

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

SALLY RICHARDSON, )  
 )  
Plaintiff and Appellant, )  
vs. ) Appeal No. 27754  
 )  
MICHAEL RICHARDSON, )  
 )  
Defendant and Appellee. )

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

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THE HONORABLE ROBERT GUSINSKY  
CIRCUIT COURT JUDGE

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APPELLANT'S BRIEF

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## TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES	ii
JURISDICTIONAL STATEMENT	1
PRELIMINARY MATTERS	1
STATEMENT OF LEGAL ISSUE	2
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
STANDARD OF REVIEW	4
ARGUMENT	5
THE COURT ERRED IN DISMISSING THE CIVIL SUIT FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS FOR FAILNG TO STATE A CLAIM.	
CONCLUSION	15
REQUEST FOR ORAL ARGUMENT	17
CERTIFICATE OF SERVICE	17
CERTIFICATE OF COMPLIANCE	18
APPENDIX	19

## TABLE OF AUTHORITIES

### STATE CASES :

<i>Feltmeier v. Feltmeier</i> , 798 NE 2d 75 (2003)	13
<i>Gassman v. Gassman</i> , 296 N.W.2d 518 (1980)	2, 11
<i>Hack v Hack</i> , 495 Pa. 300 (1981), 433 A.2d 859	14
<i>Henricksen v. Cameron</i> , 622A.2d 1135, 1139 (Me. 1993)	13
<i>Henry v. Henry</i> , 534 N.W.2d 844 (S.D. 1995)	11
<i>McCulloh v. Drake</i> , 2001 WY 56, 24 P.3d 1162 (2001)	13
<i>Pickering v. Pickering</i> , 434 N.W.2d 758 (1989)	2, 6, 8,
<i>Richard P. v. Superior Court (Gerald B.)</i> , 202 Cal.App.3d 1089, 249 Cal.Rptr. 246 (1Dist, 1988)	8, 9, 14
<i>Scotvold v. Scotvold</i> , 68 S.D. 53 (S.D. 1941)	2, 5, 10, 11
<i>Stephen K. v Roni L.</i> , (1980) 105 Cal. App. 3d 64), 642-643 16 Cal. Rptr. 618, 31 A.L.R.4 <sup>th</sup> 383	8
<i>Thompson v Summers</i> , 1997 SD 103, ¶5, 567 N.W.2d 387, 390	4
<i>Twyman v Twyman</i> , 855 S.W.2d 619 (Tex. 1993)	14
<i>Van Meter v. Van Meter</i> , 328 N.W.2d 497 (Iowa 1983)	12
<i>Weisman v Weisman</i> , 108 A.D.2d 852, 485 N.Y.S.2d 568 (1985)	14
<i>Whelan v Whelan</i> , 41 Conn. Supp. 519, 588 A.2d 251 (Super. Ct. 1991)	14

### STATE STATUTES:

SDCL 15-26(A)-3	1
SDCL 15-6-12(b)(5)	2, 4
SDCL 20-9-7	8
SDCL 15-26A-66(b)(4)	17

### LAW REVIEW ARTICLES

Ploscowe, An Action for “Wrongful Life” (1963) 38 N.Y.U.L.Rev. 1078, 1080	8, 9
Prosser, Torts (3 <sup>rd</sup> ed. 1964) ch. 1, §§ 1 and 4, pp. 1-2, 18, 21	8

## **JURISDICTIONAL STATEMENT**

This case arises from the final order entered on January 19, 2016, by Judge Robert Gusinsky in a civil action (CIV 15-1290) brought by Sally Richardson against Michael Richardson in the Seventh Judicial Circuit. The parties were divorced on April 29, 2015. After the divorce was completed Sally Richardson brought a suit against Michael Richardson for Intentional Infliction of Emotional Distress. Michael Richardson's attorney filed a Motion for Dismissal of Complaint for Failing to State a Claim Upon Which Relief May be Granted; and Alternatively, Motion for Summary Judgment. A hearing was held before the Honorable Robert Gusinsky on January 12, 2016. Judge Gusinsky signed an Order Granting Defendant's Motion for Dismissal for Failing to State a Claim Upon Which Relief may be Granted on January 19, 2016. This is an appeal by Sally Richardson of that Order.

This Court has jurisdiction pursuant to SDCL § 15-26(A)-3.

## **PRELIMINARY MATTERS**

Throughout this brief, Plaintiff and Appellant, Sally Richardson, will be referred to as Sally. Defendant and Appellee, Michael Richardson, will be referred to as Michael. Citations to the settled record will be referred to as "SR p. \_\_" followed by the page number. Citations to the transcript will be referred to "TR p. \_\_\_\_" followed by the page number and line number(s). Citations to the Verified Complaint will be referred to as "VC p. \_\_" followed by the page and line number(s). Citations to the Stipulation and Property Settlement and Agreement will be referred to as "SA p. \_\_" followed by the page number and paragraph.

## STATEMENT OF LEGAL ISSUE

### THE CIRCUIT COURT ERRED IN GRANTING THE DEFENDANT'S MOTION FOR DISMISSAL FOR FAILING TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED.

The Circuit Court concluded that “the tort of intentional infliction of emotional distress... (is) unavailable as a matter of public policy when it is predicated on conduct which leads to the dissolution of marriage.” Citing *Pickering v Pickering*, 434 N.W.2d at 761 and found the present case to be exceedingly similar to *Pickering* and dismissed this case pursuant to SDCL 15-6-12(b)(5).

#### Most relevant cases and statutes:

*Pickering v. Pickering*, 434 N.W.2d 758 (1989)

*Scotvold v. Scotvold*, 68 S.D. 53 (S.D.1941)

*Gassman v. Gassman*, 296 N.W.2d 518 (1980)

SDCL 15-6-12(b)(5)

## STATEMENT OF THE CASE

Sally and Michael Richardson were divorced in the case of *Michael Richardson v. Sally Richardson* File No. DIV 14-365, Seventh Circuit Court of Pennington County, by the Honorable Craig Pfeifle on April 29, 2015.

On September 1, 2015 Sally brought a suit against her ex-husband Michael Richardson for Intentional Infliction of Emotional Distress. On October 2, 2015 the defense filed the *Defendant's Motion for Dismissal of Complaint for Failing to State a Claim Upon Which Relief may be Granted; and Alternatively, Motion for Summary Judgment*. There was a hearing on January 12, 2016 before the Honorable Robert Gusinsky. Judge Gusinsky dismissed Sally's suit and on January 19, 2016 signed the *Order Granting Defendant's Motion for Dismissal for Failing to State a Claim Upon Which Relief may be Granted*. Sally appeals that decision and the Notice of Appeal was filed on February 8, 2016.

## STATEMENT OF FACTS

Sally and Michael were married on May 13, 2014. They had been in a dating relationship for about a year before they married. Michael contacted Sally in February of 2013 through an online ad in which Michael solicited Sally's services as an escort. No contact occurred at this time. "VC p. 1 4" In May of 2013 Michael and Sally had a chance encounter in Wal Mart. "VC p.1 5" They struck up a conversation and immediately were attracted to each other. They began dating and Sally realized that Michael had once contacted her for her escorting services. She felt she needed to tell him who she was and why she placed an ad to work as an escort. "VC p. 1 5" Michael, intrigued by this, had no issues with her being an escort and suggested they work together and make a lot of money. Sally agreed and Michael immediately became her manager. He advertised her services on several different websites, created a business card, purchased a "business" phone, and set up her escort business. He would drive her to the appointments and would often have her call so he could listen or have her set up her a computer or Ipad so he could watch. "VC p. 2 6"

As the relationship progressed Sally desired to stop escorting. She just wanted to be Michael's wife. She repeatedly begged Michael to allow her to stop. He told her that she needed to work to pay bills. "VC p. 2 8" He would repeatedly promise that she just needed to work six more months and then she could stop. The six months never came. "VC p. 2 9" Michael was physically and emotionally abusive to Sally forcing her to continue in prostitution against her wishes. As a result Sally suffers from PTSD and horrible nightmares and she takes several different medications to cope with daily life. "VC p. 3 11"

Michael filed for divorce citing irreconcilable differences. Sally stipulated to the same. However, in the parties' Stipulation Sally specifically had language inserted into the stipulation preserving her right to bring a suit against Michael. AGREEMENT ONLY AS TO MARITAL PROPERTY: "This agreement only covers the equitable division of marital assets and marital contributions. Either party is free to pursue any other cause of action a party believes necessary to resolve non-marital property and causes of action." "SA p. 4 32." Sally believed that the divorce action was not one in which a tort should be decided and elected to have the divorce granted on irreconcilable differences and preserve her right to sue after the divorce was granted. The Stipulation was signed by Sally Richardson on April 28, 2015 and by Michael Richardson on April 29, 2015.

#### **STANDARD OF REVIEW**

A motion to dismiss under SDCL 15-6-12(b) tests the legal sufficiency of the claim, not the facts which support it. The court must treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader. "The motion is viewed with disfavor and is rarely granted." *Thompson v Summers*, 1997 SD 103, ¶5, 567 N.W.2d 387, 390. "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* ¶5. Failure to state a claim upon which relief could be granted is a question of law that is reviewed de novo.

## ARGUMENT

**The Circuit Court erred in determining that Sally failed to state a claim upon which relief may be granted.**

In 1941 the South Dakota Supreme Court determined “A civil action is maintainable between a husband and wife for damages for personal tort committed by one against the other.” *Scotvold v. Scotvold*, 68 S.D. 53 (S.D.1941). The Supreme Court in its decision stated:

“When these statutes are examined to determine the rights and capacities of a married woman, the conclusion is impelled that their cumulative effect is to declare her a legal individual with the right to own and control her own property, including property held with the husband as in common or as joint tenants, and to enter into contracts with others, including her husband. It seems improbable that the Legislature which created such separate civil and property rights, and made possible such transactions between husband and wife, could have intended that one should be without remedy if the other wrongfully invaded those individual property rights or refused to abide by the terms of their mutual engagements. To sustain the husband’s contention would require us to hold a wife without remedy at law if the husband breached his contract or so invaded her property rights. We are unable to discern a basis for a holding that the wife has a remedy against her husband for breach of contract or for invasion of property rights but is without a remedy against him for personal tort. Either the statute grants sweeping remedies to the wife as against her husband, or none. We think it

intended to grant the wife rights and remedies as against the world.”

Id. at 59.

Now 75 years later in 2016 this present case was dismissed by the trial court because of the relationship of the parties. Declaring that Sally is without remedy for the tort committed against her because the Defendant was her husband. The trial court relied on the case of *Pickering v Pickering*, 434 N.W.2d 758 (1989), stating that “the tort of intentional infliction of emotional distress... (is) unavailable as a matter of public policy when it is predicated on conduct which leads to the dissolution of marriage.” However, the public policy that the *Pickering* court relies on is one in which a party cannot sue the other for affairs and the resulting birth of children. This present case does not involve children or affairs which resulted in the birth of children. *Pickering* is not controlling for this case.

Sally was forced to continue working a prostitute by her husband. She was forced through intimidation, threats and violence to continue in prostitution against her wishes. Sally Richardson has suffered severely because her husband forced her to continue in prostitution. She has many emotional issues including PTSD and debilitating nightmares. Sally is on several different medications to help her cope with daily life. This is a case of extreme, outrageous and shocking behavior on the part of the Sally’s then husband, Michael Richardson.

The Court in its hearing on January 12, 2016 stated “if true, what went on here is despicable, outrageous, and the Court can’t find strong enough words to condemn what actually happened in this case, if it’s true.” TR p. 8 lines 19-22.” The Court recognized by

the above statements that Sally has a case for Intentional Infliction of Emotional Distress. However, the circuit court dismissed Sally's case relying on *Pickering* stating "[t]hat this present case is exceedingly similar to *Pickering* in that the conduct which occurred during the marriage lead to its dissolution and for that reason the case must be dismissed." The Court went on to question, "Are you saying that that did not lead to the breakup of the marriage?" "TR p.8 line 22-24." "Are you saying that these outrageous actions had nothing to do with the termination of the marriage? Did your client want to continue in the marriage despite these claims that she is now making?" "TR p. 9 lines 3-7." " I will say yes, she did, because she repeatedly told me that all she ever wanted was for him to love her, to not have to do these things, and that basically if he would make her – stop making her so these things, they could be happy together." "TR p. 9 11-15." The trial court recognized the heinousness of the allegations and that Sally has a case but for the fact that the conduct, in part, led to the dissolution of the marriage.

This present case is not remotely similar to *Pickering*. Paul Pickering sued his estranged wife and her lover, Tom. Paul alleged alienation of affections and tortious interference with a marital contract against Tom, fraud and deceit and negligent misrepresentation against Jody, and intentional infliction of emotional distress against both Tom and Jody. The *Pickering* trial court granted summary judgment on all causes of action except alienation of affections alleged against Tom. Paul appealed. The appellate court affirmed the ruling.

As to the intentional infliction of emotional distress charge the Supreme Court in *Pickering* stated "We believe the tort of intentional infliction of emotional distress should be unavailable as a matter of public policy when it is predicated on conduct which leads

to the dissolution of a marriage.” *Pickering v Pickering*, 434 N.W.2d 758, 761 (1989). It goes on to state, “Furthermore, the law of this state already provides a remedy for this type of claim in the form of an action against the paramour for alienation of affections.” *Id* at 761, (Referring to SDCL 20-9-7).

The *Pickering* court relied on *Richard P. v. Superior Court (Gerald B.)*, 202 Cal.App.3d 1089, 249 Cal.Rptr. 246 (1Dist, 1988). *Richard P.* was very similar to *Pickering* in that an affair took place and an illegitimate child was born. Both men, Paul Pickering and Gerald B., in these cases believed they were the child’s father. Both men had their suits barred as a matter of public policy. The Court in *Richard P.* stated:

“ We agree with real parties in interest that they have alleged words which normally would suffice to state tort causes of action for fraud and intentional infliction of emotional distress. We feel that the **subject matter** of the action, however, is not one in which it is appropriate for the courts to intervene (2) “Broadly speaking, the word ‘tort’ means a civil wrong, other than a breach of contract, for which the law will provide a remedy in the form of an action for damages. It does not lie within the power of any judicial system, however, to remedy all human wrongs. There are many wrongs which in themselves are flagrant. For instance, such wrongs as betrayal, brutal words, and heartless disregard of the feelings of others are beyond any effective legal remedy and any practical administration of law. (Prosser, Torts (3<sup>rd</sup> ed. 1964) ch. 1, §§ 1 and 4, pp. 1-2, 18, 21.) To attempt to correct such wrongs or give relief from their effects ‘may do more social damage than if the law leaves them alone,’ (Ploscowe, An Action for “Wrongful Life” (1963) 38 N.Y.U.L.Rev. 1078,

1080.)” *Stephen K. v Roni L.*, (1980) 105 Cal. App. 3d 64, 642-643 16 Cal. Rptr. 618, 31 A.L.R.4<sup>th</sup> 383.)(Emphasis added).

The subject matter in both *Pickering* and *Richard P.* is the affairs which resulted in the birth of illegitimate children. The court did not feel it should intervene and allow a father to sue for intentional infliction of emotional distress that resulted from the birth of a child. The court concluded with, “We feel, however, that the innocent children here may suffer significant harm from having their family involved in litigation such as this and that this is exactly the type of lawsuit if allowed to proceed, might result in more social damage than will occur if the courts decline to intervene.” *Richard P. v. Superior Court (Gerald B.)*, 202 Cal.App.3d 1089, 249 Cal.Rptr. 246 (1Dist, 1988). “We do not believe that the law should provide a basis for such familial warfare.” *Richard P. v. Superior Court (Gerald B.)*, 202 Cal.App.3d 1089, 249 Cal.Rptr. 246 (1Dist, 1988) quoting (Ploscowe, *supra*, 38 N.Y.U.L.Rev. at p. 1080.)

The present trial court’s reliance on *Pickering* which relies on *Richard P.* is misplaced for this present case. These cases are not on point with the allegations in the present case of Sally Richardson. The string of old cases that support the public policy argument that a spouse cannot sue a present or former spouse for Intentional Infliction of Emotional Distress all deal with affairs, alienation of affection issues and children born out of the affairs. There are no children born to Sally and Michael.

This present case deals with far more than hurt feelings and brutal words. This is a case of human trafficking at the hands of Sally’s husband. This is extreme and outrageous conduct inflicted upon Sally by Michael. Judge Gusinsky stated in the January 12, 2016 hearing “if true, what went on here is despicable, outrageous, and the

Court can't find strong enough words to condemn what actually happened in this case, if it's true." "TR p. 8 19-22." The public policy argument is not applicable to the present case as there are no children affected and this is not merely familial warfare. Public policy would not be served and more social damage will occur if this present case is not allowed to be heard. To say that in essence a spouse is granted immunity for such acts as complained herein when committed against another hails back to the days of when women were treated as chattel.

The history of our marital relations began under the common law where a husband and wife were considered one legal person. Upon marriage the wife became her husband's property and as such the husband was responsible for the wife's actions. The wife could not sue her husband because as his property she would be suing herself. The laws evolved and fortunately changed to recognize that there are situations in which one spouse may sue the other spouse for a tort committed by the other as decided in *Scotvold*.

"Woman shall retain the same legal existence and legal personality after marriage as before marriage and shall receive the same protection of all her rights as a woman, which her husband does as a man; and for any injury sustained to her reputation, person, property, character or any natural right, she shall have the same right to appeal in her own name alone to the courts of law or equity for redress and protection that her husband has to appeal in his own name alone." *Scotvold v. Scotvold*, 68 S.D. 53, 58 (S.D.1941). As stated above the *Scotvold* court determined that, "A civil action is maintainable between a husband and wife for damages for personal tort committed by one against the other." *Id.* at 66.

In 1980 the South Dakota case of *Gassman v. Gassman*, 296 N.W.2d 518 (1980) was heard. The court stated that “a damage suit for tort is hardly a matter to be tried in a divorce action... The Appellant could have started a civil suit for damages for personal tort committed by appellee as this court decided in *Scotvold v Scotvold*, 68 S.D. 53, 66, 298 N.W. 266, 269 (1941).” The court realized that damages cannot be awarded within the divorce context but rather need to be addresses in a separate tort suit. Using *Scotvold* as precedence the court continued to hold that a tort between a husband and wife is maintainable. This is the very reason that Sally did not sue for fault in her divorce. The divorce action is not one in which tort damages could be recovered.

Another South Dakota case *Henry v. Henry*, 534 N.W.2d 844 (S.D. 1995) determined that *Pickering* was not controlling and was factually distinguishable because it dealt with pre-divorce conduct. However, the court stated that, “This court, in *Gassman v Gassman*, 296 N.W.2d 518, 522 acknowledged that a spouse can bring a civil suit for damages caused by tortious conduct of the other spouse.” Citing *Scotvold v Scotvold*, 68 S.D. 53, 66, 298 N.W. 266, 269. It continued with “despite the potential for entertaining such a claim, however, Lois (Henry) waived that opportunity by signing a release in the parties’ settlement agreement.” *Id.* at 847. Despite dismissing Lois Henry’s claim in that instance the court recognized a suit CAN be brought by a spouse against another spouse and rightly could have been brought outside the divorce action. Sally in her stipulation for divorce specifically had wording placed which would preserve her right to sue for a tort upon completion of the divorce inserting, “Either party is free to pursue any other cause of action a party believes necessary to resolve non-marital property and causes of

action” within the stipulation which was signed by both parties and entered along with the parties divorce decree. “SA p. 4 32.”

Sally suffered greatly at the hands of Michael Richardson. Although there was physical abuse during the marriage much of Sally’s scars are emotional. She is dealing with PTSD and horrifying nightmares. Sally currently takes several different medications in order to cope with her daily life. Her severe emotional distress has affected her deeply.

Thankfully many states have now realized the need for reform in the area of tort law within marriages and that to disallow ALL tort actions because of public policy considerations is not in the best interests of spouses. The Supreme Court in Iowa recognized that, “The elements of the tort of intentional infliction of emotional distress, and some of its policy considerations, are different from those in an alienation claim. We CANNOT conclude as a matter of law that NO facts are conceivable under which a claim for intentional infliction of emotional distress could be maintained merely because, it like alienation claims, arises out of a failed marital relationship.” *Van Meter v. Van Meter*, 328 N.W.2d 497, 498 (Iowa 1983). (Emphasis added).

The Wyoming Supreme Court stated “In many marriages, and undoubtedly in most troubled marriages, a high level of emotional antagonism exists between the spouses, and it is likely that volatile circumstances will often be perceived as extreme and outrageous. We have questioned whether legal intrusion into behavior which occurs within a marriage is appropriate and whether legal relief in addition to a divorce is justified for an intentional infliction of emotional distress claim in light of this fact. We conclude they are. Emotional distress is as real and tormenting as physical pain, and

psychological well-being deserves as much legal protection as physical well-being.” *McCulloh v Drake*, 2001 WY 56 ¶ 23, 24 P.3d 1162, 1169 (2001) quoting *Henricksen v. Cameron*, 622 A.2d 1135, 1139 (Me.1993). The Wyoming Supreme Court also stated, “Although the preservation of marital harmony is a respectable goal, behavior which is truly outrageous and results in severe emotional distress should not be protected in some sort of misguided attempt to promote marital peace.” *Id* at 1169 ¶ 23. The court went on to state, “We are convinced that extreme and outrageous conduct by one spouse which results in severe emotional distress to the other spouse should not be ignored by virtue of the marriage of the victim to the aggressor and hold that such behavior can create and independent cause of action for intentional infliction of emotional distress.” *McCulloh v. Drake*, 2001 WY 56, 24P.3d 1162, 1170 ¶ 26.

The State Supreme Court in Illinois stated that “After examining case law from courts around the country, we find the majority have recognized that public policy considerations should not bar actions for intentional infliction of emotional distress between spouses or former spouses on conduct occurring during the marriage.” *Feltmeier v. Feltmeier*, 798 NE 2d 75, 82 (2003) quoting *Henricksen v Cameron*, 622A.2d 1135 at 1140. The Illinois Court then concluded that, “[t]hat neither the policy considerations commonly raised nor the law of this state support a conclusion that an action for intentional infliction of emotional distress based on conduct occurring in the marital setting should be barred or subject to any heightened threshold for establishing outrageousness.” *Feltmeier v. Feltmeier*, 798 NE 2d 75, 83 (2003)

All of the above and many more states have recognized that there are instances in which a suit can and should be brought against a former spouse.<sup>1</sup> The *Pickering* decision which is currently controlling divorce and tort law within marriage in South Dakota is not even remotely similar to the present case that Sally brings. Sally suffered greatly at the hands of her husband. The man who should have been her protector forced her to be a prostitute against her wishes. She repeatedly begged him to allow her to stop. He was physically, mentally and emotionally abusive. This case is far more severe than betrayal, brutal words or heartless disregard for her feelings, although all of these things occurred; severe, extreme and outrageous conduct are at the heart of this suit. The *Pickering* case and its reliance on *Richard P.* were both cases revolving around hurt feelings, child paternity and cases of the heart. Plaintiffs in those cases no doubt suffered emotional distress but truly nothing comparable to the abuse that Sally endured. The trial court's reliance on *Pickering*, is out of date, is not on point and should not be used as precedence to dismiss this suit.

## CONCLUSION

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<sup>1</sup> See *Hack v Hack*, 495 Pa. 300 (1981), 433 A.2d 859 "We conclude that a tortfeasor's immunity from liability because of his marital relationship to the injured party cannot be sustained on the basis of law, logic or public policy."

See *Whelan v Whelan*, 41 Conn. Supp. 519, 588 A.2d 251 (Super. Ct. 1991), divorced wife sued former husband for Intentional Infliction of Emotional Distress. Superior Court held that wife had adequately stated a claim. "even in the context of divorce litigation, the husband's conduct was outrageous, and the wife's emotional distress was above and beyond that which usually attends divorce."

See *Twyman v Twyman*, 855 S.W.2d 619 (Tex. 1993) the Texas Supreme court determined that the wife has properly stated a claim for Intentional Infliction of Emotional Distress against the husband.

See *Weisman v Weisman*, 108 A.D.2d 852, 485 N.Y.S.2d 568 (1985) allowed a counterclaim by a divorced wife against her ex-husband for intentional infliction of emotional distress. The court found that the wife had properly stated a claim against the husband.

South Dakota in 1941 recognized that there are situations in which a spouse can and should be able to sue their spouse for tortious conduct. Now, in 2016, the trial court has dismissed a lawsuit, by a woman who has been severely emotionally abused and forced into human trafficking, because it is her husband who was the one forcing her to commit prostitution. South Dakota's reliance on *Pickering* which relies on a California case based on a public policy argument is not even closely related to the present case. We have gone backwards to the detriment of many. If Sally had not been married to Michael at the time he forced her to continue in human trafficking Sally could have maintained an action for Intentional Infliction of Emotional Distress.

South Dakota must, as many other states already have, determine that there are circumstances within the context of a marriage that one spouse should be allowed to sue the other for tortious conduct that has occurred within the marriage. South Dakota cannot continue to rely on the *Pickering* case. This case and the subject matter of this case should not be controlled by the holding in *Pickering*. The ability to sue a spouse for a tort action involving extreme and outrageous conduct should be allowed as it was determined in *Scotvold* in 1941. The elements of the intentional infliction of emotional distress will prevent frivolous lawsuits. The bar is high to prove in these types of cases, but it is a bar that with the necessary elements should be allowed to be overcome, even one spouse or former spouse against another.

Sally Richardson has a legitimate claim for intentional infliction of emotional distress. Many states now recognize claims for intentional infliction of emotional distress within the context of marriage. It is time South Dakota join those states. We can no longer rely on an antiquated public policy argument from a California case, which is not

on point with the present case, to control our law. There are instances in which a tort action is appropriate and torts committed by one spouse against the other should not be protected by the marital contract.

This situation goes far beyond the controlling case law of *Pickering*. The intentional infliction of emotional distress that Sally has suffered at the hands of her then husband is the very reason South Dakota must change its stance on marital tort law. To throw a blanket over all marital situations and disallow any tort actions within the context of marriage is to inflict further emotional distress upon a victim. This current “public policy” argument is detrimental to society and actually goes against public policy. A spouse must be allowed to sue the other spouse as was previously decided in *Scotvold*, which in 1941 recognized the right of a spouse to sue his/her spouse and should be controlling law in South Dakota. The threshold is high to prove the elements of intentional infliction of emotional distress and as such that alone will weed out unnecessary and frivolous claims. This case should be remanded and allowed to proceed to trial.

## **REQUEST FOR ORAL ARGUMENT**

Sally Richardson respectfully requests this Court to allow oral argument.

Dated this 22nd day of March, 2016.

For the Appellant Sally Richardson,  
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#### CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of March, 2016, I caused the foregoing Appellant's Brief to be electronically filed with the Clerk of the Supreme Court of South Dakota by serving the same upon Shirley Jameson-Fergel, Clerk of the Supreme Court of South Dakota, by email at: [scclerkbriefs@uj.s.state.sd.us](mailto:scclerkbriefs@uj.s.state.sd.us).

I also certify that on March 22, 2016, I served a true and correct copy of the foregoing Appellant's Brief upon Nathaniel Nelson, Attorney for the Appellee, 731 St. Joseph Street, Suite 220, Rapid City, South Dakota 57701, by email at: [nate.nelson@renschlaw.com](mailto:nate.nelson@renschlaw.com).

Dated this 22nd day of March, 2016.

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#### CERTIFICATE OF COMPLIANCE

Pursuant to S.D.C.L. § 15-26A-66(b)(4), counsel for the Appellant does hereby state that the foregoing brief is typed in proportionally spaced typeface in Times New Roman 12 point. The pages of this brief, excluding the Appendix, do not exceed forty and the word processor used to prepare this brief indicated that there are no more than 4693 words in the body of the brief.

IN THE SUPREME COURT  
OF THE  
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No. 27754

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Plaintiff and Appellant,

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APPEAL FROM THE CIRCUIT COURT  
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THE HONORABLE ROBERT GUSINSKY  
CIRCUIT COURT JUDGE

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APPENDIX TO THE APPELLEE'S BRIEF

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CONTENTS

Divorce Decree	20
Notice of Entry of Judgment and Decree	22
Stipulation and Property Settlement Agreement	24
Verified Complaint	33
Plaintiff's Affidavit in Support of the Complaint of Intentional Infliction of Emotional Distress	37
Trial Court's Order Granting Defendant's Motion for Dismissal for Failing to State a Claim Upon Which Relief may be Granted entered January 19, 2016	40

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

No. 27754

SALLY RICHARDSON,

Plaintiff and Appellant,

v.

MICHAEL RICHARDSON,

Defendant and Appellee.

---

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

---

THE HONORABLE ROBERT GUSINSKY  
CIRCUIT COURT JUDGE

---

APPENDIX TO THE APPELLEE'S BRIEF

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CONTENTS

Divorce Decree	20
Notice of Entry of Judgment and Decree	22
Stipulation and Property Settlement Agreement	24
Verified Complaint	33
Plaintiff's Affidavit in Support of the Complaint of Intentional Infliction of Emotional Distress	37
Trial Court's Order Granting Defendant's Motion for Dismissal for Failing to State a Claim Upon Which Relief may be Granted entered January 19, 2016	40

STATE OF SOUTH DAKOTA )  
 )  
 COUNTY OF PENNINGTON )  
 )  
 MICHAEL RICHARDSON, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 SALLY RICHARDSON, )  
 )  
 Defendant. )

IN CIRCUIT COURT  
 SEVENTH JUDICIAL CIRCUIT

FILE NO. DIV14-365

**DECREE OF DIVORCE**

The forgoing matter having come before the Court by way of a duly signed Stipulation and Settlement Agreement that justly and equitably divided all assets and debts, and resolved all issues; and the parties having waived notice, a hearing, trial, and entry of Findings of Fact and Conclusions of Law; and more than 60 days having elapsed since commencement of this action; and the parties having signed the proper Affidavits to establish jurisdiction and that the grounds for divorce shall be upon irreconcilable differences; and neither of the parties being in the military service or otherwise subject to the protections of the Serviceman's Civil Relief Act, or similar legislation; and good cause appearing for entry of the Decree of Divorce; therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that the parties' Stipulation and Settlement Agreement shall be, and hereby is, approved and adopted herein by this reference and is included herein as if set forth in full; and it is further

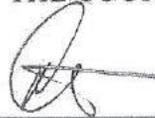
ORDERED, ADJUDGED AND DECREED that any pre-Decree order of this Court concerning the parties and regarding this marital dissolution, shall be, and the same hereby is, terminated and otherwise rendered null and void as to further compliance therewith; and it is further

ORDERED, ADJUDGED AND DECREED that the marriage of the parties shall be, and it hereby is, dissolved upon the ground of irreconcilable differences, and each of the parties is restored to the status of single persons; and it is further

ORDERED, ADJUDGED AND DECREED that the parties, and each of them, are to promptly and without haste sign and deliver to the other, or the other's attorney, such documents as are necessary to implement the various obligations and benefits set forth therein.

Dated this 29 day of April, 2015.

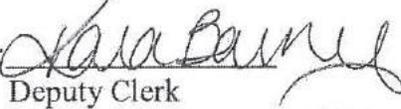
BY THE COURT:



The Honorable Craig A. Pfeifle  
Circuit Court Judge

ATTEST:

Ranae Truman  
Clerk of Courts

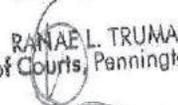
By   
Deputy Clerk

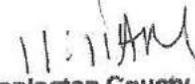
(SEAL)



State of South Dakota } Seventh Judicial  
County of Pennington } Circuit Court  
I hereby certify that the foregoing instrument  
is a true and correct copy of the original as  
the same appears on record in my office this

APR 29 2015

  
RANAEL. TRUMAN  
Clerk of Courts, Pennington County  
By \_\_\_\_\_ Deputy

  
Pennington County, SD  
FILED  
IN CIRCUIT COURT

APR 29 2015

Ranae Truman, Clerk of Courts  
By \_\_\_\_\_ Deputy

STATE OF SOUTH DAKOTA )  
 )  
COUNTY OF PENNINGTON )

IN CIRCUIT COURT

SEVENTH JUDICIAL CIRCUIT

MICHAEL RICHARDSON, )  
 )  
Plaintiff, )

FILE NO. DIV14-365

vs. )

NOTICE OF ENTRY OF JUDGMENT  
AND DECREE OF DIVORCE

SALLY RICHARDSON, )  
 )  
Defendant. )

TO: SALLY RICHARDSON, Defendant:

NOTICE IS HEREBY GIVEN That the Judgment and Decree of Divorce in the above-entitled matter was signed by the Honorable Craig A. Pfeifle, Circuit Court Judge, on the 29th of April, 2015, that said Judgment and Decree was attested and filed at the office of the Clerk of Courts for Pennington County, South Dakota on the 29th of April, 2015, that this Notice is intended as Notice of Entry of Judgment pursuant to SDCL § 15-26A-6, and that a copy of the above-entitled Judgment is enclosed herewith.

Dated this 29th day of April, 2015.

RENSCH LAW  
A Professional Law Corporation

/s/ Nathaniel F. Nelson  
Nathaniel F. Nelson  
Attorney for Plaintiff  
731 St. Joseph, Suite 220  
P.O. Box 8311  
Rapid City, SD 57709  
(605) 341-1210

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served a true and correct copy of Notice of Entry of Judgment and Decree of Divorce upon the person herein next designated on the date shown by electronic service through Odyssey to said addressee, to-wit:

Robert Pasqualucci  
Attorney at Law  
550 North 5th Street  
Rapid City, SD 57701

which address is the last known address of the addressee known to the subscriber.

Dated this 29th day of April, 2015.

RENSCH LAW  
A Professional Law Corporation

/s/ Nathaniel F. Nelson

Nathaniel F. Nelson  
Attorney for Plaintiff

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
	)	
MICHAEL RICHARDSON,	)	FILE NO. 51 Div14-365
	)	
Plaintiff,	)	
	)	<b>STIPULATION AND PROPERTY</b>
vs.	)	<b>SETTLEMENT AGREEMENT</b>
	)	
SALLY RICHARDSON,	)	
	)	
Defendant.	)	

IT IS HEREBY STIPULATED by and between Plaintiff Michael Richardson and Defendant Sally Richardson the following terms as their Stipulation and Settlement Agreement in this divorce action:

1. EXPIRATION OF 60 DAYS: More than sixty days has elapsed since the date of commencement of this action.
2. WAIVER OF NOTICE, FINDINGS AND CONCLUSIONS, AND TRIAL: Trial of any issue is waived, as is entry of Findings of Fact and Conclusions of law, and notice or a hearing as a necessary precursor to entry of the final Decree of Divorce.
3. VOLUNTARINESS: Each of us has signed this Stipulation freely, knowingly, voluntarily, without duress or deceit. We have each had counsel, and have been fully advised of our rights and the consequences and obligations of the terms of this Stipulation.
4. BINDING EFFECT: The terms of this agreement shall be binding on each of us.
5. FINANCIAL AND PERSONAL STATUS: Each of us is satisfied that we have been sufficiently informed of the financial and personal status of the other, and each of us has given full and mature thought to the making of this agreement and of all obligations contained herein, and the consequences thereof.
6. RESOLUTION OF ALL CLAIMS BETWEEN US: It is our intention, and we each hereby so declare, that the terms of this Stipulation shall, and they do, fully and finally resolve and settle all claims between us, whether known or unknown, potential or existing. We each recognize, however, that one or more of the terms herein may require compliance by one or the other beyond the date of the Court's entry of the Decree of Divorce. As to such terms, the person who has a duty to act accordingly shall do so. No other claims between us, whether financial, tort-based, or otherwise, shall exist hereafter.

7. RELINQUISHMENT, RELEASE, AND WAIVER: Except for specific obligations set forth elsewhere herein this Stipulation, each of us releases and absolves the other from any and all obligations and liabilities for past and/or present acts or omissions, and also future acts and duties, and each party releases the other from any and all liabilities, duties or obligations of any kind or character.

8. INTEGRATION AND INCORPORATION: This Stipulation is fully integrated, and any side-agreements, and no agreements not expressly stated herein, shall be, and hereby are, rendered null and void, and shall be considered cancelled and superseded by these terms.

9. MODIFICATION ONLY VALID IF SIGNED AND APPROVED: No modification of the terms herein shall be valid unless set forth in writing, signed by both parties, and approved by the Court.

10. INCORPORATION INTO DECREE OF DIVORCE OF THESE TERMS: It is our intention and request that all of the terms of this Stipulation be incorporated within the Court's final Decree of Divorce. If the Court refuses to accept any part or paragraph of this agreement or wishes to modify the same, the entirety of this agreement shall be rendered null and void.

11. HOLD HARMLESS AND INDEMNIFICATION: Regarding terms herein that one party is to bear to the exception of the other that party shall fully indemnify and hold the other harmless therefrom.

12. RESIDENCY: We are each residents of Pennington County, South Dakota.

13. DATE AND PLACE OF MARRIAGE: We were married on May 13, 2014 in Las Vegas, Nevada, and have ever since that time remained a married couple.

14. NO CHILDREN: No children have been born of our marriage nor did we adopt any children, and Defendant Sally Richardson is not now pregnant.

15. GROUND FOR DIVORCE- IRRECONCILABLE DIFFERENCES: The grounds for the divorce shall be irreconcilable differences. We have each signed the necessary Affidavits for this.

16. WAIVER OF SPOUSAL SUPPORT OR ALIMONY: Each party fully and finally waives any and all claims against the other for spousal support or alimony of any kind.

17. WAIVER OF ELECTIVE SHARE OR OTHER INHERITANCE INTEREST: Each party waives his or her right to receive from the other any inheritance or other such interest, including but not limited to an elective share of the estate of the other.

18. DIVISION OF DEBTS: We agree an equitable division of the debts of each of us, including marital, pre-marital and non-marital debts, have already been divided between us. We further agree that any debt in the name of a particular party shall be the sole obligation of that party.

19. ATTORNEY'S FEES: Each of us shall pay his or her own attorney's fees, sales tax and costs incurred in this action.

20. BANK ACCOUNTS: Each of us shall retain, free and clear of any claim of the other, any and all checking and/or savings account held individually in his or her name, respectively.

21. RETIREMENT ACCOUNTS AND FUTURE EARNINGS: Each of us, as to the other, irrevocably waives any and all right, title, and interest to any social security, retirement or related benefits belonging to the other, as well as any earnings of the other.

22. REAL PROPERTY: As between us, any real estate or real property, including but not limited to the marital residence, shall be the sole property of the person whose name is shown as "owner" of that real property, with full waiver by the other of any interest in the same, including but not limited to a marital or homestead interest.

23. EXECUTION AND DELIVERY OF DOCUMENTS: If necessary to give effect to any term of this Stipulation regarding a financial matter, each of us shall promptly and without haste sign and return to the other whatever appropriate document is necessary to show waiver of, or transfer to the other, any and all interest in and to such financial matter.

24. QUIT CLAIM DEED(S): If necessary to give effect to any term of this Stipulation regarding real property, each of us shall promptly and with haste sign and return to the other a Quit Claim or other appropriate real property document showing transfer to the other of any and all interest in and to such property.

25. MORTGAGE RELEASE: If necessary to give effect to any term of this Stipulation regarding a mortgage on real property, each of us shall promptly and with haste sign and return to the other whatever appropriate document is necessary.

26. DIVISION OF PHYSICAL ASSETS: We agree an equitable division of the physical assets of each of us has already been made and divided between us. Any item of physical assets in the possession of one party at the time of the last signing of this agreement shall be the sole property of that possessor. Neither of us shall make any marital claim, now or later, against the personal assets of the other, whether owned now or hereafter acquired, or against any inheritance or other financial bounty received, or to be received, by the other.

27. MARITAL PROPERTY PAYMENT OBLIGATION: If Defendant signs and returns, or has signed and returned, this Stipulation to Plaintiff or his attorney by or before April 30, 2015, regarding property payment, the sole and exclusive marital property settlement payment shall consist of Plaintiff paying to Defendant a total lump-sum of \$30,000.00. The payment may be made by three installments as follows (no interest shall accrue on an amount due as long as payment, or transmittal of payment, is made timely, with transmittal of payment meaning paid to her or her attorney, or if mailed post-marked to her or her attorney by the date shown below):

- a) \$10,000.00 on April 30, 2015;
- b) \$10,000.00 by June 30, 2015;
- and c) \$10,000.00 by August 30, 2015.

28. PARTIAL AND FINAL SATISFACTION OF JUDGMENT: Regarding each of the first two property settlement payments identified above, upon receipt of each such individual payment, it shall be the duty of Defendant to serve upon Plaintiff, through his counsel, and file with the Court, a Partial Satisfaction of Property Payment Judgment concerning such payment. Upon receipt of the final payment, it shall be the duty of Defendant to serve upon Plaintiff, through his counsel, and file with the Court, a Final Satisfaction of Property Payment Judgment.

31. INCOME TAX FILING AND REFUND: For the tax year 2015, each of us shall file his or her own separate income tax return, and each of us shall be the sole recipient of any refund from the same, or the sole payment obligor of any tax due on the same. If by the time of execution of this Stipulation any required income tax return for 2014 has not yet been filed by either or both parties, the filing for the tax year 2014 shall be separate for each party, and each such party shall be the sole recipient of any refund, or the sole payment obligor of any tax due. It is the intention of each of us that each party is to bear sole responsibility for his or her own past, present, or future tax liability or obligation.

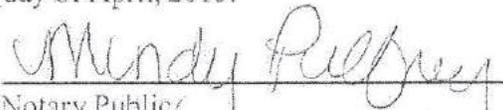
32. AGREEMENT ONLY AS TO MARITAL PROPERTY: This agreement only covers the equitable division of marital assets and marital contributions. Either party is free to pursue any other cause of action a party believes necessary to resolve non-marital property assets and causes of action.

THIS IS A CONTRACT AND NOT A MERE RECITAL

Dated this 29 day of April, 2015.

  
Michael Richardson, Plaintiff

Subscribed and sworn to before me this 29 day of April, 2015.

  
Mandy Peltgen  
Notary Public  
My Commission Expires: 2/4/2016

(SEAL)

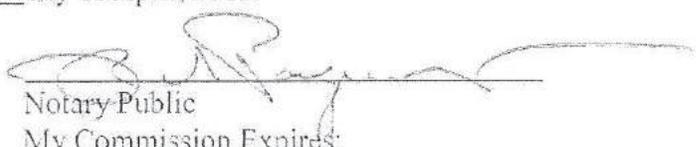
APPROVED BY:

  
Nathaniel F. Nelson  
Attorney for Plaintiff

Dated this 28 day of April, 2015.

  
Sally Richardson, Defendant

Subscribed and sworn to before me this 28 day of April, 2015.

  
Notary Public  
My Commission Expires:



  
Robert Pasqualucci  
Attorney for Defendant



the presence of their respective attorneys to discuss issues pertaining to the Parties' legal matters.

3. Neither the Petitioner nor the Respective Respondent shall abuse, physically harm, make threats of abuse or violence, harass or stalk one another, directly or indirectly, or through the use of any written, voice or social media.
4. This stipulated agreement shall remain in place for a period of two years or until further order of the Court.
5. The Petitioner's minor daughter, Ashley M. Zerulla, is also protected under the same terms of this stipulation and the Civil Protection Order.
6. The parties recognize any violation of this Stipulation may be a contemptuous act which is subject to penalty by the Court. In the event either party fails to comply or the other party is required to bring the matter before the Court to compel performance, the non-complying party shall pay all reasonable attorney fees unless the Court finds there was a reasonable excuse for noncompliance.

This agreement was made on the record in the Court of the Honorable Judge Pfeifle on December 18, 2014.

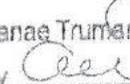
PETITIONER

  
Sally Richardson

State of South Dakota )  
County of Pennington )

On this the 18<sup>th</sup> day of December, 2014, before me, the undersigned officer, personally appeared Sally Richardson, known to me or satisfactorily proven to be the person whose name is

Stipulated Agreement for Civil Restraining Order  
Page 2 of 3

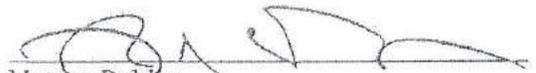
Pennington County, SD  
FILED  
IN CIRCUIT COURT  
DEC 18 2014  
Ranae Truman, Clerk of Courts  
By  Deputy

subscribed to the within instrument and acknowledged that she executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.



RESPONDENT

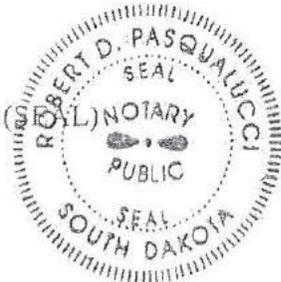
  
Notary Public  
My Commission Expires: 12-10-18

  
Michael Richardson

State of South Dakota )  
County of Pennington )

On this the 18 day of December, 2014, before me, the undersigned officer, personally appeared Michael Richardson, known to me or satisfactorily proven to be the person whose name is subscribed to the within instrument and acknowledged that he executed the same for the purposes therein contained.

In witness whereof I hereunto set my hand and official seal.



  
Notary Public  
My Commission Expires: 12-10-18

State of South Dakota ) Seventh Judicial  
County of Pennington ) Circuit Court  
I hereby certify that the foregoing instrument  
is a true and correct copy of the original as  
the same appears on record in my office this

APR 29 2015

RANAE L. TRUMAN  
Clerk of Courts, Pennington County

Stipulated Agreement for Civil Restraining Order  
Page 3 of 3

Pennington County, SD  
FILED  
IN CIRCUIT COURT

DEC 18 2014

Ranae Truman, Clerk of Courts  
By Call Deputy

By \_\_\_\_\_ Deputy



STATE OF SOUTH DAKOTA )  
 )  
:SS  
COUNTY OF PENNINGTON )

IN CIRCUIT COURT  
  
SEVENTH JUDICIAL CIRCUIT

SALLY RICHARDSON, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
MICHAEL RICHARDSON, )  
 )  
 )  
 )  
Defendant. )

CIV 15-  
  
VERIFIED COMPLAINT

COMES NOW, Sally Richardson, the above named Plaintiff for her cause of action against the Defendant, Michael Richardson, and alleges the following:

1. This action is brought by the Plaintiff, Sally Richardson, a resident of Pennington County, South Dakota, who resides in New Underwood, South Dakota.
2. The Defendant in this action is Michael Richardson a resident of Pennington County, South Dakota, who resides at 22561 Miller Drive, Rapid City, South Dakota.
3. Plaintiff and Defendant were married on May 13, 2014. The parties separated in September of 2014 and divorced on April 29, 2015.
4. Defendant first contacted the Plaintiff by phone in February of 2013. Plaintiff was newly working as a part-time escort and the Defendant solicited her by phone. No contact occurred at this time.
5. While in Rapid City in May of 2013 the Plaintiff and Defendant had a chance encounter at Walmart. They immediately struck up a relationship. Unbeknownst to either of them she was the escort that he had solicited. However, Plaintiff has ceased all escort work by the time they meet at Walmart. They set a meeting for a later date. After meeting the Plaintiff at Walmart

the Plaintiff suddenly realized that the Defendant and the person who had previously contacted her in February of 2013 for an escort appointment were the same person. She immediately told the Defendant who she was and they then began a romantic relationship.

6. The Defendant has no issues with her having been an escort, in fact he wholeheartedly encouraged it. He later provided her with a cell phone, business cards, posted her services on several different web sites, he would often drive her to appointments, and he enjoyed watching and listening to her while she was with clients. The Defendant also advised her as to how she should entertain the clients.

7. The relationship between the Plaintiff and Defendant became physically and verbally abusive almost immediately. In spite of the turmoil the Plaintiff loved the Defendant and wanted the relationship to work. The parties were married in May of 2014.

8. The Plaintiff pleaded to stop the escort business upon the parties' entering marriage. However, the Defendant realized the amount of money that could be made and demanded the Plaintiff continue. He became violent with the Plaintiff when she would beg to quit the escort business. He repeatedly would threaten to kill her or himself. He attempted suicide in January 2014. Over the course of their relationship there were numerous calls to 911 with reports of domestic violence. The Plaintiff lived in constant fear for her safety and the safety of her daughters.

9. The Defendant would continually tell the Plaintiff that in six months she could stop the escort business. He claimed that there were bills to be paid and she needed to work to pay them.

10. The Defendant was very aggressive sexually and would demand that the Plaintiff act as though the Defendant was her "daddy." She was told to call him "daddy" and act like a small child. The Defendant would often choke the Plaintiff during intercourse. The parties would have anal sex and after, the Defendant would demand that the Plaintiff "clean" the excrement off his penis with her mouth. The Plaintiff ended up with e coli, the suspected reason was ingesting feces.

11. As a result of the Defendant's extreme and outrageous conduct, intentionally and recklessly forcing the Plaintiff, his wife, to continue in prostitution against her wishes, the Defendant has caused the Plaintiff severe emotional distress. The Plaintiff is presently seen by two different mental health professionals. The Plaintiff has been diagnosed with PTSD as a result of the abuse she endured during her relationship with the Defendant. The Plaintiff suffers from horrible nightmares. The Plaintiff is on several medications to help her cope with daily living.

12. The Defendant through his course of action did commit the Tort of intentional infliction of emotional distress upon the Plaintiff, by his extreme and outrageous conduct, he acted intentionally and recklessly, causing the Plaintiff severe emotional distress, and as a result the Plaintiff suffered and is in fact suffering disabling emotional responses from the Defendant's behavior.

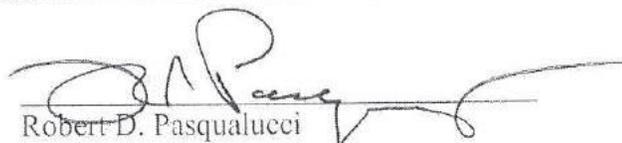
#### PRAYER

WHEREFORE, the Plaintiffs demand judgment against the Defendants for the following:

- a. Money judgment together with interest according to law for damages in an amount to be determined by the jury;
- b. Punitive Damages in the amount of \$1,000,000.00
- c. Any and all allowable reasonable attorney fees, costs, disbursements, and pre-judgment interest; and
- d. Any other further relief the Court deems just and proper.

#### PLAINTIFF DEMANDS TRIAL BY JURY

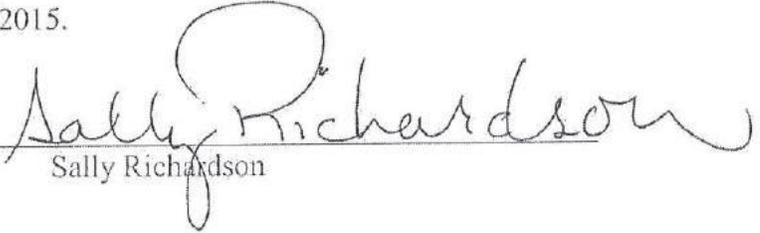
Dated this 1st day of September, 2015.

  
Robert D. Pasqualucci  
550 N 5<sup>th</sup> Street  
Rapid City, South Dakota 57701  
(605) 721-8821  
robert@rushmorelaw.com  
ATTORNEY FOR Sally Richardson

VERIFICATION

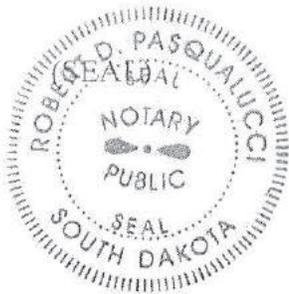
Sally Richardson, being first duly sworn upon oath, states that she is the Plaintiff named in the above action; and that she has read the within and foregoing Verified Complaint and knows the contents thereof, and that the same is true and correct to the best of her knowledge, information and belief.

Dated this 1st day of September, 2015.

  
Sally Richardson

Subscribed and sworn to before me this 1st day of September, 2015.

  
Notary Public - South Dakota  
My Commission Expires: 12-10-18





Defendant also advised me as to how I should entertain the clients. Telling me to “get in, give ‘em what they want, and get out with their money.”

5. Our relationship became physically and verbally abusive almost immediately. In spite of this turmoil I loved him and wanted the relationship to work.

6. I wanted to stop the escort business almost as soon as I ventured into it. I just wanted to be a girlfriend, then a wife and mother. However, the Defendant realized the amount of money that could be made and demanded that I continue to work. He became violent with me when I would beg him to let me stop. He repeatedly would threaten to kill me, my girls, or himself and in fact he attempted suicide in early 2014. Throughout our relationship there were numerous calls to 911 with reports of domestic violence. I lived in constant fear for my safety and the safety my daughters.

7. The Defendant would continually tell me that in six months I could stop the business. He claimed that there were bills to be paid and I needed to work to pay them. He would take me and pick me up from my appointments and make sure I gave him all the cash that I had earned. He would force me to go when I was sick.

8. The Defendant was very aggressive sexually and would demand that the I act as though I was his little girl and call him “daddy.” The Defendant would often choke me during intercourse. We would have anal sex and after, the Defendant would demand that I “clean” the excrement off his penis with my mouth. I ended up in the hospital in Bellevue, NE with severe bleeding and intestinal pain. I was diagnosed with e coli, the suspected reason was ingesting feces.

9. As a result of the Defendant’s extreme and outrageous conduct, intentionally and recklessly forcing me, his wife, to continue in prostitution against my wishes, he has caused me severe emotional distress. I am seen by two different counselors. I have been diagnosed with

PTSD. I suffer from horrible nightmares and have a very difficult time sleeping. In the event that I fall asleep I wake up with night terrors, I am screaming and walking in my sleep. I am on several medications to help me cope with daily living. I live in constant fear and anxiety.

DATED this 1st day of September, 2015.

By: Sally Richardson  
Sally Richardson

SUBSCRIBED TO and sworn before me on this 1st day of September, 2015



[Signature]  
Notary Public  
My commission Expires: 12-10-18



### BACKGROUND

Plaintiff, Sally Richardson, and Defendant, Michael Richardson, were married on May 13, 2014. The parties separated in September of 2014 and divorced on April 29, 2015. Plaintiff brings a cause of action against Defendant for intentional infliction of emotional distress. Plaintiff alleges that Defendant engaged in extreme and outrageous conduct by “intentionally and recklessly forcing the Plaintiff, his wife, to continue in prostitution against her wishes...” Plaintiff also alleges that as a result of Defendant’s conduct she has been diagnosed with PTSD, suffers horrible nightmares, and must utilize several medications to help her cope with daily living.

### ANALYSIS

The South Dakota Supreme Court has made clear that “the tort of intentional infliction of emotional distress ... [is] unavailable as a matter of public policy when it is predicated on conduct which leads to the dissolution of a marriage.” *Pickering v. Pickering*, 434 N.W.2d 758, 761 (S.D. 1989). This rule recognizes that in the context of countless failed marriages “[t]here are many wrongs which in themselves are flagrant...[however,] [t]o attempt to correct such wrongs or give relief from their effects ‘may do more damage than if the law leaves them alone.’” *Id.* at 762 (quoting *Richard P. v. Superior Court (Gerald B.)* 202 Cal. App3d 1089, 249 Cal. Rptr. 246 (1 Dist. 1988)). Thus, in order to avoid the duplicity of countless divorce actions stringing with them a procession of companion tort claims, public policy prohibits intentional infliction of emotion distress claims which stem from conduct which resulted in

the dissolution of the parties' marital relationship. *State Farm Fire & Cas. Co. v. Harbert*, 2007 S.D. 107, ¶ 14, 741 N.W.2d 228, 233.

Plaintiff argues that her Complaint should not be dismissed pursuant to the rule found in *Pickering*. Plaintiff argues that *Pickering* does not apply because the Court's decision "was dependent upon the facts presented to the Court." See Plaintiff's Brief at p1. Plaintiff further argues that a cause of action for intentional infliction of emotion distress can be recognized even if it arises from facts surrounding a divorce action. *Id.* (citing *Christians v. Christians*, 2001 SD 142 at ¶41, 637 N.W.2d at 385 (Konenkamp, J., concurring specially).

*Christians* stands for the proposition that South Dakota law permits a cause of action for intentional infliction of emotional distress based on conduct which is independent from the dissolution of the marriage, such as torts which have occurred after the filing of divorce. *Christians*, 2001 S.D. at ¶20-25. Consequently, South Dakota law also permits a former spouse to sue their estranged spouse for post-divorce conduct. *Henry I*, 534 N.W.2d 844, 856-857 (1995). Nonetheless, South Dakota law does not permit a cause of action for intentional infliction of emotional distress based upon conduct which led to the dissolution of the marriage. *Pickering*, 434 N.W.2d at 761.<sup>1,2</sup> This rule exists to

<sup>1</sup> *Christians* and *Henry I* are entirely consistent with the *Pickering* rule by virtue of the fact that the plaintiffs in both cases alleged torts which were independent of their grounds for divorce. This is logically evidenced by the fact that both plaintiffs had already filed for a divorce before the tort which led to their cause of action was committed. *Christians*, 2001 S.D. at ¶ 24 ("[t]o recover the claimant must meet the necessary elements separate from her grounds for divorce. Connie's claim stems from Michael's conduct that occurred after filing for divorce"); *Henry*, 534 N.W.2d at ("[h]ere, we are considering the parties' settlement agreement along with post-divorce conduct. *Pickering*, therefore, is not controlling.").

prevent a “repackaged cause of action that already has been specifically pleaded.” *Harbert*, 2007 S.D. at ¶14.

In applying the above rules to present case, the Court considers that Plaintiff makes no allegations of tortious conduct occurring before the parties’ marriage, after the parties’ marriage, or even after the filing of divorce. Rather, Plaintiff’s allegations of tortious conduct appear to stem entirely from “Defendant’s extreme and outrageous conduct, intentionally and recklessly forcing the Plaintiff, *his wife*, to continue in prostitution against her wishes...” See Plaintiff’s Complaint Page 3 (emphasis added).<sup>3</sup>

Plaintiff herself has stated, “I felt we need[ed] to get a divorce because we were never going to be in a normal relationship...yes Michael filed for divorce but it was I who asked him and begged him to file for divorce because there was nothing normal about our relationship and I wanted out.” See Email from Plaintiff’s Attorney Pasqualucci Dated January 13, 2016; See *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986) (holding, “Ordinarily, only the facts alleged in the complaint are considered in ruling on a 12(b)(5) motion. However, materials attached to the complaint as exhibits may be considered in construing the sufficiency of the complaint.”); See also *Montgomery v. Indep.*

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<sup>2</sup> The Court does not contend that a spouse cannot sue a spouse for tortious conduct which is truly independent of the grounds which led to the dissolution of the marriage. *Scotvold v. Scotvold*, 68 S.D. 53, 298 N.W. 266, 267 (1941) (Court allowing one spouse to sue other spouse for personal injury claim arising from automobile accident).

<sup>3</sup> The conduct alleged by Plaintiff, if true, would likely suffice for a claim of intentional infliction of emotion distress. Nonetheless, *Pickering’s* public policy prohibits causes of action predicated on conduct which leads to the dissolution of a marriage, even if such conduct is severe or might otherwise result in “untold humiliation, embarrassment, and emotional scarring.” *Pickering*, 434 N.W.2d at 761.

*Sch. Dist. No.*, 709, 109 F. Supp. 2d 1081, 1087 (D. Minn. 2000). Plaintiff's counsel then explains that "the reasons behind the divorce were not *solely* the forced prostitution." See Email from Plaintiff's Attorney Pasqualucci Dated January 13, 2016 (emphasis added).<sup>4</sup> Hence based upon these admissions by Plaintiff, it is undeniable that Plaintiff's cause of action stresses conduct which already formed a basis for the dissolution of the parties' marriage.

Based upon Plaintiff's admissions, the Court believes that Plaintiff's tort claims allege a "repackaged cause of action that already has been specifically pleaded." *Harbert*, 2007 S.D. at ¶14. Here, the Court considers that the parties' divorce was granted upon the grounds of irreconcilable differences. The Court also recognizes, given the brevity of the marriage and the egregiousness of the facts alleged, that Defendant's conduct, if true, logically led to the parties' "irreconcilable differences." As such, Plaintiff cannot re-litigate those facts which led to the dissolution of her marriage simply because such facts were not the sole reason for her ultimate divorce. See Email from Plaintiff's Attorney Pasqualucci Dated January 13, 2016. These same considerations were certainly applied by the Court in *Pickering* when the Court connected that the defendant's adultery and deceit led to the dissolution of the parties' marriage, despite no record that the plaintiff's divorce was granted upon the specific grounds of the defendant's adultery or extreme cruelty during the marriage. *Pickering*, 434 N.W.2d at 761. Hence, the Court considers the present case to

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<sup>4</sup> Ordinarily only the facts alleged in the complaint are considered in ruling on a 12(b)(5) ruling, nonetheless, Plaintiff and her counsel have offered statements to supplement Plaintiff's Complaint and such statements operate as admissions of fact by Plaintiff. See *Morton*, 793 F.2d at 187.

be exceedingly similar to *Pickering* and finds that Plaintiff's claim should be dismissed pursuant to SDCL 15-6-12(b)(5).

CONCLUSION

For the reasons outlined above, the Court hereby **GRANTS** Defendant's Motion and **ORDERS** the dismissal of Plaintiff's Complaint pursuant to SDCL 15-6-12(b)(5). In addition, the Court hereby **DENIES** Defendant's Motion to Strike.

Dated this 19 day of January, 2016.

BY THE COURT.

  
The Honorable Robert Gusinsky  
Circuit Court Judge  
Seventh Judicial Circuit

ATTEST:

RANAE TRUMAN,  
CLERK OF COURTS

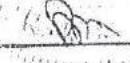
By:   
Deputy



State of South Dakota } Seventh Judicial  
County of Pennington } Circuit Court  
I hereby certify that the foregoing instrument  
is a true and correct copy of the original as  
the same appears on record in my office this

JAN 19 2016

RANAE L. TRUMAN  
Clerk of Courts, Pennington County

By:  Deputy

Pennington County, SD  
FILED  
IN CIRCUIT COURT

JAN 19 2016

Ranae Truman, Clerk of Courts

By:  Deputy

**IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA**

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**APPEAL No. 27754 / NOTICE OF REVIEW No. 27775**

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**SALLY RICHARDSON,**

**Plaintiff and Appellant,**

**v.**

**MICHAEL RICHARDSON,**

**Defendant and Appellee (with Notice of Review)**

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

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**HON. ROBERT GUSINSKY**

---

**APPELLEE'S BRIEF/NOTICE OF REVIEW BRIEF**

---

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NOTICE OF REVIEW WAS FILED FEBRUARY 29, 2016**

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iii

PRELIMINARY STATEMENT ..... 1

JURISDICTIONAL STATEMENT ..... 2

STANDARD OF REVIEW ..... 2

STATEMENT OF LEGAL ISSUES ..... 3

STATEMENT OF THE CASE..... 4

STATEMENT OF THE FACTS ..... 7

ARGUMENT ..... 9

i) Issues Omitted by Sally forstall relief ..... 9

ii) "Is Rule 12(b)(5) relief nullified?" ..... 9

iii) "Does the Divorce Stipulation Preserve During-Marriage Tort Claims?" ..... 10

v) "Can consent make 'valid' an 'invalid' cause of action?" ..... 11

iv) "Is the alleged tortious misconduct tied to the marriage and its dissolution?" ..... 12

vi) "Was there a genuine issue of material fact prohibiting dismissal?" ..... 14

1. South Dakota law bars monetary damage civil actions between former spouses for alleged tortious actions centered upon purported marital misconduct that led to the dissolution of the marriage. ..... 14

2. Should South Dakota reverse established public policy and decisional precedent about such tort actions, and open the door to such lawsuits? ..... 21

NOTICE OF REVIEW [Appeal No. 27775]

3. If the Court holds that Rule 12(b)(5) relief was technically not available due to the circuit court's consideration of facts beyond those within the four corners of Sally's Verified Complaint, then Michael should still prevail under Rule 56(b),(c) summary judgment......25

REQUEST FOR ORAL ARGUMENT .....28

CONCLUSION.....28

APPENDIX.....30

**TABLE OF AUTHORITIES**

<b><u>South Dakota Supreme Court Cases</u></b>	<b><u>Page</u></b>
<i>Christians v. Christians</i> , 2001 SD 142, 637 N.W.2d 377. . . . .	5, 11, 15, 18, 20
<i>Cutler-Christians v. Christians</i> , 2001 SD 104, 633 N.W.2d 176 . . . . .	11
<i>Davis v. Wharf Resources</i> , 2015 SD 61, B N.W.2d B . . . . .	2, 26
<i>Flandreau Pub. Sch. Dist. #50-3 v. G.A. Johnson Const. Co.</i> , 2005 SD 87, 701 N.W.2d 430 . . . . .	4, 26
<i>Flugge v. Flugge</i> , 2004 SD 76, 681 N.W.2d 837 . . . . .	20, 23
<i>Gades v. Meyer Modernizing Co.</i> , 2015 SD 42, 865 N.W.2d 155 . . . . .	3
<i>Grant County Concerned Citizens v. Grant County. Bd. of Adjustment</i> , 2015 SD 54, 866 N.W.2d 149 . . . . .	11
<i>Helmbolt v. LeMars Mutual Insurance Co., Inc.</i> , 404 N.W.2d 55 (S.D. 1987) . . . . .	12
<i>Henry v. Henry</i> , 95 SDO 389, 534 N.W.2d 844 (1995) (Henry I) . . . . .	5, 12, 15, 18, 19, 20, 21, 23
<i>Henry v. Henry</i> , 2000 SD 4, 604 N.W.2d 285 (Henry II) . . . . .	4, 12, 15, 18, 19, 21, 23
<i>Hunt v. Hunt</i> , 309 N.W.2d 818 (S.D. 1981) . . . . .	24
<i>In re Certification of Questions of Law (Knowles)</i> , 1996 SD 10, 544 N.W.2d 183 . . . . .	24
<i>In re Murphy</i> , 2013 SD 14, 827 N.W.2d 369 . . . . .	11
<i>In re Wallbaum Living Trust</i> , 2012 SD 18, 813 N.W.2d 111 . . . . .	9
<i>O’Neill v. O’Neill</i> , 2016 SD 15, -- N.W.2d -- . . . . .	11
<i>Papke v. Harbert</i> , 2007 SD 87, 738 N.W.2d 510 . . . . .	25
<i>Pennington County v. State ex rel. Unified Judicial System</i> , 2002 SD 31, 641 N.W.2d 127 . . . . .	11
<i>Peters v. Great W. Bank, Inc.</i> , 2015 SD 4, 859 N.W.2d 618 . . . . .	3

<i>Pickering v. Pickering</i> , 434 N.W.2d 758 (S.D. 1989) .....	4, 5, 12, 15, 17, 18, 19, 21, 22, 23
<i>Riley v. Young</i> , 2016 SD 39 (S.D. Slip Op., April 27, 2016).....	5, 26
<i>Sanford v. Sanford</i> , 2005 SD 34, 694 N.W.2d 283 .....	23, 24
<i>Scotvold v. Scotvold</i> , 68 S.D. 53, 298 N.W. 266 (1941) .....	14, 20
<i>Seymour v. W. Dakota Vocational Technical Inst.</i> , 419 N.W.2d 206 (S.D. 1988).....	2, 27
<i>Siefkes v. Clark Title Co.</i> , 88 S.D. 81, 215 N.W.2d 648 (1974) .....	12
<i>Sisney v. Best, Inc.</i> , 2008 SD 70, 754 N.W.2d 804.....	2, 3
<i>Spenner v. City of Sioux Falls</i> , 1998 SD 56, 580 N.W.2d 606 .....	9
<i>State v. Blackburn</i> , 2009 SD 37, 766 N.W.2d 177 .....	2, 25
<i>State v. Pellegrino</i> , 1998 SD 39, 577 N.W.2d 590 .....	9
<i>State Farm Fire &amp; Casualty Co. v. Harbert</i> , 2007 SD 107, 741 N.W.2d 228 .....	4, 5, 12, 15, 18, 19, 22, 23
<i>Steele v. Bonner</i> , 2010 SD 37, 782 N.W.2d 379 .....	9
<i>Tjeerdsma v. Global Steel Bldgs. Inc.</i> , 466 N.W.2d 643 (S.D. 1991) .....	9
<i>Tibke v. McDougall</i> , 479 N.W.2d 898 (S.D. 1992) .....	4, 26
<i>Unruh Chiropractic Clinic v. DeSmet Insurance Co. of South Dakota</i> , 2010 SD 36, 782 N.W.2d 367 .....	12, 24, 25
<i>Veeder v. Kennedy</i> , 1999 SD 23, 589 N.W.2d 610.....	23, 24
<i>Weger v. Pennington County</i> , 534 N.W.2d 854 (S.D. 1995) .....	9
<i>Wells Fargo Bank v. Fonder</i> , 2015 SD 66, B N.W.2d B .....	2
<i>Weston v. Jones</i> , 1999 SD 160, 603 N.W.2d 706 .....	11
<i>Wheeler v. Cinna Bakers, LLC</i> , 2016 SD 33, B N.W.2d B (S.D. Slip Op., April 13, 2016).....	3

**Other Cases**

*Epps v. Stewart Info. Serv. Corp.*, 327 F.3d 642 (8<sup>th</sup> Cir. 2003).....11

*Feltmeier v. Feltmeier*, 798 N.E.2d 75 (Ill. 2003) .....23

*Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp.2d 1081 (D. Min. 2000) .....25

*Morton v. Becker*, 793 F.2d 185 (8th Cir. 1986).....4, 25, 26

*Richard P. v. Superior Court (Gerald B.)*, 202 Cal. App.3d 1089, 249 Cal. Rptr. 246  
(1988).....16, 17, 18

*Stephen K. v. Roni L.*, 105 Cal. App.3d 640, 164 Cal. Rptr. 618 (1980).....16

**Statutes**

SDCL § 1-1-23.....24

SDCL § 1-1-24.....24

SDCL § 15-6-12(b)(5) .....1, 2, 4, 9, 10, 14, 20, 25, 26, 27, 28

SDCL § 15-6-56(b),(c).....1, 2, 4, 5, 14, 25, 26, 27, 28

SDCL § 15-26A-22.....2

SDCL § 15-26A-60(6) .....9, 11

SDCL § 15-26A-62.....9

SDCL § 20-9-7.....24

SDCL § 25-4-4.....21

SDCL § 53-9-8.....12

## PRELIMINARY STATEMENT

The motions hearing transcript is cited as “HTR” with the page number (“p.”). The settled record (Alphabetical Index) is “SR” followed by the Index number, and the page number, where a specific page reference is needed. The circuit court’s Order of Dismissal is its SR number. The parties are “Sally” for Plaintiff /Appellant, and “Michael” for Defendant/Appellee. Citation to Sally’s Appellant’s Brief is “AB” followed by the page number.

Sally is appealing from a final Order [SR 117] dismissing her Complaint [SR 2]. Michael had moved for dismissal [SR 11] in lieu of filing an Answer, seeking either dismissal under SDCL § 15-6-12(b)(5) “failure to state a claim upon which relief may be granted,” or in the alternative, for summary judgment under SDCL § 15-6-56(b),(c). The circuit court granted the Rule 12(b)(5) motion, and dismissed the Complaint solely upon that basis. Because dismissal was ordered under Rule 12(b)(5), the circuit court did not address Rule 56(b),(c) summary judgment relief. Promptly thereafter, Michael inquired of the court whether the Order of Dismissal might be amended to add dismissal under Rule 56(b),(c) so as to avoid the potential of an appellate ruling remanding the case back to the circuit court to consider also applying Rule 56(b),(c). The circuit court declined to do so [email from circuit court of January 20, 2016, stating: “The Court’s previous Order sets forth the Court’s position and as such it will stand.” *Id.*].

Michael’s Notice of Review addresses the alternate Rule 56(b),(c) relief issue. It was filed simply to vest this Court with clear appellate jurisdiction -- if this Court were to hold that the grant of Rule 12(b)(5) relief instead ought to have been made under Rule 56(b),(c). Under Michael’s Notice of Review, this Court may hold that dismissal was

proper under Rule 12(b)(5) or Rule 56(b),(c), together or separately. Michael is briefing the issue because ‘failure to comply with the notice of review requirements results in a waiver.’ *State v. Blackburn*, 2009 SD 37, ¶ 8, 766 N.W.2d 177, 181 (citations omitted). However, as this Court stated in *Davis v. Wharf Resources*, 2015 SD 61, ¶ 22, “[W]e will not overturn a right result even though it is based on a wrong reason.” (Quoting from *Seymour v. W. Dakota Vocational Technical Inst.*, 419 N.W.2d 206, 209 (S.D. 1988).)

Technically, Michael is not appealing from the circuit court having declined his emailed suggestion to amend the dismissal order to add summary judgment under Rule 56(b),(c). Rather, Michael’s Notice of Review is centered upon the circuit court’s decision to not include within its Order of Dismissal a Rule 56(b),(c) grant of summary judgment, either along with Rule 12(b)(5) as a basis of dismissal, or as its sole basis.

### **JURISDICTIONAL STATEMENT**

Michael’s Notice of Review was timely asserted (filed Monday, February 29, 2016) under SDCL § 15-26A-22 from a final order, following Sally’s Notice of Appeal [SR 136] therefrom filed on February 8, 2016.

### **STANDARD OF REVIEW**

Sally’s appeal is from the grant of dismissal of the Complaint upon SDCL § 15-6-12(b)(5). In *Wells Fargo Bank v. Fonder*, 2015 SD 66, this Court stated that the Standard of Review for such a dismissal is as follows:

A motion to dismiss for failure to state a claim pursuant to SDCL § 15-6-12(b)(5) tests the legal sufficiency of the pleading. *Sisney v. Best Inc.*, 2008 SD 70, ¶ 8, 754 N.W.2d 804, 809. We “accept the [pleading’s] material allegations as true and construe them in a light most favorable to the pleader to determine whether the allegations allow relief.”

*Id.* “Because that determination tests the legal sufficiency of the pleading, we review the matter de novo.” *Id.*

*Fonder*, at ¶ 6.

Regarding the Notice of Review, which is from the (implicit) denial of, and/or decision to not grant Michael’s summary judgment motion [SR 11], the Standard of Review is as follows:

“In reviewing a grant or a denial of summary judgment under SDCL § 15-6-56(c), we must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law.” *Gades v. Meyer Modernizing Co.*, 2015 SD 42, ¶ 7, 865 N.W.2d 155, 157-158 (quoting *Peters v. Great W. Bank, Inc.*, 2015 SD 4, ¶ 5, 859 N.W.2d 618, 621). “We view the evidence ‘most favorably to the nonmoving party and resolve reasonable doubts against the moving party.’” *Id.* ¶ 7, 865 N.W.2d at 158 (quoting *Peters*, 2015 SD 4, ¶ 5, 859 N.W.2d at 621).

“Statutory interpretation is a question of law reviewed de novo.” *Wheeler v. Cinna Bakers LLC*, 2015 SD 25, ¶ 4, 864 N.W.2d 17, 19.

*Pitt-Hart v. Sanford USD Medical Center*, 2016 SD 33, ¶¶ 6-7 (S.D. Slip Op., April 13, 2016.)

### **STATEMENT OF LEGAL ISSUES**

#### **Sally’s Notice of Appeal [Appeal No. 27754]**

1. Does South Dakota law bar monetary damage civil actions between former spouses for alleged tortious acts centered upon purported marital misconduct that led to the dissolution of the marriage?

The circuit court correctly ruled that precedential law and public policy bar such actions as a matter of law, and thus granted dismissal under Rule 12(b)(5) of Sally’s Verified Complaint for having failed to state a claim upon which relief may be granted.

SDCL § 15-6-12(b)(5)

*Pickering v. Pickering*, 434 N.W.2d 758 (S.D. 1989)  
*State Farm Fire & Cas. Co. v. Harbert*, 2007 SD 107, 741 N.W.2d 228  
*Henry v. Henry*, 2000 SD 4, 604 N.W.2d 285 (*Henry II*)

2. Should South Dakota reverse established public policy and decisional precedent about such tort actions, and open the door to such lawsuits?

The circuit court declined to do so.

*Pickering v. Pickering*, 434 N.W.2d 758 (S.D. 1989)  
*State Farm Fire & Cas. Co. v. Harbert*, 2007 SD 107, 741 N.W.2d 228  
*Henry v. Henry*, 2000 SD 4, 604 N.W.2d 285 (*Henry II*)

**Michael's Notice of Review [Appeal No. 27775]**

3. Should the Rule 12(b)(5) Dismissal Order have included as well, or as a substitute, a Rule 56 (b),(c) summary judgment grant for Michael?

The circuit court declined to do so, holding that dismissal was the correct result, upon the ground of Rule 12(b)(5) failure to state a claim upon which may be granted, and that it was unnecessary to invoke Rule 56 summary judgment.

SDCL § 15-6-56(b),(c)  
*Morton v. Becker*, 793 F.2d 185 (8th Cir. 1986)  
*Flandreau Pub. Sch. Dist. #50-3 v. G.A. Johnson Const. Co.*, 2005 SD 87,  
701 N.W.2d 430  
*Tibke v. McDougall*, 479 N.W.2d 898 (S.D. 1992)

**STATEMENT OF THE CASE**

Virtually none of the foundational facts were in dispute. At the circuit court level [Hon. Robert Gusinsky, Seventh Judicial Circuit Court of Pennington County], of those few facts that were not agreed upon, or were not obviously undeniable, none were of the sort that negated dismissal being nevertheless appropriate. The few disputed facts that were material to the issues—even when taken most favorably to Sally—still supported dismissal in favor of Michael.

Michael's "bottom line" of this appeal is this: As a matter of public policy and clearly-established precedent, South Dakota law does not--and should not--permit a spouse or former spouse to sue his/her spouse or former spouse for alleged tortious actions that occurred during the marriage, leading to the dissolution of the marriage. In other words, *stare decisis* should prevail unless and until the Legislature says otherwise. This Court's pronouncement of public policy, and its precedents of *Pickering v. Pickering*, 434 N.W.2d 758 (S.D. 1989); *State Farm Fire & Casualty Co. v. Harbert*, 2007 SD 107, 741 N.W.2d 228; *Christians v. Christians*, 2001 SD 142, 637 N.W.2d 377; *Henry v. Henry*, 2000 SD 4, 604 N.W.2d 285 (*Henry II*); *Henry v. Henry*, 95 SDO 389, 534 N.W.2d 844 (1995) (*Henry I*) should stand, irrespective of any contrary situation that may exist in some other state.

On September 22, 2015, several months after their divorce had been finalized, Sally commenced this civil action for monetary damages via a Summons [SR 1], Verified Complaint [SR 2], and a supporting Affidavit [SR 6]. On October 2, 2015, Michael filed a Motion for Dismissal of Complaint for Failing to State a Claim Upon Which Relief May Be Granted, and Alternatively, Motion for Summary Judgment [SR 11]. Along with the Motion, Michael filed an Affidavit with a Rule 56(c) Statement of Undisputed Facts [SR 24].

On November 23, 2015, Sally countered with Plaintiff's Response to Defendant's Statement of Undisputed Material Facts [SR 51], and Plaintiff's Response to Defendant's Statement of Undisputed Material Facts [SR 55]. On November 25, 2015, Michael responded with three filings: Defendant's Reply Brief in Support of Summary Judgment Motion [SR 59]; Defendant's Reply to Plaintiff's Qualified Agreement or Failure to Agree

to Defendant's "Statement of Undisputed Fact" [SR 87]; and Defendant's Designation of "Statements of Undisputed Fact" With Which Both Parties Agree [SR 98]. The day after the hearing (which was delayed until January [SR 125]), while the circuit court was considering its ruling Sally's counsel sent the court an email containing substantive argument [SR 116]. Against it, Michael submitted Defendant's Objection to Plaintiff's "Non-Record" Supplementation of Her Resistance to Motion for Dismissal or Summary Judgment [SR 109]. On January 13, 2016 Sally's attorney sent a responsive email [SR 116].

On January 19, 2016, the circuit court filed its Order Granting Defendant's Motion for Dismissal for Failing to State a Claim Upon Which Relief May Be Granted [SR 117]. Notice of Entry of the Order was dated January 20, 2016 [SR 123]. Because the circuit court omitted any reference in the Order to Michael's Alternative Motion for Summary Judgment, and due to a concern that the Order may be construed as being based on a consideration of significant facts outside of the Complaint, Michael's counsel emailed the circuit court, suggesting that the dismissal order be amended to include a grant of summary judgment. On January 20, 2016, the circuit court declined to do so [email from court to counsel, itemized within Appellee's Designation of Record; and copy attached to Notice of Review dated February 29, 2016].

On February 8, 2016 Sally filed and served her Notice of Appeal [SR 136]. Michael timely thereafter filed and served his Notice of Review.

### **STATEMENT OF FACTS**

Because Michael is the Appellee, he is not required to set forth his own Statement of Facts. However, reading Sally's Statement of Facts it behooves Michael to include a

separate Statement of Facts. Michael states that he doesn't agree that all of the Facts stated below are necessarily true, but he is setting them forth in the light most favorable to Sally, as per summary judgment rules.

Sally admits that she first met Michael in February 2013, when she was advertising her services as a prostitute (an "escort") in an online ad that Michael answered [AB, p. 3]. They met again in May 2013 at Wal-Mart, and started dating [*Id.*]. Sally says she agreed to allow Michael to become her "escort" manager [*Id.*].

Michael and Sally were married on May, 13, 2014 [SR 98, ¶ 4; SR 117, p. 2; AB, p. 3]. They formally separated four months later, in September, 2014 [SR 28, ¶ 5; SR 98 ¶ 5; SR 117, p. 2]. The divorce Summons and Verified Complaint were served on Sally on September 13, 2014 [SR 28, ¶ 6; SR 98, ¶ 6]. Although Michael had commenced the divorce action, the circuit noted in its decision [SR 117, p. 4] that: "Plaintiff [Sally] herself has stated, 'I felt we need[ed] to get a divorce because we were never going to be in a normal relationship . . . Yes, Michael filed for divorce but it was I who asked him and begged him to file for divorce because there was nothing normal about our relationship and I wanted out.'" [See SR 125, HTR 9; SR 116.] Sally and Michael were divorced on April 29, 2015 by a Decree which incorporated therein a Stipulation which contained a division of assets and debts, and a general Release of Claims [SR 117].

Sally's civil complaint alleged intentional infliction of emotional distress against Michael, asserting that he "engaged in extreme and outrageous conduct by 'intentionally and recklessly forcing Plaintiff [Sally], his wife, to continue in prostitution against her wishes . . .'" [SR 117, p. 2.]

It is not necessary to explicitly describe the alleged acts which Sally urged as the underlying factual basis for her civil suit. The circuit court's dismissal order, in a footnote, says of them: "The conduct alleged by [Sally], if true, would likely suffice for a claim of intentional infliction of emotional distress." [SR 117, p. 4 n.3.] Nevertheless, dismissal was granted because in Sally's Verified Complaint she was alleging that these alleged acts occurred during the marriage. The circuit court correctly stated that Sally had made "no allegations of tortious conduct occurring before the parties' marriage, after the parties' marriage, or even after the filing of divorce." [SR 117, p. 4.] The circuit court found as undisputed, "Rather, [Sally's] allegations of tortious conduct appear to stem entirely from '[Michael's] extreme and outrageous conduct, intentionally and recklessly forcing the Plaintiff, *his wife*, to continue in prostitution against her wishes ...' See Plaintiff's Complaint Page 3 (emphasis added)." [SR 117, p. 4; emphasis in Court's Order.]

### **ARGUMENT**

i) ***Issues Omitted by Sally for stall relief***

It is important to recognize the contrast between the issues Sally raised in the circuit court and the issues she raised in this Appeal. Her Appellant's Brief does not contain every argument she asserted below. Thus, only those issues she has included within her Appellant's Brief are now before this Court. "Failure to brief [a] matter . . . constitutes a waiver of that issue." *Weger v. Pennington County*, 534 N.W.2d 854, 859 (S.D. 1995) (citing *Tjeerdsma v. Global Steel Bldgs. Inc.*, 466 N.W.2d 643, 644 n.2 (S.D. 1991))." *Spenner v. City of Sioux Falls*, 1998 SD 56, ¶ 30, 580 N.W.2d 606, 613. Sally is prohibited from raising any issue not argued in her Appellant's Brief. Sally is

disallowed from raising an issue for the first time in her Reply Brief, per the strict mandate of SDCL § 15-26A-62: “The reply brief must be confined to new matter raised in the brief of the appellee ...” Also, “[F]ailure to cite authority is fatal.” *Steele v. Bonner*, 2010 SD 37, ¶ 35, 782 N.W.2d 379, 386; *In re Wallbaum Living Trust*, 2012 SD 18, ¶ 38, 813 N.W.2d 111, 120 [(“The failure to cite to supporting authority is a violation of SDCL § 15-26A-60(6) and the issue is thereby deemed waived.”) (quoting *State v. Pellegrino*, 1998 SD 39, ¶ 22, 577 N.W.2d 590, 599)).]

ii) **“Is Rule 12 (b)(5) relief nullified?”**

It was not raised in Appellant’s Brief whether Rule 12(b)(5) was nullified as a proper basis upon which dismissal was granted. Indeed, its omission renders as moot Michael’s entire Notice of Review, as Michael only filed the Notice of Review in case Sally argued that Rule 12(b)(5) was inapplicable, either outright or because the circuit court considered matter not contained within the four corners of the Verified Complaint. Michael is required by procedural rule to brief his Notice of Review issue, so he has done so below. However, by doing so he is not waiving his objection to this Court entertaining the foundational issue of whether Rule 12(b)(5) was rendered inapplicable. It is Sally’s obligation--not Michael’s --to brief any and all perceived issues of alleged procedural and/or substantive error committed at the circuit court level. Failure to do so constitutes waiver of the deficiency. Here, as to Rule 12(b)(5), Sally has not included any Rule 12(b)(5) argument in her Appellant’s Brief, and thus she is prohibited from doing so afresh in her Reply Brief. As to the Reply Brief rule that permits her to respond to Michael’s Notice of Review issue, Michael’s objection is that he only included that Notice of Review in case she did include that issue within her Appellant’s

Brief. Michael's inclusion of discussion of the issue below is strictly in keeping with his requirement to brief the Notice of Review issue.

iii) **“Does the Divorce Stipulation Preserve Marital Tort Claims?”**

Another issue not include in the Appellant's Brief, and thus must be deemed to have abandoned, is that certain language contained within the divorce Stipulation and Property Settlement Agreement at ¶32 “preserved” her right, and/or gave her the right, to sue Michael for monetary damages for alleged tortious misconduct purportedly occurring during the marriage. Without waiving Michael's objection to any consideration of this issue, but rather only including the following for clarity of context, perhaps Sally has waived this issue because she has realized the law is so squarely against her on it. “The party asserting personal jurisdiction has the burden of establishing a prima facie case, and the burden does not shift to the party challenging jurisdiction.” *Epps v. Stewart Info. Serv. Corp.*, 327 F.3d 642, 647 (8<sup>th</sup> Cir. 2003). By using “consent” as a supposed foundational basis in an attempt to force upon the circuit court jurisdiction over an asserted cause of action, private parties may not unilaterally create judicial recognition of a cause of action that is not otherwise recognized as valid. See, e.g., *In re Murphy*, 2013 SD 14, ¶9, 827 N.W.2d 369, 371-372 [(“ . . . consent cannot confer jurisdiction). See also *Pennington County v. State ex rel. Unified Judicial System*, 2002 SD 31, ¶17, 641 N.W.2d 127, 133 (“Jurisdiction cannot be conferred by consent, agreement, stipulation or waiver.” (Citing *Weston v. Jones*, 1999 SD 160, ¶33, 603 N.W.2d 706, 713 (Sabers, J., dissenting))).]” In *O'Neill v. O'Neill*, 2016 SD 15, -- N.W.2d --, this Court stated:

[W]e are not persuaded by Rick’s assertion that a circuit court’s jurisdiction may be preserved directly by the agreement of the parties. Rick offers no authority in support of this argument; consequently the argument is waived. See SDCL § 15-26A-60(6); *Grant Cty. Concerned Citizens v. Grant Cty. Bd. of Adjustment*, 2015 SD 54, ¶24, 866 N.W.2d 149, 158. Contrary to Rick’s argument, parties “cannot confer subject matter jurisdiction by agreement, consent, or waiver.” *Cutler-Christians v. Christians*, 2001 SD 104, ¶9, n.2, 633 N.W.2d 176, 178 n.2.

*O’Neill*, at ¶31.

iv) **“Can consent make ‘valid’ an ‘invalid’ cause of action?”**

Sally=s contention that her cause of action should be “valid” because of public policy is unfounded, because the Supreme Court of South Dakota has already barred her cause of action as being “invalid”. See, e.g., *State Farm Fire & Casualty Co. v. Harbert*, 2007 SD 107, 741 N.W.2d 228; *Christians v. Christians*, 2001 SD 142, 637 N.W.2d 377; *Henry v. Henry*, 2000 SD 4, 604 N.W.2d 285 (*Henry II*); *Henry v. Henry*, 95 SDO 389, 534 N.W.2d 844 (1995) (*Henry I*); *Pickering v. Pickering*, 434 N.W.2d 758 (S.D. 1989). Simply put, the applicable law and public policy cannot be overcome, superceded, or negated by contract language. Examples are SDCL § 53-9-8 (“Any contract restraining exercise of a lawful profession, trade, or business is void to that extent, . . .”); and case law such as *Unruh Chiropractic Clinic v. DeSmet Insurance Co. of South Dakota*, 2010 SD 36, ¶ 16, 782 N.W.2d 367, 372 (“Although public policy strongly favors freedom to contract, ‘[it] is not an absolute right or superior to the general welfare of the public.’ *Siefkes v. Clark Title Co.*, 88 S.D. 81, 88, 215 N.W.2d 648, 651-652 (1974).”). See also, e.g., *Helmbolt v. LeMars Mutual Insurance Co., Inc.*, 404 N.W.2d 55 (S.D. 1987) (Void against public policy are provisions in an automobile liability

policy contract requiring that a prerequisite of the insured recovering UM/UIM be a judgment entered against the tortfeasor).

v) **“Is the alleged tortious misconduct tied to the marriage and its dissolution?”**

Next, it is also highly important to emphasize that Sally is in agreement that within this Appeal she is not contending that her Verified Complaint points to any alleged pre-marital or post-divorce tortious conduct by Michael, but rather applies to a during-the-marriage time period. Sally readily concedes that the alleged acts of misconduct to which her Verified Complaint is directed were alleged happenings within the marital time, and she also readily concedes that those alleged acts of misconduct were intertwined with the dissolution of the marriage. In this regard she states:

- (a) “This is a case of extreme, outrageous and shocking behavior on the part of the [*sic*] Sally’s then husband, Michael Richardson.” [AB, p. 6.]
- (b) “The Court went on to question, ‘Are you saying that that did not lead to the breakup of the marriage?’ TR p. 8 lines 22-24. ‘Are you saying that these outrageous actions had nothing to do with the termination of the marriage? Did your client want to continue in the marriage despite these claims that she is now making?’ TR p. 9 lines 3-7. ‘I will say yes, she did, because she repeatedly told me that all she ever wanted was for him to love her, to not have to do these things, and that basically if he would make her -- stop making her so [*sic--do*] these things, they could be happy together.’ TR p. 9 11-15.@ [AB, p. 7.]
- (c) “If Sally had not been married to Michael at the time he forced her to continue in human trafficking Sally could have maintained an action for Intentional Infliction of Emotional Distress.” [AB, p. 15.]
- (d) “Many states now recognize claims for intentional infliction of emotional distress within the context of

marriage. It is time South Dakota join[s] those states.”  
[AB, p. 15.]

The above firmly establishes that Sally agrees her Verified Complaint was restricted to alleged misconduct within the time of the parties’ marriage, and that the marriage was dissolved at least in part due to such alleged misconduct. Thus, she concedes that the circuit court was not overlooking, or misapprehending, the language of the Verified Complaint.

vi) **“Was there a genuine issue of material fact prohibiting dismissal?”**

Lastly, within her Appellant’s Brief Sally does not assert that Michael wasn’t entitled to Rule 12(b)(5) relief--or, for that matter, Rule 56(b),(c) relief--because there existed a genuine dispute of material fact. Rather, she only argues that the public policy of this State ought to be changed concerning during-marriage intentional torts that lead to dissolution of the marriage (as apart from those torts that do not, such as negligence in an auto accident; *see, e.g., Scotvold v. Scotvold*, 68 S.D. 53, 298 N.W. 266, 267 (1941) [SR 117, p. 4, n.2]).

1. **South Dakota law bars monetary damage civil actions between former spouses for alleged tortious actions centered upon purported marital misconduct that led to the dissolution of the marriage.**

It is undisputed that as a matter of law and public policy, South Dakota law clearly bars monetary damage civil claims between spouses or former spouses for alleged tortious actions centered upon alleged marital misconduct that led to the dissolution of the marriage. Thus, the circuit court correctly ruled that precedential law and public policy bar such actions as a matter of law. Because there is no genuine factual dispute that Sally’s Complaint is solely directed to Michael’s alleged tortious marital misconduct, the

circuit court thus properly granted dismissal. Whether that dismissal had been appropriate under Rule 12(b)(5) or Rule 56(b),(c), dismissal was the correct result.

Pages 2 through 6 of the circuit court's Dismissal Order contain a cogent and succinct analysis of this Court's holdings on South Dakota law's rejection of tort claims for monetary damages being permitted outside of the divorce file. The lead cases are *Pickering v. Pickering*, 434 N.W.2d 758 (S.D. 1989); *State Farm Fire & Cas. Co. v. Harbert*, 2007 SD 107, 741 N.W.2d 228; *Christians v. Christians*, 2001 SD 142, 637 N.W.2d 377; *Henry v. Henry*, 2000 SD 4, 604 N.W.2d 285 (*Henry II*); and *Henry v. Henry*, 95 SDO 389, 534 N.W.2d 844 (*Henry I*).

*Pickering* laid the groundwork repeated in *Harbert*, *Christians*, *Henry II*, and *Henry I*. It was in *Pickering*, that this Court declared, in no uncertain terms, that public policy prohibited tort actions arising from conduct within a marriage:

On July 29, 1986, Paul [husband] commenced a suit for divorce against Jody [wife] and the present action against Jody and Tom [paramour] alleging intentional infliction of emotional distress, fraud and deceit, negligent misrepresentation, tortious interference with a marital contract, and alienation of affections. Motions for summary judgment were submitted by defendants and plaintiff on May 1, 1987, and May 15, 1987, respectively. After a hearing, the trial court granted summary [judgment against Paul]. Furthermore, the law of this state already provides a remedy for this type of claim in the form of an action against the paramour for alienation of affections.

We next examine Paul's allegation of fraud and deceit against Jody. Paul contends that Jody intentionally kept him "in the dark regarding the illicit affair and the true paternity of the child" and caused him to "profess to his friends, family, and his church" that he was the child's natural father. As a result of these declarations, Paul

suffered untold humiliation, embarrassment, and emotional scarring.”

We need not determine whether Paul has established a prima facie case on this tort because we conclude that his action for fraud and deceit also should be barred as a matter of public policy. Although we agree with Paul that his allegations normally would suffice to state a cause of action for fraud, we believe the subject matter of this action is not one in which it is appropriate for the courts to intervene.

The exact issue that now confronts us was addressed by the California Court of Appeal in *Richard P. v. Superior Court (Gerald B.)*, 249 Cal. Rptr. 246 (Cal. App. 1 Dist. 1988). The court barred the action on the basis of public policy, stating:

Broadly speaking, the word “tort” means a civil wrong, other than a breach of contract, for which the law will provide a remedy in the form of an action for damages. It does not lie within the power of any judicial system, however, to remedy all human wrongs. There are many wrongs which in themselves are flagrant. For instance, such wrongs as betrayal, brutal words, and heartless disregard of feelings of others are beyond any effective legal remedy and any practical administration of the law. To attempt to correct such wrongs or give relief from their effects may do more damage than if the law leaves them alone.”

*Id.* at 249 (quoting *Stephen K. v. Roni L.*, 105 Cal. App.3d 640, 642-643, 164 Cal. Rptr. 618, 619 (1980)) (citations omitted). The court continued:

We conclude here that any wrong which has occurred as a result of [the defendant’s] actions is not one that can be redressed in a tort action. We do not doubt that this lawsuit emanated from an unhappy situation in which the real parties in interest suffered grief. We feel, however, that the innocent

children here may suffer significant harm from having their family involved in litigation such as this and that this is exactly the type of lawsuit which, if allowed to proceed, might result in more social damage than will occur if the courts decline to intervene. “We do not believe that the law should provide a basis for such interfamilial warfare.”

*Richard P.*, 249 Cal. Rptr. at 249 (citation omitted).

We find the reasoning of the court in *Richard P.* persuasive. . . . We are not unsympathetic for Paul because of the embarrassment and humiliation he suffered. Any attempts to redress this wrong, however, may do more social damage than if the law leaves it alone. We hold that the fraud and deceit alleged by Paul is not actionable because public policy would not be served by authorizing the recovery of damages under the circumstances of the present case. Summary judgment in favor of Jody, therefore, was appropriate.

*Pickering*, at 761-762. (Footnotes omitted.)

Sally’s contends “*Pickering* is not controlling for this case” [AB, p. 6], that “This present case is not remotely similar to *Pickering*” [AB, p. 7], and that the circuit court’s “reliance on *Pickering* . . . is misplaced” [AB, p. 9.] Sally’s primary reasoning, it seems, is that *Pickering* and a California case cited in it had involved Affairs which resulted in the birth of illegitimate children.” [AB, p. 9.]

The circuit court correctly identified the lack of a valid cause of action in Sally’s contentions below. “[Sally] argues that *Pickering* does not apply because the Court’s decision ‘was dependent upon the facts presented to the Court.’” [SR 117, p. 3.] What Sally refuses to recognize is that this Court has never limited *Pickering* in this fashion. Nor does Sally’s Appellant’s Brief do more than state in conclusory form her broad

attack on *Pickering*. The circuit court got it correct when it stated: “Hence, [this court] considers the present case to be exceedingly similar to *Pickering* . . .” [SR 117, pp. 5-6.]

Sally’s Appellant’s Brief does not discuss *Harbert*, *Christians*, or *Henry II* [*Henry v. Henry*, 2000 SD 4, 604 N.W.2d 285]. She does reference *Henry I* [*Henry v. Henry*, 95 SDO 389, 534 N.W.2d 844], only to say that in it, *Pickering* had been found to not control because *Henry I* dealt with “pre-divorce conduct.” It is only here that Sally makes a limited reference to her abandoned “consent/preservation of claim” argument that she had asserted in the circuit court level but did not identify as an issue, nor argue with citations to authority within her Appellant’s Brief. [AB, pp. 11-12.]

*Henry I* is not supportive of Sally’s arguments. In it, the following was stated by this Court:

In *Pickering*, this court held that the cause of action for intentional infliction of emotional distress was not available between spouses for conduct which leads to the dissolution of the marriage. *Id.* at 761. In that case, the plaintiff- husband was precluded from suing his ex-wife and her lover for intentional infliction of emotional distress which arose out of their affair and the subsequent birth of their child. The court stated:

“... There are many wrongs which in themselves are flagrant. For instance, such wrongs as betrayal, brutal words, and heartless disregard of feelings of others are beyond any effective legal remedy and any practical administration of the law. To attempt to correct such wrongs or give relief from their effects ‘may do more damage than if the law leaves them alone.’”

*Id.* (citing *Richard P. v. Superior Court (Gerald B.)*, 202 Cal. App.3d 1089, 249 Cal. Rptr. 246 (1 Dist. 1988)).

*Henry I*, at ¶14, 534 N.W.2d at 847.

In *Henry II*, [*Henry v. Henry*, 2000 SD 4, 604 N.W.2d 285], this Court emphasized that in *Henry I* “we held that although [wife] could not sue for pre-divorce acts, she could sue for post-divorce torts. *Henry I*, 534 N.W.2d at 846-847.” *Henry II*, at ¶2, 604 N.W.2d at 287.

In *State Farm Fire & Casualty Co. v. Harbert*, 2007 SD 107, 741 N.W.2d 228, this Court cited to *Pickering*, holding:

In *Pickering* . . . , this Court declined to recognize a “repackaged cause of action that already has been specifically pleaded.” We refused as a matter of public policy to recognize actions for intentional infliction of emotional distress, fraud and deceit, negligent misrepresentation, and tortious interference with a marital contract when such claims were “predicated on conduct which leads to the dissolution of a marriage.” *Id.* at 761. In *Pickering* we concluded that any wrong that occurred as a result of the defendant’s alleged fraud and deceit in the context of a marriage is not one that can be redressed in a tort action because public policy would not be served by authorizing an award of damages under the circumstances. *Id.* at 761-762. By definition, a civil wrong is given a remedy in the judicial system as a “tort” action for damages. However, the judicial system cannot remedy all wrongs, particularly those wrongs which are beyond any effective legal remedy and practical administration of the law. *Id.* at 761. For example, wrongs such as “betrayal, brutal words, and heartless disregard of feelings of others” are in themselves outrageous conduct and “to attempt to correct such wrongs or give relief from their effects >may do more damage than if the law leaves them alone.” *Id.* at 761.

*Harbert*, at ¶14, 741 N.W.2d at 233.

Regarding *Christians v. Christians*, 2001 SD 142, 637 N.W.2d 176 -- another salient decision Sally ignored--this Court sorted out of the lawsuit-prohibition category pre-marital and post-marital torts, but otherwise it re-asserted *Pickering*'s ban.

Another case Sally did not cite to was *Flugge v. Flugge*, 2004 SD 76, 681 N.W.2d 837. In *Flugge*, this pertinent language appears:

In *Christians*, we acknowledged that conduct leading to the dissolution of a marriage does not constitute grounds for a claim of intentional infliction of emotional distress. However, we noted that independent torts are actionable. *Christians*, 2001 SD 142 at ¶21, 637 N.W.2d at 382 (citing *Henry v. Henry*, 534 N.W.2d 844, 846 (S.D. 1995); *Scotvold v. Scotvold*, 68 S.D. 53, 55, 298 N.W. 266, 269 (1941)). We held that to recover for a claim of intentional infliction of emotional distress, the claimant must establish the necessary elements of the tort separate from the grounds for divorce. In a special concurrence, Justice Konenkamp stated, "to ensure that these tort claims are not conceived out of petty spite or as leverage for concessions on divorce issues, trial courts ... must sift out unmeritorious suits." *Christians*, 2001 SD 142 at ¶41, 637 N.W.2d at 385 (Konenkamp, J., concurring specially).

*Flugge*, at ¶13, 681 N.W.2d at 841.

The decision upon which the Appellant's Brief heavily relies is *Scotvold*, from 1941. However, as is shown above from *Flugge*, even as recently as 2004 this Court did not extend *Scotvold* to where Sally would have it go, even though *Scotvold* was noted in the decision.

There is no doubt or dispute that the current state of the law in South Dakota is such that Sally's Complaint for monetary damages did not state a valid cause of action. As such, under SDCL § 15-6-12(b)(5) she failed to state a claim upon which relief may be granted. The circuit court correctly so determined. The dismissal ought to be affirmed.

2. **Should South Dakota reverse established public policy and decisional precedent about such tort actions, and open the door to such lawsuits?**

Sally's entire argument in her Appellant's Brief seems to be that this Court should reverse established law and decisional precedent, and announce a new public policy about monetary damage lawsuits for during-marriage tortious misconduct that aids the decision to divorce. Sally's Brief is silent, though, on whether such a monumental determination is best left to the Legislature, who to date has not chosen to overrule *Pickering*, *Henry (I or II)*, or *Harbert*. Michael asserts that: (a) The public policy stance taken under those decisions ought to stand; and (b) if the public policy is going to be changed, it ought to be changed by the Legislature, not this Court.

What is in reality a demand that a monetary-gain avenue be opened for her, Sally's Appellant's Brief insinuates this appeal is for Women's Rights, as if no forum for redress against intentional misconduct by one spouse against the other during a marriage exists in South Dakota. Redress, of course, does exist, running the gamut from protection orders to alimony awards to criminal prosecution. A party may seek divorce upon the grounds of "Extreme Cruelty as defined under SDCL § 25-4-4" ["Extreme cruelty is the infliction of grievous bodily injury or grievous mental suffering upon the other, by one party to the marriage."]. A party in a divorce may seek Protection Orders.

It is lacking in supportive fact or law for Sally to portray to this Court that within the divorce proceeding she was prohibited from litigating the allegations she has raised in her tort suit for money damages. Sally could have defended against Michael's alleged marital acts against her, claiming he was guilty of committing acts against her that constituted "extreme cruelty." She could have sought to have the marriage dissolved

upon Michael's alleged extreme cruelty, by Counterclaim. Sally chose not to do any of these things. Instead, she waived them. She cannot be heard now, at this late date, to contend otherwise.

Along this line, this Court made the following point in *Pickering*, where it stated --as quoted in *Harbert*:

By definition, a civil wrong is given a remedy in the judicial system as a "tort" action for damages. However, the judicial system cannot remedy all wrongs, particularly those wrongs which are beyond any effective legal remedy and practical administration of the law. [*Pickering v. Pickering*, 434 N.W.2d 758] at 761 [S.D. 1989]. For example, wrongs such as "betrayal, brutal words, and heartless disregard of feelings of others" are in themselves outrageous conduct and "to attempt to correct such wrongs or give relief from their effects 'may do more damage than if the law leaves them alone.'" *Id.* at 761.

*State Farm Fire & Cas. Co. v. Harbert*, 2007 SD 107, ¶14, 741 N.W.2d 228, 233.

As the circuit court correctly noted in its dismissal order, "There are many wrongs which in themselves are flagrant. . . ." [SR 117, p. 2; quoting from *Pickering*, at 762.] However, opening Pandora's Box to money damage suits for them "may do more damage than if the law leaves them alone." *Id.*

Despite Sally's implied protestations, there is no constitutional issue here. Indeed, she makes no overt contention that there is. Her arguments that this Court should unravel the state of prevailing law are not novel, nor are they part of the current groundswell of societal change. Rather, Sally points to foreign jurisdictions and aging decisions that were in existence when this Court ruled in *Flugge* and *Harbert*.

If change were right for South Dakota in the wake of those cited foreign decisions, certainly our Legislature would have made them, or this Court would have

already sided with them in 2004 with *Flugge*, or in 2007 with *Harbert*. Sally’s Appellant’s Brief ignored both *Flugge* and *Harbert*. Not one of Sally’s foreign-court decisions holding to the contrary were decided after either of those rulings. Indeed, the “newest” one she cited to, *Feltmeier v. Feltmeier*, 798 N.E.2d 75 (Ill. 2003), was decided a full four years prior to this Court’s decision in *Harbert*.

In the nine years that have passed since *Harbert*, the South Dakota Legislature has not seen the need to supercede or overrule the public policy position set forth in *Pickering*, *Flugge*, *Christians*, *Henry (I or II)*, or *Harbert*. That silence speaks volumes.

Judicial prudence says if there is to be a change in the public policy of this State on this issue, it ought to be left to the Legislature to enunciate it. From a similar setting, this Court’s statement in *Sanford v. Sanford*, 2005 SD 34, 694 N.W.2d 283, well-fits the present situation:

This is not the first time this Court has been invited to “modernize” the law of South Dakota concerning the legal relationships between individuals who are involved in a marriage that is in the process of failing. In *Veeder v. Kennedy*, 1999 SD 23, 589 N.W.2d 610, we were asked to abolish the tort of alienation of affections as it had been abolished in a large majority of the states. The tort had been viewed by Justices of this Court in a previous case as “[an] archaic holdover . . . from an era when wives were considered the chattel of their spouse.” *Id.* ¶17, 589 N.W.2d at 615 (quoting *Hunt v. Hunt*, 309 N.W.2d 818, 821 (S.D. 1981)). However, in *Veeder* we declined to abolish this tort as its source was a statute, not case law:

The “public policy” argument of *Kennedy* cannot be supported by our system of law. SDCL § 1-1-23 states that the sovereign power is expressed by the statutes enacted by the legislature. SDCL § 20-9-7 which authorizes [plaintiff’s] cause of action in this

case is such a statute. Under SDCL § 1-1-24 the common law and thus an abrogation of the common law are in force except where they conflict with the statutory will of the legislature as expressed by SDCL § 1-1-23. . . . As no constitutional defects are claimed by Kennedy, we are compelled to leave the cause of action intact and instead defer to the legislature=s ability to decide if there is a need for its elimination. “[W]e are not legislative overlords empowered to eliminate laws whenever we surmise they are no longer relevant or necessary.”

*Veeder*, 1999 SD 23, ¶23, 589 N.W.2d at 616 (quoting *In re Certification of Questions of Law (Knowles)*, 1996 SD 10, ¶66, 544 N.W.2d 183, 197).

*Sanford*, at ¶23, 694 N.W.2d at 289-290.

This Court has held likewise in several other recent situations:

*Unruh Chiropractic Clinic v. DeSmet Ins. Co. of S.D.*, 2010 SD 36, 782 N.W.2d 367: “Although we acknowledge that competing public policy considerations have been articulated by courts adopting the opposing view [foreign citation omitted], we leave it to the Legislature to balance the competing public policies . . .” *Id.* at ¶21, 782 N.W.2d at 374.

*Papke v. Harbert*, 2007 SD 87, ¶80, 738 N.W.2d 510, 536: “We think it prudent, therefore, . . ., to leave any further rule changes to the Legislature.”

Sally’s argument for a change in public policy should be rejected.

**NOTICE OF REVIEW [Appeal No. 27775]**

3. **If the Court holds that Rule 12(b)(5) relief was technically not available due to the circuit court's consideration of facts beyond those within the four corners of Sally's Verified Complaint, then Michael should still prevail under Rule 56(b),(c) summary judgment.**

“[F]ailure to comply with the notice of review requirements results in a waiver.”

*State v. Blackburn*, 2009 SD 37, ¶ 8, 766 N.W.2d 177, 181 (citations omitted).

The circuit court's dismissal Order expressly asserts that a Rule 12(b)(5) dismissal may include consideration of some facts beyond the borders of the plaintiff's Complaint. At pages 4-5 of the Order [SR 117], the circuit court states:

... *See Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986) (holding, “Ordinarily, only the facts alleged in the complaint are considered in ruling on a 12(b)[5] motion. However, materials attached to the complaint as exhibits may be considered in construing the sufficiency of the complaint.”) *See also Montgomery v. Indep. Sch. Dist. No. 709*, 109 F. Supp.2d 1081, 1087 (D. Minn. 2000). [Sally's] counsel then explains that “the reasons behind the divorce were not *solely* the forced prostitution.” *See* Email from Plaintiff's Attorney Pasqualucci Dated January 13, 2016 (emphasis added).<sup>n4</sup> Hence based upon these admissions by Plaintiff, it is undeniable that Plaintiff's cause of action stresses conduct which already formed a basis for the dissolution of the parties' marriage.

n.4. Ordinarily only the facts alleged in the complaint are considered in ruling on a 12(b)(5) ruling, nonetheless, Plaintiff and her counsel have offered statements to supplement Plaintiff's Complaint and such statements operate as admissions of fact by Plaintiff. *See Morton*, 793 F.2d at 187.

[SR 117, pp. 4-5.] See also, e.g., *Riley v. Young*, 2016 SD 39, ¶ 7, 8 N.W.2d 8 (S.D. Slip Op., April 27, 2016) (circuit court affirmed in dismissing habeas corpus petition--a civil case, see ¶4--for having failed to state a claim; affirmed even though circuit court reviewed material beyond the four corners of the petition itself.)

Michael fully agrees with the circuit court on this point. His Notice of Review was not generated due to disagreement, but rather was born of caution. There is South Dakota precedent for this Court remanding Rule 12(b)(5) dismissals back to the circuit courts for Rule 56(c) determinations. See, e.g., *Flandreau Pub. Sch. Dist. #50-3 v. G.A. Johnson Const. Co., Inc.*, 2005 SD 87, ¶6 n.4, 701 N.W.2d 430; *Tibke v. McDougall*, 479 N.W.2d 898, 903-904 (S.D. 1992). Such a result effectively means the appellee may have won the war, but lost the battle, in that the appellee must then endure the significant legal cost and substantial litigation time delay involved in a remand resulting, this time, in a Rule 56(c) dismissal, followed by the losing party appealing again.

In other words, Michael filed his Notice of Review to permit this Court to deny Sally's appeal on any of three grounds: (1) Affirming outright the Rule 12(b)(5) dismissal; or (2) deciding *de novo* that the right result was achieved, even though on the wrong grounds, see, e.g., *Davis v. Wharf Resources*, 2015 SD 61, ¶22 ["[W]e will not overturn a right result even though it is based on a wrong reason." (Quoting from *Seymour v. W. Dakota Vocational Technical Inst.*, 419 N.W.2d 206, 209 (S.D. 1988))], and therefore affirmation of the circuit court should stand as is; or (3) this Court can convert the Rule 12(b)(5) dismissal to a Rule 56(c) dismissal by granting Michael's Notice of Review.

Procedurally, a Rule 12(b)(5) Motion becomes a Rule 56 motion for summary judgment:

If, on a motion asserting the defense numbered (5) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in § 15-6-56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by § 15-6-56.

SDCL § 15-6-12(b).

Under § 15-6-56(b),

A party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

*Id.*

Michael was entitled to summary judgment relief. He fulfilled all of the requisites for it, filing a Motion [SR 11] with a supporting Affidavit and related documents [SR 24], a Statement of Undisputed Material Facts [SR 24; SR 87], and a Statement of Agreed Upon Facts [SR 98].

The circuit court's dismissal Order did not hold that Rule 56 relief was not rightful for Michael, but rather implied that once Rule 12(b)(5) dismissal was deemed appropriate there was no need for Rule 56(c) relief. [SR 117; plus email from court dated January 20, 2016.] The circuit court saw no technical need to undergird the dismissal by either skipping Rule 12(b)(5) grounds, or doubling the authority of the dismissal by adding Rule 56(c) relief to it.

Again, Michael is not in disagreement with the circuit court's position that a Rule 12(b)(5) dismissal can be valid even though its determination included consideration of certain non-"within the four corners of the Complaint"-information. Should this Court determine that dismissal of Sally's law suit was appropriate, but that the basis ought to have been Rule 56(c) summary judgment rather than Rule 12(b)(5), the Notice of Review allows this Court to do so without a remand order. Judicial economy, as well as great savings to the parties of time and money, will benefit from such a ruling.

### **REQUEST FOR ORAL ARGUMENT**

Should the Court desire oral argument on the issues, Michael requests the same.

### **CONCLUSION**

Michael respectfully requests that this Court affirm dismissal of Sally's Complaint, either by upholding the Rule 12(b)(5) Order entered by the circuit court, or by holding that Rule 56(b),(c) relief was appropriate, and that this Court grant Michael his appellate costs, plus such other and further relief in his favor as is appropriate.

Dated this \_\_\_\_ day of May, 2016.

RENSCH LAW  
A Professional Law Corporation

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Nathaniel Forrest Nelson  
Attorney for Appellee/Cross-Appellant  
Michael Richardon  
P.O. Box 8311  
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APPENDIX  
Table of Contents for Notice of Review

<u>Appendix Document</u>	<u>Pages</u>
Order Granting Defendant’s Motion for Dismissal For Failing to State a Claim Upon Which Relief May Be Granted [January 19, 2016] .....	A1-A6
Email from Court declining to amend dismissal Order to include summary judgment grant [January 20, 2016] .....	A7

STATE OF SOUTH DAKOTA, )  
 )SS.  
COUNTY OF PENNINGTON. )  
 )

IN CIRCUIT COURT  
SEVENTH JUDICIAL CIRCUIT

SALLY RICHARDSON,  
 )  
 )  
 ) Plaintiff,

vs.

MICHAEL RICHARDSON,  
 )  
 )  
 ) Defendant.

) FILE NO. CIV 15-1290  
)  
) ORDER GRANTING DEFENDANT'S  
) MOTION FOR DISMISSAL FOR  
) FAILING TO STATE A CLAIM UPON  
) WHICH RELIEF MAY BE GRANTED  
)  
)  
)

This matter came before the Court on Defendant's Motion for Dismissal for Failing to State a Claim upon which Relief May be Granted; and Alternatively Motion for Summary Judgment (hereinafter "Defendant's Motion"). In response, Plaintiff filed Plaintiff's Response in Opposition to Defendant's Motion for Dismissal. On January 12, 2016, the parties held a hearing before the Court addressing Defendant's Motion. On January 13, 2016, Plaintiff sent a supplemental submission to the Court via email. In response, Defendant objected to this submission and filed Defendant's Objection to Plaintiff's Erroneous "Non-Record" Supplementation of her Resistance to Motion for Dismissal or Summary Judgment (hereinafter "Defendant's Motion to Strike"). The Court having considered the record, briefs, and the arguments of counsel, and being fully advised as to all matters pertinent hereto, for the reasons set forth below, hereby **GRANTS** Defendant's motion and **ORDERS** the dismissal of Plaintiff's Complaint pursuant to SDCL 15-6-12(b)(5). In addition, the Court hereby **DENIES** Defendant's Motion to Strike.

## **BACKGROUND**

Plaintiff, Sally Richardson, and Defendant, Michael Richardson, were married on May 13, 2014. The parties separated in September of 2014 and divorced on April 29, 2015. Plaintiff brings a cause of action against Defendant for intentional infliction of emotional distress. Plaintiff alleges that Defendant engaged in extreme and outrageous conduct by “intentionally and recklessly forcing the Plaintiff, his wife, to continue in prostitution against her wishes...” Plaintiff also alleges that as a result of Defendant’s conduct she has been diagnosed with PTSD, suffers horrible nightmares, and must utilize several medications to help her cope with daily living.

## **ANALYSIS**

The South Dakota Supreme Court has made clear that “the tort of intentional infliction of emotional distress ... [is] unavailable as a matter of public policy when it is predicated on conduct which leads to the dissolution of a marriage.” *Pickering v. Pickering*, 434 N.W.2d 758, 761 (S.D. 1989). This rule recognizes that in the context of countless failed marriages “[t]here are many wrongs which in themselves are flagrant...[however,] [t]o attempt to correct such wrongs or give relief from their effects ‘may do more damage than if the law leaves them alone.’” *Id.* at 762 (quoting *Richard P. v. Superior Court (Gerald B.)* 202 Cal. App3d 1089, 249 Cal. Rptr. 246 (1 Dist. 1988)). Thus, in order to avoid the duplicity of countless divorce actions stringing with them a procession of companion tort claims, public policy prohibits intentional infliction of emotion distress claims which stem from conduct which resulted in

the dissolution of the parties' marital relationship. *State Farm Fire & Cas. Co. v. Harbert*, 2007 S.D. 107, ¶ 14, 741 N.W.2d 228, 233.

Plaintiff argues that her Complaint should not be dismissed pursuant to the rule found in *Pickering*. Plaintiff argues that *Pickering* does not apply because the Court's decision "was dependent upon the facts presented to the Court." See Plaintiff's Brief at p1. Plaintiff further argues that a cause of action for intentional infliction of emotion distress can be recognized even if it arises from facts surrounding a divorce action. *Id.* (citing *Christians v. Christians*, 2001 SD 142 at ¶41, 637 N.W.2d at 385 (Konenkamp, J., concurring specially).

*Christians* stands for the proposition that South Dakota law permits a cause of action for intentional infliction of emotional distress based on conduct which is independent from the dissolution of the marriage, such as torts which have occurred after the filing of divorce. *Christians*, 2001 S.D. at ¶20-25. Consequently, South Dakota law also permits a former spouse to sue their estranged spouse for post-divorce conduct. *Henry I*, 534 N.W.2d 844, 856-857 (1995). Nonetheless, South Dakota law does not permit a cause of action for intentional infliction of emotional distress based upon conduct which led to the dissolution of the marriage. *Pickering*, 434 N.W.2d at 761.<sup>1,2</sup> This rule exists to

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<sup>1</sup> *Christians* and *Henry I* are entirely consistent with the *Pickering* rule by virtue of the fact that the plaintiffs in both cases alleged torts which were independent of their grounds for divorce. This is logically evidenced by the fact that both plaintiffs had already filed for a divorce before the tort which led to their cause of action was committed. *Christians*, 2001 S.D. at ¶ 24 ("[t]o recover the claimant must meet the necessary elements separate from her grounds for divorce. Connie's claim stems from Michael's conduct that occurred after filing for divorce); *Henry*, 534 N.W.2d at ("[h]ere, we are considering the parties' settlement agreement along with post-divorce conduct. *Pickering*, therefore, is not controlling.").

prevent a “repackaged cause of action that already has been specifically pleaded.” *Harbert*, 2007 S.D. at ¶14.

In applying the above rules to present case, the Court considers that Plaintiff makes no allegations of tortious conduct occurring before the parties’ marriage, after the parties’ marriage, or even after the filing of divorce. Rather, Plaintiff’s allegations of tortious conduct appear to stem entirely from “Defendant’s extreme and outrageous conduct, intentionally and recklessly forcing the Plaintiff, *his wife*, to continue in prostitution against her wishes...” See Plaintiff’s Complaint Page 3 (emphasis added).<sup>3</sup>

Plaintiff herself has stated, “I felt we need[ed] to get a divorce because we were never going to be in a normal relationship...yes Michael filed for divorce but it was I who asked him and begged him to file for divorce because there was nothing normal about our relationship and I wanted out.” See Email from Plaintiff’s Attorney Pasqualucci Dated January 13, 2016; See *Morton v. Becker*, 793 F.2d 185, 187 (8th Cir. 1986) (holding, “Ordinarily, only the facts alleged in the complaint are considered in ruling on a 12(b)[5] motion. However, materials attached to the complaint as exhibits may be considered in construing the sufficiency of the complaint.”); See also *Montgomery v. Indep.*

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<sup>2</sup> The Court does not contend that a spouse cannot sue a spouse for tortious conduct which is truly independent of the grounds which led to the dissolution of the marriage. *Scotvold v. Scotvold*, 68 S.D. 53, 298 N.W. 266, 267 (1941) (Court allowing one spouse to sue other spouse for personal injury claim arising from automobile accident).

<sup>3</sup> The conduct alleged by Plaintiff, if true, would likely suffice for a claim of intentional infliction of emotion distress. Nonetheless, *Pickering*’s public policy prohibits causes of action predicated on conduct which leads to the dissolution of a marriage, even if such conduct is severe or might otherwise result in “untold humiliation, embarrassment, and emotional scarring.” *Pickering*, 434 N.W.2d at 761.

*Sch. Dist. No.*, 709, 109 F. Supp. 2d 1081, 1087 (D. Minn. 2000). Plaintiff's counsel then explains that "the reasons behind the divorce were not *solely* the forced prostitution." See Email from Plaintiff's Attorney Pasqualucci Dated January 13, 2016 (emphasis added).<sup>4</sup> Hence based upon these admissions by Plaintiff, it is undeniable that Plaintiff's cause of action stresses conduct which already formed a basis for the dissolution of the parties' marriage.

Based upon Plaintiff's admissions, the Court believes that Plaintiff's tort claims allege a "repackaged cause of action that already has been specifically pleaded." *Harbert*, 2007 S.D. at ¶14. Here, the Court considers that the parties' divorce was granted upon the grounds of irreconcilable differences. The Court also recognizes, given the brevity of the marriage and the egregiousness of the facts alleged, that Defendant's conduct, if true, logically led to the parties' "irreconcilable differences." As such, Plaintiff cannot re-litigate those facts which led to the dissolution of her marriage simply because such facts were not the sole reason for her ultimate divorce. See Email from Plaintiff's Attorney Pasqualucci Dated January 13, 2016. These same considerations were certainly applied by the Court in *Pickering* when the Court connected that the defendant's adultery and deceit led to the dissolution of the parties' marriage, despite no record that the plaintiff's divorce was granted upon the specific grounds of the defendant's adultery or extreme cruelty during the marriage. *Pickering*, 434 N.W.2d at 761. Hence, the Court considers the present case to

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<sup>4</sup> Ordinarily only the facts alleged in the complaint are considered in ruling on a 12(b)(5) ruling, nonetheless, Plaintiff and her counsel have offered statements to supplement Plaintiff's Complaint and such statements operate as admissions of fact by Plaintiff. See *Morton*, 793 F.2d at 187.

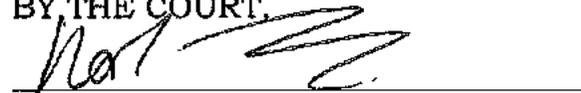
be exceedingly similar to *Pickering* and finds that Plaintiff's claim should be dismissed pursuant to SDCL 15-6-12(b)(5).

**CONCLUSION**

For the reasons outlined above, the Court hereby **GRANTS** Defendant's Motion and **ORDERS** the dismissal of Plaintiff's Complaint pursuant to SDCL 15-6-12(b)(5). In addition, the Court hereby **DENIES** Defendant's Motion to Strike.

Dated this 19 day of January, 2016.

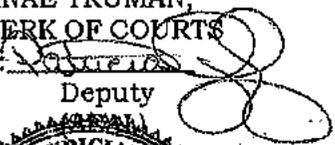
BY THE COURT.



The Honorable Robert Gusinsky  
Circuit Court Judge  
Seventh Judicial Circuit

ATTEST:

RANAE TRUMAN,  
CLERK OF COURTS

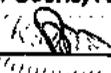
By:   
Deputy



State of South Dakota } Seventh Judicial  
County of Pennington } Circuit Court  
I hereby certify that the foregoing instrument  
is a true and correct copy of the original as  
the same appears on record in my office this

JAN 19 2016

RANAE L. TRUMAN  
Clerk of Courts, Pennington County

By:  Deputy

Pennington County, SD  
FILED  
IN CIRCUIT COURT

JAN 19 2016

Ranae Truman, Clerk of Courts

By:  Deputy

## RE: Richardson v. Richardson

Gusinsky, Judge Robert [Robert.Gusinsky@ujs.state.sd.us]

**Sent:** 1/20/2016 11:25 AM

**To:** ""mindy.pulfrey@renschlaw.com"" <mindy.pulfrey@renschlaw.com>

**Cc:** nate.nelson@renschlaw.com, "Robert Pasqualucci" <robert.pasqualucci@yahoo.com>, "Laidlaw, Matt" <matt.laidlaw@ujs.state.sd.us>

---

Dear Counsel:

The Court's previous Order sets forth the Court's position and as such it will stand.

RG

**From:** mindy.pulfrey@renschlaw.com [mailto:mindy.pulfrey@renschlaw.com]

**Sent:** Wednesday, January 20, 2016 9:42 AM

**To:** Gusinsky, Judge Robert

**Cc:** nate.nelson@renschlaw.com; Robert Pasqualucci

**Subject:** Richardson v. Richardson

Judge Gusinsky,

Please see the attached documents from Mr. Nelson

Thank you.

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