

No. 19-716

In The  
SUPREME COURT OF THE UNITED STATES

ZHI GANG ZHANG,

*Petitioner,*

v.

DAN RASMUS, AN INDIVIDUAL,  
RASMUS LAW OFFICE, LLC;  
TIM JAMES, AN INDIVIDUAL,  
JAMES LAW, PC;  
WILLIAM R. SKOLNICK, AN INDIVIDUAL,  
AMY D. JOYCE, AN INDIVIDUAL,  
SKOLNICK & SHIFF, P.A.,

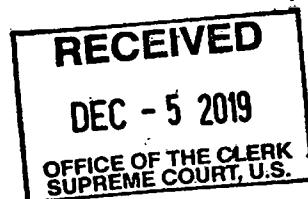
*Respondents.*

On Petition For Writ Of Certiorari  
To The Supreme Court of South Dakota

PETITION FOR WRIT OF CERTIORARI

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Pro Se Litigant, Appellant





## **QUESTIONS PRESENTED**

### **Introduction**

Fraud committed by attorneys has been treated as a component of legal malpractice such as in the United States Court of Appeals, Third Circuit, in contrast to other United States district courts. In this case, the South Dakota Supreme Court treated fraud as part of legal malpractice by opining that no prejudice was caused when the trial court denied Petitioner's motion to include a separate fraud claim. The practice of including fraud as a part of a legal malpractice claim in the instance case and in the Third Circuit permitted the exoneration of Respondents without evidential review, a very unlikely acquittal process in other circuit or state courts for fraud claims.

The first question presented is the following:

Whether differences in the acquittal process between fraud committed by an attorney and fraud committed by a non-attorney in some but not all federal

and state courts violated the Equal Protection Clause of the 14th Amendment to the U.S. Constitution.

The second question presented is the following:

Whether a court continuing with legal proceedings while repeatedly delaying interpreter approval for a non-native English-speaking pro se petitioner violated Petitioner's right to a fair hearing provided for in the Fifth Amendment of the U.S. Constitution.

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## RELATED PROCEEDINGS

The Circuit Court of the Fifth Judicial Circuit,  
Brown County, South Dakota, Zhi Gang Zhang v. Ling  
Ma, Div. 09-887, Stipulation and Judgment and Decree  
of Divorce, April 21, 2011.

The Circuit Court of the Fifth Judicial Circuit,  
Brown County, South Dakota, Dr. Zhi Gang Zhang v.  
Jodi L. Brown individually and Brown Law Firm, P.C.,  
Civ. 13-329, Judgment of Dismissal, November 4, 2013.

The Circuit Court of the Fifth Judicial Circuit,  
Brown County, South Dakota, Zhi Gang Zhang v. Dan  
Rasmus, an individual, Rasmus Law Office, LLC; Tim  
James, an individual, James Law, PC, William R.  
Skolnick an individual, Amy D. Joyce, an individual  
Skolnick & Shiff, P.A, Civ. 16-446, Judgment for  
Defendants William R. Skolnick, Amy D. Joyce and  
Skolnick & Shiff, P.A, January 18, 2018.

The Supreme Court of the State of South Dakota,  
Zhi Gang Zhang v. Dan Rasmus, an individual, Rasmus

Law Office, LLC; Tim James, an individual, James Law, PC, William R. Skolnick an individual, Amy D. Joyce, an individual Skolnick & Shiff, P.A, #28524, 2019 S.D. 46, Reversed in Part and Affirmed in Part, July 24, 2019.

The Supreme Court of the State of South Dakota, Zhi Gang Zhang v. Dan Rasmus, an individual, Rasmus Law Office, LLC; Tim James, an individual, James Law, PC, William R. Skolnick an individual, Amy D. Joyce, an individual Skolnick & Shiff, P.A, Order Denying Petition for Rehearing # 28524, September 4, 2019.

#### **OPINIONS BELOW**

The Opinion of The Supreme Court of the State of South Dakota is reported at 932 N.W 2.d 153, 2019 S.D. 46 and is attached at Apn. 64. The Supreme Court of the State of South Dakota: Order Denying Petition for Rehearing # 28524 is unpublished and is attached at Apn. 94.

The orders of the Circuit Court of the Fifth

Judicial Circuit, Brown County, South Dakota, granting Respondents' motions for summary judgment are unpublished and are attached at Apn. 95 and 96.

## **JURISDICTION**

The Supreme Court of the State of South Dakota issued its Opinion on July 24, 2019. Petitioner's rehearing petition was timely filed on August 13, 2019 and was denied on September 4, 2019. This Court has jurisdiction pursuant to 28 U.S.C. §.1257.

## **CONSTITUTIONAL AND STATUTORY**

### **PROVISIONS**

Section 1 of the 14th Amendment to the United States Constitution provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## Amendment Five to the United States

Constitution provides as follows:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Code § 1827 (d)(1), (j) is attached as Apn 105.

### **STATEMENT OF CASE AND FACTS**

The factual review involves three sequential circuit court cases and an appeal to the South Dakota Supreme Court.

#### **The Divorce Case**

Zhang filed for divorce on September 25, 2009, through attorney King. Attorney Brown took over the divorce case on November 6, 2009. Prior to when Brown

took over, there were some discussions privately between Zhang and King regarding temporary alimony, but King was not involved in the temporary alimony hearing or its final preparation. Brown and Zhang discussed a temporary alimony offer based on Zhang's family 10-year spending history. A temporary alimony hearing was held on November 12, 2009, mostly in chambers, followed by an open court hearing. Brown told Zhang that she provided her temporary alimony proposal along with the spending history summary to the court during the temporary alimony hearing. Brown informed Zhang that Judge Van Wald decided the temporary alimony amount after the meeting in chambers and that, due to time constraints, the submitted documents were not used or referenced by the court. However, during a July 27, 2010, hearing for cause, Judge Van Wald read a portion of an e-mail from Zhang to his former attorney, King, as proof that Zhang had made an agreement with court on November 12,

2009, to pay the temporary alimony amount. Judge Van Wald stated “doctor said” as proof of the agreement made; however, this court-produced proof was not in the open court hearing transcript and Zhang had never had the opportunity to be in chambers to make the quoted statement to the court. Furthermore, Zhang’s e-mail to King should be a privileged attorney-client communication. The e-mail was never discussed between Brown and Zhang for any reason, nor was the privileged e-mail ever supplied to the court for any purpose as far as Zhang knew. By following Brown’s explanation and advice on temporary alimony, Zhang incurred additional expenditures attempting to readdress the temporary alimony. On October 4, 2010, after a whole day spent in a temporary alimony modification hearing, nothing was achieved and neither the modification hearing nor the temporary alimony modification were completed until the end of the divorce case. Brown did not provide any explanation as to how

Zhang's communication with King got into court's hand to be used as the basis for the temporary alimony determination made during the chambers meeting, which Brown attended not King. Zhang felt that Brown had deceived him on the temporary alimony determination and on what had occurred in chambers, especially because there were more expenditures for a temporary alimony modification hearing that was never finished.

The process and information used to determine temporary alimony was crucial, because permanent alimony was later determined based solely on the temporary alimony, without reference made to any real historical accounting data or financial record-based need.

Zhang's ex-wife's team compiled a three-year summary accounting by an accountant, Jin, to be used for alimony determination reference. In describing the only one summary accounting, Oliver alleged

contradictorily during court proceedings that the accounting was a spending summary of Zhang's family of four; three people's spending accounting; Zhang's ex-wife's spending only; and for spending that happened in Minnesota only. In actuality, the summary accounting used by Oliver to exhibit the financial need of his client included Zhang's South Dakota business account, which was never used for family spending; a credit card of Zhang's ownership only; and other South Dakota accounts.

. The inaccuracy of the three-year summary accounting was exposed during Jin's deposition. Zhang's ex-wife's team hired Johnson, a financial planner, as an expert witness to further spin on the summary accounting that Oliver had provided contradicting explanations of. Knowing the summary accounting could not be used for three years as originally compiled for faulty accounts inclusions and lacking any credibility in accounts selection exposed from Jin's deposition,

Johnson arbitrarily chose only eight months of temporary alimony spending history on which to base her calculations and recommendations. Although only eight months of alimony spending history were used, Johnson testified that the alimony spending history was a reliable accounting of three years of accustomed spending history for three people in Minnesota only by following Oliver's statement made to court. During Johnson's testimony, Oliver made another statement that the same summary accounting only included the accounts used by Ling Ma in Minneapolis in contrary to facts. That the summary accounting even could not tell for sure how many personals spending was included and very skewed alimony spending span was used as a reliable accounting of accustomed spending history for only one person (Zhang's ex-wife) in Johnson's expert's calculation and recommendation. The court made the permanent alimony determination based on the temporary alimony spending period and Johnson's

testimony and calculation. Thus, the process and time spent on the alimony determination, the main contention of the divorce, became a sham legal proceeding from day one of the temporary alimony determination as everything was decided based on temporary alimony without clarifying the number of people used to determine the calculation and without any reference to real relevant information or historical need bases as required by law.

Zhang consulted Brown for redress of these offenses immediately after the bench trial. Brown misled Zhang to sue the defending attorney and experts personally, rather than filing for a new trial based on frauds committed by the defending team or filing an appeal. As an attorney, Brown should have known that suing the defense attorney and experts was not a feasible lawful remedy, yet she misguided Zhang at that time to pursue the impossible. In trying to sue the defending team by following Brown's advice, Zhang

incurred more unnecessary expenditures, consulting several attorneys, who all informed Zhang that a lawsuit against the expert witnesses or his ex-wife's legal team would be unfeasible. While consulting these attorneys, Zhang's critical time in which he could have filed for a retrial or an appeal had passed.

### **Malpractice Case Against Brown**

After Zhang discovered that he had been deceived by Brown, not only regarding the temporary alimony issue, but also by her advice to sue his ex-wife's legal team, which caused him to miss his opportunity to file for a retrial or an appeal, Zhang retained attorney James to file a malpractice action against Brown. A divorce case summary with 3,224 items of supporting documents, including e-mails that Brown misguided Zhang to sue the defending teams, was supplied to James for the filing preparation.<sup>1</sup> Those documents

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<sup>1</sup> The same summary and computer files were provided to the circuit court on June 30, 2013, in a CD format.

were transferred to other respondents later.

James retained attorney Fox as a potential expert witness on September 21, 2012. Fox showed unwillingness to testify against her fellow attorney by repeatedly delaying her reply. Fox made a no merit conclusion for Brown's case without providing a single sentence in her report on Zhang's claim of Brown's deception on temporary alimony and misguided recommendation of an impossible lawsuit of his ex-wife's defense team. James explained the unique situation of attorneys potentially meeting each other in the future due to the small South Dakota bar to Zhang and introduced Zhang to Minnesota attorney Rasmus, who Zhang retained as primary counsel. James then acted as local counsel for Rasmus.

Due to a conflict regarding assigned Judge Kean, Rasmus suggested and arranged to transfer the two-month old case to another "experienced" Minnesota group, Skolnick and Joyce. However, no counsel

substitution paperwork was filed with the circuit court.

Unknown to Zhang at the time, Respondent Joyce failed to find an attorney to sponsor their firm's pro hac vice admission, thus Skolnick and Joyce were never qualified to represent Zhang in South Dakota. Meanwhile, Rasmus and James simply ceased their counsel function without obtaining permission from the circuit court or filing any counsel substitution paperwork. During this time, Brown's attorney filed a motion for Judgment on the Pleadings, followed by a 15-6-11(b) Notice. On October 10, 2013, a Notice for Hearing of Motion for Judgment, scheduled for November 4, 2013, was mailed to both James and Rasmus.

None of the Respondents tried to contact Zhang to discuss the upcoming summary judgment hearing until October 18, 2013. Skolnick mailed Zhang a letter on October 18 stating that their firm was declining to represent Zhang, alleging that there was no merit upon

which to file a malpractice case against Brown.

Although each Respondent alleged that there were no merits in the case against Brown, no Respondent ever challenged the material facts relating to Oliver's fraud on the court, Brown's deception regarding the temporary alimony determination process, or Brown's misguidance in advising Zhang to sue defending team. Before the end of Brown's case, Zhang was never informed by the Skolnick group regarding their failure to get pro hac vice admission, which would be a more realistic reason for their departure from Zhang's action against Brown. Otherwise, Zhang would have discovered that the Skolnick group was not qualified to represent him during the November 4, 2013, hearing.

After the Skolnick group's letter declining to represent Zhang, Rasmus and James filed a counsel withdrawal motion on October 22, 2013, with no reason mentioned, appearing to attempt to conceal their failure

to perform counsel of record duties for more than a month while the Skolnick Respondents were not qualified to represent Zhang.

Judge Keen had insisted on attorney appearance for the November 4<sup>th</sup> hearing.<sup>2</sup> Judge Keen acknowledged that none of the Respondents filed a document in opposition to Brown's motion and held Rasmus and James as counsel of record<sup>3</sup> until the end of Brown's malpractice case on October 31, 2017 (fn2).

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<sup>2</sup> Judge Kean (October 31, 2013 e-mail to Rasmus and James): "I --- planned on coming [to Aberdeen] due to the Motion for Judgment on the Pleadings that had been filed. --- I do not really care as to which attorney appears, but, one of you should unless the hearing is cancelled due to the dismissal."

<sup>3</sup> Judge Kean (October 25, 2013) "Although Mr. James has filed a motion to withdrawn, it does [not] automatically mean that the motion is granted. --- In addition, nothing has been done to address the motion for judgment on the pleadings which preceded all this recent flurry about who was or was not representing Dr. Zhang."

Zhang's malpractice case against Brown was terminated, because Respondents left Zhang without the assistance of counsel to face the impossible task of preparing for a summary judgment hearing in four days without any documents filed in the circuit court to support his case. Under the guidance of Rasmus, Zhang had to sign the "Stipulation of Dismissal with Prejudice" as a pro se, even though the document said that the agreement was "made through counsel" and the stipulation was the product of Rasmus working with Brown's attorney without Zhang's involvement.<sup>4</sup>

### **Case Against Respondents**

Due to his lack of legal knowledge and his

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<sup>4</sup> Zhang did not voluntarily terminate the Brown case, contrary to the South Dakota Supreme Court's Opinion. ([¶6] Opinion Apn. 67). In opposing Rasmus' summary judgment motion, Zhang attached facts discussing the termination of the case against Brown. The facts were resubmitted in Zhang's rehearing petition. The South Dakota Supreme Court was silent regarding all facts provided and discussion made on this issue

deficiency in English, especially his deficiency in legal professional English, Zhang contacted several attorneys in South Dakota before commencing pro se with his malpractice case against Respondents. In 2015, Zhang had hired attorney Johnson to assist Zhang in correcting the alimony in Zhang's divorce case, but was unsuccessful, because current law does not allow alimony changes if circumstances have not changed. Attorney Johnson was not willing to address Brown's deception regarding temporary alimony or her misguidance in advising Zhang to sue his ex-wife's defending team, nor was he willing to address Oliver's fraud on the court, even though Johnson acknowledged to Zhang that the evidence that Zhang had provided in revealing those frauds was factual during Johnson's involvement from 2015 to 2016. Zhang included his experience with Johnson along with Zhang's previous encounters with other attorneys, including attorney Fox (whom Zhang had retained as a potential expert

witness), into his affidavit to the circuit court to report the reality of attorneys' frauds and how other attorneys avoided revealing their peers' frauds in South Dakota with factual evidences attached. (Apn.123).

To fully understand and to make proper responses to Respondents' legal arguments, Zhang requested the use of an interpreter. Zhang worked with the circuit court early on and included an interpreter request in the caption of his complaint.

Under the direction of the court administrator, Zhang pursued all potential interpreters. Unfortunately, some of the interpreters provided by the court could barely speak English. Zhang attempted to resolve the interpreter issue prior to any court hearing by working with Respondents and the circuit court. The court administrator had requested Zhang to pay for the interpreter cost and Zhang agreed to pay for the interpreter, including the interpreter's travel costs. But Zhang's efforts to obtain an interpreter before any

hearings were frustrated due to back and forth discussions, first with the court administrator, then in repeated filings with the court. Prior to the first hearing, Zhang filed an official letter to presiding Judge Myren on May 23, 2017, with some of his communications with court administrators attached, to discuss his previous efforts and candidacies for interpreter. Zhang found two court certified interpreters in Minnesota but none in South Dakota. Zhang had contacted one of the Minnesota certified interpreters and expressed willingness to work with the other interpreter if the court or Respondents desired. Zhang further stated in the letter,

“Any verbal court proceeding to let plaintiff acting as pro se to argue and think in a second language with all those legal professional defendants will be an obvious prejudice to plaintiff because plaintiff [Zhang] started to learn English from his college time and plaintiff had no single day of college education in a English speaking country.”

(Apn.142).

Zhang had arranged certified interpreter Zhou from Minnesota, but had to cancel his services for each of the two initial hearings (there were only three hearings for the whole proceeding) while waiting for the circuit court's approval.

The first hearing happened on May 31, 2017. Regarding the interpreter, the following interaction between Zhang and the judge occurred:

"MR. ZHANG: He's certified. Also, plaintiff has made clear, to be fair, there is a two, there are two certified interpreters in Minnesota. I did not contact the other one that, the defendants screened the other one, just to say, to be fair. --- plaintiff willing to really work with anyone just so long as appropriate.

THE COURT: The defendants don't need to approve your interpreter. Only the Court — all the interpreter has to do is meet the Court's requirements. ---"

(Apn. 109-110)

After the hearing, Zhang had to research the meaning of some of the words used by legal professionals, such as moot, etc., by reading the hearing transcript, because he did not fully understand the

meaning of the words at the time of the hearing.

Multiple important motions were heard on October 6, 2017, on the second hearing including Skolnick's motion to dismiss and alternative motion for summary judgment, Zhang's motion to compel compliance with discovery rules, Zhang's motion for interpreter use, Zhang's motion to amend his complaint, and Zhang's motion seeking punitive damages.

Zhang's motion for interpreter use was finally approved on October 6, 2010, for future hearing use. The court stated that the reason for its delay and the two hearings that took place prior to the interpreter approval was because an official hearing needed for interpreter approval (Apn.113). In contrast, Respondent James' summary judgment motion was ruled upon and granted in the form of a memorandum decision, without an official hearing. (Apn.96). Zhang challenged the court's repeated delay regarding interpreter approval and related potential prejudice during the interpreter

approval hearing. Zhang argued that the results of the hearings without an interpreter present should have at best questionable validity, because Zhang was prejudiced by the court without any basic attempt to obtain minimum equality for Zhang in a verbal court proceeding: “I had to cancel his use today. So anything caused or to this from this hearing, and I think plaintiff has a right to clarify this because the delay of interpreter use.” (Apn. 113-114).

Zhang’s only attempt to amend his complaint (with pretrial conference more than three months away – pretrial conference could be set after January 15, 2018 – and no oppositional motion made by Respondents) was denied on October 6, 2017, solely because “[w]e are significantly [far] along in the case[.]”(Apn.114).

Even though the case has been ten months from the filing, due to lacking Respondents cooperation in the discovery process not much progress was achieved by October 6, 2017, As matter of fact, there are motions for

compel filed and heard on the same day and it had taken the circuit court ten months just to grant Zhang's interpreter use. Zhang made his objection on the court's denial of his motion in the amendment of his complaint.

Rasmus' declares in his summary judgment motion filing "There is no way that a jury could have determined, without the aid of an expert, whether or not there was malpractice or whether there were damages proximately cause by that malpractice." (Apn.85 fn 4). Even though Rasmus made such a general statement to obtain summary judgment, Rasmus failed to identify or report to the circuit court any evidential fact regarding Brown deceiving Zhang regarding temporary alimony, misguiding Zhang to sue Zhang's ex-wife's defense team, and the related unnecessary expenditures paid by Zhang that should not be treated as frank simple fraud or would need expert witness testimony in order to be understood by a lay person.

Zhang filed his resistance documents to Rasmus'

summary judgment motion according to the requirements of SDCL 15-6-56 (c). Additionally, Zhang included extensive briefing and cited multiple cases that held that expert witnesses weren't required (Apn. 109) to prosecute a fraud claim, which is a form of intentional tort, and that set out the lay person standard exception to the expert witness mandate for legal malpractice proceedings.

During Rasmus' summary judgment motion hearing, Zhang verbally restated that fraud does not need an expert witness for prosecution and reiterated the lay person exception to the expert witness requirement (Apn. 118). The circuit court granted Rasmus' summary judgment motion without any preliminary factual review for the lay person exception to the expert witness mandate and without considering whether a fraud claim should be included with legal malpractice cases.

Even though Brown was not a defendant in

Respondents' case, during the Rasmus summary judgment hearing, Zhang made adequate showing of Brown's deception on the alimony issue, the sham legal process plus Oliver's fraud on the court, and related financial losses that Zhang had incurred due to Brown's deception, because Brown's case is the causation for Respondents' case. Zhang's "showing" was ruled as irrelevant by the circuit court. (Apn.118). Zhang repeated the "showing" at the end of the same hearing, mentioning frauds committed by both Brown and Respondents. (Apn.120).<sup>5</sup>

The malpractice case against Respondents was terminated when the circuit court granted all but one summary judgment motion, which was withdrawn by Respondent Rasmus after Zhang filed a Rule 11 (b) notice.

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<sup>5</sup> In contrast to the South Dakota Supreme Court's conclusion that Zhang made no "showing" in Brown's case. (Apn. 81).

## **Appeal to South Dakota Supreme Court**

Zhang timely filed an appeal to the South Dakota Supreme Court. The South Dakota Supreme Court issued its opinion on July 24, 2019, in which the court reversed the circuit court's dismissal of Skolnick based on lack of personal jurisdiction but affirmed the remainder of the circuit court's decision. Zhang filed a rehearing petition, pointing out other South Dakota Supreme Court opinions that made direct contradiction to the factual evidence supplied to the circuit court since it was a de novo review on summary judgment motions granted by the circuit court. Zhang's petition for rehearing was denied on September 4, 2019.

The South Dakota Supreme Court dodged factual conflict by making two statements in different locations of the opinion to confirm James' summary judgment motion. Appellate Court stated, “[¶5] ---- The court eventually allowed Rasmus and James to withdraw” (Apn. 66); “[¶15.] James moved for summary judgment

as well, claiming the transfer of representation to Skolnick removed any duty he owed to Zhang. The circuit court agreed and granted James summary judgment.” (Apn. 72).

The relevant facts in the time period from when the Skolnick group agreed to take over to when the Brown case was terminated include the following: James’ motion for withdrawal made on October 24, 2013, Judge Kean held James as counsel of record on October 31, 2013; retroactive court order released James from counsel duty on October 25, 2013; circuit court artificially decided James’ counsel ending date was September 18, 2013, to grant James’ summary judgment motion contradicting to Judge Kean’s court order; Rasmus, sponsored by James, would be an illegal counsel of record for his staying until at least October 25, 2017, in South Dakota Court without James’ sponsorship. Obviously, a September 18, 2013, termination date for James as decided by the circuit

court would be direct proof that James had deserted his co-counsel duty. Zhang included the above facts in his appellant's brief.

The South Dakota Supreme Court made Zhang's fraud claim and Zhang's evidential facts of Brown's deception and misguidance, plus Oliver's fraud on the court, disappear by making the following statements in the opinion.

"There may well be disputed facts associated with Zhang's divorce in the sense that he disagrees with the testimony provided by certain expert witnesses, or statements of his ex-wife's attorney, or even the determination of the facts by the court. However, none of these disputes are material to his malpractice claims in the absence of any evidence that Brown acted negligently"

Apn. 86.

What should have been a determination of who provided more reliable factual evidence in the legal proceeding became a calculation of the number of people who claimed to have found no support: "Outside of Zhang's own conclusory allegations, neither James, Skolnick, nor a consulting legal expert have found

support for his claims that Brown committed malpractice.” (Apn. 85)

It has been acknowledged by both courts and all involved parties that proving the case against Brown is the core to the whole dispute including the Respondents’ case.

The South Dakota Supreme Court opined that, [i]n order to advance his current malpractice claims against the Appellees, Zhang must establish a colorable claim of negligence against Brown. The undisputed material facts contained in the record establish, however, that he is unable to make this predicate showing” (Apn. 81).

South Dakota Supreme Court ignored repeated such “showing” that Zhang had, even the ones made during his resistance to Rasmus’s summary judgement motion filing and the related hearing on Brown’s deception, etc. To establish a colorable claim, Zhang attached 120 pages of factual documents to his

resistance filing to Rasmus' summary judgment motion not to mention that Zhang had provided to the circuit court a 77 page summary with numerous supporting written documents in the CD mentioned in fn. 1. The only thing Zhang did not do was limit his claim to negligence only, but he made multiple and broader claims in addition to a legal malpractice claim in Respondents' case.

The South Dakota Supreme Court opinion regarding Respondents' motion for summary judgment (Apn.79-86) restricted legal malpractice to negligence or error and professional standard only. The court's opinion did not mention what to do for the facts presented in Brown's and Respondents' case regarding Brown's deception on alimony determination and misguiding Zhang to sue the defense team.

In the malpractice case against Respondents, Zhang had tried to add a fraud complaint in order to have fraud properly prosecuted and was denied by the

circuit court. The South Dakota Supreme Court opined that “[t]he circuit court’s decision to deny Zhang’s motion to amend his complaint to include a fraud claim cannot serve as a basis for reversal since it was based upon Skolnick’s jurisdictional claim”. The South Dakota Supreme Court’s opinion could not be supported by either the contents of Zhang’s complaint, nor by the circuit court’s decision. Zhang’s amended complaint (Apn. 145) stated that “defendants Skolnick[’]s chose to willfully cheat the Plaintiff by alleging that Civ. 13-329 [Brown’s case] would be unsuccessful,” (*i.d.*) and other claims on Skolnick’s fraud bear no relationship with Skolnick’s jurisdictional claim. The purpose explained in Zhang’s motion to amend his complaint was to meet the punitive damage requirement; that stated purpose had no correlation to Skolnick’s jurisdiction claim (Apn. 144). The circuit court’s denial was based solely on the court’s statement that “[w]e are significantly [far] along in the case[.]” (Apn. 114), which has nothing to do with

Skolnick's jurisdictional claim.

In Zhang's Appellant's Brief number one, Zhang clearly asked the South Dakota Supreme Court on the possibility of partial compensation by adjudicating the fraud claim alone and the prejudicial effect of not allowing a fraud claim (Apn. 152). If a fraud claim had been allowed, Zhang would have a viable trial in which a jury could evaluate his proffered evidence, versus no trial at all. The difference is not as trivial as the court alleged in its opinion.

Regarding factual evidence, the South Dakota Supreme Court did not address Zhang's assertion that it was error to grant Rasmus' summary judgment motion without any evidential review of the briefed exceptions to the expert witness mandate in legal malpractice cases. Despite the huge volume of evidence supplied by Zhang, the court opined that "he [Zhang] lacks critical expert testimony" (Apn. 92 ) to justify the circuit court's ruling on Rasmus' summary judgment motion without

any evidential review and ignoring Zhang's arguments on the lay person standard exception or his argument that fraud has no professional standard to compare with since it is not a professional activity.

Zhang's affidavit on the expert witness issue in South Dakota as an effort to get the candidacy of experts expanded was skewedly characterized by the South Dakota Supreme Court by using only one tenth of the contents of Zhang's affidavit to characterize the document:

“Zhang filed an affidavit on the deadline [date for providing expert opinion] in which he stated he had ‘enough written evidence to prove his case[.]’ He further stated that the facts and ‘evidence to be presented at trial will show the acts and omissions so clearly that a layman could reasonably conclude that they were negligent without the aid of expert testimony.’”

(Apn. 70)

The court failed to mention the other nine tenths of Zhang's affidavit, which elaborated Zhang's experiences with attorneys from South Dakota and the small-bar phenomena in South Dakota. (Apn.123-141)

Additionally, Zhang used evidential facts that demonstrated that an attorney had committed fraud on the court. Zhang's affidavit revealed that, in South Dakota, attorneys chose to use avoidance, excuses, subterfuge, and even abandonment of their clients rather than performing their professional and ethical duties; no legal experts involved were willing to reveal even fraud on the court of their peer, not to mention testifying against their peer. Zhang stated, "The fact that legal experts like Attorney Harvey Oliver can perpetrate 'fraud on the Court' illustrates the fragility and danger of injustice in our current legal system."

(Apn. 137) Even though Zhang's filing was made timely, the circuit court did not mention expanding the expert pool as a solution to the small-bar phenomena. Nor did the South Dakota Supreme Court address the solution, even when directly asked by Zhang to expand the expert witness pool to nationwide. (Apn.153 and 155-156).

Regarding the delayed interpreter approval

process briefed by Zhang on appeal, the South Dakota Supreme Court does not think Zhang was prejudiced or unfairly treated by the circuit court, and, in its opinion, the court even blamed Zhang for the interpreter delay (Apn.91), even though Zhang was required to attend two hearings to get an approval for interpreter use in addition to his previous endeavors with the court administrator. In contrast, James' summary judgment motion was granted by the circuit court a without single hearing. Such drastic difference was briefed by Zhang in his appellant's brief and was ignored by the South Dakota Supreme Court.

The fact that Zhang had followed Brown's and Respondents' guidance, incurring additional expenditures, is a direct showing of Zhang's reliance element for his fraud claim, which is in direct contradiction to the South Dakota Supreme Court's no reliance opinion. (Apn.89).

In his rehearing petition, Zhang questioned why,

throughout the different actions, no Respondent or court mentioned attorneys' deception or the fraud issue. For court procedural doctrine, the unopposed disputed material facts should have been admitted. Zhang then found SDCL § 16-19-34 (South Dakota Attorney Deceit Statutes) on attorney's fraud, thus realizing what other attorneys, even the courts, are avoiding. Zhang included his findings into his rehearing petition.

The prevalence of the mentioned avoidance had emboldened attorneys to make fraudulent statement without fear of any consequences, such as in the case against Respondents, when Rasmus made two affidavits with directly contradicting facts. Even though Zhang revealed Rasmus' untruthful affidavits by mentioning the contradicting facts, neither the circuit court nor the South Dakota Supreme Court addressed the issue.

This filing was not for factual review; additional statements made by the South Dakota Supreme Court in contradicting the facts in the court record can be

elaborated during the merit phase briefing as needed.

Some of the issues were already mentioned in Zhang's Petition for Rehearing filed in the South Dakota Supreme Court.

## **REASONS FOR GRANTING THE WRIT**

### **On First Question Raised**

**1. Lower court decisions are conflicting in how they approach frauds committed by attorneys among different courts**

There are conflicts shown by both federal circuit courts and state courts on whether to include fraud into the legal malpractice category when prosecuting fraud committed by attorneys during their professional activity.

Fraud: A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment. Fraud is usu. a tort, but in some cases it may be a crime. Black's Law Dictionary 10<sup>th</sup> ed. Malpractice: An instance of negligence or

incompetence on the part of a professional (*i.d.*).

The majority of federal and state courts would distinguish fraud from a legal malpractice claim during proceedings, as shown in *Sheehy v. New Century Mortg. Corp.*, 690 F.Supp.2d 51, 64 (2010) (“Therefore, where, as here, the issue is whether an attorney breached her fiduciary duty by engaging in outright fraud in connection with a real estate transaction, plaintiff need not provide expert testimony to survive summary judgment on this claim”) and *Smith v. Morris, Manning & Martin, LLP*, 264 Ga. App. 24,27 (2003) (“[U]nder Georgia law, the affidavit requirement in OCGA § 9-11-9.1 ‘is applicable only to those professional malpractice actions alleging professional negligence.’ Claims based on a professional’s alleged intentional conduct do not require an expert affidavit.” (quoting *Labovitz v. Hopkinson*, 271 Ga. 330, 334(3), 337 (1999)).

The United States Court of Appeals, Third Circuit, affirmed a lower court’s denial decision on a

fraud claim based solely on the fact that no expert in the legal field provided an affidavit against their fellow attorney in the case. *Nuveen Municipal Trust v. Withumsmith Brown P.C.*, 752 F.3d 600 (2014). The Third Circuit asked for clarification from the New Jersey Supreme Court by filing a petition for certification on N.J. Stat. Ann. § 2A:53A-27 and the petition was denied. The Third Circuit confirmed the case as follows: “In light of the New Jersey Supreme Court’s denial of our petition for certification, we decide the question based on our best understanding of how the New Jersey Supreme Court would rule.” *Id.* The Third Circuit clearly stated that the *Nuveen Municipal Trust* complaint should be categorized as “--- an action alleging an intentional tort, such as common law fraud or aiding and abetting common law fraud, which relates to alleged professional malpractice or negligence but does not require proof of malpractice or negligence[.]” *Id* at 602.

The same situation has occurred in Petitioner

Zhang's case: The outright fraud committed by Brown by deceiving Zhang as stated in this petition was included into malpractice because Respondent Rasmus made a comprehensive allegation of "no expert, no case," and the circuit court then granted the summary judgment motion based on this general allegation without distinguishing malpractice from the fraud claim. The case was affirmed by the South Dakota Supreme Court because Zhang "lacks critical expert testimony" to prove the evidential facts provided to prove his fraud claim.

Both the Third Circuit and the South Dakota Supreme Court had limited their statements for confirmation of a lower court's decision on malpractice to negligence only and left fraud out. But when those two courts confirmed decisions from the lower courts, the affirmation decision included fraud as a component of malpractice, because the initial denial of the cases were made under the assumption that fraud was a part of

malpractice.

The South Dakota Supreme Court's opinion indicated that the denial of the malpractice claims which ended the whole proceeding would have no difference if the fraud claim was allowed to be considered separately from malpractice. Zhang asked the South Dakota Supreme Court directly in his Appellant's Brief whether the fraud should be allowed to be considered separately. Thus, from the South Dakota Supreme Court's opinion of confirmation, the fraud was included as a component of malpractice. In *Nuveen Municipal Trust*, the Third Circuit had clearly indicated the inclusion of the fraud into malpractice in the expert witness requirement process (N.J. Stat. Ann. § 2A:53A-27):

“Contrary to Nuveen’s contentions, case law from lower New Jersey courts comports with *Couri* and supports the conclusion that the monetary recovery sought by *Nuveen* is of the type that triggers the AOM Statute. ---- “claim that [a party’s] alleged malpractice resulted in money damages was contemplated by the Legislature as a claim for ‘property damage’ under the [AOM]

statute." --- we conclude that a claim against an attorney for alleged malpractice is a claim for property damage within the legislative intent and plain meaning of the statute.

752 F.3d 600, 603,604 (internal citation omitted)

The Minnesota Supreme Court differentiated fraud from malpractice:

"Fraud is an intentional act that 'is distinguished from negligence by the element of scienter required. --- There is no doubt of fraudulent intent when the misrepresenter knows or believes the matter is not as he or she represents it to be.

"On the other hand, professional negligence requires proof of a negligent act that departs from the standard of care. --- The very fact that an act is characterized as negligent indicates that harm to another as the result of it was neither foreseen *nor intended*, although a reasonable man would have foreseen danger to others because of it and would have adopted another course of conduct. ---.

"Further, claims of negligence and fraud involve different defenses and measures of damages. For example, a contributory-negligence defense is a proper offset to liability for an unintentional act, but is not an adequate defense for intentional acts. --- And the measure of damages for fraud is out-of-pocket losses, while negligence damages are compensatory, which is a broader measure including general and special damages, and out-of-pocket and future losses."

*Noske v. Friedberg*, 713 N.W.2d 866, 876 (2006)

(emphasis in original; internal quotation marks and citations omitted).

Zhang stated in his Appellant's Brief that "fraud is an intentional tort of common law deceit, not a tort of negligence for professional malpractice as written in Appellees' professional insurance policies."

**2. Including fraud as a component of legal malpractice has resulted in the exoneration of attorneys for outright fraud, without performing a basic preliminary factual review by either the court or jury.**

Including frauds as a component of malpractice resulted in what occurred in the instance case and in *Nuveen Municipal Trust*: The offenders were acquitted without any form of evidential review, a form of exoneration that could not be enjoyed by non-attorneys who committed the same offense.

Usually, in a fraud case, the factual components are relatively simple and would meet the lay person standard exception, even for the malpractice

prosecution. The unfortunate reality is that, once a claim cloaked as legal malpractice, the trial court will first jump to the expert witness mandate rather than require an evidential review first, as happened in both *Nuveen Municipal Trust* and the instance case. Thus, a viable claim of frauds filed with a legal malpractice claim as one of the counts was dismissed solely due to a lack of legal experts to testify for legal malpractice. No legal experts to testify can be caused by different reasons, and one of the reasons could be as simple as an expert's refusal because the fraud is not malpractice from the start. Other reason such as the "small bar" phenomena described in the instance case, in which no one wants to testify against their peers for outright frauds.

No matter what the underlying cause, the end result is the same: An attorney who commits fraud is exonerated differently than a non-attorney who commits fraud.

Acquitting an attorney's outright frauds differently than frauds committed by non-attorneys violated the Equal Protection Clause of the 14th Amendment.

**3. There is a need for this Court to resolve the conflict among courts on whether to include outright fraud committed by attorney into legal malpractice and stop the constitutional violation.**

There is an endemic of legal malpractice cases filed without legal expert willing to testify, as stated in the South Dakota Supreme Court's opinion (fn 3, Apn.81).

That the real number of attorneys acquitted for their frauds just because of confusing on how to assign outright fraud claim filed along with malpractice is unknown. There is urgent need for this Court attention on the matter. The unconstitutional acquittal process enjoyed by attorneys but not others needs to be stopped by this Court by using this case as a vehicle to prevent

future similar unconstitutional acts.

The widespread tolerance by attorneys of their fellow attorneys' frauds and the reluctance to solve obvious problems has created the crisis of a miscarriage of justice and has resulted in public distrust of attorneys and even our legal system.

There were more attorneys than necessary involved in the instance case. Yet, what Zhang saw through the proceedings was that there was even more deception happening, because not a single attorney was willing to do anything regarding another attorney's fraud, even when the fraud was fraud on the court. If Zhang had claimed wrongly regarding the fraud claim or his claim was not supported by evidential facts, there were plenty of opportunities for Respondents or other attorneys involved in the case to make a statement that the evidential documents that Zhang had provided were not factual to support his fraud claim. Instead of challenging their fellow attorneys for fraud or reporting

those frauds to related agencies as appropriate, the involved attorneys chose to remain silent rather than take on the tougher choice of confronting their peers' frauds. During the avoidance, a new group of attorneys exacerbated the initial fraud by further deceiving Zhang on the subject.

Similarly, the circuit court and the South Dakota Supreme Court chose the same wrong pathway by avoiding any mention of the questions raised regarding attorneys' fraud. Both courts chose to allow the attorneys' summary judgment motions, which were made purely by allegations without concrete evidential support, while Zhang's voluminous documents attached in opposition were not even mentioned. The South Dakota Supreme Court went as far as covering up factual conflicts in James' summary judgment motion decision by making two separate statements, as stated in the statement of facts. Zhang had stated those factual conflicts in his appellant's brief, with Judge Kean's e-

mails quoted and the original court orders attached to Zhang's rehearing petition.

That the South Dakota Supreme Court could disregard material documents already docketed with the court to make statements like “[t]here may well be disputed facts associated with Zhang’s divorce in the sense that he disagrees with the testimony provided by certain expert witnesses, or statements of his ex-wife’s attorney, or even the determination of the facts by the court” to deal with frauds revealed in the instance case is troublesome. Simply put, the South Dakota Supreme Court ruled that the extra cost to sue the defense team and the expenses on a “sham legal process” are routine for any divorce case. Zhang was foolish enough to spend more money to pursue the impossible to sue the defending team rather than file appeal as South Dakota Supreme Court opined: “Zhang did not appeal the court’s order, but he viewed the result as adverse”. That the South Dakota Court made the fraud on the

court committed by Oliver, which was documented in hearing and trial transcripts, vanish by such a statement is extraordinary, as fraud on the court carries potential disciplinary and criminal significance.

The South Dakota Supreme Court's statements made in contradiction to the factual evidence supplied include the following: “[¶6] ---Zhang voluntarily dismissed his malpractice lawsuit against Brown on October 31, 2013; [¶36] Zhang could not have detrimentally relied on any allegedly fraudulent omissions by Skolnick. --- (plaintiff could not prevail in her fraud claim without demonstrating reliance upon a misrepresentation)” showed the global attitude of the South Dakota Supreme Court in dealing with attorneys' fraud.

Although there is a more severe penalty than malpractice listed for attorneys' fraud by the law (SDCL § 16-19-34 (South Dakota Attorney Deceit Statutes)), the law would be an ideologic symbol if mentioning or

dealing with frauds committed by attorneys had been avoided by every attorneys that Zhang had consulted, including by the court system in South Dakota. The hiding fraud by the related courts had more detrimental effects on containing attorneys' bad behavior or general public trust in the system.

Obviously, complicated fraud committed by attorneys would need expert witness testimony to aid the jury in making a determination, but the expert witness is for the complexity of the fraud itself. To mandate an expert witness solely because the defendant is an attorney to raise the bar for success in prosecuting outright fraud committed by attorney is neither constitutionally sound nor is it the proper approach to discourage attorneys' fraudulent misconducts. Thus, this Court's attention is needed.

## **On the Second Question Raised: Fair Hearing**

### **1. The payment and interpreter granting procedure is not fully settled at present time.**

The “Language Access in State Courts” from the Department of Justice Civil Rights Division, issued on September 15, 2016, requested state courts to pay for interpreters used in civil proceeding.

In the instance case, the circuit court had asked Petitioner to pay for the cost, and Zhang had agreed in order to get the interpreter to start on time for any verbal proceeding.

The person who could grant or should grant the interpreter also not very clear as had happened in this case or in U.S. Code § 1827 (d)(1), (j).

**2. The trial court should at least treat all parties equal if not facilitating Zhang's effort to obtain interpreter, rather than hindering the basic fairness principle in delaying the interpreter use without convincing excuses.**

Even after Zhang had agreed to pay for all interpreter-related costs, including potential traveling expenses for the interpreter, Zhang's interpreter use was delayed and Zhang had to go through two hearings without the help of the needed interpreter. After the hearing, Zhang had to find out the meaning of some English legal words that were used, without full understanding during the hearing.

Zhang had invited all Respondents' involvement in the interpreter seeking and approval process while working with the trial court.

In the instance case, fairness and equal justice have gone out the window. Zhang had to endure repeated delays by the court on the approval of his

interpreter with unsound excuses (Apn.113). Zhang had to go through multiple final, outcome-affecting hearing without the needed interpreter help. When Zhang asked the South Dakota Supreme Court to resolve the unfairness and unequal treatment that Zhang had suffered, the court had added more insult to the injury by stating that “[a]ny delay in obtaining approval for the interpreter’s assistance is attributable to Zhang, not the court.”

The fact that Petitioner lacked the capacity to understand and to use the only weaponry -- English legal jargon -- in a legal battle in a totally strange arena to him, with his ability to fight crippled by the court, is lacking a minimum sense of fairness or justice.

For the extreme unfair treatment and adverse outcome of the related hearings without an interpreter’s help, Zhang has to declare that his right to a fair hearing provided by the Fifth Amendment is violated, as was 28 U.S.C § 1827, although the statute is currently

mainly used by Limited English Proficiency (LEP) with counsel. The criteria for using 28 U.S.C § 1827 for a pro se litigant has not been fully discussed anywhere. The South Dakota Supreme Court opinion in the instance case is not consistent with the ABA's resolution of "Standards for Language Access in Courts" adopted in February 2012.

The lower courts' treatment of Petitioner is unjustified and violated Zhang's fair hearing right provided by the Fifth Amendment as the United States Court of Appeals, Ninth Circuit, had opined in a similar case. *U.S. v. Mayans*, 17 F.3d 1174,1180,1181 (1994).

"Barriers to language access can interfere with the capacity of state courts to accurately evaluate the facts and fairly administer justice. And they can also place unfair and unconstitutional burdens on individuals –" the "Language Access in State Courts" from The Department of Justice Civil Rights Division, issued on September 15, 2016.

**3. The Court could use the instance case as a vehicle to lessen the confusion and injustice that occurred in this case to eliminate potential similar unconstitutional occurrences**

In July 2008, the Brennan Center for Justice – a public policy and law institute that focuses on issues of democracy and justice – released an 88-page report on an extensive study of language access in state courts. The report, Language Access on the State Courts, notes that about 25 million people in the US are LEP and need an interpreter in court. and the DOJ also quoted similar data.

The issue raised in this case that needs this Court's attention is that, for a pro se litigant who has to fight the entire legal battle by himself, any deficiency in proper language use either in understanding or expression would cause prejudicial effects on the final outcome of a legal action. In cases represented with legal Counsel, the counsel can help alleviate

misunderstanding and confusion. In pro se situation clearly understand every word is critical for the fairness. Thus, it is a must, not choice if pro se litigant willing to pay the interpreter and should grant a qualified interpreter timely. The South Dakota Supreme Court reasoning for the confirmation of the circuit court delaying in the interpreter use is outrageous because Zhang did not insist only on one interpreter but willing to work with any qualified interpreter and had proposed to let court or Respondents to make the choice.

## **CONCLUSION**

The petition for a writ of certiorari should be granted.

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