IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

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APPEAL NO: 26939, 26940, 26941, 26942, 26943, 26944

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Ralph Eagleman, et al., Plaintiffs and Appellants,

v.

Wisconsin Province of the Society of Jesus and Rosebud Educational Society/ St. Francis Mission, et al. Defendants and Appellees

* * * *

APPEAL FROM THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

* * * *

HONORABLE RODNEY J. STEELE
Judge Pro Tem

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BRIEF OF APPELLANTS

* *

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Notices of Appeal filed January 6, 2014

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JURISDICTIONAL STATEMENT

On January 6, 2014 Plaintiffs timely *filed and served* these appeals of the December 4, 2013 orders granting Summary Judgment to Defendants Wisconsin Province of the Society of Jesus (WPSJ) and Rosebud Educational Society/ St. Francis Mission (SFM). Notice of Entry of the orders were served by SFM December 9, 2013.

LEGAL ISSUES

I. Was application of the 2010 amendment to SDCL 26-10-25 to cases filed before its effective date constitutional under Art. 1 § 8, Art. 1 §10, Art. 4 §2, and the Fourteenth amendment to the United States Constitution?

Trial Court's Ruling: The trial court found that the 2010 amendments to SDCL 26-10-25 could be retroactively applied to cases pending prior to its July 1, 2010 effective date.

Relevant Authority
United States v. Lovett, 328 U. S. 303 (1946)
Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988)
United States v. Klein, 80 U.S. 128 (1871)
Boggs v. Adams, 45 F.3d 1056 (7th Cir. 1995)

United States Constitution Article I, Section 8, Clause 3
United States Constitution Art. I, §10, cl. 1
United States Constitution, Art. IV, §2, cl. 1
Fourteenth Amendment to the United States Constitution

II. Did WPSJ and SFM carry their burden identified in *Zephier v. Catholic Diocese of Sioux Falls*, 2008 SD 56, 752 NW 2d 658 , by demonstrating that there was no genuine issue of material fact as to whether defendants committed an act as defined by SDCL 26-10-29 and "laws of similar effect [to SDCL 22-22] at the time the act was committed which act would have constituted a felony?"

Trial Court's Ruling: The trial court found that Plaintiffs had not established that WPSJ and SFM concealed information from law enforcement under SDCL 22-22-46 and that statute could not be retroactively applied. The court found that WPSJ and SFM did not have *specific intent* to aid and abet *statutory rape*. Further, the court held that SDCL 22-22 generally could be retroactively applied to the conduct of Defendants because the statutes did not exist at the time of the conduct.

Relevant Authority

Stratmeyer v. Stratmeyer, 1997 S.D. 97, 567 N.W.2d 220, 223 .
Zephier v. Catholic Diocese of Sioux Falls, 2008 SD 56, 752 NW 2d 658
State v. Austin, 172 NW 2d 284, 289 (SD 1969)
People v. Haywood, 131 Cal. 2d 259 (Cal. Dist. Ct. App. 1955)

SDCL 26-10-25
SDCL 26-10-29
SDCL 22-22-24.3
SDCL 22-22-46

III. Was there a genuine issue of material fact as to when Plaintiffs discovered fraudulent concealment by WPSJ and SFM under the standard set forth in S*trassberg v. Citizens state bank*, 1998 SD 72, 581 NW.2D 510?

Trial Court's Ruling: The trial court found that Plaintiffs were aware of the abuses by clergy of "the Catholic Church" from the time the abuses took place and that there was no evidence that WPSJ and SFM concealed any information that would have prevented them from timely pursuing their claims.

Relevant Authority

Koenig v. Lambert, 527 N.W.2d 903I
Strassburg v. Citizens State Bank, 1998 SD 72, 581 NW 2d 510
Holmes v. Wegman Oil Co., 492 NW 2d 107 (SD 1992)
Piotrowski v. City of Houston, 237 F. 3d 567 (5th Cir. 2001)

SDCL 26-10-25
SDCL 26-10-27

STATEMENT OF THE CASE

This is an appeal of 6 cases with 10 plaintiffs alleging sexual abuse while they were children attending the St. Francis Mission boarding school, run by the Wisconsin Province of the Society of Jesus (hereinafter WPSJ) and Rosebud Educational Society/ St. Francis Mission (hereinafter SFM). Judge Rodney Steele, judge pro tem for Pennington County Circuit Court, granted summary judgment dismissing the cases.

STATEMENT OF THE FACTS

WPSJ provided priests, brothers, and scholastics to SFM, an entity formed and still run by WPSJ. SFM and WPSJ ran the school during the periods relevant to this suit. Plaintiffs have made allegations that they were abused by the following agents of WPSJ and SFM: Brother Chapman, Father Fagan, Father Gill, Father Frey, and Brother Boschert. Plaintiffs present evidence and allege that WPSJ and SFM knew or should have known of the widespread and long lasting abuse they suffered, intentionally abandoned their duty to protect them as children, and had a pattern and practice of intentionally concealing the abuse of them and others.

Brother Francis Chapman

In a string of letters spanning almost five years, WPSJ and SFM discuss discovering Chapman in the basement of the priest house with little girls and torn panties, noting that the problem has been "known", theorizing Chapman is mentally sick, solving the problem by giving him a warning, hoping to solve the problem with a strong talking to, and then trying to be around after school to prevent little girls from coming around. See July 23, 1968 letter from Richard T. Jones, SJ to Joe, P.C. and October 20, 1968 letter from Richard T. Jones, SJ, to Joe, P.C. Declaration of Michael Shubeck in Support

of Plaintiff's Opposition to Defendants' Joint Motions for Summary Judgment (hereinafter, Decl. Shubeck), Ex. 3[1] (One Star R. 2404).

Ida Marshall, Antoinette Miller, Adrian Larvie, Lloyd One Star and Marian Sorace all made allegations of abuse by Chapman, which included sex acts with multiple children at once. Deposition of Ida Marshall (hereinafter, Dep. Marshall) 22:9-24:1, 26:18-27:9, 69:13-71:14. Deposition of Antoinette One Star Miller (hereinafter, Dep. Miller) 29:6-31:18, 35:6-37:6, 50:6-51:6, 79:23-81:9; Deposition of Marian A. Sorace (hereinafter, Dep. Sorace) 13:6-16:25, 18:1-19:16, 45:4-47:22. Decl. Shubeck, Ex. 2; Deposition of Lloyd One Star (hereinafter, Dep. L. One Star) 90:4-102:9. *Id* at Ex. 2; Affidavit of Adrian Larvie ¶3. Decl. Shubeck, Ex. 5, One Star R. 2402. Chapman would bate the children with food and sweets and then fondle and rape them. *Id*. See also Brother Francis Chapman Obituary, Decl. Shubeck, Ex. 4, One Star R. 2402. There is testimony that WPSJ and SFM agents knew of the abuse before 1963. Dep. Marshall p. 28:12-29:2, 60:13-22; Dep. Sorace 16:20-25, 17:1-5, *Id* at Ex. 2. Such knowledge would likely have prevented some or all abuse alleged by Plaintiffs in this case. See Affidavit of Adrian Larvie ¶¶ 2-3 (abuse after 1963 based on age at abuse), Decl. Shubeck, Ex. 5, One Star R. 2402; Dep. L. One Star 20:2-8, 90:4-102:9 (abuse after 1963 based on age at abuse); Dep. Miller 7:9-19, 29:6-31:8, 42:19-22 (abuse after 1963 based on age at abuse); Dep. Marshall 24:21-25:2, 45:4-6 (last abuse approximately summer of 1962), *Id* at Ex. 2. See also July 23, 1968 letter from Richard T. Jones, SJ to Joe, P.C. and October 20,

[1] This brief will cite to the record in the One Star (CIV04-594) case for documents that are common to all cases. Documents specific to other cases will be identified by their case name.

1968 letter from Richard T. Jones, SJ, to Joe, P.C., *Id* at Ex. 3.

Father Bernard Fagan

Larry Tar has alleged fondling by Father Fagan from 1968 to 1971. See complaint on file in *D.M. et al v. Wisconsin Province of the Society of Jesus*, Civ. No. 10-1058 (DM R. 3). Father Fagan was the Jesuit superior at SFM from 1969 to 1980 when he took a sabbatical. See SFM Records, Decl. Shubeck, Ex. 8. One Star R. 2402 Fagan confessed to struggling with sexuality during these years, which "began with viewing pornography, went on to masturbation, and even to sexual activity with Native American girls." See March 18, 1994 letter Bernard Fagan to Fr. Michael B. Woster, JCL, *Id* at, Ex. 9. In his confession Fagan noted that he had been disclosing his activities to his superiors through confession. *Id.* In the fall of 1982, WPSJ finally acted on this information and sent Fagan for treatment. *Id.*

Father Joseph Gill

David Standing Soldier, Wendell Big Crow, Lawrence Ford and Lloyd One Star all alleged abuse by Father Gill, which consisted of anal fondling, anal penetration, forced oral sex, and sodomy. Deposition of David Standing Soldier (hereinafter, Dep. Standing Soldier) 41:22-42:12, 74:12-15, 131:2-7, 131:19-23; Deposition of Ralph Eagleman (hereinafter, Dep. R. Eagleman) 32:2-20; Deposition of Wendell Big Crow (hereinafter, Dep. Big Crow) 34:10-39:3; Deposition of Lawrence Ford (hereinafter, Dep. Ford) 15:14-20:24; Deposition of Lloyd One Star (hereinafter, Dep. L. One Star) 63:25-64:10, 75:19-78:10, 79:22-80:25, 160-1, *Id* at Ex. 2.

Dave Standing Soldier testified that he told Father Walleman in between about 1960 or 1962 but was called a liar and turned over to Gill to be whipped. *Id*. Dave's

report to Father Walleman could likely have prevented the abuse of Ralph, Wendell, Lawrence and Lloyd if it had been acted on. Dep. R. Eagleman 9:19-23, 32:2-20 (abuse after 1962 based on age), Dep. Big Crow (abuse in 1972), Dep. Ford 5:13-14, 15:4-20:24 (abuse after 1962 based on age). Dep. Lloyd One Star 160:16-17 (abuse after 1962), *Id*.

Father Paul Frey

Regina One Star and Ralph Eagleman both testified to fondling by Father Frey. Dep. R. One Star 30:2-31:20; Dep. Ralph Eagleman 19:16-20:25, 49:5-51:24, *Id* at Ex. 2. Paul Frey was consistently listed as a priest that was being monitored and noted as having problems with his mental condition and drinking in the letters to WPSJ from SFM. See October 20, 1968 letter from Richard T. Jones, SJ, to Joe, P.C., January 8, 1970 letter to Father Provincial, July 7, 1970 letter semiannual report to Father Provincial and February 17, 1973 letter from Robert P. Neenan, S.J. to Rev. Bruce Biever, S.J, *Id* at Ex. 3. The letters document a cavalier response of Barney Fagan, the superior of the time. *Id.*

Brother Boschert

Howard Dean Graham alleged genital fondling by a Brother Boschert in the Brother's room at Holy Rosary Mission. WPSJ have not bothered to answer outstanding discovery on this perpetrator that was served in the coordinated case of J*oyce W. v. Wisconsin Province of the Society of Jesus, et al*, Civ. No. 10-1035 on March 15, 2013.

Non-disclosure

WPSJ and SFM had duties to report the crimes, and thus protect Plaintiff and others, under federal and state law. See 18 USC § 4 (1909) (misprision of a felony); SDCL 22-11-12 (1976) (same); SDC 1939 § 13.0203 (aiding, abetting, and concealing) (transferred to SDCL §§ 22-3-3 and 22-3-5); SDCL 26-10-10 (1964) (Persons required to

report child abuse or neglected child) (Transferred to SDCL §§ 26-8A-3 to 26-8A-10); SDC 1939, § 43.9901 (Contributing to abuse, neglect, or delinquency or causing child to become child in need of supervision as misdemeanor.) (transferred to SDCL 26-9-1). WPSJ and SFM also had a fiduciary duty to disclose. See *Koenig v. Lambert*, 527 NW 2d 903 (1995).

In 1986 WPSJ did a review of its compliance with child abuse reporting law in the states it operated in, concluded they had duties to report under South Dakota law, and did not report the known abuse at St. Francis Mission. See April 24, 1986 Letter Robert Benning to Patrick J. Burns, SJ. See September, 1986 notice to parishes from Patrick J. Burns, SJ, Decl. Shubeck Ex. 16, One Star R. 2402. Instead, WPSJ delayed as long as five decades in disclosing the abuse they knew they had a duty to disclose. WPSJ and SFM maintained public silence and falsely maintained in discovery responses that the allegations by the original One Star Plaintiffs were the only allegations related to St. Francis Mission. See Plaintiff's Motion to Continue Defendants' Motion for Summary Judgment, Exhibits B and C, One Star R. 2330.

The Trial Court's Errors

Plaintiffs contend the trial court erred by placing the burden of proof of defendants' affirmative defense under SDCL 26-10-25 on them and by not drawing reasonable inferences in their favor because the court found that the above evidence of discovery and intentional violation of various legal reporting duties was insufficient to show WPSJ and SFM concealed information in violation of SDCL 22-22-46. The court failed to recognize the rule that breach of a duty to protect is evidence of specific intent to harm. Further, the court erroneously failed to recognize that statutory rape is a general

intent crime and, therefore, the evidence of "knowing" allowance of continued rape created an issue of fact. Finally, the court oddly found SDCL 26-10-25 retroactive but found the provisions of SDCL 22-22 were not in violation of the express holding of *Stratmeyer v. Stratmeyer*, 1997 SD 97, 567 N.W.2d 220 (reasoning that the statute was intended to be retroactive because of the reference to SDCL 22-22).

Plaintiffs also contend that the trial court erred by not recognizing that the above evidence demonstrated issues of fact on two acts of fraudulent concealment (1) concealment of the acts of the abusers and (2) concealment of the discovery of the abuse by WPSJ and SFM and failure to report. Plaintiffs were not on notice of the acts of the abusers because of the confusion created by their conditions. The court did not address uncontested evidence in the affidavits of Howard Graham and Adrian Larvie that they only recently recalled the memories. The Court did not address evidence of repression by Lawrence Ford, Antoinette Miller, Ralph Eagleman, Regina One Star and David Standing Soldier. Further, the court did not address the confusion testified to by all the plaintiffs that resulted from the abuse. Plaintiffs were not on notice that WPSJ and SFM had perpetrated criminal acts under SDCL 22-22 until the Chapman letters and other evidence was produced in 2010.

<u>The 2010 Amendment to SDCL 26-10-25 (HB 1104) and the targeting of these specific pending cases</u>

In 2010 Steven Smith, an attorney for a Catholic entity being sued by counsel for Plaintiffs, authored a bill presented as HB 1104 and presented it to the South Dakota legislature. The bill amended the statute of limitations with the sentence: "However, no person who has reached the age of forty years may recover damages from any person or

entity other than the person who perpetrated the actual act of sexual abuse." See SDCL 26-10-25 (2010) . Smith authored the bill with the assistance of attorneys in companion litigation brought by the attorneys for Plaintiffs. Decl. Shubeck, Ex. 18 at 5:15-18. (One Star R. 2402). The attorney authors of HB 1104 had the specific aim to target the litigation brought by the attorneys for Plaintiffs:

> I can tell you of other cases like the one where I spoke to a guy by the name of Eric Shulte who is representing another group of individuals and *the same group of lawyers from California* who represent 76 plaintiffs, excuse me, not like the other case where they represent 29 plaintiffs, they are representing people who supposedly were abused in 1930, 1935 and the act themselves is unknown.

Id at 5:23-6:5 (emph. added). Mr. Smith is directly referring to the Zephier collection of cases that were the subject of an appeal decided on the same date as an appeal by the plaintiffs here. Smith specifically made Plaintiffs' attorneys the target of his bill, stating:

> I would say that's really what got me thinking that I should be here because yes, when this lawyer -- these lawyers like to fly into Sioux Falls in their private jet, get off a press conference on the Cathedral steps and talk about what's wrong, get back on the jet and fly back home and then leave us in ashes here in South Dakota.

Id at 10:20-11:1. Smith is specifically referring to a press conference held in these cases. As stated by Smith:

> What we're finding is, and you've seen that handout there, is we now have a group of individuals who have done a wonderful job of going across Western America and suing the Catholic church, suing any associate of the Catholic church, basically doing what they can to line their pockets, and doing so really with no, I would say, Look to the victim themselves. And that's the reason why I'm here this morning. This group here from California, from Washington has kind of a, what I would call a universal approach to those kind of cases….I'll be honest with you, if my problem, and it's not my problem but it's also Jim McMahon's and many other attorneys as well who are facing the same, I guess, suits from these peoples specifically out of California is that we're trying to defend people who are long dead.

Decl. Shubeck, Ex. 19 3:16-4:15. (One Star R. 2402). See also *Id* at 5:14-7:9. The purpose of the bill was summed up by Smith:

> Essentially what we're asking this committee to do and the senate to do is give -- I guess, give a good look at this bill and basically say and understand that we don't need people flying in from California telling us we've been hurt *even if we necessarily haven't* because we got a promise of compensation at the end.

Id at 8:10-16 (emph added). Smith is referring to *these specific* Plaintiffs and their attorneys implying the cases have been fraudulently brought.

The sponsor of the bill in the Senate, Senator Garnos, continued to argue the facts of the cases based on the false hearsay of Mr. Smith's testimony:

> *[Y]ou have a team of lawyers or firms outside of South Dakota come in to South Dakota and they will file the lawsuits against particular schools, mission schools and one of them being the St. Joseph's Indian School in Chamberlain.* I have a handout that I gave to everyone and it kind of gives a list of actually what these law firms do. *They put these in papers; they advertise for clients to come forward and do this, and there's several different areas where they try to go in that respect. But again, this bill was drafted to turn back these tactics that are used by these lawyers.*

Decl. Shubeck, Ex. 19, March 2, 2010, 3:23-4:9 (emph. added). (One Star R. 2402). The testimony of Senator Garnos is an outright admission that these cases were targeted because these specific Plaintiffs chose out of state attorneys. Further, Garnos is referring to the *specific facts* of these cases and *these* Plaintiffs and convincing the legislature that their cases are fraudulent. Representative Tom Deadrick followed the same script in the House. See *Id*, Ex. 19, February 16, 2010, 2:13-3:16.

The testimony of Smith and the sponsors of the bill was decisive in the adjudication by the legislature. Senator Abdalla found these plaintiffs guilty of fraud, stating: "I think sexual abuse is a terrible thing *but so is abuse of prosecuting abuse* and I urge this Body to pass this bill." *Id*, Ex. 19, March 2, 2010, 10:4-6. The senators were specifically

swayed by Mr. Smith's unsupported and false testimony regarding the conduct of Plaintiffs' attorneys. See e.g. *Id.*, Ex. 18, at 12:3-12:25. Congressman David Lust voted because the bill "somewhat gets Mr. Smith to where he wants to be." *Id* at 18:20-22.

The Trial Court's Errors

Plaintiffs contend that the trial court erred because of the explicit prohibition on retroactive application of statutes to pending litigation under SDCL 2-14-14 and because of the prohibition of legislative targeting of specific litigants under the United States Constitution.

ARGUMENT

I. IF THE LEGISLATURE INTENDED HB 1104 TO APPLY TO PENDING LITIGATION, THEN IT IS UNCONSTITUTIONAL AS APPLIED TO THESE CASES

HB 1104 plainly does not apply to pending litigation because of SDCL 2-14-14 and the legislature did not clearly abrogate the effect of that statute. Even if it does apply, it cannot be applied to the pending litigation before this Court because to do so would be unconstitutional targeting of specific pending litigation.

A. HB 1104 Is An Unconstitutional Bill of Attainder Because the Legislature Crafted the Bar of HB 1104 on the Facts of the Specific Cases Before This Court, These Plaintiffs Received Trial by the South Dakota Legislature

HB1104 is an unconstitutional Bill of Attainder because (1) the legislature directly targeted *these* Plaintiffs, (2) the legislature targeted *these* Plaintiffs in retaliation for their lawful exercise of their rights and completely closed the courtroom doors for *these specific* Plaintiffs to receive any remedy at all.

The United States Constitution Art. I, §10, cl. 1 provides:

> "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . ."

Id. "A bill of attainder is a legislative act which inflicts punishment without a judicial trial." *Cummings v. Missouri*, 71 US 277, 323 (1867). The United States Supreme Court has stated that this clause was to be read broadly "in light of the evil the Framers had sought to bar" and described a Bill of Attainder as: "legislative punishment, of any form or severity, of specifically designated persons or groups." *United States v. Brown*, 381 US 437, 447 (1965). The element of "punishment" is defined as:

> The deprivation of any rights, civil or political, previously enjoyed, may be punishment, the circumstances attending and the causes of the deprivation determining this fact….Disqualification … *from the privilege of appearing in the courts*, … may also, and often has been, imposed as punishment.

United States v. Brown, 381 US at 448 (quoting *Cummings v. Missouri*, 71 US 277, 320 (1867)) (emphasis added). The element of "specifically designated persons or groups" has been defined as follows:

> [L]egislative acts, no matter what their form, that apply either to named *individuals or to easily ascertainable members of a group* in such a way as to inflict punishment on them without a judicial trial are bills of attainder prohibited by the Constitution.

Id at 448-449 (quoting *United States v. Lovett*, 328 U. S. 303, 315-316 (1946)) (emph. added).

B. <u>The South Dakota Legislature Specifically Targeted Plaintiffs' Cases Because They Crafted Their Legislation Based on Testimony of Twisted Versions of the Facts of These Specific Plaintiffs' Cases</u>

The legislative debates specifically demonstrate that these Plaintiffs were targeted by the legislature because they were specifically targeted in the debates on HB1104 and are an "easily ascertainable group".

Whether legislation is a bill of attainder depends on the level of targeting. Where individuals are named for specific punishment, the case is an easy one. See e.g. *United*

States v. Lovett, 328 US 303 (named individuals were banned from government employment). Targeting of a class may be a bill of attainder. See e.g. *Cummings v. Missouri*, 71 US 277, 322-324 (law that required an oath that required denial of past sympathy or support for enemies of the United States, challenged by a Roman Catholic Priest that refused to take the oath, was found to have targeted persons that sympathized with the Confederacy in the Civil War).

The legislature specifically was trying to craft legislation targeted at these cases. They discussed the specific facts of these cases. Further, Senator Hammamil specifically spoke of "the incidents referred to." Decl. Shubeck, Ex. 18 19:13-24. Representative Lusk vocalized the goals of the Judiciary committee of providing protection to a specific litigant in pending litigation. Decl. Shubeck, Ex. 19, at 18:21-22. (One Star R. 2402).

These specific plaintiffs were clearly targeted by the South Dakota legislature and a bill was crafted to target the facts of these cases. This trial court held that the legislature intended the statute to apply to these cases and, thus, the statute was designed to apply "to easily ascertainable members of a group".

C. Plaintiffs Are Being Punished Through Trial By Legislature

This legislation had all of the characteristics of a trial. The legislature received facts of the cases and attorneys for defendants in companion cases were present and argued for the crafting of the bill. The legislators were persuaded that *these specific* Plaintiffs were committing a fraud on the state of South Dakota based on testimony that they chose California attorneys, that there were a large number of them and that they were making claims recognized under the law of South Dakota. It is obvious from the record that these Plaintiffs were punished by the legislature of the state of South Dakota. Under the trial court's March 18, 2011 opinion, the effect of HB 1104 is that the legislature denied *these*

specific Plaintiffs a remedy because of the perceived wrongs. *These specific* Plaintiffs have received trial by legislature and were never given an opportunity to prove their case.

Precedent demonstrates that HB1104 is punishment. In *Cummings,* 71 US 277, a Roman Catholic Priest was convicted under a criminal statute that was violated by failing to take an oath regarding support of the Confederacy. In *ex parte Garland*, 71 US 333 (1866) a similar statute was challenged. Both statutes were held to be unconstitutional bills of attainder.

Cummings cited as an example of an unconstitutional bill of attainder:

> A British act of Parliament … might declare, that if certain individuals, or a class of individuals, failed to do a given act by a named day, they should be deemed to be, and treated as convicted felons or traitors.

71 US at 324. In *Lovett*, 328 US 303, the United States Supreme Court looked to the congressional record to discover the purposes of an appropriations bill amendment that provided that thirty-nine named individuals could not be hired by the federal government because they were allegedly subversives. The United States Supreme Court struck the amendment down as an unconstitutional bill of attainder because it was directed at named individuals as punishment. The Court stated:

> The effect was to inflict punishment without the safeguards of a judicial trial and "determined by no previous law or fixed rule." The Constitution declares that that cannot be done either by a State or by the United States.

Id at 316-317. Punishment was defined broadly by the court and not limited to a finding of criminal liability.

In this case, the legislature crafted legislation directed at *these specific* plaintiffs that rendered their right to a remedy attainted before that right even accrued. Here, this court and the trial court decided accrual was an issue for trial in these cases. Yet, on the eve of

trial, Plaintiffs' causes of action were found to have been cut off completely. The effect of the trial court's rulings is that *these specific* Plaintiffs could not have brought suit earlier and the legislature completely cut off all remedies of *these specific* Plaintiffs with HB1104. Similar to *Cummings*, *these specific* plaintiffs were targeted to have their cases forever barred from the courts of this state for failing to bring a suit before a specific day. The specific day had already passed at the time the law became effective.

These cases are similar to *Lovett* because there was no fixed rule applied to dismiss these Plaintiffs' claims, this was trial by legislature not based on any facts. The safeguards of a *judicial* trial were absent.

This case presents an unconstitutional bill of attainder similar to *Lovett*, *Cummings*, and *Garland*, because, as described above, there are specific identifiable persons targeted for punishment. They are being punished because the legislature heard a twisted version facts of their cases presented by attorneys for defendants in pending companion litigation. The legislature concluded that *these specific* plaintiffs had brought fraudulent cases not worthy of the South Dakota courts. Their punishment is that the courtroom doors are forever closed to them, the legislature has decided their cases.

D. <u>If The Legislature Had Intended HB 1104 To Apply To Pending Litigation, It Would Be An Unconstitutional Targeting Of These Plaintiffs' Right To Choose Out Of State Counsel</u>

HB 1104 was directed at depriving the rights of litigants to choose out of state counsel. The act violates the Dormant Commerce Clause and the Privileges and Immunities Clause of the United States Constitution, Art. IV, §2, cl. 1 because it was a purposeful targeting of interstate commerce and the exercise of the privileges and immunities of United States Citizens. See e.g. *Oregon Waste Systems, Inc. v. Department Of Environmental Quality Of The State Of Oregon*, 511 U.S. 93 (1994) (purposeful

discrimination against interstate commerce); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) (unconstitutional residency restrictions on bar admission).

Mr. Smith specifically targeted the cases before this court based on the exercise of their right to seek out of state counsel. Mr. Smith testified that SDCL 26-10-25 "has been quite useful tool for groups of lawyers out of California." Decl. Shubeck, Ex. 18, at 3:23-4:4. (One Star R. 2402). Smith called the statute "the California Lawyers' Welfare Bill," and described the ills of California attorneys working in South Dakota. *Id* at 4:4 -13.

The legislators were especially keen on putting limits on out of state attorneys practicing in South Dakota. Ms. Gibson asked: "Is your main purpose for bringing this in is because California is actually, maybe in your mind, abusing the laws of South Dakota?" *Id* at 10:13-18. In response, Mr. Smith explicitly targeted the cases before this Court. *Id* at 10:20-11:1. Ms. Gibson followed up with another question regarding Plaintiffs' choice of out of state counsel. *Id* at 11:12-13. Mr. Tupperville was also interested in targeting the exercise of the right to hire out of state counsel. *Id* at 12:3-25

HB 1104 was purposefully drafted to target the Plaintiffs' before this Court and their choice of out of state counsel and, therefore, is *per se* unconstitutional as applied to these cases.

E. <u>If The Legislature Had Intended HB 1104 To Apply To Pending Litigation, It Would Be An Unconstitutional Direction Of A Rule Of Decision In Pending Litigation</u>

If the South Dakota legislature intended HB 1104 to be retroactive then they had the very litigation before this court in mind when the statute was passed and have unconstitutionally provided a rule of decision. *United States v. Klein*, 80 U.S. 128 (1871) stands for the proposition that the legislature may not "prescribe rules of decision to the Judicial Department of the government in cases pending before it." *Id* at 146. This

reasoning is based on the separation of powers doctrine recognized by the South Dakota Supreme Court. See e.g. *Dunker v. Brown County Board of Education*, 121 NW 2d 10 (SD 1963). However, due process also requires that the parties specifically targeted with a rule of decision have notice and the opportunity to be heard. See e.g. *Londoner v. City and County of Denver*, 210 US 373 (1908).

F. HB 1104 Cannot Be Applied To Litigation Pending Prior To Its Effective Date Because A Grace Period Is Constitutionally Required When A Statute Of Limitations Is Altered

In the case of HB 1104, the legislature was constitutionally required to provide a reasonable grace period for the filing of claims because HB 1104 is a statute of repose and, therefore, affects substantive rights. See *Wilson v. Iseminger*, 185 U. S. 55, 62-63 (1902). See also *Nichols v. Bowersox*, 172 F.3d 1068, 1073 (8th Cir. 1999). See also e.g. *Boggs v. Adams*, 45 F.3d 1056 (7th Cir. 1995) (finding grace period required for victims to file under Illinois childhood sexual abuse statute of repose); *Groch v. Gen. Motors Corp*., 2008 Ohio 546 (OH 2008) (finding that plaintiffs were entitled to a reasonable time after passage of a statute of repose to file their cases). HB 1104 includes no grace period and cannot be applicable to pending litigation.

G. This Court is bound by the United States Supreme Court interpretation of the US Constitution as to the relevance of legislative history for considering intentional discrimination by the South Dakota legislature in violation of the Constitution

This Court is being asked to apply the United States Constitution and determine if the cases before it were targeted by legislation. This Court is bound by the Constitution and the United States Supreme Court interpreting that document. This Court's rules of construction for interpreting South Dakota statutes have no bearing on this analysis. Therefore, the legislative history must be considered.

Article VI, Clause 2 of the United States Constitution (hereinafter the Supremacy Clause) provides: "This Constitution…shall be the supreme law of the land; and the judges in every state shall be bound thereby…" *Id.*

The United States Supreme Court has outlined the pertinent evidence in the inquiry:

> Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decision making body.

Church of Lukumi Babalu Aye, Inc., 508 U.S. 520, 540 (1993) (a First Amendment case citing *Arlington Heights v. Metropolitan Housing Development Corp*., 429 U. S. 252, 266-268 (1977) (Equal Protection case)).

As to bills of attainder, United States Constitution Art. I, §10 cl. 1, the case law of the United States Supreme Court demonstrates that legislative history provides evidence of legislation targeting specific individuals or classes of individuals. For example, in *Lovett*, 328 US 303, the United States Supreme Court looked to the congressional record to discover the purposes of an appropriations bill amendment that provided that thirty-nine named individuals could not be hired by the federal government because they were allegedly subversives. In fact, it is absurd to attempt to imagine what evidence would establish a violation of a constitutional provision that prohibits legislation targeting specific individuals or groups without legislative history.

Exploration of legislative history is also appropriate under the Commerce Clause, See e.g.; *HP Hood & Sons, Inc. v. Du Mond*, 336 US 525 (1949) (exploring regulator's stated discriminatory purpose), and the Due Process Clause. See e.g. *Klein*, 80 US 128 (exploring the historical context and bills passed at the same time). If violations of these

provisions of the United States Constitution that prohibit discrimination cannot be demonstrated by clear statements of intent in legislative history, then it is difficult to imagine why the provisions even exist.

Further, the fact that the *entire legislature* voted on a bill brought and drafted by a defense attorney for a defendant in pending litigation does not cure the equal protection issues in this case. A similar argument was made in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 US 432 (1985) where the city council claimed they voted because of the negative attitude of property owners near a proposed facility for people with mental handicaps. The Court stated:

> It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, … and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."…

473 US at 448 (citations omitted). See also *Romer v. Evans*, 517 US 620 (1996)(state wide referendum struck down).

Plaintiffs challenge the application of HB 1104 as applied to them specifically under Article I, § 9, the Commerce Clause, and the Due process Clause of the United States Constitution.

II. SDCL 26-10-25 APPLIES TO THE CASES AT HAND BECAUSE INTENTIONAL CRIMINAL CONDUCT BY WPSJ AND SFM HAS BEEN ALLEGED AND DEMONSTRATED

In *Bernie v. Abbey* this court held that SDCL 26-10-25 (1991) applied to intentional criminal conduct. 2012 S.D. 64, 821 N.W.2d 224. As pointed out by this court in *Stratmeyer v. Stratmeyer*, SDCL 26-10-29 defines intentional criminal conduct by reference to SDCL 22-22 (sex offenses) “or prior laws of similar effect at the time the act

was committed which act would have constituted a felony." 567 N.W.2d 220, 223, 1997 S.D. 97, ¶15. See also SDCL 26-10-29. There is a genuine issue of material fact as to whether WPSJ and SFM themselves perpetrated intentional criminal acts that constituted "sex offenses" under that chapter and prior laws of similar effect.

There is a genuine issue of material fact as to whether WPSJ and SFM are perpetrators of sex offenses under two current statutes: SDCL 22-22-24.3 (felony for a person who "causes or knowingly permits" a minor to be abused) and 22-22-46 (Assisting, harboring, concealing, or providing false information about sex offender) and prior laws of similar effect.[2] Both of these statutes clearly punish parties, other than the perpetrator, for aiding, abetting and concealing childhood sexual abuse. As these cases occurred between 1960 and 1980, before the existence of these specific statutes, the crimes would have been prosecuted under an aiding, abetting or concealing theory. SDC 1939, 13.0203 (transferred to SDCL §§ 22-3-3 and 5) provided:

> All persons concerned in the commission of crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense or aid and abet in its commission, though not present, are principals. All persons who, after the commission of any felony, conceal or aid the offender with knowledge that he has committed a felony and with intent that he may avoid or escape from arrest, trial, conviction, or punishment, are accessories…

Id.

A. <u>There is a genuine issue of material fact as to whether WPSJ and SFM were principals to childhood sexual abuse in this case because Defendants breached a</u>

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[2] "[A] business entity may be held criminally liable for its actions." *State v. Hy Vee Food Stores, Inc*., 533 NW 2d 147, 149 (SD 1995) (citing *State v. Taylor*, 147 N.W. 72 (SD 1914); Fletcher Cyclopedia Of The Law Of Private Corporations § 4951 (1993 rev. ed.)). See also SDCL 22-1-2 (31) ("person" includes entities).

legal duty to act

There is a genuine issue of material fact as to whether WPSJ and SFM aided and abetted the abuse alleged because WPSJ and SFM had affirmative duties to protect Plaintiff and acted *in loco parentis*.

An exception to the rule that one must be affirmatively giving aid to a perpetrator to have aiding and abetting liability for an act is where "he or she is under a legal duty to prevent it." 22 C.J.S. Criminal Law § 174. See also *State v. Johnson*, 139 N.W. 2d 232, 236 (SD 1965) (noting the rule). Under this exception, an omission of a legal duty, knowing of the consequences, demonstrates intent that the act occur. See e.g. *State v. Austin*, 172 NW 2d 284, 289 (SD 1969) (manslaughter conviction for parent charged with aiding and abetting); *State v. Zobel*, 134 NW 2d 101, 110 (SD 1965) cert. denied, 382 U.S. 833, 86 S.Ct. 74, 15 L.Ed.2d 76 (1965)(same). See also LaFave and Scott, Criminal Law, § 26 at 182 (West 1972); *State v. Walden*, 293 SE 2d 780 (NC 1982)(conviction for aiding and abetting assault); *State v. Williquette*, 370 N.W.2d 282, 125 Wis. 2d 86 (Ct. App. 1985) (reversal of a dismissal of a criminal information because failure of a parent to act created a jury question as to intent that the crime be committed); Criminal liability for excessive or improper punishment inflicted on child by parent, teacher, or one *in loco parentis*, 89 A.L.R.2d 396, §§24-25 (Criminal liability of person as aider and abettor, or other participant)(Originally published in 1963).

In the case at hand, WPSJ and SFM acted *in loco parentis*. They acted as parents of boarding school students. They had an affirmative duty imposed by the criminal law to protect the children in their care. Plaintiffs contend that there is an issue of material fact as to whether WPSJ and SFM aided and abetted the abuse of Plaintiffs by allowing known and suspected abusers to remain with children and failing to report that abuse.

B. Even if *State v. Jucht* requires an aider and abettor have the mental culpability of the crime, statutory rape is a general intent crime and WPSJ and SFM had the intent necessary

WPSJ and SFM knowingly allowed Plaintiffs to be raped by the perpetrators in this case and could have been criminally liable as aiders' and abettors to statutory rape at the time of the abuse because it is a general intent crime. See *State v. Fulks*, 160 NW 2d 418, 420 (SD 1968) (stating that statutory rape is "one of a rather large class of crimes where concert of act and criminal intent is not required."). In this case, there is an issue of fact as to whether WPSJ and SFM "knowingly" aided or encouraged the abuse by allowing known perpetrators to remain with children. See SDCL 22-1-2(1)(c) (definition of "knowledge, knowingly"). While there is no South Dakota precedent on point, California courts interpreting Penal Code 31, a statute identical to South Dakota's SDCL 22-3-3 (formerly SDC 1939, § 13.0203) have addressed the very issue of whether a parent or guardian can be prosecuted for a statutory rape committed by another person and found in the affirmative. See e.g. *People v. Wood* 56 Cal. 431, 432-433, 205 P. 698, (Cal. Dist. Ct. App. 1922) ; *People v. Haywood*, 131 Cal. 2d 259 (Cal. Dist. Ct. App. 1955).

C. There is evidence that WPSJ and SFM had the intent to conceal under the separate theory that they perpetrated a criminal act currently punishable under SDCL 22-22-46 as a felony accessory

There is a question of fact as to whether WPSJ and SFM concealed the abuse at issue "with intent that he may avoid or escape from arrest, trial, conviction, or punishment." See SDC 1939, § 13.0203 (second sentence), See also *Johnson* 139 NW2d at 236. Acting as an accessory after the fact was a felony. See SDC 1939, 13.0603 (transferred to SDCL 22-3-5 last sentence). Prosecuting the concealing of sexual abuse under this statute would have a similar effect to current SDCL 22-22-46. WPSJ and SFM

had duties to disclose the abuse, knew of the abuse, and breached those duties. The failure to so disclose leads to the inference that WPSJ and SFM did so with the intent to avoid scandal and criminal liability.

III. THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO WHETHER SDCL 26-10-25 BARS PLAINTIFFS' CLAIMS BECAUSE WPSJ AND SFM DID NOT ADDRESS THEIR BURDEN UNDER ZEPHIER

WPSJ and SFM have not carried their burden under *Zephier v. Catholic Diocese of Sioux Falls*, 2008 SD 56, 752 NW 2d 658 because they did not even argue that Plaintiffs "discovered or should have discovered that the injury or condition was caused by the act" under SDCL 26-10-25. Instead, WPSJ and SFM argued, simply, that Plaintiffs were over the age of 40 when they brought suit.

SDCL 26-10-25 is an affirmative defense, and the burden of proof to establish a defense is on the party who seeks to rely on it. See *Zephier,* 2008 SD 56, ¶9, 752 NW 2d 658, 663. The burden shifts only when a defendant presumptively establishes the defense. See *Id*.

In Zephier, the defendants did not argue or produce evidence that any plaintiff had discovered their cause of action outside of the period in SDCL 26-10-25 and this court reversed summary judgment. See *Id*. In this case, WPSJ and SFM could not have carried their burden because they did not even make the argument as to SDCL 26-10-25.

IV THERE IS A GENUINE ISSUE OF MATERIAL FACT AS TO FRAUDULENT CONCEALMENT TOLLING UNDER THE STRASSBERG STANDARD

There is a genuine issue of material fact as to whether the applicable statute of limitations was tolled under the doctrine of fraudulent concealment because two categories of causes of action were concealed by WPSJ and SFM (1) the causes of action for the acts of the perpetrator and (2) the independent causes of action for the acts and

omissions of WPSJ and SFM. *Strassberg v. Citizens State Bank* demonstrates the level of evidence required to survive summary judgment.

Fraudulent concealment is a doctrine that tolls the statute of limitations where the facts creating a cause of action have been concealed through fraud or a wrongful failure to disclose. *Hinkle v. Hargens*, 81 NW 2d 888 (SD 1957). It is based on the reasoning that "[i]t is neither logical nor equitable to frown on [fraud] in a court of equity and allow it to be used as a shield in a court of law." *Id* at 890. The focus of fraudulent concealment analysis is discovery of a cause of action. *Id* ("fraudulent concealment of a cause of action tolls the statute of limitations until the cause of action is discovered or might have been discovered by the exercise of diligence."). A plaintiff with actual notice of their cause of action cannot establish fraudulent concealment. See *One Star v. Sisters of St. Francis*, 2008 SD 55, ¶34, 752 N.W.2d 668, 682. However, where there is not clear evidence of actual notice or circumstances within a defendant's control creating confusion, fraudulent concealment is a question of fact for the jury. See e.g. *Koenig v. Lambert*, 527 N.W.2d 903-4 (reversing summary judgment on issue of fraudulent concealment tolling where plaintiff alleged childhood sexual abuse from 12 years old until 29 and did not file suit until age 45 after receiving therapy). See also *Strassburg v. Citizens State Bank*, 1998 SD 72, 581 NW 2d 510 (A businessman farmer did not bring a cause of action until ten years after the defendant bank's attorney told him an "insignificant" wrongful setoff was taken from a constructive trust held for him but this court found "whether plaintiff knew or should have known of his cause of action at the time the Bank's attorney admitted only a fractional setoff is a question of fact."); *Shadrick v. Coker*, 963 SW 2d 726 (TN 1998) (finding that the facts of the malpractice case did not

"necessarily compel a reasonable person to conclude that [the plaintiff] knew or reasonably should have known that his problems were the result of wrongful or tortious conduct " because the defendant doctor had offered innocent explanations for the plaintiffs' symptoms, other than medical error, on multiple occasions). Once active concealment has occurred, the notice required to undo the concealment is a question of fact. See e.g. *Holmes v. Wegman Oil Co.*, 492 NW 2d 107 (SD 1992) (attempted recall campaign of defective product after ten years of concealment of defect was not sufficient to mitigate fraudulent concealment because the program was not completed).

In *Strassberg*, the plaintiff, a businessman farmer, was told that a bank took a wrongful setoff of funds Strassberg claimed were held in constructive trust in an account for his benefit but the setoff was "insignificant in comparison to the amount of [his] claim." 581 NW2d at 512. Strassberg did not bring a cause of action until ten years later but this court found "whether plaintiff knew or should have known of his cause of action at the time the Bank's attorney admitted only a fractional setoff is a question of fact." *Id* at 512.

A. <u>There is a genuine issue of material fact as to whether a reasonable person would be on notice of their causes of action for the abuse in this case.</u>

There is a genuine issue of material fact as to whether Plaintiffs exercised reasonable diligence in discovering their causes of action for abuse.

<u>Notice to Reasonable Persons</u>

The South Dakota legislature and this court have recognized that childhood sexual abuse creates a confusion in victims that lasts into adulthood. See SDCL 26-10-25, *Stratmeyer*, 567 N.W. 2d 220, *Koenig*, 527 N.W.2d 903. The scientific evidence demonstrates that having abuse buried in the back of a victim’s mind is not per se notice

of a cause of action because the coping mechanisms a child forms to deal with the abuse constitutes a confusion in reasonable people that lasts long into adulthood and prevents such a discovery.

Plaintiffs' expert, Dr. King, wrote about the "Common Coping Strategies for Survivors of Childhood Sexual Abuse." See Report of Dr. King, Decl. Shubeck, Ex. 13, p.4. [3] Obviously, a child knows an act occurred at the time of the abuse and has to have some recollection of the abuse to bring suit. King specifically identifies the coping mechanism of shame avoidance and the effect of learning the futility of reporting as reasons help is not sought by reasonable persons. *Id*.[4] What is important in the analysis of what constitutes notice to a reasonable person, is the way a reasonable child's mind copes with the abuse that creates a confusion that is frozen in time, a means of coping with the abuse that reasonable people demonstrably do not alter until long into adulthood. *Id.*

A.L., H.D.G. and L.T.

Adrian Larvie (A.L.) and Howard Dean Graham (H.D.G.) have produced

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[3] See also research funded and conducted by the United States Conference of Catholic Bishops: Terry, Keren J., Child Sexual Abuse: A Review of the Literature, UCCSB Child And Youth Protection, pp. 6-8; Terry, Keren J., The Nature And Scope Of Sexual Abuse Of Minors By Catholic Priests And Deacons In The United States 1950-2002 2006 Supplementary Report, UCCSB, pp. 4-17; The Nature And Scope Of Sexual Abuse Of Minors By Catholic Priests And Deacons In The United States 1950-2002, UCCSB, pp. 89-93; Terry, Keren J., The Causes and Context of Sexual Abuse of Minors by Catholic Priests in the United States, 1950-2010, UCCSB, pp. 27-34. Available at http://www.usccb.org/issues-and-action/child-and-youth-protection/reports-and-research.cfm, accessed 3/25/14. See also e.g. Ann Marie Hagen, Note, Tolling the Statute of Limitations for Adult Survivors of Childhood Sexual Abuse, 76 IowaLRev 355 (1991).

[4] Shame has been recognized as creating an issue of fact as to confusion. See *Grover Curtis Mallory v. Sisters of the Blessed Sacrament, et al*. (Civ. 09-700). Bradley Zell, May 25, 2010, Mem Op, pp. 10-12, Decl. Shubeck, Ex. 15. The knowledge of parents is irrelevant. See e.g. SDCL 26-10-27.

affidavits testifying that they were not on notice of the causal connection between the abuse and their injury. Decl. Shubeck, Exs 5 and 7. Adrian became an alcoholic at eight years old and staved off surfacing of the memories until close in time to filing suit. *Id* at Ex 5, ¶¶ 5-8. Howard also turned to substances while he was a minor and put the memories out of his mind. *Id* at Ex 7, ¶¶ 5-7. He did not discover the connection between his injuries and abuse until 2010 when he saw news reports of others coming forward. *Id.*

Lawrence Ford

WPSJ and SFM pointed to testimony by Lawrence Ford that he told his wife and a friend about the events. However, Lawrence testified this was within a year or two of filing suit. Dep. Ford, p. 23:5-11, 26:19-26:16, 41:4-18., Decl. Shubeck, Ex. 2.[5] Lawrence identified reports of priest abuse as a trigger for him remembering. See *Id* at 26:20-23. He increased his drinking to deal with the pain after the memories surfaced. *Id* at 38:22-39:2. Telling his story bothered him immensely. *Id* at 28:7-8. Through testing and examination, Dr. King found that Lawrence had not brought the memories forward until recently and his mind had concealed the abuse through the mechanisms of "exaggerated sense of self, interpersonal distancing, alcohol abuse, cognitive numbing, and other forms of cognitive avoidance" and that he "continues to struggle with depression, fear, interpersonal relationship difficulties, confusion, distorted selfimage, and helplessness." Decl. Shubeck, Ex 13, p. 12. Dr. King found that the concealing condition was consistent with what reasonable victim's experience. *Id*, p. 13.

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[5] Ford's deposition was April 26, 2006 and he testified the disclosures were "probably just in the past four or five years." Dep. Ford 26:4. See also 26:15-28:1 (within 4½ years of the deposition), Decl. Shubeck, Ex. 2.

Antoinette Miller

WPSJ and SFM noted that Antoinette attempted to tell her parents of the abuse. However, Antoinette has explained why she did not disclose further: "Back then we didn't know what was going on, you know. We thought they were priests and nuns and brothers that, you know, we put our trust in and we didn't know back then." Dep. Miller 64:17-20, Decl. Shubeck, Ex. 2. She also testified to how she went about forgetting. *Id* at 51:21-25. She did not know that Chapman had injured her until she disclosed the abuse to her husband around November 2002. *Id* at 41:13-16, 49:3-50:4, 77:8-78:21, 83:17-84:1. As testified by Dr. King, when a child's report of abuse is rejected a child is led to conclude the situation is hopeless and a child's mind resorts to pursuing concealing strategies. Decl. Shubeck, Ex. 13, p. 39. King opined that Antoinette employed the coping mechanisms of interpersonal withdrawal and cognitive avoidance and, as a result, has experienced interpersonal distancing, distrust, an antagonistic approach to conflict and other emotionally-charged situations, and intellectualization. *Id* at p. 40. Dr. King has opined that a reasonable person would have responded similarly. *Id* at p. 41.

Ralph Eagleman

WPSJ and SFM make a great deal about the fact that Eagleman testified that he would never forget about what happened to him. However, Ralph testified that he was not on notice of his cause of action, as a result of the abuse, Ralph was remorseful and blamed himself. Dep. R. Eagleman 42:20-43:8, Decl. Shubeck, Ex. 2. He testified: "At those times I thought I was going to hell. And they told me hell was a bad place for bad people." *Id.* Ralph identifies the triggering event where his memories came to the surface as the 2002 death of his brother in an alcohol related car accident, testifying: "and I

associate my – my deep inner feelings, my emptiness, when I lost my brother and I connected it." *Id* at 57:12-5:98. After that he resolved to change his life by confronting the coping mechanisms that kept him from facing the abuse. *Id*. Dr. King has opined that Ralph's test results are consistent with other victims of abuse and that he employed the coping mechanisms of intellectualization, interpersonal distancing, and cognitive simplification. King finds that, as a result, Ralph experienced depression, fear, interpersonal relationship difficulties, confusion, poor self-image, and helplessness. Decl. Shubeck, Ex. 13 at p. 15. He also opined that "a reasonable person experiencing the same conditions and type of abuse would respond similarly." *Id* at p. 16.

Ida Marshall

WPSJ and SFM noted that Ida Marshall told her father of the abuse and remembered the events all her life. However, her father did nothing. Dep. Marshall 24:17-22, Decl. Shubeck, Ex. 2. This created a sense of hopelessness for Ida. *Id* at 40:16-19. See also 24:17-22. Afterward, Ida testified to an intense fear of telling people and addressing the memories. *Id* at 35:15-36:5, 41:2-6, 57:11-14. When she attempted to face that fear, Ida experienced a fear so intense that she would have an anxiety attack or throw up. *Id* 29:5-15. She only started talking when the memories started coming back. *Id* at 35:15-36:5, 77:14-78:15. Dr. King found that Ida's emotional development halted in her early years. Decl Shubeck, Ex. 13 at p. 49. He found that Ida "felt helpless about being able to do anything about [the abuse], so actively avoided going into any kind of depth in processing it and never made the connection of the abuse to her current and past symptomatology." *Id*. Further, "a reasonable person in Ms. Marshall's position would have utilized these or similar defensive mechanisms in order to avoid facing her sexual

abuse injuries and would have failed to appreciate the impact of the childhood sexual abuse on any of these injuries until recently." *Id* at p. 50.

Wendell Big Crow

WPSJ and SFM base their defense on Wendell's disclosure of the abuse to his brother, which occurred at the time of the abuse when Wendell was a minor. However, his brother did nothing as a result. Wendell testified to why he did not disclose further:

> Well, something kind of like emotionally that, you know, that -- the shame of it, you know. Because kind of, to face the other people, you know, kind of like, face the priests and stuff like that, you know. That's kind of scary, you know, to talk to anybody, see anybody about that thing, you know. Like something -- something might happen again like that. I kind of stayed back away from people at that time. You know, like I say, I just quit doing everything. You know, I just lost interest in all kinds of things that, you know, I was enjoying at that time, you know.

Dep. Big Crow 53:21-54:8, Decl. Shubeck, Ex. 2. Dr. King found that Wendell "coped by isolating himself, shutting down emotionally, and avoiding conscious attention to the abuse ("[I] tried to get rid of it." "I didn't do anything about it. Forgot it.") Decl. Shubeck, Ex. 13, p. 23. King found the test results demonstrated chronic and long term "Post-Traumatic Stress Disorder (PTSD), depression, relationship problems, the inability to understand the full extent of his condition, and the inability to express himself emotionally and/or to feel." *Id*. Further, King found a reasonable person "would have utilized these same defensive mechanisms in order to avoid facing his sexual abuse injuries and would have failed to appreciate the impact of the childhood sexual abuse on any of these injuries until recently when he was exposed to others who had suffered similarly." *Id,* p. 25.

Regina One Star

WPSJ and SFM claim that Regina One Star had knowledge because she testified:

"It was like something I put away, you, know, and I thought it was over completely, so I don't know. I don't know how to talk about it…..I mean, I feel ashamed, yet…" Deposition of Regina One Star (hereinafter Depo R. One Star) at 34:4-12, Decl. Shubeck, Ex. 2. However, One Star's testimony is actually of memory repression, the memories were subconsciously there but not consciously accessed. See *Id* at 46:6-11. She further described the phenomenon she was suffering:

> Troubling part was it was hard for me with my feelings. I was lost somewhere. I had a hard time expressing and I still do sometimes, but its just there was something lost, gone, and I think I'm still searching. It has to do with feelings, you know more so. Like I feel like I'm wrong constantly or I feel like I'm – I have to wait for someone to order me to do something.

Id. She testified that she started drinking to cope with the feelings and she did not realize it was related the abuse until she stopped drinking and began to recall the incidents at St. Francis. *Id*, Decl. Shubeck, Ex. 2. She was only able to come forward with the abuse when she found out she was not alone, she testified: "I was hearing things and that gave me a chance to kind of open myself up a little bit, you know, towards it." *Id* at 50:12-21. Dr. King identified coping mechanisms of avoidance of the feelings resulting from the abuse through alcohol abuse and burying the memories. Decl. Shubeck, Ex. 13, p. 45. He further found that this is the response a reasonable person would have had. *Id*.

<u>David Standing Soldier</u>

WPSJ and SFM point out that Standing Soldier testified that he always remembered "it." However, Dave testified to the concealing mechanism of his condition, Dave has suffered from shame and lack of trust. Dep. Standing Soldier 124:23-128:13, 131:2-7, Decl. Shubeck, Ex. 2). As he testified: "I feel more shameful more than anything else because I couldn't talk. Couldn't tell nobody." Dave put his trust in Father Gill and

that abuse changed his view of the world and persons in authority and prevented him from disclosing the abuse. *Id* at 53:2-56:24, 74:12-15, 124:23-128:13. Dave testified to a very specific reason that he would have developed concealing coping mechanisms:

> At the time I pushed it, I didn't want to think about it at all because of what happened. My mother respected the church immensely and trusted them and I couldn't break her heart and tell her what happened. I tried one time to tell a nun what happened to me and she said I was lying and she sent me to Mr. Gill, who then whipped me for lying. And then rubbed my bottom after saying, God loves you, Jesus loves you, and he forgives you for lying. Even though I was crying from the pain, I left and didn't cry anymore.

Id at 42:1-12. Dr. King has opined that the test results confirm Dave's coping mechanisms, stating "he coped by internalizing his pain and emotional turmoil and avoiding thinking about it. He stated he used alcohol as a means to not think about what happened in his past." Decl. Shubeck, Ex. 13, p. 63. King states that "These characteristics are all common finding among survivors of childhood sexual abuse—especially if they have not received psychological help." *Id*. Further, "a reasonable person in Mr. Standing Soldier's position would have utilized these same defensive mechanisms in order to avoid facing his sexual abuse injuries and would have failed to appreciate the impact of the childhood sexual abuse on any of these injuries until recently when he was exposed to others who had suffered similarly." *Id*, p. 64.

Like the plaintiff in Koenig, these plaintiffs were over forty years old when they brought their actions but have provided evidence of the confusion created by WPSJ and SFM' conduct and their conditions. WPSJ and SFM have not contradicted the evidence. Further, the confusion, of misinformation and belief of futility, suffered by the businessman in *Strassberg* is surely analogous, if not much less significant, than the confusion of Native American victims of childhood sexual abuse who are suffering with

confusion created by self blame, fear of reprisal, hopelessness, and buried memories.

B. There is a genuine issue of material fact as to whether a reasonable person would be on notice of causes of action based on concealment and failure to prevent childhood sexual abuse by WPSJ and SFM.

Plaintiffs have independent causes of action for the direct conduct of WPSJ and SFM in failing to protect them and concealing the abuse. WPSJ and SFM maintained that they did not know or participate until discovery revealed they had in fact discovered and failed to report the abuse. A reasonable person would not be on notice of the cause of action for the direct liability of WPSJ and SFM by the mere fact that they were harmed by an agent.

In *Piotrowski v. City of Houston*, 237 F. 3d 567 (5th Cir. 2001), this exact issue was examined and fraudulent concealment tolling was applied. There, the plaintiff timely filed suit against individual police officer but not against the city. She claimed that she was not aware that the city had participated in the tort until a deposition of an individual officer revealed the pattern and practice by the city. Similarly, in *Strassberg*, Strassberg was not found to have notice of a cause of action against the bank because he knew he had a cause of action against the banks' depositor.

Here, Plaintiffs similarly were not aware of the conduct of WPSJ and SFM in failing to protect and concealing abuse until discovery produced documentation of that fact. WPSJ and SFM had sole control over the information related to their liability and a fiduciary duty to disclose it. Further, defendants have continued to disavow their knowledge of the abuse.

CONCLUSION

For the above reasons, Plaintiffs respectfully request that this Court finds (1) that HB1104 cannot be constitutionally applied to these cases, (2) that WPSJ and SFM have

not carried their burden of establishing the defense of SDCL 26-10-25 and (3) that there is a genuine issue of material fact as to whether fraudulent concealment tolls the statute of limitations in these cases.

Respectfully submitted this 16th day of April, 2014.

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Michael P. Shubeck

REQUEST FOR ORAL ARGUMENT

Appellants request oral argument before this court.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief of Appellants does not exceed the number of words permitted under SDCL § 15-26A-66, said Brief containing 9,990 words.

_____

Michael P. Shubeck

APPENDIX

CERTIFICATE OF SERVICE

The undersigned certifies that on April 16, 2014, he caused true and correct copies of the foregoing to be served upon each of the persons identified below as follows:

[ ]	First Class Mail	[ ]	Overnight Mail
[ ]	Hand Delivery	[ ]	Facsimile
[ ]	Electronic Mail	[ ]	ECF System

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MICHAEL SHUBECK

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal Nos. 26939, 26940, 26941, 26942, 26943 and 26944

RALPH EAGLEMAN, et al.

Plaintiffs and Appellants,

vs.

WISCONSIN PROVINCE OF THE SOCIETY OF JESUS AND ROSEBUD EDUCATIONAL SOCIETY/ST. FRANCIS MISSION, et al.,

Defendants and Appellees.

Appeal from the Circuit Court, Seventh Judicial Circuit
Pennington County, South Dakota

Honorable Rodney J. Steele, Judge Pro Tem

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Notice of Appeal filed January 6, 2014

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PRELIMINARY STATEMENT

Appellants on this consolidated appeal will be referred to throughout this brief as Plaintiffs. Appellees Wisconsin Province of the Society of Jesus and Rosebud Educational Society/St. Francis Mission will be referred to as Defendants. References to the Settled Record will be identified using the Clerk's Appeal Index (CI), with reference to the appropriate Plaintiff or lead Plaintiff's last name, followed by the page and paragraph number.

JURISDICTIONAL STATEMENT

This is an appeal from an Order granting summary judgment issued by the Honorable Rodney J. Steele on December 6, 2013. Eagleman CI 2771; One Star CI 865; Standing Soldier CI 702; Marshall CI 539; Big Crow CI 899; A.L.[1] CI 789. Appeal of the Order was filed January 6, 2014. Eagleman CI 2777; One Star CI 871; Standing Soldier CI 708; Marshall CI 545; Big Crow CI 905; A.L. CI 798.

STATEMENT OF LEGAL ISSUES

I. Whether S.D.C.L. §26-10-25 and the extended statute of limitations applies to causes of action against non-perpetrators of childhood sexual abuse.

Most Relevant:

Bernie v. Blue Cloud Abbey, 2012 S.D. 64, 821 N.W.2d 224
Sandoval v. Archdiocese of Denver, 8 P.3d 598 (Colo. App. 2000)
Kelly v. Marcantonio, 678 A.2d 873 (R.I. 1996)
Ryan v. Roman Catholic Bishop of Providence, 941 A.2d 174 (R.I. 2008)
S.D.C.L. §26-10-25

[1]These Plaintiffs sought leave to proceed with their cases using fictitious names. A.L. CI 147 – Although Plaintiffs' counsel used names in the opening brief, Defendants will refer to this group of Plaintiffs by initial, consistent with their request.

S.D.C.L. §22-1-2(1)(b)
S.D.C.L. §26-10-29
United States Constitution, Art. 1, §10, Clause 1
South Dakota Constitution, Art. V, §12

II. Whether Plaintiffs, who have full knowledge of facts regarding their alleged abuse, can assert fraudulent concealment to toll application of statute of limitations.

Most Relevant:

One Star v. Sisters of St. Francis, Denver, Colorado, 2008 S.D. 55, 752 N.W.2d 668
Bernie v. Blue Cloud Abbey, 2012 S.D. 64, 821 N.W.2d 224
S.D.C.L. §15-2-24(3)
S.D.C.L. §15-2-22

III. Whether the statute of repose added to S.D.C.L. §26-10-25 is constitutional and applies retroactively.

Most Relevant:

Wegleitner v. Sattler, 1998 S.D. 88, 582 N.W.2d 688
Cary v. City of Rapid City, 1997 S.D. 18, 559 N.W.2d 891
Stratmeyer v. Stratmeyer, 1997 S.D. 97, 567 N.W.2d 220

STATEMENT OF THE CASE

Plaintiffs' claims are barred by the three-year statute of limitations identified in S.D.C.L. §§ 15-2-14 and 15-2-22. This suit attempts to avoid the holding of this Court in *Bernie v. Blue Cloud Abbey*, 2012 S.D. 64, 821 N.W.2d 224, by claiming Plaintiffs are entitled to assert the tolling provisions of S.D.C.L. §26-10-25.

STATEMENT OF THE FACTS

Plaintiffs claim they suffered abuse as children attending school. Eagleman Complaint (2004) CI 3; Amended Complaint (2005) CI 89; Second Amended

Complaint (2006) CI 665; (Proposed) Second Amended Complaint (2012) CI 2157; Third Amended Complaint (2013) CI 2233; One Star Complaint (2008) CI 5, Amended Complaint (2013) CI 826; Standing Soldier Complaint (2009) CI 21, Amended Complaint (2013) CI 664; Marshal Amended Complaint (2006) CI 18, Amended Complaint (2013) CI 500; Big Crow Complaint (2008) CI 14, Amended Complaint (2013) CI 826; A.L. Complaint (2010) CI 3. In the Complaints filed by the Eagleman, One Star, Standing Soldier and Big Crow Plaintiffs, the claims advanced against these Defendants were based on theories of breach of fiduciary duty, negligent failure to protect from the crimes of others and respondeat superior/vicarious liability. The Complaints in A.L. included these same theories, but also advanced a claim based on allegations the failure to protect against the crimes of others constituted violations of S.D.C.L Chapter 22-22 and childhood sexual abuse as defined by S.D.C.L §26-10-29.[2]

These Defendants filed and served motions for summary judgment. Eagleman CI 2295; One Star CI 408; Standing Soldier CI 247; Marshal CI 73; Big Crow CI 450; A.L. CI 313. As required by S.D.C.L. §15-6-56(c)(1), these Defendants provided a statement of material facts which they contended there was no genuine issue to be tried. Eagleman CI 2291; One Star CI 411; Standing Soldier CI 250; Marshal CI 76; Big Crow CI 453; A.L. CI 317. Although the

[2]The trial court allowed Eagleman, One Star, Standing Soldier, Marshall and Big Crow to file Amended Complaints including these same allegations. Eagleman CI 2330; One Star CI 858; Standing Soldier CI 663; Marshal CI 499, 500; Big Crow CI 423.

respective Plaintiffs filed responses, as contemplated by S.D.C.L. §15-6-56(c)(2), those responses did not dispute salient facts. Eagleman CI 2746; One Star CI 490; Standing Soldier CI 327; Marshal CI 423; Big Crow CI 848; A.L. CI 377.

Based on the uncontested statement of facts and considering the responses of Plaintiffs, the abuse alleged by each respective Plaintiff occurred sometime prior to 1971. Each of the Plaintiffs was over the age of 40 at the time complaints were served or filed. Further, the Plaintiffs admit these Defendants did not perpetrate the alleged act of sexual abuse. *See* Complaints and Brief of Appellants, Statement of Facts, at p. 1.

The trial court considered the allegations in the Complaints or Amended Complaints, but determined the allegations did not establish the statutorily required intentional conduct that would trigger the tolling provisions of S.D.C.L. §26-10-25. The trial court also determined the statute of repose, added in 2010, was constitutionally applied to bar claims advanced by these Plaintiffs. Finally, the trial court addressed claims that fraudulent concealment tolled any statute of limitations and determined the undisputed facts established that each Plaintiff had full knowledge of the operative facts, and that each Plaintiff failed to offer any evidence of facts allegedly concealed by these Defendants, precluding claims that fraudulent concealment tolled the limitations period.

SUMMARY JUDGMENT STANDARD

The issues raised by Plaintiffs' appeal have been resolved by this Court in *Bernie v. Blue Cloud Abbey*, 2012 S.D. 64, 821 N.W.2d 224. Because the issues

presented are clearly controlled by settled South Dakota law, S.D.C.L. §15-26A-87.1 would allow this Court to dispose of the matter on briefs and the record.

As this Court noted in *Bernie*, the construction and application of statutes of limitations present legal questions reviewed *de novo*. citing *Jensen v. Kasik*, 2008 S.D. 113, ¶4, 758 N.W.2d 87, 88. In reviewing summary judgment, "affirmance is suitable if any legal basis exists to support the court's decision." *Horne v. Crozier*, 1997 S.D. 65, ¶5, 565 N.W.2d 50, 52. In *Bernie*, this Court analyzed S.D.C.L. §26-10-25 and concluded that the plain language of the statute restricted application to civil claims brought against perpetrators and did not permit the extended time for bringing suit to apply to related claims brought against third parties. *Id.* at ¶7, *citing Sandoval v. Archdiocese of Denver*, 8 P.3d 598, 600-01 (Colo. App. 2000). There are no disputed questions of fact. These Defendants are not perpetrators of the alleged sexual assault or offense. The statute of limitations identified in S.D.C.L. §15-2-14 controls. These cases were not brought within the time allowed by S.D.C.L. §§ 15-2-14(3) and 15-2-22. Further, fraudulent concealment does not apply, because each Plaintiff was aware of the facts giving rise to their claims. There is no evidence that these Defendants concealed anything from Plaintiffs which would have prevented them from timely pursuing their claims.

Because the matter is controlled by settled South Dakota law, there is no need to consider whether the 2010 amendment to S.D.C.L.§26-10-25 is constitutional.

ARGUMENT

I. *Under the Plaintiffs' Amended Complaints, are the Defendants perpetrators who engaged in intentional conduct, thus entitling the Plaintiffs to the tolling provisions of S.D.C.L. §26-10-25?*

A. Only the individual committing the actual act of abuse is a perpetrator.

In *Bernie v. Blue Cloud Abbey*, this Court held that the extended limitations period in S.D.C.L. §26-10-25 does not apply to the alleged negligent acts of entity defendants, but only to intentional acts which constitute a felony, committed by the individual perpetrator of the claimed abuse. 2012 S.D. 64, ¶12, 821 N.W.2d 224, 228. Further, the claimed abuse must be an act proscribed by S.D.C.L. Chapter 22-22 (sex offenses) that would have constituted a felony at the time the alleged act occurred. *Id*. Plaintiffs admit these Defendants are not the perpetrator of the actual act of alleged abuse. Appellants' Brief at p. 1. Plaintiffs seek to avoid the effect of the ruling in *Bernie* by arguing these Defendants allegedly engaged in intentional, criminal conduct.

This Court determined the intentional acts of the perpetrator defendant must be felony criminal conduct proscribed by S.D.C.L. 22-22. *Bernie,* 2012 S.D. 64 ¶12, 821 N.W.2d at 228. S.D.C.L. 22-22 identifies sex offenses, each requiring a specific act on the part of the perpetrator, acts which cannot be accomplished by these Defendants. The intentional, criminal conduct Plaintiffs assert as sufficient to entitle them to an extended limitations period is a claim these Defendants breached a duty to protect students, or had knowledge the alleged perpetrator was

abusing a minor (a violation of S.D.C.L. §22-22-24.3, enacted in 2002) or assisted, harbored, concealed or provided false information about a sex offender (a violation of S.D.C.L. §22-22-46, enacted in 2006). Plaintiffs also allege that Defendants could be guilty of aiding and abetting the alleged abusers; a violation of S.D.C.L. §22-3-3, or as an accessory, in violation of S.D.C.L. §22-3-5. Neither S.D.C.L. §§22-3-3 or 22-3-5 are codified in S.D.C.L. §22-22 and therefore, by statute do not fall within the ambit of proscribed intentional sexual offense conduct by a perpetrator.

What is clear from the arguments advanced by Plaintiffs is the legal theories used as the basis of claims against these Defendants are theories of liability not involving intentional, criminal conduct and instead are instead claims based on vicarious liability, the very theories this Court addressed in *Bernie* and rejected. 2012 S.D. at ¶15, 821 N.W.2d at 230. (Therefore, it is simply too far of a stretch to say that causes of action for negligence, breach of fiduciary duty and vicarious liability are, in any legal sense of the phrase, causes of action "based on" intentional criminal conduct.)

Throughout their submission to this Court, Plaintiffs fail to address this determination. Plaintiffs refer to the *Bernie* decision in one instance, and then only to assert a holding that S.D.C.L. §26-10-25 applied to intentional criminal conduct. See Brief of Appellants at p. 17. This Court made it clear that the term "based on" encompasses only those civil claims brought against the perpetrator arising from his or her sexual assault or offense. *Bernie,* 2012 S.D. 64, ¶ 8, 821

N.W.2d at 227. These Defendants could not have committed a sexual assault or offense. The trial court correctly determined S.C.D.L. §26-10-25 did not allow for an extended limitations period and the Plaintiffs claims were barred by the statute of limitations.

Plaintiffs' arguments ignore the very careful analysis this Court conducted in *Bernie*, which rejected claims that conduct, other than the actual engagement in sexual activity, could support a civil action, based on "intentional conduct," and trigger application of S.D.C.L. §26-10-25. This Court recognized it was simply too far a stretch to say that causes of action for negligence, breach of fiduciary duties, and vicarious liability are, in any legal sense of the phrase, causes of action, "based on" intentional criminal conduct. *Bernie*, 2012 S.D. at ¶15, 821 N.W.2d at 230. Simply put, Plaintiffs' complaints are based on assertions these Defendants failed to stop the person committing the alleged actual act of sexual abuse. This conduct does not rise to the level of intentional conduct, required by S.D.C.L. §26-10-25.

The *Bernie* court recognized a distinction between a "perpetrator," used to define the defendant alleged to have engaged in the intentional, criminal conduct, and actual act of sexual abuse, and "non-perpetrating defendants," to identify those defendants who did not engage in the actual act of sexual abuse. 2012 S.D. at ¶6, 821 N.W.2d at 227. This is the same terminology adopted by the Rhode Island court in *Kelly v. Marcantonio*, 678 A.2d 873 (R.I. 1996), a decision cited

with favor by the *Bernie* court. *See* 212 S.D. at ¶9, 821 N.W.2d at 227-28. *See also*, *Ryan v. Roman Catholic Bishop of Providence*, 941 A.2d 174 (R.I. 2008).

The claims advanced by Plaintiffs are not causes of action based on intentional, criminal conduct by these Defendants, or claims that these Defendants engaged in the actual act of child sexual contact proscribed by criminal code. Child sexual contact has, as an essential element, the specific intention to arouse or produce sexual gratification. S.D.C.L. §22-22-7.1 (enacted in 1976) ; *State v. Ondricek*, 535 N.W.2d 872 (S.D. 1995). The sexual offenses proscribed by statutes in effect in the 1950's and 1960's likewise required similar elements of intent and acts that can only be accomplished by the perpetrator. *See, e.g.,* SDC §13.1727 (1960 Supp.), cited in *State v. Klueber,* 81 S.D. 223, 132 N.W.2d 847,848 (1965). Only the person committing the actual act of sexual contact has the specific intent required to be guilty of child sexual contact.

Along with the clear holding in *Bernie*, S.D.C.L. §22-1-2 defines certain terms. When applied to the intent with which an act is done or omitted, the words "intent" and "intentionally," or all derivatives thereof, import a specific design to cause a certain result or a specific design to engage in conduct of that nature. S.D.C.L. §22-1-2(1)(b). *See also, State v. Nelson*, 88 S.D. 348, 220 N.W.2d 2 (1974) *cert. denied*, 419 U.S. 1110, 95 S.Ct. 784, 42 L.Ed.2d 807; SDC §13.0102(1) (1939). When this definition is considered with the analysis in *Bernie*, there is only one conclusion; these Defendants are not perpetrators triggering application of S.D.C.L. §26-10-25.

B. *Allegations of aiding and abetting are insufficient to establish perpetrator status.*

The only conduct that will support application of the extended statute of limitations is intentional, criminal conduct. *Bernie v. Blue Cloud Abbey*, 2012 S.D. 64, 821 N.W.2d 224. Further, S.D.C.L §26-10-29 adds additional limitations on what constitutes the criminal conduct that will justify the extended statute of limitations. Under the terms of S.D.C.L §26-10-29, the childhood sexual abuse must have been committed by the civil defendant, against the victim, in violation of those sex offenses enumerated in S.D.C.L. 22-22, that constitute a felony. The statute further recognizes that what constitutes criminal conduct is subject to change and specifically limits consideration to the proscriptions in place at the time of the alleged conduct. Plaintiffs claim the alleged conduct of these Defendants falls within proscriptions against aiding and abetting criminal conduct.

First, the allegations do not meet the intentional conduct required by S.D.C.L. §26-10-25. The alleged conduct does not constitute sex offenses proscribed S.D.C.L. §22-22. In *State v. Jucht*, 2012 S.D. 66, ¶27, 821 N.W.2d 629, 636, this Court clarified that the aiding and abetting statute incorporated proof of the full *mens rea* required of a perpetrator of the substantive offense. In order for a person to be held accountable for the specific intent crime of another under an aiding and abetting theory of principal liability, the aider or abettor must have knowingly aided the other person, with the intent that the other person

commit the charged crime. *Id.* at ¶25. Any other requirement would result in an aider and abettor facing criminal liability where a principal could not. *Id.*

Using S.D.C.L. §§ 22-22-46 or 26-10-29 to bootstrap a claim that an entity defendant is a "perpetrator" ignores the statutory limiting language that requires intentional conduct of "the" perpetrator, contained in S.D.C.L. §§ 26-10-25 and 26-10-29. The argument ignores the requirement the acts constitute felony sex offenses proscribed by S.D.C.L. Chapter 22-22. Attempting to cast the actions of these Defendants as "aiding and abetting" does not alter the nature of the cause of action. The nature of the Plaintiffs' causes of action against these Defendants remains based upon negligence, breach of fiduciary duty and vicarious liability, not the "intentional conduct" or claims against "the perpetrator" actually engaged in the act of a sexual offense against a child. *Bernie*, 2012 S.D. at ¶71, 821 N.W.2d at 230.

Plaintiffs cite the California decision of *People v. Wood*, 56 Cal.App. 431, 432-33, 205 P. 698 (Cal.Dist.Ct.App. 1922) as support for their claims that criminal intent is not a prerequisite for prosecution under an aiding-and-abetting theory. Plaintiffs fail to advise this Court that the holding in *People v. Wood* has been effectively overturned by *People v. Standifer*, 38 Cal.App.3d 733 (Cal.Ct.App. 1974) (mere presence at the scene and failure to take steps to prevent a crime do not establish aiding and abetting, the proof must show not only aiding the actor but also sharing the required intent). Further, the decision cited by Plaintiffs in *People v. Haywood*, 280 P.2d 180 (Cal. 1955), was addressed with

disfavor by the Court of Appeals in *People v. Culbertson*, 171 Cal.App.3d 508 (1985) (defendant could not be convicted on aiding and abetting, where statute required participation in the sexual act). Even under California law, those who unwittingly aid a perpetrator do not become aiders and abettors when they later learn of the perpetrator's criminal purpose. *People v. Nguyen*, 21 Cal.App.4th 518, 26 Cal.Rptr.2d 323, 336 (1993).

Equally fatal to Plaintiffs' argument is that S.D.C.L. §26-10-25 specifically uses the term "intentional" for the type of conduct that will support the extended statute of limitations. Only intentional conduct triggers the extended statute. Words used in the statute must be given their plain meaning. *Pete Lien & Sons, Inc. v. City of Pierre*, 1998 S.D. 38, ¶9, 577 N.W.2d 330, 331. S.D.C.L. §22-1-2(1)(b) and the statutes codified prior to 1976 require a specific design to cause a certain result or a specific design to engage in conduct of that nature. While statutory rape may not require criminal intent, mere knowledge of an act by a perpetrator is not sufficient to rise to the required intent as defined in S.D.C.L. §22-1-2(1)(b), and its predecessor statutes, or S.D.C.L. §26-10-25. This issue was fully addressed in *Bernie*. The trial court should be affirmed.

C. Plaintiffs seek impermissible ex post facto application of statutes.

This Court made it clear in *Bernie* that S.D.C.L. §26-10-25 limits application of the extended statute of limitations to claims against the defendant who allegedly committed the actual act of sexual abuse. In their further effort to avoid this Court's ruling in *Bernie*, Plaintiffs argue the definition of childhood

sexual abuse contained in S.D.C.L. §26-10-29 is sufficient to make the alleged acts (or failure to act) criminal, therefore triggering application of S.D.C.L. §26-10-25. It is undisputed the conduct these Plaintiffs complain of occurred some time prior to 1971. Application of S.D.C.L. §26-10-29, enacted in 1991, or S.D.C.L. §22-22-46, enacted in 2006, is impermissible. Moreover, S.D.C.L. §26-10-29 defines "childhood sexual abuse" to include any act by the perpetrator against the complainant. By its own terms, childhood sexual abuse is limited to any act by the perpetrator, and no alleged failure to act by these Defendants constitutes childhood sexual abuse. Additionally, the statute limits those violations of Chapter 22-22 to the laws in effect at the time the act was committed.

Pursuant to S.D.C.L. §2-14-21, no part of the code of laws enacted by S.D.C.L. §2-16-13 shall be construed as retroactive, unless such intention plainly appears. Not only is there no plain legislative intention to support retroactive application of any of the statutes cited by Plaintiffs. These statutes cannot be retroactively applied because to do so would be a violation of the *ex post facto* clause in the United States Constitution (Article I, §10, Clause 1), and the Constitution of the State of South Dakota. *See* Article VI, §12. The South Dakota Supreme Court and the United States Supreme Court recognize that the *ex post facto* clause is aimed at laws that "retroactively alter the definition of crimes or increase the punishment for criminal acts." *California Dep't of Correc. v. Morales*, 514 U.S. 499, 504, 115 S.Ct. 1597, 1601, 131 L.Ed.2d 588, 594 (1995); *Delano v. Petteys*, 520 N.W.2d 606, 608 (S.D. 1994). Each of the statutes

Plaintiffs argue as a basis for alleged intentional conduct sufficient to trigger application of the extended discovery provisions of S.D.C.L. §26-10-25 are statutes enacted long after the alleged acts took place.

The statutes Plaintiffs attempt to cite as intentional criminal conduct to support their argument that they are entitled to the extended limitations period identified in S.D.C.L. §26-10-25 clearly change the legal consequences of certain acts, rendering application of the statutes impermissible. *Lewis v. Class*, 1997 S.D. 67, ¶22, 565 N.W.2d 61, 65. S.D.C.L. §22-22-46 was adopted in 2006. S.D.C.L. §22-22-24.3 was adopted in 2005. Contrary to Plaintiffs' assertions, there was no statute placing any obligation on these Defendants to make a report of suspected criminal conduct. At the time these alleged acts occurred, only medical providers and law enforcement had the obligation to report suspected injuries. *See* H.B. 551 (1964); Eagleman CI 2713; One Star CI 796; Standing Soldier CI 634; Marshal CI 464; Big Crow CI 831; A.L. CI 701; and S.D.C.L. §26-10-10 (1965). The conduct Plaintiffs complain of occurred in the late 1950s and early 1960s, before reporting requirements became applicable to medical providers or law enforcement, and decades before a broadening of those requirements.

Plaintiffs ask this Court to act in violation of the Constitutions of the United States and South Dakota. Further, the result sought by Plaintiffs would violate the very statute they assert as the basis for their claims. S.D.C.L. §26-10-29 defines conduct as criminal, acts that would have been a violation of law in effect at the

time the act was allegedly committed. By statute, this Court is limited to the law in effect at the time the act was allegedly committed. Plaintiffs cannot claim *ex post facto* application of the statutes to criminalize conduct that was not criminal when the conduct took place.

II. ***Allegations of fraudulent concealment are unsupported by any facts.***

Plaintiffs argue the applicable statute of limitations was tolled, due to fraudulent concealment. Plaintiffs assert the trial court impermissibly placed a burden on them to establish the existence of material facts in avoidance of the statute of limitations. The trial court correctly applied the analysis required when a statute of limitations defense is raised on summary judgment. *Peterson v. Hohm,* 2000 S.D. 27, ¶¶ 7-8, 607 N.W.2d 8, 10-11.

These Defendants moved for summary judgment and raised the statute of limitations as a bar to the action. When faced with a summary judgment motion, where the defendant asserts the statute of limitations as a bar to the action and presumptively establishes the defense by showing the case was brought beyond the statutory period, the burden shifts to the plaintiff to establish the existence of materials facts and avoidance of the statute of limitations. *Peterson v. Hohm*, 2000 S.D. 27, ¶¶7-8, 607 N.W.2d 8, 10-11 (citations omitted), cited in *One Star v. Sisters of St. Francis, Denver, Colorado,* 2008 S.D. 55, ¶12, 752 N.W.2d 668, 675.

These Defendants made a presumptive showing that the suits initiated by Plaintiffs were untimely. The uncontested statement of facts filed by these

Defendants and responses made by Plaintiffs establish that the abuse alleged by each respective Plaintiff occurred sometime prior to 1971. The earliest complaint filed was in 2004, decades after the abuse occurred. Further, because each of the Plaintiffs was over the age of 40 at the time their suits were initiated, the suits filed by Plaintiffs are well outside of the statute of limitations, even allowing additional time for their period of minority. S.D.C.L. §§ 15-2-14(3) and 15-2-22. Each Plaintiff either testified at deposition to the identity of their alleged abuser or named the alleged abuse in their Complaint.

Because these Defendants met their burden and presumptively established the statute of limitations defense by showing the cases were brought beyond the statutory period, the burden shifted to Plaintiffs to come forward with material facts in avoidance of the statute of limitations. *Peterson,* 2000 S.D. 27, ¶¶7-8, 607 N.W.2d 8, 10-11. Plaintiffs' response did not raise material facts that would support avoidance of the statute of limitations. *See* Eagleman CI 2746; One Star CI 490; Standing Soldier CI 327; Marshal CI 423; Big Crow CI 848; A.L. CI 377. Instead, in response to the motion, Plaintiffs argued they were unaware of their causes of action. At the trial court level, these Plaintiffs provided no citation to any fact that these Defendants allegedly concealed. *Id.* Further, as Plaintiffs admit, they had full knowledge of the facts surrounding the alleged events and that each, essentially, never forgot the alleged events. Any attempt by these Plaintiffs to claim evidence of "repression" must be viewed with caution. That claim is contrary to their own testimony, and those arguments were not advanced at the

trial court level and were waived. *Action Mech. v. Deadwood Historical Pres. Comm'n*, 2002 S.D. 121, 652 N.W.2d 742.

Plaintiffs' argue that their causes of action did not accrue until they were fully aware of their injuries. However, this Court, in *One Star v. Sisters of St. Francis*, rejected arguments that the statute did not begin to run until full extent of their injuries were known. 2008 S.D. 55, ¶16, 752 N.W.2d at 767. Because these Defendants are not the alleged perpetrators of actual acts of sexual abuse, S.D.C.L. §26-10-25 does not apply to allow an extended "discovery-based" approach. This Court must look to S.D.C.L. §15-2-14, which is triggered by the "occurrence." *Toben v. Jeske,* 2006 S.D. 57, 718 N.W.2d 32. Contrary to Plaintiffs assertions, no "discovery rule" applies to delay the running of a statute of limitations unless there has been explicit statutory authorization to that effect. *Alberts v. Giebink,* 299 N.W.2d 454 (S.D. 1980), cited in *Baye v. Diocese of Rapid City*, 630 F.3d 757 (D.S.D. 2011).

Plaintiffs argue this Court should reverse the decision of the trial court because these Defendants did not meet the burden imposed on them by *Zephier v. Catholic Diocese of Sioux Falls*, 2008 S.D. 56, 752 N.W.2d 658. Because S.D.C.L. §26-25-10 does not extend the statute of limitations with respect to the claims against these Defendants, the analysis in *Zephier* does not apply. The statute of limitations applicable to what claims may have existed against these Defendants is triggered by the occurrence. *Alberts*, 299 N.W.2d at 455. These Defendants presumptively established Plaintiffs brought their claims outside the

limitations period identified in S.D.C.L. §15-2-14(3) and the additional time allowed in S.D.C.L. §15-2-22 because of the Plaintiffs' status as minors.

Plaintiffs' reliance on *Strassburg v. Citizens State Bank*, 1998 S.D. 72, 581 N.W.2d 510, is likewise misplaced. The cause of action in *Strassburg* was based on S.D.C.L. §15-2-13 which incorporated a discovery element. 1998 S.D. ¶10, 581 N.W.2d at 514. The triggering event which begins the limitations period for personal injury claims based on S.D.C.L. §15-2-14 is the date of occurrence.

Because the limitations period begins to run on the date of the alleged occurrence, there is no reason for this court to consider issues related to discovery, or whether Plaintiffs acted reasonably. The only remaining argument is whether the limitations period was tolled due to alleged fraudulent concealment. Fraudulent concealment operates only for the benefit of those who were not aware of the facts or can establish the facts that had been concealed. *One Star v. Sisters of St. Francis*, 2008 S.D. 55 at ¶16, 752 N.W.2d at 676. It is undisputed that these Plaintiffs have not provided any citation to the record of facts these Defendants allegedly concealed. *Clark County v. Sioux Equip. Corp.,* 2008 S.D. 60 ¶20, 753 N.W.2d 406, 413. (When a motion for summary judgment is made and supported as provided in S.D.C.L. §15-6-56, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as other wise provided, must set forth specific facts showing that there is a genuine issue of material fact.) It is undisputed that each Plaintiff identified the individual they claim committed the actual act of sexual abuse. Plaintiffs specified the alleged

occurrences. Plaintiffs cannot claim a better version of the facts than their own testimony. *Tieszen v. John Morrell & Co.*, 528 N.W.2d 401 (S.D. 1995).

Plaintiffs have offered nothing to articulate what these Defendants allegedly concealed. These Plaintiffs had knowledge of the basic operative facts. *Glad v. Gunderson, Farrar, Aldrich & DeMersseman*, 378 N.W.2d 680, 683 (S.D. 1985). The facts cited by these Plaintiffs are similar to the claims advanced by the plaintiffs in *One Star*. Because fraudulent concealment is an exception to the statute of limitations, Plaintiffs had the responsive burden of identifying facts creating a material issue of entitlement to the exception. *One Star*, 2008 S.D. 55, at ¶11, 752 N.W.2d at 675. Each was aware of the alleged abuse and injury, along with the identity of the alleged abusers. Under these circumstances, fraudulent concealment does not apply. *Id.* ¶34. As a matter of law, these Defendants could not have fraudulently concealed something Plaintiffs either already discovered or something that they alone knew. *Id.* at ¶35.

III. *Application of the statute of repose in S.D.C.L. §26-10-25 is constitutional.*

The decision of this Court in *Bernie* limits the extended statute of limitations for civil claims based on intentional criminal conduct against the perpetrator of the alleged abuse. The trial court correctly determined the claims advanced by Plaintiffs against these Defendants were barred by the statute of limitations. That determination should be affirmed. There is no need to consider further the trial court's determination with respect to the application of the statute

of repose. *Stern Oil Co., Inc., v. Brown*, 2012 S.D. 56, ¶9, 817 N.W.2d 395, 399 (on appeal, this Court will affirm the circuit court's ruling granting a motion for summary judgment if any basis exists to support that ruling). However, should this Court determine it necessary to address that issue, the trial court correctly addressed the question of constitutionality of the provision.

In the matters before this Court, the latest date any Plaintiff reached the age of 19 was in 1977. Eagleman CI 2291; One Star CI 411; Standing Soldier CI 250; Marshal CI 76; Big Crow CI 453; A.L. CI 317. The personal injury claims of Plaintiffs were barred 14 years before the enactment of S.D.C.L. §26-10-25, and 33 years before the amendment adding the statute of repose in 2010. Because S.D.C.L. §26-10-25 allows an extended limitations period only for civil claims based on intentional conduct by the alleged perpetrator, S.D.C.L. §26-10-25 has no impact on the claims against these Defendants. With the decision of this Court in *Bernie*, limiting application of the extended limitations period, Plaintiffs claims were not impacted by the repose provision because the claims were already barred. *Walker v. Barrett*, 650 F.3d 1198 (8th Cir. 2011), cited with approval in *Bernie,* 2012 S.D. 64, ¶11, 821 N.W.2d at 228 (at the time the statute was changed, the limitations period had expired, and defendant had a tested right to be free from suit). There is no need for this Court to consider whether the repose provision is constitutional as applied to these Plaintiffs or whether the repose provision applies retroactively.

Plaintiffs advance arguments of the constitutionality of the 2010 amendment, S.D.C.L. §26-10-25. Plaintiffs seek to argue that the 2010 amendment "targeted these specific pending cases." However, it is apparent the arguments advanced do not apply to the cases presently before this Court, but instead refer to the *Zephier* collection of cases, and possibly the claims presented in *Bernie*, by reference to the trial court's March 18, 2011 opinion. *See* Appellants' Brief at 7, 11. An argument that these Plaintiffs were targeted is disingenuous.

Plaintiffs argue that the last sentence of S.D.C.L. §26-10-25, which reads as follows: "However, no person who has reached the age of forty years may recover damages from any person or entity, other than the person who perpetrated the actual act of sexual abuse[,]" is unconstitutional. As an alternative, Plaintiffs argue the provisions cannot be applied retroactively. Plaintiffs did not provide the South Dakota Attorney General with notice of an intent to challenge the constitutionality of the statute at the trial court level. S.D.C.L. §15-6-24(c).

To succeed in a constitutional challenge to a legislative act, the challenger must prove beyond a reasonable doubt that the legislature acted outside of its constitutional authority. *City of Chamberlain v. R.E. Lien, Inc.*, 521 N.W.2d 130, 131 (S.D. 1994). There is a strong presumption that the laws enacted by the legislature are constitutional and that presumption is rebutted only when it clearly, palpably and plainly appears the statute violates a provision of the constitution. *Sedlacek v. South Dakota Teener Baseball Program,* 437 N.W.2d 866, 868 (S.D.

1989). If a statute can be construed so as not to violate the Constitution, that construction must be adopted. *Cary v. City of Rapid City*, 1997 S.D. 18, ¶10, 559 N.W.2d 891, 893, *citing Simpson v. Tobin*, 367 N.W.2d 757, 766 (S.D. 1985).

Plaintiffs' argument that the statute of repose provision is an unconstitutional bill of attainder is not supported. The creation of rights and remedies in civil damage acts is a proper exercise of legislative power which has been so long settled that no citation or authorities is necessary. *Wegleitner v. Sattler,* 1998 S.D. 88, ¶8, 582 N.W.2d 688, 691. The Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object. *Duke Power Co. v. Carolina Environmental Study Group, Inc.,* 438 U.S. 59 at 88 n. 32, 98 S. Ct. 2620 at 2638 n.32, 57 L.Ed 2d 595 at 620 n. 32.

Plaintiffs cite to *Cummings v. Missouri*, 71 U.S. 277, 18 L.Ed. 356, 4 Wall. 277 (1866), as authority that a change in the statute of limitations concerning civil claims of personal injury represents a prohibited "punishment". The decision referred to does not stand for that proposition. The issue in *Cummings* involved consideration of the "test oath" imposed by the constitution of the state of Missouri. 71 U.S. at 316. Every person who was unable to take the oath was declared incapable of "holding, any office of honor, trust, or profit under its authority, or of being an officer, councilman, director, or trustee, or other manager of any corporation, public or private, now existing or hereafter established by its authority, or of acting as a professor or teacher in any educational institution, or in

any common or other school, or of holding any real estate or other property in trust for the use of any church, religious society, or congregation." *Id.* at 317. The oath contained other provisions that limited the ability to engage in certain professions along with imposing fines or imprisonment for not taking the oath or false swearing to the oath. *Id.* The *Cummings* court did recognize that punishment may be the deprivation of civil rights, and access to judicial tribunals to challenge the determination of guilt. *Id.* at 325. The situation in *Cummings* is not factually similar to the matter presented here and does not support any conclusion that the legislation is intended as "punishment."

Further, in *Guangdong Wireking Housewares & Hardware Co., Ltd., v. United States*, 745 F.3d 1194 (Fed. Cir. 2014), the Federal Circuit Court recognized that the Supreme Court has held that a civil law violates the *Ex Post Facto* Clause on three occasions and in no instance since 1878. The *Guangdong* court recognized the cases, including *Cummings*, represented a narrow exception to the general rule that the *ex post facto* clause only applies to laws that alter the criminal penalties associated with particular conduct. The repose portion of S.D.C.L. §26-10-25 does not alter criminal penalties associated with any conduct.

The United States Supreme Court's standard for determining when a civil law can be deemed punitive, sufficient to be a criminal penalty, is clearly spelled out in the Court's decision in *Smith v. Doe*, 538 U.S. 84, 123 S.Ct. 1140, 155 L.Ed.2d 164 (2003). This standard is exacting and difficult to satisfy. Under the standard, a court must first "ascertain whether the legislature meant the statute to

establish 'civil' proceedings." *Id.* at 1146. If the intention of the legislature was to impose punishment, that ends the inquiry. If, however, the intention was to enact a regulatory scheme that is civil and non-punitive, the court must examine whether the statutory scheme is "so punitive either in purpose or in affect, as to negate the State's intention to deem it civil." *Id.* at 1142-43, *quoting Kansas v. Hendricks*, 521 U.S. 346, 361, 117 S.Ct. 2072, 138 L.Ed.2d 501 (1997).

Clearly, the question regarding S.D.C.L. §26-10-25 deals with a civil remedy, not criminal punishment. Only the clearest proof will suffice to over-ride legislative intent and transform what has been denominated a civil regulatory scheme into a criminal penalty. *Hudson v. United States*, 522 U.S. 93, 118 S.Ct. 488, 139 L.Ed.2d 450 (1997). Consequently, S.D.C.L. §26-10-25 and subsequent provisions do not violate the *ex post facto* clause.

Plaintiffs' argument that this statute represents a bill of attainder is also fundamentally flawed. A bill of attainder is a law that legislatively determines guilt and inflicts punishment upon an identified individual without provisions of the protections of a judicial trial. *United States v. Brown*, 381 U.S. 437, 447, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965). Liability does not attach by operation of the last sentence of S.D.C.L. §26-10-25. Consequently, the statute of repose does not determine guilt. Further, there is no punishment, a predicate element of a bill of attainder. *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425, 97 S.Ct. 2777, 53 L.Ed.2d 86 (1977). In *Selective Serv. Sys. v. Minnesota Pub. Interest Research*

Group, 468 U.S. 841, 104 S.Ct. 3348, 82 L.Ed.2d 632 (1984) In addressing the punishment prong, the *Selective Service* court stated that:

> In deciding whether a statute inflicts forbidden punishment, we have recognized three necessary inquiries: (1) whether the challenged statute falls within the historical meaning of legislative punishment; (2) whether the statute, "viewed in terms of the type and severity of burdens imposed, reasonably can be said to further non-punitive legislative purposes;" and (3) whether the legislative record "evinces a congressional intent to punishment."

Statutes of limitation are not historically viewed as legislative punishment. Instead, statutes of limitation are to provide a speedy and fair adjudication of the rights of the parties and protect parties from stale claims. *Murray v. Mansheim*, 2010 S.D. 18, ¶11, 779 N.W.2d 379, 384. The statute of limitations furthers non-punitive legislative purposes; the orderly progress of claims. *Id*. The statute of repose is not punishment because it serves a non-punitive purpose; the fair and speedy resolution of disputes.

When considering arguments that a statute was unconstitutional based on a claimed violation of the open courts provision of the South Dakota Constitution, the *Wegleitner* court recognized the open court provision was meant to allow unhindered access to the courthouse by a person who had a valid cause of action based on existing statute or the common law, *timely and properly brought,* who then would be allowed to present their case to a human fact finder. *Id.*at 1998 S.D. 88 ¶ 33, 582 N.W.2d at 698. S.D.C.L. §26-10-25 allows people with valid causes of action to present their case to a human fact finder, so long as the claims are timely and properly brought. The statute is constitutional.

The legislature is free to change the law applicable to pending cases. *Axel Johnson, Inc., v. Arthur Andersen & Co.*, 6 F.3d 78 (2nd Cir. 1993); *Plaut v. Spendthrift Farms, Inc.*, 514 U.S. 211, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995); *State ex rel Research Med. Ctr. v. Peters*, 631 S.W.2d 938 (Mo. App. 1982); *Tonya K. by Diane K. v. Board of Educ. of the City of Chicago,* 847 F.2d 1243, 1247 (1988); *Lyons v. Lederle Lab.*, 440 N.W.2d 769, 770 (S.D. 1989). Further, as this Court has recognized, the legislature, and not the courts, are the proper place to determine the state's public policy. *Wegleitner v. Sattler,* 1998 S.D. 88, ¶25, 582 N.W.2d at 696. As in *Wegleitner,* Plaintiffs are unable to muster a single case from a single jurisdiction which has adopted the rationale they advance. 1998 S.D. 88, ¶ 26, 582 N.W.2d at 696.

The remainder of Plaintiffs' arguments with respect to the constitutionality of S.D.C.L. §26-10-25 were not raised below. Because those issues were not specifically addressed, Plaintiffs have waived those claims. *Action Mechanical, Inc. v. Deadwood Historical Pres. Comm'n,* 2002 S.D. 121, 652 N.W.2d 742.

This Court previously determined the extended limitations provision applicable to those alleged perpetrators of sexual abuse applied retroactively. *Stratmeyer v. Stratmeyer*, 1997 S.D. 97, 567 N.W.2d 220. Any additional provisions should apply retroactively as well. *Id.*, at ¶16.

CONCLUSION

The issues presented by this appeal are conclusively governed by *Bernie v. Blue Cloud Abbey*, 2012 S.D. 64, 821 N.W.2d 224. This Court previously held that the extended limitations period in S.D.C.L. §26-10-25 does not apply to alleged negligent acts of entity defendants, but only to intentional acts which constitute a felony committed by the individual perpetrator of the claimed abuse. Plaintiffs' attempts to cast conduct allegedly attributable to these Defendants as intentional criminal conduct subject to felony charges is without support. Plaintiffs' complaints are based on assertions these Defendants failed to stop the person committing the alleged actual act of sexual abuse, or take other steps to protect Plaintiffs. This conduct does not rise to the level of intentional conduct required by S.D.C.L. §26-10-25.

This Court cannot use statutes passed after the alleged conduct occurred to bootstrap claims of alleged criminal conduct sufficient to trigger application of S.D.C.L. §26-10-25. Because those statutes seek to impose criminal sanctions on conduct which was not criminal at the time the act was committed, application would be an impermissible *ex post facto* application.

These Defendants asserted the statute of limitations as a bar to the actions brought by Plaintiffs and presumptively established that defense, by showing the cases were brought beyond the statutory period. Consequently, the burden shifts to the Plaintiffs to establish the existence of material facts such to avoid the statute of limitations. Claims of fraudulent concealment require, as a matter of law,

concealment. Where a plaintiff is aware of the circumstances giving rise to their claim, fraudulent concealment does not apply.

The trial court correctly applied the law and considered the facts presented. This Court should affirm the trial court's decision dismissing these claims.

Respectfully submitted this _____ day of May, 2014.

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CERTIFICATE OF COMPLIANCE

Pursuant to S.D.C.L. §15-26A-66, counsel for the Appellees Wisconsin Province of the Society of Jesus and Rosebud Educational Society/St. Francis Mission, does hereby submit that the foregoing brief is 28 pages in length. It is typed in the proportionally spaced typeface of Times New Roman 13 point. All footnotes are typed in the proportionally spaced typeface of Times New Roman 13 point. The word processor used to prepare this brief indicates that there are a total

of 6,667 words, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Issues, and Certificates of counsel.

/s/ Thomas G. Fritz
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CERTIFICATE OF SERVICE

The undersigned certifies that a PDF version of Appellees' Brief was served via electronic mail on the following individuals:

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The undersigned also certifies that Appellees' brief was submitted in Word format to the Clerk of the South Dakota Supreme Court, via electronic mail, to SCClerkBriefs@ujs.state.sd.us. The undersigned further certifies that the original and two (2) copies were sent to Ms. Shirley Jameson-Fergel, Clerk of the South Dakota Supreme Court, 500 East Capitol, Pierre, SD 57501-5070, by United States Mail, first-class postage prepaid, on May 22, 2014.

/s/ Thomas G. Fritz
Thomas G. Fritz

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* * * *

APPEAL NO: 26939, 26940, 26941, 26942, 26943, 26944

* * * *

Ralph Eagleman, et al., Plaintiffs and Appellants,

v.

Wisconsin Province of the Society of Jesus and Rosebud Educational Society/ St. Francis Mission, et al. Defendants and Appellees

* * * *

APPEAL FROM THE CIRCUIT COURT OF
THE SEVENTH JUDICIAL CIRCUIT
PENNINGTON COUNTY, SOUTH DAKOTA

* * * *

HONORABLE RODNEY J. STEELE
Judge Pro Tem

* *

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Notices of Appeal filed January 6, 2014

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LEGAL ISSUES

Appellants reaffirm the Legal Issues found in their opening brief.

STATEMENT OF THE CASE

Appellants reaffirm the Statement of the Case found in their Opening Brief.

STATEMENT OF THE FACTS

Plaintiffs have brought allegations of *both* direct and vicarious liability in their amended complaints. See Case Nos. 06-890, 08-1989, 08-1990, 09-0378 Amended Complaints, Counts I to III; Case No. 04-594 Third Amended Complaint Counts I to III; Case No. 10-1058 Complaint Counts I, IV, and V (hereinafter "Operative Complaints").[1]

ARGUMENT

I. THERE IS AN ISSUE OF FACT AS TO WHETHER DEFENDANTS ENGAGED IN FELONIOUS INTENTIONAL CRIMINAL CONDUCT IN THIS CASE

Saint Francis Mission (SFM) and Wisconsin Province of the Society of Jesus (WPSJ) are defined as perpetrators of felonious intentional criminal "childhood sexual abuse" under SDCL 26-10-29 because, at the time of their conduct, they violated laws of similar effect to those found in SDCL 22-22. Plaintiffs have provided evidence of such conduct which creates a dispute of fact for the jury to decide.

A. Plaintiffs have alleged that intentional childhood sexual abuse crimes were committed by SFM and WPSJ against them

An intentional crime, whether it requires general or specific intent, qualifies under SDCL 26-10-25 if a prior law constituted a felony. This case is distinguishable from Bernie because both general and specific intent crimes committed by SFM and WPSJ have been alleged.

Bernie found against the plaintiffs on the issue of whether "SDCL 26-10-25

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[1] SFM admits that all Plaintiffs have alleged intentional criminal conduct. See Appellees' Brief, at fn. 2.

applies to claims against non-perpetrating defendants who are sued *for negligence or on other theories of liability not involving intentional, criminal conduct.*" *Bernie v. Blue Cloud Abbey*, 2012 SD 63, ¶4, 821 N.W.2d 224, 236 (emphasis added). In other words, the plaintiffs had not pled intentional criminal conduct.

Under South Dakota criminal law, there are two categories of criminal intent, specific and general. See e.g. *State v. Mulligan*, 736 NW 2d 808 (SD 2007), ¶¶ 18-21, (discussing the difference between negligence and general intent); *State v. Jucht*, 2012 SD 66, 821 NW 2d 629 (noting the difference between specific and general intent crimes). Both classes of crimes punish intentional criminal conduct. See *State v. Huber*, 356 NW 2d 468, 473 (SD 1984) (finding crime at issue did not require specific intent and stating: "Use of the term 'intentionally'... does not designate an additional mental state beyond that accompanying the act.").

In this case, there is a dispute as to whether SFM and WPSJ engaged in criminal conduct. Plaintiffs allege intentional criminal conduct directly perpetrated by SFM and WPSJ, not simply negligence or vicarious liability as alleged in *Bernie*. See Operative Complaints. Plaintiffs have alleged that Defendants have violated SDCL 22-22-24.3 (felony for a person who "causes or knowingly permits" a minor to be abused) and 22-22-46 (Assisting, harboring, concealing, or providing false information about sex offender).

SFM correctly points out that Plaintiffs must show that the same conduct was punishable at the time of the abuse. Here, the crime of aiding and abetting statutory rape, and the separate crime of concealing the abuse, were available at the time of the abuse. See SDC 1939, § 13.0203 (aiding, abetting, and concealing statute). See also e.g. SDC 1939 § 13.2801; SDCL 1939 § 13.2803; SDC Supp 1960, § 13.1727; and SDCL § 22-22-

5 (1972). These statutes would have made the conduct currently punishable under SDCL 22-22-24.3 and 22-22-46 felonies.

B. SDCL 26-10-29 incorporates the whole of SDCL 22-22 into its definition of intentional childhood sexual abuse, SFM asks this Court to limit that reference to SDCL 22-22-7

SFM claims that the only crime that can be "intentional" under SDCL 26-10-25 is SDCL 22-22-7 (Sexual contact with child under sixteen). Appellees' Brief, pp. 9, 12. However, if it was the legislature's intent to so limit the effect of SDCL 26-10-25, they would not have referenced the whole of SDCL 22-22, which includes both general and specific intent crimes. See *Stratmeyer v. Stratmeyer*, 1997 SD 97, ¶17, 567 N.W.2d at 223 (listing historic crimes with the effect of those found in SDCL 22-22 in 1997, including SDCL 22-22-1 (statutory rape)). Notably, neither SDCL 26-10-25(1991) nor SDCL 26-10-29 limit "childhood sexual abuse" to the actual act of abuse.[2]

SFM appears to argue that Plaintiffs' allegations of direct liability under SDCL 22-22-24.3 and 22-22-46 are really claims of vicarious liability similar to those dismissed in *Bernie*. Appellees' Brief, p. 7. However, a reasonable examination of the statutes indicates that a defendant is criminally culpable for their own acts. SDCL 22-22-24.3 requires a criminal defendant "cause or knowingly permit" abuse, while SDCL 22-22-46 requires a person who "knowingly assists, harbors, or conceals a sex offender in eluding law enforcement." These are acts "committed by the defendant against the complainant...which act would have been a violation of chapter 22-22..." SDCL 26-10-29.

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[2] See last sentence of 2010 amendment to SDCL 26-10-25.

C. There is an issue of fact as to whether WPSJ and SFM had the mens rea to aid and abet statutory rape, which does not have a specific intent element

Statutory rape does not require proof of intent and this Court has even labeled the crime as one imposing strict liability where a defendant's state of mind is irrelevant. See *State v. Jones*, 2011 SD 60, ¶14, 804 NW 2d 409, 414 (SD 2011). Therefore, SFM's citation to case law dealing with specific intent crimes has no bearing on this analysis and SFM's reliance on SDCL 22-1-2(b), the definition of intent, is sorely misplaced.

Even if the crime of statutory rape is interpreted to require some degree of mens rea, it is the "knowing" level of mens rea. See *Jones*, 2011 SD 60, ¶14, 804 NW 2d 409, 414 (reading a "knowing" element into the crime of rape by intoxication); see also *State v. Jucht*, 2012 SD 66, ¶27, 821 N.W.2d 629, 635 (Noting that "this Court has required the aider and abettor to 'knowingly' assist the principal in the commission of the crime... These cases typically involved general intent crimes.").

Contrary to SFM's argument, *People v. Wood* and *People v. Haywood* demonstrate that a person that did not perform the act can be convicted of aiding and abetting statutory rape if they have knowledge of the criminal intent of the actor.[3] 56 Cal.App. 431, 205 P. 698 (1922), 131 Cal. App. 2d 259, 280 P.2d 180 (Ct. App. 1955). While SFM appears to claim they unwittingly allowed the alleged conduct and only later

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[3] SFM fails to advise this Court that they mischaracterized the holding of *People v. Standifer*, 38 Cal. App. 3d 733 (Cal.Ct.App 1974). Appellees' Brief, p. 11. A close examination demonstrates that the court actually followed the intent requirement of *People v. Wood*. See *Id,* 38 Cal. App. 3d at 744. Similarly, SFM claims that *Haywood* was addressed with disfavor in *People v. Culbertson*, 171 Cal. App. 3d 508 (Cal.Ct.App 1985). However, that case was limited to statutory language disallowing accomplice liability. *Id* at 513-515. See also *People v. Russelle*, C059730 (Cal. Ct. App. Oct. 9, 2009) (unpublished) (distinguishing *Culbertson*).

learned of the criminal purpose,[4] there is a disputed issue of fact because of evidence that SFM and WPSJ acted knowing of the criminal intent of perpetrators. The most striking evidence demonstrates they knowingly allowed Brother Chapman to remain with children and failed in their civil and criminal duties to report the discovered abuse.

D. There is an issue of fact as to whether the intent element is satisfied where SFM and WPSJ intentionally neglected a duty to protect

Even if aiding and abetting the rape of a child required specific intent, such intent can be demonstrated by the intentional disregard of a duty to protect. See e.g. *State v. Austin*, 172 NW 2d 284, 289 (SD 1969) (manslaughter conviction for parent charged with aiding and abetting); *State v. Zobel*, 134 NW 2d 101, 110 (SD 1965) cert. denied, 382 U.S. 833, 86 S.Ct. 74, 15 L.Ed.2d 76 (1965)(same). See also *State v. Walden*, 293 SE 2d 780, 785-7 (NC 1982)(citing *Zobel* and *Austin* and holding "the failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed."). Defendants had civil and criminal duties to protect the children in their care because they acted *in loco parentis*. See *E.H. v. M.H.*, 512 N.W.2d 148, 149 n.* (SD1994); Restatement (Second) of Torts § 314A; SDCL 22-22-24.3 and 22-22-46. SFM and WPSJ do not even address this argument. There is an issue of fact in this case of whether the failure of SFM and WPSJ to protect Plaintiffs, and criminal failure to disclose abuse to authorities, rises to the level of consent, and

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[4] SFM cites *People v. Nguyen*, 21 Cal. App. 4th 518, 26 Cal. Rptr. 2d 323 (Ct. App. 1993) for the proposition that California law does not punish "unwitting" participants. Appellees' Brief, p. 11.The case actually upheld sex offense convictions against accomplices in a robbery because the sex offenses were reasonably foreseeable. *Id.*

therefore intent, that the crimes occur under the rules of *Austin* and *Zobel*.

E. There is an issue of fact as to whether SFM and WPSJ had the specific intent to conceal childhood sexual abuse

The crime of concealing required proof a person concealed the crimes of another with "intent that he may avoid or escape from arrest, trial, conviction or punishment." SDC 1939, § 13.0203. SFM does not argue anywhere in its brief that it did not have specific intent to conceal, rather they claim they did not have specific intent to perform the sexual act. The crime of concealing does not require such proof.

Plaintiffs have provided evidence of SFM and WPSJ concealing criminal sexual abuse. SFM and WPSJ had criminal duties to report felonious childhood sexual abuse. SFM and WPSJ discovered or were on notice of the abuse alleged by Plaintiffs. See July 23, 1968 letter from Richard T. Jones, SJ to Joe, P.C. and October 20, 1968 letter from Richard T. Jones, SJ, to Joe, P.C. Declaration of Michael Shubeck in Support of Plaintiffs' Opposition to Defendants' Joint Motion for Summary Judgment (Hereinafter, "Decl. Shubeck," Ex. 3), One Star R. 2402; Dep. Marshall p. 28:12-29:2, 60:13-22; Dep. Sorace 16:20-25, 17:1-5, *Id* at Ex. 2; March 18, 1994 letter Bernard Fagan to Fr. Michael B. Woster, JCL, *Id* at Ex. 9; Dep. Standing Soldier 41:22-42:12, 74:12-15, 131:2-7, 131:19-23, *Id* at Ex. 3; October 20, 1968 letter from Richard T. Jones, SJ, to Joe, P.C., January 8, 1970 letter to Father Provincial, July 7, 1970 letter semiannual report to Father Provincial and February 17, 1973 letter from Robert P. Neenan, S.J. to Rev. Bruce Biever, S.J, *Id* at Ex. 3. They were bound to disclose the information when they discovered it. Plaintiffs have provided evidence of discussions of the scandal that revelation of such abuse would cause and damage to the perpetrators. See July 23, 1968 letter from Richard T. Jones, SJ to Joe, P.C. and October 20, 1968 letter from Richard T.

Jones, SJ, to Joe, P.C., *Id*; March 18, 1994 letter Bernard Fagan to Fr. Michael B. Woster, JCL, *Id* at, Ex. 9. Plaintiffs have provided evidence that Defendants were on notice of their reporting duties. See April 24, 1986 Letter Robert Benning to Patrick J. Burns, SJ. See September, 1986 notice to parishes from Patrick J. Burns, SJ, Decl. Shubeck Ex. 16, One Star R. 2402. This evidence, coupled with common sense, leads to the inference that the information was intentionally concealed.

F. Use of SDCL 22-22 and laws of "similar effect at the time" to define and compensate childhood sexual abuse does not retroactively create a criminal liability *ex post facto*

SFM's ex post facto and retroactive application argument is easily disposed of. The United States Supreme Court has consistently held that the *ex post facto* clause is limited to criminal liability. See *Calder v. Bull*, 3 US 386, 390-1 (1798).[5] No new criminal liability is created here because SDCL 26-10-25 allows for compensation to an injured party, not a criminal penalty. Further, SDCL 26-10-29 requires that the criminal law used to define childhood sexual abuse have "similar effect" as a prior law and thus, the conduct at issue was always criminally punishable. Finally, *Stratmeyer* found that the legislature clearly intended for SDCL 26-10-25 to apply retroactively to past criminal acts because of its reference to the definitions in SDCL 22-22. *Stratmeyer v. Stratmeyer*, 1997 S.D. 97, ¶15, 567 N.W.2d 220, 223.

[5] See also e.g. *Watson v. Mercer*, 33 US 88, 110 (1834) ("In short, ex post facto laws relate to penal and criminal proceedings which impose punishments or forfeitures, and not to civil proceedings which affect private rights retrospectively.").

G. Defendants argue that they presumptively established SDCL 15-2-14(3) and 15-2-22 but they do not argue that they presumptively established SDCL 26-10-25

As established above, there is a disputed issue of material fact as to intentional criminal conduct. SFM argues that SDCL 26-10-25 (1991) does not apply in this case. WPSJ and SFM have not presumptively established that they did not commit the crimes of aiding and abetting statutory rape and criminally concealing sexual abuse of Plaintiffs. The issue of reasonable delayed discovery under SDCL 26-10-25, whether Plaintiffs discovered or should have discovered sooner than within three years prior to filing suit, is uncontested by defendants in this appeal.[6] This case is distinguishable from *One Star* and *Zephier* because, in those cases, this Court found the plaintiffs were *actually* knew of their cause of action because of writings or statements made long before bringing suit. *One Star v. Sisters of St. Francis*, 2008 SD 55, ¶¶19-21, 752 N.W.2d 668, 677-8 (Lloyd One Star and Marianne Sorace)[7]; *Zephier v. Catholic Diocese of Sioux Falls*, 2008 S.D. 56, ¶12, 752 N.W.2d 658, 664-5 (Orson Cuny). In *Zephier*, summary judgment in the cases that did not have such a showing of actual discovery of the injury and cause was reversed because there was still a factual dispute. *Zephier,* 2008 SD 56, ¶¶9-10, 752 N.W.2d at 663-4. Further, by the plain text of the statutory scheme, the date of discovery is computed "from the date of discovery of the last act by the same perpetrator which is part of a common course of conduct of sexual abuse or exploitation." SDCL 26-10-26.

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[6] SFM argues that Plaintiffs have not established fraudulent concealment but do not address their separate burden of proving their affirmative defense under SDCL 26-10-25.

[7] One Star wrote a newspaper article prior to 3 years of bringing suit while Sorace was told of a suspicion she was abused by a psychologist and this Court found those facts to be discovery as a matter of law. *One Star*, 2008 SD 55, ¶¶2-5, 19-21, 752 NW at 672-673, 677. *C.f. Strassburg v. Citizens State Bank*, 1998 S.D. 72, 581 N.W.2d 510.

C.f. *One Star* 2008 SD 55, ¶ 15, 752 N.W.2d at 675-6.

Here, SFM simply argues that Plaintiffs allege abuse occurring "sometime prior to 1971", Plaintiffs are currently over 40 years old, and Plaintiffs were able to identify their abuser in their complaint. Appellees' Brief, p. 16. This is even less persuasive than the argument rejected in *Zephier*. *Zephier*, 2008 SD 56, ¶10, 752 N.W.2d at 664 (holding: "Defendants' showing of knowledge of the abuse, coupled with cessation of control of the School, did not presumptively establish that students also discovered or reasonably should have discovered that their injury or condition was caused by the abuse."). SFM and WPSJ have not presumptively established their defense under SDCL 26-10-25.

II. EVEN IF SDCL 26-10-25 IS NOT THE APPLICABLE STATUTE OF LIMITATIONS, THERE IS AN ISSUE OF FACT AS TO WHETHER FRAUDULENT CONCEALMENT TOLLS SDCL 15-2-14(3), AND 15-2-22

Even if SFM and WPSJ have presumptively established their affirmative defenses, there is an issue of fact as to whether fraudulent concealment tolling acts to toll both Plaintiffs' claims for: (1) the vicarious liability of WPSJ and SFM, and (2) the direct liability of WPSJ and SFM.

A. Plaintiffs need not demonstrate active concealment because WPSJ and SFM acted in loco parentis at a boarding school

SFM neglects the rule that a failure to disclose by one with a duty to do so constitutes fraudulent concealment by arguing Plaintiffs did not demonstrate active concealment.

As stated in *One Star*:

> If a trust or confidential relationship exists, an affirmative duty to disclose is imposed, and mere silence by the party under that duty constitutes fraudulent concealment. The silence must concern defects which the party with the duty to disclose knew or should have known.

2008 SD 55, 752 NW.2d 668, ¶32, 681 (internal citations omitted).

In *Koenig v. Lambert*, 527 N.W.2d 903 (SD1995), this court found an issue of fact as to whether silence constituted concealment because the relationship between church and parishioner was one of trust. Similarly, in *Greene v. Morgan, Theeler, Cogley & Petersen*, 1998 SD 16, 575 NW 2d 457, an issue of fact was found where an attorney testified to knowing an antenuptial agreement was invalid and he did not advise his client of it.

In this case, there is a trust or confidential relationship. WPSJ and SFM acted in loco parentis in running a boarding school for children, they acted as parents and representatives of God. Plaintiffs were completely dependant on them for support and care. Plaintiffs put their trust and faith in WPSJ and SFM. (Dep. Miller 38:20-22; 64:17-20, Dep. Marshall 72:14, Dep. Standing Soldier 53:2-56:24, 74:12-15, 124:23-128:13, Decl. Shubeck, Ex. 2.

Demonstration of silence is enough.

B. Plaintiffs have demonstrated a dispute of fact as to whether a reasonable person would have been confused by the psychological circumstances created by the abuse and, thus, not on notice as demonstrated by the rule of *Strassberg*.

Strassberg, along with other cases, demonstrates that evidence of confusion caused by either the defendant or psychological conditions can create an issue of fact as to constructive notice of fraudulent concealment.

The rule of *One Star* is that fraudulent concealment tolling operates "until the cause of action is discovered or might have been discovered by the exercise of diligence." *One Star* 208 SD 55 at ¶34, 752 N.W.2d at 682.

The cases on point demonstrate that evidence of confusion can create an issue of fact as to notice of a cause of action. *Strassberg v. Citizens State Bank* found a question

of fact existed as to fraudulent concealment even though a businessman was told by the attorney for the defendant that a wrongful act had been committed against him ten years prior to bringing suit.[8] 1998 SD 72, 512 N.W.2d 510. The plaintiff claimed that he relied on statements by the defendant's attorney that the wrong was "insignificant" in deciding not to bring a cause of action within the statute of limitations. *Id.* In *Roth v. Farner-Bocken Co.*, 2003 SD 80, 667 NW 2d 651, this court found confusion resulted where the defendant opened the plaintiff's mail and readdressed it to conceal the invasion of privacy, even though the plaintiff noticed the address and postmark on a letter inside was the defendant's. Finally, *Koenig v. Lambert* implicitly recognized that the confusion arising from the psychology of childhood sexual abuse could be a basis for fraudulent concealment tolling. 527 N.W.2d 903 (1995).

While not fraudulent concealment cases, *Rodriquez v. Miles*, 2011 SD 29, 799 NW 2d 722, and *DZ Iron Wing v. Catholic Diocese Of Sioux Falls*, 2011 SD 79, 807 NW 2d 108, are distinguishable from the cases at hand. In *Miles*, this court found that the psychologist's opinion "leaves open whether Rodriguez had inquiry notice." 2011 SD 29, ¶9, 799 NW 2d 722, 725. In each of these cases Dr. King, a psychologist specializing in Native American psychology, has rendered such an opinion based on his research and experience in the field and found that a reasonable person would not have been placed on notice under the facts of each of the Plaintiffs' cases. See Report of Dr. King, Decl.

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[8] SFM is claims *Strassberg* did not address fraudulent concealment. Appellees' Brief, p. 18. *Strassberg* actually found an issue of fact on *both* undiscovered fraud tolling *and* fraudulent concealment tolling. *Strassberg* 581 N.W.2d at 515-516. Regardless, Count II of Plaintiffs' complaints, fraudulent concealment, invokes the fraud statute of limitations.

Shubeck, Ex. 13, pp. 6-7, One Star R. 2402.

In the *Iron Wing* case, the plaintiff identified anger as the injury that he was seeking a remedy for and this court found he always knew he had that injury. 2011 SD 79, ¶13, 807 N.W.2d at 112. Iron Wing identified an injury and assigned blame for that injury. Here, there are two distinguishable categories:

> 1. Uncontested testimony of repression. Larvie, Graham, Ford, Miller, and One Star. Decl. Shubeck, Ex 2 (Depo. Ford 26:20-23, 28:7-8, 38:22-39:2; Depo. Miller 41:13-16, 49:3-50:4, 51:21-25, 77:8-78:21, 83:17-84:1; Depo One Star 34:4-12, 46:6-11, 50:12-21), Ex 5, ¶¶5-8, Ex 7, ¶¶5-7, Ex 13, pp. 27, 36, 45.
> 2. Uncontested testimony that Plaintiffs did not come forward because of self blame or, in other words, shame. Eagleman, Marshall, Big Crow, and Standing Soldier. Decl. Shubeck Ex 2 (Depo Eagleman 42:20-43:8, 57:12-5:98; Depo. Marshall 24:17-22, 29:5-15, 35:15-36:5, 40:16-19, 41:2-6, 57:11-14, 77:14-78:15; Dep. Big Crow 53:21-54:8 ; Dep. Standing Soldier 42:1-12, 53:2-56:24, 74:12-15, 124:23-128:13, 131:2-7), Ex 13, pp. 7, 16, 54, 57.

Obviously, a plaintiff is not on notice of a cause of action if they recently recalled the abuse. Further, a plaintiff cannot be on notice of a cause of action when they blame themselves for what happened their entire life. Shame and self blame has been shown to be a reason some reasonable victims do not come forward. See Report of Dr. King, Decl. Shubeck, Ex. 13, p. 7, One Star R. 2402.[9] Reasonable persons are not placed on notice by self blame and shame because, by definition, they blame themselves.[10]

SFM does not contradict any of Plaintiffs' evidence that they were under the

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[9] See also The Nature And Scope Of Sexual Abuse Of Minors By Catholic Priests And Deacons In The United States 1950-2002, UCCSB, pp. 77, 159 (study found "32.9% of their subjects did not report their abuse during childhood because they felt guilt or shame as a result of the abuse").

[10] This is the holding of *Grover Curtis Mallory v. Sisters of the Blessed Sacrament, et al.* (Civ. 09-700). Judge Bradley Zell, May 25, 2010, Mem Op, pp. 10-12, Decl. Shubeck, Ex. 15.

psychologically concealing effects of childhood sexual abuse. SFM simply claims that Plaintiffs were able to name perpetrators in their complaint and this is conclusive evidence that they were on notice of their causes of action. Appellees' Brief, p. 18. Because SFM has not established the date Plaintiffs knew or should have known of their cause of action, their position is illogical; knowing the name of a perpetrator *now* is not evidence of knowing the name *earlier*.

There is an issue of fact as to whether there was sufficient confusion in these cases to demonstrate fraudulent concealment.

C. There is an issue of fact as to whether Plaintiffs should have been on notice of causes of action based on concealment and failure to prevent abuse by WPSJ and SFM

WPSJ and SFM do not address Plaintiffs' claims that fraudulent concealment tolling also tolls their causes of action for the direct liability of WPSJ and SFM, regardless of any knowledge Plaintiffs had of a cause of action against the perpetrators, because Plaintiffs could not have known that these entities had discovered the abuse and failed to prevent or disclose it. This is exactly the holding of *Roth v. Farner-Broken*, 2003 SD 80, 667 NW 2d 651, which found that the plaintiff's testimony that he could not have learned that the defendant was reading his mail until he found copies of his mail in discovery responses by the defendants provided sufficient evidence for a jury to find that the plaintiff exercised reasonable diligence in discovering his cause of action. *Id* at ¶18, 660. Here, Plaintiffs did not learn that WPSJ and SFM had discovered the abuse until letters evidencing the fact were produced in discovery.

Further, the long delay in disclosing, where there is a duty to do so, creates an issue of fact in this case. This court found an issue of fact as to the sufficiency of warning where a fraudulent concealment cause of action was alleged because of a long period of

delay in disclosing a product defect. *Holmes v. Wegman Oil Co.*, 492 NW 2d 107, 111-2 (SD 1992).

In this case, the defendants had a duty to prevent the abuse of Plaintiffs and various civil and criminal duties to disclose the abuse to Plaintiffs and authorities. WPSJ and SFM clearly learned of the breach of these duties by July 23, 1968, the date of the first Chapman letter. Decl. Shubeck, Ex. 3. They were bound to disclose the information. Further, WPSJ knew of the duty to report the abuse under South Dakota criminal law as early as April 24, 1986. *Id* at Ex. 16. None of the information about abuse at St. Francis was disclosed until 2010. During this long delay, Plaintiffs were suffering the tragic psychological effects of childhood sexual abuse that might have been rectified by diagnosis and treatment. Like *Holmes*, there is an issue of fact as to whether there was fraudulent concealment because of the long delay in disclosure.

SFM's only argument related to fraudulent concealment of their direct liability seems to be that Plaintiffs were on notice of the direct conduct of WPSJ and SFM because they were on notice of the vicarious liability of WPSJ and SFM. In other words, Plaintiffs should have known that these were not isolated incidents and WPSJ and SFM were rotten to the core despite assurances that they were pious representatives of God. Confusion is the unifying principle of the cases on point. There is an issue of fact as to whether representations by WPSJ and SFM and the psychological state of Plaintiffs constituted the confusion required to show fraudulent concealment.

III. ASSUMING THE 2010 AMENDMENT APPLIES, THE SOUTH DAKOTA LEGISLATURE UNCONSTITUTINALLY TARGETED THE CASES BROUGHT BY THESE PLAINTIFFS AND THEIR ATTORNEY

Plaintiffs contend that if the legislature intended the 2010 amendment to SDCL to apply to them in contravention of SDCL 2-14-24 (Actions pending and rights accrued

before code), then the legislative debates on HB1104 demonstrate these cases were among a group that were specifically and unconstitutionally targeted by that legislation. While Plaintiffs are making an "as applied challenge" and not challenging the general constitutionality of the amendment, Plaintiffs have complied with 15-6-24(c) out of an abundance of caution. See response from Attorney General Jackley, Appendix, p. 1.

SFM correctly argues that the legislature is empowered to create and abolish new rights and remedies. However, they must do so within the bounds of the United States Constitution. *McCulloch v. Maryland*, 17 US 316 (1819).[11] Plaintiffs argue that targeting them and their choice of counsel by the South Dakota legislature is illegitimate under several provisions of the United States Constitution. HB 1104 (2010) was passed because of false testimony related to the conduct of the attorneys before this Court in bringing a large number of cases related to Catholic Boarding schools. As can be shown by the record of the legislature, HB 1104 was an attempt to effect all Catholic boarding school litigation in the state. Decl. Shubeck, Ex. 18, One Star R. 2402.

SFM has confused the *ex post facto* clause with the bill of attainder clause. See Appellees' Brief p. 23. A bill of attainder is legislative targeting of an individual or specific class for civil or criminal liability. See e.g. *Fletcher v. Peck*, 10 US 87, 138 (1810) ("A bill of attainder may affect the life of an individual, or may confiscate his property, or may do both."). The Bill of Attainder Clause focuses on targeting, both

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[11] SFM cites a number of cases allowing laws of general applicability to alter the law applicable to pending cases. Appellees' Brief, p. 26. SFM ignores the provisions of the United States Constitution cited by Plaintiffs that explicitly prohibit discrimination against specific targeted individuals.

retroactive and prospective, not retroactive criminal punishment. See e.g. *ex parte Garland*, 71 US 333 (1866) (finding an oath statute designed to bar ex-confederates from the practice of law was a Bill of Attainder). See also *Id* at 390-392 (Justice Miller noting in dissent that the statute was a prospective civil statute). An ex post facto law, on the other hand, creates retroactive criminal liability. See *Fletcher*, 10 US at 138 (stating: "An ex post facto law is one which renders an act punishable in a manner in which it was not punishable when it was committed.").

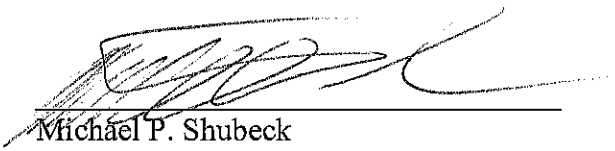
The argument of SFM demonstrates that a bill of attainder has been applied in this case. SFM admits that *Cummings v. Missouri*, 71 US 277 (1866) "did recognize that punishment may be the deprivation of civil rights, and the access to judicial tribunals to challenge the determination of guilt." Appellees' Brief, p. 23. In this case, Plaintiffs were targeted to have an existing civil right, a cause of action and redress in the courts, deprived of them specifically. Plaintiffs were deemed by the legislature to have brought causes of action that were fraudulent and untrustworthy without their ability to challenge such a claim of their guilt. This is not a simple alteration of a remedy generally. Plaintiffs' cases and their attorneys were focused on specifically in crafting the legislation.

Contrary to the argument of SFM, Plaintiffs did raise the remainder of their constitutional arguments below by arguing that they had been unconstitutionally targeted, citing the specific constitutional provisions, and citing case law interpreting the constitutional provisions. See Tr. 34:6-35:17 (due process). See also Appendix, p. 2, Plaintiff's Opposition To Defendants' Joint Motions For Summary Judgment.

CONCLUSION

For the above stated reasons, Plaintiffs respectfully request that summary judgment be reversed.

Respectfully submitted this 5th day of June, 2014.



Michael P. Shubeck

REQUEST FOR ORAL ARGUMENT

Appellants requests oral argument before this court.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Brief of Appellants does not exceed the number of words permitted under SDCL § 15-26A-66, said Brief containing 5000 words.

Michael P. Shubeck

APPENDIX

CERTIFICATE OF SERVICE

The undersigned certifies that on June 5, 2014, he caused true and correct copies of the foregoing to be served upon each of the persons identified below as follows:

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Re: *Kerwin Eagleman, et al. v. St. Francis Mission, Appeal No. 26939*
Ida Marshall v. St. Francis Mission, Appeal No. 26940
Wendell Big Crow v. St. Francis Mission, Appeal No. 26941
Regina One Star v. St. Francis Mission, Appeal No. 26942
D.M., et al. v. St. Francis Mission, Appeal No. 26943
David Standing Soldier v. St. Francis Mission, Appeal No. 26944

Counsel:

The Office of Attorney General has received a notice of constitutional challenge under SDCL 15-6-24 from Mr. Shubeck regarding the above-entitled matters. Please be advised that the Office of Attorney General believes counsel for the parties in the case will fully present the constitutional issues to the Court. Therefore, the Attorney General will not be intervening or otherwise participating in this matter.

Thank you.

Very truly yours,

Roxanne Giedd
Deputy Attorney General

RG:jkp

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
Kerwin Eagleman, Ralph Eagleman, Lawrence Ford, Antoinette (One Star) Miller, and Noah One Star,	)	CIV. NO. 04-594
Plaintiff,	)	**PLAINTIFF'S OPPOSITION TO DEFENDANTS' JOINT MOTIONS FOR SUMMARY JUDGMENT**
vs.	)	
The Wisconsin Province of the Society of Jesus, et al,	)	
Defendants	)	

COMES NOW the above named Plaintiffs and through their undersigned counsel, submits the following Opposition to Defendant's Motion for Summary Judgment.

INTRODUCTION

This case is one of a total of twelve active coordinated cases where the fifteen plaintiffs have all alleged abuse at St. Francis Mission boarding school on the Rosebud Reservation. Defendant Wisconsin Province of the Society of Jesus (hereinafter Jesuits) provided priests, brothers, and scholastics to Rosebud Educational Society (hereinafter RES), an entity formed and still run by the Jesuits. RES and the Jesuits ran the school during the periods relevant to this suit.

The procedural history is complicated by seven appeals and numerous motions filed or responded to by Plaintiffs counsel in these and related cases that stalled prosecution either by court order or agreement of counsel at various times.

The sum of the testimony in this case demonstrates that Native American children were taken from their families and put into a physically abusive environment that planted the seeds of fear and silence. Deposition of Father Kenneth Walleman (hereinafter, Dep.

case, Plaintiff is asserting civil liability.

V. THE 2010 AMENDMENT CANNOT BE APPLIED TO CASES FILED BEFORE THE EFFECTIVE DATE OF THAT STATUTE BECAUSE THERE IS NOT CLEAR INTENT TO DO SO

Defendants argue that the 2010 amendment to SDCL 26-10-25 applies to this case, which was filed prior to the effective date of that statute. However, application of that statute to *pending* litigation is barred by SDCL 2-14-24.

As stated above, there are two statutes applicable to retroactivity, the general statute of SDCL 2-14-21, that applies to application generally, and the specific statute of SDCL 2-14-24, that applies to *pending* litigation specifically. The effective date of statutes is the first day of July after the passage. SDCL 2-14-16.

A. The Fact That There Is A Completely Separate Statute For Retroactive Application To Pending Litigation Indicates That A Statute Can Be Retroactive To A Cause Of Action And Not Retroactive To Pending Litigation

By passing a statute for general retroactivity and a completely separate and more specific statute for retroactivity to pending litigation, the legislature clearly intended that the two situations be treated separately. Under the rules of statutory construction, a specific statute controls a general statute. See Hartpence v. Youth Forestry Camp, 325 N.W.2d 292, 295 (S.D. 1982). In this case, SDCL 2-14-24 specifically defines retroactivity of a law to pending litigation. Therefore, the analyses of retroactivity to pending litigation must be analyzed separately from retroactivity to a cause of action that was not commenced prior to the effective date of a statute.

B. The *Stratmeyer* Case Did Not Address The Specific And Separate Issue Of Whether There Was Intent To Apply SDCL 26-10-25 Retroactively To Pending Litigation.

SDCL 26-10-25 is not retroactive because Stratmeyer did not address application of SDCL 26-10-25 (1991) to pending litigation and the 2010 amendment does not either.

For a statute to retroactively apply ***to pending litigation***, the legislature must have clearly intended that result and doubts are resolved against application. First Nat. Bank of Minneapolis v. Kehn Ranch, 394 NW 2d 709, 716-7 (SD 1986) (holding "we must conclude that the Kehn lawsuit filed against Milbank in 1983 is not affected by a statute subsequently enacted in 1984.") (internal citations omitted).[10]

The situation at hand is distinguishable from Stratmeyer, which discussed the very specific question of "whether the Legislature intended SDCL 26-10-25 to apply to all ***acts of intentional conduct*** or only to those ***acts of intentional conduct*** occurring ***after the effective date*** of the statute." Stratmeyer, 1997 SD 96, ¶ 14 (emph. added). This is a question of general retroactivity of the statute, there has been no finding of the entirely separate issue created by the specific statute on point, SDCL 2-14-24, of whether the legislature indicated intent to apply HB 1104 to pending litigation.

On July 1, 2010 HB 1104 became effective and added a sentence to SDCL 26-10-25 stating: "However, no person who has reached the age of forty years may recover damages from any person or entity other than the person who perpetrated the actual act of sexual abuse." The legislature added nothing to the statute to indicate that it was intended to apply ***to pending litigation***. Further, nowhere in the entire statutory scheme of 26-10, et seq. is there any discussion of how the statute(s) would apply to litigation pending at

[10] See also Baatz v. Arrow Bar, 426 NW 2d 298 (SD 1988) (stating: "It is settled law in this state that a statute will not operate retroactively unless the legislative act clearly expresses an intent that it so operate" and citing SDCL 2-14-2 along with cases). See also Ernst & Young v. Revenue & Regulation, 2004 SD 122, ¶ 11, 689 NW 2d 449, 452-3 (finding no legislative intent to apply a longer statute of limitations to litigation pending at the time a new statute was enacted).

the time of its passage. There is no indication of legislative intent to apply the statute to pending litigation, much less a "clear" indication.

The legislature is very capable of specifying how to apply a statute.[11] The legislature has made statutes explicitly prospective.[12] The legislature has made statutes explicitly retroactive.[13] The legislature has made statutes explicitly *not* retroactive.[14] The legislature has even made statutes that explicitly direct how they are to be applied to pending litigation.[15]

C. The *Bernie* decision did not apply the 2010 amendment to the cases at issue, which were commenced prior to the affective date of that statute

Defendants claim that Bernie is somehow supportive of applying the 2010 amendments to this case. However, that case explicitly applied and interpreted the 1991 statute. See Bernie v. Abbey, 2012 SD 64, ¶3. Therefore, the case does not stand remotely for the proposition that Defendants claim.

D. Conclusion

A legislature must demonstrate clear intent to have a statute applied retroactively. SDCL 2-14-24 treats retroactive application to pending litigation separately from retroactivity in general and, therefore, creates a separate inquiry into whether the legislature intended a statute to be retroactive to pending litigation. In the case of HB 1104, there is no evidence of the intent of the South Dakota legislature to have HB 1104 retroactively applied to pending litigation.

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[11] See SDCL 2-14-24 (application to pending litigation); SDCL 2-14-16 (effective date); SDCL 2-14-21 (retroactive application).
[12] See e.g. SDCL 15-2-12.2; SDCL 15-2-14.1; SDCL 15-2-14.2; SDCL 15-2-14.6; SDCL 15-2A-10.
[13] See e.g. SDCL 49-40-3.1; SDCL 49-39-11; SDCL 49-31-74; SDCL 36-1-3; 1-19B-60; SDCL 58-10-16; SDCL 21-1-13.1.
[14] See e.g. SDCL 37-24-34.
[15] See e.g. SDCL 47-31B-703; SDCL 21-1-13.1; SDCL 29A-8-101.

VI. EVEN IF IT IS DETERMINED THAT THE LEGISLATURE CLEARLY INTENDED THE 2010 AMENDMENT TO BE APPLIED TO THESE CASES APPLICATION IS UNCONSTITUTIONAL BECAUSE SUCH A HOLDING WOULD AMOUNT TO TARGETING OF SPECIFIC LITIGANTS

If this Court should find that the legislature clearly intended that the 2010 amendment applies to Plaintiff, application of that statute here would be unconstitutional because the conclusion would mean that Plaintiff's case was targeted by the South Dakota legislature.[16]

A. The South Dakota Legislature Specifically Targeted Plaintiffs' Cases

The legislative debates specifically demonstrate that these Plaintiffs were targeted by the legislature because they were specifically targeted in the debates on HB1104 and are an "easily ascertainable group". Decl. Shubeck, Ex. 18, 19.

The author of HB1104 was Steven Smith an attorney for the Priests of the Sacred Heart, a defendant in related cases involving some of the same attorneys before this Court.[17] Mr. Smith referred to the need for legislation being created because the Attorneys before this court were licensed in California:

> I can tell you of other cases like the one where I spoke to a guy by the name of Eric Shulte who is representing another group of individuals and ***the same group of lawyers from California*** who represent 76 plaintiffs,

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[16] A distinction must be made between federal and state law regarding legislative history. Under federal constitutional law, legislative history is evidence of discrimination. See e.g. Church of Lukumi Babalu Aye, Inc., 508 U.S. at 540 (citing Arlington Heights v. Metropolitan Housing Development Corp., 429 U. S. 252, 266-268 (1977) (equal protection clause)); United States v. Lovett, 328 US 303 (1946) (looking to congressional record); HP Hood & Sons, Inc. v. Du Mond, 336 US 525 (1949) (exploring regulator's stated discriminatory purpose); Romer v. Evans, 517 US 620, 634-635 (1996); United States v. Klein, 80 US 128 (1872). Under South Dakota statutory interpretation, legislative history cannot be used. . See City of Chamberlain v. R.E. Lien, Inc., 521 NW 2d 130 (SD 1994) (challenge under Article III, § 26, of the South Dakota Constitution). Jensen v. Turner County Board of Adjustment, 2007 SD 28, 730 NW 2d 411 (interpretation of a South Dakota permitting statute). In matters of federal law, this Court is bound by the law laid down by the United States Supreme Court not the South Dakota Supreme Court. United States Constitution, Article VI, Clause 2 ("This Constitution, and the Laws of the United States which shall be made in pursuance thereof; ...shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding.").

[17] See Decl. Shubeck, Ex. 18, 19.

> excuse me, not like the other case where they represent 29 plaintiffs, they are representing people who supposedly were abused in 1930, 1935 and the act themselves is unknown.

Id. at 5:23-6:5 (emph. added). Mr. Smith is directly referring to Zephier v. Catholic Diocese of Sioux Falls, Civ. No. 04-1521, brought by the attorneys for Plaintiff at the same time as One Star v. Sisters of St. Francis was filed before this court.

Mr. Smith explicitly targeted the cases before this Court:

> I would say that's really what got me thinking that I should be here because yes, when this lawyer -- these lawyers like to fly into Sioux Falls in their private jet, get off a press conference on the Cathedral steps and talk about what's wrong, get back on the jet and fly back home and then leave us in ashes here in South Dakota.

Id. at 10:20-11:1.

The legislature specifically was trying to craft legislation targeted at these cases. They discussed the specific facts of these cases. Further, Senator Hammamil specifically spoke of "the incidents referred to." *Id.* at 19:13-24. Representative Lusk vocalized the goals of the Judiciary committee of providing protection to a specific litigant in pending litigation: "I think it somewhat gets Mr. Smith to where he wants to be." Decl. Shubeck, Ex. 18 at 18:21-22.

These specific plaintiffs were clearly targeted by the South Dakota legislature and a bill was crafted to target the facts of these cases.

B. Such targeting of these Plaintiffs is unconstitutional

If the Court finds that the legislature clearly intended the 2010 amendment to apply to Plaintiff, Plaintiff respectfully requests the Court to allow briefing on the constitutional ramifications of that intentional targeting of specific litigation. Plaintiff maintains that the following provisions of the United States Constitution would be violated by such application:

- The Bill of Attainder clause of United States Constitution Art. I, § 9. See e.g. Cummings v. Missouri, 71 US 277 (1867).
- The Due Process clause of the Fourteenth Amendment to the United States Constitution as an impermissible rule of decision. See e.g. United States v. Klein, 80 U.S. 128 (1871).
- The Equal Protection clause of the Fourteenth Amendment to the United States Constitution. See e.g. Cleburne v. Cleburne Living Center, Inc., 473 US 432, 440 (1985).
- The Commerce Clause of United States Constitution Article I, § 8. See e.g. Oregon Waste Systems, Inc. v. Department Of Environmental Quality Of The State Of Oregon, 511 U.S. 93 (1994) (purposeful discrimination against interstate commerce)
- Privileges and immunities clause Fourteenth Amendment. Supreme Court of Virginia v. Friedman, 487 U.S. 59 (1988) (unconstitutional residency restrictions on bar admission)

CONCLUSION

For the above stated reasons, Plaintiff respectfully requests that summary judgment be denied.

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