the remaining elements of fraudulent misrepresentation. In particular, there is no evidence that

the Defendants issued the Incident Report for purpose of inducing Mrs. Johnson to act upon it. Indeed, neither the Complaint, nor the submissions in this summary judgment proceeding describe or demonstrate what action the Defendants intended to induce.

For similar reasons, there is no evidence that Mrs. Johnson actually relied to her detriment upon the statements in the Incident Report. In the Complaint, the Plaintiffs allege simply that Mrs. Johnson and her family, "and the public justifiably relied upon" the alleged misrepresentations. Complaint at ¶ 134. However, the Complaint does not allege how she relied upon the Incident Report – only the conclusory statement that she did. The Plaintiffs' briefing relative to this summary judgment proceeding does not provide any greater clarity. *See Allison v. Security Ben. Life Ins. Co.*, 980 F.2d 1213, 1216 (8th Cir. 1992) (to comply with the heightened pleading requirements of Federal Rule of Civil Procedure 9(b), a plaintiff must describe "the actionable misrepresentations, how [the defendant] intended plaintiffs to act in reliance on each of the alleged misrepresentations, the nature of plaintiffs' justifiable reliance on each misrepresentation, and the damage resulting from such reliance.") (citation omitted); *see also*, SDCL § 15-6-9(b) (South Dakota's version of Rule 9(b)).

G. Even if it were not barred by sovereign immunity, the Incident Report was not published pursuant to any discernible duty, and any negligent representations contained within it are not actionable.

The South Dakota Supreme Court has stated that the first element of negligent infliction of emotional distress is that the defendant engaged in negligent conduct. *Blaha v. Stuard*, 2002 SD 19, ¶19, 640 N.W.2d 85, 90. Negligence is a

breach of a legal duty imposed by statute or common law. *Id.* (citing, *Stevens v. Wood Saumill, Inc.*, 426 N.W.2d 13, 14 (S.D. 1988) (citing, *Waltz v. City of Hudson*, 327 N.W.2d 120, 122 (S.D. 1982)).

Here, the Incident Report was voluntarily undertaken by the Defendants. There is no dispute that the Defendants had no legal or statutory duty to prepare it. This conclusion does not change even if the DOC told Mrs. Johnson that the contents of the Incident Report would be shared with her. Although a common law duty may arise when an actor engages in a gratuitous undertaking for a person who is harmed, the Incident Report was not prepared for Mrs. Johnson. *See Andrushchenko v. Silchuk*, 2008 S.D. 8, ¶24, 744 N.W.2d 850, 858-59; *State Auto Ins. Companies v. B.N.C.*, 2005 SD 89, ¶23 n. 6, 702 N.W.2d 379, 388 n. 6. It was prepared for the public and published on the DOC's website. Even the Plaintiffs acknowledge the Defendants sought to influence a broader, non-specific audience with the Incident Report. *See* Johnson brief at 56 ("The clear inference from the manner in which the After-Incident Report was drafted is that the Defendants intended to cover up, and shift *readers'* attention away from, their conduct.") (emphasis supplied).

The Defendants did not, therefore, owe a specific duty to Mrs. Johnson to issue the Incident Report. Therefore, the Defendants are entitled to summary judgment on Johnson's negligent infliction of emotional distress because the claim legally fails.

H. The Plaintiffs' constitutional claim has been fully and finally litigated in the federal courts, and any further litigation is barred by the doctrine of res judicata.[10]

The South Dakota Supreme Court has observed that "[a]lthough the punctuation differs slightly, the language in South Dakota's due process clause mirror the federal clause." *State v. Chant*, 2014 SD 77, ¶10, 856 N.W.2d 167, 170. A comparison of the two provisions illustrates the point:

> No person shall ... be deprived of life, liberty, or property, without due process of law[.]" U.S. Const. Amend. V.
>
> No person shall be deprived of life, liberty or property without due process of law. S.D. Const. Art. VI, § 2.

See also, U.S. Const. Amend XIV, § 1 ("...nor shall any State deprive any person of life, liberty, or property, without due process of law."); *Carhart v. Gonzales*, 413 F.3d 791, 795 (8th Cir. 2005) ("...the Due Process Clause of the Fifth Amendment is textually identical to the Due Process Clause of the Fourteenth Amendment, and both proscribe virtually identical governmental conduct.") (reversed on other grounds).

"When a party asserts that identical language should mean something different, he or she must present an 'interpretive methodology that leads to principled constitutional interpretation[.]'" *State v. Chant*, 2014 SD 77, ¶10, 856

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[10] Since res judicata is an absolute bar to further litigation, the Plaintiffs' state constitutional claim is not, strictly speaking, precluded by workers compensation exclusivity or sovereign immunity – there is simply no separate constitutional claim to preclude. However, if the court had decided that the res judicata issue differently, the state constitutional claim would, nevertheless, be barred by sovereign immunity based upon the analysis set out above. The Legislature has not created a private right of action for the denial of due process under our Constitution, and this court lacks the authority to do so.

N.W.2d 167, 170 (quoting, *State v. Schwartz*, 2004 S.D. 123, ¶ 30, 689 N.W.2d 430, 437 (Zinter, J., concurring)). In his concurring opinion in *Schwartz*, Justice Konenkamp acknowledged the ability of this state's citizens to provide for supplemental or enhanced constitutional protections beyond those described in the United States Constitution. However, supporting a divergent interpretation of the same textual provisions found in each constitution must be based upon an "adequate and independent basis" so that our constitution is not invoked as a "device to reject or evade federal decisions[.]" *Id.*, 2004 SD 123, ¶¶ 41, 34, 689 N.W.2d at 440. 438 (Konenkamp, J., concurring). In this regard, Justice Konenkamp suggested that the advocacy efforts of counsel play a critical role in a judge's analysis of parallel constitutional provisions:

> When arguing that a provision of our Constitution should be interpreted differently from a cognate federal provision, counsel must undertake a thorough examination, using recognized standards by which we may determine that a genuine reason exists to diverge from the federal interpretation.

Id. 2004 SD 123 ¶ 38, 689 N.W.2d at 439-440 (Konenkamp, J., concurring).

Here, this court's order seeking supplemental briefing on the state due process claim was an effort to obtain the benefit of counsels' arguments on the question of whether the due process claim based upon the South Dakota Constitution differed from the § 1983 claim decided in federal court. *See Estate of Johnson*, 2014 WL 2002882, *4 ("Plaintiffs' § 1983 claim is based on the substantive component of the Due Process Clause that protects individual liberty against certain government actions."). After reviewing the supplemental briefs and the principal authorities they cite, the court determines that the Plaintiffs have not

demonstrated a principled difference between the due process clauses in the South Dakota and United States Constitutions.

As indicated above, the text of each clause is essentially identical, and nothing in Article VI, § 2 of our Constitution suggests a broader or different concept of due process than that expressed in the United States Constitution. Nor is there any indication in this record that the historical circumstances surrounding South Dakota's due process clause contemplated more robust constitutional protection.

Beyond this, the South Dakota Supreme Court has not distinguished between the state and federal due process clauses. *See Schwartz*, 2004 SD 123, ¶ 51 (Konenkamp, J., concurring) ("[I]f the state court deals with federal precedent and persuasively demonstrates that federal court reasoning is unacceptable, its result can no more be called unprincipled than can the original federal holding.") (citation omitted). In *Chant*, our Supreme Court rejected the idea that South Dakota's due process clause afforded a greater right than its federal counterpart to collaterally challenge criminal convictions. In fact, the Supreme Court's decision in *Chant* is an unmistakable effort to acknowledge congruity between the parallel due process clauses in the absence of a principled reason to distinguish them. *See Chant*, 2014 SD 77, ¶ 10 (noting our Supreme Court continued to allow collateral attacks of criminal convictions on state constitutional grounds after the U.S. Supreme Court's decision in *Custis v. United States*, 511 U.S. 485 (1994), "without sound judicial interpretation as to why under due process concerns of the South Dakota Constitution defendants are allowed to raise these collateral attacks, when they are

not given that protection under the United States Constitution.") (quoting, *State v. Bilben*, 2014 S.D. 24, ¶ 32, 846 N.W.2d 336, 345 (Gilbertson, C.J., dissenting)).

Finally, as it relates strictly to the due process clause of Article VI, § 2, there is no apparent expression of unique state concern. It reads, as indicated above, the same as the federal due process provisions. The same cannot be said, however, for the remainder of Article VI, § 2, which provides South Dakota's citizens with the right to work regardless of their membership in a labor union. *See* S.D. Const. Art. VI, § 2 ("The right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union, or labor organization."). The right to work protection has no federal counterpart and serves to illustrate the willingness and ability of the framers of the South Dakota Constitution to provide the state's citizens with protections for items of particular concern.

For their part, the Plaintiffs argue that they can maintain a separate free-standing state law due process claim because, in their estimation, the South Dakota Supreme Court would not use the same substantive analysis as the federal courts utilized. This argument, however, responds to a different inquiry than the one posed by the court and simply offers a view about what legal principles a South Dakota court should apply in contemporary times to determine a due process claim. The principal area of the court's concern, however, is different – what, if any, textual or historical information contained in decisional law or other sources supports the idea that the right described in South Dakota's due process clause differs in any way from the federal due process clause? In this regard, the citizens of South Dakota do not have a constitutional right to a particular analytical test for

a due process claim that might differ from other jurisdictions. Rather, South Dakotans have a right against the deprivation of life, liberty or property without due process of law – the same right guaranteed by the United States Constitution. Indeed, if the court accepted the Plaintiffs' argument, it would effectively undermine the principles of judicial economy and finality that form the basis of claim preclusion doctrines such as res judicata in favor of a rule that allows the relitigation of issues previously decided on the strength of a claim that the second court might decide the issue differently. It was, in fact, this concern that prompted the court to ask the parties to submit additional argument on the issue of whether the decision of the federal courts here with respect to Count 3 of the Complaint has preclusive effect here.

Under South Dakota law, "[r]es judicata consists of two preclusion concepts: issue preclusion and claim preclusion." *American Family Ins. Group v. Robnik*, 2010 SD 69, ¶ 15, 787 N.W.2d 768, 774 (citations omitted). The United States Supreme Court has explained the distinction between the two in the following terms:

> Issue preclusion refers to the effect of a judgment in foreclosing relitigation of a matter that has been litigated and decided. This effect also is referred to as direct or collateral estoppel. Claim preclusion refers to the effect of a judgment in foreclosing litigation of a matter that never has been litigated, because of a determination that it should have been advanced in an earlier suit...

Id. (quoting, *Migra v. Warren City School Dist. Bd. of Educ.*, 465 U.S. at 77 n. 1) (embedded citation omitted).

For reasons that are as practical as they are legal, the doctrine of res judicata "seeks to promote judicial efficiency by preventing repetitive litigation over the

same dispute." *Wells v. Wells*, 2005 SD 67, ¶ 15, 698 N.W.2d at 508 (citing, *Faulk v. Faulk*, 2002 SD 51, ¶ 16, 644 N.W.2d 632, 635) (additional citation omitted). It is "premised on two maxims: A [person] should not be twice vexed for the same cause' and 'it is for the public good that there be an end to litigation.'" *People ex rel. L.S.*, 2006 SD 76, ¶ 23, 721 N.W.2d 83, 90 (quotations and citations omitted).

The preclusive bar of res judicata depends upon the existence of four elements: "1) a final judgment on the merits in an earlier action; (2) the question decided in the former action is the same as the one decided in the present action; (3) the parties are the same; and (4) there was a full and fair opportunity to litigate the issues in the prior proceeding." *Id.* at 89-90. Here, each of these elements is met, and further litigation of Count 3 is precluded.

There can be little doubt that the judgment of the Eighth Circuit Court of Appeals is a final judgment on the merits of the Plaintiffs' constitutional claim. After the Defendants removed the case to federal court, Judge Piersol granted the Defendants' motion for summary judgment, determining there was insufficient evidence to support a substantive due process violation. *See Estate of Johnson*, 2014 WL 2002881, **8-9. The decision was unquestionably one on the merits, as was the subsequent decision by the Eighth Circuit Court of Appeals which affirmed Judge Piersol's decision. The Plaintiffs did not file a petition for rehearing with the Eighth Circuit and did not seek a writ of certiorari from the United States Supreme Court. The time for a certiorari petition has long-since run, and the federal litigation of Count 3 is at an end, making the Eighth Circuit's decision final.

Further, as indicated above, the Plaintiffs have not established any discernible difference between the due process clauses of the South Dakota and United States Constitutions. Therefore, when the Plaintiffs litigated their constitutional claim in federal court, they litigated the entirety of the harm alleged in Count 3 of the Complaint. In the absence of a principled difference between the parallel constitutional provisions, it is difficult to conceive how an allegation that the state deprived a person of his life without due process could be a uniquely federal or state concern. There is only one immutable and indistinguishable right to due process of law.

The third and fourth elements of res judicata are easily supported here. The parties are, of course, the same as in the federal action. Further, the submissions and resulting judicial opinions from the federal litigation make it clear that the parties possessed and availed themselves of the opportunity fully and fairly litigate the constitutional claim in federal court.

Finally, our Supreme Court has applied the doctrine of res judicata to bar a due process claim under our Constitution where the claim was or could have been litigated in an earlier federal action under 42 U.S.C. § 1983.[11] *See Clay v. Weber*, 2007 SD 45, ¶¶ 13-15. One of the plaintiffs in *Clay* had been a member of group of prisoners who had earlier brought a § 1983 claim against the warden of the Penitentiary, challenging the prison's policy concerning inmate ownership of

[11] The *Clay* opinion does not identify the federal action as a § 1983 action, but the Eighth Circuit Court of Appeals' opinion makes it clear that it was, in fact, a § 1983 claim. *See Waff v. South Dakota Dept. of Corr.*, 51 Fed.Appx. 615 (8th Cir. 2002) (unpublished).

computers or word processors. The case was decided adversely to the prisoners in federal district court, and the plaintiff appearing in the state court action in *Clay* had been dismissed from the action without appealing. *Clay*, 2007 SD 45, ¶ 14, 733 N.W.2d at 284 (describing procedural history in federal court). When the same plaintiff brought essentially the same action in state court, the Supreme Court held it was barred by res judicata.

As far as the court can determine, the idea that Count 3 contained a separate, cognizable constitutional claim under state law arose after the federal litigation was resolved adversely to the Plaintiffs. The Complaint denominates the claim simply as, "Count 3 – 42 U.S.C. § 1983." Complaint at p. 18. Further, in its brief to the Eighth Circuit, the Plaintiffs acknowledged they had alleged "a claim under 42 U.S.C. § 1983 and five state law claims." However, if, as the Plaintiffs now contend, Count 3 included a state law claim, the number of state law claims would be six – not five. Judge Piersol's judgment reflects a similar understanding, stating he was remanding the "remaining five state law claims." Though not a determinative piece of the court's summary judgment analysis, these references do tend to support, if implicitly, the court's earlier conclusion that a separate due process claim under South Dakota's Constitution was not left lurking when the case was returned to state court.

ORDER

Based upon the foregoing, it is hereby ORDERED:

1) that the Defendants' motion for summary judgment is granted as to Counts 1,2, 4, 5, and 6 of the Complaint;

2) that any separate claim alleging a due process violation under the South Dakota Constitution in Count 3 of the Complaint is dismissed on the basis of res judicata; and

3) that the clerk will provide a copy of this Memorandum Opinion and Order to the parties' counsel electronically or by U.S. Mail.

Dated this 9th day of February, 2016.

BY THE COURT:

Mark Salter
Circuit Court Judge

ATTEST:
Angelia M. Gries, Clerk of Court

By _____, Deputy

FILED
FEB 10 2016
Minnehaha County, S.D.
Clerk Circuit Court

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Estate of Ronald E. Johnson and Lynette K. Johnson v. Douglas Weber, et al.

February 28, 2013

Preliminary Report

I. Introduction and Background

My name is Jeffrey A. Schwartz and my office is at 1610 La Pradera Drive in Campbell, California. I am the president of LETRA, Inc., a non-profit criminal justice training and consulting organization that has had offices in the San Francisco Bay area since its incorporation in June, 1972. I have worked full time with law enforcement and correctional agencies across the United States and Canada for approximately 35 years, both as LETRA's president and as a private consultant. The largest proportion of my work for the last 20 years has been with prisons and jails. I have worked with more than 40 of the 50 state departments of corrections and with small, medium and large jails and local departments of corrections. During my career I have worked with and toured literally hundreds of prisons and jails. I have served as an expert on law enforcement and corrections issues for more than 15 years. In the last 10 years, expert work has constituted perhaps 15% to 30% of my total professional time.

I was retained as an expert in this action by Don M. McCarty, Esq., of McCann, Ribstein & McCarty, P.C., of Brookings, South Dakota and John W. Burke, Esq., of Thomas, Braun, Bernard & Burke, of Rapid City, South Dakota. These two law firms represent the Plaintiffs in this case, the Estate of Ronald E. Johnson and Lynette K. Johnson. Mr. Burke and Mr. McCarty subsequently requested a written report of my professional opinions about this case. Prior to preparing this report, I have reviewed a large number of documents, a list of which is attached to this report as Appendix A.

In addition to the documents listed in Appendix A, I have reviewed the American Correctional Association Jail Standards, "Performance-Based Standards for Adult Local Detention Facilities," Fourth Edition, June, 2004.

I met with Lynette K. Johnson in Sioux Falls on February 12, 2013. I also toured the relevant locations at the South Dakota State Penitentiary (SDSP) on February 11, 2013 and attended most of the deposition of Defendant Douglas Weber on February 12, 2013 in Sioux Falls.

I am not a medical expert and I have not been asked nor have I attempted to form opinions about medical treatment in this case.

a placement inconsistent with his classification. However, the Warden approved the move of inmate Berget to West Hall and the later move of inmate Robert to West Hall with no classification or reclassification hearing and no completion of the required placement forms. Those situations were not emergency moves as defined in the policy and were simply policy violations. The failure to provide narrative explanations for those original moves and for subsequent reclassification and placement reviews were not accidental, they were intentional. The broad picture is that there were a large number of clear policy violations that were instrumental in the murder of Officer Johnson and the escape attempt by inmates Berget and Robert, and yet the South Dakota Corrections Commission, the public and perhaps many individuals within the SD DOC have been left with the impression that no policy violations occurred, because of the repeated insistence of that false conclusion by Warden Weber.

I. After the murder of Officer Ronald Johnson, Defendants engaged in a cover up.

1. The actions of Defendants after Officer Johnson's death did not cause or contribute to his death in any way. Defendants' actions do demonstrate that they went to great lengths to avoid responsibility, accountability or rigorous scrutiny with regard to Ronald Johnson's murder.

2. Lisa Fraser has testified that she placed a computer entry narrative in inmate Robert's classification hearing documents. She wrote that she disagreed with the decision to send Mr. Robert to West Hall. That narrative entry has now disappeared and cannot be located or produced by Defendants.

   SDSP staff working with classification records have testified that a narrative entry such as Lisa Fraser described would not have "fallen off" the computerized classification records or "timed out" in any other manner. They have testified that once made, such a narrative entry would remain essentially forever unless an individual went into the records and purposely expunged that entry.

   There are compelling facts that strongly suggest that Lisa Fraser did not invent a story about making such a narrative entry. Soon after Officer Johnson's death, Ms. Fraser reviewed the classification documents and saw that her narrative entry had been deleted. At least three staff members have testified that Ms. Fraser told them about what had happened at that time, and that she had been very upset about it.

There is no indication in the case record as to who might have deleted the narrative that Mr. Fraser wrote. The question of "Why" is not so difficult.

3. After Officer Johnson's death, Defendants put together an "After-Incident Report". (After-incident report is a minor modification of the more common term, "after-action report". "After-action report" and "critical incident review" are usually different names for the same thing. They refer to an after-the-fact review and/or investigation of a major incident or a crisis, not with regard to disciplining staff but rather focused on what actually happened, how it happened, the agency response to the situation, strengths and weaknesses identified in policy, training, practices and the like.) The After-Incident Report is dated May 9, 2011, just under four weeks after the murder.

4. The "after-incident report" is most noteworthy for two things. First, the conclusion of the report says that Penitentiary staff followed all policies and procedures. Defendant Warden Doug Weber, in his communication with the Governor's Office and in his presentations to the South Dakota Corrections Commission, emphasized that point repeatedly. However, as discussed earlier in this report, that is not true, a number of policies were violated, some of them repeatedly. In most cases, they were intentional violations of policies that proved crucial in the murder of Officer Johnson.

5. The second overarching problem with the After-Incident Report is what it does not say or consider. Most of the report presents descriptive information that is not particularly relevant to the murder. Then, on the issues that are clearly most crucial with regard to the murder, there is no consideration or coverage in the report at all.

   There are no timelines in the report, and the following questions remain appear to be unresolved and/or unaddressed by Defendants. When was the last time Officer Johnson was known to be alive and well by any staff member? By any inmate? Prior to their escape attempt at the West Gate sally port, when was the last time before that that anyone saw inmate Berget? Inmate Robert? When were those two inmates released from their cells? Was either inmate pat searched that day? Where did they get the two-foot long pipe they used to beat Ronald Johnson to death? Were any other inmates interviewed and did any inmates have prior knowledge that this escape attempt was coming, or that a major incident was likely? (The answer to some of these questions is now known, and was known prior to this after-incident report being distributed. For example, it was known that another inmate furnished inmates Berget and Robert with the two-foot long

pipe, but this report does not say so.)

6. Inexplicably, the report does not mention the hunger strikes by either inmate, in spite of the seminal note they played in facilitating the murder and escape attempt.

7. Other crucial issues in this incident are presented in a manner that is misleading or they are glossed over as if they are minor.

    a. For example, the use of force by staff is mentioned and staff are praised for not having used lethal force at the West Gate sally port, which could have resulted in a staff member being shot in addition to or instead of one of the two inmates. That is correct, but there is also a serious use of force problem that the report simply omits. A staff member took an AR-15 (a semi-automatic carbine) and got close enough to inmate Robert, as the inmate was trying to climb the fence separating him from the outside of the prison, to use the stock of the firearm to hit inmate Robert in the arm to prevent him from making any more progress climbing the fence. That worked, but it was a most serious mistake that could have back-fired with tragic consequences. Had inmate Robert grabbed the weapon when the staff member thrust it at him, then inmate Robert might have shot some of the staff members who had responded to the West Gate. He might have taken hostages. It is not inconceivable that the firearm would have allowed him and inmate Berget to complete their escape. There is a strong prohibition against taking firearms inside the perimeter of a prison or jail (with some narrow exceptions) and that prohibition is for good reason, having to do with the possibility that inmates might gain control of the weapon or weapons. Here, fortunately, the end result was that the escape attempt was thwarted and neither inmate gained control of any firearms. If this After-Incident Report was unbiased and rigorous, that would have been explained.

    b. The report describes the typical work duties and work schedule of inmates with the work assignments that Berget and Robert had but fails to include the work schedule for that day, which the report indicates is standard practice. There is no way to know whether such a schedule was produced on that day or not, and if so, how it fits with what is known about the timing and movement of the two inmates.

    c. One of the early sections of the report is particularly

misleading about inmate movement, a crucial issue in this murder. The report begins by saying it is not possible to eliminate inmate movement within the Penitentiary and that federal case law has found that it is not constitutional to isolate all prisoners convicted of a violent offense as a default incarceration practice. That is a "straw man" ploy. No one sensible would suggest isolating all prisoners convicted of a violent offense. However it is possible and it is legal to eliminate uncontrolled inmate movement for those individuals found to present specific high risks, such as escape. That is exactly the point. Inmates Berget and Robert could have been kept in the Jameson Annex with very limited and controlled movement but they were not. The reason they were not kept in the Jameson Annex has nothing to do with federal law or trying to eliminate all inmate movement in the Penitentiary.

d. The next three paragraphs of the report (page 7-8) present a lengthy description of Penitentiary practices, such an inmate dress code and assigning seating for meals. These generic descriptions have little or nothing to do with the murder that the report is supposed to be reviewing.

e. In that same section, the report describes how passes are given to inmates when they are to go to a specific area and then, if they do not show up within a designated time, a supervisor or manager is notified and attempts to locate the inmate are initiated. That is fine and well, but that is exactly one of the key questions about inmate Berget and Robert and the murder of Ronald Johnson. Were any phone calls made about Berget or Robert? Were there any prescribed times when Mr. Berget or Mr. Robert were supposed to arrive at designated locations? It seems that the answer is "No" but Defendants do not want to talk about that question in this report. How long could Mr. Berget and Mr. Robert have eluded staff observation or staff supervision before some staff member recognized that something was wrong? Ten minutes? An hour? Two hours? It is an important question in trying to understand what happened that day but this report does not mention that.

f. Another example is the last paragraph on page 8 of the report, in which Defendants describe that it is common for staff to direct an inmate worker to assist with other duties than those to which he is assigned. The report fails to discuss that that is an obvious problem that may have

helped inmates Berget and Robert. That is, if everyone knows that inmates are frequently given other duties than their assigned tasks, then any inmate working outside the housing unit buildings may go anywhere and staff are likely to assume, even if they know the inmate and his work assignment, that he has simply been reassigned to some other duty by another staff member.

g. From the analysis earlier in this report, it should be evident that my opinion is that classification was one of the largest problem areas in this murder, if not the single largest problem area, with multiple and important policies violated repeatedly. In spite of that, the after-incident report presents didactic material explaining how the classification system works in theory but never mentions a single fact about the classification of inmates Berget and Robert. There is no question but in the several weeks since the murder, staff had ample opportunity to review the classification documents and must have known that the placements of Berget and Robert to West Hall were done without the required explanation, without the required signatures and in some cases before the classification process was even completed. There is no need to repeat all of that analysis here but it is difficult to read the section of this report on classification and conclude other than this report failed to disclose critical information and at the same time attempted to mislead the reader.

J. The NIC Technical Assistance Report, dated September 21, 2011.

a. This report consists primarily of recommendations for improving security at the Penitentiary and recommendations on some closely related issues, such as emergency preparedness. That would be fine if that were the intent of the Technical Assistance project and the manner in which this NIC report has been used, but that is not so.

b. The report describes the SD DOC as requesting a review of their After-Incident Report. It then describes an NIC manager as identifying potential individuals for this review and then mentions planning for how the review would be conducted onsite.

c. In reality, the technical assistance was not a review of the after-incident report. If it had been, it would have gone through many or at least some of the analyses that I

engaged in, and would have identified failings in the after-incident report, and perhaps strengths in that report as well. Instead, the actual activities engaged in by the two NIC consultants were quite different. They reviewed, quite independently of the after-incident report, the events of April 12. In addition, they conducted a much more broad review of security practices at the Penitentiary, including some areas that are very important for institutional security but did not figure in the events of April 12, 2011.

d. There is no problem with the recommendations that constitute the bulk of the NIC report. In my professional opinion they are reasonable, helpful and well explained. However, the consultants did review the murder of Officer Johnson in some detail and there is no coverage in the report about any of the serious problems with policy violations that enabled Ronald Johnson's murder or with security practices that were directly related to the murder. It seems clear that, to a large extent, the NIC consultants were not informed of the multiple issues I have addressed in this report and therefore no analysis of these issues is included in their report.

8. SD DOC and Defendants have used their own after-incident report and the NIC report and the Department's response to the NIC report, in conjunction with their repeated assertions that no policies were violated and their implied message that nothing was done wrong. That was all to deflect attention from any serious review of what happened and why, in the murder of Officer Ronald Johnson.

VI. Conclusion

A. Robert and Berget murdered Officer Ronald Johnson, brutally, and in cold blood. One other individual, inmate Nordman, provided the weapon for the murder. No one but those three individuals carried out the murder of Officer Ron Johnson.

B. It is my opinion, to a reasonable degree of professional certainty, that the murder of Officer Johnson was made possible by and resulted from deliberate, intentional and extraordinary policy violations and egregious violations of well accepted security practices, and by these repeated and blatant failures Defendants breached their duty to protect inmates, staff and the community. Their conduct affects the integrity of the overall security systems and procedures for the South Dakota DOC. It is further my opinion that these security failures, policy violations and breaches of duty by Defendants led directly and predictably to the brutal death suffered by Officer Johnson. Finally, it is my additional opinion that the breaches of

Defendants duties, their repeated policy violations and their failures to maintain acceptable security practices were blatant, shocking and unconscionable.

Jeffrey A. Schwartz

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

ESTATE OF RONALD E. JOHNSON, by and through its Personal Representative, LYNETTE K. JOHNSON, and LYNETTE K. JOHNSON, Individually, Plaintiffs, vs. DOUGLAS WEBER, TROY PONTO, DARIN YOUNG, CRYSTAL VAN VOOREN, DENNY KAEMINGK, LAURIE FEILER, TIMOTHY A. REISCH, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, STATE OF SOUTH DAKOTA, and JOHN DOES 1-20, Defendants.	Civ. No. 12-4084 AFFIDAVIT OF JEFFREY A. SCHWARTZ, PH.D.

STATE OF CALIFORNIA)
)SS
COUNTY OF SANTA CLARA)

Jeffrey A. Schwartz, Ph.D., being first duly sworn, upon his oath testifies and states as follows:

1. That since issuing my report, I have reviewed the additional discovery that has been produced, which specifically includes the deposition of Jesse Sondreal, the recorded interview of inmate Tim Henry and the Affidavit of Chet Buie.
2. That the additional discovery, and in particular the three witnesses referenced above, provide further foundation for, and in fact confirm, all of the opinions in my original report, including the following:

a. Berget and Robert were extremely violent and dangerous inmates. They were not just average inmates in the system as portrayed by Warden Weber and DOC staff, and under no circumstances should they have been treated as average inmates.

b. Berget and Robert were clearly trying to manipulate the system to obtain a lower level of security and supervision, and Warden Weber and the DOC staff were aware of this.

c. These inmates, but particularly Berget, were a huge escape risk and the Department of Corrections, and in particular Warden Weber, were aware of the risk and had actual knowledge of their intent and plan to escape.

d. Warden Weber, and several members of the DOC staff, were aware and had actual knowledge of reports, information and documents that indicated Berget and Robert intended to escape, had threatened to harm staff, and in particular threatened to harm staff in conjunction with an escape.

e. That based on prior hunger strikes, and on his long history in the penitentiary, Berget was aware that he could go on a hunger strike for the purpose of obtaining lower levels of supervision and custody and to facilitate an escape.

f. That in 2004, Berget went on hunger strike for the specific purpose of being moved out of Jameson, and that Warden Weber made a deal with Berget to move him from Jameson to West in exchange for ending the hunger strike.

g. In 2009, Robert, went on a hunger strike for the specific purpose of being moved out of Jameson, and that Warden Weber made a deal with Robert to end his hunger strike in exchange for being moved. In all likelihood, Robert learned this

behavior from Berget, and evidence in the record indicates that they had likely been engaging in escape activities together going back to 2007.

h. The medical and mental health records clearly demonstrate that Berget and Robert specifically went on a hunger strike to get moved, and specifically asked to speak with Warden Weber in order to make the deal.

i. The case record demonstrates conclusively that Warden Weber did strike a deal with Berget and Robert to place them in West Hall in return for ending each of their hunger strikes. The after-the-fact denials and explanations of those two agreements constitute neither more nor less than a cover-up.

j. That multiple DOC policies were intentionally violated and/or circumvented in order to move Robert and Berget, and to avoid documenting who made the decisions and/or subsequent review of the basis for the decisions. That after they were placed in West Hall, Berget and Robert refused to comply with multiple rules and policies of the facility and, despite these violations, they continued to be housed in West Hall.

k. The case record and my own on-site observation confirm that there is a huge difference in level of security between Jameson – a modern, maximum security unit with very close inmate supervision and checks, balances and redundant security procedures – and West Hall – an older, high medium security facility lacking the architectural safeguards of Jameson and, more importantly, operated, without close supervision or individual accountability for inmates.

l. That placing Berget and Robert in West Hall, and giving them jobs that allowed them to move freely, created a serious immediate risk of harm to all staff and in

particular to the correctional officers assigned to the PI building, that there is substantial evidence to support the conclusion that the Defendant's were actually aware and appreciated the risk, and despite this risk continued to allow Berget and Robert to remain in West Hall.

3. The decision to move these inmates as part of a deal to end a hunger strike violated written DOC policy, but more importantly, the decision went against common sense and the core principals of Corrections. By making the deal, those running the facility lost control over two very dangerous inmates. They lost control of them on a daily basis in terms of the reduced custody level and virtually no supervision while the inmates were outside of their cells working jobs that allowed complete freedom of movement. The granting of outside, largely unsupervised jobs to both Berget and Robert was outrageous and grossly violates widely accepted principles and norms of basic security in American corrections. Once the deal was made, Berget and Robert knew the administration was not in control, and if the administration was not in control, the facility staff had little authority over them.

4. In this case, the pattern of conduct following the decision, in my opinion proves knowledge and appreciation of the risk. The DOC has in place policies that require documentation for a variety of reasons. The fact that neither of the initial moves were documented, and that placement did not follow policy in any respect, demonstrates that Warden Weber knew the risk that these decisions posed. His attempt to blame others for the decision is further evidence. The fact that Lisa Fraser's objection to the move is no longer on the computer and the fact that Rebecca Weaver immediately copied her portion of the files, proves knowledge and appreciation of the risk as well. The circulation of

emails and other information that survived and were actually produced, demonstrate that the critical parties involved had actual knowledge of the risk presented to the facility and the staff.[1] Finally, the two reports issued after the death of Ron Johnson, which purport to explain what lead up to the murder, but do not say that both inmates had been on hunger strikes, and were moved without documentation based on an override of the objective classification and placement system, confirm that Warden Weber knew the decisions created an immediate, serious risk of harm to the staff and were indefensible.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Dated this 15 day of October, 2013.

Jeffrey A. Schwartz

Subscribed and sworn to before me this 15th day of October, 2013.

Notary Public –
My Commission Expires: September 7, 2016

GLORIA A. MILLER
Commission # 1990462
Notary Public - California
Santa Clara County
My Comm. Expires Sep 7, 2016

CERTIFICATE OF SERVICE

[1] Some of the documents that demonstrate knowledge are as follows: 1. Medical and mental health records proving that a deal was made; 2. VanVooren email requesting a list of the most dangerous inmates; 3. The Meade County States Attorney's request for information resulting in interview of Jesse Sondreal the day following Ron Johnson's death; 4. The email from VanVooren referencing a discussion with Tolley about an escape plan by Berget and Robert.; 5. The specific shakedown of Berget's cell in August, 2010; 6. The statement of Tim Henry the day after Ron Johnson was murdered; and 7. the Affidavit of Chester J. Buie. attesting, among other things, that he was present and heard firsthand, Warden Weber make the deal with Berget to move him to West Hall in return for Berget ending his hunger strike.

I hereby certify that on the 15th day of October, 2013, I electronically filed the forgoing *Affidavit of Jeffrey A. Schwartz, Ph.D.* with the Clerk of Courts using the CM/ECF system which will automatically send e-mail notification to such filing to the following:

James E. Moore

Woods Fuller Shultz & Smith, PC

PO Box 5027

Sioux Falls, SD 57117-5027

/s/ John W. Burke

John W. Burke

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

ESTATE OF RONALD E. JOHNSON, by and through its Personal Representative, LYNETTE K. JOHNSON, and LYNETTE K. JOHNSON, Individually, Plaintiffs, vs. DOUGLAS WEBER, TROY PONTO, DARIN YOUNG, CRYSTAL VAN VOOREN, DENNY KAEMINGK, LAURIE FEILER, TIMOTHY A. REISCH, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, STATE OF SOUTH DAKOTA, and JOHN DOES 1-20, Defendants.	Civ. No. 12-4084 AFFIDAVIT OF JEFFERY A. SCHWARTZ

State of California)
):SS
County of Santa Clara)

COMES NOW, Jeffery A. Schwartz, being first duly sworn on oath deposes and states as follows:

1. As indicated on prior occasions, I have reviewed the recorded interview of Tim Henry in conjunction with this case. I have also reviewed the typed transcript of the interview.

2. It is my understanding that this statement was provided to Plaintiff's counsel as part of discovery responses in the above referenced case. Further, it is my understanding that this

recording was an enclosure to the written South Dakota Division of Criminal Investigation (DCI) report which was specifically done as part of the criminal investigation regarding the death of Ron Johnson.

3. Ron Johnson was murdered on April 12, 2011 between 10:00 a.m. and noon. From reviewing all of the information in this file, it is my understanding that within a few hours of Ron Johnson's death law enforcement officials were called to the Sioux Falls facility and began to investigate the murder.

4. As part of that investigation, the DCI began to interview inmates that lived in West Hall. From the DCI report it appears that they initially interviewed inmates who lived in West Hall on the same tier as Berget and Robert. From reviewing the recorded interview of Tim Henry, it appears that this particular interview took place the day after the murder and within 24 hours of DCI arriving at the scene.

5. The time the interview started and ended is included in the interview and the individuals involved are identified. The times given for the start and stop match the overall length of the recording. The recording is fairly good quality and only two people are engaged in the conversation.

6. I have previously issued a report in this case and a supplemental affidavit. I have reviewed the pleadings and discovery. Based on my work on this file and my expertise in this area, I would affirmatively state that this interview is the type of information that I would rely on for

purposes of forming my opinions. Further, in this particular case, there are multiple sources contained in the case record that are consistent with the substance of this record. Finally, the record is also useful in demonstrating that the Defendants were in fact on notice.

7. The fact that this interview was conducted within 24 hours of DCI arriving on the scene certainly has an impact on its value and reliability. Because this interview was conducted so quickly after the death of Ron Johnson the inmate would not have had the benefit of substantial news media. The inmate would not have known that the Plaintiff would bring a lawsuit or the basis for their claim. Further, because less than twenty four hours had passed, it would have been improbable for the inmate to make up the story or even gather the information from other sources after the death, but before the interview. The prison went into lockdown after the death, and the DCI and the DOC would have made an effort to keep information from inmates while the investigation was going on. Finally, while it is not uncommon for inmates to provide information, they will often do so for their own benefit or to seek something in exchange for the cooperation. In this particular case the inmate does not ask for anything in return for the information and acknowledges that he may be retaliated against by DOC for reporting the information.

8. The fact that this statement was given by an inmate also adds value and reliability under these particular facts. In this case Johnson alleges that the Defendants, who are all DOC employees, engaged in a course of conduct which resulted in the death of a correctional officer and that the Defendants are attempting to cover up their conduct. Because the murder took place in a prison the Defendants should have kept records regarding the decisions that were made, who made the

decisions and their basis. However, discovery in this case has shown that in many critical circumstances required records were not completed, have not been produced or have been destroyed. The medical records that have been produced demonstrate that a deal was made to end a hunger strike with both inmates. The transfer records show when the inmates were moved. The Tim Henry interview confirms many of the allegations made by Johnson. Johnson has based her claim on DOC records and deposition testimony from DOC employees. DOC employees would not share information with Tim Henry and he did not have access to the DOC records. The information he provided would come from observations within the prison and based on conversations with other inmates. Despite not having access to DOC records or having the benefit of information from DOC employees, he was able to state what took place within 24 hours of DCI arriving on the scene.

9. The Tim Henry interview is also valuable and reliable because of the detail it provides. Approximately two minutes into the interview he states that Berget forced the Administration to put him on third floor of West Hall by going to the Special Housing Unit, refusing to eat and telling the Warden to "kiss his ass". He states that this took place in mid to late 2009. The disciplinary records for Berget confirm that at approximately that same time he packed up his belongings and demanded to be moved to the Special Housing Unit and could not be talked out of it. He then went on a hunger strike. The transfer query for Berget confirms that he was then moved to third floor of West Hall. Again, Henry would not have access to the disciplinary records, medical records or transfer records for Berget.

10. At the conclusion of the interview, Tim Henry says that the death of Ron Johnson resulted

from the DOC Administration giving in to the demands by Berget and Robert, allowing them to manipulate the system, moving them out of Jameson and up to West Hall, giving them the freedom to move throughout the prison and ignoring the reports that Berget and Robert planned to escape. Again, this interview was conducted within 24 hours of DCI arriving on the scene. The contemporaneous nature of the statement given in a confined setting along with the consistency between the interview and the information uncovered in DOC records through discovery demonstrates the reliability of the statement.

11. In terms of the notice, the inmate also provides critical information that appears to be consistent with other written records provided by DOC. At several points during the interview Henry indicates that he went to DOC staff and specifically told them that escape plans were being made. He specifically states that the Warden, Special Security and several other members of senior staff were specifically informed of a planned escape by Berget. An email from Crystal Van Vooren produced through discovery would appear to be consistent with Henry's claim that he had given this information to DOC staff regarding the escape plan.

12. Tim Henry also indicates that after Berget and Robert were moved into West Hall that inmate workers from the machine shop had come through and welded cages and bars over the fans and windows in the area near Berget and Robert. Henry believes this was done because of the reports he made to the DOC administration regarding Berget and Robert, however, all the Defendants deny that they had any information that Berget and Robert intended to escape or that these particular inmates posed a substantial risk in West Hall.

13. Many of the facts contained in the Henry interview are consistent with records obtained through discovery and with the specific claims made by the Plaintiff. With regard to notice and the risk created by placing these inmates in West hall, the Henry statement is consistent with the information provided by former correctional officer Chet Buie. Most of the specific allegations made by Henry with regard to notice are denied by the Defendants in their depositions. The After Incident Report issued by the Defendants makes no mention of any of the facts set forth in the Henry interview. The contradiction between the After Incident Report and the information collected through discovery supports the allegation that the Report was intended to misrepresent what had actually taken place. The Tim Henry interview, given within 24 hours of the investigation being commenced, confirms that those who were completing the After Incident Report affirmatively choose to represent a different set of facts, some of which were materially false.

14. As indicated in this affidavit, the truth of the allegations contained in the Tim Henry statement are supported by the overall context of the interview and other documents and information obtained through discovery. It provides evidence of notice prior to the death Ron Johnson and intent to cover up misconduct following the death. Finally, as an expert in this field, particularly in the context of this case, and the other evidence in the case file supporting the

reliability of this record, it is the type of record that I would rely on in forming my opinions in relation to the conduct of the Defendants and resulting death of Ron Johnson.

Dated this 25 day of November, 2013.

Jeffery A. Schwartz

Subscribed and sworn to before me this 25th day of November, 2013.

NICHELLE RUSSIEN
COMM. # 1982497
NOTARY PUBLIC - CALIFORNIA
SANTA CLARA COUNTY
COMM. EXPIRES JULY 14, 2016

Notary Public – Nichelle Russien

Commission Expires: July 14, 2016

State of California, County of Santa Clara
Subscribed and sworn to (or affirmed) before me on this 25 day of Nov, 2013 by Jeffrey A Schwartz
proved to me on the basis of satisfactory evidence
to be the person(s) who appeared before me.

(Signature of Notary)

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

ESTATE OF RONALD E. JOHNSON, by and through its Personal Representative, LYNETTE K. JOHNSON, and LYNETTE K. JOHNSON, Individually, Plaintiffs, vs. DOUGLAS WEBER, TROY PONTO, DARIN YOUNG, CRYSTAL VAN VOOREN, DENNY KAEMINGK, LAURIE FEILER, TIMOTHY A. REISCH, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, STATE OF SOUTH DAKOTA, and JOHN DOES 1-20, Defendants.	Civ. No. 12-4084 AFFIDAVIT OF DAVID TOLLEY

STATE OF SOUTH DAKOTA)
)ss
COUNTY OF PENNINGTON)

David Toiley, being first duly sworn, upon his oath testifies and states as follows:

1. I was released from South Dakota State penitentiary in 2013. Prior to that date I had spent a number of years in the penitentiary. I was in Rapid City for a hearing on my underlying case when Ron Johnson was killed. While I was in prison I challenged my conviction and I was eventually successful in obtaining my release from the DOC.

2. I am personally familiar with Eric Robert, Rodney Berget, and Ron Johnson. I knew Berget well because we both had been in the prison for a long time. I did not like Robert and generally would not associate with him. Berget changed substantially once Robert came to the penitentiary and the two were together most of the time. Because of Robert and because I was trying to legally obtain my release, I spent less time around Berget in the last couple of years, and I eventually distanced myself from both of them because I was concerned about what they intended to do.

11-21-13

APPENDIX A

3. After the most recent information was published regarding the above lawsuit I made contact with Lynette Johnson. I contacted her to express my condolences for the death of her husband and provide her with what information I could with regard to his death. Ron Johnson was a good guard and an exceptional person. He treated inmates with dignity and respect. He did not deserve to die.

4. Robert and Berget were moved out of Jameson as part of deals to end hunger strikes. This fact was well known to unit management in West Hall. The issue was discussed with me on a regular basis by unit management.

5. Prior to Berget being moved to West Hall I was contacted by Brad Woodward. In that discussion Brad Woodward specifically requested that I change cells and move into the cell next to Berget on third floor. He indicated that they were moving Berget to West Hall as part of deal to end a hunger strike. They asked me to move into the cell next to him and keep an eye on him. Transfer documents would confirm that I was moved to third floor of West Hall at or about the same time Berget was moved to the third floor of West Hall.

6. After I moved into the cell next to Berget I had a number of conversations with DOC staff. I had specific conversations with Brad Woodward, Crystal Van Vooren, Joe Miller, Heather Veld, Pam Linneweber and Mary Rodasky. In those conversations I told them that Robert and Berget were clearly up to something. I did not know the details of their plan, but from those conversations it was clear that the senior staff at the penitentiary were aware that Berget and Robert intended to escape. I confirmed this with them, and told them on multiple occasions that it appeared they were making plans.

7. In particular I had conversations with Crystal Van Vooren regarding an alleged escape plan involving Berget and Robert in the spring of 2010. She was clearly aware from the conversation that Berget and Robert had plans to escape. On this occasion she contacted me and I was taken to her office. It is my understanding that Crystal Van Vooren denies this knowledge. She is lying. She specifically called me to her office to discuss information she had received. In addition, when I was in her office she was reading from documents and reports when discussing the plan. I saw the documents on her desk and those documents would verify her knowledge of the plan.

8. I had discussions with Mary Rodasky and she specifically told me that she had multiple kites indicating that Berget and Robert intended to escape. I was told by Joe Miller, Heather Veld, and Pam Linneweber on more than one occasion to keep an eye on both Berget and Robert. I was told that DOC staff knew what was going on and were watching them. In my discussions with DOC staff I questioned why Berget and Robert were being housed in West Hall and I was told that the decision was above their head.

9. During this timeframe the maintenance and machine shop did substantial work in West Hall. They welded screens and cages over windows and exhaust fans in and around the area where Berget and Robert were housed. The work was done by inmates, and supervisors

11-21-13

APPENDIX F-2

from the machine and maintenance shops were present. I assume that records from those two shops would confirm the work that was done.

10. In the last several years I have been working to have my sentence reduced or my conviction overturned. Because of these efforts I knew that I would be getting released in the near future. Because of what I saw going on, I specifically requested to be moved away from Eric Robert and Berget. I did not want to be around them if they made an escape attempt. I informed DOC staff that I wanted to be moved. I told DOC staff that Berget and Robert were clearly up to something. Based on my request I was allowed to move away from them. Transfer records will confirm that I was moved prior to the escape attempt.

11. Berget did temporarily have my job when I was in Rapid City for court, but I was not involved in any way in the escape plan by Berget and Robert. As indicated above, DOC staff knows that I was not involved because I told them on multiple occasions about Berget and Robert. Prior to being given my job, Berget moved freely throughout the facility throughout the day although he did not have an off-unit job. When Berget had my job on a temporary basis, it allowed him to continue to move freely about the institution. It was clear that rules and restrictions were not enforced with regard to Berget and Robert and they were allowed to move freely around the facility without supervision.

12. Doug Weber spoke with Berget and Robert frequently. I specifically heard Robert threaten to kill Doug Weber. I also heard Robert and Doug Weber discuss the fact that Robert was only in West Hall because Doug Weber made a deal with him.

13. I was hesitant to provide information regarding this case because I believe the DOC will do virtually anything to cover this up.

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Dated this 21st day of November, 2013

DAVID TOLLEY

Subscribed and sworn to before me this 21st day of November, 2013.

Notary Public, South Dakota
My Commission Expires: 7-13-17

(SEAL)

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27792

ESTATE OF RONALD E. JOHNSON, by and through its Personal Representative, LYNETTE K. JOHNSON, and LYNETTE K. JOHNSON, Individually,

Plaintiffs/Appellants,

vs.

DOUGLAS WEBER, TROY PONTO, DARIN YOUNG, CRYSTAL VAN VOOREN, DENNY KAEMINGK, LAURIE FEILER, TIMOTHY A. REISCH, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, STATE OF SOUTH DAKOTA, and JOHN DOES 1-20,

Defendants/Appellees.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

THE HONORABLE MARK E. SALTER

BRIEF OF APPELLEES

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Notice of Appeal filed March 16, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

JURISDICTIONAL STATEMENT

The circuit court, the Honorable Mark E. Salter, entered a memorandum opinion and order dated February 9, 2016, granting summary judgment. (SR2978.) The order was filed on February 10, 2016. The circuit court entered judgment dated February 16, 2016. (SR3012.) Notice of entry of judgment was filed February 17, 2016. (SR3010.) Plaintiffs the Estate of Ronald E. Johnson, by and through its Personal Representative, Lynette Johnson, and Lynette Johnson, individually (collectively "Johnson") filed a timely notice of appeal on March 16, 2016. (SR3043.)

STATEMENT OF THE ISSUES

1. After the murder of correctional officer Ron Johnson while he was on duty, various employees of the Department of Corrections voluntarily wrote and published an after-incident report to the public explaining the facts related to the murder and steps taken since the murder. Johnson contends that the report omitted relevant facts concerning Ron's death and was drafted in an effort to cover up the involvement of some of the DOC employees she sued. In writing and publishing the after-incident report, were any of the Appellees guilty of extreme and outrageous conduct that was beyond all possible bounds of decency and properly regarded as atrocious and utterly intolerable in a civilized community?

   The circuit court held that whether writing and publishing the report was extreme and outrageous is a question initially for the court, and that the alleged misstatements and omissions from the report failed to meet the "rigorous benchmark" for extreme and outrageous conduct sufficient to create tort liability.

   Fix v. First State Bank of Roscoe, 2011 S.D. 80, 807 N.W.2d 612

2. Johnson claimed that the after-incident report was written with the intent to deceive her and for the purpose of inducing her to act upon it, and that she justifiably relied on the after-incident report, which are two of the necessary elements to establish fraudulent misrepresentation. Johnson argues that some of the DOC officials intended to induce her to refrain from holding any DOC official responsible for Ron's death, but she did not believe the report and later filed this lawsuit seeking to hold the Appellees accountable for Ron's death. Given these inherently contradictory positions, is there any factual question whether Johnson could prove both the fourth and fifth elements of misrepresentation?

The circuit court held that Johnson presented no evidence that any Appellee intended to deceive her or to induce her to act upon the report, and that Johnson presented no evidence that she relied on the report.

North American Truck & Trailer v. M.C.I. Com. Serv., 2008 S.D. 45, 751 N.W.2d 710
Delka v. Continental Cas. Co., 2008 S.D. 28, 748 N.W.2d 140
RESTATEMENT (SECOND) OF TORTS §§ 537, 546

3. Johnson receives workers compensation benefits on account of her husband's death, but contends that she should be allowed to sue for a violation of the Due Process Clause of the South Dakota Constitution. Johnson argues that the liability standard for such a claim would be less than intentional conduct. Is such a state constitutional claim by a recipient of workers-compensation benefits barred by SDCL § 62-3-2, which precludes tort claims "on account of" an employee's death, and which excepts only claims based on intentional conduct?

The circuit court did not address this argument, which was briefed.

Harn v. Continental Lumber Co., 506 N.W.2d 91 (S.D. 1993)
Estate of Johnson v. Weber, 785 F.3d 267 (8th Cir. 2015)

4. Despite receiving workers compensation benefits on account of her husband's death, Johnson sought to recover through two tort claims, the intentional infliction of emotional distress and fraudulent misrepresentation, both of which were based on the DOC's after-incident report. Johnson claims that she was injured by the official reporting of the events related to her husband's death. Are claims based on reporting about an employee's death "rights and remedies . . . on account of such injury or death" and therefore barred by SDCL § 62-3-2?

The circuit court did not address this argument, which was briefed.

Fryer v. Kranz, 2000 S.D. 125, 616 N.W.2d 102
Hagemann v. NJS Eng'g, Inc., 2001 S.D. 102 632 NW.2d 840

5. Johnson contends that she pleaded a violation of South Dakota's due-process claim in her complaint under the heading "Count 3—42 U.S.C. § 1983," and that such a claim would differ from her federal constitutional claim, which was litigated in federal court and dismissed with prejudice. Did the circuit court correctly conclude that this claim failed as a matter of law for multiple reasons?

The circuit court held that a state constitutional claim under the Due Process Clause would not differ from a federal constitutional claim, and that res judicata barred such a claim. It alternatively held that no such claim had been pleaded, South Dakota courts cannot recognize such a claim, and sovereign immunity would bar the claim in this case.

SD Const. Art. III, § 27
Adrian v. Vonk, 2011 S.D. 84, 807 N.W.2d 119
Taylor v. Sturgell, 553 U.S. 880 (2008)
Clay v. Weber, 2007 S.D. 45, 733 N.W.2d 278

STATEMENT OF THE CASE AND THE FACTS

This case began in state court on April 27, 2012. Johnson's complaint pleaded six claims, which have been significantly narrowed during the four years of this litigation. The Defendants removed the case to federal court where summary judgment was granted on Johnson's federal constitutional claim under 42 U.S.C. § 1983 (Count 3) by Judge Piersol and affirmed on appeal. Johnson's state-law claims were remanded. (Appellees' App. 044.)[1] Defendants moved for summary judgment. The circuit court granted this motion, and Johnson has not appealed the summary judgment on her state-law wrongful death (Count 1), survival (Count 2), and negligent inflication of emotional distress (Count 5) claims. Consequently, this appeal concerns only Johnson's claim for intentional infliction of emotional distress (IIED) (Count 4) and fraudulent misrepresentation/nondisclosure (Count 6). Johnson also urges the Court to adopt a new claim based on the South Dakota Constitution, but no such claim was pleaded in Johnson's complaint.

Ron Johnson worked at the South Dakota State Penitentiary for almost 24 years. (SR114 ¶ 2; SR1265 ¶ 2.) He was murdered while at work by inmates Rodney Berget and Eric Robert on his 63rd birthday, April 12, 2011. (*Id.*) Robert and Berget assaulted Ron at his post in the Prison Industries building, took part of his uniform, and attempted to escape through the West Gate of the SDSP, where they were apprehended. (SR117 ¶

[1] Copies of the district court's decision dismissing the federal claim and the Eighth Circuit's decision affirming the dismissal are included in the Appellees' appendix.

12; SR1266 ¶ 12.) Both Robert and Berget were charged with first-degree murder, both pleaded guilty, and both were sentenced to death. Robert was executed on October 15, 2012; Berget remains on death row. (SR117 ¶¶ 13-14; SR1266 ¶¶ 13-14.)

Johnson's federal claim contended that Robert and Berget should not have been housed at the SDSP, and should not have had jobs as orderlies off their unit. In particular, she claimed that:

- as of the date of the murder, they were both classified as maximum custody inmates, and should have been housed at the Jameson Annex
- even though the classification policy allowed them to be housed at the SDSP based on the warden's discretionary decision, they should not have been housed there because:
    - they were both convicted of violent offenses (kidnapping, and kidnapping and attempted murder)
    - Berget had a lengthy history of escapes and escape attempts
    - Robert was disciplined for an escape attempt while incarcerated in 2007
- the DOC's classification policy was violated because:
    - a placement form was not completed when Berget was initially moved to the SDSP in 2004
    - three of seven of Berget's classification documents required five signatures for the placement based on the warden's discretion, but had only two
    - the narratives explaining why the classification decisions were made were not sufficiently descriptive
- the orderly jobs to which Robert and Berget were assigned gave them too much freedom of movement
- Warden Weber moved Robert and Berget to the SDSP in exchange for their agreement to end hunger strikes, which violated DOC policy.

In dismissing Johnson's federal claim, the district court and the Eighth Circuit considered these facts and held that they were insufficient as a matter of law to establish a

federal constitutional violation. (Appellees' App. 043 & 051.) At issue on appeal, by contrast, are two of Johnson's state-law claims based on the DOC's after-incident report. Thus, the extended statement of the facts in Johnson's brief, which focuses on events occurring years before Ron's murder, is largely irrelevant to this appeal. That being said, it is undisputed that: (1) Robert and Berget had no institutional history of violence and neither threatened staff in the days before April 12, 2011 (SR133 ¶¶ 72-73; SR1282 ¶¶ 72-73; SR120 ¶ 24; SR1269 ¶ 24); (2) their criminal and escape histories were not statistically good predictors that they might assault and kill a correctional officer (SR139 ¶¶ 97, 100; SR1285-86 ¶¶ 97, 100); (3) no one warned any of the Appellees that either was likely to assault and kill a correctional officer in April, 2011 (SR137-38 ¶¶ 91, 92, 94; SR1285 ¶¶ 91, 92, 94); (4) no one had any advance knowledge of what happened on April 12, 2011; and (5) Robert and Berget were housed at the SDSP based on multiple administrative decisions occurring over a course of years that were authorized by statute and DOC policy. (SR135 ¶ 79; SR1283 ¶ 79; SR126 ¶ 43; SR1277 ¶ 43.)

With respect to the after-incident report, it is an 18-page document with six attachments, prepared at the direction of Troy Ponto, an associate warden, and Jennifer Wagner, the DOC's corrections and program contracts manager, to document what happened on April 12, 2011, and what steps were taken after the incident to ensure that such a murder would not happen again. A copy of the report is in the appendix to this brief. (Appellees' App. 001.) The report is dated May 9, 2011. It evolved into a public document, but Deputy Secretary Laurie Feiler testified that she did not expect from the outset that the report would be public. (SR140 ¶ 101; SR1286 ¶ 101.)

The report was written by multiple people. Wagner and Ponto wrote the initial draft, which was then reviewed, edited, and revised by many people in Pierre, including Feiler and staff in the Governor's office. (SR140 ¶ 102; SR1286 ¶ 102.) The draft was also reviewed with senior staff at the SDSP, including Warden Weber, Associate Warden Darin Young, and Deputy Warden Daryl Slykhuis. (*Id.*) Many drafts were circulated and reviewed before the document was completed. (*Id.*) The report was published on the DOC's website, where it was available to the public. (SR140 ¶ 101; SR1286 ¶ 101.)

ARGUMENT

Johnson appeals from summary judgment on three claims: (1) intentional infliction of emotional distress (IIED); (2) fraudulent misrepresentation; (3) and denial of substantive due process. In a thorough opinion, the circuit court dismissed the IIED claim because the alleged conduct was not extreme and outrageous. (App. B17-B18.) It dismissed the fraudulent misrepresentation claim because there was no evidence the Defendants induced Johnson to rely on the report. (*Id.* at B19-B20.) The circuit court dismissed the substantive due process claim based on res judicata and multiple alternative grounds.

The Court reviews a circuit court's grant of summary judgment under the *de novo* standard of review. *Heitmann v. Am. Fam. Mut. Ins. Co.*, 2016 S.D. 51, ¶ 8, __ N.W.2d __ (quoting *Ass Kickin Ranch, LLC v. Star Mut. Ins. Co.*, 2012 S.D. 73, ¶ 7, 822 N.W.2d 724, 726). On review of a grant of summary judgment, the Court must "decide 'whether genuine issues of material fact exist and whether the law was correctly applied.'" *Id.* (quoting *Ass Kickin Ranch*, 2012 S.D. 73, ¶ 6). "We will affirm a circuit court's decision so long as there is a legal basis to support its decision." *Id.*

1. Writing and publishing the after-incident report was not extreme and outrageous.

To establish IIED, Johnson must prove all four elements of the tort: (1) an act by the defendant amounting to extreme and outrageous conduct; (2) intent on the part of the defendant to cause the plaintiff severe emotional distress; (3) the defendant's conduct was the cause in fact of plaintiff's distress; and (4) the plaintiff suffered an extreme disabling emotional response to defendant's conduct. *Fix v. First State Bank of Roscoe*, 2011 S.D. 80, ¶ 19, 807 N.W.2d 612, 618. Whether conduct is extreme and outrageous under the first element "is initially for the trial court." *Id.* Proof of such conduct "must exceed a rigorous benchmark." *Id.* The conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and be regarded as atrocious, and utterly intolerable in a civilized community." RESTATEMENT (SECOND) OF TORTS § 46, cmt. d (1964).

The circuit court held that Johnson failed to prove either the first or second element. (App. B17-B18.) As to the first, the circuit court held that the statements and omissions from the incident report, assumed to be self-serving and inaccurate, did not exceed the "rigorous benchmark" for extreme and outrageous conduct. (*Id.*) As to the second, the circuit court found no showing that any of the parties "drafted and published the Incident Report in a calculated effort to cause Mrs. Johnson serious mental distress." (*Id.* at B18.) On appeal, Johnson contends that there were jury questions, that a court can infer intent from the evidence, and that the relationship between the parties is relevant to the inquiry. (Appellants' Br. at 21-22.) Johnson's argument fails for several reasons.

First, Johnson's brief does not cite to any facts in the record that could be construed as extreme and outrageous conduct. The facts alleged in Johnson's complaint

are based on what the after-incident report did not disclose, including "all of the events leading up to RJ's murder, particularly the decisions that [the DOC] made which resulted in Berget and Robert being outside of South Dakota's maximum security facility." (SR17 ¶¶ 91-92.) On appeal, Johnson's brief identifies three areas in which she contends the after-incident report was inaccurate: (1) it did not mention that Robert and Berget had both engaged several times in hunger strikes; (2) it incorrectly stated that staff followed all policies and procedures; and (3) it misused a classification term, "administrative decision." (Appellants' Br. at 18-19.) The facts in the record on these issues do not demonstrate extreme and outrageous conduct.

The hunger strikes that Johnson argues should have been mentioned occurred in 2004 and 2009, years before the murder. (SR126 ¶¶ 43, 46; SR135 ¶ 79; SR1277 ¶ 43; SR1278 ¶ 46; SR1283 ¶ 79.) They were not mentioned in the after-incident report because they were not, as the district court held in dismissing Johnson's federal claim, relevant to the murder. (Appellees' App. 042 (assuming that facts related to hunger strikes and the suggestion that Warden Weber made deals with Robert and Berget were true, facts were too far removed in time to establish a substantial risk of serious, immediate, and proximate harm as required to prove liability).)

Johnson contends that the statement that all policies and procedures were followed was wrong because some classification documents had not been properly completed even if the warden had discretion to make the transfers at issue. Corrections officials who were deposed disagreed whether the paperwork errors meant the statement in the after-incident report was correct. But even assuming *arguendo* that the statement was inaccurate, mistakenly stating that all policies were followed when there were

actually some instances when paperwork did not contain a sufficient number of signatures falls far short of extreme and outrageous conduct.

With respect to the third issue, the after-incident report refers to "administrative factors" under DOC Policy 1.4.B.2, which is different than an "administrative decision," which is the basis in the classification policy on which Berget and Robert were housed at the SDSP. (SR893.) Feiler testified that she "maybe created some confusion when we used the word administrative factors," and that she "kind of commingled what is commonly known as administrative factors or administrative placement with administrative decision." (*Id.*) But the imprecise use of a specialized term in a published report is not extreme and outrageous conduct.

Ultimately, including certain facts in, and excluding others from, a published report after the murder of a State employee does not constitute extreme and outrageous conduct that is beyond all possible bounds of decency. As the circuit court held, "[a]t most, the Incident Report was the DOC's parochial view of Mr. Johnson's murder that fell short of full disclosure." (App. B18.) Johnson's brief cites to no other facts as the basis for her claim.

Second, Johnson's brief cites no authority, from South Dakota or anywhere else, supporting her argument that not including certain facts in a public report can constitute extreme and outrageous conduct. By comparison, this Court held in *Fix* that a bank's conduct in failing to abide by the terms of a written promise that an elderly woman could continue to live in her house even if the bank became the owner of it was not extreme and outrageous conduct. 2011 S.D. 80, ¶ 21, 807 N.W.2d at 618-19. Even assuming that the bank "intentionally reneged on its promise," the Court held that the conduct was not

extreme and outrageous, and therefore affirmed summary judgment. Johnson's brief does not mention this decision, on which the circuit court relied. It would be incongruous, if not impossible, to reconcile a decision in Johnson's favor on this issue with the decision in *Fix*.[2]

Third, Johnson argues that the relationship between the parties is relevant, that the DOC officials knew that Johnson was traumatized by and grieving as a result of her husband's murder, and that "the Defendants were both the employer and a government agency." (Appellants' Br. at 22-23.) Johnson's brief cites no South Dakota cases in support of these two arguments. The Restatement addresses the relationship of the parties in comment e, which describes the relevant relationship as one "which gives [the actor] actual or apparent authority over the other, or power to affect his interests." RESTATEMENT (SECOND) OF TORTS § 46, cmt. e. The examples are police officers, school authorities, landlords, and collecting creditors. *Id.* Here, although the State was Ron Johnson's employer, there was no relationship between the State and Lynette Johnson giving the State authority over her or the power to affect her interests. The only relationship is that the State pays workers compensation benefits to Lynette Johnson as Ron Johnson's widow, but her claim for IIED is unrelated to the payment of benefits. The only South Dakota case involving an employment relationship cited in Johnson's brief is *Kjerstad v. Ravellette Pub. Co.*, 517 N.W.2d 419 (S.D. 1994), in which an

[2] The public nature of the after-incident report, which was written and published by the DOC, suggests that the report constitutes public speech protected by the First Amendment, which would preclude a verdict based on IIED. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1215-19 (2011) (reversing verdict against Westboro Baptist Church founder based on intentional infliction of emotional distress due to protests at military funeral because speech was of public concern and therefore protected by First Amendment).

employer spied on employees using the bathroom. The case did not discuss the employment relationship, but focused on the nature of the conduct involved.

As for the argument that Johnson was vulnerable, the same could be said of Rita Fix when she was put out of her house by the First State Bank of Roscoe. Johnson relies on *Wangen v. Knudson*, 428 N.W.2d 242 (S.D. 1988), in which the Court affirmed an IIED verdict in favor of a plaintiff who was suffering from and being treated for severe depression. The Court held that the fact of treatment and severe depression were known to the plaintiff's employer, which was relevant to whether the employer's conduct was extreme and outrageous. *Id.* at 248. Johnson did not plead any analogous facts to establish that when the after-incident report was written, she was suffering from and treating for severe depression, that the officials responsible for writing the report had knowledge of her condition, and that they therefore reasonably should have known that the alleged omissions from the after-incident report would cause severe emotional distress based on Johnson's condition. Moreover, the after-incident report was not addressed to or directed at Johnson. It was a public accounting of what happened. Johnson's claims that it was incomplete or self-serving are legally insufficient to establish that it was extreme and outrageous.

Finally, Johnson argues that the circuit court's decision erred in stating that "there is no showing that the Defendants drafted and published the Incident Report in a calculated effort to cause Mrs. Johnson serious mental distress" because the second element of her claim, intent to cause severe emotional distress, can be proved by reckless conduct. (App. B18; Appellants' Br. at 23.) The circuit court's memorandum opinion, however, addresses the fact that the report was not directed at or addressed to Lynette

Johnson and concludes that Johnson's own arguments defeated her claim that the report was intended to deceive her. (App. B18.) Johnson cites to no contrary evidence establishing the sort of reckless conduct necessary to prove this element of the tort. (Appellants' Br. at 23.)

Ultimately, Johnson cites to no case, in South Dakota or elsewhere, based on which this Court could hold that alleged omissions from a public report describing and assessing the facts and circumstances that led to the murder of a correctional officer can constitute extreme and outrageous conduct sufficient to establish the intentional infliction of emotional distress. The circuit court properly granted summary judgment.

2. The after-incident report does not support a claim for fraudulent misrepresentation.

Johnson argues that certain statements in the after-incident report were false and were intentionally or recklessly made with the intent to deceive Lynette Johnson to her detriment. (Appellants' Br. at 23-27.) To establish fraudulent misrepresentation, Johnson had to prove six elements:

(1) a defendant made a representation as a statement of fact;

(2) the representation was untrue;

(3) the defendant knew the representation was untrue or he made the representation recklessly;

(4) the defendant made the representation with intent to deceive the plaintiff and for the purpose of inducing the plaintiff to act upon it; and

(5) the plaintiff justifiably relied on the representation; and

(6) the plaintiff suffered damage as a result.

North American Truck and Trailer v. M.C. I. Com. Serv., 2008 S.D. 45, ¶ 10, 751 N.W.2d 710, 714; *Delka v. Continental Cas. Co.*, 2008 S.D. 28, ¶ 30, 748 N.W.2d 140, 152. The

circuit court correctly granted summary judgment because Johnson offered no evidence that any Defendant intended to deceive Johnson, or that Johnson justifiably relied on the report. (App. B19-B20.)

Based on the evidence and her argument on appeal, Johnson cannot prove both the fourth and fifth elements of the tort. "'[S]ummary judgment is proper [when a plaintiff] produces no evidence of deceitful intent on [defendant's] part.'" *Delka*, 2008 S.D. 28, ¶ 31, 748 N.W.2d at 152 (quoting *Garrett v. BankWest, Inc.*, 459 N.W.2d 833, 847 (S.D. 1990)). Johnson contends that Deputy Secretary Laurie Feiler's testimony that the DOC knew "early on" that it was "going to share the contents of the report" with Lynette is evidence of deceitful intent, as is Secretary Kaemingk's testimony that he thought that Lynette could rely on the report. (Appellants' Br. at 25.) But evidence that they knew Johnson would read the report is not evidence of intent to deceive.

Johnson has to prove not only that the persons who wrote the report intended to deceive her, but also that they intended to induce her to act upon the deceit. *North American Truck & Trailer*, 2008 S.D. ¶ 10, 751 N.W.2d at 714. Johnson argues that the report "failed to disclose many of the basic facts which actually led to the death of Ron Johnson," although her brief does not cite to the record for this statement. (Appellants' Br. at 25.) Her theory is that the Defendants wanted to cover up their involvement in classification decisions, housing assignments, and job assignments that she contends were responsible for the murder, to "deceive Lynette Johnson and induce her to refrain from blaming or otherwise seeking to hold the Defendants accountable for the murder of her husband." *Id.* Assuming for the sake of argument that this is a reasonable inference from the evidence, it cannot save Johnson's claim. Rather, it would make it impossible for her

to prove the next element, that she "justifiably relied on the representation." *North American Truck & Trailer*, 2008 S.D. ¶ 10, 751 N.W.2d at 714. Johnson obviously took issue with the incident report, did not believe it, and filed this lawsuit against the Defendants in which she accused them of misleading her. She did not refrain either from blaming them or from seeking to hold them accountable. In other words, she did not rely on the report.

The circuit court found that there was no evidence in the record of deceitful intent. If this Court concludes otherwise, Johnson must still prove reliance, which logically she cannot because this lawsuit and the allegations she has made concerning intent show she did not rely on the report. The circuit court noted that there was no particular statement in Johnson's complaint and no explanation in her briefing about how she relied on the incident report to her detriment, and concluded that she had failed even to comply with SDCL § 15-6-9(b). (App. B20.) Johnson's response on appeal is to cite a treating psychiatrist's report that she suffered trauma from her husband's murder and the Defendants' subsequent misrepresentations. (Appellants' Br. at 26-27.) This argument fails for three fundamental reasons. First, it confuses the fifth element (justifiable reliance) and sixth element (damage as a result) of the tort. They are separate and distinct. Second, reliance requires action or a failure to act. "The recipient of a fraudulent misrepresentation can recover against its maker for pecuniary loss resulting from it if, but only if, (a) he relies on the misrepresentation in acting or refraining from action . . . ." RESTATEMENT (SECOND) OF TORTS § 537. Johnson did not refrain from acting based on the incident report. To the extent that she acted by filing this lawsuit, she acted not in reliance on the report, but in opposition to it. Third, the tort requires proof

that Johnson relied on, i.e., believed, the misrepresentation. *See* RESTATEMENT (SECOND) OF TORTS § 546 ("The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss suffered by one who justifiably relies *upon the truth of the matter misrepresented*, if his reliance is a substantial factor in determining the course of conduct that results in his loss (emphasis added)."). The medical testimony that Johnson cites in her brief does not establish that she ever believed the report. It shows she was distraught because she did not believe the incident report: "'She alleges that deliberate misinformation that has the appearance of a cover-up has aggravated her psychiatric state.'" (Appellants' Br. at 26 (quoting SR2834).) This is the opposite of justifiable reliance.

In attempting to respond on appeal to the circuit court's dismissal of her fraud claim, Johnson has only confirmed that the claim makes no sense. In addition to a misrepresentation of fact, proof of fraud requires evidence that the person to whom the misrepresentation was made believed it to be true, acted or refrained from acting based on that belief, and was injured as a result. Johnson contends, by contrast, that she did not believe the misrepresentations in the incident report to be true, that she filed a lawsuit based on her unbelief, and that she was injured by, as her psychiatrist, put it, her sense of "betrayal" (Appellants' Br. at 26), not by her acting in reliance on the misrepresentation. Concluding that Johnson presented a submissible case of fraud on these facts would be unprecedented.

Finally, Johnson contends that the Appellees did not argue lack of reliance to the circuit court. (Appellants' Br. at 27.) To the contrary, Defendants raised this argument below. (SR2912 ("Proof of fraud also requires evidence that Johnson relied on the report

to her injury.").) Johnson did not object to this issue being raised in a reply brief. To the contrary, at the hearing she argued that the Defendants' report omissions had successfully misled her and, when that statement was challenged by the circuit court, argued that she had relied on the report in various ways. (SR3133.) After the hearing, Johnson did not ask for an opportunity to further address reliance, even though the circuit court requested supplemental briefing on another issue. (SR2926.) On appeal, Johnson identifies no evidence concerning reliance that she possessed but was unable to present to the circuit court. Any error related to the presentation of this issue would be harmless given the inescapable contradiction between the requirement of reliance and (1) Johnson's contention that the misrepresentations in the report harmed her precisely because she recognized them to be untrue, and (2) her decision to pursue this lawsuit.

3. Whether South Dakota should recognize a tort based on its own Due Process Clause is moot because, in this case, such a tort would be barred by workers-compensation immunity.

Johnson asks this Court to recognize a new tort claim for violations of substantive due process based on South Dakota's Due Process Clause. The Court may avoid this constitutional issue, however, because, as couched by Johnson, a state substantive due-process claim concerning Ron's death would be barred by workers-compensation immunity.[3]

Johnson received, and continues to receive, workers-compensation benefits for Ron's death. Receipt of these benefits excludes "all other rights and remedies of the employee, the employee's personal representatives, dependents, or next of kin, on

[3] The circuit court did not rely on this argument, which was briefed below, but this Court may affirm summary judgment for any valid reason. *BAC Home Loans Servicing, LP v. Trancynger*, 2014 S.D. 22, ¶ 18, 847 N.W.2d 137, 142.

account of such injury or death." SDCL § 62-3-2. Johnson's receipt of survivor benefits therefore precludes her in her individual capacity and as the personal representative of his estate from "all other rights and remedies . . . on account of [Ron's] injury or death." *Id.*

The rationale for substituting workers-compensation benefits for the remedies provided by state-law based civil torts "is to provide an injured employee a remedy which is both expeditious and independent of proof of fault." *Harn v. Continental Lumber Co.*, 506 N.W.2d 91, 95 (S.D. 1993). It also provides "employers and co-employees [with] a liability which is limited and determinate." *Id.* To ensure that these legislative purposes are fulfilled, this Court "construes worker's compensation statutes liberally to provide coverage even when the worker would prefer to avoid it." *Id.* Johnson provides no persuasive reason why civil torts based on alleged violations of the South Dakota Constitution should not be subject to workers-compensation immunity, just like other state-law based civil torts.

The state substantive due-process tort that Johnson asks this Court to recognize is expressly made on account of Ron Johnson's death. (SR21 ¶ 113.) The workers-compensation immunity statute clearly and unambiguously excludes "***all*** other rights and remedies . . . on account of such injury or death." SDCL § 62-3-2 (emphasis added). The only exception is for intentional torts. *See id.* "'When the language in a statute is clear, certain, and unambiguous, there is no need for construction, and this Court's only function is to declare the meaning of the statute as clearly expressed.'" *Puetz Corp. v. South Dakota Dep't of Revenue*, 2015 S.D. 82, ¶ 16, 871 N.W.2d 632, 637 (quoting *State v. Clark*, 2011 S.D. 20, ¶ 5, 798 N.W.2d 160, 164). As this Court has recognized, if "the Legislature desired to limit the application and effect of SDCL § 63-3-2, it certainly

knows how to do so." *Hageman v. NJS Eng'g, Inc.*, 2001 S.D. 102, ¶ 6 n.4, 632 N.W.2d 840, 844 n.4. The Legislature unambiguously chose to exclude all remedies except intentional torts, leaving no room to permit civil torts based on state constitutional provisions that are not intentional torts.[4]

As argued by Johnson, her proposed substantive due-process claim would not qualify for SDCL § 63-3-2's intentional-tort exception. The federal courts have already held that, as a matter of law, Johnson cannot prove that Defendants' conduct shocked the conscience under the state-created danger theory of substantive due process. (Appellees' App. 051.) Johnson therefore asks not only that this Court recognize a new tort, she argues that the elements of the new tort should be less restrictive than the Eighth Circuit's conscience-shocking standard. (Appellants' Brief at 31.) Although Johnson has never identified what elements this new tort should have, any test less restrictive than the Eighth Circuit's conscience-shocking standard would necessarily fail to satisfy the intentional-tort exception, and would be barred by workers-compensation immunity.

As noted by Johnson, in the Eighth Circuit, a plaintiff alleging a substantive due process claim based on the state-created danger theory must satisfy a five-part test. (Appellees' App. 049.) The fifth element is that "in total, the [defendants'] conduct 'shocks the conscience.'" (*Id.*) Because this case involved circumstances where the Defendants had time to deliberate, this required Johnson to prove that the Defendants acted with "deliberate indifference" to Ron's safety. (*Id.* at 050.) Deliberate indifference means that the defendant "'was aware of facts from which the inference could be drawn

[4] Johnson's Section 1983 claim based on the federal Due Process Clause was not subject to workers-compensation immunity because federal law trumps state-law based immunities. *Martinez v. California*, 444 U.S. 277, 284 (1980) (conduct wrongful under Section 1983 cannot be immunized by state law).

that a substantial risk of serious harm exists, and he must also draw the inference.'" (*Id.* (quoting *Moore v. Briggs*, 381 F.3d 771, 773-74 (8th Cir. 2004)). It is equivalent to criminal recklessness. *Moore*, 381 F.3d at 773. Johnson acknowledged that deliberate indifference is a lower level of intent than actual intent to harm in her Eighth Circuit Reply Brief. (Appellees' App. 081 at n.3.)

Johnson's request that this Court adopt a test less stringent than awareness that "a substantial risk of serious harm exists" means that the tort she proposes would not qualify for the intentional-tort exception. With regard to the intentional-tort exception, this Court has held "'intent pointedly means intent.'" *McMillin v. Mueller*, 2005 S.D. 41, ¶ 13, 695 N.W.2d 217, 222 (quoting *Harn*, 506 N.W.2d at 95). A worker must therefore prove at least "'a substantial ***certainty*** that injury will be the ***inevitable outcome*** of employer's conduct.'" *Id.* (quoting *Jensen v. Sport Bowl, Inc.*, 469 N.W.2d 370, 372 (S.D. 1991)) (emphasis added). A substantial certainty that injury will inevitably follow is a more restrictive standard than the Eighth Circuit's standard of deliberate indifference.

In addition, the Eighth Circuit has equated its standard with criminal recklessness. In contrast, this Court has held that even reckless conduct does not satisfy the intentional-tort requirement. *Id.* ¶ 14, 695 N.W.2d at 222 ("Moreover, even though the employer's conduct is careless, grossly negligent, reckless or wanton . . . those acts still fall within the domain of workers' compensation."); *Harn*, 506 N.W.2d at 98 ("To establish an intentional tort of an employer, proof beyond that required to prove negligence and beyond that to prove recklessness must be established). Accordingly, Johnson's request that this Court adopt a less stringent substantive-due-process claim based on South

Dakota's Constitution is futile because such a claim would be barred by workers-compensation immunity.

4. Johnson's IIED and misrepresentation claims should also be barred by workers-compensation immunity because they are claims "on account of" Ron's death.

Johnson's claims for IIED and misrepresentation based on the allegation that the after-incident report misrepresented or omitted facts related to Ron's murder should likewise be barred by workers-compensation immunity because they would not exist but for Ron's death and there is a clear, strong nexus between these claims and Ron's death.[5] The IIED and misrepresentation claims therefore are "on account of" Ron's death. If such claims are not barred, injured workers or their family members could obtain workers-compensation benefits *and* avoid workers-compensation immunity simply by alleging that misrepresentations were made by the employer concerning the circumstances of that injury or death.

As noted, workers-compensation benefits exclude "all other rights and remedies" of employees or their family members "on account of [the employee's] injury or death." SDCL § 62-3-2. This Court has broadly construed the coverage terms providing benefits to employees and the corresponding immunity for employers. *Jensen*, 469 N.W.2d at 373 ("worker's compensation law is to be liberally construed to provide coverage, even when the worker doesn't want it"). A liberal construction in favor of workers-compensation benefits to the exclusion of tort liability "serves two important values: (1) it maintains 'the balance of sacrifices between employer and employee in the substitution

[5] The circuit court did not rely on this argument, which was briefed below, but this Court may affirm summary judgment for any reason appearing in the record. *BAC Home Loans Servicing, LP*, 2014 S.D. 22, ¶ 18, 847 N.W.2d at 142.

of no-fault liability for tort liability,' and (2) it minimizes 'litigation, even litigation of undoubted merit.'" *Fryer v. Kranz*, 2000 S.D. 125, ¶ 9, 616 N.W.2d 102, 105 (quoting 6 Larson's Workers' Compensation Law (MB) § 103.05[6] at 103-44 (May 2000)). This "[e]xclusiveness imparts efficiency to the worker's compensation system." *Id.* Consequently, "'[e]very presumption is on the side of avoiding superimposing the complexities and uncertainties of tort litigation on the compensation process.'" *Id.* (quoting 6 Larson's Workers' Compensation Law (MB) § 103.05[6] at 103-44 (May 2000)).

Accordingly, this Court has held that fault-based contribution or indemnity claims by third parties are claims "on account of" an employee's injury or death and are barred by workers-compensation immunity. *Hagemann v. NJS Eng'g, Inc.*, 2001 S.D. 102, ¶ 8, 632 N.W.2d 840, 845-46. This Court recognized that, after an employer paid workers-compensation benefits, permitting "[a]dditional exposure through the indirect method of a third-party action would be a blatant violation of expressed legislative policy.'" *Id.* ¶ 6 n.3, 632 N.W.2d at 844 n.3 (quoting *Phillips v. Union Pac. R.R. Co.*, 614 P.2d 153, 154 (Utah 1980)). In a concurring opinion, Chief Justice Gilbertson explained that a fault-based "claim for contribution is intimately tied to, and 'on account of personal injury or death.'" *Id.* ¶ 15, 632 N.W.2d at 846 (Gilbertson, C.J., concurring in result). In contrast, an indemnity claim based on a relationship, such as a contractual indemnity clause, "is not 'on account of personal injury or death'" because it is "a separate cause of action that arises 'independent of the underlying liability.'" *Id.* ¶ 16, 632 N.W.2d at 847 (Gilbertson, C.J., concurring in result).

Here, Johnson's IIED and misrepresentation claims are intimately tied to Ron's death. Her misrepresentation claim alleges that the DOC had a duty "to be forthright and complete in their analysis and reporting of the events and circumstances which led to the murder of RJ." (SR23 ¶ 129.) It further alleges that, by misrepresenting the circumstances of Ron's death, Johnson suffered damages. (SR24 ¶ 135.) The IIED claim similarly alleges that the DOC engaged in extreme and outrageous conduct by inaccurately representing the circumstances of Ron's death, and that the inaccuracies concerning Ron's death caused Johnson to suffer severe emotional distress. (SR21-SR22 ¶¶ 116-19.)

Johnson's IIED and misrepresentation claims are intimately tied to Ron's death because they would not have arisen but for his death *and* there is a strong factual nexus between those claims and Ron's death. Liability for each claim depends on the assertion that the DOC misrepresented the circumstances of Ron's death. Moreover, the impact of these alleged misrepresentations--and thus Johnson's damages--depends on the fact that they concerned the subject of Ron's death. Johnson's own statement of the facts demonstrates the connection as she devotes 15 pages to the circumstances leading up to Ron's death and less than two pages to the after-incident report. (Appellants' Brief at 3-19.) Moreover, Johnson admits that her "claims are based on the Defendants' conduct that contributed to the death of Ron Johnson and the Defendants' later efforts to cover up and misrepresent their involvement in the murder." (*Id.* at 20.)

In these circumstances, Johnson's IIED and misrepresentation claims are intimately tied to Ron's death and therefore fall within the definition of claims "on account of" his death. *See Pittman v. W. Eng'g Co.,* 813 N.W.2d 487, 498 (Neb. 2012)

(Nebraska workers-compensation immunity barred husband's NIED claim based on observing his wife's body following her on-the-job death because it would not have arisen but for his spouse's death and there was a clear, rational nexus between her death and his claim); *Maney v. Louisiana Pac. Co.*, 15 P.3d 962, 968 (Mont. 2000) (Montana workers-compensation immunity barred mother's IIED and NIED claims based on seeing his death in the hospital from workplace injuries because the claims would not have arisen but for her son's death and there was a clear nexus between the workplace injury and the claims).

This conclusion does not require the Court to hold that all IIED or misrepresentation claims by an employee or family member receiving workers-compensation benefits would be barred. The policies underlying workers-compensation immunity would not apply to an IIED or misrepresentation claim unrelated to a covered injury or death. Johnson's IIED and misrepresentation claims, however, have a clear and strong dependency on the circumstances of Ron's death, and thus her receipt of workers-compensation benefits should bar these claims. Allowing family members to receive workers-compensation benefits and simultaneously pursue tort liability merely by alleging that an employer misrepresented the circumstances of a workplace injury or death would destroy the quid pro quo of employer immunity in exchange for employee benefits without fault. Every presumption is against superimposing the complexities and uncertainties of tort litigation on the compensation process, and thus this Court should hold that Johnson's claims are barred by workers-compensation immunity.

5. Johnson's proposed new tort based on the South Dakota Constitution fails for multiple reasons in addition to workers-compensation immunity.

Although workers-compensation immunity provides a sufficient basis to affirm the summary judgment on Johnson's proposed constitutional tort, the circuit court correctly identified multiple other reasons why that claim fails as a matter of law. These reasons provide alternative grounds for this Court to affirm summary judgment on Johnson's substantive due-process claim.

Taking the circuit court's reasons in logical order, it first concluded that Count 3 did not assert an independent substantive-due-process claim under the South Dakota Constitution. (App. B29.) Second, even if Johnson had asserted such a state-law claim, it held that the South Dakota "Legislature has not created a private right of action for the denial of due process under our Constitution, and this court lacks the authority to do so." (App. B22 n.10.) Third, the circuit court held that, assuming South Dakota would adopt a state-law claim, the underlying right to substantive due process would be the same as that provided by the United States Constitution. (*Id.* B25-B26.) Pursuant to res judicata, the claim preclusive effect of the federal court's judgment on the Section 1983 substantive-due-process claim therefore barred Johnson's attempt to assert a claim based on the South Dakota Constitution's virtually identical language. (*Id.* B26.) Last, if res judicata did not apply, the circuit court stated that sovereign immunity would bar Johnson's proposed new tort just as it barred her wrongful-death and survival claims. (*Id.* B22 n.10.)

a. Johnson did not plead an independent claim based on South Dakota's Due Process Clause.

The circuit court correctly determined that Count 3 of Johnson's Complaint did not assert both a Section 1983 claim and an independent claim based on the South Dakota

Constitution. Count 3 of Johnson's complaint is titled "Count 3 – 42 U.S.C. § 1983." (SR19 ¶¶ 105-106.) In Count 3, the only express reference to a cause of action is "[t]hat 42 U.S.C. § 1983 provides a civil cause of action." (SR19 ¶ 107.) Count 3 also expressly refers to the state-created danger theory used by federal courts to evaluate Section 1983 claims based on the United States Constitution's Due Process Clause. (SR20 ¶ 110.) During the federal court proceedings, the parties referred to Count 3 as a federal Section 1983 claim. (Appellees' App. 055; Appellees' App. 073, 074, & 075.)

When Johnson asked for her state-law claims to be remanded to state court, she listed five state-law claims that did not include a substantive due process claim based on the South Dakota Constitution: "Johnson's wrongful death (Count 1) and survival claim (Count 2) stem from Ron's murder. In contrast, Johnson's claims for IIED (Count 4), NIED (Count 5), and misrepresentation / non-disclosure (Count 6) stem from the deceptive *After-Incident Report*." (Appellees' App. 076-77.) Similarly, on appeal, Johnson stated that she had alleged "a claim under 42 U.S.C. § 1983 and five state law claims." (Appellees' App. 079.) While litigating in federal court, Johnson never contended that Count 3 should also be remanded to state court because it included not only a Section 1983 claim but also a sixth state-law claim based on the South Dakota Constitution.

In addition, Johnson now contends not only that Count 3 should be construed to assert a claim based on the South Dakota Constitution, but that the elements of this claim should be different than the conscience-shocking test used in the Eighth Circuit to evaluate the state-created danger theory. A review of Count 3, however, reveals that its substantive allegations are limited to the state-created danger theory. (SR20 ¶¶ 110-12.)

If Johnson wished the circuit court or this Court to recognize a new tort based on the South Dakota Constitution with different elements than those used by the Eighth Circuit, it was incumbent upon Johnson to plead the elements of this proposed tort so that the Defendants could conduct discovery concerning those elements and present this Court with a complete record, including briefs concerning the wisdom of adopting the tort as proposed by Johnson. For all these reasons, the circuit court correctly concluded that Johnson's complaint did not allege an independent tort based on the South Dakota Constitution.

b. The Legislature has not created a private cause of action for alleged violations of South Dakota's Due Process Clause, so sovereign immunity precludes this Court from adopting Johnson's proposed tort.

The circuit court correctly concluded that, even assuming *arguendo* that Johnson had pleaded a new tort based on South Dakota's substantive Due Process Clause, the Legislature's decision not to create a private cause of action for violations of that Clause means the courts should not adopt such a tort. South Dakota's Constitution includes sovereign immunity and gives the Legislature the discretion to decide when the State may be sued. S.D. Const. Art. III, § 27 ("The Legislature shall direct by law in what manner and in what courts suits may be brought against the state."). For discretionary acts, "[a]n express waiver of sovereign immunity is required." *Adrian v. Vonk*, 807 N.W.2d 119, 123 (S.D. 2011). This means a constitutional provision or statute must expressly give plaintiffs the right to sue the State before civil torts are permitted. *Id.* Moreover, the authorization must identify in what manner and in what court suit may be brought against the State. *Id.*

South Dakota's Due Process Clause merely states that "No person shall be deprived of life, liberty or property without due process of law." S.D. Const., Art. VI, § 2. It contains no language waiving sovereign immunity, no language permitting civil actions for a violation, and does not identify any method or court where a civil action could be brought for a substantive due process violation. This means that the South Dakota courts are not free to recognize a new tort that would allow suits against the State based on alleged violations of South Dakota's Due Process Clause.

c. The circuit court correctly held that, pursuant to claim preclusion, the judgment on Johnson's federal substantive-due-process claim barred her from pursuing another substantive-due-process claim based on the South Dakota Constitution.

The circuit court correctly concluded that the claim preclusion aspect of res judicata bars Johnson's attempt to continue litigating a substantive due-process violation. "The preclusive effect of a federal-court judgment is determined by federal common law." *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008). The Eighth Circuit recognizes that one element of claim preclusion is that there must have been a "full and fair opportunity to litigate the matter in the proceeding that is to be given preclusive effect." *Costner v. URS Consultants, Inc.*, 153 F.3d 667, 673 (8th Cir. 1998).

Johnson contends that she did not have a full and fair opportunity to litigate her substantive-due-process claim in federal court. But significantly she does not contend that her ability to conduct discovery in federal court was restricted in any way. When the Defendants moved for summary judgment, Johnson did not contend that the motion was premature or submit a Rule 56(f) motion seeking further discovery. Rather, she responded to summary judgment with an 81-page Statement of Material Facts containing 406 numbered paragraphs. (Appellees' App. 060.) Her counsel submitted 28 exhibits

including excerpts from fifteen depositions, one interview, and two affidavits. (Appellees' App. 062.)

Judge Piersol considered all these materials, as well as supplemental materials submitted by Johnson, but nevertheless found that, even construing the facts in Johnson's favor, she could not prove that any of the Defendants were deliberately indifferent. (Appellee's App. 030 n.1, 043.) After Judge Piersol granted summary judgment, Johnson appealed to the Eighth Circuit. Johnson did not contend on appeal that she had been denied sufficient opportunity to gather evidence before summary judgment. The Eighth Circuit also reviewed the record most favorably to Johnson and did "not find the Warden acted with deliberate indifference in his transfers of Robert and Berget." (Appellees' App. 051.) Accordingly, the circuit court correctly determined that "the submissions and resulting judicial opinions from the federal litigation make it clear that the parties possessed and availed themselves of the opportunity to fully and fairly litigate the constitutional claim in federal court." (App. B28.)

Johnson contends, however, that the circuit court erred because she obtained an affidavit from Michael Thomas, a former cellmate of Eric Robert, after Judge Piersol granted summary judgment. Johnson's argument is misplaced. Whether she had a full and fair opportunity to litigate her substantive-due-process claim focuses on the opportunity she had to litigate that claim; not whether it is still possible to find additional evidence concerning that claim. If the ability to find one more potential item of evidence allowed a party to completely relitigate a claim, there would be no end to litigation. When the parties are identical in the two proceedings at issue, the Eighth Circuit has held that the "discovery of additional evidence does not afford [a losing party] 'a second

opportunity to prove a fact or make an argument relating to an issue previously decided.'" *Kent v. United Omaha Life Ins. Co.*, 484 F.3d 988, 995 (8th Cir. 2007) (quoting *Liberty Mut. Ins. Co. v. FAG Bearings Corp.*, 335 F.3d 752, 762 (8th Cir. 2003)).

Moreover, Johnson presented no evidence to the circuit court that she could not have obtained the affidavit from Michael Thomas before Judge Piersol granted summary judgment. To the contrary, Michael Thomas was known to be a potential witness before summary judgment because he was discussed during the deposition of Jesse Sondreal. (Appellees' App. 067, 068-69, 070.) Johnson discussed Thomas in her statement of material facts and brief in opposition to summary judgment, and never contended that she had been unable to locate him nor did she ask for additional time to obtain discovery from him. (Appellees' App. 057-58 ¶ 388; Appellees' App. 072.)

In any event, the affidavit that Thomas provided after summary judgment would not have changed the result. Thomas does not claim to have personal knowledge of Robert and Berget's plan to escape on April 12, 2011. Nor does he claim to know that any Defendant was aware of that plan. He merely claims to have warned various DOC personnel that Robert was dangerous ***in March 2009 and earlier***. (SR2567 to SR2568 ¶ 16.) A warning given over two years before the incident suggesting that Robert was dangerous and wanted to escape would be merely cumulative to the extensive record that Judge Piersol and the Eighth Circuit considered and held to be insufficient as a matter of law.

Johnson thus has not shown sufficient inability to obtain this evidence during the federal court proceedings or that her new evidence has sufficient weight to justify a finding that she did not have a full and fair opportunity to litigate in federal court. *See*

Liberty Mutual, 335 F.3d at 765 ("some degree of diligence must be shown to avoid the application of issue preclusion on a 'new evidence' theory where the parties in both actions are the same and there is no allegation that another party's actions prevented the introduction of the evidence by the estopped party in the initial litigation"). The circuit court correctly determined that Johnson had a full and fair opportunity to litigate her substantive-due-process claim in federal court.

Johnson contends that South Dakota decisions establish that discovering new evidence is an exception to res judicata. State law, however, does not control the effect of a federal judgment in a federal-question case. *Taylor*, 553 U.S. at 891. In addition, the South Dakota decisions Johnson cites did not recognize an exception to res judicata based on the discovery of a single item of evidence concerning an event that occurred before the first litigation began. Rather, they concerned issues that arose following the initial ruling. *In re L.S.*, 2006 S.D. 76, ¶ 11, 721 N.W.2d 83, 87 (state obtained new evidence that mother was unfit after court verbally ruled that case should be dismissed); *Lewton v. McCauley*, 460 N.W.2d 728, 731 (S.D. 1990) (res judicata did not apply to issues that arose as a result of the appellate ruling in the first case). Neither *In re L.S.* nor *Lewton* involved the discovery of new evidence concerning a pre-litigation event, and thus they do not help Johnson.

Johnson alternatively argues that res judicata should not apply to her claim based on the South Dakota Constitution because the federal litigation only concerned her Section 1983 claim. The circuit court rejected this argument because Johnson provided no authority that South Dakota's Due Process Clause has been construed to provide greater protection than the United States Constitution's Due Process Clause. To the

contrary, in *State v. Chant*, 2014 S.D. 77, 856 N.W.2d 167, this Court chose to align its interpretation of the South Dakota Due Process Clause with the United States Supreme Court's interpretation of the Federal Due Process Clause because there was no principled reason to interpret the identical language differently. *Id.* ¶ 10, 856 N.W.2d at 170. Pursuant to *Chant*, the circuit court correctly concluded that the right to substantive due process would be the same under the South Dakota Constitution as the United States Constitution.

If the two constitutions provide the same right to substantive due process, it then follows that the circuit court correctly determined that identity of claims existed and res judicata applied. In the Eighth Circuit, the test for determining whether claims are the same for purposes of res judicata is "'whether the wrong for which redress is sought is the same in both actions.'" *Daley v. Marriott Int'l, Inc.*, 415 F.3d 889, 896 (8th Cir. 2005) (quoting *Roach v. Teamsters Local Union No. 688*, 595 F.2d 446, 449 (8th Cir. 1979). South Dakota uses the same test: "'whether the wrong sought to be redressed is the same in both actions.'" *Clay v. Weber*, 2007 S.D. 45, ¶ 13, 733 N.W.2d 278, 284 (quoting *Black Hills Jewelry Mfg. Co. v. Felco Jewel Indus., Inc.*, 336 N.W.2d 153, 157 (S.D. 1983)). Here, as the circuit court recognized, the wrong that Johnson is trying to redress based on the South Dakota Constitution is the very same wrong she litigated and lost in federal court: the alleged deprivation of Ron's life without due process of law.

In fact, Johnson relies on the very same paragraphs of her Complaint--Count 3--to support both causes of action. Because the wrong sought to be redressed is identical, the claim-preclusion aspect of res judicata bars Johnson's attempt to assert another substantive due process claim, even if one assumes *arguendo* that this Court would adopt

different elements for a substantive due process claim based on the South Dakota Constitution than the elements the Eighth Circuit uses for Section 1983 claims based on the United States Constitution. *See Clay*, 2007 S.D. 45, ¶ 15, 733 N.W.2d at 284-85 (claim-preclusion aspect of federal judgment on inmate's Section 1983 claim concerning prison's policy that inmates could not own computers barred him from subsequently pursuing due process claim based on South Dakota Constitution).

d. The circuit court correctly recognized that sovereign immunity would apply to Johnson's proposed constitutional tort.

The circuit court held that, if res judicata did not apply, then sovereign immunity would bar Johnson's proposed state substantive-due-process claim pursuant to the same analysis it had earlier applied to Johnson's wrongful-death and survival claims. (App. B22 n.10.) The circuit court recognized that this case involved two forms of sovereign immunity. The first is the statutory sovereign immunity available to the State and state employees[6] "for any injury caused by or resulting from: (1) An escaping or escaped prisoner." SDCL § 3-21-9. Here, it is undisputed that Berget and Robert murdered Ron as part of a failed escaped attempt. (SR117 ¶ 12; SR1266 ¶ 12.) Johnson's substantive-due-process claim based on Ron's death therefore is a claim for an injury caused by or resulting from escaping prisoners.

Constitutional sovereign immunity would also apply. It is well established that, absent an express waiver of sovereign immunity, discretionary decisions by state employees are protected by sovereign immunity. *Truman v. Griese*, 2009 S.D. 8, ¶ 20, 762 N.W.2d 75, 80 (State employees are generally immune from suit when they perform

[6] As the circuit court noted, the Legislature has extended immunity for injuries within the scope of this statute to private individuals as well, so SDCL § 3-21-9 "appears to contemplate sovereign and 'non-sovereign' immunity." (App. B10 n.5.)

discretionary functions, but not when they perform ministerial functions.). As the circuit court correctly concluded, the administrative decisions that Johnson contends contributed to Berget and Robert's escape attempt are expressly defined as discretionary by statute:

> No inmate has any implied right or expectation to be housed in any particular facility, participate in any specific program, or receive any specific service, and each inmate is subject to transfer from any one facility, program, or service at the discretion of the warden of the penitentiary.

SDCL § 24-2-27. This Court has recognized that "[i]mmunity is critical to the state's evident public policy of allowing those in charge of jails to make discretionary decisions about prison administration without fear of tort liability." *Hancock v. Western South Dakota Juvenile Servs. Ctr.*, 2002 S.D. 69, ¶ 15, 647 N.W.2d 722, 725.

Johnson has noted that constitutional sovereign immunity does not apply to intentional torts. *Hart v. Miller*, 2000 S.D. 53, ¶ 37, 609 N.W.2d 138, 148. As couched by Johnson, however, the tort she asks this Court to adopt would not be an intentional tort. She urges this Court to use a less stringent intent standard than the deliberate indifference standard used by the Eighth Circuit to determine whether conduct shocks the conscience. As explained in the workers-compensation section, deliberate indifference does not require intent to harm, but rather merely requires an awareness that "a substantial risk of serious harm exists." (Appellees' App. 050.) Consequently, a new state constitutional tort with an even less stringent intent standard than deliberate indifference would clearly not be an intentional tort and would therefore be barred by constitutional sovereign immunity.

CONCLUSION

Johnson did not plead a claim based on a violation of the South Dakota Constitution, and even if she had, it would be barred by the dismissal of her federal constitutional claim and by sovereign immunity. Of Johnson's state-law claims based on the after-incident report, only two are at issue on appeal. Her claim for IIED fails on the merits because the way in which the after-incident report was written was not extreme and outrageous, and her fraud claim fails because she cannot prove both intent to deceive and reliance to her detriment. In addition, all three claims at issue on appeal are barred by the exclusivity of workers-compensation benefits. The Appellees respectfully request that the judgment be affirmed.

Dated this ____ day of October, 2016.

WOODS, FULLER, SHULTZ & SMITH P.C.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 2010, Times New Roman (12 point) and contains 9,293 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this ____ day of October, 2016.

WOODS, FULLER, SHULTZ & SMITH P.C.

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I hereby certify that on the _____ day of October, 2016, I electronically served via e-mail, a true and correct copy of the foregoing Brief of Appellees to the following:

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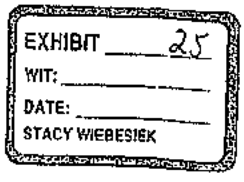
APPENDIX

SD Department of Corrections After-Incident Report

Homicide of Senior Correctional Officer Ronald "RJ" Johnson and Escape Attempt by Inmates Rodney Berget and Eric Robert

May 9, 2011



SD Department of Corrections
After-Incident Report

Table of Contents

Report on the Homicide of Senior Correctional Officer Ronald "RJ" Johnson and the Escape Attempt by Inmates Rodney Berget and Eric Robert May 9, 2011

On April 12, 2011 two inmates made an unsuccessful escape attempt from the South Dakota State Penitentiary (SDSP) in Sioux Falls. One of the two inmates was wearing portions of a correctional officer's uniform. A search of the prison resulted in the discovery of Senior Correctional Officer Ronald E. Johnson, who was severely injured in the Prison Industries (PI) Building. Officer Johnson was transported to a Sioux Falls hospital where he was later pronounced dead. Inmates Rodney Berget and Eric Robert have each been indicted for first degree murder, first degree murder-kidnapping and simple assault.

This report provides analysis and an overview of the events of April 12, 2011 and the days after Senior Correctional Officer Johnson's murder. It is organized in multiple sections, some containing copies of existing reports and documents. This report communicates the events of April 12, 2011, as well as post-incident actions and responses. It also provides contextual information associated with the major incident and the recommendations resulting from the after action review.

1. Narrative Summary from Major Incident Report

The following information is an excerpt of the Narrative Summary of the Major Incident Report submitted by Associate Warden [redacted] and [redacted] of SDSP. A full copy of the Major Incident Report is included as *Attachment 1*. In both the attachment and this narrative, names have been redacted.

> "On April 12, 2011, at approximately 10:45am, Officer [redacted] was relieving officer [redacted] at the West Gate for chow. The food truck showed up and needed to come into the facility. At this time she notified Cpl. [redacted] to shakedown/escort the truck into the facility. Once the truck was inside, there was what appeared to be an "officer" pushing a hand cart with one large cardboard box wrapped with packing tape along with a smaller box. The "officer" was coming from the PI building walking towards West Gate. Officer [redacted] noticed the "officer" had his head down and was wearing a baseball cap. At this time what appeared to be an "officer" entered through the inside gate which was still open from when the truck came inside.

Once in between the gates she realized the "officer" did not swipe his ID badge. Officer [redacted] then stepped outside of the West Gate Control to remind the "officer" to swipe his badge. The "officer" stated he forgot his badge. Officer [redacted] asked Cpl. [redacted], who was also in between the gates, if he recognized the staff. Cpl. [redacted] stated he did not. Officer [redacted] then asked the "officer" his name and he responded "[redacted]". Officer [redacted] asked Cpl. [redacted] if he was related to the "officer" to which he responded he didn't think so. At this time the Cpl noticed that the "officer" was wearing a white t-shirt under an oversized officer jacket and oversized pants. Cpl. [redacted] requested for the OIC to be called to the West Gate. Officer [redacted] called for an OIC [officer in charge] to step to West Gate.

Immediately after the call on the radio, inmate Robert, Eric #46127 who had the officer uniform on and inmate Berget, Rodney #41951 who was hiding in the large box, began to assault Cpl. [redacted]. Officer [redacted] called a Code Red Code 3 at West Gate and Officer [redacted] was in the process of returning to his post. Cpl. [redacted] ended up in a fetal position as the inmates assaulted him. Officer [redacted] took the AR 15 out of West Gate Control and yelled to the inmates to stop. Both inmates responded "Go Ahead and Shoot!". When staff started to arrive Inmate Berget began to swing a staff radio microphone and inmate Robert began to climb inside of the outside gate. Officer [redacted] hit inmate Robert in the hand with the stock of the weapon to prevent inmate Robert from getting any further into the razor wire in the southwest corner of the outside gate.

Associate Warden [redacted], Major [redacted] and others reported to the Code at West Gate. Once AW [redacted] got to the inside gate he observed Cpl. [redacted] with his back towards [redacted] with blood on his right forearm. [redacted] yelled for the gate to be opened. Officer [redacted] opened the gate. [redacted] stepped in between the gates and gave directives to the inmates to get on the ground. Inmate Berget hesitated and Inmate Robert jumped from the razor wire. Both inmates were taken to the ground by a number of staff. Inmate Berget was escorted to the SHU and Inmate Robert was taken to Health Services with 2 small cuts on his right hand from the razor wire.

Knowing that an inmate had a staff uniform, a search for a missing staff was initiated in PI. PI Supervisor [redacted] found officer Ron Johnson in PI on the floor unresponsive, on his stomach, in a large pool of blood, with his head wrapped with shrink wrap, dressed only in his socks, shirt, and underwear. At approximately 10:56am a Code Red Code 5 was called in the SDSP PI Bldg. Immediately the ambulance was called. Staff noticed a large open wound on his head. Immediately Sgt. [redacted] removed the shrink wrap from around Officer Johnson's head. Sgt [redacted] began chest compressions while officer [redacted] began breathes with a face shield. Captain [redacted] requested the AED. Staff arrived with the AED along with Health Services. The AED was hooked up and advised no shock. CPR was resumed by staff until paramedics arrived at approximately 11:05am. Paramedics left the Penitentiary with Officer Johnson at 11:17am.

Cpl. [redacted] was taken to the emergency room at Avera McKennan Hospital. He had bruising around his left eye, his upper and lower lips were swollen, red knot on the back of his head, and bruising on the left chest area. Cpl. [redacted] returned to the prison.

After inmates Berget and Robert were detained, the outside perimeter was secured with weapons and staff. Emergency count was initiated for staff and inmates. Count was cleared at 12:10pm.

Officer Johnson was pronounced dead at 11:50am at Sanford Hospital.

Inmates Berget, Rodney #41951 and Robert, Eric #46127 were transported to the Minnehaha County Jail.

Located near where Officer Johnson was assaulted was a 2 foot pipe that appeared to be used as the weapon and Inmate Berget's prison identification card.

The State Penitentiary initiated lockdown procedures until Wednesday April 13, 2011. During the lockdown procedures, inmates were served meals in their cells."

The West Gate Control Room is located above the inner and outer gates of the West Gate area. During this incident, Officer [redacted] and Officer [redacted] were in the West Gate Control Room and on the catwalk outside the control room which is above the gates and above the razor wire on the top of the outer (south) gate. Attachment 2 is an aerial photograph of the State Penitentiary/Jameson Annex prison complex identifying the West Gate and other areas pertinent to this report.

The State Division of Criminal Investigation (DCI), the Sioux Falls Police Department, the South Dakota Highway Patrol, and the Minnehaha County Sheriff's Department responded and provided assistance in securing the outside perimeter. The Sioux Falls Police Department transported inmates Rodney Berget and Eric Robert to the Minnehaha County Jail.

The State Penitentiary initiated lockdown procedures Tuesday, April 12, 2011. Lockdown continued April 13 with step down on the 14th and the Penitentiary returned to normal operations on the morning of Friday, April 15, 2011.

The DCI is serving as the lead criminal investigative agency. The criminal prosecution of inmates Berget and Robert is being conducted by the Attorney General's office.

2. Prison Industries Building

The Prison Industries Building (PI Building) where Officer Johnson was murdered is located within the secure perimeter of the South Dakota State Penitentiary. See *Attachment 2 (PI #1)*. It is a two-story building located in the northeast section of the group of buildings making up SDSP. The PI Building houses a sign shop, machine shop, license plate shop, and laundry on the first floor. The Braille/upholstery shop, cabinet and custom furniture shop and print/book bindery shop are located on the second floor. This PI Building was constructed in 1905-06 with additions in 1916-18 and again in

1929-30. It reflects the old linear design of prison construction, with a long hallway running most of the south side of the building with the shops generally placed on the north side of the building with access from the hallway. As of April 12, 2011, one officer and eight shop foremen were assigned to this building. *Attachment 3* is a map of the first floor of the PI Building.

The site of the assault on Officer Johnson is one of three PI buildings on the State Penitentiary/Jameson Annex prison complex. There is also what is referred to as PI #2 or the "new PI building" located in the East Yard of the State Penitentiary and a PI building located adjacent to the Jameson Annex (Jameson PI).

Approximately 144 inmates are assigned to work in the original PI Building during a typical work day. Some of these 144 inmates work part-time in Prison Industries and attend school or programming part-time. Twenty of the 144 are laundry workers, either full or part-time. At any given time, the number of inmate workers in the PI Building is between 100 and120.

3. Staffing and Post Assignments in PI Building

Each of the shops in the PI Building and the prison laundry has a prison shop foreman assigned to supervise the operations of their respective shop. There are eight prison shop foremen assigned to work in the PI building.

On April 12, 2011, in addition to the eight shop foremen, there was one correctional officer post in the PI Building. This post was responsible to patrol the building hallways and common areas of the building and monitor inmate traffic in and out of the building.

Correctional Officer Johnson was in an "Early Rec Crew" position. Rec Crew positions assist with running daily recreation periods and daily transports of inmates to various appointments (medical and court) and transports between facilities. "Rec Crew" officers also assist with covering the dining hall and relieving staff for meals for those working the wall towers and cell halls. Tasks included are counting inmates, making cell hall rounds, and completing daily logs, administering UAs (urinalysis) and breathalyzers, conducting pat downs and strip searches, and disciplinary reports. This position works all areas of the institution and provides support in areas that need to be covered due to sick calls, vacation, training, and other absences. On April 12, Officer Johnson was assigned to the PI Building correctional officer post. While the post in Prison Industries was not his regular post, by nature of his assignment as a Rec Crew officer, he worked many different institutional posts.

Specific duties of Correctional Officer posts are documented in post orders. Post orders are written documents for correctional posts in the institution which provide specific

instruction and guidance to staff on the functions and duties of the post. *Attachment 4* is a copy of the SDSP PI Building Post Order.

While each prison shop foreman has duties unique to his or her shop, the following are common responsibilities of these foremen: supervising inmates, writing passes, accounting for tools, training inmates on job duties, establishing business relationships with vendors and prison industries customers, maintaining HAZMAT materials, attending staff briefings, controlling contraband by performing random shakedowns of their area, and monitoring and controlling the quality of products being produced and delivered to customers. Prison shop foremen receive pre-service and annual in-service training.

4. Location of the murder of Senior Correctional Officer Johnson

The correctional officer assigned to the PI Building had an office area ("old office") east and slightly north of the "Main PI access/Exit" and adjacent to an area used for storage of industry supplies and equipment *(see Attachment 3)*. Officer Johnson was found toward the back of this storage area behind some pallets of wood. This is not an area where the officer assigned to this post would normally be located during his duties.

5. Inmate movement

It is not possible to eliminate inmate movement within the Penitentiary. Federal case law holds it is not constitutional to isolate all prisoners convicted of a violent offense as a default incarceration practice. Unfortunately, two-thirds of Penitentiary inmates are incarcerated for violent offenses, and more than two hundred have an escape history.

There are structured inmate release/ring out times for meals, recreation and programming (school, religious activities, work and treatment). Schedules for all activities are posted in the housing units and on the internal prison network. Passes are issued by staff when inmates are called to a specific area (health services, law library, chapel, etc). Inmates are notified of approved movement via loudspeaker. If an inmate does not arrive to a designated location within the designated time, the officer in charge is notified, and the inmate is located.

The staff monitors inmate movement by examining passes and remaining alert for suspicious inmate movement. Inmates are subject to random pat searches, walk through metal detectors, UAs, and breathalyzers. Inmates are assigned seating for meals in the dining hall as directed by staff.

Inmates must follow the inmate dress code which states inmates must wear their inmate identification cards clipped on the front of their shirt. The ID card contains a photo of the inmate with his height, weight, and date of birth listed. Inmate workers wear the appropriate color uniform that designates where the inmate works: red (on the housing unit), green (off the housing unit), and white (kitchen). PI workers wear khaki shirts.

6. Berget's and Robert's access to PI Building

Inmate Berget was an orderly responsible for recycling and assisted with laundry carts as assigned by the unit staff. Inmate Robert was a laundry orderly. These positions require movement within the walls of the State Penitentiary. Inmate laundry orderlies leave their assigned housing units and move the laundry through the PI building to the laundry and are observed by the laundry supervisor upon arrival. Berget and Robert were housed in West Hall of the State Penitentiary. Inmate Berget was approved to move between West Hall and the recycling area located next to the PI building. Inmate Robert was approved to move between West Hall and the laundry. Robert and Berget, when assigned to assist with laundry, were responsible for delivering dirty laundry from West Hall to the laundry and retrieving clean laundry for West Hall. When laundry runners leave their cell hall, they walk across the prison yard to the PI Building, enter and walk down the hall of the first floor of the PI Building (past the office and storage area) to the laundry which is located on the far east end of the first floor of the PI building. They are observed and supervised by the prison shop foreman in the laundry as they drop-off and pick-up laundry. At that time, they would normally then return to the cell hall with the clean laundry. This round trip between the cell hall and laundry typically occurs six times each weekday morning and 10-12 times each weekday afternoon.

The prison shop foreman supervising the laundry puts out a schedule for the orderlies indicating times, items (whites, bedding, and colors) and days for laundry.

Recycling is typically moved from cell hall to the PI building once each weekday morning and once again each weekday afternoon. Recycling orderlies collect all inmate garbage from the cell hall and sort for recycling.

It is not uncommon for unit staff or correctional officers to direct an inmate worker to assist with other duties. If inmates are employed but their primary job has down time, staff frequently will instruct them to start other work rather than allow the inmate to remain idle.

7. Security Audits, Inspections and Controls

South Dakota Department of Corrections (SDDOC) adult institutional staff, trained by the National Institute of Corrections (NIC), annually conduct security audits of institutional procedures throughout SDDOC adult facilities. Penitentiary staff members have been utilized in other correctional facility audits in the state of South Dakota and in other states.

Staff members walk through each cell on each housing unit daily to search for contraband and ensure that all housing rules are being followed. Staff members conduct weekly maintenance inspections of their units and cells. The Multi-Disciplinary Shakedown Team (MDST) searches ("shakes down") different areas of the Penitentiary at different times each week. The MDST consists of 20 plus trained staff from different departments working at the Penitentiary. Penitentiary staff completes urinalysis testing and breathalyzers to deter and detect alcohol or drug use by inmates. Procedures are in place for this testing to occur on each shift. The staff regularly searches "hot spots" or places at risk for making homemade alcohol or other contraband concealment.

The Warden conducts rounds every weekday morning, Monday through Friday, of all the units. The Warden talks with staff and the inmate population, gauges how the units are functioning and observes the cleanliness and order of the facility. While the Warden periodically will conduct these rounds on weekends and holidays, a senior staff member will typically do the weekend rounds. One day a week, the Warden does an in-depth inspection of the facilities, visiting every cell front, the prison industry buildings and Coolidge school. Every week he also visits administrative and disciplinary housing units and makes himself available for staff working those areas and for every inmate housed in these segregation units. Three times a week the Warden personally observes the meal service to monitor quality and quantity and to ensure contract compliance. Twice a week, the staff tests the cell bars throughout the facilities by pounding a rubber mallet against them to ensure their stability. The SDSP has one canine trained in the detection of tobacco and cell phones and a second canine trained in the detection of drugs.

The SDDOC participates in the Performance-Based Measures System (PBMS) a nationwide automated information system developed by the Association of State Correctional Administrators (ASCA) Performance Measures Committee (PMC) to translate the missions and goals of correctional agencies into a set of uniform measurable outcomes. As a participant in PBMS, the SDDOC has outcome measures of how well facilities are meeting correctional responsibilities and how their performance compares with other participants. The PMC establishes uniform indicators of performance and measures. The current ASCA PBMS performance standards are public safety, institutional safety, substance abuse, mental health, academic education, healthcare and justice. For each standard, there are uniform measures of performance,

and for each measure there are a variety of uniform key indicators. *Attachment 5* is a sample of PBMS measures for the SDDOC in calendar year 2010.

8. Classification of Inmates

To determine the best management of inmates, the SDDOC uses standard classification systems. The custody classification system is predominately a risk-based system, but policy allows for some mitigation or addition of risk factors and for institutional placements based on factors in addition to risk. The classification system is an objective system, highly structured through policy, training, data collection, and standardized procedures across adult facilities.

Inmates are classified to one of four custody levels: maximum, high medium, low medium and minimum. Risk levels are based on points assigned to rankings in five areas: current offense seriousness, length of sentence remaining, incidence of violence, institutional risk behavior, and escape profile. Crime of conviction does not always correlate with institutional violence. There are inmates serving sentences for non-violent offenses who have violent prison conduct, and there are inmates in prison for violent offenses who don't have a history of violence within prison. In addition to these risk factors, actual risk behavior (institutional rule infractions) and administrative risk factors can impact risk and ultimately, final custody level.

In addition to final custody level, the classification system also uses a placement tool to identify issues, in addition to risk, that impact facility placement of the inmate. These issues include separation requirements, medical needs, presence of pending charges, and administrative factors regarding institutional adjustment.

The custody classification system utilized by the SDDOC was developed in the mid-1990s through a technical assistance grant funded by the National Institute of Corrections (NIC). The system is reviewed annually through policy review. The DOC Office of Classification and Transfer issues annual reports of classification activity. The classification system was audited internally in 2008 and is scheduled for a subsequent audit this year. In 2007, a consultant specializing in inmate classification systems, funded through a NIC technical assistance grant, reviewed the custody classification system and determined the system was sound and all of the items being used met national standards.

In addition to oversight and review of the overall classification program, individual classification packets are peer-reviewed and as directed by policy, certain classification decisions require ascending supervisory approval. For example, prior to inmate classification to minimum custody, approval is required by either a deputy warden or an associate warden. Additionally, prior to facility placement based on administrative

factors, approval is required by the warden, the DOC director of classification and transfer, and a deputy warden or an associate warden.

Initial classifications are completed by case managers within the admissions and orientation units. Reclassifications are completed by the case manager of the housing unit where the inmate lives. Every classification is subject to audit by other case managers to ensure quality control and assure proper procedures are followed. Each inmate is classified at least annually.

9. Profile of Inmates Housed at Penitentiary

There are 767 individual offenders currently housed at the State Penitentiary. Twenty-three are parolees under the community transition program or under extended detainment and 744 are inmates. Of the 744 inmates, 67 are in specialized housing (disciplinary segregation or special needs). Of the 677 inmates who are housed in general population, six are minimum custody, 159 are low-medium custody, 465 are high-medium custody, and 47 are maximum custody.

To increase chances of rehabilitation, to require productive use of time, and to reduce recidivism, general population inmates are encouraged to attend treatment, work, school, religious programming, and recreation. Inmates may participate in a number of religious and cultural activities within the facilities in Sioux Falls, led by over forty trained volunteer chaplains. Inmates are able to complete their GED and/or take cognitive-behavioral change classes and electives such as job search, Thinking for a Change, computers, financial responsibility, general safety, food safety, 3M building maintenance, and independent studies.

Of the 677 general population inmates housed at the State Penitentiary, 456 are incarcerated for a violent offense, 203 have escape points counted on their classification, and a majority of the 677 have multiple felony convictions. The average number of felony convictions for general population inmates at the State Penitentiary is 2.3. There are 56 inmates serving a life sentence housed in the State Penitentiary. System wide, there are 790 male inmates with escape points counted on their classification and 1,384 incarcerated for a violent offense.

10. Classification of Inmate Rodney Berget #41951

Inmate Berget is a 48-year old male serving a life sentence for kidnapping from Meade County. He was originally charged on June 11, 2003 with kidnapping (three counts), second degree rape, first degree robbery, first degree burglary and commission of a

felony while armed with a firearm, aggravated assault, and possession of stolen property. In addition, an Information for Habitual Offender [multiple felonies on record] was filed. On December 2, 2003, he pled guilty to kidnapping. The Information for Habitual Offender and the other charges were dismissed.

Inmate Berget has 4 escape incidents on his record: 7/7/1984 escaped from the SDSP Minimum Unit (Cottage); 5/26/1987 escaped from the Penitentiary Recreation Building; 7/17/1987 escaped from a van transport and on 10/23/2003 Berget assisted another inmate trying to escape from Lawrence County Jail.

Berget is a maximum security inmate who, prior to April 12, 2011, had been housed at the State Penitentiary continuously since September, 2005 and for periods of time in 2004. His last classification was 12/17/2010.

Inmate Berget has worked in the institution in various orderly positions. Berget's inmate conduct did not show a history of threats or incidents of violence towards staff or other inmates.

11. Classification of Inmate Eric Robert #46127

Inmate Robert is a 46 year old male serving an 80 year sentence for kidnapping from Meade County. He pled guilty to the charge. His background contains one other offense of shoplifting in 1982, which was dismissed.

His last classification was on 4/15/2010. He is a maximum security inmate who had been housed at the State Penitentiary continuously since June 2009 and for periods of time in 2006 and 2007.

Inmate Robert was written-up for attempted escape in May 2007. Special Security received information that a lock in the West Hall Shower Room had been cut. Upon investigation, the hasp ring on the fan room door to which a padlock had been secured was cut and patched with JB Weld [soft compound]. This infraction was handled through the inmate disciplinary system. Robert was found to have committed a major prohibited act and served 45 days in disciplinary segregation. He lost his job as a shower orderly. The door in question could not have aided in an escape attempt as it merely led to a further secure location.

Inmate Robert's institutional work history has involved mostly kitchen, laundry, and various orderly positions. Robert's inmate conduct did not show a history of threats or incidents of violence towards staff.

12. Job Assignments

Penitentiary unit staff manages inmate work lists. As soon as an inmate arrives at a housing unit, his name is added to the bottom of the work list. Once a position becomes available in the shops, kitchen, housing unit, school, chapel, or other locations, the unit staff offers the position to the next appropriate inmate on the list. If an inmate receives a major rule infraction, disciplinary action may include the loss of his job. Inmates who choose not to work while serving their sentence may be subject to a major rule infraction. Unit staff members assign a work position to inmates based on the inmate's institutional adjustment, length of sentence, successful behavior, treatment and educational needs, and skill set.

Inmate Berget was an orderly responsible for recycling the aluminum cans, cardboard and paper products, and other materials, from the West Hall housing unit. He would transport the recycling items from West Hall to the recycling bins located outside the PI building. Inmate Berget was also assigned by unit staff to assist with laundry.

Inmate Robert was a laundry orderly. He was responsible for delivering dirty laundry from West Hall to the laundry and retrieving clean laundry for West Hall.

13. Unit Staff

Unit staff is comprised of a unit manager, unit case manager, and unit coordinator. The unit manager is responsible for the operations of the inmate housing unit. The unit case manager is responsible for the classification of each inmate on the housing unit and assists the unit manager with responsibilities as assigned. The unit coordinator is responsible for managing the accounts, visit lists, disciplinary issues, clothing needs, and work lists for the inmates on the unit.

14. Use of Force Procedures

During Berget's and Robert's attempted escape, staff utilized the appropriate level of force necessary to control the situation and prevent the escape. Although lethal force could have been warranted, the staff chose to use less than lethal force. SDDOC Policy on Use of Force outlines that staff could have shot Berget and Robert to prevent their escape and to prevent further injury to staff. While SDDOC policy authorizes use of lethal force for this type of situation, and the responding staff would have been justified in using lethal force, they chose to contain the situation with non-lethal force. Officer [redacted] recognized the seriousness of the situation and chose not to discharge his

weapon. Officer [redacted] determined that discharging his weapon could have risked injury to staff in close proximity. Instead, Officer [redacted] used the stock of his weapon to hit inmate Robert's hand to prevent him from getting any further into the razor wire. When staff responded to the Code Red Code 3 at the West Gate on 4/12/2011, the inmates were not following instructions given. Staff used hands-on procedures, placed the inmates on the ground, and applied restraints.

15. Radio/Body Alarm Policies

All staff and volunteer chaplains entering the secured facilities must have in their possession either a radio or body alarm. Staff are trained on radio procedures during pre-service and in-service. *Attachment 6* is a copy of the procedures for radio emergency call codes and response to body alarms.

16. Staff Training

All staff are required to attend SDDOC in-house pre-service and annual in-service training. This applies to contract and other agency staff assigned to SDDOC adult facilities, including the civilian prison industry supervisors in the new PI building and the Jameson PI building.

A. Pre-Service

Pre-service consists of three weeks of classroom training and four weeks of on-the-job training for uniformed staff. Classroom training consists of a basic overview of working with offenders, policies, and procedures. Classes include supervision of inmates, basic principles of security, code of ethics, use of force, communication, con-games, CPR, suicide awareness, emergency response, Prison Rape Elimination Act, weapons training, searching principles, pressure point control tactics (PPCT), cultural awareness, first aid, and other classes to help employees gain a basic understanding of supervising inmates. Staff are on a six-month probationary period following hire.

On-the-job training (OJT) gives the employees a more in depth understanding of how the classroom knowledge is applied to their actual job. While on OJT, the new staff members are assigned a mentor and work in various areas of the institution. Staff members are trained on the procedures of the various posts throughout the facilities.

B. In-Service

The 40 hours of annual in-service training consists of mandatory refresher classes such as emergency response/use of force, CPR, principles of security, code of ethics, suicide awareness, con-games, cultural diversity, policy review, and re-certifications. In-service curriculum is also tailored to address the current needs of the facility at the time of the training and provide sessions to fill those needs, such as team building and security threat groups.

C. Firearms Training

Senior staff, unit staff and correctional officers are certified annually and tower staff are certified quarterly on the use of the following firearms: AR-15 rifle, 38 revolver, and shotgun.

17. Staff/Inmate Ratios

On April 12, 2011 there were nine staff working in the PI building: one correctional officer and eight prison shop foremen. No Penitentiary correctional officer positions were cut in the FY 2012 budget.

FY 2012 Staff to Inmate Ratios
1 officer per 5.16 inmates
1 staff per 4.28 inmates

18. Employee Assistance

Staff members involved with the April 12, 2011 incident attended several Critical Incident Stress Management sessions. Senior staff and managers met with individual staff members. Mental health staff and volunteer chaplains were made available for all staff. Staff who wished to attend the memorial service were able to do so. Bishop [redacted] of the [redacted] has offered services to the staff through [redacted]. The staff has been directed to human resources for assistance in retaining services. [redacted], victim witness specialist, has been given names of staff members to contact. Supervisors have been directed to reach out to staff who are struggling to cope with the incident. The senior staff has held several informational briefings to keep the staff informed on events, changes, and how to get help.

19. After-Incident Action Plan

In the weeks since the incident, SDDOC has made an evaluation of the incident. Within hours of the incident, changes were made to the facilities and operations of the Penitentiary. Additional changes have been made in the days and weeks since the incident. **All but one of the recommendations offered below have been fully implemented.** The recommendations have been approved by the Governor as part of an intensive and sustained collaboration between SDDOC and his office. The following are after-incident action plan recommendations from the major incident of the Berget/Roberts escape attempt and murder of Officer Ron Johnson:

1. **Route all routine foot traffic through the Main Control Room.** The escape was attempted at the West Gate, a double gate which creates a sally port allowing the opening of only a single gate at a time. The West Gate is the only vehicle gate for the State Penitentiary, but in the past has also been used for foot traffic. To improve security and to better control foot traffic into and out of the Penitentiary, all foot traffic is now routed through the Main Control Room, unless an exception is granted by an authorized official. Implemented 4/13/2011.

2. **Reduce access points into and out of Prison Industries (PI) Building.** All buildings within the Penitentiary grounds were evaluated to determine the optimal number of entrances. For example, the PI Building has a total of nine possible building egress points, four overhead doors for delivery and five pedestrian doors. At the time of the assault, as was typical, two of the pedestrian doors and one of the overhead doors were open in the PI Building. To improve security and to better control entrance and egress to this building, traffic has been limited to only one access point. Implemented 4/14/2011.

3. **Install additional cameras.** An evaluation was completed of all the shops, school, hallways, and other rooms within the Penitentiary to determine the proper degree of electronic surveillance in each of those areas. Although a more comprehensive analysis and placement plan is necessary, a preliminary analysis suggests that 90-110 new cameras should be installed, including approximately 70 in the PI Building, six in PI #2, 32 in Coolidge School, two at the Jameson Vehicle Gate, and four at the West Gate. This will provide a higher degree of electronic surveillance within the Penitentiary. Initial evaluation implemented 4/13/2011. Full implementation targeted for 8/15/2011.

4. **Better position staff post location within the (PI) Building.** Correctional officer post locations within all buildings were evaluated to determine their optimal location, and one change was made. The staff desk within the PI Building has been moved to the front door, so all inmate traffic into and out of the PI

Building can be monitored by the PI correctional officer. This will provide improved security and better control of the building. Implemented 4/14/2011.

5. **Add additional correctional officers.** A staffing evaluation was completed of all buildings and correctional officer posts within the Penitentiary. In three specific locations, an additional correctional officer was added to increase security and safety, including one new correctional officer in the PI building. For the PI Building, this allows one officer to make consistent rounds of the building and shop areas, while a second officer works from the PI building main entrance to control egress and limit foot traffic in the PI Building. Implemented 4/14/2011 (one position) and 4/25/2011 (two additional positions).

6. **Adjust inmate work assignments.** A full review of the classification of work-assigned inmates with a history of escape behavior was conducted. All assignments were consistent with industry practice, and SDDOC policies, but work assignments for two inmates were adjusted. Implemented 4/20/2011.

7. **Improve lighting.** A review of the lighting levels of all buildings within the Penitentiary was completed. In a number of locations, rewiring has been conducted to ensure low level light is on at all times. This will reduce the occurrence of dark spots and will increase safety and security. Implemented 4/28/2011.

8. **Strengthen secured perimeter fences.** All secured perimeter walls and fences were evaluated to ensure they were sufficiently secure. Additional razor wire and non-climbing mesh have been added to some areas and electrical conduit has been covered with a metal sheath. Implemented 4/13/2011.

9. **Relocate chemical dependency (CD) offices.** All staff office locations were evaluated to ensure their location was appropriately safe and secure. One office used by chemical dependency (CD) staff has been relocated to allow for increased safety and security and to facilitate better supervision of inmates and staff. Implemented 4/26/2011.

10. **Restrict inmate traffic.** A review of traffic throughout the Penitentiary was evaluated, and changes were made. For example, at all three PI Buildings, inmates without job assignments within those buildings will no longer be allowed access into those facilities. Traditionally, unit orderlies walked from their housing units into the PI building to pick up supplies, drop off laundry, drop off equipment, and conduct other routine duties. Now, unit orderlies will instead drop off and pick up their supplies or equipment at the PI building main entrance. Additionally, within the PI Building, an internal door to the sign shop has been closed to ensure that the assigned correctional officer is able to monitor and observe inmates moving between shops from the new post location. Implemented 4/14/2011.

11. Provide radios for civilian PI staff. Civilian staff members supervise inmates working for Hope Haven in the new PI Building and in the Jameson PI Building metal craft shop. These staff members were not previously provided radios as a standard practice, but they are now required to carry radios. Implemented 5/5/2011.

12. Mandate body alarms. Prior to this incident, staff entering the secure perimeter who did not have a radio were required to wear an audible body alarm. This policy has been revised so that all staff members are now required to wear a body alarm within the secure perimeter, regardless if they have a radio or not. Implemented 5/9/2011.

20. Conclusion

As with any critical incident within SDDOC, a thorough review has been completed. This review resulted in modifications to Penitentiary facilities and procedures. Penitentiary staff followed all policies and procedures. The inmates were unsuccessful in their escape attempt.

There had not been a South Dakota correctional officer killed in the line of duty since 1951. SDDOC staff will continue to grieve, reflect, and move through this tragedy. The majority of the inmate population has shared in the grieving process by participating in memorial services, writing condolences to RJ's family, and expressing their sorrows to staff and volunteer chaplains. Ultimately our continued goal is to fulfill the mission of the SDDOC:

> *To protect the citizens of South Dakota by providing safe and secure facilities for juvenile and adult offenders committed to our custody by the courts, to provide effective community supervision to offenders upon their release and to utilize evidence-based practices to maximize opportunities for rehabilitation.*

Attachment 1: Major Incident Report

South Dakota Policy Distribution: (Public or Non-Public	Attachment: Major Incident Report Please refer to DOC policy 1.1.A.3 / 1.5.II.3 Reporting Information to DOC Administration / Use of Force - JCC

MAJOR INCIDENT REPORT

TO: Secretary of Corrections [redacted] FROM: [redacted]

NAME OF OFFENDER(S):				
Berget, Rodney	41951		Kidnapping/Murder
Robert, Eric	46127		Kidnapping
Last – First	*Offender #*	*DOB*	*Crime or Adjudication*

TYPE OF INCIDENT: Attempted Escape, Staff Assault & Staff Death

DATE OF INCIDENT: 4/12/11 TIME OF INCIDENT: 10:45 X AM ☐ PM

LOCATION OF INCIDENT: West Gate and PI Office

NARRATIVE SUMMARY: (Provide how the incident occurred, how the incident was discovered and all details of the incident in chronological order).

On April 12, 2011, at approximately 10:45am, Officer [redacted] was relieving officer [redacted] at the West Gate for chow. The food truck showed up and needed to come into the facility. At this time she notified Cpl. [redacted] to shakedown/escort the truck into the facility. Once the truck was inside, there was what appeared to be an "officer" pushing a hand cart with one large cardboard box wrapped with packing tape along with a smaller box. The "officer" was coming from the PI building walking towards West Gate. Officer [redacted] noticed the "officer" had his head down and was wearing a baseball cap. At this time what appeared to be an "officer" entered through the inside gate which was still open from when the truck came inside.

Once in between the gates she realized the "officer" did not swipe his ID badge. Officer [redacted] then stepped outside of the West Gate Control to remind the "officer" to swipe his badge. The "officer" stated he forgot his badge. Officer [redacted] asked Cpl. [redacted], who was also in between the gates, if he recognized the staff. Cpl. [redacted] stated he did not. Officer [redacted] then asked the "officer" his name and he responded "[redacted]". Officer [redacted] asked Cpl. [redacted] if he was related to the "officer" to which he responded he didn't think so. At this time the Cpl noticed that the "officer" was wearing a white t-shirt under an oversized officer jacket and oversized pants. Cpl. [redacted] requested for the OIC to be called to the West Gate. Officer [redacted] called for an OIC to step to West Gate.

Immediately after the call on the radio, Inmate Robert, Eric #46127 who had the officer uniform on and Inmate Berget, Rodney #41951 who was hiding in the large box, began to assault Cpl. [redacted]. Officer [redacted] called a Code Red Code 3 at West Gate and Officer [redacted] was in the process of returning to his post. Cpl. [redacted] ended up in a fetal position as the inmates assaulted him. Officer [redacted] took the AR 15 out of West Gate Control and yelled to the inmates to stop. Both inmates responded "Go Ahead and Shoot!". When staff started to arrive Inmate Berget began to swing a staff radio microphone and Inmate Robert began to climb inside of the outside gate. Officer [redacted] hit inmate Robert in the hand with the stock of the weapon to prevent inmate Robert from getting any further into the razor wire in the southwest corner of the outside gate.

Associate Warden [redacted], Major [redacted] and others reported to the Code at West Gate. Once AW [redacted] got to the inside gate he observed Cpl. [redacted] with his back towards [redacted] with blood on his right forearm. [redacted] yelled for the gate to be opened. Officer [redacted] opened the gate. [redacted] stepped in between the gates and gave directives to the inmates to get on the ground. Inmate Berget hesitated and inmate Robert jumped from the razor wire. Both inmates were taken to the ground by a number of staff. Inmate Berget was escorted to the SHU and inmate Robert was taken to Health Services with 2 small cuts on his right hand from the razor wire.

Knowing that an inmate had a staff uniform, a search for a missing staff was initiated in PI. PI Supervisor [redacted] found officer Ron Johnson in PI on the floor unresponsive, on his stomach, in a large pool of blood, with his head wrapped with shrink wrap, dressed only in his socks, shirt, and underwear. At approximately 10:56am a Code Red Code S was called in the SDSP PI Bldg. Immediately the ambulance was called. Staff noticed a large open wound on his head. Immediately Sgt. [redacted] removed the shrink wrap from around Officer Johnson's head. Sgt. [redacted] began chest compressions while officer [redacted] began breathes with a face shield. Captain [redacted] requested the AED. Staff arrived with the AED along with Health Services. The AED was hooked up and advised no shock. CPR was resumed by staff until paramedics arrived at approximately 11:05am. Paramedics left the Penitentiary with Officer Johnson at 11:17am.

Cpl. [redacted] was taken to the emergency room at Avera McKennan Hospital. He had bruising around his left eye, his upper and lower lips were swollen, red knot on the back of his head, and bruising on the left chest area. Cpl. [redacted] returned to the prison.

After Inmates Berget and Robert were detained, the outside perimeter was secured with weapons and staff. Emergency count was initiated for staff and inmates. Count was cleared at 12:10pm.

Officer Johnson was pronounced dead at 11:50am at Sanford Hospital.

Inmates Berget, Rodney #41951 and Robert, Eric #46127 were transported to the Minnehaha County Jail.

Located near where Officer Johnson was assaulted was a 2 foot pipe that appeared to be used as the weapon and inmate Berget's prison identification card.

The State Penitentiary initiated lockdown procedures until Wednesday April 13, 2011. During the lockdown procedures, inmates were served meals in their cells.

WHO WAS INVOLVED?
(Include the names of all staff involved in the incident)

[redacted]

South Dakota Policy Distribution: (Public or Non-Public	Attachment: Major Incident Report Please refer to DOC policy 1.1.A.3 / 1.5.H.3 Reporting Information to DOC Administration / Use of Force - JCC

All DOC Policies and Procedures were followed.

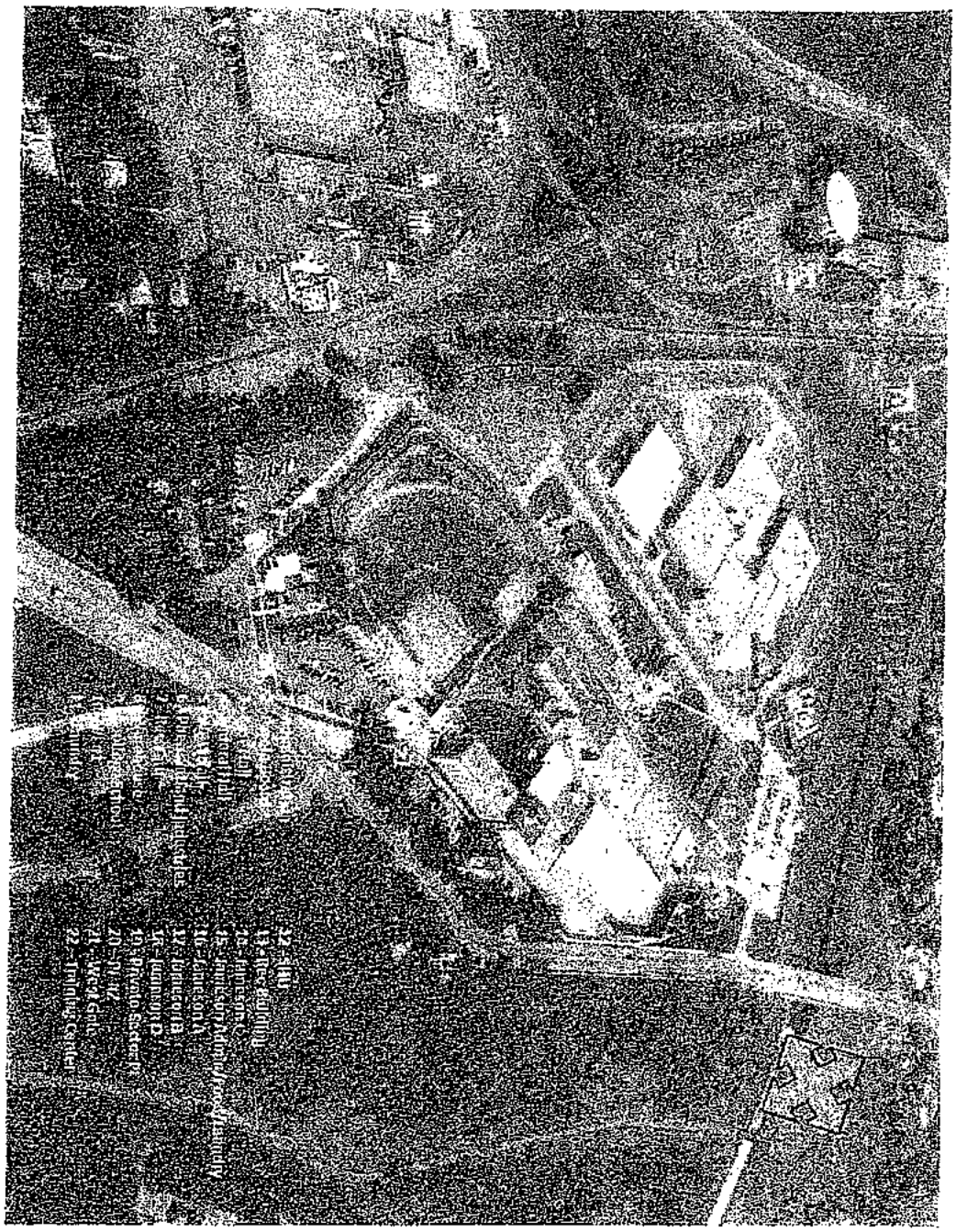
RESPONSE: (list whether and when law enforcement, media and others were contacted)

Media Contacted:	X Yes No	Date/Time Contacted:	4/12/11	1:20p	☐AM ☐PM
Law Enforcement Contacted:	X Yes No	Date/Time Contacted:	4/12/11	11:12a	☐AM ☐PM
Others Contacted?	X Yes No	Who?	NA		
		Date/Time Contacted:			AM ☐PM
Others Contacted?	X Yes No	Who?	NA		
		Date/Time Contacted:			☐AM ☐PM

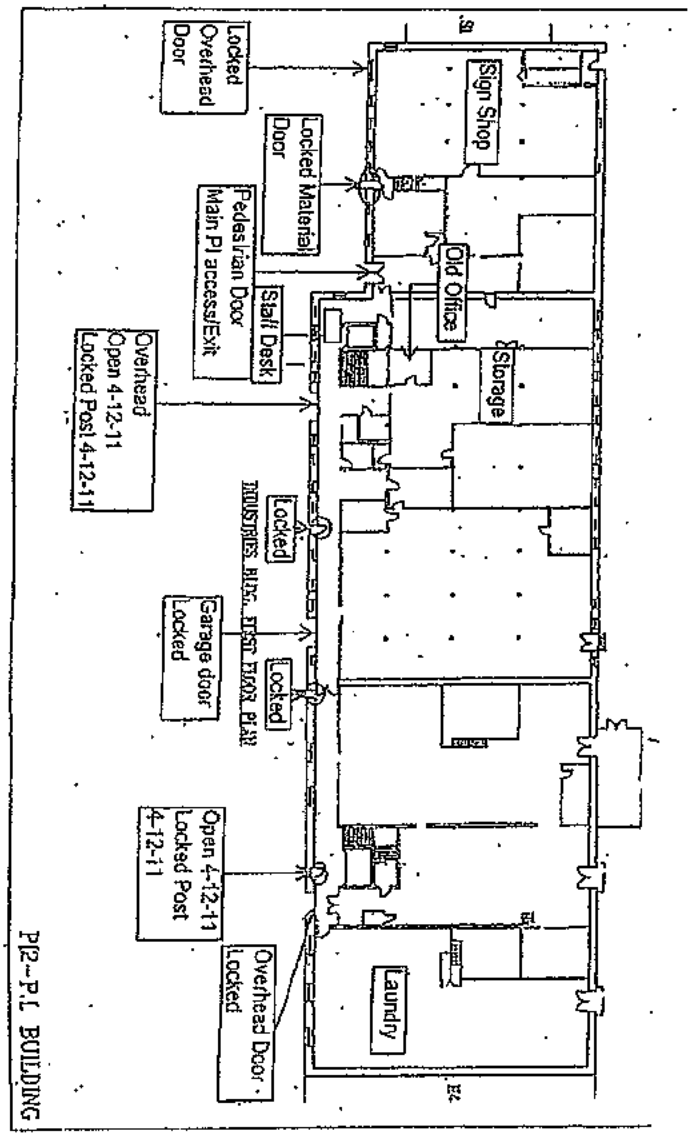
CORRECTIVE ACTION: (Briefly state any corrective action or disciplinary action that has been taken or will be taken as a result of this incident)

Review of all policy and procedures of the South Dakota State Penitentiary has been initiated.

Attachment 2: Aerial Photograph of Penitentiary Complex



Attachment 3: Map of First Floor of Prison Industries Building



Attachment 4: SDSP PI Building Post Orders

SDSP PI BUILDING POST ORDERS

6:45a.m.	Check and make sure all shops are unlocked and supervisors are there to run shops. If a supervisor is not available at 7:30 a.m. call Main Control and ask if keys have been checked out for their shop.
7:15 a.m.	Attend Briefing on 5th Floor of Admin Building.
7:45 a.m.	Make rounds do all escorts for PI vehicle through West gate and walk-ins through Main Control, check all passes. When vehicles are coming in, make sure West Gate notifies Unit B. Check underneath vehicle, collect driver's licenses and hang on clipboard dropped down by West gate Officer. Make sure all PI inmates show up to work within 15 minutes of work ring out. Breaks are not allowed outside. Check all passes and do a minimum of 2 to 3 pat searches an hour.
9:15 a.m.	Make rounds, check passes (all inmate workers must have pass when leaving the shop area unless they are going to lunch break or after work is complete). Inmates not working in Braille unit get pat searched when they leave the shop. Braille workers get pat searched when they go to lunch, break and at night when they go to their cells. Start pat searched at 10:15 a.m. PI step van will be brought in to pick up UPS.
10:20 a.m.	OIC will call the first of three groups for lunch. The inmates will eat and then return to the cell hall for Count.
10:30 a.m.	OIC will call for last three shops for lunch. PI Officer takes lunch.
11:10 a.m.	Take out UPS and pickups when count clears and it is cleared through West gate. Go out front and check PI office for inbound UPS or anything else that needs to be brought into the shops.
11:15-3:00 p.m.	Check passes, check incoming laundry for contraband. Do inmate count when they come back from lunch.
3:30 p.m.	Tool check in all shops. Can be checked before 7:30 a.m., or at 11:50 a.m. or 3:00 p.m.
3:35 p.m.	Pat search Braille shop workers as they return to the cell hall.
3:40 p.m.	Put phone in charger, shut off light and lock doors to office. Also lock west entrance door when leaving for the day. Leave the bars open. Turn Rec list in to Main Control and the Control Rooms. Make sure all inmates are out.
3:45 p.m.	Turn keys in to Main Control.

Last Revised on 9/18/2010

Attachment 5: Example of Performance Based Management System Data

Measure (Average 2010)	Connecticut	Indiana	Iowa	Kansas	Kentucky	Louisiana	Massachusetts	Mississippi	Nebraska	New Mexico	North Dakota	South Dakota	West Virginia	Wyoming
Inmate on Staff Assaults with Serious Injury %	0.00	0.01	0.01	0.00	0.02	0.05	0.01	0.11	0.00	0.01	0.00	0.00	0.00	0.05
Inmate on Staff Assaults that did not involve Serious Injury %	0.10	0.07	0.00	0.00	0.05	0.00	0.23	0.09	0.05	0.07	0.07	0.07	0.07	0.05
Inmate on Inmate Assaults with Serious Injury	0.01	0.01	0.01	0.00	0.02	0.00	0.02	0.03	0.05	0.01	0.03	0.01	0.03	0.02
Inmate on Inmate Assaults without Serious Injury	0.19	0.15	0.15	0.02	0.09	0.00	0.40	0.20	0.36	0.15	0.20	0.20	0.20	0.47
Inmate on Inmate Fights	0.43	0.09	0.19	0.03	0.33	0.58	0.49	0.22	0.43	0.30	0.35	0.25	0.36	0.41
Random Cell Searches %	209.56	349.86	54.08	6.58	53.08	287.79	41.10	113.04	3.40	203.42	103.76	54.29	49.12	70.09
Targeted Cell Searches %	20.19	29.89	34.52	0.14	5.42	154.65	168.62	46.62	163.27	37.59	0.00	73.95	11.24	13.37
Major Contraband Finds of Weapons %	0.05	0.19	0.03	0.00	0.11	0.14	0.24	0.92	0.10	0.09	0.00	0.03	0.08	0.02
Major Contraband Finds of Cell Phones	0.01	0.72	.0.00	0.00	0.05	0.06	0.13	1.81	0.32	0.00	0.02	0.55	0.05	0.01
Positive Drug Tests (random)	59.70	7.37	0.99	0.01	2.25	1.04	.	71.10	1.15	0.38	0.13	0.1	3.59	1.12
Immediate Use of Force	0.56	0.24	0.83	0.00	0.09	0.18	0.37	0.26	0.62	0.19	0.56	0.37	0.11	0.28
Planned Use of Force	0.53	0.05	0.71	0.00	0.19	0.13	0.06	0.05	0.26	0.04	0.11	0.21	0.01	0.16
Inmate Attempted Suicide	0.11	0.01	0.07	0.00	0.02	0.01	0.10	0.03	0.00	0.03	0.14	0.08	0.00	0.01
Inmate Suicides	ALL ZEROS FOR EVERY STATE													
Escape from Secure Facility	0	0	0	0	0	0	0	0	0	0	0	0	0	0.01

Occurrences in relation to average state prison population.

Attachment 6: Radio Emergency Call Codes and Response to Body Alarms

Radio/Body Alarm Policies

All staff and volunteer chaplains entering the secured facilities must either have in their possession a radio or body alarm. Staff are trained on radio procedures during Pre-Service and In-Service. Below are the procedures as defined by Radio Use OM 2.3.A.20:

Emergency Call codes: Code Reds and Code Green:

A. Code Red emergency: Code Red emergencies are for call lights, fence alarms and medical emergencies and emergency requests for staff assistance.
   1. Any staff member (including contractual staff and/or staff from another State agency who work on the SDSP premises) that becomes aware of an emergency situation requiring the notification and/or request for help of supervisors or other staff will make a radio call declaring the emergency situation as a Code Red, code one, two, three, four or five.
   2. If a staff member does not have a radio, he/she will either notify the closest staff person who possess a radio to make the call or will contact the nearest control room by phone (5555 for the SDSP or 5559 for Jameson) or in person. *These are emergency numbers that ring into the control rooms that identify the location of the caller.*
   3. In the event that a staff person contacts a control room by phone or in person, control room staff will broadcast the Code Red via the radio.

B. The staff member should first identify himself/herself by name or post, whichever is the most helpful in terms of identifying their location and will make the Code Red call to the nearest control room.

C. The Code Red call will also include the following information:
   1. The nature and/or severity of the emergency; e.g. call light, fight, fire, staff assault, medical emergency, etc.
   2. The location of the emergency; e.g. cell number, unit/section, kitchen, rec building, etc.
   3. The urgency of the response requested by staff, using the following guidelines:
      a. Code RED, Code ONE: Staff are to respond at the earliest convenience. An example of Code One response would include responding to an emergency call light in a Special Housing Unit (SHU) or Unit A. Code One response is typically used for important information that needs to be exchanged.
      b. Code RED, Code TWO: Staff are to respond by walking quickly to the area. Examples of Code Two response would include responding to an emergency call light in general population, when there is threatening behavior, non-compliance with a direct order or when back-up is required.
      c. Code RED, Code THREE: Emergency, Staff needs assistance. This code requires an "All Hands" response. All available uniformed security staff and Unit staff are to respond by running or making their best time to the area where assistance is needed as soon as possible. Code Three response is typically used in the event of an attack, injury, a life threatening situation or a situation that available staff are not able to control. An activated Personal Body Alarm also requires a Code Three response.

d. Code RED, Code FOUR: Medical Emergency , send medical assistance from (SDSP or Jameson) health services as quickly as possible. Do not state the name or medical condition of the inmate over the radio. When a medical emergency is obvious, staff should not hesitate or wait for a Sergeant or above to call a Code Red, Code Four after first calling the Code Red, Code Three.

e. Code RED, Code FIVE: Medical Emergency. Control room, call 911 for emergency medical assistance. This call is usually made by a Sergeant or above after Internal Health Services has responded and the situation has been assessed.
Once requested by Officers on the scene of the medical emergency, the control room of the facility with the emergency makes this call.
Control room staff should always assume an emergency response is needed unless otherwise instructed (Code 3, Fire Department and ambulance with lights and sirens).

f. Code Green, is the radio call to assemble a cell entry team. When an intervention staff person in charge or the OIC determines a cell entry intervention is necessary, he will make a "Code Green" radio call to summon the staff that will make up a cell entry team.

D. The entire call should be made twice to ensure clarity and transmission.

1. The respective control room will repeat the call in its entirety to "All Units" so that the clarity of the radio transmission is ensured.
2. The OIC will determine when sufficient staff have responded and will notify the respective control room that sufficient staff have responded.
3. Corporals and Sergeants will ensure that sufficient staff remain on their units or posts to maintain normal operations or to lock up remaining inmates.

E. When the emergency situation is resolved the staff member who called the Code Red or the supervisor on the scene will call the respective control room to "Cancel Code Red".

1. The reason for the cancellation should be stated.
2. The caller will identify himself/herself by name or post.
3. The respective control room will repeat the notification of cancellation of the Code Red to all units.

Emergency Response for Personal Body Alarms

A. When a Personal Body Alarm is activated, all staff within range of the sound should treat the Alarm as a Code Red, Code Three call for assistance and respond to the sound of the alarm. staff with a radio should use the radio to call the control room and issue a Code Red, Code Three call for assistance.

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

ESTATE OF RONALD E. JOHNSON, and through its Personal Representative, Lynette K. Johnson; and LYNETTE K. JOHNSON, individually,	*	CIV 12-4084
Plaintiffs,	*	
vs.	*	MEMORANDUM OPINION AND ORDER
DOUGLAS WEBER; TROY PRONTO; DARIN YOUNG; CRYSTAL VAN VOOREN; DENNY KAEMINGK; LAURIE FEILER; TIMOTHY A. REISCH; SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, STATE OF SOUTH DAKOTA; and JOHN DOES 1-20,	*	
Defendants.	*	

This case arises from the death of Ronald E. Johnson, a correctional officer who worked for the South Dakota Department of Corrections at the South Dakota State Penitentiary (SDSP) for years. On April 12, 2011, Ronald Johnson was at work when he was brutally murdered by inmates Rodney Berget and Eric Robert. Plaintiffs Lynette Johnson and the Estate of Ronald Johnson (Plaintiffs) filed a complaint in state court pleading five state law claims and one federal constitutional claim under 42 U.S.C. § 1983 alleging that Defendants created the danger that resulted in the death of Ronald Johnson. Defendants removed the case to federal court pursuant to 28 U.S.C. § 1441(a). This Court has jurisdiction under 28 U.S.C. § 1331 because the complaint includes a

federal constitutional law claim. The Court may exercise supplemental jurisdiction over the state-law claims under 28 U.S.C. § 1367.

Defendants filed a motion for summary judgment arguing that they are entitled to qualified immunity because the evidence does not meet the high standard required to prove a state-created danger claim. The brutal murder of guard Ronald Johnson by Berget and Robert shocks everyone's conscience. That, however, is not the test for whether there was a constitutional violation by Warden Weber and other Defendant South Dakota State Penitentiary employees. Likewise, this is not a question of whether Warden Weber and others were negligent or grossly negligent, as those levels of proof do not meet the high burden necessary for finding a constitutional violation. Instead, the question is primarily whether the actions and inactions of Warden Weber or any of the other prison employee Defendants shock the conscience. The actions of Warden Weber and the other employees do not shock the conscience, and for that and the following reasons Defendants are entitled to summary judgment on the constitutional violation claim.[1] The remaining five state law claims will be remanded for further proceedings to the South Dakota trial court from which they were removed.

BACKGROUND

In ruling on a motion for summary judgment, the Court is required to view the facts in the light most favorable to the non-moving party and must give that party the benefit of all reasonable inferences to be drawn from the underlying facts. *AgriStor Leasing v. Farrow*, 826 F.2d 732, 734 (8th Cir. 1987). The facts below are presented in the light most favorable to the Plaintiffs in this case.

As part of an escape attempt, inmates Eric Robert and Rodney Berget murdered Ronald Johnson on April 12, 2011, in the Prison Industries building (PI building) at the SDSP in Sioux Falls,

[1]The Court will deny Defendants' motion to strike the affidavit of Chester Buie and the interview of Timothy Henry, doc. 60, and the Court will consider Buie and Henry's affidavits. In addition, the Court will grant Plaintiffs' motion for leave to supplement the materials in response to the motion for summary judgment, doc. 67, and the Court will consider admissible information that is based on personal knowledge in the affidavits of Andrew Hanson and David Tolley.

near Johnson's post that day.[2] Johnson was a senior correctional officer and was staffing the PI building in place of Officer Craig Baumberger, who was out that day. Johnson and eight shop supervisors were assigned to the PI building.

The Jameson Annex is the only South Dakota Department of Corrections (DOC) facility designated to house maximum custody inmates. On April 12, 2011, the SDSP housed mostly medium custody inmates. On that day, Berget and Robert were maximum custody inmates that, pursuant to DOC policy, were to be housed in the Jameson Annex absent a discretionary "administrative decision" or other similar process that allows them to be housed elsewhere.[3] The DOC's classification policy provides, in part, that, in the Warden's discretion, an inmate may be housed in a facility other than where his custody level suggests. Such a placement requires approval of the deputy warden or an associate warden, the warden, and the Classification and Transfer manager for the DOC. The Defendants moved Berget and Robert out of the Jameson Annex and into West Hall at the SDSP, a facility with lower levels of custody and supervision. Berget was moved to West Hall in June of 2004. Robert was moved there in June of 2009. The "administrative decision" paperwork process was not followed and Defendants did not properly document the transfers or the reasons for transferring Berget and Robert out of the Jameson Annex. Berget resided outside of the Jameson Annex for half of 2004 without any written authorization. Warden Weber testified that DOC policy forbids making deals with inmates, and that he was obligated to comply with DOC policy. Although Warden Weber denies it, the testimony of some other witnesses

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[2]In 2011, two state or federal correctional officers were killed in the line of duty. Before Johnson's murder, the last time that a correctional officer was killed in the line of duty in South Dakota was on September 6, 1951, when a correctional officer was murdered by an inmate.

[3]In May, 2011, there were 677 inmates housed in general population at the SDSP. Of that number, 456 were incarcerated for a violent offense, and 203 had escape points counted on their classifications. There were 47 maximum custody inmates housed at the SDSP, outside of the Jameson Annex. In a subsequent Technical Assistance Report requested by the DOC and submitted by the National Institute of Corrections on September 21, 2011, it was reported that there was sufficient vacant bed space at Jameson to absorb the maximum custody inmates that were being housed at the SDSP.

indicates that Warden Weber made deals to move Robert and Berget into West Hall in exchange for ending their hunger strikes.[4]

On April 12, 2011, both Berget and Robert were living in West Hall at the SDSP, although not in the same cell. According to DOC policy, inmates in the Jameson Annex are subject to direct correctional supervision while inmates in West Hall are not. Witnesses testified that Berget and Robert were not subject to direct correctional supervision while in West Hall.

The Defendants knew the violent criminal histories of Berget and Robert. Berget's criminal history includes a conviction for grand theft in 1977, when he was first incarcerated at the SDSP at the age of 15. His criminal history after 1977 included convictions for grand theft, burglary, escape, kidnapping, and attempted first degree murder. As of April 12, 2011, Berget was serving a life sentence for the attempted murder conviction, and a second life sentence for the kidnapping.[5] When Berget arrived at the SDSP on December 4, 2003, he was housed at the Jameson Annex until his transfer to West Hall in June of 2004. Berget's West Hall housing was continued by Acting Warden, Daryl Slykhuis, in February, 2005, and renewed again in December, 2005, without all of the required signatures on the form. Berget's placement in West Hall was reviewed and confirmed again in December of the following years, up to and including December, 2010. The proper paperwork was not always completed.

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[4]Although the Court makes no credibility determination of who to believe on that point, the Court for purposes of this motion is required to take the view most favorable to the non-moving party. Since the Plaintiffs are the non-moving party on this motion, the Court for purposes of the motion must consider that hunger strike deals were made.

[5]These convictions resulted from Berget shooting his ex-girlfriend and her friend, then kidnapping a store clerk at gun point on June 2, 2003.

Robert was convicted of kidnapping in January, 2006.[6] He was sentenced in Meade County to a term of 80 years in prison. He had no previous criminal history. Shortly after Robert arrived at the SDSP in January, 2006, he was housed in West Hall because he was not a maximum custody inmate. After his arrival, penitentiary officials learned that a woman in Brule County had been raped by Robert in 2002 or 2003, and she had obtained a protection order against Robert. She had been in a relationship with Robert and she did not report the rape at the time it occurred. At Robert's annual classification review on January 8, 2007, his recommended placement was at the SDSP. On September 5, 2007, after he was written up for tampering with a lock, Robert's placement was changed to Jameson and this was renewed in April of 2008 and 2009. He was moved back to West hall on June 24, 2009. That placement was continued by "administrative decision" in April, 2010.

Defendants knew about Berget and Robert's escape histories. In 1984, Berget escaped from the SDSP, for which he was prosecuted and convicted. In 1987, Berget escaped from the SDSP through an air handling unit, for which he was prosecuted and convicted. In 1988, Berget jumped out of a van during a transport. In June, 1991, Berget was disciplined because of his involvement in a proposed escape that was discovered before it was attempted involving some steel mesh over windows in the cell hall that had been cut. In 1994, Berget was disciplined for cutting security bars in the East Hall shower room. In December, 2003, Berget was involved in helping another inmate try to escape from the Lawrence County jail by lifting him over a wall. He was not charged with a crime, but the activity was scored by the DOC as an escape attempt in his classification reviews. Although some witnesses testified that Berget may have been involved with Robert in planning an escape in 2007, there is no evidence that any of the Defendants were aware of his possible involvement, and there are no documented escape attempts for Berget between December 4, 2003 and April 12, 2011. There is some evidence, however, that Berget might have been planning escape attempts. Former inmate Tim Henry indicated that in late 2009 he reported to a DOC employee that Berget and Robert were planning to escape from the penitentiary. Berget's cell was searched in

[6]On July 24, 2005, Robert impersonated a law enforcement officer and pulled over a woman on a road near Black Hawk, South Dakota. He forced her into the trunk of her vehicle. The woman called authorities with her cell phone and was rescued.

August, 2010, and officers discovered a box cutter razor blade, an exacto knife razor blade, and drill bits. He was cited for possessing unauthorized articles, and he was placed in disciplinary segregation. Except for what happened on April 12, 2011, Berget's escapes or attempts did not involve violence.

Robert was disciplined for attempted escape in June, 2007. A confidential informant told authorities that Robert cut part of a lock in the West Hall shower room at the SDSP. At the time, Robert was working as an orderly in the shower room. As stated earlier, there is some testimony indicating that Berget may have been involved. Robert was given 90 days in disciplinary segregation in the Jameson Annex, and he continued to reside in Jameson until 2009 when he was moved back to West Hall. Robert had no other escape attempts and no escapes in his institutional or criminal history.

As for job assignments, Berget regularly held orderly positions. There are no documented problems with Berget's job assignments before April 12, 2011. Former correctional officer Chester Buie opined in his affidavit that Berget used his jobs to give him the ability to have periods of time where he could move about the penitentiary, unobserved, possibly planning escapes.[7] Berget's job on April 12 was trash recycling orderly, a job he started on March 18, 2011. In that position, Berget would leave and return to West Hall multiple times per day.

Robert was working as a laundry cart pusher on April 12, 2011. He was assigned his job as a laundry cart pusher on December 14, 2009. This involved making round trips each day with a laundry cart between West Hall and the laundry, located in the PI building, which is outside and across the yard, but within the secure perimeter of the SDSP. The round trip typically occurred six times each weekday morning and 10-12 times each weekday afternoon. Correctional officer, Brad Woodward, testified that Robert wanted to work in the shop in the PI Building, but he was not allowed to work there because he had seven escape points for his attempted escape in June, 2007

[7]Buie went to work as a correctional officer at the SDSP in 1980 and continued to be employed there until his retirement in January of 2011.

when he cut a lock in the shower room. An inmate with seven escape points is not allowed to work in one of the Prison Industries' shops.

According to his affidavit, in late summer or early fall of 2010, Buie heard that Berget and Robert's names came up all the time during senior staff meetings with Warden Weber. On separate occasions, he asked Warden Weber and unit manager Brad Woodward when they were going to lock up Berget and Robert. He got no response. Officer Buie kept an eye on Berget and Robert and noticed that they were routinely together by September of 2010.

On April 12, 2011, Berget and Robert left West Hall for the PI building. The usual work day for inmates was from about 7:00 a.m. until 3:45 p.m, with a break for lunch and a break for a standing count. Dennis Donovan, the laundry supervisor, wrote in an informational report on April 18, 2011, that Robert was in and out of the laundry four or five times before 9:40 a.m. on April 12, 2011. Sometime after 10:00 a.m. Berget and Robert attacked Ronald Johnson. They assaulted him, took part of his uniform, wrapped his head in shrink wrap, and tried to cover his body with cardboard. Robert put on part of Johnson's uniform and Berget hid himself in a large box that Robert then pushed on a hand cart to the West Gate, a service entrance to the SDSP, where they were apprehended after a correctional officer refused to open the outside gate.

After the murder and escape attempt, Robert was charged with first degree murder, first degree felony murder, and simple assault, and was also arraigned on an information for being a habitual offender. He pleaded guilty to the charge of first degree murder and was sentenced to death. He was executed on October 15, 2012. Berget was charged with and pleaded guilty to first-degree murder and was sentenced to death. He remains incarcerated on death row.

DISCUSSION

The doctrine of qualified immunity shields government officials from liability so long "as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). "Qualified

immunity is an immunity from suit rather than a mere defense to liability, which is effectively lost if a case is erroneously permitted to go to trial." *Avalos v. City of Glenwood*, 382 F.3d 792, 798 (8th Cir. 2004) (citations and internal quotations omitted). "Qualified immunity is available 'to all but the plainly incompetent or those who knowingly violate the law.'" *Id.* (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Id.* (citation omitted).

The initial inquiry in the qualified immunity analysis is this threshold question: "Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201 (2001). If the facts alleged demonstrate a constitutional violation, the second inquiry "is to ask whether the right was clearly established"; that is, "whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 201-02. Third, the Court must determine if, taking the facts in the light most favorable to the Plaintiff, "there are no genuine issues of material fact as to whether a reasonable official would have known that the alleged actions violated that right." *Foulks v. Cole County*, 991 F.2d 454, 456 (8th Cir. 1993).

The first question for this Court is whether the facts alleged by Plaintiffs demonstrate a constitutional violation. Plaintiffs' § 1983 claim is based on the substantive component of the Due Process Clause that protects individual liberty against certain government actions. Plaintiffs claim that Defendants' conduct deprived Ronald Johnson of substantive due process by affirmatively creating the danger that brought about his death. The Fourteenth Amendment states in part: "nor shall any State deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV; *see also DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 194–95 (1989). The Supreme Court has noted, "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security." *DeShaney*, 489 U.S. at 195. Thus, "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may

be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." *Id.* at 196.

Generally, state actors are liable under the Due Process Clause only for their own acts and not for the violent acts of third parties, *see Fields v. Abbott*, 652 F.3d 886, 890 (8th Cir. 2011), but the Eighth Circuit has recognized two exceptions to this rule: (1) the state owes a duty to protect those in its custody; and (2) "the state owes a duty to protect individuals if it created the danger to which the individuals are subjected." *Id.* This second exception is called the state-created danger theory. *Id.* Plaintiffs' constitutional claim in this case rests on the danger creation theory. The state-created danger doctrine derives from the Supreme Court's decision in *DeShaney*. In that case, a four-year-old boy was repeatedly beaten by his father. 489 U.S. at 192–93. The county Department of Social Services (DSS) obtained a court order to place the boy in the temporary custody of a local hospital, but it returned him to his father's custody after deciding there was insufficient evidence of abuse. *Id.* at 192. Despite signs of continuing abuse when DSS would check on the boy each month, DSS failed to take any action to protect him. *Id.* at 192–93. Finally, the father beat the boy so severely that he suffered severe brain damage. *Id.* at 193.

The boy and his mother sued DSS and several of its employees under § 1983, alleging that they violated the boy's rights under the Due Process Clause by failing to protect him against a risk of which they knew or should have known. *Id.* The Supreme Court rejected the claim, stating, "[a]s a general matter, ... we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197. The Court acknowledged that in limited contexts, such as "incarceration, institutionalization, or other similar restraint of personal liberty," a "special relationship" between the state and the individual imposes on the state an affirmative duty to protect, but found that such a relationship did not exist between the boy and the state because the harm occurred while the boy was in his father's custody and not while he was in the state's custody. *Id.* at 200–03.

The Supreme Court further explained that the state could not be held liable because it had not, by its actions, placed the boy in a more dangerous position:

> While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them. That the State once took temporary custody of Joshua does not alter the analysis, for when it returned him to his father's custody, it placed him in no worse position than that in which he would have been had it not acted at all; the State does not become the permanent guarantor of an individual's safety by having once offered him shelter.

Id. at 201. Lower courts, including the Eighth Circuit, have relied on this language to recognize a "state-created danger" exception that creates a duty to protect against private violence in limited circumstances.

The Eighth Circuit has explained that to succeed on the state-created danger theory of substantive due process, Plaintiffs must prove: (1) that Ronald Johnson was a member of a limited, precisely definable group, (2) that the defendants' conduct put him at a significant risk of serious, immediate, and proximate harm, (3) that the risk was obvious or known to the defendants, (4) that the defendants acted recklessly in conscious disregard of the risk, and (5) that in total, the defendants' conduct shocks the conscience. *Fields,* 652 F.3d at 891 (internal quotations and citation omitted).

In many state-created danger cases, as in the Eighth Circuit's decision in *Fields*, the courts focus on whether the defendant's conduct shocks the conscience, and the cases demonstrate that the mental state required to violate a substantive right is a critical issue for all plaintiffs asserting a state-created danger claim. Whether conduct is conscious shocking is a question of law for the court. *See Terrell v. Larson*, 396 F.3d 975, 981 (8th Cir. 2005) (en banc) ("Because the conscience-shocking standard is intended to limit substantive due process liability, it is an issue of law for the judge, not a question of fact for the jury.").

In *Fields*, the Eighth Circuit held the state did not have a due process duty to protect a jailer from attack by two inmates. The Eighth Circuit assumed that the plaintiff could satisfy the first four elements of the state-created danger test, but found her claim failed because the evidence did not show the defendants engaged in conscience shocking, deliberately indifferent conduct. The Eighth Circuit in *Fields* discussed "the constitutional concept of conscience shocking:"

> "[T]he constitutional concept of conscience shocking duplicates no traditional category of common-law fault." *Lewis*, 523 U.S. at 848, 118 S.Ct. 1708. "[A]ctionable substantive due process claims involve a level of abuse of power so brutal and offensive that they do not comport with traditional ideas of fair play and decency." *Hart*, 432 F.3d at 806 (brackets, ellipses, and internal quotation marks omitted). Under the state-created-danger theory, negligence and gross negligence cannot support a § 1983 claim alleging a violation of substantive due process rights. *Id.* at 805. And "[p]roof of intent to harm is usually required, but in some cases, proof of deliberate indifference, an intermediate level of culpability, will satisfy this substantive due process threshold." *Terrell v. Larson*, 396 F.3d 975, 978 (8th Cir. 2005).
>
> The deliberate-indifference standard is employed only where actual deliberation is practicable. *Lewis*, 523 U.S. at 851–53, 118 S.Ct. 1708 (differentiating between substantive due process cases in which the deliberate-indifference standard applies because prison officials have the luxury of time to make unhurried judgments regarding inmate welfare, and cases where a higher standard of intent to harm applies because certain unforseen circumstances demand instant judgment). In this case, the Miller County individual defendants acted under circumstances in which actual deliberation was arguably practicable because of Fields's allegations that (1) they had been made aware, based on her previous injuries from the same drunk-tank door, that the door was dangerous, and (2) they were previously informed that the jail was understaffed. *See Hart*, 432 F.3d at 806 (applying the deliberate-indifference standard). We will thus apply that standard here.
>
> To define deliberate indifference in a substantive due process case, the Supreme Court has adopted the subjective standard of criminal recklessness set forth in the Eighth Amendment context. *Moore ex rel. Moore v. Briggs*, 381 F.3d 771, 773 (8th Cir. 2004). Deliberate indifference requires that an official must be "aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Hart*, 432 F.3d at 806 (internal quotation marks omitted). And deliberate indifference that shocks the conscience in one environment "may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience shocking." *Lewis*, 523 U.S. at 850, 118 S.Ct. 1708.

Fields, 652 F.3d at 891-92.

The parties agree that Defendants in the present case had time to deliberate and that Plaintiffs' task is to show deliberate indifference because Defendants did not need to make any quick decisions that merit applying a higher standard.[8] As stated above, deliberate indifference requires both that the official "be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists" and that the official actually draw that inference. *Hart v. City of Little Rock*, 432 F.3d 801, 806 (8th Cir. 2005). Mere negligence and even gross negligence are not actionable as a constitutional violation. *Id.* at 805-06.

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[8]Both parties have expert witnesses. Plaintiffs move to preclude Defendants' expert, Dr. Hardyman, from testifying that there was no significant risk of serious and immediate harm to Ronald Johnson. (Doc. 42.) The motion will be granted. Improper opinions such as this are stating a legal conclusion. *See Berry v. City of Detroit*, 25 F.3d 1342, 1353 (6th Cir. 1994). Given her experience and training, Dr. Hardyman could have expressed her opinion as to the level of risk of harm to Ronald Johnson, but not couched in the language of the legal test itself, but instead in the language normally used in her profession. These improper legal conclusions would not be admissible at trial, so they will not be taken into account for purposes of ruling on the motion for summary judgment. *See Duluth News–Tribune v. Mesabi Publ'g Co.*, 84 F.3d 1093, 1098 (8th Cir. 1996) ("In evaluating the evidence at the summary judgment stage, we consider only those responses that are supported by admissible evidence."). For the same reason, the Court will not consider those opinions of Plaintiffs' expert, Jeffrey Schwartz, that state a legal conclusion. (For example, Jeffrey Schwartz opines that Defendants' "repeated policy violations and their failures to maintain acceptable security practices were blatant, shocking and unconscionable.") Schwartz could testify that there were failures to maintain acceptable security practices but he would not be allowed to state an opinion that such failures were "unconscionable," as that is a legal question for the court to determine. Plaintiffs also move to preclude Dr. Hardyman's opinion that Berget and Robert's housing and job assignments were "appropriate," which Dr. Hardyman changed to "not unreasonable" in her deposition. Because there is a close fit between Dr. Hardyman's expertise in the area of evaluating classification systems and data concerning prisoners' propensity to commit assaults and her testimony that Berget and Robert's housing and job assignments were not unreasonable, the Court will consider Dr. Hardyman's opinion, limited to "not unreasonable" as that is how Dr. Hardyman limited that opinion. If Dr. Hardyman continued to believe the housing and job assignments were appropriate, given her training and experience, she could have expressed that opinion. *See, e.g., Schmidt v. City of Bella Villa*, 557 F.3d 564, 571 (8th Cir. 2009) ("[F]or an expert witness to be qualified based on experience, that experience must bear a close relationship to the expert's opinion.").

Plaintiffs contend that, in order to determine whether Defendants acted with deliberate indifference, the Court should look at Defendants' continuing course of conduct beginning in 2004 when Berget was moved into West Hall. Plaintiffs argue that Defendants' policy allowing maximum custody inmates such as Berget and Robert to be housed outside of Jameson, the only maximum security facility in South Dakota, in turn allowed the inmates to have jobs with less supervision than is required of maximum custody inmates, and this created dangerous conditions at the penitentiary which Defendants knew about and failed to rectify over the years, ultimately depriving Ronald Johnson and Plaintiffs of their substantive due process rights. Most of Defendants' conduct about which Plaintiffs complain is far removed from the ultimate harm to Ronald Johnson. In a case like this, where so much time passed between the initial decisions and the ultimate harm, the Court believes that the immediate and proximate harm element of the *Fields* test ties into the analysis of the deliberate indifference element.

The second element of the *Fields* test states that, in order to be actionable, a defendant's conduct must produce a "substantial risk of serious, immediate, and proximate harm." Here, most of Defendants' actions and decisions are too far removed in time to have put Ronald Johnson at a significant risk of immediate and proximate harm. The Eighth Circuit's decision in *Dorothy J. v. Little Rock Sch. Dist.*, 7 F.3d 729 (8th Cir. 1993), is instructive on this issue. Holding that a public school had no constitutional duty to protect a mentally retarded student who was raped in school by a student known to be violent and sexually assaultive, the Eighth Circuit in *Dorothy* noted, "In most every circuit court decision imposing § 1983 liability because the State affirmatively created or enhanced a danger, 'the immediate threat of harm has a limited range and duration[.]'" *Dorothy J.*, 7 F.3d at 733 n. 4 (quoting *Reed v. Gardner*, 986 F.2d 1122, 1127 (7th Cir. 1993)). The Eighth Circuit concluded that the plaintiff's injury two years after the attacker was enrolled in the school's special program is "too remote a consequence" of the action or inaction of state officials, thus no liability existed under § 1983. *Id.* at 733; *see also Martinez v. California*, 444 U.S. 277, 285 (1980) (decedent's murder by parolee committed five months after parolee's release "is too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law").

Also instructive on the immediate and proximate harm element is a Tenth Circuit case, *Ruiz v. McDonnell*, 299 F.3d 1173 (10th Cir. 2002). In *Ruiz*, a mother enrolled her child in a state-licensed home daycare. The Colorado Department of Human Services was required to perform criminal background checks on day care operators and confirm operators are properly insured. Colorado officials failed to conduct even a cursory investigation which, had they done so, would have uncovered the operators' extensive criminal background involving domestic violence, and that they were uninsured. The child died from abuse by the operator of the daycare. The mother brought a claim under § 1983 asserting that the department's failure to uncover the operators' history of domestic violence and lack of insurance amounted to a constitutional violation under the state created danger theory. *Ruiz*, 299 F.3d at 1178. In ruling that licensing a daycare is not the requisite affirmative conduct necessary to state a claim, and in upholding dismissal of the § 1983 claim, the Tenth Circuit focused on the requirement that defendants' act of licensing the daycare place the child "at substantial risk of serious, immediate, and proximate harm." *Id.* at 1183. The Tenth Circuit reasoned that the threat of harm must be of "limited range and duration," rather than generally applicable to a broader populace. "[T]he improper licensure did not impose an immediate threat of harm. Rather, it presented a threat of an indefinite range and duration." *Id.* Likewise, in the present case, the decisions to house Berget and Robert outside of Jameson in 2004 and 2009, the renewal of those decisions in the following years, and allowing the inmates to work jobs outside of Jameson, presented a threat of an indefinite range and duration, not an immediate and proximate risk of harm.

The Court will consider actions taken or decisions made by Defendants closer in time to Johnson's murder. The last act that could have constituted an immediate and proximate risk of harm was placing Berget in the recycling orderly job on March 18, 2011, a little over three weeks before Berget and Robert murdered Johnson. The recycling orderly job allowed Berget to leave West Hall regularly throughout the day, and triggered his ability to be in the PI building where Johnson was stationed on April 12, 2011. To decide if Defendants were deliberately indifferent in placing Berget in the recycling orderly job, the Court must determine whether Defendants were aware of facts from which the inference could be drawn that a substantial risk of serious harm existed to correctional

officers, and whether Defendants actually drew that inference, when Berget was given the recycling orderly job.

Defendants certainly were aware of Berget and Robert's criminal and escape histories when they gave Berget the recycling orderly job, and they were aware that Berget and Robert were still housed outside of Jameson. But Berget had worked as an orderly in various positions for many years without creating a known threat of harm to anyone. Even if the Court assumed Defendants were aware of facts from which an inference of a risk of harm could be drawn, Plaintiffs have not advanced sufficient facts supporting a claim that Defendants inferred someone would be harmed if Berget worked as a recycling orderly. Under an exact analysis of the circumstances in this case, Defendants' conduct within the limited time-frame which the Court may consider is not deliberately indifferent and that conduct does not shock the conscience. *See, e.g., Martinez v. Uphoff*, 265 F.3d 1130 (10th Cir. 2001) (the state-created danger theory did not give rise to liability where prison guard was killed by escaping inmates, ruling that under the circumstances of the case "inaction in the face of known dangers or risks [was] not enough to satisfy the danger-creation theory's conscience shocking standard"). Each case regarding injury or death of a prison guard by an inmate is fact specific. The actions of the murderers of Ronald Johnson shock the conscience, but those are not the actions the Court must consider in determining whether the actions and inactions of any of the Defendants shock the conscience.

Because there is insufficient evidence to show a violation of the Due Process Clause of the Constitution, Defendants are entitled to qualified immunity on Plaintiffs' § 1983 claim. Summary judgment will be granted on the § 1983 claim, and the state law claims will be remanded to state court. *See In re Prairie Island Dakota Sioux*, 21 F.3d 302, 304 (8th Cir. 1994) (if case is removed from state court and the federal claim is dismissed, court has discretion to remand the state law claims as an alternative to dismissing without prejudice). Accordingly,

IT IS ORDERED:

1. That Plaintiffs' motion to exclude certain opinions of Defendants' Expert Patricia Hardyman, doc. 42, is granted in part and denied in part as set forth in footnote 8;

2. That Defendants' motion to strike the affidavit of Chester Buie and interview of Timothy Henry, doc. 60, is denied;

3. That Plaintiffs' motion to file supplemental materials in opposition to Defendants' motion for summary judgment, doc. 67, is granted to the extent that the Court will consider admissible information that is based on personal knowledge;

4. That Plaintiffs' motion to supplement the record to alleviate Defendants' objection to Timothy Henry's interview, doc. 77, is granted.

5. That Defendants' motion for summary judgment is granted as to Plaintiffs' federal claim brought pursuant to 42 U.S.C. § 1983; and

6. That the state law claims in Plaintiffs' complaint are remanded to state court.

Dated this 15th day of May, 2014.

BY THE COURT:

Lawrence L. Piersol
United States District Judge

ATTEST:
JOSEPH HAAS, CLERK

BY: _____
DEPUTY

785 F.3d 267
United States Court of Appeals,
Eighth Circuit.

ESTATE OF Ronald E. JOHNSON, and through its Personal Representative, Lynette K. Johnson; Lynette K. Johnson, Individually, Plaintiffs–Appellants

v.

Douglas WEBER; Troy Ponto; Darin Young; Crystal Van Vooren; Denny Kaemingk; Laurie Feiler; Timothy A. Reisch; South Dakota Department of Corrections; State of South Dakota; John Does 1–20, Defendants–Appellees.

No. 14–2383.
|
Submitted: Feb. 11, 2015.
|
Filed: May 4, 2015.

Synopsis

Background: Estate of state prison guard who was murdered by inmates who attempted to escape brought § 1983 action in state court against various prison officials and the state department of corrections (DOC), alleging constitutional violations. Action was removed to federal court. The United States District Court for the District of South Dakota, Lawrence L. Piersol, J., 2014 WL 2002882, granted summary judgment in favor of defendants. Estate appealed.

[Holding:] The Court of Appeals, Bye, Circuit Judge, held that prison officials did not violate substantive due process rights of guard who was murdered.

Affirmed.

West Headnotes (15)

[1] **Federal Courts**
⇐ Summary judgment

The court of appeals reviews a district court's decision to grant a motion for summary judgment de novo, applying the same standards for summary judgment as the district court. Fed.Rules Civ.Proc.Rule 56(a), 28 U.S.C.A.

Cases that cite this headnote

[2] **Civil Rights**
⇐ Good faith and reasonableness; knowledge and clarity of law;motive and intent, in general

Qualified immunity shields a government official from liability and the burdens of litigation in a § 1983 action for damages unless the official's conduct violated a clearly established constitutional or statutory right of which a reasonable official would have known. 42 U.S.C.A. § 1983.

Cases that cite this headnote

[3] **Civil Rights**
⇐ Government Agencies and Officers

Civil Rights
⇐ Good faith and reasonableness; knowledge and clarity of law;motive and intent, in general

In analyzing a claim of qualified immunity on a motion for summary judgment, the court considers whether the evidence demonstrates that the defendants' conduct violated a constitutional right; if there was a constitutional violation, the court next considers whether the right violated was clearly established. Fed.Rules Civ.Proc.Rule 56(a), 28 U.S.C.A.

Cases that cite this headnote

[4] **Constitutional Law**
⇐ Duty to Protect;Failure to Act

Nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[5] **Constitutional Law**
Custody or restraint;special relationship

The state owes a duty, under the substantive due process clause, to protect those in its custody. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[6] **Constitutional Law**
Creation of danger or risk

The state owes a duty to protect individuals from private actors, under the substantive due process clause, if it created the danger to which the individuals are subjected. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[7] **Civil Rights**
Persons Liable in General

In § 1983 suits, each defendant's conduct must be independently assessed because § 1983 does not sanction tort by association. 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[8] **Constitutional Law**
Creation of danger or risk

To succeed on a substantive due process claim based on state-created danger, a plaintiff must prove (1) that he was a member of a limited, precisely definable group, (2) that the state defendants' conduct put the plaintiff at a significant risk of serious, immediate, and proximate harm, (3) that the risk was obvious or known to the defendants, (4) that the defendants acted recklessly in conscious disregard of the risk, and (5) that in total, the defendants' conduct shocks the conscience. U.S.C.A. Const.Amend. 14.

3 Cases that cite this headnote

[9] **Constitutional Law**
Creation of danger or risk

Under the state-created-danger theory, negligence and gross negligence cannot support a § 1983 claim alleging a violation of substantive due process rights. U.S.C.A. Const.Amend. 14; 42 U.S.C.A. § 1983.

1 Cases that cite this headnote

[10] **Constitutional Law**
Egregiousness;"shock the conscience" test

Actionable substantive due process claims involve a level of abuse and power so brutal and offensive that they do not comport with traditional ideas of fair play and decency. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[11] **Constitutional Law**
Egregiousness;"shock the conscience" test

The test a court employs to ascertain a valid substantive due process violation is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience. U.S.C.A. Const.Amend. 14.

1 Cases that cite this headnote

[12] **Constitutional Law**
Negligence, recklessness, or indifference

Although proof of intent to harm is usually required to support a valid substantive due process claim, in certain cases, proof of deliberate indifference will satisfy the substantive due process threshold. U.S.C.A. Const.Amend. 14.

2 Cases that cite this headnote

[13] **Constitutional Law**
Negligence, recklessness, or indifference

In cases where defendants acted under circumstances in which actual deliberation was practical, their conduct may shock the conscience, as required to support a substantive due process claim, only if they acted with deliberate indifference. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

[14] **Constitutional Law**
Negligence, recklessness, or indifference
Sentencing and Punishment
Deliberate indifference in general

The deliberate indifference standard applied in a substantive due process case is the same as that applied in Eighth Amendment cases: the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference. U.S.C.A. Const.Amends. 8, 14.

1 Cases that cite this headnote

[15] **Constitutional Law**
Particular issues and applications
Constitutional Law
Property and employment
Constitutional Law
Discipline and classification
Prisons
Work assignments;termination
Prisons
Classification;security status
Prisons
Conduct and control in general

State prison officials did not shock the conscience or act with deliberate indifference by housing two prisoners with violent criminal pasts, one with a history of multiple escapes and one with a history of planning an escape, in a medium security environment, and giving them job assignments which allowed prisoners to move within the prison, and thus, officials did not violate substantive due process rights of prison guard who was murdered by prisoners during their attempted escape; prisoners had no history of violence or threats while incarcerated before the murder, and one prisoner had worked in the prison for many years without creating any known threat of harm to any guard. U.S.C.A. Const.Amend. 14.

Cases that cite this headnote

Attorneys and Law Firms

*268 John William Burke, argued, Rapid City, SD, (Donald Mark McCarty, Brookings, SD, on the brief), for appellant.

*269 James Ellis Moore, argued and on the brief, Sioux Falls, SD, for appellee.

Before BYE, BEAM, and BENTON, Circuit Judges.

Opinion

BYE, Circuit Judge.

The Estate of Ronald E. Johnson and Lynette K. Johnson (collectively, "Johnson") commenced this 42 U.S.C. § 1983 complaint alleging violations of the constitutional and state law rights of the deceased Ronald Johnson. The district court [1] granted summary judgment to defendants. Johnson filed the instant appeal arguing summary judgment was improper. We affirm.

1 The Honorable Larry Piersol, United States District Judge for the District of South Dakota.

I

Pursuant to the proper standard of review, described below, the following are the facts as most favorable to Johnson. At the time of his death, Ronald Johnson was a prison guard for the South Dakota State Penitentiary ("the penitentiary"), a South Dakota Department of Corrections ("DOC") facility in Sioux Falls, South Dakota. On April 12, 2011, Rodney Berget and Eric Robert, inmates at the penitentiary, attempted to escape and in the process intentionally murdered Ronald

Johnson. Berget and Robert were convicted of first degree murder and sentenced to death.

Rodney Berget first came to the penitentiary at the age of fifteen after escaping at least twice from his placement at South Dakota's State Training School. During his lifetime, Berget amassed multiple convictions for grand theft, burglary, escape, and attempt to escape. He spent most of his life in the South Dakota prison system. In addition to his two escapes from the State Training School, Berget escaped from the penitentiary on three separate occasions, the last of which occurred in 1987. None of Berget's escapes or escape attempts were violent and although Berget has a history of violence, he did not have a history of institutional violence. Berget was last incarcerated in 2003, and was initially placed in the maximum security area, but in 2004 was transferred to the medium security area, West Hall. Berget had various disciplinary problems during this incarceration, including refusing housing assignments and conducting hunger strikes. During his incarceration Berget was transferred to segregation at various times and would thereafter return to West Hall. The paperwork for transfers was not always timely and properly completed, and Johnson alleges at least some transfers were negotiated in exchange for ending hunger strikes.

Eric Robert had no criminal history when he arrived at the penitentiary in 2006 to serve an eighty-year sentence for kidnapping. Robert did not have a history of institutional violence prior to the murder of Ronald Johnson, but in 2007 was discovered making preparations for an escape attempt. Thereafter, Robert was moved to maximum security and the DOC learned through a confidential informant Robert had threatened a correctional officer. Robert conducted a hunger strike and was moved from maximum security into West Hall. The paperwork process was not followed and Johnson alleges the transfer was negotiated in exchange for ending the hunger strike.

Although no concrete threats or plans were known by any of the defendants, there was some forewarning of an escape *270 attempt. In 2009, the DOC received information from an inmate indicating Berget and Robert were planning an escape attempt. In 2010, the DOC received similar information from a different inmate. During this same time frame, correctional officer Chester Buie observed Robert and Berget had developed a relationship. Johnson heavily relies on a media report claiming the DOC knew Robert and Berget were planning an escape attempt in which they intended to murder a guard. The only evidence Johnson presents indicating the DOC may have known of a murder and escape plot comes from a media interview given immediately after the murder by Jesse Sondreal, the state's attorney who had prosecuted Robert and Berget. Sondreal testified he told the media he previously learned about a murder and escape plan. Sondreal's deposition testimony made clear the information did not originate from any of the defendants, but rather came from the Department of Criminal Investigation. Sondreal could not identify any details of the alleged escape and murder plot, but understood the threat to a guard was related to Robert's 2007 escape attempt.[2] No other witnesses corroborate the information Sondreal provided to the media and Sondreal could produce no notes or e-mails to show exactly what he learned and from whom.

2 Johnson does not argue Robert's 2007 escape attempt included a plan to murder a prison guard, and no evidence in the record supports such a claim.

Berget and Robert ultimately ended up residing near each other in West Hall. At the time of the murder, Robert held the job of laundry cart pusher, requiring Robert to push a cart to and from the laundry building, which was separate from West Hall. Berget held various orderly jobs during his incarceration and was a trash-recycling orderly at the time of the murder. The jobs held by Robert and Berget did not require direct correctional supervision at all times. Taking advantage of the relative freedoms offered by their jobs, on April 12, 2011, Robert and Berget left West Hall and proceeded to an unauthorized area of the penitentiary where they murdered Ronald Johnson and attempted to escape from the penitentiary. The escape attempt was unsuccessful and Robert and Berget were convicted of murder.

Johnson thereafter commenced this suit in South Dakota state court. Johnson named as defendants the State of South Dakota; the South Dakota Department of Corrections; Douglas Weber, the then-warden at the South Dakota State Penitentiary; Troy Ponto, as associate warden; Darin Young, a former associate warden and current Warden at the penitentiary; Crystal Van Vooren, a major who has worked for the DOC since 1989; Dennis Kaemingk, the Secretary of the DOC whose appointment became effective on May 2, 2011; Laurie Feiler, the Deputy Secretary of Corrections; Timothy

A. Reisch, the former Secretary of Corrections until becoming Adjutant General for South Dakota on April 2, 2011; and twenty John Does. Johnson brought a federal constitutional claim under 42 U.S.C. § 1983 and five state law claims, alleging defendants were constitutionally liable for the murder of Ronald Johnson because Robert and Berget had violent criminal pasts, escape histories, were maximum-security inmates housed in the wrong area, made deals with the Warden, did not have proper classification paperwork, and had too much freedom of movement in their jobs. The defendants removed the action to federal court.

The district court found defendants entitled to qualified immunity and granted summary judgment on Johnson's constitutional claims. The district court remanded *271 the remaining state law claims. Johnson appeals.

II

[1] "We review a district court's decision to grant a motion for summary judgment *de novo*, applying the same standards for summary judgment as the district court." *Tusing v. Des Moines Indep. Cmty. Sch. Dist.*, 639 F.3d 507, 514 (8th Cir.2011). Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(a). In considering summary judgment motions, the burden of demonstrating there are no genuine issues of material fact rests on the moving party, and we review the evidence and the inferences which reasonably may be drawn from the evidence in the light most favorable to the nonmoving party. *Davis v. Jefferson Hosp. Ass'n*, 685 F.3d 675, 680 (8th Cir.2012). " 'Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.' " *Torgerson v. City of Rochester*, 643 F.3d 1031, 1042 (8th Cir.2011) (quoting *Ricci v. DeStefano*, 557 U.S. 557, 585, 129 S.Ct. 2658, 174 L.Ed.2d 490 (2009)).

[2] [3] "Qualified immunity shields a government official from liability and the burdens of litigation in a § 1983 action for damages unless the official's conduct violated a clearly established constitutional or statutory right of which a reasonable official would have known." *Chambers v. Pennycook*, 641 F.3d 898, 904 (8th Cir.2011) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Review of a grant of summary judgment based upon the granting of a claim of qualified immunity is a two-step process. First, we consider whether the evidence demonstrates that the defendants' conduct violated a constitutional right. *See Saucier v. Katz*, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). If there was a constitutional violation, we next consider whether the right violated was clearly established. *See id.*

[4] [5] [6] Johnson's complaint alleges a constitutional due-process claim asserting liability for the injury caused to Ronald Johnson by Robert and Berget. "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189, 195, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) (holding the failure of the county's Department of Social Services to provide a child with adequate protection against his father's violence did not violate the child's substantive due process rights). However, substantive due process does require a state to protect individuals under two specific circumstances. "First, the state owes a duty to protect those in its custody." *Hart v. City of Little Rock*, 432 F.3d 801, 805 (8th Cir.2005). "Second, the state owes a duty to protect individuals if it created the danger to which the individuals are subjected." *Id.* Johnson relies on the state-created-danger theory of liability.

[7] [8] "To succeed on such a theory, [a plaintiff] must prove (1) that [Ronald Johnson] was a member of 'a limited, precisely definable group,' (2) that the [defendants'][3] conduct put [Ronald Johnson] at a *272 'significant risk of serious, immediate, and proximate harm,' (3) that the risk was 'obvious or known' to the [defendants], (4) that the [defendants] 'acted recklessly in conscious disregard of the risk,' and (5) that in total, the [defendants'] conduct 'shocks the conscience.' " *Fields v. Abbott*, 652 F.3d 886, 891 (8th Cir.2011) (quoting *Hart*, 432 F.3d at 805).

3 We are cognizant that in § 1983 suits "each defendant's conduct must be independently assessed" because § 1983 "does not sanction tort by association." *Heartland Acad. Cmty. Church v. Waddle*, 595 F.3d 798, 805–06 (8th Cir.2010). In this appeal, we need not separately examine the individual actions of the various defendants because we find,

> even taking into consideration the acts of all the defendants together, no constitutional rights were violated.

[9] [10] [11] Under the state-created-danger theory, negligence and gross negligence cannot support a § 1983 claim alleging a violation of substantive due process rights. *Hart*, 432 F.3d at 805. "Instead, actionable substantive due process claims involve a level of abuse and power so brutal and offensive that they do not comport with traditional ideas of fair play and decency." *Id.* at 806 (alterations and internal quotation marks omitted). "The test we employ to ascertain a valid substantive due process violation is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience." *Id.* at 805 (alteration and internal quotation marks omitted).

[12] [13] [14] Although proof of intent to harm is usually required, in certain cases proof of deliberate indifference will satisfy this substantive due process threshold. *Terrell v. Larson*, 396 F.3d 975, 978 (8th Cir.2005) (en banc). In cases where "defendants acted under circumstances in which actual deliberation was practical ..., their conduct may shock the conscience of federal judges only if they acted with 'deliberate indifference.' " *Moore ex rel. Moore v. Briggs*, 381 F.3d 771, 773 (8th Cir.2004) (quoting *Cnty. of Sacramento v. Lewis*, 523 U.S. 833, 851–52, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998)). The deliberate indifference standard applied in a substantive due process case is the same as that applied in Eighth Amendment cases: "the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Moore*, 381 F.3d at 773–74 (citing *Farmer v. Brennan*, 511 U.S. 825, 837, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994)).

[15] On appeal, Johnson argues the district court erred in its analysis of the *Hart* factors and argues the actions of the defendants shock the conscience. First, Johnson alleges the district court erred in taking into account only the most recent housing and job assignments in its analysis in light of the temporal requirement of the second *Hart* factor. We need not determine exactly how "immediate" a harm must occur under *Hart*, because even considering housing decisions as early as 2004 there is no evidence of deliberate indifference or conscious-shocking conduct. We need not analyze all five *Hart* factors because we conclude, even viewing the facts in the light most favorable to Johnson, the defendants' conduct did not shock the conscience. *Fields*, 652 F.3d at 891.

Johnson alleges the job assignments shock the conscience because Robert and Berget were given too much freedom of movement and freedom from supervision. We disagree. Berget had worked as an orderly for many years without creating a known threat of harm to any correctional officer. The defendants were not indifferent to any alleged threat because no reported threat carried enough specificity for this Court to determine the penitentiary staff should have drawn an inference of a substantial risk of harm. *See Moore*, 381 F.3d at 774. Despite the histories of Berget and Johnson, the defendants were not *273 deliberately indifferent in allowing Berget and Robert to hold these prison jobs.

Johnson alleges moving Berget to a medium security housing area shocks the conscience, particularly in light of missing paperwork and alleged hunger strike deals. Johnson maintains Berget had no right to be placed outside the maximum unit based on his criminal history, escape history, and institutional conduct. This is correct; Berget would have no viable challenge to a maximum security placement. *See Burns v. Swenson*, 430 F.2d 771 (8th Cir.1970). However, moving Berget to a medium security area, although not required, does not shock the conscience, particularly in light of DOC policy allowing Warden discretion in housing assignments.

Although Berget had a substantial history of escaping and escape attempts and Robert had attempted to escape, and although both committed violent crimes before incarceration, neither Robert nor Berget had committed a murder and neither Robert nor Berget had committed a violent act in prison or shown any propensity for prison violence. Johnson argues Robert and Berget were extremely dangerous inmates. In retrospect that allegation is certainly true. The murder perpetrated on Ronald Johnson shocks the conscience of this Court; however, the record does not demonstrate it was deliberate indifference to not consider Robert and Berget extremely dangerous before the murder of Ronald Johnson. We need not decide whether allowing an extremely dangerous inmate to reside in general population with the opportunity to murder shocks the conscience, because the histories of Robert and Berget do not support deliberate indifference in failing to consider them highly dangerous. Even with vague notice of a planned escape attempt, the defendants were not

deliberately indifferent in failing to place Robert and Berget in maximum security. No prior escape attempts included violence and none had been successful after 1987.

South Dakota Codified Laws § 24–2–27 contemplates the DOC will have control of housing and classification of inmates. DOC policy contemplates the same, and, despite a policy of basing housing on classification, allows Warden discretion. Although the paperwork was not always completed for the discretionary housing decisions, it was within the Warden's power to move Robert and Berget from the maximum security facility to the West Hall. We do not find the DOC's policies on Warden discretion to shock the conscience and we do not find the Warden acted with deliberate indifference in his transfers of Robert and Berget.

III

Accordingly, we affirm the judgment.

All Citations

785 F.3d 267

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UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

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ESTATE OF RONALD E. JOHNSON, by and through its Personal Representative, LYNETTE K. JOHNSON, and LYNETTE K. JOHNSON, Individually,	:	CIV. 12-4084
Plaintiff,	:	DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
vs.	:	
DOUGLAS WEBER, TROY PONTO, DARIN YOUNG, CRYSTAL VAN VOOREN, DENNY KAEMINGK, LAURIE FEILER, TIMOTHY A. REISCH, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, STATE OF SOUTH DAKOTA, and JOHN DOES 1-20,	:	
Defendants.	:	

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Under Fed. R. Civ. P. 56 and Local Rule 56.1, the Defendants move that the Court grant summary judgment, based in part on qualified immunity, dismissing Plaintiffs' complaint. This motion is based on a separately-filed statement of undisputed material facts, a supporting brief, and the affidavits of Douglas Weber, Troy Ponto, and Darin

Young. The evidence cited in the statement of undisputed facts is attached to an affidavit of counsel as required by Local Rule 56.1.

Dated this 9th day of September, 2013.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore
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James.Moore@woodsfuller.com
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of September, 2013, I electronically filed the foregoing Defendants' Motion for Summary Judgment, using the CM/ECF system which will automatically send e-mail notification of such filing to the following:

Donald M. McCarty
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John W. Burke
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Rapid City, SD 57702

Attorneys for Plaintiffs

/s/ James E. Moore
Attorney for Defendants

UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

SOUTHERN DIVISION

o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o-o

ESTATE OF RONALD E. JOHNSON, by and through its Personal Representative, LYNETTE K. JOHNSON, and LYNETTE K. JOHNSON, Individually,	:	CIV. 12-4084
Plaintiff,	:	DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT
vs.	:	
DOUGLAS WEBER, TROY PONTO, DARIN YOUNG, CRYSTAL VAN VOOREN, DENNY KAEMINGK, LAURIE FEILER, TIMOTHY A. REISCH, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, STATE OF SOUTH DAKOTA, and JOHN DOES 1-20,	:	
Defendants.	:	

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Under Fed. R. Civ. P. 56, all of the Defendants have moved for summary judgment dismissing Lynette Johnson's claims against them. Johnson has sued them following the death of her husband, Ron Johnson, who was murdered by two inmates. The Defendants' motion follows extensive discovery, which uncovered uncertain memories about events dating back to 2004, imperfect compliance with written policy,

Qualified immunity is "'an immunity from suit rather than a mere defense to liability.'" *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985)). Its purposes include the "desire to ensure that 'insubstantial claims' against government officials [will] be resolved prior to discovery." *Id.* (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 n.2 (1987)). The United States Supreme Court has therefore "'stressed the importance of resolving immunity questions at the earliest possible stage in litigation.'" *Id.* (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)). The "issue of qualified immunity is a question of law for the court, rather than the jury, to decide." *Littrell*, 388 F.3d at 584.

a. Johnson's claim under 42 U.S.C. § 1983 does not establish a constitutional violation.

Johnson's complaint pleads one federal constitutional claim under 42 U.S.C. § 1983. (Doc. 1, Ex. A, ¶¶ 106-14.) Ron Johnson was murdered at work by inmates Eric Robert and Rodney Berget; he was not murdered by the Defendants. In *DeShaney v. Winnebago Cnty. Dep't of Soc. Servs.*, 489 U.S. 189 (1989), the United States Supreme Court held that a state actor's failure to protect an individual against private violence does not violate the Due Process Clause. The Court noted that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195. Instead, the clause is a limit on

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

ESTATE OF RONALD E. JOHNSON, by and through its Personal Representative, LYNETTE K. JOHNSON, and LYNETTE K. JOHNSON, Individually,	Civ. No. 12-4084
Plaintiffs,	
vs.	**PLAINTIFF'S STATEMENT OF MATERIAL FACTS**
DOUGLAS WEBER, TROY PONTO, DARIN YOUNG, CRYSTAL VAN VOOREN, DENNY KAEMINGK, LAURIE FEILER, TIMOTHY A. REISCH, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, STATE OF SOUTH DAKOTA, and JOHN DOES 1-20,	
Defendants.	

COME NOW the Plaintiffs, by and through their attorneys of record, Don M. McCarty and John W. Burke, and hereby identify the following facts:

1. May 5, 1962 Rodney Berget born in Aberdeen, South Dakota on May 5, 1962. *Def. Init. Disc.536-537.* He is sent to the State Training School, in Plankington, SD at a young age. *Def. Init. Disc. 314.* He escapes at least twice from the State Training School. *Depo. Exhibit 110.* He is sent to the South Dakota State Penitentiary Sept 2nd 1977, at the age of 15. *Depo. Exhibit 110.* The entrance record for the South Dakota State Penitentiary from August of 1984, identifies felony offenses in 1974, 1976 and 1977. It indicates that he has 5 lifetime felonies at that time. *Def. Init. Disc. 536-537.* Other than the reference on the entrance record, no information on the 1974 and 1976 felonies have been produced.

and extremely disciplined and had a short fuse. *Depo.of Sondreal at 27, 31.*

386. A presentence investigation was completed along with a psychosexual evaluation of Eric Robert. *Depo.of Sondreal at 28, 29.*

387. Jesse Sondreal testified that this was the longest sentencing hearing ever had as a States Attorney. He argued that Robert receive a sentence that was essentially equivalent to life in prison. Based on the facts of the case and the evidence submitted at the time of sentencing the Judge imposed an 80 year sentence on Robert. *Depo.of Sondreal at 33-37.*

388. In 2007, Robert filed a Motion to Modify his Sentence. Although, the Motion to Modify was filed in 2007 no hearing was held on the motion until December 22, 2008. Prior to the hearing on December 22, 2008, Sondreal received a letter from the Mikeal Thomas who had been a cell mate of Eric Robert. Based on that letter from Mikael Thomas, Sondreal asked to have DCI interview Mikeal Thomas and gather additional information. Based on DCI's interview of Mikael Thomas and the letter received by Sondreal, Sondreal believed that Erick Robert had been in administrative segregation for attempted violence or an attempted escape. Because he had this initial information Sondreal contact the Penitentiary. Sondreal confirms that the email from Crystal VanVooren dated March 3, 2009 was generated due to his request for information regarding Eric Robert. While Sondreal doesn't know for sure, he believes that he contacted the Penitentiary requesting the information after the first hearing in December but before the second half of the hearing on the Motion to Modify which was held on March 11, 2009. When Sondreal contacted the Penitentiary he asked to speak with security. He believes that he spoke with the head of security or the internal organization that would deal with escapes or threats of violence. Although, he doesn't know the name of the individual he spoke to. Sondreal, was told that someone would call him back. Sondreal confirms that someone from the

Penitentiary did return his call but it was after the second hearing on the Motion to Modify and therefore, he couldn't use the information as the hearing. *Depo.of Sondreal at 40-45.*

389. At his deposition, Sondreal confirmed that he would have been specifically seeking information about escape plans or threats to assault staff. Sondreal doesn't believe that he received anything in writing from the DOC. *Depo.of Sondreal at 46.*

390. Sondreal confirms that he was asking about escape plans and threats to staff but he wouldn't have provided the information referenced in VanVooren's employee regarding a 5-5 escape from 2007 or threats to staff in 2008. *Depo.of Sondreal at 47, 48.*

391. With regard to his call to the DOC and what he conveyed to them, Sondreal testified as follows "well, I have an x-con who is in custody wanting a sentence modification and giving me information, so I initial took that very lightly in a sense. I wanted to get some more things. *Depo.of Sondreal at 77.*

392. Sondreal doesn't remember who he spoke to from the Department of Corrections or the substance of those conversations. In the information that was provided to his by the Department of Corrections couldn't be used at the hearing on Roberts Motion to Modify because that proceeding had been completed before the department called him back. *Depo.of Sondreal at 45, 77.*

393. On April 12, 2011, Jesse Sondreal heard about the murder of Ron Johnson and the escape attempt by Berget and Robert. *Depo.of Sondreal at 49.*

394. On April 13, 2011, Sondreal is interviewed by Austin Hoffman from Keloland. In that interview it states "In 2008, he (Robert) applied for a sentence reduction and Sondreal found out even more about Robert. (He was plotting at that time to kill a prison employee and had been at that time, or close to in late 2008, had been put on segregation of some sort of had had his

their ass. *Tim Henry DCI Interview at 4, 5.*

404. He indicates to DCI that in 2009 when he reported the escape he said he knew that the two of them wanted cells next to each other and that Tolly was involved. He indicates to DCI that he reported to Woodward that Berget and Robert were serious and that they were not fucking around. *Tim Henry DCI Interview at 6, 7.*

405. He indicated to DCI that Berget didn't even have a job in laundry and that he was running back and forth all the time. He says he reported to DCI that he asked Woodward why do you have these guys in this facility and was told to not worry about it. He states to DCI why did they put him in West hall, have they lost their minds. He indicates to DCI that I gave them this. He reports that he gave them this information and that he went into Woodward's office and went back a second time and Woodward told him that he had spoken to Weber about it. *Tim Henry DCI Interview at 9, 10, 14.*

406. At the end of the meeting Henry says, it all lead up to this from the move down here, to kicking those people out, to manipulating the system to the point that they did. To the administration giving into those with demands which I still haven't understood yet. To bringing these people back up here, to allowing them and giving them more liberties as time went on and discounting what I gave them. I mean, I told them, I mean they have told me that and why were they running amuck, loose, I thought this is what Jameson was for and maybe now they will be housed somewhere even beside that because this is crazy. *Tim Henry DCI Interview at 23, 24.*

Dated this 15th day of October, 2013.

Attorneys for the Estate of Ronald E. Johnson and Lynette K. Johnson

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CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of October, 2013, I electronically filed the foregoing *Plaintiff's Statement of Material Facts* with the Clerk of Courts using the CM/ECF system which will automatically send e-mail notification of such filing to the following:

James E. Moore
Woods Fuller Shultz & Smith, PC
PO Box 5027
Sioux Falls, SD 57117-5027

/s/ John W. Burke
John W. Burke

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

ESTATE OF RONALD E. JOHNSON, by and through its Personal Representative, LYNETTE K. JOHNSON, and LYNETTE K. JOHNSON, Individually,	Civ. No. 12-4084
Plaintiffs,	
vs.	**AFFIDAVIT OF DONALD M. MCCARTY**
DOUGLAS WEBER, TROY PONTO, DARIN YOUNG, CRYSTAL VAN VOOREN, DENNY KAEMINGK, LAURIE FEILER, TIMOTHY A. REISCH, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, STATE OF SOUTH DAKOTA, and JOHN DOES 1-20,	
Defendants.	

State of South Dakota)
)ss
County of Pennington)

Donald M. McCarty, being first duly sworn, upon his oath testifies and states as follows:

1. That I am one of the attorneys for Plaintiffs in the above-captioned matter.

2. That I make this *Affidavit* to make documents part of the record.

3. That attached hereto are the following:

Exhibit A – Defs' Initial Disclosures 305-318;
Defs' Initial Disclosures 418-468;
Defs' discovery responses – South Dakota State Penitentiary Entrance Record dated 8/28/84;
Defs' discovery responses 615;
Deposition Exhibit 66

Exhibit B – Defs' Initial Disclosures 30;
Defs' Initial Disclosures 146-150;

Defs' Initial Disclosures 295-296;
Defs' Initial Disclosures 333-335;
Defs' Initial Disclosures 341-343;
Defs' Initial Disclosures 374;
Defs' Initial Disclosures 376;
Defs' Initial Disclosures 400;
Defs' Initial Disclosures 458;
Defs' Initial Disclosures 464;
Defs' Initial Disclosures 474;
Defs' Initial Disclosures 1283;
Defs' Initial Disclosures 1285-1286
Defs' Initial Disclosures 1302;
Defs' Initial Disclosures 1408;
Defs' Initial Disclosures 1493-1494;
Defs' Initial Disclosures 1529-1541;
Defs' Initial Disclosures 1543-1551;
Defs' Initial Disclosures 1609;
Defs' Initial Disclosures 1666;
Defs' Initial Disclosures 1974;
Defs' Initial Disclosures 1984;
Defs' Initial Disclosures 2070;
Defs' Initial Disclosures 2308-2309;
Defs' Initial Disclosures 2311-2315;
Defs' Initial Disclosures 2369;
Defs' Initial Disclosures 2371-2373;
Defs' Initial Disclosures 2375-2379;
Defs' Initial Disclosures 2905-2906

Exhibit C – Defs' discovery responses 155;
Defs' discovery responses 162;
Defs' discovery responses 277;
Defs' discovery responses 286-287;
Defs' discovery responses 435;
Defs' discovery responses 440-446;
Defs' discovery responses 448-449;
Defs' discovery responses 451;
Defs' discovery responses 487;
Defs' discovery responses 526-527;
Defs' discovery responses 780;
Defs' discovery responses 784;
Defs' discovery responses 790

Exhibit D – (Document sealed pursuant to the Court's Order dated 10/23/12 – Original document to be filed directly with the Clerk of Courts)

Exhibit E – (Document sealed pursuant to the Court's Order dated 10/23/12 – Original document to be filed directly with the Clerk of Courts)

Exhibit F – Deposition Transcript of Jesse Sondreal with Exhibits135, 136, 138 and 139

Exhibit G – Deposition Transcript of Lisa Fraser

Exhibit H – Deposition Transcript of Rick Leslie

Exhibit I – Deposition Transcript of Douglas Weber

Exhibit J – Deposition Transcript of Rebecca Weaver

Exhibit K – Deposition Transcript of Daryl Slykhuis

Exhibit L – Deposition Transcript of James Severson

Exhibit M – Deposition Transcript of Denny Kaemingk

Exhibit N – Interview of Timothy Henry

Exhibit O – Deposition Transcript of Chad Straatmeyer

Exhibit P – Deposition Transcript of Craig Baumberger

Exhibit Q – Deposition Transcript of Troy Ponto

Exhibit R – Deposition Transcript of Laurie Feiler

Exhibit S – Deposition Transcript of Jeff Pibal

Exhibit T – Deposition Transcript of Darin Young

Exhibit U – Affidavit of Chester J. Buie

Exhibit V – Affidavit of Jeffrey A. Schwartz, Ph.D.

Exhibit W – (Document sealed pursuant to the Court's Order dated 10/23/12 – Original document to be filed directly with the Clerk of Courts)

Exhibit X – Deposition Transcript of Crystal Van Vooren

Exhibit Y – Deposition Exhibit 61

Exhibit Z – Jeffrey A. Schwartz, Ph.D.'s Preliminary Report dated February 28, 2013

Exhibit AA – Deposition Exhibits 88, 89, 95 and 96

Exhibit BB – Deposition Exhibit 51

FURTHER YOUR AFFIANT SAYETH NAUGHT.

Dated this 15th day of October, 2013

Donald M. McCarty

Subscribed and sworn to before me this 15th day of October, 2013.

Vanessa K. Layka
Notary Public, South Dakota
My Commission Expires: 7/3/14

(SEAL)

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of October, 2013, I electronically filed the foregoing *Affidavit of Donald M. McCarty* with the Clerk of Courts using the CM/ECF system which will automatically send e-mail notification of such filing to the following:

James E. Moore
Woods Fuller Shultz & Smith, PC
PO Box 5027
Sioux Falls, SD 57117-5027

/s/ Donald M. McCarty
Donald M. McCarty

UNITED STATES DISTRICT COURT
DISTRICT OF WISCONSIN
WESTERN DISTRICT

ESTATE OF RONALD E. JOHNSON, by and through its Personal Representative, LYNETTE K. JOHNSON, and LYNETTE K. JOHNSON Individually,

Plaintiffs,

-vs-

CIV NO. 12-4084

DOUGLAS WEBER, TROY PONTO, DARIN YOUNG, CRYSTAL VAN VOOREN, DENNY KAEMINGK, LAURIE FEILER, TIMOTHY A. REISCH, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, STATE OF SOUTH DAKOTA, and JOHN DOES 1-20,

Defendants.

The deposition of JESSE SONDREAL pursuant to notice and subpoena at Pfister Hotel, 424 E. Wisconsin Avenue, Milwaukee, Wisconsin, pursuant to the Federal Rules of Civil Procedure, on the 2nd day of August, 2013 commencing at 8:30 o'clock in the morning before SUSAN K. TAYLOR, a Court Reporter and Notary Public in and for the State of Wisconsin.

proportionality?

A **That would be the only thing left to argue in an appeal where you've waived all your rights, you've waived your right, pled guilty and were sentenced and were sentenced within the framework of the statutory allowable min/max range.**

Q My recollection is the judge gave him an 80-year sentence. Right?

A **If I think about it, I think it is either 80 or 85 and I don't know which one.**

Q In terms of a first-time felony conviction, 80 years -- Well, two things. In terms of a first-time felony conviction and no one actually being physically injured, he got a substantial sentence.

A **Tantamount what I felt at the time to a life sentence because if I recall, I think first time violent felon under that grid, he would have had to serve at least 50 if not 60 percent before first parole eligibility which would be a 40-year stint minimum before he would even be first eligible.**

Q At the time, do you remember ballpark how old he was?

A **I would guess he was in his 40s.**

Q So as you say, given the -- although the judge did not give him life in prison, the judge in essence gave him what was tantamount to a life sentence based on parole

eligibility.

A **That is what I felt at the time.**

Q Okay. Did anything more in terms of Eric Robert's history come up to your recollection between the sentencing and the time of the motion to modify the sentence?

A **No.**

Q You received -- When I look at this file, it is somewhat odd and I hope you can explain it to me. The motion to modify sentence is filed on November 15, 2007, but from my review of the records, there is no hearing held on that motion until December 22, 2008.

A **I believe the statute required a one-year motion and then the legislature changed that to two years and I remember Attorney Kinney asking me if I had any objection to the hearing maybe taking place outside of the two years so long as he got his motion filed within the two years.**

Q What was your response to that?

A **I acquiesced.**

Q That does explain to me the gap. Right? The judge would have had -- based on the change in the law, at least theoretically, the judge would have had authority for two years from the date of the judgment and sentence based on that change.

A **Correct.**

Q But Kinney maybe filed the motion within the one year because the law was written that way at the time, but with your consent, he then delayed the hearing of it.

A **That is what -- that is what I recall. I remember talking to him about that specifically.**

Q You get the motion to modify. You obviously -- if I am wrong on this -- felt strongly this guy needed a sentence tantamount to life. You get the motion to modify. What do you do?

A **Nothing.**

Q At what point do you do something in relation to it?

A **Once I think I start to get some background information or I start to hear that a date is going to be set or when things are going to start materializing, I don't know if I did something right away on receiving the motion. At some point, something set my wheels in motion as to look into how Robert was faring at the penitentiary and obviously, I had to review extensively Dr. Manlove's report.**

Q Explain to me Dr. Manlove's report.

A **He is a psychiatrist who the defense hired out of Rapid City. He flew down to Sioux Falls to interview Robert on one or multiple occasions and opined on his future dangerousness.**

Q And they had them generate a report for purposes of the motion to modify?

A **Correct.**

Q The first hearing on the motion to modify is scheduled and heard on December 22, 2008. Prior to that hearing, other than reviewing Dr. Manlove's report, what else do you recall doing?

A **I received an unsolicited letter from -- I believe his name was Michael Thomas who was an inmate who had been a cellmate of Robert and based on that, I asked I believe DCI to interview him and gather any additional information.**

Q So you send them down to do that. Do you do anything else?

A **I contacted the penitentiary because I had heard -- and I don't remember all the facts, but it would be borne out in those transcripts and Michael Thomas's letter to me -- that he either has been in administrative segregation for attempted violence or an attempted escape and I attempted to locate or check the veracity of that allegation and to be able to use it against him at his hearing and against Dr. Manlove's report.**

MR. MC CARTY: If you will look there, one of the exhibits we had sent out in advance is

Q You don't agree with it that ethically, you would be obligated to make sure what you said was true?
A **Well, I would never intentionally say something that was false. My objection or distinction with your question would be that the rules would somehow prohibit me from talking about a pending case that was not in my jurisdiction and that I was not prosecuting.**
Q I don't want to debate with you. That is not my intent to debate with you what the ethical rule would require. But when you sat down for this interview, you certainly knew that everything that you said to the reporter needed to be truthful from your perspective and based on what you believed to be the actual facts.
A **Yes.**

MR. MC CARTY: I will represent to you that next exhibit that we marked, the DVD, is the news article that actually ran on Keloland.

THE WITNESS: Okay.

MR. MC CARTY: If you would boot that up, Jesse, so you can look at it and watch it quick.

THE WITNESS: It is open. Should I play it?

MR. MC CARTY: Play it.

(DVD was played)

Q Jesse, you obviously have seen that before?
A **Yes.**
Q And in addition to having seen that, had you read the version of that same report?
A **I believe so.**
Q Did you tell the interviewer -- Was it actually Mr. Austin that interviewed you?
A **Mr. Hoffman, yes.**
Q Mr. Hoffman, I am sorry. Did you tell Mr. Hoffman that based on your experience with Eric Robert, based on what you knew of his history as of April 13, 2011, that he was the most violent and dangerous person you had ever seen?
A **I believe that.**
Q You believe that?
A **Yes.**
Q When you -- I think what you are saying to me is you believe that today.
A **I believe I said it then and I believe I would have believed it then, too.**
Q And you don't have any dispute with the context of that report, do you?
A **No.**

MR. MC CARTY: I didn't hear a response.

A **No, I have no dispute with the context of the report.**
Q In that report and on that date of July 13, 2011, you believed, based on the information you had gathered with regard to Eric Robert, that he had previously plotted to kill a prison employee?
A **I had been led to believe that.**
Q And on this day, going back to our discussion about what the ethical rule is or isn't and your agreement that there is no question that you would be obligated to tell the truth in conjunction with this when you were being interviewed, you believed on that day that that was something that he had been engaged in based on what you had been told.
A **That that allegation had been made and that there was punishment based on that type of behavior.**
Q The same thing is true -- the same thing is true with regard to plotting the escape. Right?
A **Right.**
Q When you look at that particular language, did you believe at the time that plotting the escape and killing a prison employee were tied together?
A **Yes. I mean, I internalized it or felt that it was one. It might have been kind of a series of one thing. And I kept remembering some shower room or something coming up in either our investigation or the interviews or the**

hearing and so as I think about it, I keep hearing shower room, but I don't know why that is relevant.
Q On that particular day when you were interviewed, you believed that he had been in -- one way or another, it had been conveyed to you that he had a plan to -- in 2008, to try to escape and to kill a prison employee in conjunction with that.
A **That is what I had been led to believe.**
Q I have the transcript and the exhibits that were offered at the motion to modify the sentence. I have the information that was submitted there. Is there any information that you think you gathered prior to this interview that would go to the issue of the -- of him plotting an escape and killing a prison employee that we have not discussed?
A **I would have probably been looking back at the Michael Thomas stuff which was sentence modification stuff and would have been offered at that hearing, his letters and his interview and I think there was a transcript of that, too.**
Q Michael Thomas alleges that Eric Robert wanted to kill Tim Henry. Do you remember that?
A **I don't recall who was the source of his -- or the aim of his plot.**
Q If that is reflected in the documents submitted by DCI

based on their interview with Mr. Thomas, you wouldn't dispute that?

MR. MOORE: This is James Moore. I will just object to the form of the question. He doesn't have the document in front of him. He has not seen it.

MR. MC CARTY: Go ahead. You can answer.

A **I don't have it and I don't recall and I don't have a name in mind.**

Q Do you recall whether Thomas alleged that Robert may kill a CBM worker? Someone that worked up at the penitentiary?

A **I did remember that. CBM sticks out to me, yes.**

Q But the name Tim Henry in terms of an inmate, that doesn't ring any bells?

A **I don't know. That doesn't ring any bells.**

Q Most importantly there, I don't think Mr. Thomas -- you tell me if I am wrong based on your recollection -- he doesn't ever say that Eric Robert was plotting to kill someone in conjunction with the escape. Do you recall him ever saying that?

A **I don't recall. I don't have a recollection. What I recall would be contained in his letters and interviews verbatim.**

Q You don't have any recollection -- You know you had a phone call with somebody at the Department of Corrections. Correct?

A **Yes, at the front end.**

Q Before that second hearing on the motion to modify. Right?

A **And then after, we also had a conversation and I don't know if we got into the specifics, but I know that I did not request any documentation thereof because the order had already been entered.**

Q You don't remember who it was that you had the conversation with or what they told you.

A **I don't remember who it was with and if we got into the facts or not. I just remember at the time thinking great, you know, great timing on the call; the hearing has already taken place and the cross-examination of Robert has taken place and the order has been entered I think.**

Q So the sources of your information with regard to what Eric Robert would or wouldn't have done while he was in the penitentiary would have been the letters from Mr. Thomas, the DCI interviews of Mr. Thomas, and the conversations or information that you would have gotten from the DOC based on those phone calls.

A **That would have been the extent.**

MR. MC CARTY: I want to take a break for about five minutes because I am coming closer to the end. I don't know from the conference call standpoint whether we should -- We can probably just put you on mute or hold and then we will call back to you -- or not call back; we will let you know when we want to go back on the record.

THE WITNESS: We will keep the line open.

(Discussion off the record)

(Documents were marked Exhibit Nos. 138 and 139)

MR. MC CARTY: Jesse, look at what's been marked as Exhibits -- Well, look at Exhibit 138 for me first.

THE WITNESS: Okay.

Q Do you recognize that article?

A **I have read it.**

Q Have you read it before today?

A **Not sure.**

Q That is a fair answer. Do you see in that article where Cindy Davis who did the report is indicating that you called Eric Robert one of the evilest men that you ever prosecuted?

A **I see that.**

Q Do you remember doing an interview with her?

A **I do.**

Q Do you believe you told her that?

A **That sounds like something I would have said in this regard.**

Q This is posted on April 12, 2011 at 6:09 p.m. Mountain Time. Do you see that?

A **I see that under the header.**

Q That is something that you would have believed is true then on that particular date and something you still believe today?

A **Yes.**

Q If we look at Exhibit 139, do you recognize that article? Review it for me.

A **Okay.**

Q Do you see the quote in the third paragraph attributed to you?

A **I do.**

Q This one looks like this article was done on April 13. Correct?

A **That is what the document purports.**

Q Do you have any reason to dispute that?

A **No.**

Q Reading your quote, is that something you believe you would have said to Cindy Davis or do you have any reason to dispute it?

A No, sir, I do not.
Q All right. And were you provided with any substantive content about Eric Robert in that conversation?
A **I could have been, but like I said, the reason for the call had dissipated and so there was small talk about what I was looking for. I didn't get the documents that I was looking for in time to submit them.**
Q So is it correct that you were at no time provided with any documentation from DOC of the sort that you had called looking for?
A **Correct.**
Q Is it fair to say that your basis for your questions about any reports related to an escape attempt or a threat to assault or kill a staff member were based on a letter that you had received from Michael Thomas?
A **That is what initially gave rise to that -- to that whole inquiry.**
Q And after you received the letter from Michael Thomas, you provided that to the Division of Criminal Investigation. Correct?
A **I believe I did, yes.**
Q Did you provide it to anyone at the Department of Corrections?
A **I would doubt that I would have done that. I don't recall -- I don't recall not doing it specifically,**

but there is no reason why in that chain of events I would have sent it to them.
Q You testified a little bit about your understanding that you thought Robert had been involved in an escape attempt involving west hall shower and that that was somehow connected to a plot or a threat to kill a staff member. Is that -- is my question correct?
A **I didn't say west hall; I just recall shower and I recall the words tunneling being used or thrown about and CBM worker. I thought -- I may have mistaken that as a guard, but I thought it was somebody that was not an inmate.**
MR. MC CARTY: I will object to the form of the question on the grounds that it is not -- the form of the question was not consistent with the testimony by him earlier.
Q I am not trying to recharacterize your testimony, Jesse. I want to know what it was because I am not -- I am not clear from what you said earlier. I wanted to know if you thought based on what you heard that the escape attempt and the threat to kill staff were somehow connected.
A **Yes.**
Q And what was the basis for your understanding?
A **My basis would have been any information related to**

Q Is it fair to say that you never discussed with anyone at the Department of Corrections a question of whether Robert had threatened to assault or kill someone working for CBM? Do you know whether you ever talked to anyone at DOC about that?
A **I broached that issue and wanted to get documentation. That is why I called. I didn't get the information that I was looking for, though.**
Q Do you recall the letter that you got from Michael Thomas?
A **I can still kind of see it in my head a little bit because I know it was on yellow legal paper.**
Q Do you recall at the end of the letter, he asked you to consider writing some type of letter on his behalf to the parole board?
A **I remember that.**
Q Did you ever do that?
A **Nope.**
MR. MC CARTY: I didn't hear an answer.
THE WITNESS: My answer was no, I did not.
BY MR. MOORE:
Q You also said you understood that Michael Thomas was

moved out of Eric Robert's cell based on his concerns about living with Robert. Was that based on information that came from Michael Thomas either in the letter or through an interview at DCI?
A **It would have been either my understanding through the interview, his letter, and/or discussing his situation with the DCI agent who did the interview.**
MR. MOORE: Those are all the questions I have for you.
MR. MC CARTY: I have a couple follow-up questions.
EXAMINATION BY MR. MC CARTY:
Q The initial basis you think -- at least part of it was -- in terms of calling DOC was this letter from Michael Thomas. Right?
A **Well, I wouldn't have had any other reason to know or think or believe that he had these issues but for that letter triggering that.**
Q But no matter what -- no matter who you spoke to and what they said back to you, at the point that you called sometime before Crystal Van Vooren's e-mail, I think like March 3, you would have gotten on the phone with a representative from the Department of Corrections and conveyed to them that you had information indicating that an extremely violent inmate in their custody you

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

ESTATE OF RONALD E. JOHNSON, by and through its Personal Representative, LYNETTE K. JOHNSON, and LYNETTE K. JOHNSON, Individually,	Civ. No. 12-4084
Plaintiffs,	
vs.	**PLAINTIFFS' BRIEF IN RESISTANCE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT (AMENDED)**
DOUGLAS WEBER, TROY PONTO, DARIN YOUNG, CRYSTAL VAN VOOREN, DENNY KAEMINGK, LAURIE FEILER, TIMOTHY A. REISCH, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, STATE OF SOUTH DAKOTA, and JOHN DOES 1-20,	
Defendants.	

COME NOW Plaintiffs Estate of Ronald E. Johnson and Lynette K. Johnson, by and through their attorneys of record, Donald M. McCarty and John W. Burke, and hereby submit the following in resistance to *Defendant's Motion for Summary Judgment [Doc. 35]*.

INTRODUCTION

In their brief, the Defendants do their best to reframe what this case is about. The Defendants minimize this case and suggest, almost disrespectfully, that it is about "uncertain memories," "imperfect compliance with written policy," and "poor record-keeping." Whether the Defendants' summary of this case is the product of artful litigating or simple misunderstanding is of no import. In either case, that is not what this case is about. This case is about the Defendants' intentional and egregious violations of well accepted security practices

Wisconsin. *Id. at ¶160.* The request was denied. *Id.*

Later that same month, the DOC learned of a threat to staff. Correctional Officer Flick filed a written report advising that a confidential informant had advised him that Robert was "after" him. *Id. at ¶161.* The report included the specific detail that Robert "was going to wait until after his Court date and depending what the outcome was he was going to blast [Mr. Flick]." *Id.* The inmate suggested that Mr. Flick "watch [his] back." *Id.*

In connection with Robert's request for a reduction of his 80-year sentence, the Meade County States Attorney (Jesse Sondreal) contacted the DOC and requested information concerning "any possible escape plans/write-ups and threats to assault staff." *Id. at ¶168.* Defendant Van Vooren indicated at that time that Robert's file contained the following: "a 5-5 escape write-up from 07 and threats to staff in 08." *Id.* A contemporaneous DOC *Progress Report* advised that Robert's conduct "makes him a security risk," and represented that Robert would "remain at the Jameson Annex Maximum Security Unit-D." *Id.* States Attorney Sondreal's desire to obtain further information from the DOC was not without a purpose. States Attorney Sondreal had received a letter from Robert's cellmate at the time (Michael Thomas), which prompted him to have the cellmate interviewed by agents of the South Dakota Division of Criminal Investgation ("DCI"). *Id. at ¶¶392-97.* As result of their interview of the cellmate, States Attorney Sondreal concluded that there was credible information that Robert was planning an escape attempt that involved the killing of a DOC employee – and that is why he contacted the DOC, advised the DOC of the information, and sought any additional information that the DOC might have. *Id.*

The court promptly denied Robert's request to have his sentence reduced, so as of March of 2009, Robert knew that he would be at the Penitentiary for the rest of his life. Robert quickly

such an unconstitutional policy or custom." *Defendant's SJ Brief at 7.* This is untrue. In this case, the evidence makes clear that no policy was in place to govern the assignment of jobs to inmates in West Hall. *Depo. Exhibit 26 at p. 8; Depo. of Slykhuis at 26.*

2. Johnson's claims against the State and the DOC based upon 42 U.S.C.A. § 1983.

The Defendants maintain that the State and the DOC are not "persons" under 42 U.S. C.A. § 1983 and therefore may not be subject to liability for a claim based upon that statute. Given the United States Supreme Court's decision in Will v. Michigan Dept. of State Police, 491 U.S. 58, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989), Johnson agrees that the State and the DOC are entitled to summary judgment on Count 3 of the *Complaint.*

3. Supervisory liability under 42 U.S.C.A. § 1983.

The Defendants state that "[t]here is no supervisory liability under Section 1983." *Defendant's SJ Brief at 8.* Preliminarily, this is an incorrect statement of the law. Instead, in the words of the Eighth Circuit, "[i]n the section 1983 context, supervisor liability is limited." *Boyd v. Know, 47 F.3d 966, 968 (8th Cir. 1995).* A supervisor can be held liable if he/she "'know[s] about the conduct and facilitate[s] it, approve[s] it, condone[s] it, or turn[s] a blind eye for fear of what he or she might see.'" *Id. (quoting Ripson v. Alles, 21 F.3d 805, 809 (8th Cir. 1994)).*

Turning to the real question – whether any of the Defendants are liable under a theory of supervisory liability – the Defendants clearly misunderstand Johnson's allegations. Johnson is not attempting to hold any of the Defendants liable simply because they were a "supervisor" of others. While the evidence makes clear that each of the Defendants "'kn[e]w about the conduct and facilitate[d] it, approve[d] it, condone[d] it, or turn[ed] a blind eye for fear of what he or she might see,'" Johnson's allegations go farther. *Id. (quoting Ripson, 21 F.3d at 809.* Johnson is alleging that the Defendants were directly involved, and that their respective actions/inactions

supervise Case Managers. Johnson wants the decision-makers to be held liable, not the scriveners.[16] Importantly, in their brief, the Defendants admit that Weber, Ponto, and Young can be liable under Section 1983 to the extent that they were involved in the decision to house Berget and Robert in West Hall. *Defendants' Brief at 10.*

4. The Defendants are not entitled to qualified immunity.

A. Johnson's claim under 42 U.S.C. § 1983 does establish a constitutional violation.

The Defendants agree that substantive due process requires a state to protect individuals under two specific circumstances: (1) a state owes a duty to protect those in its custody; and (2) a state owes a duty to protect individuals if it created the danger to which the individuals are subjected. *Defendant SJ Brief at 13 (citing Fields v. Abbott, 652 F.3d 886, 890 (8th Cir. 2011)).* In this case, the exception that is applicable is the second, often referred to as the "state-created danger" exception. The Defendants correctly state that his exception requires a plaintiff to show the following: (1) that Johnson was a member of a limited, precisely definable group; (2) that the Defendants' conduct put Johnson at a significant risk of serious, immediate, and proximate harm; (3) that the risk was obvious or known to the Defendants; (4) that the Defendants acted recklessly in conscious disregard of the risk, and (5) that in total, the Defendants' conduct shocks the conscience. The Defendants do not argue that Johnson was not a member of a limited, precisely definable group, element (1); therefore, only elements (2) – (5) will be discussed.

B. Element (2) – Defendants' conduct put Ron at "significant risk of serious, immediate, and proximate harm."

[16] The Defendants state that "discovery has proved who was and who was not involved in the actions complained of." *Defendant's SJ Brief at 10.* This is untrue. To this day, despite extensive discovery and twenty-six depositions, no one will confirm who initiated, analyzed, and made the decision to transfer Berget and Robert out of the Jameson Annex June of 2004. *Depo. of Slyhuis at 101-02.*

end hunger strikes. After these agreements were made the inmates went unsupervised and unchecked. At the same time multiple reports were made indicating that the inmates intended to escape and that the escape could result in harm to staff. Despite what the defendants were obligated to know and did in fact know about these particular inmates, they disregarded the specific warnings and maintain the placement of these inmates in a position that allowed them free movement within the system and gave them opportunity to plan and kill a member of the staff. The individual acts are shocking by themselves but the cumulative affect combined with the affirmative obligation of the defendants in this particular case lead to the conclusion that the conduct was conscience shocking.

According to correctional expert, Jeffrey A. Schwartz, Ph.D., who has been consulting in the corrections field for some 35 years, "the breaches of Defendants' duties, their repeated policy violations and their failures to maintain acceptable security practices were blatant, shocking and unconscionable." *Affidavit of McCarty at Exhibit Z.*

f. Whether a violation of policy establishes a constitutional violation.

As noted by the Defendants, the Eighth Circuit has held that as a general rule a violation of prison policy does not give rise to liability under section 1983. The Defendants' focus on this ruling is misplaced. The Eighth Circuit had held that "a violation of prison policy alone does not give rise to section 1983 liability." *Moore v. Rowley, 126 Fed. Appx. 759, 760 (emphasis added).* In this case, Johnson is not alleging "a violation of prison policy alone." Indeed, as detailed above, Johnson is alleging – and the evidence has demonstrated – far more. Stated another way, Johnson's section 1983 claim does not rest upon the fact that the Defendants violated various documentation policies. Johnson is alleging a state-created danger; the Defendants' policy violations only serve to demonstrate their intent.

5. Johnson's state-law claims.

a. If the Court grants summary judgment on Johnson's section 1983 claim, the remaining state-law claims should be remanded rather than dismissed.

The Defendants posits that if the Court grants their motion for summary judgment on Johnson's section 1983, the Court should proceed to dismiss Johnson's state-law claims. *Defendant's SJ Brief at 31.* As is readily apparent, this issue is moot if the Court allows Johnson's section 1983 claim to proceed. Assuming, *arguendo*, this Court elects to dismiss Johnson's section 1983 claim, it should not dismiss Johnson's state-law claims. Rather, it should simply remand them to state court. Remanding such claims will result in a far more efficient use of resources. If the state-law claims are dismissed, Johnson and the Defendants will be burdened with re-beginning the entire action, including serving each of the Defendants. Likewise, despite the enactment of section 1367(d), remanding the matter ensures that the parties and the state court are not burdened with frivolous motions/arguments based upon statutes of limitations. Finally, remanding the matter makes sense since this matter is before this Court by virtue of the Defendants' removal. Noticeably, neither of the two cases relied on by the Defendants to support a dismissal of Johnsons' state-law claims were before the district courts because they had been removed.

b. Johnson's state-law claims are not barred by the exclusivity of worker's compensation.

The Defendants argue that Johnson's state-law claims are barred because the general rule is that worker's compensation is the exclusive remedy. Before proceeding, it is important to draw a distinction in the nature and origin of the claims that are alleged. Johnson's wrongful death claim (Count 1) and survival claim (Count 2) stem from Ron's murder. In contrast, Johnson's claims for IIED (Count 4), NIED (Count 5), and misrepresentation / non-disclosure

(Count 6) stem from the deceptive *After-Incident Report*. To be clear, Johnson's claims for IIED, NIED, and misrepresentation / non-disclosure do not seek damages for the murder of Ron on the job.

i. Wrongful death and survival claims.

The Defendants acknowledge that a plaintiff is not limited to workers' compensation benefits for injuries "intentionally inflicted by the employer." *Defendants' Brief at 32. See also McMillin v. Mueller, 2005 S.D. 41, ¶12, 695 N.W.2d 217, 222.* When determining whether an employer "acted intentionally," the South Dakota Supreme Court looks at three elements: "1) whether the employer had actual knowledge of the dangerous condition; 2) if there was a substantial certainty that injury was to occur; and 3) the employer still required the employee to perform." *McMillin, 2005 S.D. at ¶15.* Needless to say, the South Dakota Supreme Court has commented that this analysis is fact specific. *Id. (quoting Harn v. Continental Lumber Co., 506 N.W.2d 91, 99 (S.D. 1993)).*

Here, Johnson's wrongful death and survival claims are not prohibited by SDCL 62-3-2 because Johnson has pointed to substantial evidence "plausibly demonstrat[ing]" that the Defendants "acted intentionally."[17] Specifically, the evidence makes clear that the Defendants had actual knowledge of the dangerous condition (see subparagraph 4.C. and 4.D, *supra*); that there was a substantial certainty that injury was to occur (see subparagraph 4.B., *supra*); and that Ron was nevertheless required to perform.

ii. IIED, NIED, and misrepresentation claims.

Johnson's claims for IIED (Count 4), NIED (Count 5), and misrepresentation (Count 6)

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[17] *See Fryer v. Kranz, 2000 S.D. 125, ¶11, 616 N.W.2d 102, 106 ("'The worker must also allege facts that plausibly demonstrate an actual intent by the employer to injure or a substantial certainty that injury will be the inevitable outcome of employer's conduct.'").*

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14-2383

ESTATE OF RONALD E. JOHNSON, by and through its Personal Representative, LYNETTE K. JOHNSON, and LYNETTE K. JOHNSON, Individually,

Appellants,

DOUGLAS WEBER, TROY PONTO, DARIN YOUNG, CRYSTAL VAN VOOREN, DENNY KAEMINGK, LAURIE FEILER, TIMOTHY A. REISCH, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, STATE OF SOUTH DAKOTA, and JOHN DOES 1-20,

Appellees.

Appeal from the United States District Court for the District of South Dakota – Southern Division
(4:12-cv-04084-LLP)

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SUMMARY OF THE CASE

Eric Robert and Rodney Berget were violent, maximum custody inmates held by the South Dakota Department of Corrections' ("DOC"). As maximum custody inmates, they were required to be housed in the Jameson Annex ("Max Facility"), the DOC's only facility designated for maximum custody inmates.

As a result of numerous intentional and systematic violations of security practices and DOC policy, including clandestine "deals" by the Warden to end hunger strikes, Robert and Berget were moved out of the Max Facility. Despite repeated warnings by staff and inmates, the DOC ignored the risks, and knew that it was putting Correctional Officers in danger – and went to great lengths to hide its conduct – but proceeded nonetheless. On April 12, 2011, Robert and Berget killed long-time Correctional Officer Ronald E. Johnson ("Johnson") in connection with an escape attempt. This action was subsequently commenced in South Dakota state court alleging a claim under 42 U.S.C. § 1983 and five state law claims. After removal, the District Court granted summary judgment in favor of the Warden and other Defendants on Johnson's § 1983 claim and remanded the state law claims.

Due to the legal questions presented and the extensive underlying facts, Johnson respectfully requests thirty minutes for oral argument.

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 14-2383

ESTATE OF RONALD E. JOHNSON, by and through its Personal Representative, LYNETTE K. JOHNSON, and LYNETTE K. JOHNSON, Individually,

Appellants,

DOUGLAS WEBER, TROY PONTO, DARIN YOUNG, CRYSTAL VAN VOOREN, DENNY KAEMINGK, LAURIE FEILER, TIMOTHY A. REISCH, SOUTH DAKOTA DEPARTMENT OF CORRECTIONS, STATE OF SOUTH DAKOTA, and JOHN DOES 1-20,

Appellees.

Appeal from the United States District Court for the District of South Dakota – Southern Division
(4:12-cv-04084-LLP)

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temporal considerations.[3]

The murder of Johnson was not a product of inadvertence or happenstance; instead, the Defendants affirmatively created the risk. There was no justifiable reason for creating the risk and the DOC's conduct was strictly prohibited. The DOC had access to all of the necessary information to make the correct decision, all the time necessary to consider its options, and most importantly, the absolute ability to eliminate the risk posed to Johnson at any time. (Appx. 111-13) Finally, because the DOC had custody of Robert and Berget, it had the ability to control the interaction between them and Johnson. The DOC was aware that the initial risk that it had created was growing greater as time passed, yet the DOC chose to do nothing to eliminate the risk. The DOC was so acutely aware of the risk that it had created, that it actually asked another inmate (Tolley) to move into the cell next door to Robert and Berget so that he could report their activities to the DOC. Tolley repeatedly reported that they intended to escape. Tolley's report was corroborated by Henry. In the meantime, CO Buie was reporting observations of

[3] In this regard, consider that all parties agree in this case that the deliberate indifference standard applies to the Defendant's conduct rather than an intent to harm. The deliberate indifference standard applies because in this particular case, the Defendants had the actual ability to deliberate. If the actual facts of the case can have an impact on the intent element, why would the Court not apply a similar rational to the "immediate" component of the test? The unique facts of this case justify a more considered interpretation of the term "immediate" because the state actors maintained the control and ability to eliminate the risk.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27792

ESTATE OF RONALD E. JOHNSON,
by and through its Personal Representative,
LYNETTE K. JOHNSON, and
LYNETTE K. JOHNSON, Individually,

Plaintiffs and Appellants,

vs.

DOUGLAS WEBER, TROY PONTO,
DARIN YOUNG, CRYSTAL VAN
VOOREN, DENNY KAEMINGK,
LAURIE FEILER, TIMOTHY A. REISCH,
SOUTH DAKOTA DEPARTMENT OF
CORRECTIONS, STATE OF SOUTH
DAKOTA, and JOHN DOES 1-20,

Defendants and Appellees.

Appeal from the Circuit Court
Second Judicial Circuit
Minnehaha County, South Dakota

THE HONORABLE MARK E. SALTER

APPELLANTS' REPLY BRIEF

NOTICE OF APPEAL FILED MARCH 16, 2016

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

CASES:

PRELIMINARY STATEMENT

In this case Johnson asserts that over the course of several years the Defendants engaged in an affirmative course of conduct that created a real and substantial risk to the safety and lives of Department of Corrections ("DOC") employees. Johnson further claims that the Defendants knew and appreciated the risk they had created and, despite having multiple opportunities to eliminate the risk, chose not to correct the situation. Johnson vigorously maintains that the Defendants' conduct directly contributed to the death of Ron Johnson. Finally, Johnson alleges that almost immediately after Ron's death, the Defendants engaged in a cover up to conceal their prior actions that contributed to the murder. As part of those efforts, the Defendants affirmatively misrepresented the relevant facts to Johnson and, in furtherance of those efforts, dishonestly stated that no policies or procedures were violated and issued an *After-Incident Report* that plainly suggested that the death was an unavoidable tragedy.

In this case, the circuit court somehow concluded that many of the facts "are truly undisputed." *SR at 2813.* In keeping with this erroneous conclusion, the *Brief of Appellees* states: "Thus the extended statement of the facts in Johnson's brief, which focused on events occurring years before Ron's murder, is largely irrelevant to this appeal." *Brief of Appellees at 3.*

The Defendants also place emphasis on the fact that the federal courts ruled against Johnson on her § 1983 claim, and suggest that any review of Johnson's State Constitution due process claim would be a waste of time. The Defendants fail to point out that the District Court did not consider most of the facts asserted by Johnson because

it was bound by the Eighth Circuit's requirement that the Defendants' conduct produce an "immediate" harm. Thus, the District Court concluded that the conduct was "too far removed in time." Aside from the fact that this Court may not include this "immediacy" requirement, Johnson's IIED and misrepresentation claims contain no such requirement. As a result, all of the facts demonstrating the Defendants' conduct are relevant and should be considered by this Court.

REPLIES TO THE APPELLEES' ARGUMENTS AND AUTHORITIES

I. WHETHER A JURY COULD CONCLUDE THAT THE DEFENDANTS' CONDUCT WAS EXTREME AND OUTRAGEOUS.

A. Johnson has identified facts demonstrating that the Defendants' conduct was extreme and outrageous.

At the outset, the Defendants strive to minimize their conduct which culminated with the issuance of the *After-Incident Report*. Accordingly, the Defendants suggest that Johnson's claim is based solely on the *After-Incident Report's* failure to include particular statements, the inclusion of certain incorrect statements, and the imprecise use of a specialized term. As the Defendants well know, Johnson's claim is not based on a few missing sentences, typos, and/or word choices.

To analyze this issue, the Court must compare the sanitized *After-Incident Report* with the facts as presented by Johnson, most of which are heavily disputed by the Defendants. Among many others, Johnson identified the following facts which are relevant to her claims that the Defendants do not admit, and which are therefore in dispute:

- Berget and Robert were extremely violent and dangerous men; they were not average inmates. *SR at 1271, 1274-75, 2390.*

- Berget had attempted to escape multiple times and had posed a substantial threat to escape. *SR at 1215, 2400.* In 2007, Robert attempted to escape and DOC documents confirm that Berget was involved. *Id. at 1231-34.*

- By any reasonable reading of DOC policy, Berget and Robert were to be housed in maximum security and subjected to direct correctional supervision in the Jameson Annex. *SR at 536, 574, 1698-99.*

- Both Berget and Robert engaged in virtually identical hunger strikes for the express purpose of being moved to an area with less security and supervision. *SR at 1223, 1254, 1242-43, 2390.*

- Berget and Robert could not have been moved out of Jameson to a lower level of security and supervision without affirmative decisions by the Defendants. *SR at 1223, 1254, 1242-43.*

- The Defendants, and specifically Warden Weber, entered into deals with both inmates whereby, in exchange for ending their hunger strikes, they were moved out of maximum security and into a lower level of security and supervision. *SR at 1221-23, 1254, 1242-43, 2390.* The medical records for both inmates include multiple specific demands to see Warden Weber. *SR at 1241-42.* The comments made by each inmate are very similar and they make the same demands. *SR at 2500-01, 1242-43.*

- These transfers violated (i) the DOC's Classification Policy, (ii) the DOC's hunger strike policy, and (iii) basic ethical rules applicable to corrections. *Id. at 2390.*

- Warden Weber moved these inmates knowing that the transfers violated the DOC policies identified above. *SR at 2425-26.*

- In July of 2009, Robert demanded to be moved to the third floor of West Hall to a cell next to Berget. *SR at 1240-43.* In August of 2009, Berget unilaterally packed up his belongings and demanded to be moved out the cell he had been living in for several years. *SR at 1244-45.* He further demanded to be moved to the third floor of West Hall in a cell next to Robert. The Defendants acquiesced and moved both inmates to the third floor of West Hall in cells W085 and W089, resulting in them being separated by only one cell. *SR at 801-04, 1444-46. APP to Appellants' Brief at F-3.*

- From the point that Berget and Robert were moved into the cells next to each other, no senior administrative official ever signed their name as

approving Berget's placement. *SR at 1246, 49.*

- David Tolley testified in an affidavit that the DOC asked him to move to the third floor of West hall in a cell next to Berget and Robert to spy on them and report what he learned. *APP to Appellants' Brief at F-2.*

- David Tolley stated in an affidavit that he reported that Berget and Robert intended to escape and, because he did not want to be around when something happened, actually asked to be moved to a cell away from them. *APP to Appellants' Brief at F-3.* The Defendants granted Tolley's request, but inexplicably left Berget and Robert in the same cells in West Hall. *Id.*

- Starting in 2009 and continuing until Ron Johnson's murder, the Defendants were aware from a number of sources, including David Tolley, that Berget and Robert were planning to escape. *APP to Appellants' Brief at F-3.*

- Despite this knowledge, the DOC kept Berget and Robert in West Hall as part of the agreements to end hunger strikes. *SR at 801-04, 1444-46.*

- Reports made during this time-frame included threats of violence and the potential for harming a guard. *APP to Appellants' Brief at F-3.*

- Case Manager Lisa Frazier specifically warned against moving Robert out of the Jameson Annex. *SR at 2404.* Her narrative warning against the move is somehow missing and has never been produced.

- Tim Henry specifically warned that Berget and Robert were intending to attempt an escape and questioned why they were not in the Jameson Annex. *SR at 2723-24, 1276-77.* Henry specifically questioned why they were allowed to move freely in and out of West Hall. *SR at 2727-28.*

- After seeing Berget and Robert in West Hall and observing their conduct, Correctional Officer Chet Bouie warned the Defendants that Berget and Robert should be locked up. *SR at 2338.*

- In 2009, Meade County States Attorney Jesse Sondreal contacted the DOC regarding Robert's motion to modify his sentence. *SR at 148, 153-54.*

- Based on his investigation and discussion with the DOC, Sondreal believed that Robert intended to plan an escape and kill a guard. *SR at 153-54.*

- Michael Thomas indicated that he met with DOC officials and the DCI regarding Robert. *SR at 345-51.* He asked to be moved out of Robert's cell because he was afraid of him. *Id.*

- Within three weeks of both Berget and Robert obtaining jobs that allowed them free access to the Prison Industries Building, they executed their plan to escape and killed Ron Johnson.

- Following the death of Ron Johnson, the Defendants asserted that they had compiled a comprehensive investigation into what happened leading up to the escape attempts and the death of Ron Johnson and affirmatively stated that no policies or procedures were violated. *SR at 2427.*

- The Defendants issued an *After-Incident Report* proposing changes to avoid similar circumstances in the future; however, the *After-Incident Report* makes no mention of how Berget and Robert actually obtained cells outside of the Jameson Annex, and no reference to any of the facts set forth above.

It should be noted that the Defendants either ignore or deny virtually all of the facts listed above. Compare these facts to the *After-Incident Report*. Further, if these facts are assumed as true for purposes of summary judgment, it is reasonable to conclude or, at the very least, infer that the Defendants knew that DOC policy had been repeatedly and intentionally violated; knew that they had created a risk of harm; knew that they had been warned that Berget and Robert were planning an escape attempt; and knew that their conduct unequivocally facilitated the murder of Ron Johnson because Berget and Robert would not have had the opportunity to do so had they been housed where they were supposed to be, in maximum security. And, most importantly, the Defendants knew that if their inexcusable conduct came to light, there would be personal and public repercussions. As a result, the Defendants elected to hide the truth, and issue an *After-Incident Report* that they knew full well to be false, despite the fact that it was one of their own that was killed, and the fact that they knew that Ron's wife, Lynette, would be

relying upon their representations to try and understand how she came to lose her husband in a part of the prison where only trusted inmates are permitted.

B. Defendants' conduct constitutes extreme and outrageous conduct.

The Defendants' second claim is that Johnson's brief cites no authority that an IIED claim can be established based on the creation of false or misleading reports. *Brief of Appellees at 9.* This is simply not true.

By way of example, Johnson would direct the Court to Banyas v. Lower Bucks Hospital, 437 A.2d 1236 (Pa. Super. Ct. 1981). In that case, the court allowed an IIED claim to proceed stating:

> If the [hospital], in fact intentionally propagated a falsehood when they wrote that Mr. Lavin's death was attributable solely to Mr. Banyas, we believe that they could also be found liable for the emotional distress suffered by Mr. Banyas. We would find an intentional misstatement of the cause of death to be intolerable professional conduct and extreme and outrageous. Certainly, Mr. Banyas was substantially certain to suffer emotional distress following such a report. Therefore, if proven, the facts alleged by appellant in this first count would entitle him to relief.

Id. at 1239.

A similar holding was reached in Thomas v. Hospital Board of Directors of Lee County, 41 S.3d 246 (Fla. Dist. Ct. App. 2010). In that case, the court of appeals held (i) that the defendants' conduct in making false statements regarding the cause of death and falsifying records rose "to the level of atrocious and utterly intolerable behavior which cannot be condoned in a civilized community;" (ii) that "when an actor has knowledge 'that the other [person] is peculiarly susceptible to emotional distress,' the actor's 'conduct may become heartless, flagrant, and outrageous when the actor proceeds in the face of such knowledge;'" and (iii) that "in a situation where a person's loved one has

died, it would be apparent to anyone that the person would be susceptible to emotional distress and, therefore, that the action of providing false information concerning the loved one's cause of death meets the standard for a claim of outrage (intentional infliction of emotional distress)." *Id. See also Trujillo v. Puro, 683 P.2d 963 (N.M. Ct. App. 1984); Chuy v. Philadelphia Eagles, 595 F.2d 1265 (3rd Cir.1979); Syzmanski v. Hartford Hospital, 1991 WL 16189 (Conn. Super. Ct. 1991); Wangen v. Knudson, 428 N.W.2d 242, 248 (S.D. 1988).*[1]

C. Johnson's IIED claim and misrepresentation claims are not barred by the exclusivity of worker's compensation.

The Defendants contend that Johnson's IIED and misrepresentations claims are "on account of" Ron Johnson's death and should therefore be barred by the workers-compensation immunity found in SDCL 62-3-2. *Brief of Appellees at 20.* The Defendants are incorrect.

The language in the statute is clear. The prohibition of other claims under SDCL 62-3-2 is limited to claims "on account of personal injury or death arising out of and in the course of employment . . . ." *SDCL 62-3-2.* And, Johnson's claim for IIED is not on account of Ron's murder, nor did it arise out of and in the course of Ron's employment; rather, they are "on account of" actions of the Defendants following the murder.

[1] The Defendants also argue that Johnson offered no authority for the premise that the Defendants would know she was traumatized by Ron Johnson's murder and that Johnson failed to provide any authority demonstrating that the relationship between the parties is relevant. This is simply not true. In addition to common decency, Johnson would again direct the Court's attention to *Watts v. Chittenden, 22 A.3d 1214 (Conn. 2011),* and *House v. Hicks, 179 P.3d 730 (Or. 2008)*, both of which were referenced in Johnson's initial brief. *See Appellants' Brief at 20-21, 25. See also Restatement (Second) of Torts § 46, comment e; Thomas v. Hospital Board of Directors of Lee County, 41 S.3d 246 (Fla. Dist. Ct. App. 2010).*

As support, the Defendants direct this Court to two decisions from other states: Pittman v. Western Engineering Co., 813 N.W.2d 487 (Neb. 2012), and Maney v. Louisiana Pac. Co., 15 P.3d 962 (Mont. 2000). Neither of these decisions concerned allegations that the employer – months down the road – intentionally misrepresented the events and circumstances which led to the employee's death. Instead, the events giving rise to the loved-ones' emotional distress claims in Pittman and Maney were contemporaneous with the death of the employee and involved seeing their loved one's body. *Pittman, 813 N.W.2d at 491; Maney, 15 P.3d at 401.*

A more suitable case for guidance is Barnes v. Double Seal Glass Co., Inc., Plant 1, 341 N.W.2d 812 (Mich. Ct. App. 1983). Barnes arose after a sixteen-year-old boy, who was illegally employed without a work permit, was killed on-the-job. *Id. at 814.* Following the work accident, the Defendants did not immediately call for an ambulance or attempt to give the teenager medical aid, and the company President and other employees "told hospital personnel that they found decedent by the side of the road and did not know him." *Id.* The employer also failed to notify the teenager's parents about the accident. *Id.* Finally, the employer "cleaned up the accident site so that police would not be able to accurately investigate the accident." *Id.*

The Michigan Court of Appeals determined that the parents' IIED claim was not barred. *Id. at 817.* In the words of the court: "Plaintiffs' claim for intentional infliction of emotional distress is made on their own behalf, for their own injuries, for a tort directed at them rather than at their son." *Id.* The claims "state an independent cause of action for intentional infliction of emotional distress which is not derivative and is

outside the scope of the wrongful death act and the [Worker's Disability Compensation Act]." *Id. at 818.*

Johnson is not asserting a bystander claim, nor is she alleging that her emotional distress is a product of learning of Ron's death or watching him die. Johnson's IIED claim focuses on the Defendants' course of conduct following the murder.[2]

II. WHETHER THERE ARE NO GENUINE ISSUES OF MATERIAL FACT CONCERNING JOHNSON'S CLAIM FOR FRAUDULENT MISPRESENTATION.

Element (4). The Defendants contend that no showing of an intent to deceive has been made. However, under the Defendants' version of what must be shown, intent may seemingly only be demonstrated by an admission by the Defendants. Needless to say, defendants rarely admit such intent, thus plaintiffs must often rely upon circumstantial evidence. As aptly stated by the United States District Court for the District of North Dakota:

> Direct evidence of what may have been in a prison official's mind is often difficult to come by and is not required. Just as in criminal cases where the ultimate burden of proof is even higher, jurors rely upon circumstantial evidence to draw an inference that the requisite mental state existed.

*Norman v. Wrolstad, 2008 WL 351457, *25 (D.N.D. 2008).*

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[2] In its Issue No. 3, the Defendants assert that the question of whether this Court should adopt a State Constitution due process claim is moot because, in the Defendants' opinion, it would be barred by workers-compensation exclusivity. *Brief of Appellees at 16.* Johnson disagrees. Numerous federal courts have held that a party's § 1983 claim preempts and/or supersedes any "exclusive" remedy contained within a state worker's compensation statute. Here, the same principle should hold true, and Johnson's civil rights claim based on Article VI, § 2 of the South Dakota Constitution should preempt and/or supersede SDCL 62-3-2. *Compare Rosa v. Cantrell, 705 F.2d 1208, (10th Cir. 1982); Walker v. Rowe, 535 F.Supp. 55, 57 (N.D. Ill 1982); Hutchings v. Erie City and County, 516 F.Supp. 1265, 1273 (W.D. Pa. 1981).*

Element (5). The Defendants also submit that Johnson's claim for misrepresentation must fail because she has not shown reliance. The Defendants' argument is flawed. If a claim for misrepresentation is negated whenever a person suspects foul play and eventually commences a lawsuit, then no claims would survive summary judgment.

Lynette Johnson's husband and best friend was brutally and suddenly murdered on his birthday while working for the DOC. On the date of his death, Ron Johnson had been continuously employed by the DOC for nearly twenty-four years. Given these circumstances, it cannot be maintained in good faith that Lynette Johnson would not have relied on Ron's employer, supervisors and co-workers for an explanation as to what took place – at least until she started to discover that she had been lied to.

Regardless, given that the Defendants did not genuinely *argue* element (5), it was inappropriate for the circuit court to grant summary judgment based upon an argument not contained in the Defendants' initial brief. *See Shurr v. A.R. Siegler, Inc., 70 F. Supp. 2d 900, 912 (E.D. Wis. 1999); United States v. Letscher, 83 F. Supp. 2d 367, 377 (S.D.N.Y. 1999). Compare Aase v. State, S. Dakota Bd. of Regents, 400 N.W.2d 269, 275 (S.D. 1987) (Sabers, J., dissenting).* Further, the error clearly was not harmless given the circuit court's comment that Johnson's brief failed to "provide any greater clarity" on the issue of whether Lynette Johnson relied to her detriment upon the *After-Incident Report*.

Further, a report prepared by Dr. Nathan Szajnberg was disclosed to the Defendants and made part of the record. Although the Defendants take issue with his report, claiming that he does not directly address element (5). The opinions reached by

Dr. Szajnberg articulate a condition that results directly from reliance on those who claimed to have knowledge of what took place and representations they made regarding the death of Ron Johnson.[3]

Do the Defendants honestly contend that Johnson knew that the DOC was lying to her on the day of Ron Johnson's death? Do they really believe that Johnson knew that she was being lied to on the day of Ron Johnson's funeral, or on any of the days the DOC officiously had a staff member stay with Lynette Johnson in her home for several days, offering a form of condolence, but misrepresenting the truth? Without even raising the issue directly in a motion for summary judgment, the Defendants are asking this Court to rule as a matter of law that the surviving spouse of a murdered state employee would have absolutely no reasonable basis to expect or rely on an explanation as to the death of his/her spouse killed while on the job. The argument is ridiculous and shameful.

III. WHETHER SOUTH DAKOTA SHOULD RECOGNIZE A PRIVATE CAUSE OF ACTION FOR VIOLATION OF THE DUE PROCESS CLAUSE FOUND IN ARTICLE VI, § 2 OF THE SOUTH DAKOTA CONSTITUTION.

A. Johnson pled a claim for violation of Ron Johnson's due process rights under the South Dakota Constitution.

Count III of Johnsons' *Complaint* included an allegation that the Defendants violated Johnson's due process rights under Article VI, § 2 of the State Constitution.[4]

[3] The Defendants also conveniently ignore a finding made by Dr. Szajnberg indicating that Lynette Johnson had further losses from her "subsequent discoveries" of what she perceived as intentional violations of policy by Warden Weber and other administrative staff and a possible cover up. SR at 2753. In fact, Dr. Szajnberg went on to point out that the damages caused by each (the original trauma of the event and the later reliance on the false information) were distinct. *SR at 2752.*

[4] Article VI, § 2 of the South Dakota Constitution provides, in pertinent part: "No person

Specifically, Johnson made the following allegation: "[Ron Johnson] was deprived of rights, privileges and immunities secured by the United States Constitution and the South Dakota Constitution . . . . "). *SR at 20 (emphasis added).*

Johnson acknowledges that his State Constitution due process claim was not under its own "heading" or "Count". However, contrary to the Defendants' suggestion, that is not dispositive. A similar argument was made by the defendants, and rejected by this Court, in East Side v. Next, Inc., 2014 S.D. 59, 852 N.W.2d 434:

> Defendants argue that because the complaint did not outline each separate cause of action East Side presents to this Court, it cannot raise those separate actions on appeal. We disagree. "South Dakota still adheres to the rules of notice pleading[.]" "[U]nder notice pleading, a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings." East Side adequately put Defendants on notice of its claims and presented evidence in support of its claims.

Id. at n. 6 (internal citation omitted) (emphasis added).

Given that Johnson specifically alleged that Ron Johnson was deprived of rights, privileges and immunities secured by the South Dakota Constitution, Johnson satisfied SDCL 15-6-8(a) and well beyond any "notice" pleading requirement.[5]

B. The Legislature has not created a private due process violation cause of action.

According to the Defendants, because the Legislature has not created this private

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shall be deprived of life, liberty or property without due process of law." *S.D. Constitution, Art. VI, § 2.*

[5] The Defendants' interpretation of SDCL 15-6-8(a) is so strict that they go so far as to claim that Johnson was required to "plead the elements of [such a State Constitution process claim]" in his *Complaint*. *Brief of Appellees at 26.* The Defendants provide no legal authority for this claimed pleading obligation. Clearly, SDCL 15-6-8(a) contains no such requirement.

cause of action, "South Dakota courts are not free to recognize a new tort that would allow suits against the State based on alleged violation of South Dakota's Due Process Clause." *Brief of Appellees at 26-27.* The Defendants seemingly ignore that this Court has previously recognized private causes of action under South Dakota's Constitution. *See Hurley v. State, 143 N.W.2d 722 (1966), Egan Consolidated School District v. Minnehaha County, 270 N.W. 527, 528 (S.D. 1936); Appeal of Black Hills Indus. Freeport, Inc., 268 N.W.2d 489, 492 (S.D. 1978).*

Article VI, § 2 provides that "[n]o person shall be deprived of life, liberty or property without due process of law." *S.D. Constitution, Art. VI, § 2.* This Constitutional guarantee affords much less protection if the State cannot be held accountable when it deprives one of its own citizens of life, liberty, or property without due process of law. This Court should follow the lead of numerous other states and recognize an implied cause of action for state constitutional violations.

C. Res judicata does not bar Johnson's claim.

In Johnson's initial brief, it was pointed out that the fourth element for res judicata was not present because new facts came to light after the Federal District Court ruled. When new facts arise *after* the prior proceeding, there could not have been a "full and fair opportunity" to litigate those facts, and the doctrine of res judicata may be not be applied. *Lewton v. McCauley, 460 N.W.2d 728, 731 (S.D. 1990); Interest of L.S., 2006 S.D. 76, ¶ 50, 721 N.W.2d 83, 97.*

The circuit court was provided with new facts that were not part of the federal court proceeding. Specifically, the circuit court was provided with the affidavit of

Michael E. Thomas, which was received some six months after the federal District Court had ruled. *SR at 68, 2483.* Because Thomas' testimony was not received until *after* the District Court ruled, there are new facts that were not litigated in the prior proceeding. Thus, res judicata is inapplicable.

The *Affidavit of Michael E. Thomas* is significant. Former inmate Michael Thomas made contact with Lynette Johnson in November of 2014. *Affidavit of Michael E. Thomas.* Thomas confirmed (i) that he was a cellmate with Robert in 2007; (ii) that on many occasions Robert talked about what had happened in his past and he threatened to harm people in the future, and specifically mentioned his sentencing judge, the prosecutor, other inmates and guards; (iii) that Robert specifically asked Warden Weber to move him out of the Jameson Annex and up to the Hill, and that Warden Weber refused and told Robert that he was too dangerous to be moved; (iv) that Robert scared him and, as a result, he asked to be moved to a different cell and was moved; and (v) perhaps most important, he met with DOC special security and the DCI on more than one occasion to discuss Robert, and addressed the issues directly with Warden Weber as well. *Id. at 1-2.*

D. A private cause of action for violation of Article VI, § 2 is not barred by statutory or Constitutional sovereign immunity.

Applying SDCL 3-21-9 to bar Johnson's claim would constitute a violation of Johnson's right to due process under the South Dakota Constitution. In Knowles v. United States, 1996 S.D. 10, 544 N.W.2d 183, the South Dakota Supreme Court concluded that SDCL 21-3-11 (which concerned a cap on medical malpractice damages) violated South Dakota's due process clause. The Legislature's apparent objective in

adopting SDCL 3-21-9 was to protect the State and DOC employees from claims for injuries to the public caused by fleeing persons, or paroled or escaping prisoners, presumably because the DOC has virtually no control over such persons once they are beyond DOC's supervision. Here, the application of SDCL 3-21-9 does not bear a "real and substantial relation to the objects sought to be obtained." *Knowles, 1996 S.D. at ¶¶34-35.* If the Defendants' argument is accepted, a DOC employee could conspire with a prisoner to aid that prisoner in escaping and yet be immune from liability even if part of the plan involved killing another DOC employee. Surely the Legislature could not have intended such a result. "The constitution is not a grant but a limitation upon the lawmaking power of the state legislature and it may enact any law not expressly or inferentially prohibited by state and federal constitutions." *Kramar v. Bon Homme County, 155 N.W.2d 777, 778 (S.D.1968).*[6]

The Defendants' claim that they are separately entitled to immunity because their conduct was "discretionary" also lacks merit. "[A] ministerial act is the simple carrying out of a policy already established . . . ." *King v. Landguth, 2007 S.D. 2, ¶11, 726 N.W.2d 603, 607.* With regard to determining whether an act is ministerial or discretionary in nature, the South Dakota Supreme Court has adopted the Restatement (Second) of Torts § 895D. *Kyllo v. Panzer, 535 N.W.2d 896, 902 (S.D. 1995); Schaub v. Moerke, 338 N.W.2d 109, 111 (S.D. 1983).*

[6] Any application of SDCL 3-21-9 that results in Johnson's wrongful death claim being barred would violate the Equal Privileges and Immunities Provision found in Article VI, § 18 (because it arbitrarily and improperly vitiates Johnson's legal rights simply because he happened to be injured by State employees who work for the DOC) and the Open Courts Provision found in Art. VI, § 20 (because, as applied, it improperly purports to immunize state employees sought to be held liable for ministerial acts).

The care and control of prisoners is deemed to be a ministerial act. In fact, the comments to Restatement (Second) of Torts § 895D specifically identify "the care of prisoners" as an example of a ministerial act. *Id. at cmt. h.* A number of courts which have considered the issue are in accord. *See Gordon v. Frank, 454 F.3d 858 (8th Cir. 2006); Clark v. Prison Health Services, Inc.. 572 S.E.2d 342 (Ga. App. 2002); Pederson v. Traill County, 601 N.W.2d 268 (N.D. 1999); Kagan v. State, 646 N.Y.S.2d 336 (N.Y. App. Div. 1996); CJ.W. v. State, 853 P.2d 4 (Kan. 1993); Doe v. Arguelles, 716 P.2d 279 (Utah 1986); Bandfield v. Wood, 361 N.W.2d 280 (Mich. 1985); Payton v. United States, 679 F.2d 475 (5th Cir. 1982); Tarpley v. Steps, 2007 WL 84426 (E.D. Mo. 2007) (unreported).*

CONCLUSION

Based upon the foregoing, Johnson respectfully requests that this Court reverse the circuit court's *Judgment*.

Dated this 28th day of October, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66(b)(4), I hereby certify that *Appellants' Reply Brief* complies with the type volume limitation provided for in SDCL 15-26A-66. *Appellants' Reply Brief* contains 4,926 words and 24,930 characters. I have relied on the word and character count of our word processing system used to prepare *Appellants' Reply Brief*. The original *Appellants' Reply Brief* and all copies are in compliance with this rule.

/s/ John W. Burke .
John W. Burke

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of October, 2016, I sent to:

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via e-mail, a true and correct copy of the foregoing *Appellants' Reply Brief* relative to the above-entitled matter.

/s/ John W. Burke .
John W. Burke