

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

No. 28580

EXCEL UNDERGROUND, INC.,
Plaintiff/Appellee,

vs.

BRANT LAKE SANITARY DISTRICT,
Defendant/Appellant

BRANT LAKE SANITARY DISTRICT,
Plaintiff/Appellant,

vs.

EXCEL UNDERGROUND, INC., and
GRANITE RE, INC.,
Defendants/Appellees.

GRANITE RE, INC.,
Third-Party Plaintiff/Appellee

vs.

REED I. OLSON and MELISSA D. FISCHER-OLSON,
Third-Party Defendants/Appellees

Appeal from the Circuit Court
Third Judicial Circuit, Lake County, South Dakota
The Honorable Patrick Pardy, Presiding Judge

**BRIEF OF APPELLANT
BRANT LAKE SANITARY DISTRICT**

**NOTICE OF APPEAL FILED March 30, 2018
ORAL AGRUMENT REQUESTED**

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PRELIMINARY STATEMENT

Appellant Brant Lake Sanitary District will be referred to as BLSD. Excel Underground, Inc. will be referred to as “Excel.” Granite Re, Inc. will be referred to as “Granite Re.” Schmitz Kalda and Associates, Inc. will be referred to as “SKA.”

JURISDICTIONAL STATEMENT

BLSD has appealed: the August 1, 2017 Order granting partial summary judgment to Excel; the Order and Judgment dated December 11, 2017 that granted SKA’s motion for summary judgment; the Order dated January 12, 2018 that denied BLSD’s motion for summary judgment; the Judgment dated February 20, 2018; and the Order dated March 13, 2018 denying BLSD’s motion for new trial/JNOV. BLSD filed its Notice of Appeal on March 30, 2018.

STATEMENT OF THE ISSUES

- 1. Whether the trial court erred in granting Excel’s motion on BLSD’s liquidated damages claims.**
 - *Estate of Ducheneaux*, 2018 SD 26, 909 N.W.2d 730
 - *Overholt Crop Ins. Service Co. v. Travis*, 941 F.2d 1361 (8th Cir. 1991)
 - *Subsurfco, Inc. v. B-Y Water Dist.*, 337 N.W.2d 448 (S.D. 1983)

- 2. Whether the trial court erred in granting SKA’s motion for summary judgment but denying summary judgment on the same claims to BLSD.**
 - *Leonhardt v. Leonhardt*, 2012 SD 71, 822 N.W.2d 714
 - *In re Estate of Rille ex rel. Rille*, 728 N.W.2d 693 (Wis. 2007)
 - *Ruple v. City of Vermillion, S.D.*, 714 F.2d 860 (8th Cir. 1983)

- 3. Whether the trial court erred in instructing the jury that SKA was BLSD’s agent.**
 - *Clausen v. Aberdeen Grain Inspectors*, 1999 SD 66, 594 N.W.2d 718
 - *Collins Co., Inc. v. City of Decatur*, 533 So.2d 1127 (Ala. 1988)
 - *Egemo v. Flores*, 470 N.W.2d 817 (S.D. 1991)

4. Whether the trial court erred in allowing evidence, argument, and an instruction concerning an alleged competitive bidding violation.

- *Winter Bros. Underground, Inc. v. City of Beresford*, 2002 SD 117, 652 N.W.2d 99
- SDCL 19-19-403

5. Whether the damages award was excessive, speculative, and contrary to law.

- *Big Band, Inc. v. Williams*, 202 N.W.2d 121 (S.D. 1972)
- *Lamar Advertising of South Dakota v. Heavy Constructors, Inc.*, 2008 SD 10, 745 N.W.2d 371
- *Mooney's, Inc. v. South Dakota Dept. of Transp.*, 482 N.W.2d 43 (S.D. 1992)

STATEMENT OF THE CASE

Excel filed suit against BLS D for breach of contract. BLS D filed a countersuit against Excel and Granite Re, and a contribution claim against SKA. The trial court dismissed BLS D's claim for liquidated damages and granted summary judgment to SKA, on the grounds that Excel could not prove any damages caused by SKA. The trial court denied summary judgment to BLS D on the same damages. At trial, the jury found for Excel. The trial court denied BLS D's motion for a new trial and its motion for judgment as a matter of law. This appeal follows.

STATEMENT OF FACTS

Brant Lake is a small lakeside community near Chester, South Dakota, consisting of year-round and part-time residents. (TT 1169:21). The BLS D board is made up of unpaid volunteers who live in the district. (TT 1170-72). After many years of having residents' sewage needs served by individual septic tanks, the Board decided to install a sewer system. (TT 1172-73).

BLS D contacted a number of other lakeside sanitary districts to determine the best course of action. (TT 1173-74). The project was to be funded by loan and grant money,

as well as local contributions from a tax opt-out and fees from residents. (TT 1178-79). Eventually, BLS D selected SKA as an engineer for the project because it had worked with both the Madison and Chester sanitary districts. (TT 1180-81). SKA drafted the plans and specifications for a pressure sewer system around the lake. (TT 1182).

The system, as designed, consists of two branches of main line surrounding the lake; they join on the west side into a single line that drains into the lagoon. Each home or cabin is connected via a gravity sewer pipe to a device called a grinder pump, which grinds the sewage and moves it via pressure down a smaller line that connects to the main line. The plans called for the majority of the pipe to be installed via a process known as directional boring. Unlike open trenching, where the contractor digs a hole and puts the pipe in it, directional boring allows the pipe to be installed without disturbing the ground surface. (TT 548-49).

The project was to be substantially complete – that is, providing service to each homeowner - by December 12, 2012, with final completion required by May 30, 2013. (TT 1183-84). These dates were not aspirational; the contract stated that, if the contractor failed to meet the deadlines, it would pay \$1,450 per calendar day as liquidated damages. (Appx. 147). The contract also stated that, if BLS D terminated the contract, it had the right to complete the project and recover the cost of completion from the contractor. The contract specifically provided that such a “termination shall not affect any right of [BLS D] against Contractor then existing or which may thereafter accrue.” (R 227, Appx. 150). Not a single bidder complained that the proposed timeline was unreasonable. (TT 513).

Like all the other bidders, Excel was provided with copies of the plans and the spec book, and had the opportunity to view the lake. (TT 513). SKA also fielded questions from the various contractors. (TT 514). Reed Olson, the owner of Excel, contacted SKA to ask about the soil conditions; Kim Buell, the owner of SKA and the primary design engineer on the project, told him that, although soil testing had been done in the area of the lagoon, there was no data on the soil on around the lake, and Olson would have to do his own tests. (TT 514-15).

Unlike several other contractors, Excel never did any soil testing. (TT 515, 1065). Reed Olson stated at his deposition that he drove around the lake but never got out of his truck, because there was no need. (TT 1062-63). By trial, however, he claimed to have paid multiple visits. (TT 844). Whatever concerns he may have had, they were not incorporated into his bid.

There were five bidders on Phase 2. Excel's bid was the lowest by approximately \$430,000. (TT 1188). Reed Olson conceded that he was concerned about the spread. Olson testified that he discovered an error in his bid the day of the bid opening. He claimed that he told Buell about the mistake, and Buell told him it was too late to do anything; Buell testified that Olson never asked to withdraw and told Buell that he stood by his bid. (TT 516). In any event, Olson made no attempt to follow the contractual procedure for withdrawing his bid; he admitted that this was because he had never bothered to read the documents. (TT 518, 1074-76). When he applied for a performance bond, Olson stated that he was comfortable with the bid, and that the reason Excel was so much lower was that it had superior numbers on the pump installation. (TT 1077-78).

At the same time that Olson claimed he was told he could not withdraw his bid, the Board was concerned about the spread and the fact that Excel had never done a project of this size. (TT 1189). One of the primary concerns was the size of the company; while other bidders talked of putting three or four crews on the job, Excel could field only one. (TT 519). Further, neither Excel nor Olson had experience with directional boring; the company did not even own a boring machine. (TT 520, 1059). Olson, however, reassured Buell that he would hire extra employees and achieve substantial completion by October. (TT 522). Relying on these assurances, BLSD awarded the contract to Excel. At the meeting where the contract was awarded, Reed Olson was on his phone attempting to secure a boring machine. (TT 1573-74).

The project was contentious and behind schedule almost from the start. Despite its failure to meet the contractual requirement that it provide a construction schedule before the pre-construction meeting, Excel received notice to proceed on June 25, 2012. (TT 526). However, Olson told Buell that Excel had another project to finish before it could start at Brant Lake, and promised to begin on July 9. (TT 526-27).

Excel finally commenced work at the end of July. (TT 1086). By August, the project was already behind schedule. (TT 1192). SKA and Excel were having near-constant disputes over the work, with Excel refusing to follow directions and failing to keep SKA advised of the construction schedule. (TT 531-36, 551-52, 1587-89). As one witness described it, the project “was one big fight from day one.” (TT 1643). Reed Olson threatened to quit the job on several occasions. (TT 963). SKA eventually put a second inspector on the site because Excel needed so much supervision. (TT 553). By January of 2013, Excel was communicating with BLSD via attorney. (TT 1096).

The project also suffered from staffing problems; multiple witnesses testified that, due in part to the behavior of Reed's brother, Scott, Excel had difficulty keeping employees on the site. By the spring of 2013, all of Reed's original crew had quit. (TT 1362, 1574-76). Greg Maag, who reviewed Excel's payrolls as part of his work for the First District Association of Local Governments, testified that Excel had approximately six or seven employees on the project and sometimes had only one or two. (TT 1343-44)

The final completion date came and went, and Excel had not even finished laying the main lines. Perhaps unsurprisingly, the relationship between Excel and BLSD continued to deteriorate. Although Excel had bid \$8.25 a lineal foot to install the 1 ¼ inch line between the grinder pumps and the main line, and had elsewhere bid \$25 a lineal foot to open trench the gravity sewer that went from the house to the grinder pump, it demanded \$275 a lineal foot to open trench the 1 ¼ inch line in Spawn's addition. (TT 549-51). BLSD followed the engineer's recommendation and did not grant a change order. (TT 572).

There was also a dispute over the quality control testing on the main line. Over the course of nine weeks, Excel tested and passed approximately three quarters of the pipe using the formula in the spec book. (TT 544). When SKA changed to a new formula upon Excel's request, it took Excel ten weeks to get the remaining one quarter of the line to pass. (TT 544).

Winter arrived, and the project was still incomplete. Although homeowners were supposed to be able to utilize the sewer system, issues cropped up almost immediately. Many homeowners had their grinder pumps or the lateral lines freeze. These problems were not merely due to cold weather. Excel had failed to restore the grade around the

pipes and grinder stations. (TT 1698). There were air cavities in the backfill around some of the pits. (TT 1554). On a number of houses that would have repeated freezing problems over the winter, the pipe was actually exposed. (TT 1504, 1708-09). Excel had also neglected to install insulation discs on the pumps as required by the contract documents. (TT 1551).

Some of the problems had nothing to do with freezing. At a number of properties, the system was not working because Excel had failed to open the valve connecting the lateral line to the sewer main. (TT 1552). In fact, Excel had refused to connect several properties at all, and, at one location, it had failed to fuse the pipe connecting a grinder station to the main line so that water was actually bubbling up from the ground when the pump was turned on. (TT 1553, 1645, 1699).

Although Excel initially assisted with the troubleshooting, Reed Olson soon stopped answering his phone. (TT 554, 1606-07). Excel took the position that the manufacturer (E-One, Inc.) or the supplier of the grinder pumps (Electric Pump, Inc.) was responsible for dealing with the issues on the incomplete project. At first, Electric Pump had agreed to help; however, by December of 2013, Electric Pump made BLSD aware that it would no longer assist with the pumps. (TT 1317). Electric Pump sent a letter to Excel stating that it would not provide services after January 17, 2014. (TT 1316-17, R. 1030). Although BLSD asked if Excel would deal with the pump problems after that date, Excel continued to insist that it was Electric Pump's obligation to continue assisting BLSD. (TT 1319). BLSD concluded that Excel was not returning to the project (TT 821, 1229). On January 20, BLSD terminated the contract, citing Excel's failure to supply

sufficient workers and equipment, failure to pay subcontractors, disregard of the engineer, and violations of contract provisions. (TT 1321).

BLSO had to hire a number of contractors to clean up after Excel. First, it retained a property management company to deal with the immediate troubleshooting issues. (TT 1548). After getting quotes from multiple contractors, BLSO hired Dakota Road Builders to complete the work that Excel had left unfinished. (TT 556).

Excel filed suit for breach of contract against BLSO in Minnehaha County in February of 2014. The complaint also named Electric Pump and E-One as defendants. BLSO then filed suit against Excel and its bonding company, Granite Re, in Lake County. Excel's suit was transferred to Lake County, and the two matters were consolidated. In April of 2016, BLSO amended its complaint to make a claim for indemnity and contribution against SKA. (R. 942).

In November of 2017, Electric Pump, E-One, and SKA moved for summary judgment on Excel's claims. (R. 1218, 1235, 1771). Excel did not oppose E-One's motion. SKA's motion for summary judgment was not premised on any defect in BLSO's case. Instead, SKA argued that BLSO was not entitled to contribution and indemnity because Excel could not prove its damages. BLSO responded by agreeing that Excel could not prove its damages and asserting that, if summary judgment were granted to SKA on the so-called 'pass through' claim, BLSO could not be liable to Excel for those same damages.

At the hearing, the court initially indicated that it would address the issues raised by BLSO. (Appx. 77-78, 94). It further acknowledged BLSO's argument. (Appx. at 98). However, the trial court said that BLSO's argument was not 'ripe' and would

require a ‘motion or a jury instruction.’ (*Id.*). The trial court then granted summary judgment to Electric Pump, E-One, and SKA.

BLSD duly filed a motion based on the court’s grant of summary judgment to SKA. (R. 2290-2303). The trial court denied this motion, on the grounds that BLSD should have filed its own motion in November or joined in the motion filed by SKA. (R. 2209, Appx. 114, 131-32). The trial court also denied BLSD’s motion in limine to exclude arguments that SKA had been responsible for problems on the project.

Over the course of a two-week trial, Excel repeatedly argued that SKA was professionally negligent, and that it suffered harm as a result. The trial court, over BLSD’s vigorous objection, instructed the jury that SKA was BLSD’s agent. The jury returned a verdict for Excel. BLSD made a motion for JNOV or a new trial; the trial court denied this motion without even requesting briefs from Excel.

STANDARD OF REVIEW

The grant or denial of summary judgment is reviewed de novo. *Jorgensen Farms, Inc. v. Country Pride Corp., Inc.*, 2012 SD 78, 824 N.W.2d 410, 414. This Court also reviews the denial of motions for judgment as a matter of law and renewed motions for judgment as a matter of law de novo, viewing the evidence in the light most favorable to the nonmoving party. *Center of Life Church v. Nelson*, 2018 SD 42 ¶ 18. The denial of a motion for a new trial is reviewed for abuse of discretion. *Id.* at ¶ 31 n. 3.

“[N]o court has discretion to give incorrect, misleading, conflicting, or confusing instructions. Therefore, when the question is whether a jury was properly instructed overall, that issue becomes a question of law reviewable de novo.” *Stern Oil Co., Inc. v. Brown*, 2018 SD 15 ¶ 12, 908 N.W.2d 144, 150 (quotations omitted).

ARGUMENT

The history of this litigation is a series of compounding errors that benefitted Excel at the expense of BLS D. First, the court granted summary judgment to Excel on BLS D's claim for liquidated damages. Then, after granting summary judgment to SKA on the grounds that Excel could not prove certain damages, the court proceeded to deny BLS D's motion for summary judgment and allowed Excel to proceed to trial on the very damages that had just been held unrecoverable. The harm was further compounded when the court instructed the jury that SKA was an agent of BLS D and allowed Excel to argue that BLS D had broken the law in procuring a completion contract for the sewer project. Any one of these errors, standing alone, provides sufficient grounds for reversal. Their cumulative effect was a judgment for damages that were unsupported by the evidence and contrary to law.

I. BLS D had the right to demand liquidated damages

The trial court held that BLS D could not recover liquidated damages because, by terminating Excel, it had elected to pursue compensatory damages. This holding fails to account for the express language of the contract and is not supported by South Dakota law.

Under the contract, Excel had agreed to pay BLS D "\$1450.00 per calendar day as liquidated damages" for failure to meet deadlines. (Appx. 147). However, the contract also makes it clear that this was not an exclusive remedy. The provisions related to termination not only allowed BLS D to finish the project and to recover the cost of completion from Excel but also specifically provided that "termination shall not affect

any right of [BLSD] against [Excel] then existing or which may thereafter accrue.” (Appx. 150).

At the time of termination, Excel owed BLSD \$559,700.00 in liquidated damages; as per the contract, these damages continued to accrue until the project was at last completed. The trial court granted summary judgment to Excel on the liquidated damages claim, concluding that, under *Subsurfco, Inc. v. B-Y Water Dist.*, 337 N.W.2d 448,457-58 (S.D. 1983), BLSD’s termination of the contract prevented it from seeking liquidated damages. (Appx. 35). However, the trial court also recognized that the law has shifted in the years since *Subsurfco*. (*Id.*). Even if *Subsurfco* remains the law of this state, its holding does not deprive BLSD of the right to pursue liquidated damages under the contract.

It is true that *Subsurfco* held that “[w]hen an owner terminates a contract, the cost of completion is recoverable; the liquidated damages are not recoverable.” 337 N.W.2d at 457. However, the analysis underlying this conclusion consisted of a citation to *U.S. v. American Surety Co.*, 322 U.S. 96 (1944), and a brief quotation from *U.S. v. Maryland Casualty Co.*, 25 F. Supp. 778,780 (D.Me. 1938). *American Surety* does not stand for the general proposition announced by *Subsurfco*; instead, it did no more than consider the impact of a specific contract provision that allowed liquidated damages only “if the Government does not terminate” the contractor. 322 U.S. at 99 n. 3 (emphasis added). The BLSD/Excel contract, however, explicitly provided for the accrual of liquidated damages after termination.

Maryland Casualty Co. is of dubious value because it relied on cases from the early 20th century, which was a time of general hostility to the concept of liquidated

damages. *See, e.g., Barnes v. Clement*, 81 N.W. 301 (S.D. 1899); *Utley v. Dunning*, 161 N.W. 813 (S.D. 1917); *Fitzgerald v. City of Huron*, 199 N.W. 775 (S.D. 1924). With *Dave Gustafson & Co. v. State*, 156 N.W.2d 185, 188 (S.D. 1968), however, this Court endorsed “the modern tendency not to ‘look with disfavor upon liquidated damages provisions in contracts ... They serve a particularly useful function when damages are uncertain in nature or are unmeasurable, as is the case in many government contracts.” (emphasis supplied). Indeed, this Court has held that such clauses “are not against public policy [because they are] an appropriate means of inducing due performance, or of providing compensation, in case of failure to perform.” *Walter Motor Truck, Co. v. State by and through Dept. of Transp.*, 292 N.W.2d 321, 323 (S.D. 1980). *See also Prentice v. Classen*, 355 N.W.2d 352, 355 (S.D. 1984). This is because, in public contracts, it “is the public as a whole that suffers when such a contract is breached ... Although the damages suffered by the governmental body itself may be readily ascertainable, the damages sustained by the public are not readily ascertainable.” *In re Direct Transit, Inc.*, 226 B.R. 198, 202 (B.A.P. 8th Cir. 1998) (applying South Dakota law) (emphasis added).

There has been a similar evolution in the law regarding the question whether an owner’s termination of a contractor’s work on a project, or the contractor’s abandonment of its work, nullifies a liquidated damages provision. As *Weitz Co., LLC v. MacKenzie House, L.L.C.*, 2008 WL 2980093 * 7 (W.D.Mo. 2008), *affirmed* 665 F.3d 970, 976 (8th Cir. 2012), observed,

There was a time when the courts were quite strong in their view that almost every contract clause containing a liquidated damage provision was, in fact, a forfeiture provision which equity abhorred, and therefore, nothing but actual damages sustained by the aggrieved party could be recovered in case of contract breach... In ‘modern times,’

this hostility has relaxed and, as it has, so too has the view that terminating the contract terminates the damage caused by the contractor's delay. Damages from the delay do not end simply because the contractor is no longer working on the project, and if one accepts...that the liquidated damages provision is intended to compensate the owner for that delay, there is no principled reason for terminating the recovery.

(emphasis added). While much of the case law and commentary on this point has been phrased in terms of project abandonment, the reasoning is equally applicable to a project termination. This is particularly true in this case, where Excel's failure to meet agreed-upon deadlines and refusal to do work required by the contract were "so great [and] so unreasonable that they may fairly be deemed equivalent to [an] abandonment of the contract." *In re HRH Const. LLC*, 536 B.R. 539, 543 (Bkrtcy. S.D.N.Y. 2015). *See also Mills v. Hartz*, 94 P. 142, 144 (Kan. 1908) ("protracted delay and the failure to do the things contemplated by the [contract] ... gave the [other party] the right to treat the whole contract as abandoned.")

Under such circumstances there is "no difference between (1) a contractor who abandons a contract before it is completed and (2) a contractor who is properly discharged by the owner before it is completed – provided, of course, that the project is eventually completed." *Weitz Co.*, 2008 WL 298093 at *7 n.3. Indeed, Williston currently acknowledges that "the majority [of jurisdictions] now construe such provisions [to apply] not only to the period of time during which the performance of the contractor is delayed prior to abandonment, but to whatever period is required to complete the work." 24 WILLISTON ON CONTRACTS § 65:20 (4th ed.).

Whether the situation created by a contractor's failure to timely complete a project is described in terms of abandonment or termination, the dilemma for the owner is the same:

a Hobson's choice between (1) terminating the breaching contractor so the project can be finished, but foregoing full recovery for the delay, and (2) waiting until the contractor eventually finishes to preserve recovery of damages. Allowing liquidated damages beyond the termination date presents concerns for the contractor, but those concerns are adequately addressed by requiring the owner to establish that the contractor was properly terminated and by allowing the contractor to argue and prove that the owner was not diligent in completing the project.

Weitz Co. at *7 (emphasis added). When a contractor's failures to meet the agreed-upon deadlines requires an owner to terminate the contract, the effect of a ruling that the owner's actions nullified the liquidated damages provision unfairly allows the contractor "to limit his liability for liquidated damages by totally abandoning the work and ... den[ies] the injured party those damages which were agreed to as fairly measuring damage caused by delay." *City of Boston v. New England Sales & Mfg. Corp.*, 438 N.E.2d 68, 70 (Mass. 1982). The modern view is that the only effect termination or abandonment has on liquidated damages is to limit them "to whatever time is reasonably necessary to comply with contractual demands or, more specifically ... complete the work by a substitute contractor or by the non-breaching party's own efforts." *Cuesport Properties, LLC v. Critical Development, LLC*, 61 A.3d 91, 103 (Md. App. 2013).

Excel argued below that the rule adopted by *Subsurfco* was somehow an extension of the language in *Dave Gustafson & Co.* that a liquidated damages clause "substitute[s] the amount agreed upon ... for the actual damages resulting from breach of the contract." 156 N.W.2d at 187. But that is true only as to those damages to which a

liquidated damages clause applies. *Overholt Crop Ins. Service Co. v. Travis*, 941 F.2d 1361 (8th Cir. 1991) (applying South Dakota law. *Overholt* affirmed the award of both liquidated damages and compensatory damages in an employment contract case where the liquidated damages clause was “designed to compensate [employer] for the violation of [a] restrictive covenant,” while the employer was also entitled to damages under other provisions of “the employment agreement for which no damages were stipulated.” *Id.* at 1373. *See also Lawson v Durant*, 518 P.2d 549, 551 (Kan. 1974) (A “provision in a contract liquidating certain items of damage will not prevent the recovery of actual damages for other items to which the liquidation provision does not apply, unless the contract expressly provides that damages other than those enumerated shall not be recovered.”); *Meyer v. Hansen*, 373 N.W.2d 392, 395 (N.D. 1985).

Paragraph 14.3 of the contract required Excel to pay BLSD “the amount for liquidated damages as specified in the bid for each calendar day that [Excel] shall be in default after the time stipulated in the contract documents,” while Paragraph 17.2 required Excel, in the event of its termination from the project for cause, to pay BLSD the cost for completing the project if those costs exceeded the unpaid balance of the contract price, without any reference to liquidated damages. It is clear that these are two independent categories of damage, and BLSD was entitled to make claims for both of them. Although “a party may not receive actual and liquidated damages for the same injury ... actual damages related to the cost of completion are separate and distinct from liquidated damages intended to compensate for injury resulting from delay,” *A. Miner Contracting, Inc. v. Toho – Tolani County Improvement Dist.*, 311 P.3d 1062, 1071 (Ariz.

App. 2013) (emphasis added). *See also Constr. Contracting & Mgmt. v. McConnell*, 815 P.2d 1161, 1167-68 (N.M. 1991).

The liquidated damages clause here related only to delay damages for the installation of this public sewer system, and as such liquidated damages were entirely proper, since “as is typical in public contracts where the public as a whole will suffer from a breach, the parties in this case could not, at the time of the agreements, and cannot quantify the resulting damages.” *In re Direct Transit, Inc.*, 226 B.R. at 203. The archaic policy concerns summarily stated in *Subsurfco* can no longer justify a judicial rewriting of the contract to release Excel from the bargain that it made. The parties had a constitutionally-recognized right to bind themselves to whatever contract they chose. *State v. Nuss*, 114 N.W.2d 633, 635 (S.D. 1962). No legitimate policy concerns now exist to allow a court to abridge that freedom of contract. *Richland State Bank v. Household Credit Services, Inc.*, 340 F.Supp.2d 1051, 1058 (D.S.D. 2004) (applying South Dakota law). This Court has not hesitated to overrule poorly-reasoned prior decisions regarding damages. *See, e.g., Casper Lodging, LLC v. Akers*, 2015 SD 80, ¶¶ 70-73, 871 N.W.2d 477, 498-99. It should accordingly overrule *Subsurfco*’s outdated rule regarding liquidated damages.

Even if this Court finds that *Subsurfco* is still valid law, summary judgment for Excel was still error. In *Subsurfco*, the owner had recovered both completion costs and liquidated damages. 337 N.W.2d at 450, 457. This Court’s adoption of the reasoning in *Maryland Cas. Co.* with its characterization of contract termination as a “choice” between “inconsistent” actions, shows that the issue was one of election of remedies. *Subsurfco*’s elimination of liquidated damages from the jury award can thus be

understood as prevention of a duplicate recovery. However, “[w]hile a party may not seek ‘double recovery,’ it can request remedies in the alternative ... ‘The purpose of the election of remedies doctrine is not to block recourse to any particular remedy but to prevent duplicate recovery for a single wrong.’” *Estate of Ducheneaux*, 2018 SD 26 ¶ 34, 909 N.W.2d 730, 742. South Dakota no longer follows “the old rules of pleading” under which virtually “any act” constitutes an irrevocable election; instead, the modern view is that “a party may pursue alternative remedies so long as no double recovery is awarded.” *Ripple v. Wold*, 1996 SD 68, ¶7, 549 N.W.2d 673, 674-75. Courts may “not prohibit assertion of multiple causes of action ... even to final adjudication, so long as the plaintiff receives but one satisfaction.” *Stabler v. First State Bank of Roscoe*, 2015 SD 44, ¶ 13, 865 N.W.2d 466, 475.

Even if *Subsurfco*’s view that owners may not recover both liquidated and compensatory damages remains correct, BLSD could not be lawfully forced to choose between these remedies before trial. This was not a situation like *Subsurfco*, where an owner received an award of both completion and liquidated damages. Instead BLSD was still proceeding to trial, and was entitled to make its own choice as to which remedy best suited its evidence and strategy. Because the trial court wrongfully deprived BLSD of this choice, and failed to allow BLSD to present its valid claim for liquidated damages to the jury, BLSD’s rights were prejudiced. The judgment below should be reversed, and this case remanded for a new trial.

II. The trial court could not grant SKA’s summary judgment motion and deny BLSD’s

SKA’s motion for summary judgment did not merely implicate BLSD’s claims. Instead, it directly addressed the validity of Excel’s claims against BLSD. By granting

SKA's motion, the trial court held that Excel could not prove its damages. The Court's failure to extend this ruling to the entire case was reversible error.

“Rule 56 is not merely a technical procedure; it affects the substantive rights of the litigants [and] goes to the merits of the case...” 10A FEDERAL PRACTICE & PROCEDURE §2712 (4th ed.). In other words, a judgment entered on a motion for summary judgment “is just as binding as a judgment entered after a trial on the facts.” *Ruple v. City of Vermillion, S.D.*, 714 F.2d 860, 862 (8th Cir. 1983). In granting summary judgment to SKA, the court held, on the merits and as a matter of law, that Excel was unable to prove its damages. It was error to deny BLS D the same relief.

Nor was the court's decision justifiable on procedural grounds. The trial court concluded that BLS D should have joined in SKA's motion for summary judgment. However, BLS D did attempt to do so. In its response to SKA's motion, BLS D specifically asked that, if the SKA motion were granted, summary judgment be granted to BLS D as well. (R. 2082). Rather than rule on BLS D's request, the trial court indicated that the matter was not properly before it at that time, prompting BLS D to file its subsequent motion in the hopes of having the matter addressed. The trial court then denied this motion, on the grounds that it was untimely. BLS D's response to the SKA motion was a request for joinder. The court could have and should have granted summary judgment to BLS D at the first hearing. In fact, no motion was even necessary; the court had the power to grant summary judgment sua sponte. *Leonhardt v. Leonhardt*, 2012 SD 71 ¶ 12, 822 N.W.2d 714, 717.

SKA's motion and the court's response placed BLS D in an impossible position. Again, BLS D had made claims against SKA based on the damages that Excel sought

from BLSD; SKA's motion asserted that no such claims could be made because Excel could not prove its damages. The only way for BLSD to oppose the motion was to abandon its position that Excel was not entitled to any damages and argue Excel's case for it.

Nor was it unfair or procedurally inappropriate for Excel to defend itself. "The very fact that a party moves for a summary judgment alerts the other parties that someone is alleging that there are no facts in dispute." *In Re Estate of Rille ex rel. Rille*, 728 N.W.2d 693, 708 (Wis. 2007), quoting *Precision Erecting, Inc. v. M & I Marshall & Illsley Bank*, 592 N.W.2d 5, 14 (Wis. App. 1998). A party whose interests are implicated by the motion cannot "wait, do nothing, and then later...relitigate the issues..." *Johnson v. Bundy*, 342 N.W.2d 567 (Mich. App. 1984). Instead, a party who believes there are facts in dispute has a duty to appear and contest them, regardless of how the motion is addressed. *Rille*, 728 N.W.2d at 708-09. It was Excel's job – not BLSD's – to demonstrate that these claims were viable.

The end result of the trial court's inconsistent and procedurally unjustified decision was that Excel was allowed a second chance to prove its case, resulting in grossly inconsistent judgments. The harm to BLSD was further compounded by the allowance of Instruction 18. As a result of the trial court's decision, Excel was not only allowed to argue that it was entitled to damages based on SKA's conduct, it was permitted to blame BLSD for SKA's actions. If SKA was indeed BLSD's agent, the court's decision that it was not liable for Excel's alleged damages should have released BLSD as its principal. See *Estate of Williams ex rel. Williams v. Vandenberg*, 2000 SD

155 ¶ 15, 620 N.W.2d 187, 191. The trial court's decisions subjected BLSD to the worst of both worlds.

III. The agency instruction was reversible error

Over the vigorous objection of BLSD, the Court instructed the jury as follows:

Schmitz Kalda & Associates, Inc., and its employees were the agent of Brant Lake Sanitary District before, during and after the Phase 2 Contract. Therefore, any act or omission of Schmitz Kalda or its employees, at that time is considered the act or omission of Brant Lake Sanitary District.

There are two reasons that Instruction 18 was blatant and prejudicial error. First, Excel had never actually pleaded a claim for vicarious liability. Second, the instruction was an incorrect statement of the law, and made BLSD vicariously liable for the acts of an independent contractor.

At no point did Excel or Granite Re plead a vicarious liability claim against Brant Lake. A party is not entitled to a jury instruction on a claim or issue that has not been pleaded. *Cf. Farm Mortg. & Loan Co. v. Martin*, 214 N.W. 816, 818 (S.D. 1927); *see also Hausman v. Cowen*, 601 N.W.2d 547, 553 (Neb. 1999); *Beyer v. Todd*, 601 N.W.2d 35, 38 (Iowa 1999). An instruction on matters not first asserted by the pleadings is improper because it introduces collateral issues not otherwise before the court and it distracts the jury from its duty to answer only those legitimate questions presented by the parties through the litigation. *Traphagan v. Mid-Am. Traffic Marking*, 555 N.W.2d 778, 786 (Neb. 1996). *See also King Cole Condominium Ass'n v. Mid-Continent Cas. Co.*, 21 F.Supp.3d 1296, 1299 (S.D. Fla. 2014) (holding that vicarious liability must be pleaded).

Even if Excel had pleaded its apparent vicarious malpractice claim, the instruction would still be prejudicial error. It is one thing to argue that SKA's alleged errors, rather

than those of Excel, were the reason that the project was behind schedule. It is quite another to assert that SKA was professionally negligent and that Brant Lake, having hired SKA, is somehow liable to Excel for that negligence. The record demonstrates that SKA was an independent contractor, for whose actions BLSD cannot be held accountable.

Respondeat superior is a subspecies of vicarious liability and holds a principal liable for the acts and omissions of its agent. *Kirlin v. Halverson*, 2008 S.D. 107, ¶ 12, 758 N.W.2d 436, 444. However, there is no vicarious liability for the acts of an independent contractor. *Clausen v. Aberdeen Grain Inspection, Inc.*, 1999 SD 66 ¶ 15, 594 N.W.2d 718, 722. This rule “stems from the concept that the employer has no power of control over the manner in which the work is to be done by the contractor...” *Id.* Instead, the work “is regarded as the contractor’s own enterprise”, and the contractor “carries on an independent business and contract work according to their own methods, subject to the employer’s control only as to results.” *Id.*

“The important distinction is between service in which the actor’s physical activities and his time are surrendered to the control of the master, and service under an agreement to accomplish results or to use care and skill in accomplishing results. Those rendering service but retaining control over the manner of doing it are not servants.” Restatement (Second) of Agency § 220, cmt. e. As the federal District of South Dakota summed it up, the primary questions in determining whether an entity is an independent contractor are: 1) whether the worker was free from control or direction over the performance of service, both under the contract of service and in fact; and 2) whether the worker was customarily engaged in an independently established trade, occupation,

profession or business. *St. Paul Reinsurance Co. v. Baldwin*, 503 F.Supp.2d 1255, 1263-64 (D.S.D. 2007).

As to the first factor, “important considerations include direct evidence of the right of control, the method of payment, furnishing major items of equipment, and the right to terminate the employment relationship at will and without liability.” *Egemo v. Flores*, 470 N.W.2d 817, 821 (S.D. 1991). As to the second factor, the occupation must be independently established and the customary business of the alleged agent, such that it exists separate from the relation with the particular employer and can survive the termination of the relationship with the alleged employer. *Id.* at 822.

The contract between Brant Lake and SKA (R. 686) specifically states that the engineer was an independent contractor, and the record demonstrates the correctness of this designation. First, Brant Lake did not have the kind of control over SKA that would justify vicarious liability. Brant Lake did not direct SKA’s work or otherwise manage its day to day business. It did not have a single representative on site to monitor the work; without someone there on a regular basis to exert control, it can hardly be said that Brant Lake was directing SKA’s actions. *See Kronberg v. Oasis Petroleum North America, LLC*, 831 F.3d 1033, 1048 (8th Cir. 2016) (holding that company that did not have employees at the work site on a regular basis could not have directed independent contractor’s actions).

Moreover, it is clear that SKA was an independent business that contracted with BLSD to provide specialized services on a specific project. The BLSD project was neither the beginning nor the end of SKA; it was simply one of many jobs that the company has done over the years. (TT 507-508). Further, BLSD did not control or

provide detailed oversight of SKA's day to day work, any more than it did of Excel's; there was no BLS D representative on site to guide the project. Nor was building a sanitary sewer system part of an ongoing business for BLS D; it was a one-time project for which the sanitary district contracted with specialists to complete the work.

The Supreme Court of Alabama addressed a similar issue in *Collins Co., Inc. v. City of Decatur*, 533 So.2d 1127 (Ala. 1988). In that case, the defendant city had contracted with an engineer to provide plans and specifications, prepare the project bid and construction documents, and provide general engineering supervision on a municipal water project. *Id.* at 1128. The general contractor sued the city, arguing that the engineer's actions had been a breach of contract on the part of the city. *Id.* at 1131. However, the court held that the contractor could not recover against the city for any alleged breach based upon the activity of the engineer because the engineer was an independent contractor. *Id.*

Nor may Excel rely on its own contract with BLS D to prove agency. Section 0700, Subsection 24.1 of the Excel/BLS D contract states that, "ENGINEER shall act as OWNER'S representative during the construction period." (Appx. 151). However, merely designating an engineer the owner's representative during a project does not create subject the owner to vicarious liability. *Glenn Const. Co., LLC v. Bell Aerospace Services, Inc.*, 785 F.Supp.2d 1258 (M.D. Ala. 2011).

In *Glenn*, the plaintiff contractor argued that, because the construction contract had referred to the engineer as the owner's 'representative' and the engineer had acted as an intermediary between the contractor and the owner, the owner was vicariously liable for the engineer's acts. *Id.* at 1290-91. However, the court held that "merely acting as an

intermediary between two parties is insufficient to establish an agency or master-servant relationship with either party.” *Id.* Because the engineer had independent responsibilities, and the owner did not control when and how it was to carry out its duties, the engineer was not the owner’s agent. *Id.* at 1291. BLSD, like the owner in *Glenn*, cannot be held vicariously liable for its engineer’s acts merely because the word ‘representative’ was used in its contract with the general contractor.

Instruction 18 was in direct contradiction to longstanding precedent of this Court. A contract, by definition, requires one party to undertake an act that is of benefit to another; if the rule set out by the trial court in this matter were to become the law, it would abolish the longstanding distinction between independent contractors and employees, and render any party who enters into a contract vicariously liable for each and every act of its contractual counterpart.

Further, it is clear that the instruction prejudiced BLSD. Both Excel and Granite Re repeatedly referenced Instruction 18 in their closing. (TT 1783-84, 1829). In elaborating on the instruction, counsel for Excel claimed that SKA and BLSD were legally identical:

The District has an arm, and its hand includes the members of the board, its attorney, and the engineer. They are agents of the District. The District can only accomplish things by using that arm and that hand, and so everything that happens on that hand belongs to the body belongs to the Sanitary District itself...The District is responsible...for the breaches of all of its agents.

(TT 1784). Granite Re actually told the jury that BLSD had to be held liable even if all of the alleged harm to Excel had been caused by SKA:

Instruction Number 18, when you guys go back and start your deliberations, please look at it. It says that’s the board’s responsible for Kim Buell. I mean it talks about being an agent...The bottom line is, it’s

the board's responsibility. That's unfortunate because the board was kept in the dark, but that's the law. They are responsible for what he did, and what he didn't do. Even if...they weren't aware of it at the time, it doesn't seem fair, but that's what the law is.

(TT 1829).

Counsel's statements notwithstanding, that is not the law of this state. The erroneous instruction cannot be harmless when Excel and Granite Re did everything in their power to call attention to it. The end result was that the jury was left to determine BLSD's liability based not on its own conduct but on the conduct of an independent contractor. Such a result is nowhere contemplated by South Dakota law; upholding it would require the Court to overturn decades of precedent and abolish the distinction between independent contractors and employees.

IV. The references to and jury instruction concerning competitive bidding harmed BLSD

BLSD was also prejudiced by the trial court's decisions related to competitive bidding law. Due to Excel's repeated assertions that BLSD had violated state law when it did not put the completion contract out for public bids, BLSD filed a motion in limine to exclude all argument concerning or reference to alleged competitive bidding violations. The trial court denied this motion and went on to give Instruction 23 to the jury, thereby drawing further attention to allegations of misconduct that had no bearing on the case.

Excel had never made a claim for a competitive bidding violation and, indeed, was unable to do so. Neither Excel nor its principals were residents of Brant Lake; as such, they lacked standing to sue. *Winter Brothers Underground, Inc. v. City of Beresford*, 2002 SD 117 ¶ 14, 652 N.W.2d 99, 103. Moreover, any complaint about the bidding on Phase 3 would have been untimely, as the work has been completed and the

completion contractor paid. *Id.* at ¶ 33, 652 N.W.2d at 105. *See also Bozied v. City of Brookings*, 2001 SD 150 ¶ 23, 638 N.W.2d 264, 273. Excel could not and did not make a claim for a competitive bidding violation; it should not have been allowed to insinuate what it could not plead.

Nor could Excel claim that the award of the completion contract was relevant to BLSD's claimed damages; its own expert admitted that the contract price was fair. (TT 771). The only purpose of this line of argument was to establish that BLSD was a 'bad actor' that deserved to be punished. It is axiomatic that even relevant evidence can be excluded when its probative value is substantially outweighed by the danger of prejudice, confusion, or misleading the jury. SDCL 19-19-403. There was no reason to admit evidence that presented all of these dangers and had no probative value whatsoever.

The court's initial error was compounded by Instruction 23. The jury did not need to make a decision on whether the completion contract should have been let for competitive bidding; the only effect this instruction could have was to draw further attention to an irrelevant and improper argument. However, the trial court allowed the instruction, reasoning that "there was a lot of evidence and conversation" about bidding. (TT 1764). Two wrongs do not make a right. The court should have prohibited the 'evidence and conversation' in the first place; giving an instruction that made the improper argument seem important was reversible error.

V. The damages award was excessive, speculative, and contrary to law

Finally, the Court erred in failing to grant BLSD's motion for a new trial or, in the alternative, its JNOV motion, because the damages award was excessive, speculative, and contrary to the law.

“[N]o person can recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides. SDCL 21-1-5. Therefore, when the action is for breach of contract, the plaintiff “is entitled to recover his detriment proximately caused by the breach, not exceeding the amount he would have gained by full performance. The issue is what he is entitled to under his contract, less the cost of fully completing it in accord with its terms.” *Big Band, Inc. v. Williams*, 202 N.W.2d 121, 123 (S.D. 1972) (emphasis added). The full value of the BLSD/Excel contract was \$2,701,531.68. Therefore, the maximum amount Excel can recover is the difference between that amount and what it was actually paid, less the cost of actually completing the system. Any award beyond this amount was improper; at most, Excel is entitled to the profit it would have made on the completed contract. *Compare Lamar Advertising of South Dakota v. Heavy Constructors, Inc.*, 2008 SD 10 ¶ 7, 745 N.W.2d 371 (lost profits were for the duration of the lease contract that had been breached, not future contracts).

The lost profit damages awarded by the jury were speculative as well as excessive. “[I]t is the rule in this state that the matter of measuring damages may not be left to mere speculation on the part of the jury. Facts must exist and be shown by the evidence which afford a basis for measuring the loss of the plaintiff with reasonable certainty.” *Kressly v. Theberge*, 112 N.W.2d 232, 233 (S.D. 1961). Lost profits are not recoverable when the claim is too remote, speculative, and uncertain, and the loss is not shown by competent proof. *Lamar Advertising* at ¶ 24, 745 N.W.2d at 380. Excel failed to meet its burden of proof.

Excel sought lost profits for each and every year from 2014 to the present, alleging that BLSD's termination of the contract impaired Excel's bonding capacity and prevented it from reaping the profits it otherwise would have achieved. However, Excel did not present any actual profit figures for 2015 onwards.

The report from Excel's damages expert, Nina Braun, contains no revenue or profit data for 2015, 2016, and 2017; instead, it simply states 'tbd' for the actual profit in those years. (TT 183-184). In each and every one of her lost profit scenarios, Braun assumed that Excel had no actual earnings after 2014. (TT 184). The sole evidence Excel presented at trial for 2015, 2016, and 2017 was Reed Olson's unsubstantiated testimony that he did not pay himself a salary in those years. However, Excel was the plaintiff, not Reed Olson; the question is not how much Reed put in his own pocket, but how much his company made.

The incomplete evidence is particularly troubling in light of the data actually provided. Excel's records for 2014 – the only post-termination year for which Excel provided figures – show that Excel actually made more money following the termination than it had in any year since 2005, save for in 2012, when it was working on the BLSD contract and counting the retainage as income. (TT 180-188). Without evidence on whether and what loss actually happened, the award was speculative as a matter of law.

The lack of actual profit data was not the only problem with Excel's financial evidence. As Excel's tax records demonstrated, the company was not on an upward trajectory at the time it was awarded the BLSD contract. In fact, its total income for 2011 had been \$22,712 – its lowest profits since 2007. (TT 180-188). There was no evidence for the jury to infer that a company which had not had any taxable income in

eight of the nine prior years was nonetheless on the verge of a miraculous turnaround before the termination.

More troubling still, Braun's calculated lost profit figures relied heavily on the numbers from the 2012 tax returns. (TT 184). The gross income listed on Excel's tax return for 2012 was approximately seventeen times its gross income in 2011 and more than double what Excel had made in its best prior year, 2006. (TT 185-186). Not only was this figure abnormally high, it was also inflated. Braun testified that the 2012 gross income included the entire retainage for the project, which had not even been paid to Excel. (TT 172-174). Rather than take account of these issues, Braun used the inflated 2012 number as the basis for each and every one of her future calculations. (TT 184).

These lost profits were not merely based on contracts other than the one with BLSD. They were premised on contracts that did not even exist. An award of lost profits on future contracts requires the finder of fact to assume not only future market conditions and a bid by the plaintiff, but that the plaintiff would be the low bidder, the job would have proceeded without problems, that the plaintiff would have been paid, and that a certain profit margin would be achieved. *Manshul Const. Corp. v. Dormitory Authority*, 444 N.Y.S.2d 792, 803-04 (N.Y. Sup. Ct. 1981). While Olson testified about projects he would have bid had his bonding capacity been higher, he offered no evidence that he actually would have been the low bidder on any of those contracts. *Compare Lamar Advertising* at ¶ 22, 745 N.W.2d at 379 (lost profit projections were "based upon existing contracts..."). "The intervening factors, the open-ended possibilities, and the wishful nature of the inferences leads...to the inevitable conclusion that...[a] claim for damages

for loss of anticipated revenues is too speculative to stand as a matter of law.” *Manshul*, 444 N.Y.S.2d at 804.

Like the damages for lost profits, the damages awarded for work done under the contract were excessive and contrary to law. A contract may only be modified by the consent of both parties. *Ahlers Bldg. Supply, Inc. v. Larsen*, 535 N.W.2d 431, 435 (S.D. 1995). BLSD never agreed to modify the contract and had no obligation whatsoever to do so.

First, the jury awarded damages for a number of items that were not in the contract, and for which BLSD had never agreed to pay. Excel also received damages for a number of items, including a manhole and insulation, that were necessitated only by changes made to the plans to benefit Excel, and with the express warning that BLSD would not be paying for the additional materials. (TT 1017-18, 1020-21; 535). Similarly, Excel demanded \$42,000 for the installation of gravity sewer that, by the terms of the contract, was to be included in the price for the grinder stations. (1018-20, R. 340). Excel also sought \$37,200 for the time that Reed Olson spent doing the pressure testing. (TT 1032). However, there was no such line item in the contract and no change order even requested; Excel cannot be allowed to unilaterally change the contract after the fact.

Excel demanded approximately \$20,000 for the discrepancy between the pipe footage as measured by SKA and Excel’s own estimates. The problem with this claim is that, as per the contract, final payment would be based on the actual measurements obtained via GPS and the tracer wire that had been laid with the pipe. (TT 530, 1016-17). Excel cannot change the conditions of payment because its own numbers are more favorable than what the contractual (and more accurate) method shows. Moreover, in

light of the fact that BLSA would later discover hundreds of feet of pipe abandoned in a ditch, Excel's claims that it laid more pipe than the measurements indicated were simply not credible. (TT 1702).

Finally, and most egregiously, Excel claimed that it deserved a quarter million dollar change order for Spawn's Addition because the conditions it discovered on the site made the work more difficult to perform than it had initially anticipated. (TT 1030).

However, nothing stopped Excel from observing the conditions at the lake or conducting its own soil tests to determine what the job would cost. "When one agrees to do, for a fixed sum, a thing possible to be performed, he will not be excused or become entitled to additional compensation, because unforeseen difficulties are encountered." *Mooney's, Inc. v. South Dakota Dept. of Transp.*, 482 N.W.2d 43, 45 (S.D. 1992) (quotations omitted). It is "unfair for a contractor to receive an upward adjustment in price for a condition which any reasonable contractor would have anticipated in approaching the project." *Id.* at 46. A contractor who anticipates an issue but elects to proceed cannot rewrite the contract to offset the detriment of its decision. *Sundt Corp. v. South Dakota Dept. of Transportation*, 1997 SD 91 ¶ 11, 566 N.W.2d 476, 479. In other words, as Excel's expert put it, a contractor cannot underbid a job and then 'change order [its] way up.' (TT 651).

The duty to investigate prior to bidding was contractual as well as legal. Indeed, the instructions to bidders expressly provided that, prior to submitting a bid, bidders were required to visit the site and "become familiar with local conditions that may affect cost, progress, performance or furnishing of the Work" and, at their own expense, "make or obtain any additional examinations, investigations, explorations, tests and studies and

obtain any additional information and data which pertain to the physical conditions (surface, subsurface, and underground facilities) at or contiguous to the site or otherwise which may affect, cost, progress, performance or furnishing of the work..." (R. 280).

At the time it bid the project, Excel was aware of each and every one of the conditions for which it later demanded damages. Excel knew that no soil test data were being offered by BLS D; unlike other bidders, it decided to move forward without investigating. And any reasonable excavator – indeed, any reasonable person – would realize that a high water table would be a factor on a lakeside project where many of the cabins were right on the shoreline. Finally, the tight working conditions in Spawn's Addition were readily apparent to anyone who actually visited the lake. In fact, Reed Olson claimed that he paid particular attention to Spawn's Addition during his pre-bid visits because it was the lowest point on the lake and had exceptionally tight working spaces, and that he knew the water table might be problematic. (TT 844, 930). Excel should have seen these issues and factored them into its bid. It should not have been heard to complain about its own lack of foresight.

CONCLUSION

The trial court's decisions placed BLS D in an impossible situation. First, it was denied the chance to pursue its liquidated damages claim. However, Excel was not only allowed to seek damages for the very same allegations of engineering misconduct that the court had previously found unrecoverable as a matter of law, it was permitted to blame SKA's actions on BLS D. The end result was a verdict that was contrary to both the law and the evidence. The judgment below must be reversed.

Dated at Sioux Falls, South Dakota, this 25th day of June, 2018.

DAVENPORT, EVANS, HURWITZ &
SMITH, L.L.P.

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Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellant Brant Lake Sanitary District complies with the type volume limitations set forth in SDCL § 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 9,294 words and 46,413 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, this 25th day of June, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing “Brief of Appellant Brant Lake Sanitary District” was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capitol Avenue, Pierre, South Dakota, 57501-5070, on June 25, 2018.

The undersigned further certifies that an electronic copy of “Brief of Appellant Brant Lake Sanitary District” was emailed to the attorneys set forth below, on June 25, 2018:

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Dated at Sioux Falls, South Dakota, this 25th day of June, 2018.

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Lammers Kleibacker, LLP; and by Heather Bogard of Costello, Porter, Hill, Heisterkamp, Bushnell, & Carpenter, LLP; and by Elizabeth Hertz of Davenport, Evans, Hurwitz & Smith, LLP; and Granite Re, Inc., represented by Joseph Nilan of Gregerson, Rosow, Johnson & Nilan, Ltd, and William Fuller of Fuller & Williamson, LLP

Following a nine-day jury trial, the seven-member Jury duly empaneled returned a Special Verdict Form on February 1, 2018, in this combined action, and the Court now enters Judgment accordingly for each action.

(1)

In Civil Matter 14-50, Excel Underground, Inc., is entitled to recover damages from the Brant Lake Sanitary District in the amount of **\$1,569,691.81**. Based upon stipulations of the parties, the Court has calculated interest upon that Verdict, and has determined that amount to be **\$456,791.58**, up through and including the date of this Judgment.

NOW, THEREFORE, JUDGMENT IS HEREBY ENTERED in favor of Excel Underground, Inc., and against Brant Lake Sanitary District in the amount of **\$2,026,483.39**, such being the total of the Jury's special verdict, along with interest that accrued prior to the date of judgment.

As the prevailing party, Excel Underground, Inc., is also entitled to recover its other costs and disbursements, taxed pursuant to SDCL 15-6-

54(d), in the amount of \$ 14,606.29 ^{taxed by clerk 3-7-18 jk}, which amount will be entered by the Clerk.

(2)

In Civil Matter 14-18, Brant Lake Sanitary District is not entitled to recover damages from Excel Underground, Inc.; nor from Granite Re, Inc.; and Granite Re, Inc., is not entitled to recover damages from Reed Olson & Melissa Fischer-Olson.

NOW, THEREFORE, JUDGMENT IS HEREBY ENTERED such that Brant Lake Sanitary District shall take nothing by its Complaint and Granite Re, Inc., shall take nothing by its Third-Party Complaint, and Excel Underground, Inc., Granite Re, Inc., and Reed Olson and Melissa Fischer-Olson are accordingly entitled to judgment in their favor upon those respective claims.

As the prevailing party, Excel Underground, Inc., is entitled to recover against Brant Lake Sanitary District its costs and disbursements, taxed pursuant to SDCL 15-6-54(d); those costs will be taxed in its favor in Section (1) above, such that Excel will be entitled to one, single recovery of its cost and disbursements.

As the prevailing party, Granite Re, Inc., is entitled to recover against Brant Lake Sanitary District its costs and disbursements, taxed pursuant to

Page 3

SDCL 15-6-54(d), in the amount of \$ 3,887.98 ^{taxed by clerk 3-7-18 yk}, which amount will

be entered by the Clerk.

Melissa Fischer-Olson and Reed Olson as prevailing parties have made no application for costs.

Let judgment therefore be entered accordingly, with post-judgment interest accruing thereupon until paid and satisfied.

Dated this 20 day of February, 2018

BY THE COURT:



The Honorable Patrick Pardy
Judge of the Circuit Court



ATTEST:

Hinda Klosterman
Clerk

FILED

FEB 20 2018

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

JK

STATE OF SOUTH DAKOTA)
COURT

IN CIRCUIT

COUNTY OF LAKE)
CIRCUIT

:SS

THIRD JUDICIAL

EXCEL UNDERGROUND, INC.,

Plaintiff,

v.

BRANT LAKE SANITARY
DISTRICT,

Defendant.

39 CIV 14-50

BRANT LAKE SANITARY
DISTRICT,

Plaintiff,

v.

EXCEL UNDERGROUND, INC., &
GRAINTE RE, INC.,

Defendants,

AND

GRANITE RE, INC.,

Third-Party
Plaintiff,

v.

REED I. OLSON & MELISSA D.
FISCHER-OLSON,

Third-Party
Defendants.

39 CIV 14-18

**SPECIAL
VERDICT FORM**

We, the jury, duly empaneled to try the issues in this case, find as follows:

1. *Is Excel Underground, Inc., entitled to recover damages from Brant Lake Sanitary District?*

YES or **NO** (circle one)

If your answer is YES, specify the amount of Excel's damages:

(a) \$2,859,921.82 (for its retainage)

(b) \$483,770.00 (for other payments under the contract)

(c) \$800,000.00 (for its lost profits)

2. *Is Brant Lake Sanitary District entitled to recover damages from Excel Underground?*

YES or **NO** (circle one)

If your answer is YES, specify the amount of Brant Lake's damages which it is entitled to recover from Excel and Granite Re:

(a) _____ (expenses paid to CynTom for labor and equipment)

(b) _____ (expenses paid to Electric Pump on invoices submitted to Excel Underground and paid by Brant Lake)

(c) _____ (expenses paid to Electric Pump on invoices sent to CynTom and paid by Brant Lake)

(d) _____ (reimbursement of monthly payments to Brant Lake patrons)

(e) _____ (payments made to Brant Lake patrons for expenses incurred)

(f) _____ (expenses paid to Schmitz Kalda)

(g) _____ (expenses paid to Dakota Road Builders)

(h) _____ (for ongoing interest on additional loan secured)

If you answered NO to question 2 above, SKIP questions 3 and 4.

3. *If Brant Lake is entitled to recover damages from Excel Underground, then Granite Re is also liable for those damages. If you answered YES to question 2 above, then you must find that Brant Lake is entitled to recover damages from Granite Re in the same amount you awarded Brant Lake in question 2 above.*

- (a) _____ (expenses paid to CynTom for labor and equipment)
- (b) _____ (expenses paid to Electric Pump on invoices submitted to Excel Underground and paid by Brant Lake)
- (c) _____ (expenses paid to Electric Pump on invoices sent to CynTom and paid by Brant Lake)
- (d) _____ (reimbursement of monthly payments to Brant Lake patrons)
- (e) _____ (payments made to Brant Lake patrons for expenses incurred)
- (f) _____ (expenses paid to Schmitz Kalda)
- (g) _____ (expenses paid to Dakota Road Builders)
- (h) _____ (for ongoing interest on additional loan secured)

4. *If Brant Lake is entitled to recover damages from Granite Re, then Granite Re is entitled to recover damages from Reed and Melissa Olson. If you answered YES to question 2 above, then you must find that Granite Re is entitled to the same amount of damages you awarded Brant Lake in questions 2 and 3 above.*

- (a) _____ (expenses paid to CynTom for labor and equipment)
- (b) _____ (expenses paid to Electric Pump on invoices submitted to Excel Underground and paid by Brant Lake)
- (c) _____ (expenses paid to Electric Pump on invoices sent to CynTom and paid by Brant Lake)
- (d) _____ (reimbursement of monthly payments to Brant Lake patrons)
- (e) _____ (payments made to Brant Lake patrons for expenses incurred)

- (f) _____ (expenses paid to Schmitz Kalda)
- (g) _____ (expenses paid to Dakota Road Builders)
- (h) _____ (for ongoing interest on additional loan secured)

The same four or more jurors agreed on all the answers above.

Dated this 1st day of February, 2018.

Scott Paulsen Scott PK
Foreperson

FILED

FEB 01 2018

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT

JK

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF LAKE)

IN CIRCUIT COURT

THIRD JUDICIAL CIRCUIT

EXCEL UNDERGROUND, INC.,

 Plaintiff,

v.

BRANT LAKE SANITARY DISTRICT,

 Defendant.

39 CIV 14-50

BRANT LAKE SANITARY DISTRICT,

 Plaintiff,

v.

EXCEL UNDERGROUND, INC., &
GRAINTE RE, INC.,

 Defendants,

39 CIV 14-18

AND

GRANITE RE, INC.,

 Third-Party
 Plaintiff,

v.

REED I. OLSON & MELISSA D. FISCHER-
OLSON,

 Third-Party
 Defendants.

**ORDER DENYING MOTION
FOR NEW TRIAL AND RENEWED
MOTION FOR JUDGMENT AS A
MATTER OF LAW**

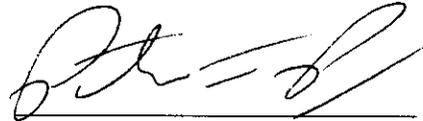
The Court, having considered Brant Lake Sanitary District's Motion for New Trial and Renewed Motion for Judgment as a Matter of Law and the other matters of record in the above-captioned case, it is hereby

ORDERED that Brant Lake Sanitary District's Motion for New Trial be DENIED. It is further

ORDERED that Brant Lake Sanitary District's Renewed Motion for Judgment as a Matter of Law be DENIED.

Dates this 13 day of March, 2018.

BY THE COURT:

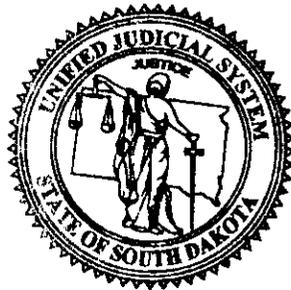


Hon. Patrick T. Pardy
Circuit Court Judge

ATTEST:



Clerk



FILED

MAR 13 2018

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
3RD CIRCUIT CLERK OF COURT



1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

2 :SS

3 COUNTY OF LAKE) THIRD JUDICIAL CIRCUIT

4 * * * * *

5 Excel Underground, Inc.,

6 Plaintiff,

Civ. 14-0050

7 v.

8 Brant Lake Sanitary District,

Motion Hearing

9 Defendant.

10 * * * * *

11 Brant Lake, Sanitary Distric,
12 Plaintiff,

Civ. 14-0018

13 vs.

14 Excel Underground, Inc., and
15 Granite RE, Inc.,
16 Defendants

* * * * *

16 Granite RE, Inc.,
17 Third-Party Plaintiff,

18 vs.

18 Reed I. Olson &
19 Melissa D. Fischer-Olson,
20 Third-Party Defendants

21 * * * * *

21 BEFORE: The Honorable Patrick Pardy,
22 Circuit Court Judge in and for the
23 Third Circuit, State of South Dakota,
24 Madison, South Dakota.

25

Proceedings were held May 20, 2016
Lake County Courthouse

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7
8 for Brant Lake Sanitary District

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1 THE COURT: We're now on the record in civil file
2 14-50, I think I'll start by having everybody put their names
3 on the record.

4 MR. BRENDTRO: Dan Brendtro for Excel Underground,
5 Reed Olson, and Missy Fischer.

6 THE COURT: Okay.

7 MR. ROCHE: Vince Roche for Brant Lake Sanitary
8 District and if the Court is wondering why there's multiple
9 lawyers it's because I'm here on a defense costs policy so
10 defending the lawsuit and then Jerry and Heather are
11 plaintiffing the claims of the District.

12 THE COURT: That reminds me, let me get her on line
13 before we get too far here.

14 (Heather Bogard appearing by phone.)

15 THE COURT: Good morning. You are on the speaker
16 phone in the courtroom and we're just kind of going through
17 introductions so.

18 MR. LAMMERS: Jerome Lammers for Brant Lake
19 Sanitary District.

20 MR. LUCE: Mike Luce for Environmental One.

21 THE COURT: And are you arguing today on anything?

22 MR. LUCE: No.

23 MR. FULLER: Bill Fuller, Granite RE.

24 THE COURT: Same thing you're just kind of
25 observing today I assume?

1 MR. FULLER: Right.

2 MR. WHEELER: Greg Wheeler for Schmitz Kalda, new
3 party to the case as of a couple days ago.

4 THE COURT: Okay, I read that.

5 MR. ERICSSON: Dick Ericsson for Electric Pump.

6 THE COURT: And you should join us because I think
7 you're about to argue. And then on the phone we have Heather
8 Lammers Bogard and who's going to be arguing for Brant?

9 MS. BOGARD: I will, judge, and I appreciate you
10 letting me appear by phone.

11 THE COURT: Not a problem, I almost made you come
12 because your father said he hadn't seen you enough, but.

13 MS. BOGARD: And I would have.

14 THE COURT: I'll tell you what I want to do unless
15 the parties have an objection, I think I'll start with the
16 two EPI cases, does that work for everybody? All right. So
17 we have two motions that relate to EPI, one made by Excel
18 Underground which if I can sum it up is to declare whether or
19 not EPI is a subcontractor or simply a supplier, is that
20 fair?

21 MR. BRENDTRO: The extension of that being whether
22 they are bound by a general contract.

23 THE COURT: Correct, but to get to that point it
24 all comes down to whether or not they're a subcontractor.

25 MR. BRENDTRO: At least for this motion, yes.

1 THE COURT: That's the one we're talking about so
2 I'll let you go ahead and argue since it's your motion first
3 on that.

4 MR. BRENDTRO: Thanks, judge. This motion is very
5 simple, based on the idea that a supplier or subcontractor or
6 whoever is involved in a project cannot be involved in a
7 public works contract just to deliver products and services
8 to that contract and then basically skate off into the sunset
9 and say we didn't have to provide the -- our products and
10 services in line with the contract that the public entity
11 originally provided. I mean there are specifications that
12 the Sanitary District had for how this was supposed to
13 unfold, it's a publically known contract, everybody is aware
14 of what the contract looks like. In this particular
15 instance, EPI is an Iowa company, had a contract with Excel
16 Underground with the provision that says it's governed by
17 Iowa law, there is Iowa law on this topic from an appeals
18 court that says that a subcontractor is inherently bound to
19 the terms and conditions of the general contract by signing
20 on for the project, that's part of the deal, you can't ignore
21 those terms and conditions. And as part of that then we're
22 asking the Court to declare that EPI is bound by the basic
23 terms of the general contract as well.

24 THE COURT: Okay, anything further?

25 MR. BRENDTRO: That's it.

1 THE COURT: Mr. Ericsson.

2 MR. ERICSSON: Thank you, your Honor, obviously
3 Excel brought their Motion for Summary Judgment and we have
4 also brought a Motion for Summary Judgment and in the
5 interest of time if it's all right with the Court we're
6 obviously arguing the same position. First of all on behalf
7 of Electric Pump we'd admit that we have a contractual
8 relationship with Excel, but the only contractual
9 relationship that we have with them is under a supply
10 agreement which has been provided to the Court, that supply
11 agreement clearly delineates Electric Pump as a supplier and
12 not as a contractor that was dated 6-12 of '12. Excel has
13 apparently made no claim under that contract but is
14 attempting to bind us to the Brant Lake Sanitary contract,
15 the general contract. Our contract was proffered to -- the
16 supply agreement was proffered to Excel, if they wanted to
17 bind Electric Pump to the Brant Lake contract they could have
18 done that, that's been common practice in the industry as I
19 understand it and did not, they chose not to do that but
20 chose to enter into the supply agreement. The issue that
21 Excel in its brief has indicated that because of our
22 submittal to Brant Lake that made us a, somehow a
23 subcontractor, that submittal as part of the project
24 delineated Electric Pump as a supplier and Excel as the
25 contractor and was only done to verify that the product that

1 was being provided to Excel under its agreement met the
2 specifications of the project. Nowhere in the supply
3 agreement either implicitly or impliedly did Mike Lannen,
4 Electric Pump, take on the role of subcontractor and again as
5 I've said it's important to note Excel never claimed any
6 breach to our written agreement with them, they've only tried
7 to bring us in as a party to the Brant Lake Sanitary
8 contract. I would disagree with counsel as to the
9 interpretation of what Iowa law is in this matter, in our
10 brief we point out there are several Iowa cases on the
11 matter, two of which are lower court cases and are not
12 binding, the Supreme Court has never opined that a
13 subcontractor or a supplier became an automatic
14 subcontractor, that's not the law in Iowa, I believe that's
15 fairly clear as stated by the Supreme Court. Lastly I would
16 just state that Excel did have an employee present at the
17 site but only to verify that the warranty period for its
18 product was to start and that's if you buy a toaster at
19 Menards you send in a warranty card and that's when your
20 warranty starts and we were out there watching when the
21 warranty for the product we supplied started, that's the only
22 reason we were there, they were not there to start up the
23 project, that was not their obligation under the contract,
24 that was the manufacturer's obligation. So therefore we say
25 there's no -- the two claims, your Honor, that I understand

1 that Excel is asserting is number one is they want a
2 declaratory judgment for contractual rights, we believe that
3 that's inappropriate where our client is not a party to the
4 contract. We don't believe that there should be a
5 declaratory judgment and that there's been no claim or any
6 showing that we can see for any damages under our contractual
7 arrangement with Excel under the supply agreement that I
8 referred to. Thank you, your Honor.

9 THE COURT: And you're going to have to forgive me,
10 your last name, how do you pronounce it again?

11 MR. BRENDTRO: Brendtro.

12 THE COURT: Brendtro. All right, I'm going to give
13 you a chance to address one thing, I've read through the
14 cases you have supplied and in fact we've done our own
15 research on the Iowa law and it appears to me that the entire
16 -- that entire area of law that would bind a supplier as a
17 subcontract is designed to protect the supplier when they're
18 dealing with government entities because you can't file a
19 lien, mechanics lien, against the government. And so it's
20 for that very narrow purpose as it's interpreted in the
21 mechanics lien statutes that they are defined as a
22 subcontractor, but I think it's also clear that that only
23 applies in the mechanics lien arena. Comment.

24 MR. BRENDTRO: Well, judge, yeah, I understand the
25 genesis of the rule, but I think it also protects contractors

1 like Excel Underground who are bidding enormous projects like
2 a 3 million dollar sewage project for being left up river by
3 a subcontractor that says oh, look at the fine print, we
4 don't have to provide you with the stuff that you needed for
5 this project, you're out of luck.

6 THE COURT: The difference is you can deal with
7 that when you draft the contract and sign it. You can
8 protect yourself as the contractor where as the supplier
9 cannot protect themselves because they don't have the ability
10 to file a lien.

11 MR. BRENDTRO: Well, I think what this process of
12 briefing both on this motion and on the responsive motion the
13 other way and I disagree, we're not just seeking declaratory
14 relief from EPI, we think they breached their contract, we
15 think that they've caused damages. I think what this has
16 shown particularly through counsel's recitation of all these
17 facts that are not in the record about how their guy was out
18 there just to observe, just to mark the warranty period
19 starting, is that my guess is both of these motions are
20 probably fact based and we can't decide them today. As far
21 as whether that specific Iowa case law applies, I understand
22 you can probably make that ruling today and decide that
23 that's an out cropping of mechanics lien protection, but I
24 think our position is still valid, I don't think they're
25 allowed to show up on site, provide services, follow parts of

1 the contract but not follow other parts of the general
2 contract, but I think what that maybe illustrates is that if
3 we can't follow Iowa law for that we'll have to use South
4 Dakota law to show that the facts of this particular
5 agreement were that they assented to the general contract
6 instead of that Iowa mandates it.

7 THE COURT: The motion before the Court is declare
8 the terms of the general contract and specifications between
9 the District and Excel Underground are incorporated by law
10 into Excel subcontract with the defendant Electric Pump, Inc.
11 and that the Electric Pump is otherwise bound by the terms of
12 the general contract. That's completely premised on Iowa
13 law, my interpretation in this matter and I think we've
14 already agreed they would have to be a subcontractor for that
15 law to apply for the purposes of your motion and in a light
16 most favorable to the respondent the motion for summary
17 judgment or partial summary judgment is denied. Now, EPI's
18 response -- or not response but EPI's motion for summary
19 judgment. This is another one and I think I'll kind of cut
20 to the chase on it. The defense is -- kind of outlines we're
21 not a subcontractor therefore there's no case against us. In
22 their disputed facts they make an allegation that the -- the
23 grinders that were delivered were faulty so assuming that
24 that's a true fact which I have to do for this hearing I
25 believe, would there not still be a potential liability even

1 if you're a supplier?

2 MR. ERICSSON: Well, your Honor, I think it's
3 interesting because nowhere that I can find in counsel's
4 pleadings has he ever even mentioned our supply agreement
5 between Excel and Electric Pump, my client. He's only
6 referred to the Brant Lake Sanitary contract. I assume if he
7 wants to bring an action against us under our contract I
8 think he can but I don't think he has. I guess my position
9 is I've never seen anything alleging that, I don't think that
10 was even mentioned in any of the pleadings. So what we're
11 saying, your Honor, is under the Brant Lake contract which is
12 the only contract that seems to be at issue presented by
13 counsel that there is no claim because we don't have any
14 contractual obligations to them under that contract. We may
15 certainly have obligations under a supply agreement but we
16 don't believe that those have been alleged.

17 THE COURT: And just to make sure I'm tracking,
18 that was Excel Underground versus EPI was originally a
19 Minnehaha case, civil file 14-391, correct? Is that the
20 Complaint we're talking about?

21 MR. BRENDTRO: Yes.

22 THE COURT: So Mr. Ericsson, count 4 that says
23 simply Excel and EPI, I'm paraphrasing, Excel Underground and
24 Electric Pump entered into an agreement, Electric Pump
25 breached that agreement whether by breach of its express

1 terms or breach of implied duty of good faith and fair
2 dealing, almost mentioning the language of the UCC, to me
3 that count is not dependent on you being a subcontractor or
4 contractor and he's not alleging the District's contract,
5 he's simply saying you two have an agreement you've breached,
6 they have a material fact and they say the grinders were
7 faulty and I don't know how you get past that on that count.

8 MR. ERICSSON: Well, if the Court interprets that
9 as bringing in our supply agreement then I understand the
10 Court's position, I just, I guess I had never seen anything
11 in Mr. Brendtro's complaint or documentation that I would
12 have seen, I would have imagined had that been the case he
13 would have attached that agreement as the contract in
14 question, your Honor.

15 MR. BRENDTRO: Judge, the simple reason I didn't is
16 because it's unclear exactly what the extent of the contract
17 is because there's a couple of page offer, there's a couple
18 of page supplier acceptance, there's the submittals, the
19 submittals are incorrect, and then there's the contract that
20 the District has, everybody is following portions of it and
21 the UCC would say we're going to follow all of it. So rather
22 than attach a bunch of stuff that wasn't clear what it was,
23 we're just alleging there was a contract.

24 THE COURT: Well, at this time I'm going to deny
25 EPI's motion as well because it does appear looking at the

1 evidence most favorable to the non-moving party here --

2 MR. ERICSSON: I understand.

3 THE COURT: -- that I would have to assume the
4 pumps, grinders, were faulty when delivered because that's
5 the allegation he made in his facts, or disputed facts, and
6 certainly Count 4 is simply a breach of contract which by
7 description could cover UCC or sale of goods or however so I
8 will deny that motion as well. Any questions from -- on
9 those two rulings?

10 MR. BRENDTRO: No, judge.

11 MR. ERICSSON: No. Thank you, your Honor.

12 THE COURT: Thank you.

13 MR. ERICSSON: Your Honor, in the interest of
14 convenience I can move back from the table now.

15 THE COURT: Please.

16 MR. ERICSSON: Someone else might want to move up.

17 THE COURT: Okay. I guess we'll take up Excel's
18 motion for partial summary judgment regarding attorney's
19 fees. Miss Lammers, have you been able to hear everybody.

20 MS. BOGARD: I have. Thank you, your Honor.

21 THE COURT: Sir, if you put that microphone right
22 in front of you though, that's the one that goes over the
23 phone. Thank you, that would help on the other end I'm sure.
24 Okay, go ahead.

25 MR. BRENDTRO: Judge, again this is a very simple

1 motion attempting to limit what we have to talk about for the
2 rest of the case. There is no specific provision within the
3 general contract which provides for the recovery of
4 attorney's fees, absent but more specific language the
5 District is precluded from asserting damages or recovery of
6 attorney's fees.

7 THE COURT: Is that it?

8 MR. BRENDTRO: That's it.

9 THE COURT: All right. Miss Bogard.

10 MS. BOGARD: Thank you, your Honor. There is a
11 specific provision, it's paragraph 17.2 of the contract that
12 provides that compensation for professional services incurred
13 to complete the project are recoverable, and I don't know how
14 it could possibly be said that attorney's services are not
15 professional. And we cited multiple cases in that regard
16 with a general reference to professional services being those
17 of attorney services and Excel did not cite any authority to
18 support their position that attorney services would not be
19 professional. There was one case, your Honor, directly on
20 point, the Second Circuit court, Gaia if I'm pronouncing it
21 correctly that held specifically in our favor that in this
22 exact situation attorney's fees would be considered part of
23 professional services, and it's consistent with the remainder
24 of the contract. There are references throughout the
25 contract to other services and how those would be split and

1 of course they're not referencing attorney services at that
2 time either. So based on the clear language of the contract
3 in addition to supporting case law we ask that you deny the
4 motion.

5 MR. BRENDTRO: Judge, the language isn't clear,
6 it's ambiguous. Professional services could mean the
7 engineer and the other people that are required to be out
8 there on a sewage project doing work. Miss Lammers wasn't
9 out there doing work on the project. It would be ambiguous
10 and then construed in our favor if that's the issue. The
11 District in their briefs argued somehow that this was an
12 implied agreement to the attorney's fees, of course
13 misunderstanding the nature of implied and express agreement.
14 There is no express language in this contract that says that
15 attorney fees are recoverable, there is no specific basis and
16 that is what the law requires is an actual specific basis to
17 recover attorney's fees.

18 THE COURT: Miss Lammers?

19 MS. BOGARD: I have nothing further, your Honor,
20 other than to say that whether it's express or implied, I
21 think it's both, it's clearly express, attorney's fees are
22 professional services and if the Court disagrees with that I
23 think it's implied just when you consider the entirety of the
24 contract.

25 THE COURT: Do you know of a single South Dakota

1 case that allows for the award of attorney's fees under the
2 American rule without the express language of attorney's fees
3 used in it? Miss Lammers -- or excuse me Miss Bogard?

4 MS. BOGARD: Your Honor, the South Dakota Supreme
5 Court has not addressed that specifically. We only have
6 general references in other states where professional
7 services included attorney services, but as I said the Second
8 Circuit did address this very situation, the only case we
9 could find either way that held in our position that
10 professional services certainly in this kind of a contract
11 included attorney services.

12 THE COURT: Well, the Court is going to rule -- the
13 Court is going to grant the motion based under the American
14 rule and the South Dakota Supreme Court I think has been
15 fairly clear on this, when you read the paragraph 17.2 in its
16 entirety the following sentence states if such cost exceeds
17 such unpaid balance the contractor will pay the difference to
18 owner, such costs incurred by owner will be determined by the
19 engineer and incorporated into a change order. It appears to
20 the Court that language requiring to be determined by the
21 engineer and incorporated into the change order contemplates
22 services to complete the project but not the -- I'm trying to
23 think of a good way to state it, but the actual services on
24 the project. I just would note that the, with the case law
25 and stuff I think it would be very easy in these contracts if

1 the parties want attorney's fees to be covered to put
2 attorney's fees in the contract and in reading that paragraph
3 in its entirety appears to this Court to talk about the
4 project itself, so that motion would be granted.

5 MR. BRENDTRO: Thank you, judge.

6 THE COURT: The next motion that I'll take up would
7 be Excel's motion for partial summary judgment regarding the
8 completion contract. Go ahead.

9 MR. BRENDTRO: Thank you, judge. There are two
10 different elements of this motion even on the first page of
11 the motion itself asking first for the Court to declare the
12 completion contract was illegal and then secondly declaring
13 that the impact of that for this case is that those damages
14 or those funds expended on that illegal contract are not
15 available as a measure of damages here. And we can -- the
16 Court can take those separately because they're two separate
17 issues. On the first issue of whether or not the contract is
18 illegal, the Court only has facts of law suggesting that the
19 contract is illegal. The District did not spend a single
20 sentence of its brief arguing that it was a plausibly legal
21 contract other than just conjecture that we believe it's
22 legal but here's why, it doesn't matter. That's the extent
23 of their argument. So on the first prong of that we can
24 decide as a matter of law that that contract is illegal
25 because the Court has no basis by which to declare it a valid

1 legal contract. The facts are clear, they're not disputed,
2 the law is clear, it's not disputed. There's not a single
3 reason that the Court would have to sanction that completion
4 contract as a legal contract, it was not bid correctly, it
5 was not publicly bid, it was not left for bids, there was no
6 emergency, the District took 5 months to include its
7 emergency. The case law on this subject is very clear, that
8 is not a valid contract. The second implication then or the
9 second part of the motion is the implication for this case.
10 It's our position that when a contractor has a general
11 contract with an owner that says that he's going to be
12 charged with the actual costs that the District incurs to
13 complete it that that presumes that the District will follow
14 the law as a public entity and complete the contract through
15 the public bidding process because that is the only way to
16 guarantee that the funds expended to complete the project
17 were appropriately spent. That's why we have public bidding,
18 to make sure that the public does not get gouged. And in
19 this case the general contractor is the one that gets gouged
20 because they just sign whatever they want for whatever prices
21 they want and pass the buck on to Excel Underground. That's
22 not a plausible system to construct public works projects.
23 That's the basis of it, I can answer more questions or I'm
24 sure Heather will have things to say about it but that's the
25 long and short of it.

1 THE COURT: Miss Bogard.

2 MS. BOGARD: Thank you, your Honor. First and
3 foremost there's no question that Excel has no standing to
4 bring this motion for partial summary judgment. Excel was
5 not a party to the contract between Dakota Road Builders and
6 Brant Lake and Excel has cited no authority to support that
7 they would have standing in this situation, and under the
8 Winter Brothers case it's clear that Excel has the burden of
9 showing that they have standing which they absolutely cannot
10 show. Winter Brothers of course involves an unsuccessful
11 bidder and even in that situation the South Dakota Supreme
12 Court held there was no standing. The Court did carve out an
13 exception in the case of favoritism and providence,
14 extravagance, fraud, or corruption and of course we have none
15 of that here. And as far as the facts are concerned, Brant
16 Lake declared an emergency under SDCL 5-18A-9 and there's no
17 showing that the laws were not followed and in any event it
18 would be a question of fact for the jury. We had to look to
19 Kentucky for a similar case where it was this type of
20 situation where the contractors trying to come up with some
21 way to find standing and we cited that in our brief and of
22 course standing was rejected in that case. But beyond there
23 being no standing, there's no remedy here for Excel. The
24 only remedy under the Winter Brothers case to Excel would be
25 -- if it had standing would be to force Brant Lake to comply

1 with the bidding laws. There's no damages that would be
2 allowed to Excel here so no standing, no remedy, and even if
3 there, you know, if the Court were to address beyond those
4 issues, there's no question it would be a question of fact
5 for the jury. We don't think that Excel has met its burden
6 and we ask that the motion be denied.

7 THE COURT: Well, the Court is going to deny the
8 motion on a couple of grounds, first of all I do agree that
9 the Excel does not have standing to challenge the contract
10 but furthermore, even if you did, I don't know that that
11 would exclude using the cost of that contract as a measure of
12 damages. Even if the contract is void for public policy
13 reasons, it doesn't mean necessarily that it was out of line,
14 too expensive, so it's still evidence of actual damages that
15 could be presented to the jury.

16 MR. BRENDTRO: Judge, if I could, one of the rules
17 in South Dakota case law allows an exception for declaratory
18 rulings and that is what this motion is asking in part one is
19 declaring that contract is void for purposes of this
20 litigation. That would not be seeking damages, that falls
21 within the exception of standing for this purpose and in our
22 brief we pointed out that if the District spent improvidently
23 money on a void illegal contract without bidding it and then
24 did not attempt to recover the over payments by cancelling
25 that contract or by taking steps against the contract or that

1 it would fail to mitigate its damages which Excel would be
2 allowed to argue to a jury.

3 THE COURT: You can argue that it's -- that they
4 paid too much, that doesn't change the fact that it's
5 evidence of damages. Now it may not be good evidence, it may
6 be bad evidence, it may be inflated, you can attack its
7 accuracy if you will as far as a measure of damages. You can
8 make an argument potentially if you have evidence that they
9 overpaid, but it's still from their perspective they hired
10 somebody, this is what it costs, it's certainly a measure or
11 evidence of the amount of damage that they incurred, so --

12 MR. BRENDTRO: And judge my point was that they
13 failed to mitigate their damages by failing to go and get the
14 money back that they shouldn't have paid in the first place.

15 THE COURT: You're assuming that they paid more
16 than they should have. Just because and again let's assume
17 for a second that it was -- that they didn't follow the
18 bidding laws, that doesn't necessarily prove that the
19 contract itself is too high, one doesn't prove the other, so
20 the motion is denied. And I believe that gets us to Excel's
21 motion for partial summary judgment regarding liquidated
22 damages. Go ahead.

23 MR. BRENDTRO: Thanks, judge. This one is again
24 very simple because the law in South Dakota is clear, it's
25 the Subsurfco case, there is no other case law that the Court

1 has to follow to reach any other conclusion other than that
2 when an order terminates a contract, liquidated damages are
3 off the table either as an abrogation, a waiver, or an
4 election and there is not a single case in South Dakota that
5 provide a contrary result for the District in this case
6 therefore liquidated damages are off the table, they're
7 denied as a matter of law.

8 THE COURT: Miss Bogard.

9 MS. BOGARD: Thank you, your Honor. First Excel
10 argues in its brief waiver which is puzzling in that notice
11 of termination included a reference to the \$559,000 in
12 liquidated damages and in any event waiver would be a
13 question of fact for the jury. As to the election of
14 remedies and the Subsurfco case, first Subsurfco was decided
15 in the early 80's and since then the South Dakota Supreme
16 Court has been very clear that it disfavors election of
17 remedies, in the Ripple case in 1996 the South Dakota Supreme
18 Court indicated that you had to elect your remedies only
19 where the plaintiff was unjustly enriched or the defendant
20 was somehow misled. And of course in this case the plaintiff
21 here being Brant Lake would not be unjustly enriched by the
22 liquidated damages, there's a very clear increased cost to
23 Brant Lake for the delay and as far as defendant being
24 misled, certainly Excel cannot even argue that they were
25 misled given that the liquidated damages provision was clear

1 and in the contract. So based on what the South Dakota
2 Supreme Court has said in Ripple and then subsequently in the
3 Stabler case, the Court does not like election of remedies,
4 it prefers that the plaintiff be able to present alternative
5 theories of recovery and then let the jury decide. And if
6 you look at the case law across the United States, your
7 Honor, it's clear that the modern prevailing rule is let the
8 plaintiff, here Brant Lake, present both, both liquidated
9 damages and the cost of completion and let the jury decide.
10 There's no question that given the last two cases in this
11 regard decided by the South Dakota Supreme Court that it
12 would rule in favor of Brant Lake and let them present that
13 to the jury and -- both theories and let the jury decide.
14 And certainly, your Honor, in this situation we would argue
15 that the best way to resolve this issue given the Court's
16 most recent ruling would be to let those liquidated damages
17 in, let the jury decide. If the jury comes back awarding
18 both then at that time maybe it's a decision for the South
19 Dakota Supreme Court and maybe the jury wouldn't award both
20 and we wouldn't need to get there, but based on more recent
21 law as well as the modern prevailing rule across the United
22 States we ask that the motion be denied.

23 THE COURT: And you talk about the modern rule in
24 regards to election of remedies, do you have an example in
25 the election where it was liquidated damages versus costs of

1 completion versus damages versus specific performance like in
2 the Ripple and Stabler case?

3 MS. BOGARD: I think, your Honor, in our brief we
4 had various examples of where the courts awarded both and I'm
5 trying to pull that out while holding the phone. And of
6 course they weren't in South Dakota admittedly, but the
7 Galatowitsch case, it's my understanding that that was the
8 holding in that case as well as the Weitz Company, an 8th
9 Circuit case. And then there was some more that we listed,
10 your Honor, on page 6 of our brief and it's my understanding
11 in all of those cases liquidated damages were allowed in
12 addition to the cost of completing the project.

13 THE COURT: Well, and the Court does acknowledge
14 that across the country there are -- there has been a shift
15 since the U.S. Supreme Court ruling that I believe we
16 discussed previously, but South Dakota at this point in time
17 has a very clear precedent that I believe binds this Court.
18 The Subsurfco case specifically states when an owner
19 terminates a contract the costs of completion is recoverable,
20 liquid damages are not recoverable, and at this point the
21 Court feels that it's bound by that ruling and based on that
22 decision --

23 MR. LAMMERS: Your Honor, may I object at this
24 point?

25 THE COURT: Please.

1 MR. LAMMERS: Thank you. The contract clearly
2 provides that section 0700-9 that termination will not affect
3 any right of Brant Lake then existing or which may thereafter
4 accrue. That contract is totally different than the one
5 Subsurfco's, a careful reading of the Subsurfco case reveals
6 there's nothing in there about the fact that liquidated
7 damages may be recovered regardless and so the facts are
8 different in that Subsurfco case, the contract is different,
9 and clearly the contract here which was signed by Excel does
10 acknowledge that termination will not affect any right of
11 Brant Lake then existing or which may thereafter accrue.

12 THE COURT: And I do -- I read the contract, I
13 understand what it says, but it's the Court's position that
14 Subsurfco is binding on the Court and therefore that motion
15 would be granted. I believe the last issue was a scheduling
16 order, I've read the briefs, I've read the motions, it seems
17 like a lot of work for a scheduling and I'll let everybody
18 comment, I'll give you my perspective first that if you guys
19 can agree on a scheduling order that would be the Court's
20 preference, I generally don't issue a scheduling order until
21 we have a trial date then we can back from that, so but I'll
22 listen to all the parties on this.

23 MR. BRENDTRO: Thanks, judge. There's two layers
24 of this scheduling order, one would be the deadlines that
25 would get us to trial, but the first layer is these quarterly

1 hearings, I think you remember how difficult it was to get 9
2 attorneys with 11 parties to get to this hearing today took
3 two weeks of emailing and a couple of reschedules. The first
4 part is just simply putting on the books now every three
5 months some hearing dates so that we can get together if
6 there are motions, it's not forcing anybody to file a motion
7 but that way we have a way to keep this case moving forward
8 without waiting another 5 months for the next motion if
9 something comes up. So I think that one hopefully is
10 agreeable to everybody and I think --

11 THE COURT: Let me cut you off. That one is not
12 agreeable to me, I know this is a super important case to you
13 people but I don't have that many dates, I have people that
14 are trying to get trials done, custody matters, just like
15 everybody is busy and I can't cut off all these dates on the
16 hopes that somebody may use them and denying other people
17 dates, so I'm not willing to do that. I would suggest that
18 if a few motions get filed before you all set them for a
19 hearing let them build up a little bit or whatever, whatever
20 you want to do, once you have a motion ask me for a hearing
21 and I'll work that but I'm not going to give away just dates
22 into the future and leave them open for a case.

23 MR. BRENDTRO: Judge, could you compromise and
24 order the parties to keep those dates open so that we can
25 schedule the hearings out?

1 THE COURT: Do you have a motion?

2 MR. BRENDTRO: I'm sure we'll find something,
3 judge, because this is trying to narrow a \$3 million dollar
4 case into a \$400,000 case.

5 THE COURT: I understand. At this point, no. When
6 the parties are ready for a trial date and we want to do
7 that, I'm assuming this would take a while if we're going to
8 try this, then I would be willing to go back and set specific
9 hearing dates. I guess my suggestion is when you have a
10 motion or two, we're still talking trial over a year out, it
11 seems a little much at this point for me. And I would note
12 like in this case, you know, everybody has a right to be here
13 but, you know, if Mr. Luce would have been on vacation he
14 could have called in from Disneyland and been able to get
15 some of this so maybe not everybody needs to be here for some
16 of them. That's your decisions. Is there anything
17 particular that we want to schedule at this point?

18 MR. BRENDTRO: Judge, no. I'm just trying to move
19 it ahead. We have nothing specific.

20 THE COURT: All right. Miss Bogard?

21 MS. BOGARD: I guess, your Honor, if it is possible
22 to get a trial date and maybe from there we could try to
23 agree to the deadlines, but for us just to keep it moving a
24 trial date would sure be helpful.

25 THE COURT: And we're talking as I believe I looked

1 in the brief we're talking 2017, is that right?

2 MS. BOGARD: We were hoping for, and your Honor,
3 after we filed our response to their motion for scheduling
4 order some issues arose at mediation that we understand would
5 extend the deadlines that we included in our response, but we
6 still are more optimistic I guess than Excel and we were
7 hoping at the latest for January 2017 trial.

8 MR. BRENDTRO: Judge, they also then sued the
9 engineer last week and I don't think the engineer is able to
10 get ready for trial between now and January, so.

11 THE COURT: Are you representing the engineer?

12 MR. BRENDTRO: No, but I'm just pointing out that I
13 don't think there's any reason that January is a plausible
14 date for trial.

15 MR. WHEELER: I do represent the engineer, your
16 Honor, Greg Wheeler again, and we acknowledged service
17 yesterday so we'll file an answer within 30 days and, you
18 know, I don't know a whole lot about the case yet, I just got
19 involved, but it seems like it's going to take us a while
20 just to get up to speed.

21 THE COURT: It will. I guess there's a new party,
22 Excel doesn't feel January is soon enough, obviously it's a
23 very important case with some very significant issues and
24 consequences so when would Excel, when do you think you'll be
25 ready for trial?

1 MR. BRENDTRO: Well, as we indicated we thought
2 that 12 months from today, I think we said ready for trial
3 June 1 of 2017, I think that's a reasonable goal.

4 THE COURT: Mr. Ericsson?

5 MR. ERICSSON: No discovery has been done, I have
6 no idea, your Honor, I'll defer.

7 THE COURT: Mr. Fuller?

8 MR. FULLER: I agree with Mr. Brendtro as far as
9 timing, I think Mr. Wheeler certainly has something to say
10 about it now.

11 THE COURT: I'm assuming the parties are a week to
12 two weeks on this trial or am I overestimating?

13 MR. LUCE: My issue a little bit, judge, is my
14 client is only in this case on count 3 seeking declaratory
15 relief which is probably frankly a half day hearing that
16 could be set any time and the rest of this I'm not privy to
17 all the discovery that's probably necessary.

18 THE COURT: Miss Bogard?

19 MS. BOGARD: I couldn't hear all of that, your
20 Honor, but I guess we're still hoping for anything I guess
21 earlier than June, even if it's February or March and I guess
22 my dad could chime in too if he disagrees, but.

23 THE COURT: He must agree, he's not chiming in.
24 So the main parties in the actual trial would be Excel and
25 Brant.

1 MR. BRENDTRO: And the engineer.

2 THE COURT: And the engineer.

3 MR. BRENDTRO: And EPI will be part of it, EPI is
4 going to get sued for something else other than the dec
5 action in the next couple of months. I think everybody is
6 going to want to be there.

7 THE COURT: Okay, here's what I'm going to do, I'm
8 going to be honest with the parties, my book ends in December
9 of 2016, I just ordered a new one and when I get it I've got
10 to project out the next year, I've got a couple murder trials
11 coming up that are each going to take a week or two and so
12 I've got to find a window, but now is the time to do it, I'm
13 certainly not against shooting for April, May time frame,
14 April, May, June, but the -- I think we should, maybe that
15 would be the next thing we do, once we get back, you can send
16 an email to everybody asking for the dates, I'll try to send
17 out some windows but again it's going to take me a little bit
18 because I've got to figure out my entire schedule for the
19 circuit for the next year, and we're just in that process
20 since this is going into next year and I'll send out some
21 dates and we'll have to try to make it work. Anything
22 further?

23 MR. BRENDTRO: No, judge. You want me to prepare
24 the order?

25 THE COURT: For which one?

1 MR. BRENDTRO: I could do it for all of them if you
2 want.

3 THE COURT: Any objection to that?

4 MR. ROCHE: That's okay with us.

5 THE COURT: All right, please.

6 MR. BRENDTRO: Okay, judge.

7 THE COURT: Okay, Miss Bogard, anything before I
8 let you go?

9 MR. LAMMERS: Nothing. Thank you, your Honor.

10 THE COURT: All right, thank you, and nice talking
11 to you. We'll be off the record.

12 (Proceedings concluded.)

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1 IN CIRCUIT COURT)
2 :SS CERTIFICATE
3 COUNTY OF CODINGTON)

4 This is to certify that I, Dawn Russell, Court
5 Reporter in the above-named County and State, took the
6 foregoing proceedings, and the foregoing pages 1-33,
7 inclusive, are a true and correct transcript of my stenotype
8 notes.

9 Dated at Watertown, South Dakota, this 7th day of
10 May, 2018.

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15 Dawn Russell
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STATE OF SOUTH DAKOTA) IN CIRCUIT COURT

:SS

COUNTY OF LAKE) THIRD JUDICIAL CIRCUIT

EXCEL UNDERGROUND, INC.,

Plaintiff,

vs.

BRANT LAKE SANITARY DISTRICT,

ELECTRIC PUMP, INC.,

Defendant and Third Party Plaintiff, and

ENVIRONMENT ONE CORPORATION,

Defendant,

vs.

39CIV14-00050

SCHMITZ KALDA & ASSOCIATES, INC.,

Third Party Defendant.

BRANT LAKE SANITARY DISTRICT,

A Political Subdivision of the

State of South Dakota,

Plaintiff,

vs.

39CIV14-00018

EXCEL UNDERGROUND, INC., and

GRANITE RE, INC.,

Defendants.

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GRANITE RE, INC.,
Defendant and Third Party Plaintiff,
vs. 39CIV14-00018
REED OLSON and
MELISSA D. FISCHER-OLSON,
Third-Party Defendants.

MOTION HEARING

PROCEEDINGS: Taken on December 6, 2017, in the
Courtroom of the Lake County Courthouse,
Madison, South Dakota, at the hour of 1:15 PM

BEFORE: The Honorable PATRICK T. PARDY Circuit
Court Judge

APPEARANCES: MR. DANIEL BRENDTRO
Brendtro Law Firm
P.O. Box 2583
Sioux Falls, SD 57101
For Excel Underground, Inc.
and
Meliss D. Fischer-Olson and
Reed J. Olson

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MS. ELIZABETH SAYLER HERTZ

AND

MR. VINCE M. ROCHE

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AND

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Costello, Porter, Hill,

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AND

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For Brant Lake

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MR. RICHARD L. ERICSSON

Ericsson Law Office

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For Electric Pump

MR. WILLIAM FULLER

AND

MR. ERIC PREHEIM

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AND

MR. JOSEPH NILAN

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For Granite Re., Inc.

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MR. MICHAEL L. LUCE
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For Environment One, Inc.

MR. GREG WHEELER

AND

MR. MITCHELL W. O'HARE
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Sioux Falls, SD 57117
For Schmitz Kalda &
Associates, Inc.

1 THE COURT: Good afternoon, everybody.
2 Alright, we'll go on the record, and I think in an
3 effort to help Kim out, appearing in the courtroom is
4 Mr. Luce, attorney for Environment One Corporation.
5 Mr. Ericsson, attorney for Electric Pump.
6 Mr. Brendtro, attorney for Excel. Did I say that
7 right?

8 MR. BRENDTRO: Brendtro.

9 THE COURT: Brendtro, sorry. Miss Lammers on
10 behalf of Brant Lake Sani -- Sani -- or Brant Lake is
11 on the phone. In the courtroom is Miss Hertz. And
12 Mr. Lammers, I couldn't find your name on my -- on
13 the tip of my tongue. And then Mr Gregerson on
14 behalf of Granite Re.

15 MR. NILAN: Sorry, Your Honor, it's Joe Nilan,
16 N-I-L-A-N. Mr. Gregerson is one of my partners.

17 THE COURT: Okay. Thank you. And then
18 Mr. Fuller also on behalf of Granite Re. And then
19 Mr. Wheeler on behalf of Schmitz Kalda. Did I miss
20 anybody? Alright.

21 Now is the time for a number of -- three
22 separate Summary Judgment motions that have been
23 filed with the Court. And I think we'll take the
24 easy one first, Environment One has filed a motion
25 for summary judgment. It's my understanding that is

1 Excel is not resisting that motion, is that true?

2 MR. BRENDTRO: That's correct, Judge.

3 THE COURT: Alright, Mr. Luce, you win.

4 MR. LUCE: Okay. I'll prepare a Judgment and
5 send it to you.

6 MR. BRENDTRO: Judge, that one I think was
7 filed both against Electric Pump and in the other
8 case, Excel. Seeking --

9 THE COURT: Alright.

10 MR. ERICSSON: I'll speak to that, we don't
11 have any objection, Judge.

12 THE COURT: Alright. It was close, but you
13 still win. Alright, so then what I'm going to do is
14 we'll just take these one at a time, and we'll start
15 with Electric Pump, Inc. I have studied all of the
16 filings, so I guess Mr. Ericsson, I'll let you
17 address -- address, and then we'll go from there with
18 questions or see where it goes.

19 MR. ERICSSON: Thank, you, Your Honor. Kim,
20 I'm -- are you picking me up alright?

21 COURT REPORTER: Yes.

22 MR. ERICSSON: Thank you. Your Honor, counsel,
23 I'll try to not recite my Brief.

24 THE COURT: You can sit.

25 MR. ERICSSON: That is okay?

1 THE COURT: Unless you don't want to, but you
2 can.

3 MR. ERICSSON: Okay, thank you. As indicated
4 this is a renewed and restated motion for Summary
5 Judgment.

6 COURT REPORTER: Can she hear okay with the
7 mics?

8 THE COURT: Miss Lammers, can you hear on the
9 phone?

10 MS. BOGARD: I can. Thank you.

11 THE COURT: Thank you. Alright, please.

12 MR. ERICSSON: Plaintiff in the action is Excel
13 Underground, which I may refer to as the Plaintiff or
14 Excel. The Defendant is Electric Pump in this
15 matter, and I'll refer to it as either the Defendant
16 or Electric Pump. We're relying not only on our most
17 recent Brief, Your Honor, but also as indicated we
18 would incorporate all previous submittals,
19 affidavits, and briefs. As the Court is aware we
20 filed an earlier motion for summary judgment.
21 Electric Pump feels it is significant that the
22 Plaintiff has raised the white flag and not resisted
23 the motion.

24 COURT REPORTER: I'm sorry, would you slow down
25 a little bit, please? Thank you.

1 MR. ERICSSON: We feel it's significant that
2 the Plaintiff has raised -- raised the white flag and
3 is not resisting the motion for summary judgment of
4 the manufacturer E-1. We believe it's the only
5 logical conclusion to be reached by the Plaintiff as
6 all discovery has shown that this is not a products
7 case, and that the product manufactured by E-1 and
8 thereafter distributed and sold by Electric Pump had
9 nothing to do with the issues and claims of the
10 Plaintiff. And as such, Electric Pump would state
11 its joinder to the Brief and Statement of Undisputed
12 Facts as submitted by E-1.

13 SDCL 15-6-56(c) sets forth the statutory
14 procedure for making and opposing motions for summary
15 judgment. One, requires the moving party to attach
16 to the motion a separate and short concise statement
17 of material facts. Two, states that the party
18 opposing shall include a separate, short, concise
19 statement of material facts as to where the opposing
20 party contends a genuine issue exists to be tried.
21 The opposing party must respond to each numbered
22 paragraph of the moving party's statement with a
23 separately numbered response and appropriate citation
24 to the record. The Plaintiff has filed to comply
25 with the statutory provision as no such statement was

1 attached either to the Statement of Material Facts
2 presented by E-1, or those presented by Electric
3 Pump. The logical conclusion to be drawn is the
4 Plaintiff doesn't dispute those undisputed facts as
5 presented, and as such all of those undisputed facts,
6 both by E-1 and Electric Pump should be deemed
7 admitted for the purpose of this motion and hearing.

8 Evidently the Plaintiff has abandoned earlier
9 claims and positions from our prior Motion for
10 Summary Judgment, and now only identifies three
11 claims against Electric Pump. After 3+ years of
12 discovery, it's abundantly clear that Electric Pump
13 played no part in the freeze ups of the pumps.
14 Electric Pump delivered pumps that were called for in
15 its Submittal, or Supply Contract. The Plaintiff
16 does not allege they were the wrong pumps, and now
17 apparently concedes the point that they were fully
18 assembled.

19 By all accounts of the testimony, both expert
20 and lay. The pumps were some of, if not the best
21 product available and suitable for the area and
22 climate. Electric Pump performed all warranty work
23 as it was required to do, and no one disputes that,
24 not even the Plaintiff. Excel, by its own admission
25 was to trouble shoot its own work. That work

1 included pump installation, and in-coming and
2 out-going lateral lines.

3 Excel apparently now realizes the much
4 discussed insulation discs had to be installed after
5 all of the hook-ups, and the pit was done, which was
6 to be done by Excel. Further, there's no dispute
7 that the discs were delivered and available for Excel
8 to install.

9 If the pumps froze up, it was not the fault of
10 the product failure, but it was a result of
11 installation failure, or as most of the testimony
12 showed, the result of extremely cold weather,
13 seasonal usage of the properties, or a confluence of
14 these, the latter of which has been described as acts
15 of God.

16 From The initial allegation in its pleading,
17 Plaintiff has attempted to somehow make Electric Pump
18 a party to Excel's contract with Brant Lake. There's
19 been no showing that Electric Pump ever agreed to, or
20 impliedly became a party to that Contract. Excel
21 contracted to build a sanitary sewer system for Brant
22 Lake. Electric Pump contracted with Excel to supply
23 product requested by Excel to build the sewer system,
24 and did supply that product.

25 Beyond supplying the product, Electric Pump's

1 only other obligation under its submittal, or Supply
2 Contract, was to perform agreed upon product warranty
3 work on the product supplied. Excel conceded that
4 all that warranty work was done.

5 Excel has shown nothing in the record, or in
6 any other testimony or evidence that obligates
7 Electric Pump to do more. Excel's merely wishing it
8 were so does not make it so.

9 Electric Pump cannot be bound by allegations
10 that this was a Contract of Adhesion. Electric Pump
11 did not draw the Contract, or compile the
12 specifications for the Contract. Brant Lake and its
13 engineer did that.

14 THE COURT: Did -- I'm going to interrupt you.

15 MR. ERICSSON: Yes.

16 THE COURT: And you're kind of just giving me
17 the Brief again.

18 MR. ERICSSON: I'm just about done, Your Honor.

19 THE COURT: Alright. Go ahead.

20 MR. ERICSSON: Is that okay?

21 THE COURT: It's fine.

22 MR. ERICSSON: Just going through the points.

23 The business --

24 COURT REPORTER: Wait. I'm sorry, I didn't
25 catch a couple of words right there.

1 MR. ERICSSON: Excel made a business choice to
2 submit its bid for the product after having reviewed
3 the contract specifications. Excel testified it had
4 experience in similar projects, if not of this size,
5 but Excel made its own decision to bid and undertake
6 the project. No one held a gun to his head,
7 certainly not Electric Pump.

8 Lastly, Excel's breach of fair dealing is
9 totally without merit. Electric Pump performed all
10 of its contractual obligations under its Submittal
11 "Supply Contract" as shown in the record. And
12 confirmed by Excel's own testimony. And continued to
13 supply, despite Excel's breach of the Supply Contract
14 to remit payments when due.

15 Electric Pump made demands for payment as to
16 competent -- as any competent and reasonable supplier
17 would do. Excel refers to ultimatums and threat --
18 threats, to no longer supply or support Excel, but
19 conveniently omits the fact, that despite any
20 reasonable pressure, Electric Pump may have exerted
21 to get Excel to comply with --

22 COURT REPORTER: I'm sorry, counsel -- counsel,
23 you're --

24 MR. ERICSSON: I'm sorry. But conveniently
25 omits the fact that, despite any reasonable pressure,

1 Electric Pump may have exerted to get Excel to comply
2 with the payment terms of the Supply Contract.

3 Electric Pump never abandoned Excel, and therefore is
4 no -- there's absolutely no basis to support Excel's
5 claim that Electric Pump did not act in good faith.

6 Electric Pump would point out that no other
7 parties to this action made claim against Electric
8 Pump, or alleged they Electric Pump did not deliver
9 its product or perform its required warranty work.

10 Summary Judgment should not be given where
11 there are disputed facts, but Excel's failure to
12 address and dispute the facts should result in E-1
13 and Electric Pump's undisputed facts being deemed --
14 being admitted. And as such, and for the reasons
15 stated, Electric Pump respectfully moves the Court to
16 grant its Motion for Summary Judgment. Thank you,
17 Your Honor, and I apologize for my speed.

18 THE COURT: Address this issue for me, Electric
19 Pump raises the issue in regards to the installation
20 disc, that they agree with you that didn't cause the
21 freeze up. But they raise the issue that Brant
22 Lake's expert apparently has argued that it caused
23 it, contributed to it, or it was a factor. Is that
24 fact? I assume it's a fact, does that raise an
25 issue?

1 MR. ERICSSON: Your Honor, as far as Electric
2 Pump is concerned, Your Honor, because we had no
3 obligation to install that disc. It was provided to
4 Excel who had the contractual obligation to install
5 it. So, there -- there's no -- I don't see any --
6 any nexus between what we have done and what -- what
7 they're claiming. The fact that the disc may or may
8 not have caused the freeze up, isn't -- isn't a
9 problem created by Electric Pump.

10 THE COURT: And I guess maybe a better way to
11 ask it is, they in their Brief state that that didn't
12 cause the freeze ups, so that's Excel's position.
13 Okay?

14 MR. ERICSSON: Excel -- Excel's position
15 that -- that not having the disc?

16 THE COURT: Their -- their position is it
17 didn't cause the freeze ups. So, whether they were
18 installed, whether they weren't installed, whether
19 they were shipped, their position is that it didn't
20 cause the freeze up. Alright. My question is, are
21 they bound by that, cause they're trying to raise
22 issues, and I want to know what your position is.
23 They're raising issues that another party, Brant
24 Lake, says it is. What is their standing in your
25 Motion for Summary Judgment, do you have a position

1 on that?

2 MR. ERICSSON: I'd have to think that through,
3 Your Honor. I apologize, my slow wittedness gives me
4 a pause on that. Again, I guess I just go back to
5 the fact that that's an argument between Brant Lake
6 and -- and Excel under the Contract between them, and
7 not -- doesn't -- doesn't involve my client, Electric
8 Pump. Whether they can raise that argument, I'm not
9 sure if the Court would allow it, but that's --
10 that's between them. The product was furnished.

11 THE COURT: The other issue I would like you to
12 touch on is, and it wasn't clear to me in the record,
13 the allegation that EP -- "EP, Inc, threatened to end
14 trouble-shooting visits in January of 2004." And the
15 word was threatened. Was that done, and if so, was
16 it -- in other words, not did they threaten, but did
17 they end their trouble-shooting visits in January?

18 MR. ERICSSON: No. There -- there were --
19 there were discussions, there were meetings held
20 concerning the freeze ups in the record that those
21 meetings were initiated by Electric Pump in an effort
22 to try to bring the parties together. Electric Pump
23 was -- was there to support warranty work, but not to
24 trouble shoot it. It's our position that we weren't
25 required to trouble shoot work that was done by the

1 contractor Excel. The freezing up of the pump is not
2 a mechanical failure. That's -- that's something
3 that's caused by something else. Anything that was
4 caused mechanically, or deficiency in the product
5 itself, is a warranty issue, which was addressed by
6 my client.

7 Your Honor, I'd -- I'd also reiterate that --
8 that in the -- in the previous filing there's an
9 Affidavit by Brant Lake, Jan Nicolay, indicated that
10 Brant Lake as the owner of the project has not
11 proffered any claims against or believes that there
12 -- they have any claims against Electric Pump for
13 product failure, or otherwise performance.

14 THE COURT: Mr. Brendtro, do you wish to
15 address or reply?

16 MR. BRENDTRO: Yes. Thank you, Judge.

17 THE COURT: And I am, believe me very familiar
18 with the facts, but if there's particular facts that
19 are important, specifically facts that you say are in
20 issue, you can point for the record.

21 MR. BRENDTRO: Sure. I'll start with his last
22 point first, that Brant -- that Brant Lake and Jan
23 Nicolay have stated they're not suing Electric Pump
24 is irrelevant to this suit. Brant Lake is suing
25 Excel. And their expert is saying that Excel failed

1 to properly insulate these -- these devices, these
2 pumps. If that's true, if a jury holds that to be
3 true, and I can't stop a jury from deciding that, we
4 have pass-through liability to Electric Pump for
5 binding us arguably with defective pumps, or
6 providing us the wrong insulation, or providing us
7 insulation discs with no instructions on them. They
8 say, "By the way, these don't go on the top, these go
9 on the bottom." It's that simple.

10 Your question to Mr. Ericsson about whether
11 Excel is bound by that testimony, the answer is yes.
12 But you have to look at what the case law actually is
13 -- what the purpose of that -- that rule is. If you
14 trace it back far enough, I did this once, that rule
15 traces back I think to one of Mike Luce's cases when
16 he was a young attorney at Davenport Evans. And the
17 Supreme Court held at that point that you're right, a
18 party trial can't, or for summary judgment can't
19 offer a better version of the facts than they
20 testified to at their own deposition, or that they
21 proffered as evidence. Those are binary cases.
22 Every single one of those cases in which that is used
23 as a binary basis, it's not a --

24 COURT REPORTER: I'm sorry, can you slow down,
25 counsel?

1 MR. BRENDTRO: It's not a multi-party case like
2 this. If you were to adopt that rule in a
3 multi-party case, then parties like me would never be
4 able to have pass-through liability survive Summary
5 Judgment, because we're going to say we're not libel.
6 And if we say we're not libel, then Electric Pump
7 gets the benefit of that.

8 THE COURT: Well, let me interrupt you.
9 Because we're going to have a very similar issue when
10 we get to the -- the SKA motion.

11 MR. BRENDTRO: Yes.

12 THE COURT: Brant Lake is a party to this law
13 suit today. They have the ability, just like you did
14 in the -- in the motion between SKA and Brant Lake,
15 to make argument, to present Affidavits, so they have
16 that ability. Now, maybe they've waived it, maybe
17 they haven't. And if I rule that way, does it not
18 become -- and I'm not so sure I don't -- the parties
19 have been using the term conclusion, and that may be
20 correct, it may not be. But it seems to the Court
21 that it would be more of a law of the case issue
22 since it's pre-judgment. And if I rule that way,
23 won't they be bound by that?

24 MR. BRENDTRO: I'm not following the pronouns.
25 Which -- which motion?

1 THE COURT: Well, your argument is that Brant
2 Lake is arguing that the lack of insulation, or disc,
3 contributed to the freeze up?

4 MR. BRENDTRO: Yes.

5 THE COURT: But they didn't insert themselves
6 into this dispute, and there's a motion that brings
7 that issue before the Court right now. If I grant
8 this motion, does that not become law of the case, in
9 the law of case doctrine?

10 MR. BRENDTRO: And which -- which specific law
11 is that?

12 THE COURT: That the disc didn't contribute to
13 the freezing.

14 MR. BRENDTRO: Well, I think you have to step
15 back farther than that. What we have is Brant Lake
16 suing us for breach of our Contract, saying by the
17 way, one of the things you didn't do was properly
18 insulate these pumps. That's their expert's
19 position. It's contrary to every other witness'
20 testimony. But, we have to deal with that. The jury
21 will hear that.

22 It's significant for the Contract between Excel
23 and Brant Lake, is not necessarily the same as its
24 significance in -- in the next direction. But, if
25 somehow Excel is bound by the jury's factual findings

1 at trial, that these were not properly insulated,
2 then one of the explanations for why they weren't, is
3 because they were shipped incomplete. Number one,
4 the Contract calls for fully assembled pumps. These
5 weren't fully assembled, and so we have contribution
6 liability based on our Contract with Electric Pump.

7 Number two, an unwritten part of that Contract
8 is that insulation stickers on important parts should
9 be on the part when it's shipped so that they're
10 installed the way that they're supposed to be
11 installed. We would have contribution liability
12 based on that.

13 In addition, we would have a breach of Contract
14 argument that they didn't supply insulated lids. You
15 know, these aren't insulated lids. We thought they
16 were lids, they looked like lid-insulating discs,
17 they fit right in there at the top. But you didn't
18 tell us that.

19 THE COURT: So, I get the factual stuff. To be
20 honest with you where the Court is hung up, is the
21 legal. Because like you said, this is not two
22 parties. And uniquely in this case it -- it -- it
23 shows up in both motions. And in one side you can
24 argue it to your benefit. You can't grant this, is
25 what you would argue in this case, because a jury may

1 find on behalf of Brant Lake on this factual
2 question, okay? So you're using it as a shield if
3 you will, not to let these parties out here. Not you
4 could let EPI out here.

5 On the other side, you're using it as a --
6 well, actually Brant Lake finds themselves in the
7 same situation, but they're using it as a sword.
8 They agree with the Summary Judgment, and then they
9 argue that -- and then that means we're not libel
10 too, so they don't have a motive to necessarily fight
11 the Summary Judgment.

12 MR. BRENDTRO: So --

13 THE COURT: Let me finish.

14 MR. BRENDTRO: Yeah.

15 THE COURT: And the parties are throwing around
16 the issue preclusion. And I have been -- I lean more
17 towards law of the case, pre-judgment, because
18 everybody is here today, everybody's had notice,
19 everybody's had a -- the ability to raise the issue
20 and fight it. So, without necessarily the factual
21 issues, help me out with the law here.

22 MR. BRENDTRO: Judge, ultimately if -- if our
23 Supreme Court was going to address this, and I don't
24 think they have addressed the exact scenario which is
25 probably our problem.

1 THE COURT: I'm guessing they're about to.

2 MR. BRENDTRO: Yeah. Well, and I don't think
3 they'll need to. I think -- I think -- I think
4 ultimately this will work itself out at trial when
5 all the parties get to -- to duke it out. But, if --
6 the parties are -- are required to defend every
7 motion for Summary Judgment, and to continue
8 asserting claims against all the parties until the
9 end of -- of the litigation, or else, that would
10 preclude us from having, you know, strategic
11 decisions about how they approach the case, that it's
12 not worth it to have this party in.

13 Technically I think E-1 should still be in this
14 case. I think there are disputed facts and there's
15 potential liability. But, as a matter of -- of trust
16 strategy, it just seems too complicated to bring them
17 in all the way through the end of trial for some
18 small basic issues that -- that may arise. That's
19 between E-1 and Electric Pump. Now. our Contract was
20 with Electric Pump. Theirs was with E-1. Electric
21 Pump has made the trial strategy decision not to
22 pursue any claim against E-1. That's up to them.

23 And so I -- I don't know if it's so much law of
24 the case as it is, do we have disputes of fact that a
25 jury needs to sort out, and how do they all

1 intercept? With Mr. Ericsson's other points, he's
2 omitting factual disputes, and they're fairly --
3 fairly latent. One of the things he tells you is, in
4 his closing argument, we didn't have a duty to
5 trouble shoot. Judge, that's in the Contract.
6 That's what the warranty section says. It's the
7 supplier has a duty to trouble shoot. That's why
8 we're here. That was --

9 THE COURT: Let me ask you a question on that.
10 Is there anything in the record that says they didn't
11 trouble shoot, or they left in 2014 after they made
12 the threat allegedly? So let's assume they made the
13 threat, doesn't the record show that they continued
14 to perform? And if not, where?

15 MR. BRENDTRO: So, the timing is this, Electric
16 Pump issues an ultimatum saying that they will no
17 longer provide services after a certain date. That
18 date is a Friday in the middle of January, I think
19 it's the 15th, but I don't recall exactly.
20 Meanwhile, Excel is -- is scrambling trying to figure
21 out how to get them to continue doing what it is that
22 they think they're supposed to do. Continue trouble
23 shooting. And trying to assure Brant Lake that we
24 will get this figured out. And the date that Excel
25 is terminated is that Friday, the 15th of January.

1 Based on communications from Brant Lake's attorney
2 saying, we can't -- we can't trust Brant Lake -- or
3 we can't trust Excels's promises that they're going
4 to trouble shoot. That seems pretty connected to me.
5 And so although they didn't walk off the job, they
6 threatened to, we get terminated, and then what
7 happens is they continue going right along and doing
8 it.

9 THE COURT: And then the next issue, on that
10 same line of questioning, and then I'll let you move
11 on. You're saying they failed to trouble shoot. The
12 pumps -- the freeze up of the pumps wasn't designed,
13 and as I understand your expert, or your filings, the
14 freezing had to do with the frost line and the
15 weather. So what could they trouble shoot?

16 MR. BRENDTRO: Well, there's some I think
17 generalizations there that we need to back up on.

18 THE COURT: Okay.

19 MR. BRENDTRO: The testimony from E-1's
20 employees, from the manufacturer's employees, two --
21 two different -- two different guys we took
22 depositions of in October. Both of them have been
23 there a long time. Both of them were asked to
24 estimate how many pumps have been shipped out the
25 door since they have been there. One was from 1985

1 forward, and one was from 2003 forward. And then
2 estimate how many times the pumps have frozen under
3 their watch. When you do the math, the answer is,
4 "These pumps, in any climate from Arkansas up to
5 Alaska, have a success rate without insulation discs
6 of 99.99%. Meaning one out of 10,000 of these
7 freezes. The solution is to send an installation
8 disc,

9 COURT REPORTER: I'm sorry, the solution is?

10 MR. BRENDTRO: To send an insulation disc. And
11 that usually solves the problem. Never in the
12 history of this company have they ever had more than
13 one freeze up at a location. Meaning at a -- at a
14 job site, at a project.

15 The testimony from these same individuals
16 overlap with the testimony from various other people
17 is that, and also matches with what an average
18 juror's understanding of -- of science and nature,
19 with even a high school education, that the ground
20 freezes in the winter, down to a certain depth. And
21 for that reason we bury pipes below where the
22 freezing reaches, so as not to cause freezing to the
23 pipes.

24 Some of these freeze ups undisputedly are
25 caused by freeze ups of the force. Meaning the pipe

1 that comes out of the grinder station. These grinder
2 stations are sold in different sizes, meaning
3 different depths. The deeper and the taller the
4 station, the deeper the outlet pipe is under -- under
5 the ground.

6 For whatever reason, the grinder stations that
7 were installed around Brant Lake have an outlet pipe
8 at 46 inches, which everybody agrees is within the
9 frost zone. Even in an average winter. It is
10 undisputed that E-1 manufactured a longer, taller,
11 deeper version of the same pump, two feet taller,
12 which you start to use as you get farther north. And
13 the two feet means that the 46 inches then adds 24 to
14 it, you're down to 70 inches.

15 So there's a dispute of fact as to whether or
16 not we even have the right depth of a grinder station
17 in this project. The simple fix would have been that
18 a deeper station coming out 24 inches deeper. The
19 average lay person can understand why we do that. An
20 engineer could understand why we do that.

21 THE COURT: So I have to stop you right there.
22 Is that issue raised anywhere as far as the pleadings
23 or Complaint? I mean that's the first -- that's the
24 first anybody has thrown that at me.

25 MR. BRENDTRO: Well, sure, it's -- it's in

1 there, and is -- this is one of those cases where it
2 takes more -- more nuance when they -- when we site
3 to the --

4 THE COURT: Is this a response to their --
5 their -- their undisputed facts?

6 MR. BRENDTRO: Judge, if -- if necessary, I
7 would be happy to provide that in -- in detail. But
8 it's -- it's in -- it's referred to, the out -- the
9 outlet pipe bury depth is referenced repeatedly,
10 including in E-1's own motion or summary judgment. I
11 mean nobody has challenged their facts about how deep
12 these -- these pumps are, and that the deeper that
13 they're buried, the less likely they are to freeze.

14 THE COURT: Alright. Anything else you want to
15 provide on this one?

16 MR. BRENDTRO: Judge, I think that's it.

17 THE COURT: Alright.

18 MR. ERICSSON: May I make -- may I make one
19 comment?

20 THE COURT: Sure.

21 MR. ERICSSON: The last --

22 COURT REPORTER: Is your mic on, counsel?

23 MR. ERICSSON: I turned it off. Your Honor,
24 during Mr. Brendtro's last remarks, he was discussing
25 the depth of the grinder feet. These are all

1 specifications that would have been made by the
2 engineer, and have nothing to do with my client as
3 the supplier. So I -- I -- I don't see any relevance
4 in that argument, as against my motion for Summary
5 Judgment.

6 The other thing I would state is Mr. Brendtro
7 when he talks about trouble shooting, he talks about
8 trouble shooting provision under the Contract, and
9 the Contract he refers to is the Contract that Excel
10 has with Brant Lake. It's not a Contract that my
11 client has with -- with Excel. My -- the only
12 Contract my client has with Excel is the submittal to
13 supply product. And there was a limited warranty to
14 do product warranty work, which they did.

15 Again -- again -- the last thing I would say,
16 Your Honor, is -- is that we were not provided any
17 responses -- specific responses to our Statement of
18 Material Facts, nor was E-1. And we're incorporating
19 E-1's facts in our facts and believe that those
20 should be dispositive of the matter.

21 MR. BRENDTRO: Judge, I realize that I omitted
22 the Contract for adhesion discussion, if I could have
23 just 45 seconds to touch on that.

24 THE COURT: Go ahead.

25 MR. BRENDTRO: The Contract of adhesion here is

1 not that someone put a gun to Excel's head to force
2 them to sign the Contract. It's that they had no
3 ability to negotiate any other terms other than the
4 ones that they signed to. Because there legally was
5 not any other party with whom they could contract for
6 these pumps.

7 To determine the extent of that agreement
8 meaning what did Excel order from Electric Pump, we
9 look at the Contract documents, and then talk to the
10 people that signed them. Electric Pump's own
11 representative, its manager, agreed that whatever it
12 says in the Contract between Electric Pump and Excel,
13 the intent is to supply what is speced in the spec
14 book, and abide by the spec book.

15 So the adhesion issue is that because Excel had
16 no ability to negotiate the terms, we look at then
17 the totality of the circumstances and what is
18 correct, which is that when a supplier who is the
19 only supplier for this product, supplies something,
20 yes, they are agreeing to the terms in the spec book,
21 that attached to the supplier. Because the only
22 other way it could work, that's what Excel would have
23 intended if it had bargaining power, it would have
24 added a line saying, "And you agree to all the terms
25 for the supplier and spec book", because that's what

1 everybody's planning.

2 Their own witness agrees that that's what he
3 would have intended. And so that's why that
4 provision in the spec book, warranty paragraph 1.6,
5 it talks about the supplier trouble shooting his part
6 of the Contract. If there's a dispute about that at
7 this table right now, then this needs to go to trial
8 with Electric Pump and -- and Excel to figure that
9 out.

10 THE COURT: If that was true, there never would
11 be a granted Summary Judgment.

12 MR. BRENDTRO: What's that?

13 THE COURT: I said if that last statement was
14 true, then there would never be a Summary Judgment
15 that's granted.

16 MR. BRENDTRO: Well, that necessarily couldn't
17 be the case, because we have a dispute about the
18 terms of this Contract. There's a factual dispute
19 about whether or not this is what they agreed to. I
20 think -- I think the facts show that we can show that
21 they agreed to be bound by the spec book, both
22 because it's a Contract of Adhesion, and because they
23 agreed that they would have intended that their
24 participation in this would reflect the engineer's
25 specifications. Not some of the specifications, but

1 all of them.

2 THE COURT: And I just want to make sure the
3 record's clear, but did you respond or file a
4 response to their Statement of Undisputed Material
5 Facts?

6 MR. BRENDTRO: You know, Judge, I -- I sit
7 here, I have no idea even how so did I -- I got the
8 document, that specific document being done.

9 THE COURT: Okay.

10 MR. BRENDTRO: The Brief spells out specific
11 paragraphs which are incorporated, and which relate
12 to bury depth and other issues. And I would ask if
13 that's an issue I would be happy to type one up today
14 and submit that to the Court for its review.

15 THE COURT: Okay, let's move on to the other
16 motion.

17 MR. WHEELER: You ready, Judge?

18 THE COURT: No.

19 MR. WHEELER: Okay. Okay.

20 THE COURT: I'm very slow.

21 MR. WHEELER: No, that's fine. I was just
22 checking.

23 THE COURT: Alright, you don't have to give me
24 a huge -- you don't have to cover the facts unless
25 it's very important, but for the most part I've

1 studied your Briefs.

2 MR. WHEELER: Thank you, Judge. I had planned
3 on that I knew you were reviewing all of the
4 materials that we submitted, and I appreciate that,
5 and I had not planned on going through everything
6 again. Certainly if you have questions about the
7 issues, I welcome them. The only thing that I wanted
8 to point out today is similar to what Mr. Ericsson
9 pointed out, that we had a statement of undisputed
10 material facts, as well that we submitted in
11 accordance with the rules. Brant Lake did respond to
12 our statement and admitted almost everything in -- in
13 our statement. There was some qualifications related
14 to contracts, that sort of thing.

15 Again, Excel did not respond at all to the
16 statement, and the statute's pretty clear that
17 parties cannot rely upon what's in their brief for
18 argument at the motion hearing. The opposing party
19 must respond to each numbered paragraph in the moving
20 party's statement with a separately numbered response
21 and appropriate citations to the record. And it's
22 very clear that that did not happen here from Excel's
23 standpoint.

24 So, according to the statute, those -- all of
25 these statements in our Statement of Material --

1 Undisputed Material Facts are admitted. And that
2 includes that Excel was required to prepare a CPM
3 Schedule by the Contract. That they never prepared
4 that schedule. That Excel never supported the \$275
5 amount claimed for trenching at Swans Addition, with
6 any back-up documentation. That Excel did not
7 determine any damages related to the pipe testing.
8 And that Excel admit that the pressure testing of the
9 pipe did not affect the completion of the project.
10 Those -- we had several pages. Those are kind of the
11 highlights. There were 30 different paragraphs that
12 due to the lack of response, are admitted. And I
13 think we had very solid citations to the record for
14 all those issues anyway. I don't know that there
15 were disputed issues. But for purposes of our
16 motion, they're admitted by Excel.

17 Other than that, I would rely on what we have
18 argued in our -- our Briefs, and like I said, Judge,
19 if you have questions, I'll be happy to entertain
20 them.

21 THE COURT: Alright. And -- and I may, but I
22 think I want to hear their response, and that may
23 generate a conversation with you, and certainly will
24 with Brant Lake. I know what Brant Lake's going to
25 say, so I'm going to skip to you if you're alright

1 with that.

2 MS. HERTZ: Well, that's fine, Judge.

3 THE COURT: But we're going to come back to
4 you. It's going to be -- it's going to be good. So
5 go ahead.

6 MR. BRENDTRO: Thanks, Judge. And again, this
7 was filed against Brant Lake, and we would have
8 expected them to file a Statement of Disputed Facts.
9 The -- the issue of pipe testing is probably the
10 simplest way to demonstrate there's an issue for
11 trial.

12 THE COURT: Let me stop you right there,
13 because I'm really more interested in the law than a
14 lot of the facts. And I think you made a very
15 interesting statement, we would have expected Brant
16 Lake to respond to their facts. They did. They
17 admitted them. So that's what they did.

18 Back to the law of the case issue that we had
19 earlier in the other conversation, you're a party,
20 you had notice, and certainly you have raised
21 argument. You -- you see how this is --

22 MR. BRENDTRO: Sure.

23 THE COURT: The Court's trying to figure out
24 how all this fits together when we have multiple
25 parties, and what's the effect of Summary Judgment

1 that may be granted between the two upon the
2 remaining parties.

3 MR. BRENDTRO: Judge, may I speak? So, yeah.

4 THE COURT: So, and I just want to -- and I'm
5 not trying to, you know, pin you down necessarily,
6 but you made the statement, we would have expected
7 them to do it. They did. And obviously if you were
8 expecting them to do it, you knew you should have
9 done it in your motion you did respond to. You --
10 you see the circle that we're -- we're in here?
11 Alright, go ahead.

12 MR. BRENDTRO: Sure. Well, we go back to
13 Electric Pump then. Electric Pump decided not to
14 resist its claim against E-1. Meaning that Electric
15 Pump still may face liability. They did that -- they
16 made that decision not knowing whether or not you
17 were going to grant the motion to let them out. But
18 they did that as a matter of practicality.

19 I think -- I think Brant Lake has that same
20 right to make a decision based on trial strategy
21 about who to keep in and who to keep out. But if
22 they're making it based on trial strategy, it can't
23 possibly affect the law of the case, because -- or
24 the facts of the case. The facts of the case would
25 be what the jury decides when they hear all the

1 evidence. They're going to hear witnesses from all
2 of these various parties. So at that point in time
3 we're just trying to figure out whose gun is lined up
4 in which direction as we get ready to go in and have
5 the battle. Which -- which rifles are still cocked
6 and ready, and which ones have been withdrawn and put
7 away. I don't think that I can agree with -- with
8 Brant Lake's theory that somehow if -- if they just
9 grant Summary Judgment to -- for contributory, or for
10 contribution, due to Schmitz Kalda that that suddenly
11 then binds everybody else by that.

12 Keep in mind that the claim that we have back
13 and forth between Excel and Brant Lake is a Contract
14 case, and they're arguing potentially negligence that
15 extends back -- backwards towards Schmitz Kalda, and
16 that's -- that's between them. I think they're wrong
17 though, that there is no issue. And I think they're
18 wrong that there is -- is no claim, and there's -- I
19 think that Schmitz Kalda is wrong about how they're
20 approaching the motion. It's -- it's initially
21 premised on this idea that you need expert testimony
22 for -- for engineering malpractice. The cases say
23 the opposite, that you don't need engineering
24 testimony unless it's so complicated a lay person
25 wouldn't understand it.

1 THE COURT: Let me move you along a little bit.
2 What fact in the record can you point to, let's
3 assume that the engineer did something that caused
4 the delay, let's assume it. What fact can you point
5 to in the record that any of those alleged delays
6 caused the delay to the completion of the project?

7 MR. BRENDTRO: So there's -- there's two
8 issues, there's -- there's a delay issue, and there's
9 the freeze ups. So the delay issue, the case law
10 that they're pointing to is about a critical track
11 record.

12 THE COURT: I just want straight fact. What
13 facts in the record shows -- cause rain can cause a
14 delay, right?

15 MR. BRENDTRO: Sure.

16 THE COURT: Let me -- let me finish.

17 MR. BRENDTRO: Yeah.

18 THE COURT: A wind storm can cause a delay for
19 a day, that doesn't necessarily mean the completion
20 date is delayed, correct?

21 MR. BRENDTRO: Correct.

22 THE COURT: So what fact in the record --

23 COURT REPORTER: I'm sorry.

24 THE COURT: Am I going too fast?

25 COURT REPORTER: Yeah, you're both.

1 THE COURT: Okay. Got it. What fact in the
2 record can you point to that's supported by the
3 record that any of these alleged breaches, or
4 negligence, caused the delay to the completion date?

5 MR. BRENDTRO: Sure. So the pipe testing is
6 the simplest one. The pipe testing process appeared
7 to have taken five or six weeks, or longer. I mean I
8 think that -- actually I think the testimony is like
9 two or three or four months longer than anticipated,
10 because of the faulty testing formula.

11 THE COURT: And your expert didn't know if it
12 was one, two or three, if I am recalling correctly?

13 MR. BRENDTRO: Right. And what I'm quoting is
14 I think Reed Olson's testimony I think, he was
15 estimating two or three or four. And I don't know
16 which it is. The quantity doesn't really matter for
17 purposes of this discussion. That there's extra man
18 power being spent by the CEO of the company who's in
19 charge of -- of -- of all these things, and who has
20 the ability to work on the project. The fact is that
21 if you're not doing pipe testing and wasting your
22 time on the wrong formula, you can be doing clean-up
23 and trouble -- or not trouble shooting, but punch
24 list items.

25 THE COURT: So, you're arguing -- it's a great

1 jury argument. What fact in the record says that?

2 MR. BRENDTRO: Because -- oh, because Excel is
3 terminated in the middle of January, 2014, and it's
4 -- and Brant Lake then hires someone for \$400,000 to
5 come and do the punch list. Which some of the things
6 could have been done --

7 THE COURT: Okay. Again, is there anything in
8 the record, where an expert, or the owner Mr. Reed,
9 or somebody says, x, y and z was going to do this,
10 but they couldn't because they were doing this?

11 MR. BRENDTRO: Again, I don't think you need an
12 expert to understand that if a full-time employee of
13 the company is spending all of his time on -- on a
14 faulty test design, that he could use his time to do
15 other things to push the project forward, including
16 the punch list items.

17 THE COURT: No, I don't think you're following
18 me.

19 MR. BRENDTRO: Okay.

20 THE COURT: So let's move away from this
21 project. So if an electrician is redoing electrical
22 work, he's not delaying the paving work that's out
23 front. Unless you can put evidence in the record
24 that your electrician's secondary skill is paving,
25 and that was the plan, whether it's on a critical

1 path, or whatever. And what I'm saying is, is there
2 anything in the record that supports your position
3 that these delays contributed to the ultimate delay?

4 MR. BRENDTRO: Yes.

5 THE COURT: Okay. What?

6 MR. BRENDTRO: Because at the time that Excel
7 was terminated in January, there were punch list
8 items left to do. Virtually all of them. That's
9 January, 2014. The testing was happening in the fall
10 of 2013.

11 THE COURT: Okay. So is there something in the
12 record that says for example the testers would have
13 been doing the punch items?

14 MR. BRENDTRO: Okay, no. But the inference
15 from the record is that Reed Olson, the owner of the
16 company, whose conducting these tests, and whose
17 primary job is running the digging equipment and
18 running crews, and managing the company, spending
19 time, you know, doing the work, the inference is that
20 he could be doing other things. He had the skill and
21 capability to do the punch list items.

22 An inference that could be drawn from the
23 record Judge, is that Reed Olson repeatedly asked for
24 the punch list to be delivered to him during that
25 same time frame, so that they could start working on

1 it. And the answer was no, we wouldn't give it to
2 them, because they're still doing other things, like
3 for example following these false testing results on
4 testing the pipe.

5 THE COURT: And again, I know -- I don't want
6 you to think I'm picking on you --

7 MR. BRENDTRO: No.

8 THE COURT: -- but correct me if I'm wrong, you
9 may not need an expert, but you had an expert,
10 Mr. Carr, right?

11 MR. BRENDTRO: Correct.

12 THE COURT: And he testified if I -- if I --
13 and correct me if I'm wrong, that he couldn't say the
14 delay in testing caused the delay to the project. So
15 you're asking me to make inferences that your own
16 expert, who assumably worked with the owner and
17 everybody else, was unable to do in a deposition?

18 MR. BRENDTRO: No, Judge. He was asked whether
19 or not he could pinpoint how the critical path was
20 affected. That's different than whether or not Excel
21 was financially damaged. If I have to spend --

22 THE COURT: Stop right there. Restate what he
23 was asked.

24 MR. BRENDTRO: He was asked whether or not he
25 could pinpoint how the critical path was affected by

1 the testing issue. Meaning --

2 THE COURT: Just hold on. Hold on.

3 MR. BRENDTRO: Yep.

4 THE COURT: That might be important to me,
5 because my understanding was he testified that the
6 test -- he couldn't say the testing caused the delay
7 of the completion of the project. So we have got --
8 I'll let these two look for that, you can continue.

9 MR BRENDTRO: Yep, Judge, it's on page five
10 and six of Schmitz Kalda's Reply Brief. The colloquy
11 that you're looking for.

12 THE COURT: That's not what I'm looking for,
13 but -- but you can continue.

14 MR. BRENDTRO: Okay. The -- Schmitz Kalda has
15 succeeded in putting blinders on, on both of us,
16 because we're talking about delay damages, in the
17 context of these other cases where the critical path
18 talks about the delay.

19 THE COURT: So, just so we're clear on it, I'm
20 not fixated on critical path.

21 MR. BRENDTRO: Okay.

22 THE COURT: What I'm fixated on, can you show
23 me some facts that -- that demonstrate there was a
24 delay? At one point Mr. Carr said without knowing
25 the number of work days allocated versus how many

1 were used, I can't tell you. And what I'm getting at
2 is, your own expert as far as I can tell couldn't
3 point to anything that caused a delay that he could
4 testify to.

5 MR. BRENDTRO: The moment that we say delay,
6 the blinders are on. Delay only is -- is talking
7 about critical path, okay? There are other ways that
8 we look at this case. If I have to hire you to come
9 out and work for me to do pointless work, and pay you
10 by the hour, or in salary, for two to three or four
11 months, my company has just wasted two to three to
12 four months worth of salary. Regardless of what the
13 end date for the project is, that's a financial harm
14 to Excel. Schmitz Kalda's own owner, Ken Buehl
15 agreed to that and admitted to that, that he
16 understood that how using the wrong testing formula
17 could cost Excel time and money. They're two
18 separate things. Delay is time, the wasted salary is
19 money. Now, what would Reed have been doing --

20 THE COURT: So stop right there then. Let's
21 follow those two then. In the record, point to
22 something where you put into a response that gives me
23 the time, or the money.

24 MR. BRENDTRO: Okay. Two or three or four
25 months of Reed's salary.

1 THE COURT: At which your own ex -- your own --

2 MR. BRENDTRO: He wasn't asked that, Judge.

3 THE COURT: And -- well, you're about to be,
4 Mr. Reed testified he didn't know, so can you argue
5 that to a jury? I don't know if I had one, two,
6 three, or four months, but pick one and pay me?

7 MR. BRENDTRO: I think you can estimate, Judge,
8 and then if a jury wants to -- if they believe that
9 the delay -- or if they believe that the money was
10 spent, the jury then has to decide how much of it was
11 spent, how much was the delay, and in Reed's estimate
12 it was two or three or four months. And the jury can
13 then find based upon that, that it's two months.

14 Now, the other way to quantify damages, Judge,
15 is that Excel Underground gets terminated, and then
16 gets sued to pay for a completion contractor to come
17 in and do all the completion work, on their own
18 timetable, regardless of what the critical path is.

19 There's no question that Reed could have been
20 doing some of that completion work had he not been
21 wasting his time doing these other things. It's an
22 inference that we can draw from the record, and it's
23 also common sense, that if I'm the guy in charge of
24 this project and I have these skills, and I've helped
25 put in all these things, and they need to be tweaked,

1 that I could either spend two or three or four months
2 tweaking them, or push that off until the spring, and
3 then spend and waste my time on these testing
4 methods. So if Excel is going to get sued in this
5 case for four or \$500,000 of tweaking that happens
6 after termination, most certainly we get to argue
7 that the engineer caused that, and that ultimately
8 Brant Lake has the right to recover from them.

9 THE COURT: Alright. Anything else you want to
10 add before I let them respond?

11 MR. BRENDTRO: Judge, then the other issue
12 is -- relates to the freeze ups, we haven't talked
13 about them. But Schmitz Kalda's role in choosing the
14 grinder station that was installed on this project,
15 nobody -- nobody disputes the engineer's job is to
16 fix the equipment. The engineer picked equipment
17 that froze multiple times around Brant Lake. In
18 contrast, the history of E-1's experience is that at
19 most, one unit would freeze around an installation at
20 any point in time. Not -- not dozens. The inference
21 from that is that somebody picked the wrong
22 equipment. It doesn't take a jury to figure out that
23 an engineer's job is to pick the right equipment for
24 this, and nobody's disputing that the engineer's job
25 is that.

1 And then ultimately --

2 THE COURT: Well, let -- let -- and I'm --
3 you're asking me to make inference after inference.
4 I think it's your responsibility to file Affidavits
5 and put material facts in the record, and tell them
6 to me. These are the material facts that I'm putting
7 forward, such as, you know, the records shows that we
8 put everything at the correct depth, and they still
9 froze.

10 MR. BRENDTRO: Judge, those are in E-1's
11 filings. They talk about the bury depth being the
12 issue.

13 THE COURT: Alright. Mr. Wheeler?

14 MR. WHEELER: Just -- just briefly, Judge. I
15 -- the questions that you raised are the questions
16 that we have raised, and Mr. Brendtro's been involved
17 on behalf of Excel since early 2013. We have been
18 through this litigation. We have had the motions,
19 they have been filed, and this is what we have got.
20 We don't have anything to show that there's any
21 damage related to anything that Schmitz Kalda did.
22 So today you asked the question, he points to the
23 pipe testing. There's nothing in the record, period
24 that shows that there was any additional material
25 cost, any additional labor, that they went and hired

1 somebody else because Reed Olson had to perform that
2 work as suggested. There's nothing to support any
3 actual additional cost damages related to the pipe
4 testing issue. And again, on the delay part of it,
5 to the extent they're claiming delay, I can't even
6 tell whether they're claiming delay any more related
7 to that. I guess they are. We have got two things.
8 One, they didn't respond to our Statement of
9 Undisputed Material Facts. One of them that says
10 Excel admitted that the pressure testing of the pipe
11 did not affect the completion of the project. Your
12 question. We have also got that's taken and cited to
13 Reed Olson's deposition, and this is the question and
14 the answer. "So the testing didn't hold up the end
15 of the project, did it? It held up the testing and
16 approval of the main line, but you're still working
17 while you're testing, right?"

18 THE COURT: You better go a little slower,
19 please.

20 MR. WHEELER: You want me to start over?
21 Answer, "Yes." Mr. Olson admitted the exact -- that
22 the testing of the pipe did not hold up the end of
23 the project, the very question that you asked. It's
24 admitted through the statute, it's admitted through
25 Mr. Olson's testimony. There's no delay that can be

1 proven related to that issue. And it's not just a
2 matter of saying two or three or four months, you
3 have got to prove that the delay actually cost
4 additional amounts. It's got to be an actual damage
5 associated with that. So it's okay, it took us two
6 extra months, pushed back the end of the project, and
7 we had additional costs of overhead, labor,
8 equipment, those types of things. That's how you
9 prove a claim like they're trying to prove. There's
10 nothing in the record whatsoever to show any damage
11 related to any of these issues, anything that Schmitz
12 Kalda did.

13 You know, the freezing stuff that Mr. Brendtro
14 has raised today, there's none of that that's been
15 presented to the Court. Their own expert, that's a
16 design issue apparently, about the size and the
17 depth, and things like that. Their expert didn't
18 raise that issue as a violation of the standard of
19 care by Schmitz Kalda in the design. So I don't know
20 where that's coming from. But again, there's nothing
21 in the record, Mr. Brendtro can't point to anything
22 showing additional dollars, material, equipment,
23 labor, and an actual damage cost associated with that
24 issue, just like every other issue. That's all I
25 have, Your Honor.

1 THE COURT: Miss Hertz, do you wish to add
2 anything?

3 MS. HERTZ: Well, I would like to discuss, and
4 if you're ready for it, Judge, you know, some of
5 these issues related to the interlocking Summary
6 Judgment motions. As to the more factual matters
7 that have been, you know, raised as part of this, we
8 have given our response to Schmitz Kalda's Statement
9 of Material Facts, and frankly we don't disagree with
10 most of them. The one thing I would like to add is I
11 believe the testing did not even -- the testing on
12 these pipes didn't even start until after the
13 substantial completion date had passed.

14 MR. BRENDTRO: That's incorrect, Judge.

15 THE COURT: Okay. And I think for the purposes
16 of this hearing though it's correct, because it was
17 in their documents, and you didn't dispute it, and
18 neither did Brant Lake. So I don't think the Court
19 has any other choice but to find that to be a fact
20 today. Am I wrong?

21 MR. BRENDTRO: I'm sorry, that it was beyond
22 the date of the Contract, or beyond the substantial
23 completion event itself?

24 THE COURT: The testing according to the record
25 that's before me started after the substantial

1 completion date.

2 MR. BRENDTRO: And -- and I guess maybe I'm
3 misunderstanding, are we talking about the date
4 specified in the Contract for substantial completion,
5 or the physical act of arriving at substantial
6 completion?

7 MS. HERTZ: I was referring to the dated stated
8 in the Contract.

9 MR. BRENDTRO: That's fine.

10 MS. HERTZ: And, Your Honor, if I need to go on
11 to address some of these other issues, I certainly
12 can do it.

13 THE COURT: And by other issues, are you --
14 you're referring to the affect of Summary Judgment
15 being granted on you?

16 MS. HERTZ: Yes, Your Honor.

17 THE COURT: Alright. So, I'll make a statement
18 on that. Well, we'll get back to that.

19 MS. HERTZ: Okay.

20 THE COURT: It is on my mind.

21 MS. HERTZ: Thank you, Judge.

22 THE COURT: Alright. Anybody else have
23 anything in regards to the substantive motions?

24 MR. BRENDTRO: Judge, the other issue that we
25 haven't discussed is whether the termination of Excel

1 was wrongful or not.

2 THE COURT: You can talk -- it's your
3 opportunity, tell me what you want to tell me nice
4 and slow.

5 MR. BRENDTRO: Okay. At the time Excel is
6 terminated, it's because the pumps are freezing. The
7 reason for the pumps freezing is never investigated
8 by the engineer, or if it is, it's never told to the
9 board. The engineer never reveals to the board his
10 potential role in improperly inspecting these, nor
11 does he come to the defense of the contractor to
12 explain, by the way these pump freeze ups, may not be
13 Excel's fault. Instead, as the board's engineer, he
14 stands idly by and let's Excel get terminated. Our
15 engineer established that one of the standards of
16 engineering is to deal with parties, including
17 clients and the public, in a fair and honest manner.
18 That conduct is neither fair nor honest. Standing by
19 while the board terminates Re for freeze ups that may
20 or may not have been his fault.

21 The Contract itself dictates who was supposed
22 to interpret the Contract, and that's the engineer
23 himself. That was his duty to step up and make sure
24 that that termination was done correctly and not
25 wrongfully. If it's proven that Excel was wrongfully

1 terminated, and that the jury believes Kim Buehl that
2 he just stands -- stood by and did nothing, I think
3 there's pass through liability that way as well.

4 THE COURT: Is that issue -- did you present
5 that issue to the Court in this hearing?

6 MR. BRENDTRO: Yes.

7 THE COURT: How?

8 MR. BRENDTRO: Page 18.

9 THE COURT: In a brief?

10 MR. BRENDTRO: Yes.

11 THE COURT: Okay. Mr. Wheeler, you want to
12 respond to that?

13 MR. WHEELER: Well, Judge, as he mentioned, I
14 mean it's in -- in the brief, but there's -- there's
15 no -- none of the facts that Mr. Brendtro referred to
16 that have been presented to the Court. What was
17 required under the contract we disagree with what he
18 said. But what he said in the brief -- what Excel
19 has said in the brief is we have a wrongful
20 termination claim against the owner. Okay. Fine.
21 Prove your claim. What does that have to do with the
22 engineer? Again, what's -- you have a claim, what
23 did the engineer do that's in the record that caused
24 damage to Excel in some way? If they were wrongfully
25 terminated, they recover under their wrongful

1 termination claim. I assume that they have that, I
2 haven't looked back at the Complaint to see that
3 that's actually a claim that was pled. But how is
4 that a recovery from -- from the engineer? It's not.
5 And we disagree. I don't have the Contract -- I
6 actually do have the Contract, but I'm not going to
7 bore the Court with trying to find the provisions of
8 the Contract, but I think it's pretty clear from
9 Mr. Buehl's deposition that he was not asked about
10 termination of the Contract. That was a decision
11 that was made by the board with their counsel that
12 they had at the time. And that Mr. Buehl was not the
13 one who was responsible so to speak for that
14 termination. So again, this is at the 11th hour
15 Excel trying to come with something to throw at the
16 engineer without any fact supporting it presented to
17 the Court, without any actual damage that was
18 incurred by them. If they have got the claim,
19 they've got the claim. But, as I said, it's -- it's
20 not a claim that survives, because -- to the engineer
21 with any damage to Excel.

22 Judge, if you look at the brief, I guess it's
23 on page 19 of the brief, there's not a single fact
24 cited there, even in the briefs, not to mention the
25 fact that there was nothing provided by Excel in the

1 way of a statement of undisputed material facts
2 relating to any of those issues. So, the facts that
3 Mr. Brendtro's referring to are -- are not in the
4 record. And as I said before, Excel's had plenty of
5 time and opportunity to present that evidence to the
6 Court.

7 THE COURT: Alright. Well, I'm going to grant
8 both motions for summary judgment. Which raises
9 another issue, that I don't believe is necessarily
10 properly before me today. It will either require a
11 motion, or a jury instruction, and it's going to be
12 -- and it's what Miss Hertz was going to talk about,
13 but I don't think that issue is ripe for today.

14 But I'll just throw some thoughts out there and
15 you can go from there as a group. So obviously Brant
16 Lake's claim was a pass through claim, and you made
17 the argument in your brief that if SK is out, then
18 you would not be liable for those same damages to
19 Excel.

20 The other issue being -- I have a hard time
21 with all of the names. If Electric Pump, Inc., is
22 out, but the engineer for Brant Lake raised the issue
23 of insulation, and the cap, what is the effect of
24 these summary judgments on this case going forward I
25 guess? And how can that be used, how can it be

1 argued, how does it relate to damages? I don't know
2 if it's law of the case. I've started to do some of
3 my own research on it, so I know we have had the
4 argument of preclusion raised, I'm not sure if it's
5 that or not. It may be a motion in limine that we
6 need to deal with, or maybe we need a hearing sooner,
7 so that the parties, they know what they need to do
8 going forward for trial. But I'm not going to rule
9 on that today, I don't think it's before me, and
10 frankly, I haven't had the benefit of -- of the work
11 that you guys will do, or briefs that you will do for
12 the Court to help me study it, so I'm not going to
13 rule on outside of granting the Summary Judgments.
14 Any questions on that?

15 MS. HERTZ: The only question I have, Your
16 Honor, is -- and this is -- this is something for
17 everybody at large, I don't believe we have set a
18 date for a motions hearing on this yet.

19 THE COURT: So here's what I want to do,
20 because this is where it gets ugly and really hard
21 for my Court Reporter, and if everybody agrees, I
22 would like to go off the record, have a normal
23 conversation with regards to scheduling, anything
24 else that we need to take place between now and
25 trial, and then I would come back on the record and

1 give everybody an opportunity to make any statement
2 they wished about the conversation we had. Does
3 anybody have an objection to proceeding in that
4 manner? Alright. So then we will take a short
5 recess from the record to simply have a calendar
6 conversation, and some housekeeping stuff in regards
7 to the trial.

8
9 (The discussion between the parties was held
10 off the record).

11
12 (After the discussion off the record was
13 finished, the following was had back on the record
14 with all parties being present, except for
15 Mr. Ericsson, Mr. Luce, and Mr. Wheeler, who left the
16 Courtroom).

17
18 THE COURT: We're back on the record, we just
19 had a conversation in regards to scheduling for
20 motions. At this time I will try to put it on the
21 record. I would instruct the Plaintiff to prepare an
22 Order. We set a motion date for the 8th of January
23 at 1:15. The parties are going to work out a
24 briefing schedule amongst themselves, but have agreed
25 that the Court will receive no later than the 29th,

1 the motion, the initial brief, and reply, by close of
2 business on the 29th of December.

3 That by the 19th of January the parties will
4 submit to the Court a set of Jury Instructions that
5 have been stipulated to by the parties. In addition,
6 any Instructions that they could not have reached an
7 agreement, the opposing party will provide the
8 grounds for the objection to the Instruction on that
9 date as well.

10 The parties will exchange witness -- witnesses
11 and exhibits with one another by the 12th of January.
12 Then by the 19th the parties will provide the Court
13 with an exhibit list, with exhibits that have either
14 been stipulated to, and if a party's objecting to an
15 exhibit, the grounds for such a -- the foundational
16 grounds for the objection. In regards to the
17 schedule I just put out, Miss Hertz, any comment?

18 MS. HERTZ: No, Your Honor.

19 THE COURT: Mr. Nilan?

20 MR. NILAN: Nilan, Your Honor. No objection.

21 THE COURT: I apologize, I'm sorry.

22 MR. NILAN: That's okay.

23 THE COURT: Mr. Fuller?

24 MR. FULLER: No objection.

25 THE COURT: And Mr. Brendtro?

1 MR. BRENDTRO: No objection, Your Honor.

2 THE COURT: And Miss Lammers?

3 MS. BOGARD: No. Thank you, Your Honor.

4 THE COURT: Alright. And then Mr. Brendtro,
5 you wanted to put something else on the record?

6 MR. BRENDTRO: Yes, Judge, the party's not
7 here, but I'm willing to just, you know, ask the
8 Court to reconsider its ruling as to Electric Pump.

9 THE COURT: Yeah?

10 MR. BRENDTRO: There -- there is no dispute
11 that Excel's own engineer has pointed a finger at --
12 I'm sorry, that Brant Lake's own engineer has pointed
13 a finger at Excel related to the installation issues,
14 and if those exist, there are enough facts in the
15 record from all of the various undisputed facts, and
16 the Affidavits in the record, that would require a
17 trial for pass through liability from Excel through
18 to Electric Pump.

19 THE COURT: And that request will be denied.

20 MR. BRENDTRO: Thank you, Judge.

21 THE COURT: Alright. Anything further today?

22 MR. NILAN: Nothing further, Your Honor.

23 THE COURT: Alright. Thank you all, and have a
24 safe trip home.

25 (End of the proceedings).

1 STATE OF SOUTH DAKOTA)
2 COUNTY OF LAKE) CERTIFICATE
3

4 I, Kim E. Callies, an Official Court
5 Reporter within and for the State of South Dakota,
6 hereby certify that I was present during the
7 proceedings had, and that the foregoing pages, 1-59,
8 inclusive, is a true and accurate transcript of my
9 Stenotype notes taken in said matter.

10 Dated this 8th day of December, 2017.

11
12
13 

14 Kim E. Callies

15 Official Court Reporter
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1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
:SS
2 COUNTY OF LAKE) THIRD JUDICIAL CIRCUIT

3 *****

4 EXCEL UNDERGROUND, INC. MOTIONS
Plaintiff, HEARING
5 vs. CIVIL 14-50

6 BRANT LAKE SANITARY DISTRICT,
7 Defendant.

8 *****

9 BRANT LAKE SANITARY DISTRICT,
Plaintiff,

10 vs.

11 EXCEL UNDERGROUND, INC., and
12 GRANITE RE, INC.,
Defendants,

13 AND CIVIL 14-18

14 GRANITE RE, INC.,
15 Third-Party
Plaintiff,

16 vs.

17 REED I. OLSON &
18 MELISSA D. FISCHER-OLSON,
19 Third-Party
Defendants.

20 *****

21 MOTIONS HEARING

22 *****

23

24

25

COPY

1 PROCEEDINGS: Taken on January 8, 2018, in the
2 Lake County Courthouse, in Madison, South Dakota,
at the hour of 1:15 P.M.

3 BEFORE: The Honorable PATRICK T. PARDY, Circuit
4 Court Judge

5 APPEARANCES: MR. DANIEL BRENDTRO
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8 Sioux Falls, SD 57108
9 For Excel Underground, Inc.

And

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And

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And

MR. JOSEPH A. NILAN
Gregerson, Rosow, Johnson & Nilan, Ltd.
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For Granite Re., Inc.

1 THE COURT: Alright, we're on the record in
2 Civil Files 14-50, and 14-18. This has been the time
3 set for a motions hearing. There are a number of
4 motions before the Court. And I think what we'll do
5 is we'll deal with the -- I assume the one that
6 everybody is most focused on is the summary judgment
7 motion first. Miss Hertz, I'll let you address your
8 motion.

9 MS. HERTZ: Alright. I just wanted to make it
10 clear from the start that this motion again is based
11 solely on the previous granted summary judgment
12 against Kalda. And that's the reason that it's been
13 made, that's the entire premise, and that's the
14 reason that we are not going into the factual needs
15 on this. Because the -- Schmitz Kalda made a motion
16 that was addressed to the validity of Excel's claims
17 rather than any issues specific to the relationship
18 between Schmitz Kalda and Brant Lake. The decision
19 on that motion should extend to this entire case.
20 Excel wishes to proceed as if the prior summary
21 judgment motions didn't happen. But summary judgment
22 on an issue is judgment as a matter of law. I know
23 Excel keeps bringing up issues of finality, but the
24 question of appealability, and frankly they could
25 have sought that certification if they wanted to.

1 That's not what's in front of us. The Court has
2 already decided on the merits as a matter of law, and
3 after hearing itself arguments to the contrary, that
4 Excel cannot prove the damages that it blames on
5 Schmitz Kalda.

6 As Brant Lake has stated repeatedly, oh, and I
7 do apologize, and if I talk too fast, just, you know,
8 shut me up and tell me to start again. Schmitz
9 Kalda's motion was premised on the invalidity of
10 Excel's damages claim. As per Excel's repeated
11 blaming of Schmitz Kalda for pretty much everything
12 that went wrong on this project, these were pass
13 through claims for which Excel believes Schmitz Kalda
14 was responsible. So, what was before the Court was
15 the validity of Excel's claims for damages. Brant
16 Lake can't be forced to reverse course from what it
17 said since day one, and basically load the gun that's
18 going to be pointed at it come this -- come up the
19 22nd. Instead, the only logical solution is for
20 Excel, which adamantly contests Schmitz Kalda's
21 version of the facts, to do exactly what it did, to
22 fight back and say, "No, there are genuine issues."

23 The Courts, in the *Estate of Rille*, and *Johnson*
24 *vs. Bundy*, those are the Wisconsin and Michigan cases
25 that Brant Lake has cited previously, held yeah,

1 that's what you have got to do, even if you want the
2 party named on the motion. And here's the most
3 important part for this stage of the proceedings,
4 Excel did respond to Schmitz Kalda's motion. In
5 *Rille* and *Johnson*, the parties hadn't made the
6 factual arguments at the time of the original summary
7 judgment motions. The Court still held them to it,
8 because they should have argued that. But here Excel
9 filed a brief, argued to the court, and exercised all
10 of the opposition rights that it would have exercised
11 if Brant Lake had been the movant. And it lost.
12 Excel does not get another chance either here or at
13 trial to make those same arguments. Call it law of
14 the case, issue preclusion, estoppel, or just the
15 definition of judgment as a matter of law. What it
16 comes down to is that if the judgment doesn't come
17 out in your favor the first time around, you don't
18 get to keep retrying in the case -- retrying your
19 case until you win or run out of options. The fact
20 as determined by the Court cannot be different for
21 different parties.

22 Excel's position is basically that until
23 there's an appeal you get to shoot until you win,
24 regardless of what the Court has already decided.
25 And regardless of which issues have been established,

1 and that other parties can't fight back on now. By
2 Excel's own logic, Brant Lake ought to be allowed to
3 come in and present what evidence of liquidated
4 damages, to the jury. Evidence of attorney's fees.
5 Because the South Dakota Supreme Court might reverse
6 itself through the summary judgment on appeal. There
7 would be no point in anybody moving for summary
8 judgment if the grant didn't resolve anything.

9 THE COURT: Let me ask you two questions that I
10 don't think were covered by anybody. Tactically
11 Brant Lake made a decision, you could have filed for
12 summary judgment the same time. You could have filed
13 the same summary judgment motion in regards to your
14 liability. So there's -- I want you to address that.
15 And then two, statutorily was it their duty to defend
16 against the summary judgment? Cause when you look at
17 the Third Party Complaint that was made against you,
18 or excuse me, your Complaint against them, was an
19 agency Complaint, basically, master-servant, so where
20 is their duty to defend on that? Because they sued
21 you and the matter could have gone to trial without
22 SKA, correct?

23 MS. HERTZ: Correct.

24 THE COURT: So, talk to those two points if you
25 would.

1 MS. HERTZ: Well, the reason that it was
2 necessary for Excel to respond is because a motion
3 for summary judgment by any party at any stage is a
4 statement that there are no material issues of
5 disputed fact here. These are the facts. These are
6 the facts that cannot be disputed. This is the way
7 it is. And because this is the way it is, this is
8 the result that has to happen. So, it doesn't matter
9 who comes in and says that. Again, it is a statement
10 that these facts are not and cannot be disputed. So,
11 if another party in the action comes in and says this
12 is the way the facts are, you can't say, "You know, I
13 disagree with that. I think these facts can be
14 disputed, but I'm just going to lie in wait, see how
15 this falls out, and then I'm going to come in and
16 make my case later. I'm not going to dispute this.
17 I'm not going to fight it, even though it's a
18 specific statement that you cannot dispute these."
19 These facts -- as the South Dakota Supreme Court has
20 said, summary judgment is what you grant when the
21 facts are clear. So if somebody else is saying the
22 facts are clear, it does not matter which side of the
23 motion you're on, or if you're named at all. If you
24 don't think those facts are clear, you have to come
25 in and make your case. And the reason this -- the

1 reasons that Brant Lake didn't move for summary
2 judgment back at that point in time is well, frankly
3 the motion we're making right now, we couldn't have
4 made back -- back in December.

5 THE COURT: But you could have made a summary
6 judgment motion against Excel?

7 MS. HERTZ: We could have made a summary
8 judgment motion against Excel, correct. But, the
9 motion that we are making right now we could not have
10 made. And what it comes right down to is that if we
11 had made it, the result would be exactly the same.
12 Because it doesn't matter who that motion is coming
13 from, it's raising the same points of undisputed
14 material facts, and Excel addressed those points.
15 Excel brought up its responsive arguments to those
16 points. The fact that they were raised by Schmitz
17 Kalda versus us, you know, it doesn't matter, it's
18 about disputing the facts. And if you don't dispute
19 the facts you're stuck with the facts.

20 THE COURT: And is there any authority that
21 relates to summary judgments that make a Plaintiff
22 respond to a Third-Party Defendant?

23 MS. HERTZ: The Plaintiff responds to a Third-
24 Party Defendant, I'm not aware of any of those, but
25 again, the *Rille* and the *Johnson* case is out of

1 Wisconsin and Michigan, address whether or not a
2 person has to respond when the motion is between two
3 other parties. And I don't believe the distinction
4 between Plaintiff, Defendant, Counter-claimant,
5 matters. Because what it comes right down to, is
6 again, these are facts being claimed as clear,
7 undisputed. And these are material facts that are
8 going to effectively decide this portion of the case.
9 And that's true no matter who you are in a case,
10 those facts are true, those facts are undisputed,
11 those facts are decided. So when it comes up it
12 doesn't matter which party you are, if you are going
13 to dispute that, you need to make your case now,
14 because really what this is about is, you know,
15 reaching the right resolution. It's not about
16 strategizing. What it's about is having everybody
17 bring their case and decide it on the facts. And
18 when it -- when somebody says hey, these are
19 undisputed, and it can be done at the stage of a
20 summary judgment? Then again, if you have a counter
21 to that, you have to do it then. Otherwise, it's
22 going to break down into gamesmanship, the
23 possibility of different results for different
24 parties. Again, this is something else that doesn't
25 matter who's the movant, who's the non-movant, who's

1 the non-party. The possibilities for vastly
2 different results are going to -- are going to pop up
3 regardless of any of those.

4 THE COURT: And you mentioned gamesmanship,
5 tactical decisions, if I cut this case right down
6 to --the summary judgment motion, right down to the
7 -- and I'm not throwing darts, but both sides made a
8 tactical decision. You made a decision not to file
9 for summary judgment, which you could have done. And
10 you didn't object to the proposed undisputed facts.
11 So the Court was left with the situation where I had
12 to adopt the undisputed facts, they were filed, and
13 there wasn't a single objection to any of them. And
14 in fact, I believe you adopted all 30 of them, the
15 Plaintiff, Brant Lake adopted them.

16 So the question is, who made the wrong tactical
17 decision? And I don't know that the statute answers
18 that question. And where I'm wrestling in my head,
19 Brant Lake made the decision not to resist or join.
20 And Excel made the decision not to file objections.
21 And the question is, did they even have that
22 responsibility. So really what this comes down to is
23 somebody made a bad tactical decision. And that's
24 what I am looking for, some authority that helps me.

25 MS. HERTZ: Well, Judge, I would -- I would

1 argue that Brant Lake actually did join in that
2 motion. Again, the position that we were put in by
3 Schmitz Kalda's motion is we need to get up there,
4 refute our own case. And as I said, Mr. Brendtro was
5 talking about I need to figure out which guns are
6 pointed at who. And we would be -- and we would be
7 loading the gun that we are going -- it is going to
8 be pointed at us.

9 THE COURT: That was a decision. But a better
10 one would have been to file a motion for summary
11 judgment, making the same allegations that Schmitz
12 Kalda made.

13 MS. HERTZ: Well, I believe that by -- by the
14 response that Brant Lake made, by stating at that
15 time, you know, these facts look very much like the
16 facts as we see them. And by saying look, if you
17 grant this motion, you have to grant this motion for
18 us as well. That was the functional equivalent of us
19 making that motion.

20 Secondly, again, when it comes down to the due
21 process argument that Mr. Brendtro raised, he had his
22 chance to respond. You know, what would have
23 happened differently for Excel if we had made that
24 motion as well? If we had said, "Hey, second" right
25 away, instead of then simply in our response brief?

1 What was -- nothing different would have happened for
2 Excel at all.

3 MR. BRENDTRO: Judge?

4 THE COURT: Anything further?

5 MS. HERTZ: Well -- well, I -- I do have to
6 bring up the point though that if the summary
7 judgment means anything, it means that those points
8 have been decided in this case. They can't be
9 decided just for Schmitz Kalda. They have to be
10 decided for us as well, because of the exact same
11 point. And if -- if Brant -- if Excel is going to be
12 allowed to come in and re-argue on a summary judgment
13 motion that it effectively lost, then frankly Brant
14 Lake should be allowed to do the exact same thing
15 with the summary judgment motions it lost back in
16 2016.

17 What it -- again, the primary issue is, have
18 these facts, have these points of fact and
19 application to the law, have they already been
20 determined? And they have. It has to be the same
21 for everybody in the case, or we are going to end up
22 with a risk of a very dissimilar result. If we have
23 to reverse course on the summary judgment, then we
24 have to bring Schmitz Kalda back in. Because
25 otherwise it's not reversing course on the summary

1 judgment, it's basically saying well, you know, we
2 have decided that -- we have decided that Excel can't
3 prove these facts, but, you know, maybe we should
4 just give them another shot. And that's not how
5 summary judgment is supposed to work. They had their
6 chance to respond. Nothing would have been different
7 if Brant Lake had filed a motion at that time, their
8 chance, their response, was the exact same.

9 THE COURT: Well, what would have been
10 different assuming he wouldn't have responded to
11 yours, the summary judgment that I signed, would have
12 discharged their claim against you as well.

13 MS. HERTZ: Correct. But the thing is, his
14 opportunity to respond would have been the same.
15 Even -- even disregarding anything to do with the
16 material facts statement, I mean even just leaving
17 that off the table, what we have got is the
18 opportunity to respond to the very points that were
19 raised by Schmitz Kalda, that are being -- that are
20 being raised today. That opportunity is the same.
21 And if you -- if you say that well, you know what, we
22 should have countered Schmitz Kalda, that's -- that's
23 a vastly different set of opportunities right there
24 saying, well, you had a chance to refute your own
25 case.

1 THE COURT: And the last point, I'm just -- I'm
2 curious, it's in my head, I mean Schmitz Kalda made
3 your argument. They didn't have privity with Excel,
4 correct?

5 MS. HERTZ: As far as I know, yes. They --
6 they were not -- there was no direct contract between
7 Schmitz Kalda and Excel.

8 THE COURT: And in 2016 those summary judgments
9 were directly between the two of you, the ones you're
10 referring, to correct?

11 MS. HERTZ: Sorry, I'm not quite following you,
12 Judge.

13 THE COURT: Yeah. Alright, Mr. Brendtro.

14 MR. BRENDTRO: Judge, it seems like it's been
15 getting to grow more and more complicated, and I
16 think part of the reason is that there is not a
17 single authority that Brant Lake can point to that
18 actually has done what they're asking this court to
19 do. Back in November, when faced with this unusual
20 posture where they are rolling over and playing dead,
21 on a motion that I did not anticipate having to
22 defend. What would have been different is that I
23 would have expected in November working on a motion
24 that affected my client's ability to pursue damages
25 from its own Defendant, as opposed to spending my

1 client's money defending somebody else's motion.

2 The tactical decisions which you make as an
3 attorney on your client's behalf to spend their money
4 on somebody else's motion is pretty simple, you don't
5 do it. Only after seeing their roll over and play
6 dead brief, where they say that guess what, if we win
7 this then we settle with Excel on damages, I then
8 have to do something. The first thing I do is go and
9 read the two cases that they cited, and we briefed
10 this back in November. *Estate of Rille*, "An injured
11 party --

12 THE COURT: You need to really read slow
13 please.

14 MR. BRENDTRO: *Estate of Rille, R-I-L-L-E*. The
15 injured party sued two Defendants, neither of which
16 had filed a cross claim against the other. One
17 Defendant filed for summary judgment and won. Issue
18 preclusion prevented the other Defendant from later
19 bringing a Third Party Complaint to bring that party
20 back in. That's not the case here. *Johnson vs.*
21 *Bundy* is exactly the same fact pattern as *Rille*,
22 *R-I-L-L-E*. That's not what we're dealing with here.
23 To make it approximate that, if somehow today I was
24 asking the Court to now sue Schmitz Kalda, to bring
25 them back in as my own Defendant, then I think we

1 could read those cases and follow those rules. But
2 that's not what we're asking to do. I'm asking to
3 continue to sue Brant Lake for what it did, for what
4 its agents did, for anything like that. And there's
5 not a single statute or case that says that I can't
6 do that. In fact, Rule 54b I think says that I get
7 to do that. Counsel for Brant Lake attempts to just
8 minimize the psyche of finality. But that's exactly
9 what Rule 54b is all about.

10 Any determination that the Court makes up until
11 the final judgment is reviewable. That's what we're
12 faced with. Frequently we don't, because we -- the
13 judge usually thinks he's got it right the first
14 time, okay? For some reason we can look back on it,
15 if we do. If the judge -- I mean if the Court would
16 like to re-open liquidated damages tomorrow, or the
17 attorney's fees issue tomorrow, that's fine. I'll --
18 I'll let somebody just do briefs, because I won that,
19 and I think I'll do it again.

20 If I was incorrect in winning it, let's reopen
21 it and fix that. But that's what 54b gives to you as
22 power, is the power to review anything at any point
23 in time until we get a final judgment. 54b also says
24 that, "Any order, however designated, which
25 adjudicates fewer than all the claims for the rights

1 and liabilities of fewer than all of the parties,
2 shall not terminate the action as to any of the
3 claims or parties." By statute, by rule, Excel can
4 continue on as if the Schmitz Kalda thing never
5 happened. It wasn't our decision to sue Schmitz
6 Kalda, it was theirs. They could have sought
7 contribution before, meaning now, or they could have
8 waited until the action was concluded to seek
9 contribution from them. They sought it during this
10 action and then they decided it was a bad idea. I've
11 explained in our Affidavits why it was a bad idea,
12 because there is no money to be gained there, there
13 is no purpose in having Schmitz Kalda at this trial.
14 None whatsoever. There's no money to be had from
15 that party.

16 She mentioned in her argument that we could
17 have sought to certify the Schmitz Kalda judgment as
18 final, if we wanted to. I don't understand that
19 argument, because it's not our judgment, and it
20 misses the point. If they wanted to rely upon that
21 judgment, as a final judgment, for you to rely upon
22 as law in the case, or issue preclusion, they should
23 have sought a Rule 54b finalizing and certifying the
24 motion. The order certifying is final, which he then
25 could have I guess filed an intermediate appeal and

1 asked the Court to rule on it. Given this late stage
2 that's not going to happen. But it's not final.
3 It's an Order that says this is what the Court
4 decided as to this particular cause of action. A
5 claim for contribution between master and servant.
6 That's not my issue, that's not my client's issue.

7 Counsel's also discussed how this original
8 motion for summary judgment was premised on Excel's
9 inability to prove its damages against Brant Lake. I
10 guess that may be true, but it overlooks I guess that
11 Brant Lake has sued Excel Underground as well, and a
12 defense to that, affirmative defense is failure to
13 mitigate damages. Did Schmitz Kalda play a role in
14 failure to mitigate? Did Schmitz Kalda play a role
15 in waiver, or estoppel, or any of the other
16 affirmative defenses that are available? That
17 conduct is relevant, and I -- and I think is part of
18 this.

19 I think the ultimate principal that underlies
20 these cases, whether you call it estoppel in a long
21 case, or issue preclusion, is prejudice. If you look
22 back in the cases, that's the issue. And the
23 question then today is not about us, it's about
24 whether Brant Lake would be prejudiced if they have
25 to defend this case going forward with all of the

1 damages intact. And the answer is no, they wouldn't
2 be prejudiced, because that's the case they expected
3 to defend on November 1st when they refused to file a
4 motion. There's no prejudice whatsoever. This is
5 not a surprise.

6 I've read Rule 56c over and over, and I don't
7 see where I had a duty to respond to that summary
8 judgment motion when I read that in conjunction with
9 54b. I don't see how in the world the Court could
10 make a ruling on this in favor of Brant Lake and
11 distinguish my client's ability to pursue damages
12 against a Defendant based -- based on a motion that
13 we had no part in.

14 Finally, the excuse that they give, that Brant
15 Lake gives, for not responding to it is because it
16 would have put them in a position where they would
17 have to like argue against their own interests.
18 Parties do that all the time. In a car crash case
19 for example, at the end of the day, Defense Counsel
20 says, we're not libel, and explains why. And then
21 says, "Now, Ladies and Gentlemen of the jury, we
22 don't think we're libel, but in the event that you
23 think that we are, here's why they're wrong on the
24 damages." They don't give up anything by doing that.
25 We have to take pieces of the case all the time,

1 arguing in the alternative. Nothing stops them from
2 doing that. They chose not to pursue this Defendant
3 for contribution. That does not affect my ability to
4 pursue them for damages. There's not a single piece
5 of case law that suggests to that issue.

6 THE COURT: Have you, and I'm assuming not,
7 since you haven't presented it to me, but have you
8 found any case law that would say that you didn't
9 have a duty to respond to the Third Party Defendant's
10 Motion for Summary Judgment? I'm asking the reverse
11 of what I asked.

12 MR. NILAN: Sure. Judge, I'll answer that in
13 two parts. I have looked -- I think I have looked
14 for that specific issue and was unable to find
15 something that matched. In the process of studying
16 summary judgment, we did find what we cited to in our
17 brief, which is that if the Court is presented with
18 an incomplete response, such as we didn't file a
19 response to their Statement of Undisputed Facts, the
20 Court has a duty to then go and find a way to make
21 the record better, either asking us to do so, and
22 investigating the record itself, expanding the time
23 to do so. And so my idea is that summary judgment is
24 not something that's won on a technicality. An
25 undisputed fact according to *Baker McGhee*, and the

1 other authority that was cited, an undisputed fact is
2 not undisputed simply because the moving party says
3 it is. The Court has a duty to determine if indeed
4 it is, in some way that the Court determines is
5 appropriate and so --

6 THE COURT: Not when we have a statute that
7 says if you don't respond, they're deemed true.

8 MR. BRENDTRO: Well, Judge, ultimately I don't
9 think that the Court can rely upon a technicality
10 defense for a summary judgment.

11 THE COURT: I mean I don't think it's a
12 technicality. The statute says, that "Unless the
13 parties refute the undisputed facts they're deemed
14 true." I don't think that's a technicality, I think
15 that's a rule.

16 MR. BRENDTRO: Okay. Yeah, and I guess if
17 that's what we're going to talk about then. It
18 doesn't say it's deemed true for the rest of the
19 case. It's deemed true for the purposes of that
20 motion. But, in any event I believe that if somehow
21 our attempt to respond to a motion that wasn't filed
22 against us, was ineffective in some way, as I asked
23 for on the day of, we would ask for an opportunity to
24 respond in a way the Court deems fit.

25 THE COURT: Mr. Nilan?

1 MR. NILAN: Thank you, Your Honor. I'll try to
2 be brief and I'll try to be slow so that Kim can take
3 me down. I think what the Court needs to do here is
4 kind of push back from the table for a minute, and
5 figure out what -- what you're trying to accomplish.
6 And I think what you're trying to accomplish is a
7 just result, a just outcome, justice, something like
8 that. And I think if you examine the record in its
9 entirety, Your Honor, you'll agree that yep, there
10 are facts in dispute here. Yep, this should be
11 decided by a jury, it should not be decided by me.

12 And I think the quandary that you're struggling
13 with, Your Honor, is, "Well, wait a minute. There is
14 some gamesmanship going on here." And I think that
15 the Court needs to focus on seeing that justice is
16 done, and not focusing on the gamesmanship so much.
17 I think that -- candidly I think that it would be a
18 very bad precedent for the Court to rule that when a
19 principal brings its agent in on a contribution and
20 indemnity claim, and then its agent brings a motion
21 for summary judgment against its principal, and its
22 principal does not defend it, that that somehow
23 becomes binding on a third party. That's what
24 happened here. Brant Lake was the principal. SKA
25 was the agent. SKA was brought in for contribution

1 and indemnity. Then they brought a motion for
2 summary judgment, which Brant Lake did not oppose.
3 And now Brant Lake says, "Gotcha. We gotcha Excel,
4 because you didn't oppose this motion that we didn't
5 oppose." Or, you know, "you didn't oppose it
6 sufficiently." To me Judge, that's bad law. I think
7 that the Court recognizes that there are facts in
8 dispute here, and I think it recognizes that it
9 should be a jury that should decide it.

10 With regard to the specific issues that Brant
11 Lake raised, the -- the doctrine of issue from
12 inclusion, simply doesn't apply. That -- and it's
13 cited in our brief. That only applies to prior and
14 separate litigation. The doctrine of the law of the
15 case may have some application here. But it comes --
16 the bottom line Judge, and if you read the cases,
17 what it comes down to is you're exercising good
18 discretion. Goes back to my first point, you want to
19 see that justice gets done here. Even if there's
20 been some gamesmanship, even if it's not been the
21 cleanest motion practice before you, the Court wants
22 to see that justice is done. That's all I have, Your
23 Honor.

24 THE COURT: Okay. Thank you. Miss Hertz, did
25 you want to make a brief rebuttal?

1 MS. HERTZ: Yes, Your Honor.

2 THE COURT: Go ahead.

3 MS. HERTZ: The primary point of Brant Lake's
4 motion is that the facts have to be the facts for
5 every party in the case. Schmitz Kalda made past --
6 the claims of Excel were effectively pass through
7 claims against Schmitz Kalda. I think that's been
8 admitted by all of the parties.

9 Insofar as Mr. Brendtro says, "You know what,
10 we shouldn't have had to respond, it wasn't fair that
11 we did have to respond". First of all, he's
12 mischaracterized the holdings in both *Johnson and*
13 *Rille*. I would -- would quote from the *Johnson* case
14 where the Court said, "The parties were, are, and
15 always have been parties in this lawsuit." This
16 party had notice of the motion for summary judgment
17 and had full opportunity to file pleadings and be
18 heard. And that's what happened here. There was
19 full notice of the motion, and Excel had an
20 opportunity, and took that opportunity to respond.
21 There is no gotcha here. Excel did respond to the
22 motion. You can't say we didn't get the chance just
23 because we didn't win. And as far as saying, "Well,
24 we didn't see this coming, and that's why there was
25 no response to the "Statement of Material Facts",

1 well, that doesn't hold water in this case, because
2 it's held in response to E-1's motion either, and
3 that was one that they knew it was directed at them
4 the entire time.

5 Insofar as the -- as the question of whether,
6 you know, well, Brant Lake just should have
7 recognized its ability to argue in the alternative,
8 this is not like a decision between say, well, you
9 know, we argued against liability, but even if they
10 win, the damages are too high. This is liability
11 alone. Liability alone. It's not saying well, if
12 then, else. It's saying okay, you know, maybe we're
13 responsible. Except we're not responsible. That's
14 exactly what we would have had to do, is say, "You
15 know what, I know we have contested all along that
16 there aren't any damages --

17 THE COURT: I've got to interrupt that. You
18 could have filed the exact same summary judgment and
19 said that, "They're right, we 100% agree with them,
20 and therefore we're not liable."

21 MS. HERTZ: We -- we did file that joinder,
22 Your Honor. Brant Lake's response to Schmitz Kalda's
23 motion said yes, these are the facts as we see them.
24 But, if this motion is granted to Schmitz Kalda, we
25 want the same relief. That's what we said in our

1 response back -- back in 2017.

2 And, when we talk about the interests of
3 justice, there's also an interest in a consistency of
4 judgments. Of having a consistent result that is the
5 same for all of the parties in the case. Justice
6 isn't served when the facts are one thing for one
7 party, and one thing for another. Again, Excel had
8 the opportunity to respond to this motion. It's
9 response was not changed in -- its opportunity was
10 not the least bit different than if Brant Lake had
11 filed -- had filed the exact same motion itself. It
12 had the chance to respond, it did respond. And it
13 did not succeed. This was a judgment that said
14 here's what the facts are, and if we reverse judgment
15 on what the facts are, then, you know, we're going to
16 have to go back to square one and bring Schmitz Kalda
17 back in, because that's basically saying the earlier
18 summary judgment was wrong.

19 MR. BRENDTRO: I have a brief procedural
20 response. Brant Lake filed a brief in November of
21 2017. It didn't file a motion. And if we're
22 concerned about Rule 56c today, it didn't file a
23 Statement of Undisputed Facts.

24 MS. HERTZ: Actually we did.

25 MR. BRENDTRO: Or a motion itself back in

1 November of 2017, to carry forward this motion.

2 THE COURT: They filed them, a Statement of
3 Undisputed Facts. They adopted all 30 of them with
4 minor exception I think to two or three of them as I
5 recall.

6 MR. BRENDTRO: They didn't file a motion.
7 They're attempting a motion via a brief. That's --
8 that's not how summary judgment works. They could
9 have stated it.

10 THE COURT: Well, I'm going to rule. This is a
11 very I think unique situation. And I don't think
12 anybody was able to find case law exactly on point.
13 If we go back to the SKA motion, the Court was in a
14 -- I think in a unique position. SKA filed a motion
15 that simply stated to dismiss Brant Lake's Third
16 Party Complaint. They filed a Statement of
17 Undisputed Material Facts. Brant Lake for the most
18 part admitted to all of them. Nobody filed a
19 Statement disputing the undisputed facts. And I
20 believe pursuant to 15-6-15 -- excuse me,
21 15-6-56(c)3, this Court was bound by the law to
22 consider those facts to be true. And based on the
23 situation that the parties had put the Court in, the
24 Court granted that motion.

25 I think Brant Lake did have options at that

1 time, they could have joined the motion for summary
2 judgment, in which case those issues would have been
3 decided for all of the parties. But for reasons I'm
4 not second-guessing, they chose not to. I have not
5 been presented with any statutes or law that I'm
6 aware of that required Excel Underground to defend
7 that motion. I'll also note that the time for filing
8 such motions is passed, and based on all of that I
9 will deny the motion.

10 In regards to the Motion in Limines, the
11 Plaintiff has filed -- well, first they filed a
12 Motion for Special Interrogatories. I'm not going to
13 take argument on that, but I am going to deny it.
14 The -- certainly something that can be taken care of
15 during Voir Dire. I think it's too late at this
16 point. And the odds of getting any type of response,
17 even if I was inclined to do it, are very slim in the
18 short window we have.

19 You also filed Motions in Limine 1 through 9,
20 if I read everybody's response correctly, I believe
21 that those shall be granted without objection. Is
22 that correct, Miss Hertz?

23 MS. HERTZ: Yes, Your Honor.

24 THE COURT: And Mr. Nilan, you're not objecting
25 to those either, are you?

1 MR. NILAN: That is correct, Your Honor.

2 THE COURT: So those would be granted. Brant
3 Lake has filed a number of Motions in Limine.
4 Motions 1, 3, 5, 6, and 7 are granted without
5 objection. Is that correct, Mr. Brent? Or excuse
6 me, Mr. Brendtro?

7 MR. BRENDTRO: Five, six and seven, Judge?
8 Yes.

9 THE COURT: One, 3, 5, 6, and 7, correct?

10 MR. BRENDTRO: Yes.

11 THE COURT: Mr. Nilan, is that your
12 understanding?

13 MR. NILAN: Yes, Your Honor.

14 THE COURT: So that leaves Motions in Limine 2,
15 4, and 8.

16 MR. NILAN: Your Honor, this is Joe Nilan,
17 could I -- could I make a comment with regard to
18 number 6?

19 THE COURT: Go ahead.

20 MR. NILAN: The Motion in Limine is to exclude
21 all evidence or reference to insurance. That's not
22 our bond. Our bond is something different than
23 insurance. I just want to make sure we're on the
24 same page there, because we do intend on introducing
25 evidence of our bond.

1 THE COURT: Miss Hertz, any concern with that?

2 MS. HERTZ: No, Your Honor.

3 THE COURT: Okay. So with that understanding,
4 6 is granted. Motions 2 and 8 are denied. And I
5 want to discuss number 4. I get Electric Pump and
6 Environment One mixed up, but obviously neither of
7 those two are parties any more. And I want to
8 understand a little better the motion. And I think
9 it's a fact that the grinder pumps froze, for
10 example. Are you saying that that wouldn't be
11 introduced? Help me out.

12 MS. HERTZ: Well, Your Honor, specifically what
13 we're trying to address here is that throughout this
14 action and up until -- well, the last -- the last
15 set, Excel had been arguing mainly, you know, these
16 pumps are defective, and also that both the
17 manufacturer E-1, and the supplier Electric Pump, had
18 an obligation or a duty to come out during the winter
19 of 2013, 2014 and deal with these freezing problems.
20 The motions that were decided for Electric Pump and
21 E-1 basically said, you know what, there's no duty
22 here. It was not their job to come out and fix these
23 pumps.

24 THE COURT: Okay.

25 MS. HERTZ: So our primary concern --

1 THE COURT: Let me stop you right there then.
2 So -- and I agree with that point on the law, I mean
3 I'm going to let you argue here, but I don't see at
4 this point how you could argue that either of those
5 two were at fault. But I do think it's necessary for
6 the jury to hear, you know, what happened. That they
7 -- to understand the case, they were put in, it was a
8 winter, they froze. I mean those --

9 MS. HERTZ: Oh, absolutely, Judge. This --
10 this isn't addressed as that kind of evidence at all,
11 it's just addressed that Excel making the specific
12 argument that, well, when we started having these
13 problems and, you know, in 20 -- the winter of 2013,
14 2014, I don't know why they expected us to fix it. I
15 don't know why they expected us to help, because it
16 was Electric Pump's problem, and it was E-1's
17 problem. That -- that's the primary thing we're
18 concerned about, with the Electric Pump issue on.

19 THE COURT: Alright. Mr. Brendtro.

20 MR. BRENDTRO: I think this probably can be
21 addressed, prior to argument. Either -- well, while
22 we're settling Instructions or figuring out what the
23 scope of what we're allowed to argue once all the
24 facts are in and Judge, the Court can see everything.
25 If we look at the facts, one scenario is that

1 this is an act of God, the freezing, because it's
2 just for the cold, okay? In that case, Your Honor,
3 we know Excel's not responsible to come out and fix
4 an act of God. Somebody should. But there's no
5 contractual duty for us to show up and fix that
6 action. Being God, if a tornado had come and taken
7 away the sewer system, again we're just saying it's
8 not us. What -- we're not going to say specifically
9 that E-1 or Electric Pump should have come out and
10 trouble shoot, although what the evidence will show
11 Judge, is that there was only one company on the
12 planet which was allowed to come and service these
13 things, and that was Electric Pump. They're under
14 warranty, they're under an exclusive --

15 THE COURT: Well -- and let me stop you. I
16 don't think we need to wrestle with the facts --

17 MR. BRENDTRO: Yeah.

18 THE COURT: -- right now. But, I'm not ruling
19 right now, I'm going to tell you what I'm thinking
20 about ruling, and then you can tweak -- you can touch
21 on it if you think you need to. But I'm thinking --
22 my gut tells me during evidence, the facts can come
23 in, it froze, this was the temperature. What can't
24 come in is that argument that Excel -- or excuse me,
25 Electric Pump or Environment-1 was negligent, and

1 they're the cause of the breach. Are we all on the
2 same sheet of music with those two?

3 MS. HERTZ: Yes, Your Honor.

4 MR. BRENDTRO: Yeah.

5 THE COURT: Okay.

6 MS. HERTZ: I -- I would just add that what
7 Mr. Brendtro was discussing was Excel's duties to
8 Brant Lake. That -- that remains to be seen, and
9 that's what we're going to trial on. What we don't
10 -- what our motion is about is coming into the
11 Courtroom and hearing, "Well, Excel didn't have these
12 duties, because these duties belonged to Electric
13 Pump and/or E-1." That's our primary concern, that
14 duty argument. You know, not the matter of the
15 freezing, not why it froze, but who had the duty to
16 fix it. I think the case up to this point we already
17 have a judgment saying that the duty did not belong
18 to E-1 or Electric Pump.

19 THE COURT: Is that your understanding?

20 MR. BRENDTRO: Though, again --

21 COURT REPORTER: Could you put that microphone
22 in front of you?

23 THE COURT: I don't know, it's not picking you
24 up I don't think.

25 MR. BRENDTRO: Can you hear me now? Again, we

1 do not intend to argue that Electric Pump was somehow
2 negligent, or that E-1 was somehow negligent. The
3 facts will come in, the facts will paint the story of
4 what it is. And, you know, we're not arguing during
5 evidence, and she's asking for you to exclude
6 argument, and I think that's fine, let's just let
7 facts come in and we can figure out as we settle
8 Instructions what the limits of the argument are
9 being based on that.

10 MS. HERTZ: And, Judge, I would like to point
11 out that my concern isn't nearly about negligence
12 arguments, it's about these contractual duty
13 arguments as well.

14 THE COURT: Is that going to be an issue during
15 evidence?

16 MS. HERTZ: During the evidence itself, you
17 know, I'm trying to think of anything that might be
18 offered, aside from testimony saying, you know,
19 someone from Excel would come in and say it wasn't
20 our job to fix this, it was E-1's job, it was
21 Electric Pump's job. That would be the kind of
22 evidence I would be concerned about.

23 THE COURT: And that -- and I won't allow any
24 evidence that contradicts the summary judgment
25 rulings.

1 MR. BRENDTRO: Against E-1 and Electric Pump?

2 THE COURT: Correct. That's what we're talking
3 about.

4 MR. BRENDTRO: Alright. And to clarify, if
5 Brant Lake had its own duty to go find a contractor
6 to deal with an act of God --

7 THE COURT: Let me put it this way, as it
8 relates to Electric Pump and E-1, evidence that says
9 this is what happened, is admissible. Any opinions
10 based on what happened, need to be presented to the
11 Court ahead of time. So you can't ask a contractor,
12 "Did E-1's actions cause this? Did E-1 act
13 improper?" That would be an opinion. So at this
14 point I'm putting the duty on the parties to notify
15 me, cause I don't know how I would write this Order.
16 Factual evidence of what happened is admissible.
17 Opinions about what happened as it relates to those
18 two organizations need to be presented to the Court
19 outside the presence of the jury. Does that take
20 care of it Miss Hertz?

21 MS. HERTZ: Yes, Your Honor.

22 MR. BRENDTRO: Would it be fair then also, for
23 example if we have depositions of staff from E-1 and
24 Electric Pump, that are not expert opinions, but
25 they're people talking about why these happened and

1 their explanation for that. Counsel's on notice of
2 that. Hasn't asked in his motion in limine to
3 exclude any specific testimony from those
4 depositions. Would it be fair to put the burden on
5 Brant Lake to at least identify something so that I'm
6 not caught unaware as I'm going through these
7 depositions and asking questions that have been asked
8 and answered, to find out suddenly this is not part
9 of the case?

10 THE COURT: I guess I'll make the assumption
11 that E-1 didn't confess that they did something wrong
12 or they wouldn't have been out on summary judgment,
13 right?

14 MR. BRENDTRO: And maybe -- maybe I
15 misunderstood the opinion portion of your ruling. If
16 you could for my benefit just reiterate which
17 opinions were asked to have an in-camera?

18 THE COURT: Nobody can give any opinion in
19 front of the jury that Electric Pump, or E-1 was
20 negligent, or somehow caused the damage.

21 MR. BRENDTRO: Understood.

22 THE COURT: We still there?

23 MS. HERTZ: Yeah. Like I said, between that
24 and again the contractual duty thing, because that
25 has been, you know, a fairly extensively litigated

1 issue between the parties. So as -- as long as both
2 of those are covered we are happy campers.

3 THE COURT: Well, you can draft the Order and
4 send it to Mr. Brendtro.

5 MS. HERTZ: Will do.

6 THE COURT: And then hopefully the two of you
7 will send me an Order you have agreed to for me to
8 sign. As well as Granite Re. And Mr. Nilan, do you
9 have anything you wish to add to that conversation?

10 MR. NILAN: No, Your Honor, I understand your
11 ruling. Thank you.

12 THE COURT: And then I think my motion for
13 summary judgment, my denial of that motion I think as
14 it relates to SKA at this point, I don't see their
15 actions as off limits in the argument, cause whatever
16 negligence they may or may not have had, would be
17 attributed to you. Now, very clearly that's going to
18 be -- I'm not sure how you make that argument,
19 because you clearly stated that you don't think they
20 were negligent.

21 MR. BRENDTRO: I think -- I think that was -- I
22 don't think I said that.

23 THE COURT: Or do I have the wrong --

24 MR. BRENDTRO: I think I was talking E-1 and
25 Electric Pump.

1 THE COURT: Okay. Then I -- I apologize for
2 putting words in your mouth.

3 MR BRENDTRO: That's okay.

4 THE COURT: Alright. Does that cover all the
5 motions that we have before us today?

6 MS. HERTZ: I believe so, Your Honor.

7 THE COURT: Okay. Then what I want to do is
8 we'll go off the record, and just have a brief
9 conversation. Again like always I'll come back on
10 the record if there's something that was said that
11 one of you feels we need to have on the record,
12 you'll certainly have that opportunity, so. Alright,
13 we'll go off the record for a second.

14

15 (Off the record discussion was held between
16 Court and counsel, after which the following was had
17 back on the record with all parties being present).

18

19 THE COURT: Back on the record. We just had an
20 off the record conversation, mostly focused on a few
21 scheduling items, and some logistics for the trial.
22 Based on that conversation, or anything else, Miss
23 Hertz, anything you need to put on the record?

24 MS. HERTZ: No. Your Honor.

25 THE COURT: Mr. Brendtro?

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MR. BRENDTRO; No, Judge.

THE COURT: Mr. Nilan?

MR. NILAN: No, Your Honor.

THE COURT: Alright. I appreciate everybody's
patience today, and we will see you all back here the
morning of the 22nd at 8:00 o'clock. Thank you.

(End of the proceedings).

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STATE OF SOUTH DAKOTA)
COUNTY OF LAKE) CERTIFICATE

I, Kim E. Callies, an Official Court Reporter within and for the State of South Dakota, hereby certify that I was present during the proceedings had, and that the foregoing pages, 1-40, inclusive, is a true and accurate transcript of my Stenotype notes taken in said matter.

Dated this 18th day of January, 2018.

Kim E. Callies

Kim E. Callies
Official Court Reporter

PHASE 2
WASTEWATER
COLLECTION
SYSTEM

2012

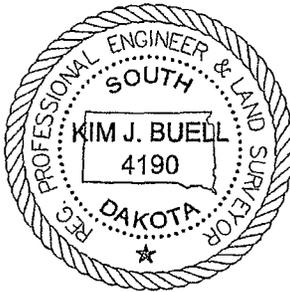
OWNER: Brant Lake Sanitary District

Jan Nicolay - Chairperson
Dick Neish - Board Member
Lowell Cady - Board Member
Georgia Hanson - Clerk
Jerome Lammers - Attorney

ENGINEER: Schmitz, Kalda & Associates, Inc.
320 N. Main Avenue, Suite A
Sioux Falls, SD 57104

Phone (605) 332-8241
Fax (605) 332-0116

Project No. 9037



CERTIFICATION:

I, Kim J. Buell, PE, hereby certify that this Document was prepared by me or under my direct supervision and that I am a duly Registered Professional Engineer under the laws of the State of South Dakota.

A handwritten signature in cursive script that reads "Kim J. Buell". The signature is written over a horizontal line.

Date: March 12, 2012

Reg. No. 4190

4. EXAMINATION OF CONTRACT DOCUMENTS AND SITE

- 4.1. It is the responsibility of each BIDDER before submitting a Bid, to (a) examine the Contract Documents thoroughly, (b) visit the site to become familiar with local conditions that may affect cost, progress, performance or furnishing of the Work, (c) consider federal, state and local Laws and Regulations that may affect cost, progress, performance or furnishing of the Work, (d) study and carefully correlate BIDDER's observations with the Contract Documents, and (e) notify ENGINEER of all conflicts, errors or discrepancies in the Contract Documents.
- 4.2. Reference is made to the Supplementary Conditions for identification of:
- 4.2.1. those reports of explorations and tests of subsurface conditions at the site which have been utilized by ENGINEER in preparation of the Contract Documents. BIDDER may rely upon the accuracy of the technical data contained in such reports but not upon non-technical data, interpretations or opinions contained therein or for the completeness thereof for the purposes of bidding or construction.
- 4.2.2. those drawings of physical conditions in or relating to existing surface and subsurface conditions (except Underground Facilities) which are at or contiguous to the site which have been utilized by ENGINEER in preparation of the Contract Documents. BIDDER may rely upon the accuracy of the technical data contained in such drawings but not upon the completeness thereof for the purposes of bidding or construction.
- Copies of such reports and drawings will be made available by OWNER to any BIDDER on request. Those reports and drawings are not part of the Contract Documents, but the technical data contained therein by reference. Such technical data has been identified and established in the Supplementary Conditions.
- 4.3. Information and data reflected in the Contract Documents with respect to Underground Facilities at or contiguous to the site is based upon information and data furnished to OWNER and ENGINEER by OWNERS of such Underground Facilities or others, and OWNER does not assume responsibility for the accuracy or completeness thereof unless it is expressly provided otherwise in the Supplementary Conditions.
- 4.4. Provisions concerning responsibilities for the adequacy of data furnished to prospective Bidders on subsurface conditions, Underground Facilities and other physical conditions, and possible changes in Contract Documents due to differing conditions appear in Section 16 of the General Conditions.
- 4.5. Before submitting a Bid, each BIDDER will, at BIDDER's own expense, make or obtain any additional examinations, investigations, explorations, tests and studies and obtain any additional information and data which pertain to the physical conditions (surface, subsurface and Underground Facilities) at or contiguous to the site or otherwise which may affect cost, progress, performance or furnishing of the Work and which BIDDER deems necessary to determine its Bid for performing and furnishing the Work in accordance with the time, price and other terms and conditions of the Contract Documents.
- 4.6. On request in advance, OWNER will provide each BIDDER access to the site to conduct such explorations and tests as each BIDDER deems necessary for submission of a Bid. BIDDER shall fill all holes, clean up and restore the site to its former condition upon completion of such explorations.

THIS BID SUBMITTED TO:

Brant Lake Sanitary District

PROJECT:

Phase 2

Wastewater Collection System

1. The undersigned BIDDER proposed and agrees, if the Bid is accepted, to enter into an Agreement with OWNER in the form included in the Contract Documents to complete all Work as specified or indicated in the Contract Documents for the Contract Price and within the Contract Time indicated in this Bid and in accordance with the Contract Documents.
2. BIDDER accepts all of the terms and conditions of the Instructions to Bidders, including, without limitation, those dealing with the disposition of Bid Security. This Bid will remain open for thirty days after the day of Bid opening. BIDDER will sign the Agreement and submit the Contract Security and other documents required by the Contract Documents within fifteen days after the date of receipt of OWNER's Notice of Award.
3. In submitting this Bid, BIDDER represents that:
 - a. BIDDER has examined copies of all the Contract Documents and of the following addenda: (Identify by Date and Number) (Receipt of all of which is hereby acknowledged) and also copies of the Advertisement or Notice to Contractors and the Instructions to Bidders;
 - b. BIDDER has examined the site and locality where the Work is to be performed, the legal requirements (federal, state and local laws, ordinances, rules and regulations) and the conditions affecting cost, progress or performance of the Work and has made such independent investigations as BIDDER deems necessary;
 - c. The Bid is genuine and not made in the interest of or on behalf of any undisclosed person, firm or corporation and is not submitted in conformity with any agreement or rules of any group, association, organization or corporation; BIDDER has not directly or indirectly induced or solicited any other bidder to submit a false or sham Bid; BIDDER has not solicited or induced any person, firm or a corporation to refrain from bidding; and BIDDER has not sought by collusion to obtain for himself any advantage over any other BIDDER or over OWNER.
4. BIDDER agrees that the Work shall be substantially completed by December 30, 2012 and finally completed by May 30, 2013. BIDDER agrees to pay \$1,450.00 per calendar day as liquidated damages in the event of failure to complete the Work on time.
5. The following documents are part of and made a condition of this Bid.
 - a. Required Bid Security of the type and in an amount equal to the sum set out in the Instructions to Bidders.
 - b. DBE Subcontractor Solicitation Information Form (DBE-6).
 - c. Certification Regarding Debarment, Suspension, and Other Responsibility Matters (Debar-2).

supervisor shall be as binding as if given to CONTRACTOR. The supervisor shall be present on the site at all times as required to perform adequate supervision and coordination of the Work.

12. CHANGES IN THE WORK

- 12.1 OWNER may at any time, as the need arises, order changes within the scope of the Work without invalidating the Agreement. If such changes increase or decrease the amount due under the Contract Documents, or in the time required for performance of the Work, an equitable adjustment shall be authorized by Change Order.
- 12.2 ENGINEER, also, may at any time, by issuing a Field Order, make changes in the details of the Work. CONTRACTOR shall proceed with the performance of any changes in the Work so ordered by ENGINEER unless CONTRACTOR believes that such Field Order entitles him to a change in Contract Price or Time, or both, in which event he shall give ENGINEER Written Notice thereof within seven (7) days after the receipt of the ordered change. Thereafter CONTRACTOR shall document the basis for the change in Contract Price or Time within thirty (30) days. CONTRACTOR shall not execute such changes pending the receipt of an executed Change Order or further instruction from OWNER.

13. CHANGES IN CONTRACT PRICE

- 13.1 The Contract Price may be changed only by a Change Order. The value of any Work covered by a Change Order or of any claim for increase or decrease in the Contract Price shall be determined by one or more of the following methods in the order of precedence listed below:
 - (a) Unit prices previously approved.
 - (b) An agreed lump sum.
 - (c) The actual cost for labor, direct overhead, materials, supplies, equipment, and other services necessary to complete the work. In addition there shall be added an amount to be agreed upon but not to exceed fifteen (15) percent of the actual cost of the Work to cover the cost of general overhead and profit.

14. TIME FOR COMPLETION AND LIQUIDATED DAMAGES

- 14.1 The date of beginning and the time for completion of the Work are essential conditions of the Contract Documents and the Work embraced shall be commenced on a date specified in the Notice to Proceed.
- 14.2 CONTRACTOR will proceed with the Work at such rate of progress to insure full completion within the Contract Time. It is expressly understood and agreed, by and between CONTRACTOR and OWNER, that the Contract Time for the completion of the Work described herein is a reasonable time, taking into consideration the average climatic and economic conditions and other factors prevailing in the locality of the Work.
- 14.3 If CONTRACTOR shall fail to complete the Work within the Contract Time, or extension of time granted by OWNER, then CONTRACTOR will pay to OWNER the amount for liquidated damages as specified in the Bid for each calendar day that CONTRACTOR shall be in default after the time stipulated in the Contract Documents.

GENERAL CONDITIONS

SEC. 0700

14.4 CONTRACTOR shall not be charged with liquidated damages or any excess cost when the delay in completion of the Work is due to the following, and CONTRACTOR has promptly given Written Notice of such delay to OWNER or ENGINEER.

14.4.1 to any preference, priority or allocation order duly issued by the OWNER;

14.4.2 to unforeseeable causes beyond the control and without the fault or negligence of CONTRACTOR, including but not restricted to, acts of nature, acts of OWNER, acts of another CONTRACTOR in the performance of a contract with OWNER, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and abnormal and unforeseeable weather; and

14.4.3 to any delays of Subcontractors occasioned by any of the causes specified in paragraphs 14.4.1 and 14.4.2 of this article.

15. CORRECTION OF WORK

15.1 CONTRACTOR shall promptly remove from the premises all Work rejected by ENGINEER for failure to comply with the Contract Documents, whether incorporated in the construction or not, and CONTRACTOR shall promptly replace and re-execute the Work in accordance with the Contract Documents and without expense to OWNER and shall bear the expense of making good all Work of other CONTRACTORS destroyed or damaged by such removal or replacement.

15.2 All removal and replacement Work shall be done at CONTRACTOR'S expense. If CONTRACTOR does not take action to remove such rejected Work within ten (10) days after receipt of Written Notice, OWNER may remove such Work and store the materials at the expense of CONTRACTOR.

16. SUBSURFACE CONDITIONS

16.1 CONTRACTOR shall promptly, and before such conditions are disturbed, except in the event of an emergency, notify OWNER by Written Notice of:

16.1.1 Subsurface or latent physical conditions at the site differing materially from those indicated in the Contract Documents; or

16.1.2 Unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inherent in Work of the character provided for in the Contract Documents.

16.2 OWNER shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the cost of, or in the time required for, performance of the Work, an equitable adjustment shall be made and the Contract Documents shall be modified by a Change Order. Any claim of CONTRACTOR for adjustment hereunder shall not be allowed unless he has given the required Written Notice; provided that OWNER may, if he determines the facts so justify, consider and adjust any such claims asserted before the date of final payment.

17. SUSPENSION OF WORK, TERMINATION AND DELAY

- 17.1 OWNER may suspend the Work or any portion thereof for a period of not more than ninety days or such further time as agreed upon by CONTRACTOR, by Written Notice to CONTRACTOR and ENGINEER which notice shall fix the date on which Work shall be resumed. CONTRACTOR will resume that Work on the date so fixed. CONTRACTOR will be allowed an increase in the Contract Price or an extension of the Contract Time, or both, directly attributable to any suspension.
- 17.2 If CONTRACTOR is adjudged a bankrupt or insolvent, or if he makes a general assignment for the benefit of his creditors, or if a trustee or receiver is appointed for CONTRACTOR or for any of his property, or if he files a petition to take advantage of any debtor's act, or to reorganize under the bankruptcy or applicable laws, or if he repeatedly fails to supply sufficient skilled workmen or suitable materials or equipment, or if he repeatedly fails to make prompt payments to Subcontractors or for labor, materials or equipment or if he disregards laws, ordinances, rules, regulations or orders of any public body having jurisdiction of the Work or if he disregards the authority of ENGINEER, or if he otherwise violates any provision of the Contract Documents, then OWNER may, without prejudice to any other right or remedy and after giving CONTRACTOR and his surety a minimum of ten (10) days from delivery of a Written Notice, terminate the services of CONTRACTOR and take possession of the Project and of all materials, equipment, tools, construction equipment and machinery thereon owned by CONTRACTOR, and finish the Work by whatever method he may deem expedient. In such case CONTRACTOR shall not be entitled to receive any further payment until the Work is finished. If the unpaid balance of the Contract Price exceeds the direct and indirect costs of completing the Project, including compensation for additional professional services, such excess shall be paid to CONTRACTOR. If such costs exceed such unpaid balance, CONTRACTOR will pay the difference to OWNER. Such costs incurred by OWNER will be determined by ENGINEER and incorporated in a Change Order.
- 17.3 Where CONTRACTOR'S services have been so terminated by OWNER, said termination shall not affect any right of OWNER against CONTRACTOR then existing or which may thereafter accrue. Any retention or payment of moneys by OWNER due CONTRACTOR will not release CONTRACTOR from compliance with the Contract Documents.
- 17.4 After ten (10) days from delivery of a Written Notice to CONTRACTOR and ENGINEER, OWNER may, without cause and without prejudice to any other right or remedy, elect to abandon the Project and terminate the Contract. In such case, CONTRACTOR shall be paid for all Work executed and any expense sustained plus reasonable profit.

18. PAYMENTS TO CONTRACTOR

- 18.1 At least ten (10) days before each progress payment falls due (but not more often than once a month), CONTRACTOR will submit to ENGINEER a partial payment estimate filled out and signed by CONTRACTOR covering the Work performed during the period covered by the partial payment estimate and supported by such data as ENGINEER may reasonably require. If payment is requested on the basis of materials and equipment not incorporated in the Work but delivered and suitably stored at or near the site, the partial payment estimate shall also be accompanied by such supporting data, satisfactory to OWNER, as will establish OWNER'S title to the material and equipment and protect his interest therein, including applicable insurance. ENGINEER will, within ten (10) days after receipt of each partial payment estimate, either indicate in writing his approval of payment and present the partial payment estimate to OWNER, or return the partial payment estimate to CONTRACTOR indicating in writing his reasons for refusing to approve payment. In

terminating any subcontract that OWNER may exercise over CONTRACTOR under any provision of the Contract Documents.

- 23.5 Nothing contained in this Contract shall create any contractual relation between any Subcontractor and OWNER.

24. ENGINEER'S AUTHORITY

24.1 ENGINEER shall act as OWNER'S representative during the construction period. He shall decide questions which may arise as to quality and acceptability of materials furnished and Work performed. He shall interpret the intent of the Contract Documents in a fair and unbiased manner. ENGINEER will make visits to the site and determine if the Work is proceeding in accordance with the Contract Documents.

24.2 CONTRACTOR will be held strictly to the intent of the Contract Documents in regard to the quality of materials, workmanship and execution of the Work. ENGINEER will not be responsible for the construction means, controls, techniques, sequences, procedures, or construction safety.

25. LAND AND RIGHTS-OF-WAY

25.1 Prior to issuance of Notice to Proceed, OWNER shall obtain all land and rights-of-way necessary for carrying out and for the completion of the Work to be performed pursuant to the Contract Documents, unless otherwise mutually agreed.

25.2 CONTRACTOR shall provide at his own expense and without liability to OWNER any additional land and access thereto that CONTRACTOR may desire for temporary construction facilities, or for storage of materials.

26. GUARANTY

26.1 CONTRACTOR shall guarantee all materials and equipment furnished and Work performed for a period of one (1) year from the date of completion. CONTRACTOR warrants and guarantees for a period of one (1) year from the date of completion of the Work that the completed work is free from all defects due to faulty materials or workmanship and CONTRACTOR shall promptly make corrections as may be necessary by reason of such defects including the repairs of any damage to other parts of the Work resulting from such defects. OWNER will give notice of observed defects with reasonable promptness. In the event that CONTRACTOR should fail to make such repairs, adjustments, or other Work that may be made necessary by such defects, OWNER may do so and charge CONTRACTOR the cost thereby incurred. The Performance Bond shall remain in full force and effect through the guarantee period.

* * * END OF SECTION 0700 * * *

GRINDER PUMP STATIONS

SEC. 2603

rated total dynamic head of 185 feet (80 PSIG). The pumps must also be capable of operating at negative total dynamic head without overloading the motor. Under no conditions shall in-line piping or valving be allowed to create a false apparent head.

1.6 WARRANTY

- A. The grinder pump MANUFACTURER shall provide a parts and labor warranty on the complete station and accessories, including, but not limited to, panel and redundant check valve, for a period of 24 months after notice of OWNER's acceptance. Any defects found during the warranty period will be reported to the MANUFACTURER by the OWNER. During the warranty period, the CONTRACTOR shall assign pump supplier to visit the project site for all trouble calls with grinder pump stations and correct the problems. During this period, homeowner or the Sewer District will not be responsible for troubleshooting. Trouble calls under warranty shall include pump failures and other "trouble shooting" issues specific to the grinder station installation.

1.7 METHOD OF MEASUREMENT AND PAYMENT

- A. The Contractor will be paid for each pump station installed as a complete product to include the equipment and labor to install the grinder station, pump, quick disconnect, and all necessary internal wiring and controls.
- B. Backfilling station and final grading are incidental to contract bid price.
- C. Grinder pump station includes gravity pipe. This is 15 LF of 4" PVC (Sch. 40) pipe inlet pipes (one or two stub-outs) to each grinder pump station and plugs shall be included in the payment for grinder pump station.
- D. The Contractor will be paid for each electrical alarm/disconnect panel installed as a complete product to include the equipment and labor to install the electrical control panel/alarm.
- E. The Contractor will be paid for each grinder pump cable length per bid item to include the cable, labor and final grading of the trench complete.

PART 2 – PRODUCTS

2.1 PUMP

- A. The pump shall be a custom designed, integral, vertical rotor, motor driven, solids handling pump of the progressing cavity type with a single mechanical seal. Double radial O-ring seals are required at all casting joints to minimize corrosion and create a protective barrier. All pump castings shall be cast iron, fully epoxy coated to 8-10 mil Nominal dry thickness, wet applied. The rotor shall be through-hardened, highly polished, precipitation hardened stainless steel. The stator shall be of a specifically compounded ethylene propylene synthetic elastomer. This material shall be suitable for domestic wastewater service. Its physical properties shall include high tear and abrasion resistance, grease resistance, water and detergent resistance, temperature stability, excellent aging properties, and outstanding wear resistance. Buna-N is not acceptable as a stator material because it does not exhibit the properties as outlined above and required for wastewater service.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28580

Excel Underground, Inc.,
Plaintiff/Appellee,

vs.

Brant Lake Sanitary District,
Defendant/Appellant

Brant Lake Sanitary District,
Plaintiff/Appellant,

vs.

Excel Underground, Inc., and Granite Re, Inc.,
Defendants/Appellees.

Granite Re, Inc.,
Third-Party Plaintiff/Appellee

vs.

Reed I. Olson and Melissa D. Fischer-Olson,
Third-Party Defendants/Appellees

Appeal from the Circuit Court, Third Judicial Circuit
Lake County, South Dakota

The Honorable Patrick Pardy
Circuit Court Judge

AMICUS CURIAE BRIEF OF DAKOTA
HOMESTEAD TITLE INSURANCE
COMPANY AND SOUTH DAKOTA
CONSERVANCY DISTRICT

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Notice of Appeal filed on the 30^m day of March, 2018

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INTEREST OF AMICUS CURIAE

Amicus Curiae, the South Dakota Conservancy District (“SDCD”) and Dakota Homestead Title Insurance Company (“DH”) (collectively “Amicus Curiae”), respectfully submit this brief in support of the Appellants seeking the reversal. SD CD finances a majority of all political subdivisions’ water and sewer projects throughout the state. DH finances smaller political subdivision projects throughout the state. SD CD financed the Brant Lake Sanitary District’s project described in this case. DH financed the cost to complete the project after Excel Underground’s exit. Amicus Curiae’s interest in this case is to make sure that this case does not increase the risks associated with underwriting governmental subdivision’s projects or create new requirements that governmental subdivisions can only award jobs to underwriter approved contractors.

PRELIMINARY STATEMENT

This brief is filed by the Amicia Curiae South Dakota Conservancy District and Dakota Homestead Title Insurance Company (collectively the “Amicus Curiae”) Appellant Brant Lake Sanitary District will be referred to as “BLSD”. Schmitz Kalda and Associates, Inc. will be referred to as “SKA”. Excel Underground, Inc. will be referred to as “Excel”.

STATEMENT OF LEGAL ISSUES

The Amicus Curiae accepts the statement of legal issues of the Appellant.

STATEMENT OF CASE

The Amicus Curiae accepts the statement of case as set forth by the Appellant.

STATEMENT OF FACTS

The Amicus Curiae accepts the statement of facts provided by the Appellant and incorporate the same as if fully set forth herein.

STANDARD OF REVIEW

The Amicus Curiae accepts the standard of review provided by the Appellant and incorporate the same as if fully set forth herein.

ARGUMENT

I. BLS D had the right to demand liquidated damages

Amicus Curiae does not make an argument on this issue.

II. The Trial court could not grant SKA's summary judgment motion and deny BLS D's.

Amicus Curiae does not make an argument on this issue.

III. The agency instruction was reversible error.

In governmental projects, engineers are hired by the State of South Dakota and governmental subdivisions to design the project and inspect the construction of the project. Governmental projects are required to be bid and let to the lowest bidder. SDCL Chapter 5-18A. Disputes can and do arise between the contractor and engineer concerning the project. Often where the contractor bids an amount which is less than the actual cost of construction or where the contractor lacked the expertise to correctly construct the project, claims will arise from the contractor that it was the engineer's acts that delayed the project or that the design of the project is wrong. Litigation often results mixing tort and contract claims. This court held that the economic loss doctrine prevents tort damages in contract actions. Fisher Sand & Gravel Co. v. South Dakota Department

of Transportation, 1997 SD 8, 858 N.W.2d 864 (SD 1997); Kreisers Inc. v. First Dakota Title Ltd. Partnership, 2014 SD 56, 852 N.W.2d 413 (SD 2014).

The agency instruction is of concern to the Amicus Curia because if affirmed it could alter the general rule that a governmental subdivision is not responsible for the acts of independent contractors associated with the governmental subdivision projects. The general rule that an employer has no liability for the acts of an independent contractor stems from the concept that “the employer has no power of control over the manner in which the work is to be done by the contractor. It is ... regarded as the contractor's own enterprise and he, rather than the employer, is the proper party to be charged with the responsibility of preventing the risks, and bearing them....” Restatement (Second) of Torts § 409 cmt. b (1965). The Court has said an independent contractor carries “on an independent business and contract work according to their own methods, subject to employer's control only as to results.” Baer v. Armour & Company, 63 S.D. 299, 302–303, 258 N.W. 135, 137 (1934).

Actual agency requires proof of certain factual elements: the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking, and the understanding of the parties that the principal is to be in control of the undertaking.

Babinski Properties v. Union Ins. Co., 833 F. Supp. 2d 1145, 1151 (D.S.D. 2011)

Engineers under governmental construction contracts are not employees or agents of the governmental entity because the governmental subdivision is not in control of the undertaking. *See Sota Foods, Inc. v. Larson-Peterson & Assocs., Inc.*, 497 N.W.2d 276, 283 (Minn. Ct. App. 1993)(engineer independent contractor and not agent or employee entitled to sovereign immunity); *See Suriano v. City of New York*, 240 A.D.2d 486, 487,

658 N.Y.S.2d 654, 656 (1997) (Independent contractor not the City's agent for purposes of imposing liability under Labor Law). There was no evidence presented that the BLSO controlled any aspect of the work responsibility of SKA. Under the facts of this case, any inference or holding that the act of independent contractor would create liability for the employer is in contradiction of the law and should be reversed.

IV. The reference to and jury instruction concerning competitive bidding harmed BLSO.

In Bozied v. City of Brookings, 2001 S.D. 150, ¶ 1, 638 N.W.2d 264, 267 (SD 2001), the City of Brookings failed to follow the bidding statutes. This Court held that in the absence of fraud, collusion, or undue influence, the parties to a void contract must be left where they are found and that the contractor may still retain those funds previously received on work performed. No evidence was presented that there was fraud, collusion or undue influence or that the contract price was unreasonable. This evidence and the instruction had no legal probative value and was prejudicial to BLSO.

Amicus Curiae would argue that allowing evidence of violations of law by either party to the contract which have no relevance as to the terms of the contract, performance of the parties, or valuation of damages is reversible error.

V. The damages award was excessive, speculative, and contrary to law.

Amicus Curiae are concerned that the amount of the verdict clearly is in excess of the amount Excel would have received by full performance of the contract. Governmental subdivisions in South Dakota have limited resources to finance projects. Projects and their financings are sized to an amount that the governmental subdivision can repay. If a

contractor is allowed to receive more than it would under the proper completion of a construction contract, then underwriting in South Dakota will significantly change.

This Court has said that the purpose of contract damages is to put the injured party in the same financial position it would have been had there not been a breach.

Lamar Adver. of S.D., Inc. v. Heavy Constructors, Inc., 2008 S.D. 10, ¶ 14, 745 N.W.2d 371, 376 (SD 2008); see also SDCL 21-1-5 (cannot recover more than what the party could have gained by full performance by both sides). No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and their origin. SDCL 21-2-1. Moreover, “[d]amages must in all cases be reasonable[.]” SDCL 21-1-3. Casper Lodging, LLC v. Akers, 2015 S.D. 80, ¶ 35, 871 N.W.2d 477, 490, (SD 2015). Any governmental construction contract dispute should be limited to those damages which may reasonably have been in the contemplation of both parties at the time they entered into the contract. Subsurfco, Inc. v. B-Y Water Dist., 337 N.W.2d 448, 457-58 (S.D. 1983). Parties to a written contract are presumed to understand the import of its terms and to have entered into the contract with knowledge of their respective rights and obligations. Alexander v. State, 74 S.D. 593, 600, 57 N.W.2d 121, 125 (1953). At the time of the contract, the original contract price, cost of completion upon breach, and liquidated damages were contemplated. Excel is not entitled to an amount exceeding the amount it would have gained by full performance.” Ducheneaux v. Miller, 488 N.W.2d 902, 915 (S.D.1992)

CONCLUSION

The Amicus Curiae respectfully requests the Court to reverse because of the errors of law on the public construction contract issues.

Dated this 6th day of August, 2018.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word and contains 1,345 words from the Interest of Amicus Curiae through the Conclusion. I have relied on the word count of a word processing program to prepare this certificate.

On this 6th day of August, 2018.

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

Appeal No. 28580

EXCEL UNDERGROUND, INC.,
Plaintiff/Appellee,

vs.

BRANT LAKE SANITARY DISTRICT,
Defendant/Appellant

BRANT LAKE SANITARY DISTRICT,
Plaintiff/Appellant,

vs.

EXCEL UNDERGROUND, INC., and
GRANITE RE, INC.,
Defendants/Appellees.

and

GRANITE RE, INC.,
Third-Party Plaintiff/Appellee

vs.

REED I. OLSON and MELISSA D. FISCHER-OLSON,
Third-Party Defendants/Appellees

Appeal from the Circuit Court
Third Judicial Circuit, Lake County, South Dakota
Case No. 14-50 and Case No. 14-18
The Honorable Patrick Pardy, Presiding Judge

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NOTICE OF APPEAL FILED March 30, 2018

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JURISDICTIONAL STATEMENT

Appellant Brant Lake Sanitary District seeks review of a judgment and orders entered in two cases consolidated for discovery and trial. Judgment was entered in favor of Appellees Excel Underground, Inc. and Granite Re, Inc. on February 20, 2018, and the circuit court denied the Sanitary District's motion for new trial on March 13, 2018. The Sanitary District filed its notice of appeal on March 30, 2018.

ISSUES PRESENTED

1. Whether the circuit court committed reversible error by dismissing the Sanitary District's claim for liquidated damages based on this Court's holding in *Subsurfco*
 - *Subsurfco, Inc. v. B-Y Water Dist.*, 337 N.W.2d 448, 457 (S.D. 1983)
 - *Printup v. Kenner*, 180 N.W. 512, 513 (S.D. 1920).
 - *Hohm v. City of Rapid City*, 753 N.W.2d 895, 907, 2008 S.D. 65, ¶ 23 (S.D. 2008).

2. Whether the circuit court's grant of summary judgment to SKA required it to grant the Sanitary District's late-filed motion for summary judgment
 - *Corson Village Sanitary District v. Strozdas*, 539 N.W.2d 876, 878 (S.D. 1995).
 - *Standard Brands v. Bateman*, 184 F.2d 1002, 1006 (8th Cir. 1950)
 - *Halvorson v. Huron Culvert and Tank Co.*, 309 N.W.2d 817, 818 (S.D. 1981).

3. Whether the circuit court committed reversible error in instructing the jury that SKA was the Sanitary District's agent.
 - *N. Improvement Co. v. S.D. State Highway Comm'n*, 267 N.W.2d 208, 214 (S.D. 1978)
 - Restatement (Second) of Agency § 142, comment (a)
 - *J.H. Larson Elec. Co. v. Vander Vorste*, 134 N.W.2d 500, 504 (S.D. 1965)

4. Whether the circuit court committed reversible error in allowing testimony and jury instructions related to emergency bidding standards
 - *Clem v. City of Yankton*, 160 N.W.2d 125, 134 (S.D. 1968).
 - *State v. Spiry*, 543 N.W.2d 260, 263, 1996 S.D. 14, ¶ 11 (S.D. 1996)

5. Whether the evidence is insufficient to support the damages awarded by the jury
 - *Maryott v. First Nat'l Bank of Eden*, 624 N.W.2d 96, 105, 2001 S.D. 43, ¶ 26 (S.D. 2001)

STATEMENT OF THE CASE

This matter involves an appeal of two separate cases filed in the Circuit Court for the Third Judicial Circuit, Lake County, South Dakota. In Case No. 14-50, Appellee Excel Underground, Inc. (“Excel”) sued Appellant Brant Lake Sanitary District (“the Sanitary District”) for breach of contract. In Case No. 14-18, the Sanitary District sued Excel and Appellee Granite Re, Inc. (“Granite”). The two cases were consolidated for purposes of discovery and trial, and a nine-day jury trial was held from January 22, 2018 to February 1, 2018.

At the conclusion of trial, the jury returned a special verdict finding that Excel was entitled to recover damages from the Sanitary District, and that the Sanitary District was not entitled to recover any damages on its claims. On February 20, 2018, the circuit court entered judgment in favor of Excel and against the Sanitary District in Case No. 14-50. The circuit court also entered judgment in favor of Excel and Granite in Case No. 14-18, and ordered that the Sanitary District take nothing by way of its complaint in that case. On March 13, 2018, the circuit court denied the Sanitary District’s motion for new trial and renewed motion for judgment as a matter of law. The Sanitary District now appeals.

STATEMENT OF THE FACTS

These two cases arise out of a contract for the installation of a new sanitary sewer system around Brant Lake. The Sanitary District hired Schmitz Kalda & Associates (“SKA”) to serve as the project Engineer. (R. 220) The Sanitary District hired Excel to perform the installation work as the project Contractor. (R. 206) Granite provided a performance bond for Excel’s work, as a surety. (R. 209)

The construction contract (hereinafter “Contract”) between the Sanitary District and Excel states that “ENGINEER shall act as OWNER’S representative during the construction period.” (Contract § 24.1)¹ It also states that the Engineer’s resident project representative shall serve as “the authorized representative of OWNER.” (Contract § 1.21) Consistent with that designation, the Contract provides the Engineer with broad authority to act on the Sanitary District’s behalf. For example, the Contract provides that the Engineer was authorized to decide the quality and acceptability of the work on behalf of the Owner; to reject work for failure to comply with the contract documents; and to issue field orders changing the details of the work. (Contract §§ 24.1, 15.1, 12.2) The Engineer was given authority to review and approve requests for payment and issue certificates of acceptance. (Contract §§ 18.1, 18.5) The Contractor was also instructed to contact the Engineer (not the Sanitary District) if the Contractor needed to seek a change order or report ambiguities or inconsistencies in the plans. (Contract §§ 12.2, 3.3)

The testimony and evidence at trial further confirmed this relationship. Sanitary District board member Dick Neish testified that SKA and its president, Kim Buell, served as the Engineer on the project and carried out the functions of the Engineer “with the full blessing” of the Sanitary District. (TT 810-11) SKA and Buell also sent letters “on behalf of” the Sanitary District, and at the district’s direction. (TT 810-11) Buell likewise testified that he was performing his work “for the Board,” that the Board controlled what he was doing, and that he was “operating under the direction of the Board throughout the entire project.” (TT 453-54) Buell also testified that Excel was entitled to

¹ A complete copy of the construction contract was admitted as Exhibit 503, and can be found beginning at page 172 of the record. Unless otherwise indicated, all references to the Contract are to the General Conditions (Sec. 0700), which begin at R. 219.

rely upon the statements of the resident project representative, Rick Brake. (TT 568)

This testimony is also consistent with the contract between SKA and the Sanitary District, which states: “All of the Owner’s instructions to Contractor will be issued through the Engineer who will have authority to act on behalf of the Owner to the extent provided in the specifications except as otherwise provided in writing.” (Exh. 540 § 1.3.2, at R. 687)

Although Excel expected to begin work within a couple weeks or a month of the May 2, 2012 bid date (TT 847), Notice to Proceed was not issued until June 25, 2012. (R. 216) Excel’s owner, Reed Olson, testified that Excel then prepared to start work with the main 6-inch sewer pipe. (TT 854-55) But before Excel could start, there was a disagreement with a farmer about the location of the pipe, which took a week to resolve. (TT 855) Excel was also delayed in its work, when it had to wait for the engineer to stake the placement of the main pipe, and when the engineer had to review and then change the route of the main line. (TT 857-59) Under the Contract, it was the Owner’s responsibility to determine and mark these locations. (Contract § 9.1) SKA was performing this work on the Sanitary District’s behalf. (TT 857)

It was also the Engineer’s responsibility to review shop drawings for the grinder pumps that would be installed at each home around the lake. Until the engineer approved the shop drawings, the equipment could not be manufactured or installed. (Contract §§ 4.1, 4.3) (Contract, Section 2603 § 1.3.A) Reed Olson testified that, as soon as he received the shop drawings from the pump manufacturer, he hand-delivered them to SKA. (TT 851) However, it took an unusually long time for the drawings to be

approved. (TT 851-52) The copy of the submittal introduced at trial showed that they were not approved by SKA until September 6, 2012. (Exh. 5)

SKA was also responsible for identifying the specific location where each grinder pump was to be installed, and obtaining an easement from each homeowner on behalf of the Sanitary District. (Contract, Section 1350 § 1.2C; TT 476-77; TT 1190) SKA and the Sanitary District agreed that this was not the responsibility of the Contractor, and that Excel could not install the grinder stations until the location had been staked. (TT 480, TT 477, TT 1279) Buell testified that there was nothing that would have prevented SKA from finalizing all of these locations by September 1, 2012. (TT 479) But SKA was frequently behind in staking the pump locations, causing delays for Excel. (TT 225-28) The on-site resident representative who was responsible for the staking admitted that only a quarter of the locations had been established by November 1, 2012, and that approximately 110 locations still had not been established by April 1, 2013. (TT 1617) SKA also agreed that it would cost Excel time and money if it had to jump from one part of the lake to another, and come back to houses that had not previously been staked. (TT 486)

In July 2012, Excel asked the onsite engineer's representative, Rick Brake, whether the pressure testing formula specified in the Contract was correct. (TT 947) Expert testimony at trial confirmed that the testing formula specified was intended for PVC pipe, and was not proper for the HDPE pipe used on the project. (TT 677-78, 680-81) Excel ended up spending weeks and weeks trying to pass pressure tests under a wrong testing formula, and digging up the pipes to search for leaks that did not exist. (TT 953-55, TT 959-60) Although SKA eventually approved an alternate test in

September 2012, Buell admitted that nothing would have justified Brake's 40-day delay in raising the issue with Buell. (TT 571) Buell admitted that using the wrong testing formula and looking for leaks could have cost Excel time and money. (TT 571)

By the Fall of 2012, it was apparent to Excel that project delays would push the work into the winter season, and that it could not be completed by the date set by the engineer. (TT 848-49, TT 868-69) Olson approached the Sanitary District about an extension of time (TT 869), and on October 24, 2012, the Board approved a motion to develop a change order to the construction schedule. (R. 71-74) But two weeks later, a second motion was carried, authorizing the Sanitary District's attorney and engineer to deny the request for an extension. (R. 75-79; TT 879) Board president Jan Nicolai testified that this and other requests for an extension were denied based on the recommendation of the engineer. (TT 1193-94) By the conclusion of the project, the Sanitary District had not granted Excel a single day's extension of time. (TT 1304)

When it reached the last area of the lake, known as Spawn's Addition, Excel notified the engineer that it would be unable to install the individual service lines for each home by directional boring, as specified in the contract. (R. 87, TT 412-13) An engineering expert also testified at trial that directional boring would have been physically impossible in this area, due to the narrow lots, narrow road, and other obstacles. (TT 665-68) Excel had to install each of the 64 service lines by open trenching, and sought a change order for additional time and compensation. (TT 889-91) At trial, both Reed Olson and Scott Olson testified to the significant challenges and additional work necessitated by the change to open trenching in Spawn's Addition, due to the sandy conditions and high water table. (TT 885-89, TT 903-08, TT 327-30) They

also testified about how much longer it took to install by this method, and the reasonableness of the additional compensation requested. (TT 890-94, TT 908, TT 327-31) However, Buell recommended that the change order be denied. (TT 415) Buell did not ask any questions about how Excel reached the amount requested, and did not attempt to negotiate a different price, before making that recommendation. (TT 424-25)

Despite these delays and refusals to grant change orders, both Excel and SKA agree that the work was substantially completed by December 2013. (TT 965, TT 1607) Excel then asked for a punch list from SKA, so that it could begin working on any outstanding issues at no cost to the Sanitary District. (TT 503-04) Excel had previously asked for a punch list in July 2013. (TT 960) But Excel's request for the punch list was refused. (TT 499) Buell agreed at trial that it was improper to withhold that list. (TT 603)

In January 2014, after substantial completion, a number of the individual grinder pumps began to freeze. (TT 967) The testimony at trial indicated that this was due to the record cold experienced in the area during that year. All parties agreed that the winter of 2014 was unusually cold. (TT 1266, TT 1560, TT 1615) Numerous individuals also testified that other utilities were freezing to a lower depth than normal. (TT 464, TT 1266) The testimony showed that the pumps were freezing, regardless of whether they had been installed with insulated lids. (TT 974, TT 1562-65) Buell agreed that the cold of that winter was an "act of nature" within the meaning of the Contract (TT 471), for which Excel was not responsible under the Contract. (Contract § 14.4.2)

When the pumps began to freeze, Excel responded to the homeowners' calls and tried to de-ice the pumps. (TT 967-68, TT 974-77) But when the freezing persisted,

Excel met with the supplier and arranged to have a trained technician respond to the freeze ups. (TT 977, TT 985) When the supplier later informed the Sanitary District it would stop responding to the problems, effective January 17, 2014, Excel wrote to the Sanitary District's attorney and committed to providing troubleshooting going forward. (TT 994). But the Sanitary District decided to terminate Excel's contract. (TT 997) At trial, the board president admitted she "had no idea" that Excel had promised to keep troubleshooting when the Sanitary District made that decision. (TT 1248)

Following termination, the Sanitary District hired a completion contractor to perform the punch list work that Excel promised to complete. (TT 1293) The Sanitary District then filed suit against Excel and Granite for the costs of completion and damages it claimed that it suffered due to the delayed completion. (R. 942) Excel sued the Sanitary District for breach of contract in a separate action. (R. 5) At trial, Excel sought to recover its retainage and numerous items of unpaid compensation. (TT 1010-38) Excel also sought to recover lost profits, occasioned by the Sanitary District's lawsuit and wrongful termination. (TT 166-77, 1040-52)

The jury rejected the Sanitary District's claims. (TT 1847, App. 6) The jury concluded that it was Excel who was entitled to damages, based on the Sanitary District's breach of contract. (TT 1847, App. 6) Specifically, the jury awarded Excel \$285,921.81 for its retainage, \$483,770.00 for other payments due under the Contract, and \$800,000.00 for Excel's lost profits. (App. 6) A polling of the jury showed that the jury's verdict was unanimous. (TT 1847-48)

ARGUMENT

The verdict in this case was not the result of any error or unfairness in the proceedings below. Both sides had the opportunity to present their claims to the jury. Both sides also had the opportunity to challenge the opposing party's claims and probe the credibility of any adverse witnesses. After hearing all of the testimony and evidence presented over the course of a two-week trial, the jury found that the evidence supported the case presented by Excel and did not support the claims presented by the Sanitary District. On appeal, this Court should adopt the jury's determinations of credibility and its resolution of conflicting evidence, and should not disturb the verdict below. There is no basis for reversing the jury's verdict in this case. The judgment of the circuit court should be affirmed.

I. The Circuit Court Did Not Commit Reversible Error in Dismissing the Sanitary District's Claim for Liquidated Damages.

A. The Circuit Court Properly Dismissed the Claim for Liquidated Damages pursuant to this Court's Holding in Subsurfco.

For the last 35 years, it has been the settled law of South Dakota that, when an owner terminates a construction contract, liquidated damages are not recoverable. *See Subsurfco, Inc. v. B-Y Water Dist.*, 337 N.W.2d 448, 457 (S.D. 1983); *see also United States v. Morris, Inc.*, 2017 WL 3426063, at *16 (D.S.D. 2017) (citing the holding of *Subsurfco* with approval). As recognized by this Court in *Subsurfco*, an owner must select one of two options when it believes a contractor has failed to complete a project in a timely manner:

It could take over the work and complete it, charging any extra cost and expense to the contractors; or it could wait until the job should be completed by the contractors, then collect as liquidated damages the per diem amount agreed upon. It could not adopt both courses. The two

methods are inconsistent.

Subsurfco, 337 N.W.2d at 458 (citing *United States v. Maryland Cas. Co.*, 25 F.Supp. 778, 780 (D. Me. 1938)). Having chosen to terminate the contractor, it would be fundamentally unfair to allow the owner to continue to pursue its claim for liquidated damages, because the work (and completion date) is now “out of the hands” and control of the contractor. *See id.* As a result, this Court held that an owner’s termination of the contractor constitutes an abrogation, waiver, or election requiring denial of the claim for liquidated damages, and it struck the owner’s claim for liquidated damages in that case. *See id.* at 452, 458.

The facts of this case are on all fours with *Subsurfco*. As in *Subsurfco*, Excel was still attempting to complete the construction work after the deadline initially set in the contract, despite various difficulties and delays encountered during the project. *Compare Subsurfco*, 337 N.W.2d at 451. And as in *Subsurfco*, the Sanitary District decided to terminate Excel and take control of the project’s completion. *Compare Id.* Having made that choice, the holding in *Subsurfco* clearly dictates that the Sanitary District was no longer entitled to pursue a claim for liquidated damages. *See id.* at 457. And both the holding and rationale of *Subsurfco* remain good law today. *See, e.g., United States v. Morris, Inc.*, 2017 WL 3426063, at *16 (D.S.D. 2017) (citing *Subsurfco*’s holding with approval). The circuit court properly followed and applied this Court’s decision in *Subsurfco* when it dismissed the Sanitary District’s claim for liquidated damages in this case.²

² In its brief, the Sanitary District argues that *Subsurfco* merely prevents a duplicate recovery, and that it should have been permitted to plead alternative remedies and proceed to trial on its claim for liquidated damages instead of having it dismissed. (App. Br. 16-17) But that is an incorrect reading of the Court’s decision in that case. The Court

On appeal, the Sanitary District urges this Court to now overrule and reject this established precedent. But under the doctrine of *stare decisis*, this Court is “reluctant” to disturb its prior rulings. See *Hohm v. City of Rapid City*, 753 N.W.2d 895, 905, 2008 S.D. 65, ¶ 20 (S.D. 2008). This Court will generally adhere to the principles it has previously announced and apply those principles to all further cases involving substantially similar facts. See *Printup v. Kenner*, 180 N.W. 512, 513 (S.D. 1920). This type of consistency and predictability is especially important in cases involving contract rights, where “considerations in favor of *stare decisis* are at their acme,” due to the reliance interests that are involved. *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

The Sanitary District has not identified any compelling reasons for overruling and setting aside this Court’s prior precedent. Although the Sanitary District claims that *Subsurfco* was decided based on a general hostility to liquidated damages and that South Dakota law has evolved on this issue, the Sanitary District admits that this change to a modern view occurred in 1968 – 15 years *before* the Court’s ruling in *Subsurfco*. See App. Br. 12 (citing *Dave Gustafson & Co. v. South Dakota*, 156 N.W.2d 185 (S.D. 1968)). This Court was fully aware of the “modern” view on liquidated damages when it reached its decision in *Subsurfco*. There has been no subsequent change in South Dakota law that requires this Court to reevaluate its prior decision. Nor is there anything in the Court’s prior opinion that indicates its decision was based on an archaic or hostile view toward liquidated damages. The opinion shows that the Court’s decision was instead

in *Subsurfco* did not merely eliminate the duplicate award of liquidated damages from the jury verdict (as claimed by the Sanitary District). The Court remanded the case for a new trial, and struck the claim for liquidated damages from the owner’s pleadings. The Court did *not* allow the owner to go forward with that claim at retrial.

based on the inherent inconsistencies and unfairness of allowing the owner to terminate the contractor and then seek to recover liquidated damages that the contractor no longer had any ability to control. *See Subsurfco*, 337 N.W.2d at 458

The Sanitary District also cites to several out-of-state cases in support of its claim for overruling. But as the Sanitary District admits, these cases are primarily concerned with instances in which the contractor has *abandoned* the project, not instances in which the contractor has been terminated. *See* App. Br. 13. Those cases have no application here. The testimony at trial showed that Excel was still working on the project and had committed to providing any necessary troubleshooting when it was terminated by the Sanitary District. (TT 994-97) The same was also true in *Subsurfco*. *See Subsurfco*, 337 N.W.2d at 451. Even if the owner should be allowed to pursue liquidated damages in cases of project *abandonment*, that rule simply is not relevant here. Nor would it provide a basis for overruling the decision in *Subsurfco*.

Importantly, even if the Court was inclined to revisit its prior holding in *Subsurfco*, there would be no justification for applying the new rule of law retroactively. In cases where the Court has announced a new principle of law and overruled clear past precedent, the decision should be applied only prospectively. *See Hohm v. City of Rapid City*, 753 N.W.2d 895, 907, 2008 S.D. 65, ¶ 23 (S.D. 2008). This is because both the parties and the circuit court reasonably relied upon and did not err in following the Court's previously-announced holding. It would be inequitable to now upset their reliance on settled precedent. *See id.* This Court should refuse to apply any newly-decided rule regarding liquidated damages retroactively against Granite and Excel.

B. The Circuit Court’s Decision Can Also Be Affirmed on Alternate Grounds.

When reviewing the circuit court’s grant of summary judgment, this Court should affirm the circuit court’s grant of summary judgment if “any basis exists to support the ruling.” *See Cole v. Wellmark of South Dakota, Inc.*, 776 N.W.2d 240, 245, 2009 S.D. 108, ¶ 11 (S.D. 2009). Thus, even if the Court decides that the circuit court’s dismissal of the Sanitary District’s liquidated damages claim pursuant to *Subsurfco* was incorrect, the Court should still affirm the decision if there are other alternative grounds for denying that claim. There are at least two such bases for affirming the decision below.

First, the assessment of liquidated damages in this case would result in an unenforceable penalty. Liquidated damages provisions will be sustained only when they are intended to estimate the actual damages sustained, and not punish the breaching party. *See Prentice v. Classen*, 355 N.W.2d 352, 355 (S.D. 1984). In such a case, the liquidated damages are “substituted” for the actual damages. *See Walter Motor Truck Co. v. South Dakota*, 292 N.W.2d 321, 323 (S.D. 1980). Actual damages cannot be awarded in addition to the liquidated damages. *See id.*

Here, the Sanitary District sought to recover both actual *and* liquidated damages for the project delay. Although the Sanitary District claims that it only sought actual damages for the costs of *completion* and liquidated damages for the cost of *delay*, the record does not bear out this separation. In its amended complaint – and at trial – the Sanitary District expressly sought payment of actual damages for several categories related to delay, including payments for porta-potties until the project was complete, refunds to customers for delays in system installation, and additional engineering fees occasioned by the delay and extension of the project. (R. 942; App. 6; TT 1821-22) If

the Sanitary District had been able to receive liquidated damages on top of these actual damages, it would have been an improper penalty. Dismissal of the claim for liquidated damages is proper on this ground.

Second, it is also apparent that the circuit court's refusal to allow the Sanitary District to present its claim for liquidated damages was harmless and not prejudicial. The Sanitary District had the opportunity to argue at trial that Excel was responsible for the project delay and did not complete the project in a timely manner. The Sanitary District also had the opportunity to seek the actual damages incurred as a result of that alleged delay. But the jury rejected the Sanitary District's view of the evidence. The jury concluded that the Sanitary District or its engineer was responsible for the project delays, and that Excel was wrongfully terminated from the project. Given that conclusion, the jury would have likewise rejected any claim for liquidated damages, and the verdict in this case would not have been any different. The circuit court's refusal to allow the Sanitary District to present its claim for liquidated damages did not result in any prejudice to the Sanitary District in this case. The judgment below should not be disturbed on this basis. *See Carpenter v. City of Belle Fourche*, 609 N.W.2d 751, 765, 2000 S.D. 55, ¶ 35 (S.D. 2000) (the refusal to instruct on theory is not prejudicial unless "it is likely the jury would have returned a different verdict" if the instruction had been given).

II. The Circuit Court's Grant of Summary Judgment to SKA Did Not Require the Court to Grant the Sanitary District's Late-Filed Motion against Excel.

A. The Circuit Court Properly Denied the Motion as Untimely.

After nearly four years of litigation, the Sanitary District and other parties requested a trial date and final scheduling order from the court. Pursuant to that

scheduling order, dispositive motions were required to be filed by October 23, 2017. (R. 1036) The Sanitary District did not file a motion on or before that date. Nor did the Sanitary District contend that there were no genuine disputes of fact, such that a trial on the merits was unnecessary.

SKA, by contrast, did file a timely motion. That motion sought dismissal of the third-party complaint filed against SKA by the Sanitary District. (R. 1235, 1239) In response, the Sanitary District admitted most of the undisputed facts stated by SKA (R. 2088) and did not oppose SKA's motion. (R. 2082) The Sanitary District instead argued that any grant of summary judgment in favor of SKA should also result in a grant of summary judgment against Excel. (R. 2084) This argument was presented only in the Sanitary District's responsive brief (which was filed after the dispositive motion deadline). The Sanitary District did not file a motion for summary judgment against Excel at that time.

It was on December 22, 2017, after SKA's motion was granted, that the Sanitary District first filed an actual motion for summary judgment. (R. 2290) This was well past the deadline for dispositive motions. It was also just one month before a jury trial was scheduled to commence. In deciding not to grant the Sanitary District's motion, the circuit noted that the Sanitary District could have made its own motion for summary judgment against Excel prior to the dispositive motion deadline, but chose not to do so. (App. 110, 114) The circuit court also noted that the time for filing dispositive motions had passed. (App. 132)

Under these circumstances, the circuit court's decision to deny the Sanitary District's late-filed motion was entirely appropriate and proper. The decision to amend a

scheduling order or allow a late-filed motion lies within the sound discretion of the circuit court, and will not be reversed on appeal absent an abuse of discretion. *See Brooks v. Milbank Ins. Co.*, 605 N.W.2d 173, 180, 2000 S.D. 16, ¶ 26 (S.D. 2000). A continuance may also be properly denied where the party had ample time to file a motion, but did not seek to do so until the last minute. *See Corson Village Sanitary District v. Strozdas*, 539 N.W.2d 876, 878 (S.D. 1995).

Here, the case had already been pending for nearly four years at the time of the dispositive motion deadline. The Sanitary District could have filed its own motion for summary judgment against Excel prior to that deadline, addressing the merits of the parties' claims. (App. 112) It chose not to do so. It instead waited until the eve of trial to file its motion. The circuit court did not abuse its discretion in denying that motion as untimely.

B. SKA's Summary Judgment Motion Was Not Directed toward Excel's Claims.

In its appeal brief, the Sanitary District argues that SKA's motion for summary judgment against the Sanitary District decided the issue of whether Excel could prove its claim for damages, and that Excel had an obligation to respond to and defend against SKA's motion. The Sanitary District is wrong on both accounts.

SKA's motion for summary judgment was directed against the *Sanitary District*. In both its motion and supporting memorandum, SKA asked the court to dismiss the Sanitary District's third-party complaint against SKA. (R. 1235, 1239) The circuit court's order on the motion was likewise limited to dismissal of the third-party complaint against SKA. (R. 2271) SKA did not ask for (and did not receive) any ruling or decision on the separate complaint and claims brought against the Sanitary District by *Excel*. As

such, Excel was not a “party opposing” SKA’s motion for summary judgment, who would be obligated to respond to SKA’s statement of material facts under SDCL 15-6-56(c). Nor has the Sanitary District identified *any* South Dakota authority that would justify now creating such an obligation. This Court has never held that a party has a duty to respond to a summary judgment motion that was not directed against it. It would be unfair to impose that burden without prior notice, after the fact.

SKA’s motion for summary judgment also did not (and could not) decide that “Excel was unable to prove its damages” as a matter of law. Contrary to the Sanitary District’s characterization of that ruling, the circuit court made clear that it had granted SKA’s motion based on the Sanitary District’s failure to dispute or oppose SKA’s right to dismissal of the Sanitary District’s claim. (App. 131) Accordingly, the only issue that was decided by the circuit court’s initial ruling was whether the Sanitary District had failed to satisfy its burden of coming forward with evidence to establish SKA’s liability for contribution or indemnity.

That claim for indemnity is separate and independent from the underlying liability. *See Weiszhaar Farms, Inc. v. Tobin*, 522 N.W.2d 484, 492 (S.D. 1994). The Eighth Circuit has recognized that the allocation of responsibility between an agent and its principal is entirely “immaterial” to the duties and liability that the principal owes to an outside party. *See Standard Brands v. Bateman*, 184 F.2d 1002, 1006 (8th Cir. 1950) (holding liability of third-party defendant was material only as it related to relationship between defendant in his role as third-party plaintiff against the third-party defendant, and was immaterial to the issue of liability between defendant and the plaintiff). The impact of the circuit court’s decision about the Sanitary District’s right to contribution or

indemnity from SKA is therefore limited to the legal rights of those two parties. The circuit court's decision does not address or decide any of Sanitary District's rights *vis-à-vis Excel*. It cannot change or control the Sanitary District's obligations and responsibilities to those parties who were not the subject of the initial motion.

Adopting the Sanitary District's rule in this case would create absurd and perverse incentives. Unlike the cases cited by the Sanitary District, the summary judgment motion in this case was not between truly adverse parties. This case instead involves a third-party complaint between a principal (the Sanitary District) and its agent (SKA) – both of whom are trying to limit the principal's liability to a common third party. As is amply demonstrated by the facts in this case, it is in both the principal's and the agent's interest to agree that neither of them did anything wrong, and then try to use that agreement amongst themselves as a sword against the remaining party – who was never the subject or object of the parties' initial motion. If the result urged by the Sanitary District is accepted, a principal and its agent would be able to engage in friendly motion practice and unilaterally exonerate themselves from liability without ever having to direct a motion against the party claiming damages. In other words, parties could engage in “summary judgment by surprise,” and make an end-run around the normal adversary process. This Court should reject the Sanitary District's attempt to extend the summary judgment ruling to a party against whom the motion was never directed.

C. The Circuit Court Was Not Bound by Its Initial Interim Order

Even if the summary judgment motion of SKA *did* decide issues relevant to Excel's claims against the Sanitary District, the circuit court was not required to extend that ruling in the face of evidence showing that summary dismissal of Excel's claims was

inappropriate. When an order or ruling decides less than all of the claims in a case, that order remains subject to revision and can be altered at any time prior to final adjudication of the entire case. *See* SDCL 15-6-54(b). In fact, this Court has specifically recognized the interim and non-final character of a summary judgment order dismissing a third-party complaint (like the one against SKA). *See Halvorson v. Huron Culvert and Tank Co.*, 309 N.W.2d 817, 818 (S.D. 1981). It was therefore permissible and appropriate for the circuit court to revise or reconsider the impact of its prior ruling after the first summary judgment motion had been decided.

Although the Sanitary District relied upon the doctrines of issue preclusion and law of the case in support of this argument below, neither doctrine alters or affects this fundamental power to revisit an interim order. This Court has been clear that issue preclusion applies only to final judgments that have been entered in prior and separate litigation; it does not have any applicability to earlier rulings made within *the same case*. *See In re Estate of Siebrasse*, 722 N.W.2d 86, 90 (S.D. 2006). The law of the case doctrine likewise does not apply to interlocutory orders, like summary judgment. *See Grynberg Exploration Corp. v. Puckett*, 682 N.W.2d 317, 322 (S.D. 2004); *accord First Union Nat'l Bank v. Pictet Overseas Trust Corp., Ltd.*, 477 F.3d 616, 620 (8th Cir. 2007). The law of the case doctrine is also a discretionary policy that is addressed to the court's "good sense." *See In re Estate of Jetter*, 590 N.W.2d 254, 258-59 (S.D. 1999).

In response to the Sanitary District's motion for summary judgment, the circuit court was presented with substantial evidence showing that there was a sufficient basis for Excel to go forward with its claims at trial. (R. 2354, 2387, 2396, 2415) It was therefore appropriate and made "good sense" for the court to allow the claims to be

decided by the jury, even if it required the court to reconsider its previous ruling. There were clearly factual and credibility disputes between the parties regarding the contract that needed to be decided by a neutral fact-finder, and the circuit court did not err in ensuring that these claims were fairly and fully litigated.³

III. The Circuit Court Did Not Commit Reversible Error in Instructing the Jury that SKA was the Sanitary District's Agent.

A. The Sanitary District Should Be Estopped from Challenging the Agency Instruction.

The construction contract in this case clearly states that SKA “shall act as [the Sanitary District’s] representative during the construction period” (Contract § 24.1), and that SKA’s resident project representative shall serve as the Sanitary District’s “authorized representative” (Contract § 1.21). The Contract also includes a delegation of authority by the Sanitary District to SKA to perform work, receive information, or make decisions on the Sanitary District’s behalf. (Contract §§ 3.3, 12.2, 15.1, 18.1, 18.5, 24.1) The professional services contract between SKA and the Sanitary District likewise states that SKA will act as the Sanitary District’s representative. “All of the OWNER’s instructions to Contractor will be issued through the ENGINEER who will have authority to act on behalf of the OWNER to the extent provided in the specifications except as otherwise provided in writing.” (Exh. 540)

³ To the extent the circuit court’s second decision resulted in any inconsistencies between the two summary judgment rulings, it was an inconsistency that was created by the Sanitary District’s own procedural default and voluntary concession of SKA’s motion – not an irreconcilable substantive conflict. The inconsistency does not provide any basis for vacating the jury’s well-supported verdict on appeal. If anything, the inconsistency should be resolved by reinstating the Sanitary District’s claim for indemnity against SKA, not vacating the award in favor of Excel, because this is the only result that would be consistent with the view of the evidence that was incorporated into the circuit court’s final judgment.

Consistent with those statements in its contracts, the Sanitary District affirmatively pled in its amended complaint that the Engineer acted as the Sanitary District's "representative" during the construction period and had authority to decide questions under the contract. (R. 949) In its third-party complaint against SKA, the Sanitary District pled that SKA "performed services on behalf of" the Sanitary District. (R. 960) The Sanitary District also specifically pled that any liability it has to Excel "can only arise by reason of the primary and active acts and/or omissions on the part of SKA." (R. 960)

On appeal, however, the Sanitary District seeks to take the opposite position. Despite its own prior allegation that its liability in this case could only be based on the acts or omissions of SKA, the Sanitary District now claims that it was "blatant and prejudicial error" to instruct the jury that the acts or omissions of SKA are considered the act or omission of the Sanitary District. (App. Br. 20) The Sanitary District also objects to the circuit court's instruction describing SKA as its "agent" during the construction period – a term that is interchangeable with "representative." *See, e.g.*, Black's Law Dictionary 64 (7th ed. 1999) (defining agent as "One who is authorized to act for or in place of another; a representative"); *see also* Black's Law Dictionary 1304 (7th ed. 1999) (defining representative as "One who stands for or acts on behalf of another. *See* AGENT.")

Equitable considerations prohibit this type of inconsistent posturing. Having affirmatively alleged that its liability could flow only through the acts or omissions of SKA, the Sanitary District should not now be heard to complain that the jury was instructed the same thing. *See, e.g., Estes v. Millea*, 464 N.W.2d 616, 619 n.3 (S.D.

1990) (“A party to an action may not make a voluntary decision to proceed in a subsequent inconsistent manner when they themselves in an undesirable position as a result of a legal posture.”); *see also Federal Land Bank of Omaha v. Houck*, 4 N.W.2d 213, 218–19, 68 S.D. 449, 460 (S.D. 1942) (stating that the doctrine of quasi-estoppel “precludes a party from asserting, to another’s disadvantage, a right inconsistent with a position previously taken by him”). Having introduced and attempted to recover based on the construction contract and professional services contract, the Sanitary District likewise should not be permitted to now disavow its provisions. *See, e.g., Mitsui & Co. (USA), Inc. v. Mira M/V*, 111 F.3d 33, 36 (5th Cir. 1997) (by filing suit under contract, party accepts all of its terms); *Atkinson v. Atkinson*, 167 F.2d 793, 796 (7th Cir. 1948) (“A person cannot claim under an instrument without confirming it”); *see also Grynberg Exploration Corp. v. Puckett*, 682 N.W.2d 317, 323, 2004 S.D. 77, ¶ 24 (S.D. 2004) (because party accepted the benefits of the contract, “they are precluded from repudiating the corresponding obligations”). This Court should hold that the Sanitary District is estopped from challenging the agency instruction on appeal.

B. The Agency Instruction Was Accurate and Properly Given

As detailed above, substantial evidence supported the circuit court’s instruction that SKA acted as the Sanitary District’s agent on the project. The construction contract expressly stated that SKA was acting as the Sanitary District’s “representative” during the construction period, and that SKA’s onsite employees served as the district’s “authorized representative.” (Contract §§ 24.1, 1.21) The contract between SKA and the Sanitary District (which the district introduced at trial) likewise states that engineer “will have authority to act on behalf of the OWNER.” (Exh. 540) It was proper for the circuit

court to instruct the jury in accordance with that binding contract language. *See Vetter v. Cam Wal Elec. Co-op., Inc.*, 711 N.W.2d 612, 620, 2006 S.D. 21, ¶ 24 (S.D. 2006) (finding the circuit court did not err where instruction accurately reflected the terms of the parties' collective bargaining agreement).

The testimony at trial also strongly supported the circuit court's instruction. Witnesses from both SKA and the Sanitary District agreed that SKA was performing work "on behalf of" the Sanitary District and with the district's "full blessing." (TT 453-54, 810-11) There was testimony that Excel was entitled to rely upon the statements of SKA's onsite employee. (TT 568) Witnesses also testified that SKA was responsible for carrying out numerous tasks on the Sanitary District's behalf. (TT 857, TT 476-77; TT 1190) On appeal, the Sanitary District has not identified a single witness who testified that SKA did not act as the Sanitary District's agent on the project.

The circuit court's instruction in this case was an accurate statement of South Dakota law. For example, South Dakota statute clearly provides that a principal is responsible to third persons for the wrongful acts or omissions of the agent committed in the course of the agency. *See* SDCL 59-6-9. This Court has also previously recognized that the close relationship between an owner and engineer makes it appropriate to evaluate the actions of the engineer in determining whether the owner fulfilled or waived certain contractual duties. *See, e.g., Subsurfco, Inc. v. B-Y Water Dist.*, 337 N.W.2d 448, 457 (S.D. 1983) (finding it was reversible error for the court to instruct the jury *not* to consider the acts and omissions of the owner's engineer). As this Court explained in *Northern Improvement Co.*, the owner cannot choose to give the engineer broad authority over the project and then later contend the engineer's actions are not binding upon it. *See*

Northern Improvement Co. v. South Dakota State Highway Comm'n, 267 N.W.2d 208, 214 (S.D. 1978). The circuit court properly instructed the jury that the acts and omissions of SKA should be considered the acts and omissions of the Sanitary District.

The Sanitary District argues the instruction was nevertheless improper, because (according to the district) the instruction improperly made the Sanitary District “vicariously liable for the acts of an independent contractor.” *See* App. Br. 20. But this argument wrongly conflates the separate concepts of tort and contract liability. The doctrine of *respondeat superior* (which is repeated throughout the Sanitary District’s argument) provides that a principal will only be liable for the torts of its servants or employees, and not the torts of its independent contractors. *See* Restatement (Second) of Agency § 219; *see also* App. Br. 21-22 (citing South Dakota cases involving *torts*); Amicus Br. 3 (citing the Restatement Second of *Torts*). But there is no similar distinction or limitation that is drawn for purposes of contractual liability:

Although servants have greater powers to subject their principals to *tort* liability than have agents who are not servants, the powers of servants to bind their principals by *contracts* or by transfers of property are not different from those of agents who are not servants. . . . The fact that A is, and B is not, a servant does not affect their powers to bind P in making contracts of sale.

Restatement (Second) of Agency § 142, comment (a) (emphasis added). With respect to contracts, the principal is liable for the actions or statements of *any* person it imbues with actual or ostensible authority, without regard to whether that person is an employee or independent contractor. *See* SDCL 59-6-2, 59-6-3. When evaluating contractual liability, the rule of *respondeat superior* simply does not come into play, and there has never been any “longstanding distinction” between employees and independent contractors with respect to this type of liability.

Here, the jury was presented only with claims for breach of contract. (App. 6) As a result, the doctrine of *respondeat superior*, and its separation of employees and independent contractors, had no application in this case. Accordingly, the circuit court did not err in instructing the jury that it could impute the acts or omissions of SKA to the Sanitary District in deciding the contract claims at issue (even if SKA was an independent contractor⁴). The circuit court’s instruction was an accurate and appropriate statement of the law of agency relating to contractual liability.

C. The Sanitary District Was Not Prejudiced by the Instruction

Even if the agency instruction was erroneous, the verdict must be affirmed unless the Sanitary District can show that the instruction was also prejudicial. *See Schultz v. Scandrett*, 866 N.W.2d 128, 133, 2015 S.D. 52, ¶ 12 (S.D. 2015) (“To constitute reversible error, an instruction must be shown to be both erroneous and prejudicial”). An instruction is prejudicial only when the jury “probably would have returned a different verdict if the faulty instruction had not been given.” *Thomas v. Sully County*, 629 N.W.2d 590, 591, 2001 S.D. 73, ¶ 4 (S.D. 2001).

The Sanitary District complains that the instruction allowed the jury to hold the Sanitary District liable for SKA’s professional negligence or malpractice. *See App. Br.* 21. But in reviewing this claim, the jury instructions must be considered as a whole, and read in context with one another. *See Luke v. Deal*, 692 N.W.2d 165, 168, 2005 S.D. 6, ¶ 11 (S.D. 2005). In this case, the only claims presented to the jury were contract claims.

⁴ We note that this factual premise of the Sanitary District’s argument has not been adequately established. Although the Sanitary District seeks to characterize SKA as an independent contractor in its written agreement, the testimony at trial indicated that the Sanitary District “controlled” what SKA was doing, and that SKA was “operating under the direction of the Board throughout the entire project.” (TT 453-54, TT 810-11).

(App. 6) The disputed agency instruction appeared directly before Instruction 19, which told the jury that “Excel claims that Brant Lake breached the contract and that Excel sustained damages as a result.” (R. 2661) Instructions 20 and 21 then informed the jury how to measure damages in a breach of contract case and told the jury the specific contract damages Excel was claiming: its retainage; other payments due “under the contract”; and lost profits. (R. 2662-63) The special verdict form also listed these same damages. (App. 6) There was never any risk that the jury would hold the Sanitary District vicariously liable for SKA’s negligence. Nor did the jury award such damages. (App. 6) The jury awarded damages for breach of contract, and any claim that Instruction 18 could be read to allow vicarious liability for professional negligence was entirely harmless. This Court should affirm, and not unnecessarily disturb, the jury’s verdict in this case.⁵

⁵ If this Court were to find reversible error with respect to this instruction, the Sanitary District makes no claim that it impacted the verdict or judgment in Case No. 14-18 (the Sanitary District’s affirmative claims against Excel and Granite). In fact, the Sanitary District concedes that it was appropriate to argue that “SKA’s alleged errors, rather than those of Excel, were the reason the project was behind schedule,” and thereby rebut the Sanitary District’s claims for delayed completion. *See* App. Br. 20-21. It is only Excel’s claim for damages (brought in Case No. 14-50) that the Sanitary District contends was affected by the instruction. Thus, in the unlikely event the Court finds reversible error on this issue, it should remand only Case No. 14-50 for retrial. The verdict and judgment in Case No. 14-18 should remain undisturbed. *See, e.g., J.H. Larson Elec. Co. v. Vander Vorste*, 134 N.W.2d 500, 504 (S.D. 1965) (“This Court when remanding a cause for new trial may limit a new trial to the issue affected by the error”); *see also Hall v. Hall*, 138 S.Ct. 1118, 1125, 1131 (2018) (noting that consolidated cases “retain their separate identities” and “independent character”); *United States v. Altman*, 750 F.2d 64, 696 (8th Cir. 1984) (similar).

IV. The Circuit Court Did Not Commit Reversible Error in Allowing Testimony and Jury Instructions Related to Emergency Bidding Standards.

A. The Manner in which the Contract was Completed Was Relevant and Admissible.

At trial, the Sanitary District sought payment for its costs to complete the project after it terminated Excel. (TT 1654-63; Exh. 560) One of the major components of these completion costs was the contract that the Sanitary District negotiated with Dakota Road Builders, in the original amount of \$499,845.00 (Exh. 534) and final amount of \$547,409.60. At trial, the parties disputed whether the cost of that completion contract was reasonable. The parties also disputed whether the Sanitary District had properly mitigated its damages.

In probing the reasonableness of the completion costs and the Sanitary District's efforts to mitigate its damages, it was entirely appropriate to elicit testimony about how that \$500,000 completion contract was agreed to and negotiated. (Indeed, the Sanitary District asked many such questions itself. (TT 555-56)) It was also entirely appropriate to ask questions about whether the Sanitary District went through the normal public bidding process before awarding the completion contract. The entire premise of the public bidding statute is that competitive bidding will guard against undue and excessive costs which might otherwise result. *See Clem v. City of Yankton*, 160 N.W.2d 125, 134 (S.D. 1968). The absence of public bidding in awarding the completion contract therefore has a clear bearing on whether that contract was reasonable in amount. The Sanitary District's decision to forego public bidding, and award the contract on an "emergency" basis was also directly relevant to the issue of whether the Sanitary District satisfied its duty to mitigate its damages. Having introduced the completion contract, and

having asked the jury to award damages to the Sanitary District based on that contract amount, the Sanitary District could not insulate itself from scrutiny about the manner in which that contract was awarded or the “emergency” that the Sanitary District believed justified foregoing public bidding. It was also appropriate for the circuit court to instruct the jury on the situations when public bidding could be excused, as this information was directly relevant to the court’s preceding (and unobjected to) instructions about the measure of recoverable damages and a party’s duty of mitigation.

B. The Error, if Any, Was Harmless

Even if it was incorrect to allow this evidence, the error was clearly harmless. In order to reverse the jury’s verdict based on the circuit court’s evidentiary ruling, the Sanitary District must show not only that an error occurred, but that the error was prejudicial. *See State v. Spiry*, 543 N.W.2d 260, 263, 1996 S.D. 14, ¶ 11 (S.D. 1996). “Prejudicial error is that which in all probability must have produced some effect upon the final result.” *Id.*; *see also Luke v. Deal*, 692 N.W.2d at 168, 2005 S.D. 6 at ¶ 11 (stating a similar test for jury instruction).

The Sanitary District has not shown that the allowance of testimony or an instruction regarding emergency procurement had any impact on the jury’s decision in this case. It cannot point, for example, to any portion of the closing arguments in which this testimony or instruction was referenced by either Granite or Excel. Nor does it identify any other concrete or identifiable impact this alleged error had on the jury’s verdict. The Sanitary District simply makes a passing and conclusory assertion that the error was prejudicial. Because that type of conclusory assertion is insufficient to satisfy the Sanitary District’s burden of showing prejudicial error, this Court should refuse to

overturn the jury's verdict or send this case back for a new trial on that basis. The Court should instead affirm the judgment below.

V. The Evidence Was Sufficient to Support the Damages Awarded by the Jury.

This Court has repeatedly emphasized that the amount of damages to be awarded is an issue peculiarly within the province of the jury. *See, e.g., Estate of Ducheneaux*, 909 N.W.2d 730, 743, 2018 S.D. 26, ¶ 39 (S.D. 2018); *Maryott v. First Nat'l Bank of Eden*, 624 N.W.2d 96, 105, 2001 S.D. 43, ¶ 26 (S.D. 2001). The jury's damage award cannot be overturned unless it is "so extremely excessive as to justify the inference or conclusion that it is the product of corruption, passion, or prejudice." *Nebraska Elec. Generation & Transmission Co-op., Inc. v. Tinant*, 241 N.W.2d 134, 138 (S.D. 1976). If the jury's verdict can be explained with reference to the evidence rather than by juror passion, prejudice or mistake of law, the verdict should be affirmed. *Maryott*, 624 N.W.2d at 105, 2001 S.D. 43 at ¶ 26 (affirming award of lost income and lost business value).

The evidence was clearly sufficient to support each and every item of damages awarded by the jury. The Sanitary District's own expert admitted that the retainage was due and owing to Excel. (TT 1665) Excel's owner, Reed Olson, testified to the basis for each and every item for additional payment under the contract that Excel requested from the jury. (TT 1010-38) There was also substantial testimony regarding the amount of Excel's lost profits due to the Sanitary District's improper termination of the contract. This included not only an expert CPA's opinions regarding Excel's projected future revenues and profits for the years 2014 to 2018 (had it not been terminated), but also Reed Olson's testimony regarding the actual revenues and work performed by Excel

during those years, following the improper termination. (TT 166-77, TT 825-30, TT 840-44, TT 1040-52)⁶

In its brief, the Sanitary District mostly just reargues the weight and credibility of the evidence presented. But on appeal, “this Court is not free to reweigh the evidence or gauge the credibility of the witnesses.” *Berry v. Risdall*, 576 N.W.2d 1, 4, 1998 S.D. 18, ¶ 10 (S.D. 1998). The Court instead reviews the evidence in the light “most favorable to the verdict.” *Maryott*, 624 N.W.2d at 101, 2001 S.D. 43 at ¶ 10. If there is sufficient evidence by which the jury’s verdict can reasonably be explained, the verdict will be sustained. *See Maryott*, 624 N.W.2d 96, 105, 2001 S.D. 43 at ¶ 27; *see also Lord v. Hy-Vee Food Stores*, 720 N.W.2d 443, 455, 2006 S.D. 70, ¶ 34 (S.D. 2006). There is clearly sufficient evidence to support and sustain the jury’s verdict in this case. There is no evidence that verdict was the product of “corruption, passion, or prejudice.” The jury’s award of damages in this case should be left undisturbed, and this Court should affirm the judgment below.

⁶ This testimony, standing alone, would be more than sufficient to affirm the jury’s verdict in this case. However, a more exhaustive discussion of the evidence supporting each of Excel’s claims for damages can be found in the brief of Appellee Excel Underground, Inc. Granite hereby adopts and joins in Section 5 of Excel’s brief, pursuant to SDCL 15-26A-67.

CONCLUSION

For the reasons described more fully above, there was no reversible error or unfairness in this case. After hearing all of the testimony and evidence presented by both sides, the jury returned a well-reasoned and unanimous verdict that is fully supported by the evidence. This Court should therefore reject the claims of the Sanitary District, and affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellee Granite Re, Inc. complies with the type volume limitations set forth in SDCL § 15-26A-66(b)(2).

According to the word count provided by Microsoft Word, this Brief contains 9,111 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, and the certificates of counsel.

Dated this 2nd day of October, 2018.

/s/ William P. Fuller

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of this replacement Brief of Appellee Granite Re, Inc. was filed electronically with the South Dakota Supreme Court on October 2, 2018, and served via electronic mail, to each of the following.

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IN THE
Supreme Court
of the
State of South Dakota

No. 28580

excel underground, inc.,
Plaintiff/Appellee
v.
brant lake sanitary district,
Defendant/Appellant

and

brant lake sanitary district,
Plaintiff/Appellant
v.
excel underground, inc.,
Defendant and Third-Party Defendant/Appellee
&
granite re, inc.,
Defendant and Third-Party Plaintiff/Appellee
v.
reed olson & missy fischer-olson
Third-Party Defendants/Appellees

An appeal of two cases, combined for discovery and trial
in the Third Judicial Circuit
Lake County, South Dakota
the hon. patrick pardy
CIRCUIT COURT JUDGE

BRIEF OF APPELLEE, EXCEL UNDERGROUND, INC.

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Notice of Appeal filed on March 30, 2018

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JURISDICTIONAL STATEMENT

This Court has the jurisdiction to hear appeals from a final judgment and to review related, intermediate orders “involving the merits and necessarily affecting the judgment....” SDCL 15-26A-7.

Any review is limited to the positions taken by the Sewer District below. *Husky Spray Serv. v. Patzer*, 471 N.W.2d 146, 153-54 (S.D. 1991). The Sewer District consented to the Trial Court’s Order of December 11, 2017, extinguishing its third-party indemnity claim. (Appellant’s Appendix, 114)

UNFAIR & INCOMPLETE FACTS

In any appeal, the parties have a duty to recite the facts “fairly” and “with complete candor.” SDCL 15-2A-60(5). In an appeal following a jury trial, we “examine the evidence in a light most favorable to the verdict.” *Baddou v. Hall*, 2008 S.D. 90, ¶ 13.

The Sewer District presents a version of the facts which omits key details, obscures factual disputes, and in some cases misrepresents the Record. Its version of the story gives the Court little help in understanding the issues. Instead, the Sewer District offers the same closing argument that the Jury rejected after nine days of trial.

Yes, the Jury heard negative allegations about Excel, but the Jury was also told that Excel’s owner is a “fussy” contractor, with three decades of

experience, and who stakes his reputation on every job. (TT 271:22-272:7; 1772:11-14; 824:22—825:5; 963:21-23; 1772:6-9)

Yes, the Jury heard that this was the largest job that Excel had handled, but the Jury was also told that Excel and its key employees routinely handled similar work for many years, with comparable project loads in the millions of dollars. (TT 1789:6-14; 120:14-25)

Yes, the Jury heard that the project quickly fell behind schedule, but the Jury was also introduced to the contract provision which excused Excel for delays beyond its control, along with substantial testimony which explained the causes of delay. (TT 618-792)

Yes, the Sewer District has repeatedly tried to distance itself from its own Project Engineer, but the Jury heard the Sewer District Board President admit that its Contract with Excel Underground required the District “to hire a “good engineer;” that its failure to provide an appropriate engineer would be held against it financially; and that the Project Engineer carried out his engineering duties “on behalf of the Board,” “at the direction of the Board,” and “with the full blessing of the Board.” (TT 796:21-797:4; 798:11-13; 810:4—812:4)

Yes, the Jury heard that dozens of pumps began freezing, but the Jury also learned that the Sewer District’s project plans required the pipes to be

buried 44 inches below the surface, and that in ordinary years at Brant Lake, frost is expected between 48 inches and 72 inches below the surface. (TT 467:16-19; 1262:8-21; 466:10-15; 469:12-17) The Jury also heard that the Winter of 2014 was one of the coldest in recent memory, that the insulation specified by the plans was insufficient or incorrect, and that Excel proposed a plan to ensure any necessary troubleshooting for the freeze-ups. (TT 464:9-11; 683:6-9 ; 684:18-685:19 ; Exhibit 16 (Record Part 2, 50-63))

The Sewer District also makes a series of procedural claims which don't match the Record. It claims that the Trial Court "granted summary judgment [to SKA] on the grounds that Excel could not prove any damages caused by SKA." (Appellant's Brief, 2) In truth, the Trial Court granted the motion because the Sewer District did not oppose it. (Appellant's Appendix, 114)

The District then tells the Court that "SKA's motion for summary judgment was not premised on any defect in the Sewer District's case." (Appellant's Brief, 8.) In truth, SKA *did* argue that the Sewer District's case for indemnity was defective, because the duty to indemnify does not extend to certain contract damages. (Record Part 1, 1256 (SKA's Brief))

On the issue of lost profits, the Sewer District tells this Court that "the sole evidence presented at trial for 2015, 2016, and 2017 was Reed Olson's

unsubstantiated testimony that he did not pay himself a salary in those years.” (Appellant’s Brief, 28) In truth, Excel provided other, significant evidence for those years, including its gross sales tax receipts for 2015 and 2016, and detailed testimony that Excel was forced to sell \$620,000 worth of its equipment while taking on \$1,168,000 in new debt to keep the company afloat. (Exhibit 9 (Record Part 1, 3447); TT 827-829; 1049-50)

The Amicus, meanwhile, makes factual assertions about public projects and bonding without any citations or basis in this Record. These are impermissible and must be stricken.

All parties are bound by the duties of candor and completeness. The panel of six Jurors dutifully sat through nine days of trial, sorted through the factual disputes, and then arrived at a conclusion. We give their conclusion substantial deference, but this requires an objective and complete picture of the facts they considered, not a partisan version.

EXCEL’S STATEMENT OF THE FACTS & CASE

The Sewer District and Excel Underground entered into a contract to construct a pressure sewer system for the residences around Brant Lake. The new system was designed to replace individual septic tanks at each home with a network of 220 *grinder stations* and buried plastic pipe. A *grinder station* functions like a combination of a sump pump and garbage

disposal: grinding the sewage of each home into a slurry, and then pumping it with low pressure via a common main line into a conventional lagoon.

(Record Part 1, 5 ; Exh. 1 & 2)

The Contract was a unit-bid contract, with 44 line-items and per-unit prices. The Contract contained two completion deadlines, one for *substantial completion* and another for *final completion*. The Contract contained a per diem liquidated damages provision for those deadlines, as well an exculpatory clause that excused Excel for delays beyond its control.

(Record Part 1, 2795)

The Contract included a specifications book (“spec book”) that described the work, along with a packet of plan sheets that depicted the work. (Exh. 1 and 2) The “spec book” also included other related portions of the agreement, such as the performance bond issued by Granite Re.

(Record Part 1, 2782)

The Contract between Excel and the Sewer District required the District to provide a Project Engineer for the construction phase. The Contract document makes hundreds—if not thousands—of references to the role played by the Project Engineer, and it expressly designates the engineer and his employees as the “representative” of the District. (Record Part 1, 2800) The District required all of its communications with Excel to be routed

via the Engineer. (*Id.*; Exh. 540 (Record Part 2, 688)) The Contract also designated the Engineer to interpret the Contract for purposes of enforcing it. (*Id.*)

The Sewer District admitted that the Contract required it to provide a “good engineer;” that its failure to provide an appropriate engineer would be held against it financially; and that the Project Engineer served with its full blessing and at its direction. (TT 796:21-25; 798:8-13; 811:15-21) In addition, our state statutes declare that a sewer district’s engineer is an appointed “officer” of that public body. SDCL 34A-5-26

The District selected SKA to serve as its project engineer. (Appellant’ Brief, 3) SKA admitted it had no prior experience designing this type of system, nor administering this type of construction project. (TT 402) The owner of SKA admitted that he made just one visit to the construction site during the three-year project, and other witnesses said this was highly unusual. (TT 421; 628-629; 729) In his absence, administration of the construction project was delegated to a non-engineer employee named Rick Brake. (TT 476, 545)

During construction, Excel and the Sewer District ran into a number of disputes regarding the work performed and delays to the project. We highlight and summarize the key disputes here.

Delays Arising From Grinder Station Locations. Under the Contract, the Sewer District delegated the duty for selecting the location of grinder stations to its Project Engineer.¹ Because Excel could not begin work in any homeowner's yard where the location had not been established, Excel alleged that the Sewer District breached the contract by not performing this task timely. (TT 477:2-19; 485-486; 482:3—487:17) Undisputedly, in the Spring of 2013 (five months *after* the project's deadline), the Project Engineer and the Sewer District had *still* failed to identify grinder station locations or place wooden stakes at 110 of the 220 lake homes. (TT 1278:17-24; 477:25-479:4; 479:5-480:21) Excel's employees testified that ultimately, on their own initiative, they obtained a directory of lake residents and began contacting homeowners themselves to help speed up the staking process. (TT 228:8-229:11)

Other Causes of Delay. Excel also alleged that its delays arose in conjunction with other factors, including: a delayed start; a delay in obtaining materials; route changes; new work added beyond the original bid; time spent performing tasks that the Contract delegated to the Project

¹ *E.g.*, Exhibit 2, Sheet 26 ("NOTE"); TT 476:15-20; 477:2-19; Record Part 1, 2858, Section 1.2.C

Engineer; time wasted using the wrong pressure testing formula; and unexpected weather conditions. (*E.g.*, TT 1516:7—1520:10; 935:23—937:9)

Slow Payments, Non-Payments, and Underpayments. Excel

Underground also alleged problems with getting paid. Excel alleged that the Sewer District was routinely late making progress payments. (TT 935:23-936:21) The District alleged that it made late payments because of government regulations.

Excel further alleged that the Sewer District was underpaying or refusing to pay for the work it was performing. At trial, the payment disputes centered upon 12 specific work items.² Excel testified that the slow payments (and underpayments) made it difficult to pay its suppliers, and that the company took out loans to pay its staff and stay afloat. (TT 1163)

Spawn's Addition. The largest of the alleged non-payments was for work that Excel performed in Spawn's Addition. The project design specified that the 1.25-inch pipe in Spawn's Addition must be directionally bored. However, this was physically impossible, due to the presence of obstacles and the compact placement of homes, leaving open trenching as the only viable construction method. (TT 895)

² TT 1010:18-1012:17. These items are addressed in more detail in Section 5 of the Argument (regarding damages).

At trial, the dispute centered around the correct rate of payment for this work. Excel requested approximately \$4,000 per home (\$275 per foot) because open trenching in this neighborhood was particularly slow, expensive, and required digging in wet, sandy soils with a very shallow water table. (TT 886-887) The facts of this dispute are addressed in more detail in Section 5 of the Argument (regarding damages).

Substantial Completion & Refusal to Provide Punch List. Shortly prior to termination, Excel reached the point of *substantial completion*, a project milestone which means that the system is operational and can now be used by the residents. (The next project milestone is *final completion*, which means that the project has fully concluded.)

At the time of *substantial completion*, virtually all 220 homes were now connected and using the system. A small number of were not yet connected, including seasonal residences and unoccupied properties. (TT 1552) In addition, some corrections and repairs were still needed, which was a normal part of the “punch list” process.³ At trial, the analogy was used that *substantial completion* is like the “rough draft” of an essay for school, which would not be graded in the same manner as the final, finished

³ Exhibit 54 (the punch list); TT 1554, 1698, 1504, 1708, 1552, 1553, 1645, 1699

product. (TT 1792) In other words, *substantial completion* as a contractual term necessarily contemplates the existence of errors, incompleteness, and more work yet to be done.

During the project, a contractor continues to work on the *punch list*, which is a list prepared by the Engineer that identifies corrections, repairs, and completions “that need to be completed to finalize the project.”⁴ Excel requested the punch list on multiple occasions but was refused a copy, and, therefore was prevented from ever beginning work on correcting those items. (TT 492-498; TT 502:19-504:20; Exhibit 74 (Record Part 2, 115-118))

Grinder Pumps Freezing. Shortly after Excel reached substantial completion, dozens of the grinder stations begin freezing. (Exhibit 57 (Record Part 2, 103) (list of service calls)) In response, Excel initially provided “troubleshooting” services, but later told the District that these widespread freeze-ups were beyond the scope of its warranty agreement. (Exhibit 16; TT 977:11-22) The regional supplier of the grinder stations took over the trouble-call duties temporarily; and when that supplier then threatened to quit, Excel proposed a series of options to resolve the troubleshooting. (*Id.*)

⁴ TT 491:2-5. *See, also*, Exhibit 54 (handwritten punch list for this project).

Despite these disputes, there was no interruption in troubleshooting services. (TT 1775:5-12)

The Termination. At the same time as these freeze-ups, Excel offered to work on the “punch list” items throughout the winter and yet again asked for a copy of the list. Excel’s offers were ignored, and, instead, the Sewer District terminated the contract. The Sewer District asserts that at the time of the termination, the Board was under the impression that Excel had abandoned the project. (TT 821; 1229) Testimony and documents demonstrated the District was mistaken. (Exh. 16 and 74) During closing arguments, counsel pointed out that the Sewer District’s board member acted surprised during her own testimony: she appeared to be reading Exhibit 74 for the very first time, and, therefore was discovering *while on the witness stand* that Excel had expressed its intent to continue working on the project. (TT 1774:10-15)

The “Emergency” Completion Contract. Following termination, the Sewer District hired a completion contractor via a half-million dollar agreement, but without submitting the matter for public bids (allegedly relying upon the public emergency exception). (*E.g.*, TT 594:9-11) The facts of this issue are developed further in Section 4 of the Argument (regarding Instruction 23 on emergency bidding).

Expert Witnesses on Engineering. On the subjects of work quality and defects in the plans, both sides (Excel and the Sewer District) presented expert testimony from retained engineers. In addition, Excel called Kim Buell from Schmitz Kalda as an adverse expert witness.

Excel's retained expert was Mike Carr, an engineer with substantial experience designing and administering the construction of over a dozen projects similar to the Sewer District's. (TT 618-624) Mr. Carr's opinions included, for example, that Excel was wrongfully terminated; that Excel was justified in seeking an extension of the contract deadline due to delays beyond its control; that the Sewer District's plans contained various defects;⁵ that the freeze-ups were either caused by an incorrect design or an extreme weather condition (or a combination of both); that the District did not face an emergency situation in the spring of 2014; and that based on all of the facts, he was not surprised that Excel had problems meeting the timeline on this job. (TT 618-792; 1731:10-20; 729-734)

The Sewer District's expert engineer was Darryl Englund, who is similarly experienced and distinguished. Mr. Englund agreed that the

⁵ See, TT 697:22-25; 695:11-16; 1704-1706; and Section 5, below. See, also, Instruction 14, which absolves the contractor for defects in the plans. (Record Part 1, 2656)

District's plans contained defects, including the Spawn's Addition trenching error, an incorrect pipe testing formula, and a pipe depth which was too shallow. (TT 1476:1-5; 1495:6—1496:9; 1444:1-18; 1437:1—24) Mr. Englund disagreed with Mr. Carr's opinions on wrongful termination and insulation. Mr. Englund conceded, however, that he "did not review every Deposition" and agreed that he was learning on the witness stand about facts he hadn't previously known, but which may be material to his conclusions. (TT 1464:12-25)

The District's Claims. Following termination, the Sewer District made a claim upon Excel Underground's performance bond and sued Excel for breach. (Appellant's Brief, 8) The Sewer District sought net damages of \$789,624.60, which included its actual costs from the construction delay, and excess costs associated with completion of the project. The District agreed that its total damages should be reduced by the retainage of \$285,921.21 which it undisputedly owed to Excel under the Contract. (Exhibit 556)

Excel's Claims. Excel sought three categories of contract damages: \$285,921.81 for its undisputed retainage; \$483,770.00 for 12 contract items for which it was underpaid or unpaid (including Spawn's Addition); and \$800,000 to recover its lost profits. (Record Part 1, 2672) On the issue of lost profits, Excel asserted that the bond claim was specious, that it was not

pursued in good faith, and that it impaired Excel's ability to get bonds for new work. Further facts in support of lost profits and the underpayments are addressed in Section 5 of the Argument (regarding the sufficiency of evidence for Excel's damages).

After 9 days of trial, the Jury returned from deliberations after an hour and twenty minutes. The Jury rejected all of the Sewer District's claims, and awarded Excel \$1,569,691.81, which was the exact amount requested in closing arguments.

From this Judgment, the Sewer District appeals and assigns error upon five issues.

PRIMARY LEGAL ISSUES

1.

Liquidated Damages

(a)

Since 1983, South Dakota has followed the *Subsurfco* rule: “when an owner terminates a contract, the cost of completion is recoverable; the liquidated damages are not.” *Stare decisis* makes this Court reluctant to overrule its prior holdings with retroactive effect. ***Should this Court overrule its holding in Subsurfco with retroactive effect here?***

(b)

Liquidated damages are unavailable when the Contractor is not responsible for the delays. Here the Jury determined that Excel was not responsible for delays. ***Rather than overruling Subsurfco, can this Court decide the issue of liquidated damages on narrower grounds, namely that the Jury’s decision makes this issue moot?***

Holding Below: The Circuit Court refused to allow the Sewer District to pursue liquidated damages. The Circuit Court held: “South Dakota at this point in time has a very clear precedent that I believe binds this Court. The *Subsurfco* case specifically states that when an owner terminates a contract... liquidated damages are not recoverable, and at this point the Court feels that it’s bound by that ruling...”⁶

Authority:

Subsurfco v. B-Y Water District, 337 N.W.2d 448 (S.D. 1983)

Dave Gustafson Co. v. State, 156 N.W.2d 185 (S.D. 1968)

Wheeldon v. Madison, 374 N.W.2d 367 (S.D. 1985)

⁶ HT, May 20, 2016, 25:16-22.

Hohm v. City of Rapid City, 2008 S.D. 65

2.

The Dismissal of SKA's Indemnity Claim

(a)

Scheduling orders fall within a trial judge's broad discretion. After the motions deadline, the Sewer District filed a motion for summary judgment, arguing that a prior summary judgment in favor of the Engineer was dispositive of all of Excel's underlying damage claims. ***Did the Trial Court abuse its discretion by denying a late motion?***

(b)

Indemnity is a remedy which is legally independent from the underlying claims, and, under Rule 54(b), intermediate orders do not terminate other claims. ***Is a summary judgment order in favor of a third-party indemnity defendant conclusively binding upon collateral parties?***

Holding Below: The Circuit Court held that SKA's initial summary judgment had no collateral effect upon Excel, and noted that there weren't "any statutes or law that I'm aware of that required Excel Underground to defend that motion." The Sewer District's own motion was denied because "the time for [it to file further] motions is passed." The Court also noted that the Sewer District "did have options at [the time the Project Engineer filed its motion], they could have joined the motion for summary judgment, in which case those issues would have been decided for all of the parties."⁷

Authority:

Dedge v. Kendrick, 849 F.2d 1398 (11th Cir. 1988)

Hagemann v. NJS Eng'g, Inc., 2001 S.D. 102

SDCL 15-6-56(a) and (b)

⁷ HT, January 8, 2018, 28:25—29:4; 29:5-8.

SDCL 15-6-54(b)

3.
Agency

A corporation can perform (or breach) a contract solely through the acts (and omissions) of its agents. The contract in this lawsuit named the Engineer as the Sewer District's representative; witness testimony uniformly confirmed the Engineer's role as an agent for this project; and by statute, the Engineer of a public sewer district is an officer. ***Was it proper to instruct the Jury that the Sewer District was responsible for breaches of the contract, regardless of whether it performed the contract itself or delegated performance to an agent? Even if the instruction was incorrect, was there any prejudice?***

Holding Below: The Circuit Court believed this was proper and gave Instruction 18 regarding agency.

Authority:

Fisher Sand & Gravel v. State, 1997 S.D. 8

Karst v. Shur-Company, 2016 S.D. 35

SDCL 34A-5-26

SDCL 59-6-5

SDCL 59-6-6

4. Emergency Bidding

The Sewer District entered into a half-million dollar completion contract without advertising it or letting it for public bids, by alleging that the situation qualified as an 'emergency' exception. The Sewer District also testified about emergency factors in connection with Excel's termination. Expert testimony challenged the notion that this was an 'emergency,' and Excel faulted the Sewer District for not mitigating its damages. ***Was it error to allow the Jury to learn about the emergency bidding process or to instruct them about the law related to it? Even if incorrect, was there any prejudice? Can an appellant allege prejudice in conclusory fashion, without citing any specific effect, specific examples, or specific testimony?***

Holding Below: The Circuit Court found the completion contract and the emergency issue to be relevant to the overall story, and it gave Instruction 23 regarding emergency bidding, which quoted directly from SDCL 5-18A-9.

Authority:

SDCL 5-18A-9

Kaarup v. Schmitz Kalda & Assoc.,

436 N.W.2d 845 (S.D. 1989)

Sun Mortg. Corp. v. W. Warner Oils, 1997 S.D. 101

5.
Excel's Damages

South Dakota law permits both actual damages and consequential damages for contract breaches, including the recovery of lost profits. Damages are permitted if they are reasonably certain. This Court is highly deferential to a Jury's decision to award damages, and places particular weight on the Trial Court's approval of such an award. ***Is there evidence in the Record to sustain the Jury's award of damages?***

Holding Below: The Circuit Court believed there was evidence necessary to sustain the Verdict and denied the motion for new trial.

Authority:

Prunty Const. v. City of Canistota, 2004 S.D. 78

Stern Oil Co v. Brown, 2018 S.D. 15

Drier v. Perfection, Inc., 259 N.W.2d 496 (S.D. 1977)

Mooney's, Inc. v. S.D. Dep't of Transp.,
482 N.W.2d 43 (S.D. 1992)

STANDARD OF REVIEW

The Sewer District suggests that *de novo* review will govern much of this appeal. Excel disagrees. Instead, most issues in this appeal will be given great deference, and some are simply unreviewable.

For the five issues raised by the Sewer District, Excel suggests that the correct standards of review are as follows.

ISSUE 1 (Liquidated Damages). The Circuit Court granted partial summary judgment to Excel, which extinguished the Sewer District's claim for liquidated delay damages.

Standard of Review for Issue 1: A claim for liquidated damages becomes moot and unreviewable when the verdict forecloses its factual basis. *Wheeldon v. Madison*, 374 N.W.2d 367, 378 (S.D. 1985); *Dave Gustafson & Co. v. State*, 156 N.W.2d 185, 188 (S.D. 1968). The grant of summary judgment is reviewed *de novo*, but "will be affirmed if there is any legal basis to support its ruling." *Rupert v. City of Rapid City*, 2013 S.D. 13, ¶ 8.

ISSUE 2 (Dismissal of Indemnity Claim against SKA). The Circuit Court granted SKA's motion for summary judgment because the Sewer District did not oppose it. (Record 2283 & 2284). The Circuit Court subsequently denied

the Sewer District's motion for summary judgment because it was filed after the scheduling order deadline. (Record 2463 & 2464).

Standards of Review for Issue 2: The grant of summary judgment to SKA is not reviewable because the District agreed with entry of it at the trial court level. *Long v. State*, 2017 S.D. 79, ¶ 19. A trial court's denial of an untimely motion is either reviewed for abuse of discretion, or, the matter is not reviewable. *Corson Vill. Sanitary Dist. v. Strozdas*, 539 N.W.2d 876, 879 (S.D. 1995) (enforcement of scheduling order reviewed for abuse of discretion); *Dedge v. Kendrick*, 849 F.2d 1398 (11th Cir. 1988) (summary judgment motion filed after deadline *per se* unreviewable).

ISSUES 3 & 4 (Agency and Competitive Bidding). The Circuit Court instructed the Jury about agency and the law of competitive bidding, and it allowed testimony about the emergency exception.

Standards of Review for Issues 3 & 4: A trial court's decision to include or deny a particular instruction is reviewed for abuse of discretion, as are evidentiary rulings, which are "presumed correct." *Veith v. O'Brien*, 2007 S.D. 88, ¶ 25. When an instruction is challenged as "incorrect," this Court applies de novo review, with a two-part test: (i) whether the instruction was legally erroneous; and (ii) whether the error was prejudicial (i.e., whether the challenged instruction "in all probability...produced some effect upon the

verdict **and** [was] harmful to the substantial rights of a party). *Bertelsen v. Allstate Ins. Co.*, 2013 S.D. 44, ¶ 41.

ISSUE 5 (Damages). The Jury awarded three categories of damages totaling \$1,569,691.81. The Trial Court denied the Sewer District's motion for a new trial and motion for judgment notwithstanding the verdict.

Standard of Review for Issue 5: "Since the very early days of this state, great deference has been afforded to jury verdicts when an argument is made that they are not supported by the evidence." *Bakker v. Irvine*, 519 N.W.2d 41, 49 (S.D. 1994). This deference involves the following common law tests:

When damages are challenged as "excessive," the jury's damage award "cannot be overturned unless it is so extremely excessive... to strike mankind, at first blush, as being, beyond all measure, unreasonable and outrageous" *Bakker v. Irvine*, 519 N.W.2d 41, 48 (S.D. 1994).

When challenged as "speculative," this Court has said that the only question to be solved and answered is, "*Is there any legal evidence upon which the verdict can properly be based, and the conclusions embraced in and covered by it be fairly reached?*" *Id.*, at 49 (italics in original).

When reviewing a trial judge's denial of a motion for a new trial, or denial of a motion for judgment as a matter of law, this Court employs the

abuse of discretion standard, and will “interpret the facts on a basis most favorable to upholding the jury's verdict.” *Landstrom v. Shaver*, 1997 S.D. 25, ¶ 72; *Ctr. of Life Church v. Nelson*, 2018 S.D. 42, ¶ 14. “If sufficient evidence exists so that reasonable minds could differ, judgment as a matter of law is not appropriate.” *Id.* ¶ 18.

This Court also gives particular weight to the trial judge’s decision to uphold an award of damages because he “has had the benefit of not only hearing and observing the same things as the jury, but also has had the opportunity to observe the jury itself for signs of passion and prejudice...” *Brewer v. Mattern*, 182 N.W.2d 327, 332-33 (S.D. 1970).

ARGUMENT

1. The Sewer District is both legally *and* factually barred from recovering liquidated damages.

Liquidated damages are unavailable for two reasons. First, as a factual matter, the Jury determined that Excel Underground was not responsible for project delays. Its Verdict has rendered the liquidated damages claim moot. Second, as a legal matter, the Sewer District’s liquidated damage provision appears to be void because it functions as a penalty clause. Either reason

offers this Court narrow grounds upon which to resolve the issue of liquidated damages without revisiting *Subsurfco*.

(a) As a factual matter, the Jury has already determined that Excel was not responsible for any project delays, which makes any claim for liquidated damages ‘moot’

This Court has held that liquidated damages for delay are unavailable under a public construction contract when it has been established, factually, that the “delay was not due to any fault or negligence of the contractor”.

Dave Gustafson & Co. v. State, 156 N.W.2d 185, 188 (S.D. 1968).

Just like in the *Dave Gustafson & Co.* case, the contract here contained a provision limiting Excel’s responsibility for delays beyond its control.

Section 14.4 reads as follows:

CONTRACTOR shall not be charged with liquidated damages or any excess cost when the delay in completion of the Work is due to the following: ...unforeseeable causes beyond the control and without the fault or negligence of CONTRACTOR, including but not limited to, acts of nature, acts of OWNER, acts of another CONTRACTOR in the performance of a contract with OWNER, fires, floods...., and abnormal and unforeseeable weather.

Record Part 1, 2795 (Exhibit 1).

At trial, the Sewer District’s theory was that Excel caused the construction delays. The District argued that the facts did *not* excuse Excel

from responsibility for the District's "excess costs" arising from those delays.

The District argued for recovery of the following "excess costs" arising from

Excel's alleged delays:

- \$9,910.77, for porta-potties and pumping septic tanks,
- \$37,125.00, to reimburse homeowners' sewer fees,
- \$445,844 for additional engineering services,
- \$44,000 for interest on a loan. (See, Exh. 556; TT 1235-1237; 1821-22; 94)

(The District also sought \$371,617 for the net costs of hiring a new contractor to complete the project. *Id.*)

Via a special interrogatory, the Jury rejected the Sewer District's theory and determined that the District was "[not] entitled to recover damages from Excel Underground." (Record Part 1, 2672). On appeal, we "interpret the facts on a basis most favorable to upholding the jury's verdict." *Landstrom v. Shaver*, 1997 S.D. 25, ¶ 72.

In a light most favorable to Excel, the Jury applied Section 14.4 and determined that Excel was excused from excess costs due to "unforeseeable causes beyond the control and without the fault or negligence of CONTRACTOR."

This same provision, Section 14.4, would also excuse Excel from any liquidated damages arising from delays beyond its control. But the essential facts about delay have already been litigated. Therefore, even if this Court overturns *Subsurfco*, the Sewer District does not have the facts to support a claim for liquidated damages.

In legal terms, the Sewer District's potential claim for liquidated damages is "moot" and barred by collateral estoppel. The District cannot relitigate the "essential facts" about delay. *Wheeldon v. Madison*, 374 N.W.2d 367, 378 (S.D. 1985) (affirming jury verdict "renders moot" any alternate legal theory premised upon the same factual allegations already rejected by jury). *See, also, Grefe & Sidney v. Watters*, 525 N.W.2d 821, 826-27 (Iowa 1994) (citing 5 Am. Jur. 2d *Appeal and Error*) refusing review when proceedings render claim "moot or abstract"); *Fin-Ag, Inc. v. Pipestone Livestock Auction Mkt., Inc.*, 2008 S.D. 48, ¶ 33 (summary judgment affirmed when *prima facie* case no longer supported in record).

In short, the District's request to overrule *Subsurfco* is now moot and abstract. Even if the law were changed, the facts to support such a claim were already decided.

In addition, the Sewer District's liquidated damage clause appears to be void.

(b) The Sewer District's 'optional' liquidated damages provision is void as a penalty clause

The Sewer District concedes that its liquidated damages provision was *optional*. It states that the Trial Court “wrongfully deprived BLSD of this choice” between liquidated or actual delay damages, and that it “was entitled to make its own choice as to which remedy best suited its evidence and strategy.” (Appellant’s Brief, 17)

An “optional” liquidated damages provision is void and unenforceable; it is a “scheme [which] distorts the very essence of liquidated damages” because it gives the owner “the option of penalizing” the contractor. *Catholic Charities of the Archdiocese of Chi. v. Thorpe*, 741 N.E.2d 651, 657 (Ill. 2000). “Optional” provisions function as penalty clauses and are therefore void. *Id.*; *Lefemine v. Baron*, 573 So. 2d 326, 330 (Fla. 1991); *Board of Educ. of Talbot County v. Heister*, 896 A.2d 342, 352 (Md. 2006); *Zuckerman v. Vanu, Inc.*, 2013 Mass. Super. LEXIS 94, at *24 (Jan. 28, 2013); SDCL 53-9-4; J. Calamari & J. Perillo, *the law of contracts* § 14-32, at 645 (3d ed. 1987) (nicknaming it the “Have Cake and Eat It Clause”).

The Sewer District has asserted its liquidated damages provision was optional. The provision is therefore void. For this reason, and independent of any other argument, the Trial Court was correct to dismiss the District’s

liquidated damages claim. *In re Med. License of Setliff*, 2002 S.D. 58, ¶ 25
(this Court affirms summary judgment upon any rationale available).

***(c) The Sewer District fails in its burden to provide
'compelling' reasons for overruling Subsurfco***

In the alternative, *Subsurfco* should not be overturned, nor does the District show why it should be overruled with retroactive effect. The holding of *Subsurfco* leaves no gray area: “when an owner terminates a contract, the cost of completion is recoverable; the liquidated damages are **not**.” This holding has remained unchanged by any subsequent case or by any of the thirty-five subsequent sessions of the South Dakota Legislature. Public entities and contractors have the right to rely upon *Subsurfco* under the doctrine of *stare decisis*.

This Court is reluctant to overturn precedent retroactively. Such a decision implicates the *Chevron Oil* factors. *Hohm v. City of Rapid City*, 2008 S.D. 65, ¶ 20.

---First, the decision to be applied nonretroactively must establish a new principle of law, either by **overruling clear past precedent** on which litigants may have relied or by deciding an issue of first impression whose resolution was not clearly foreshadowed.

---Second, it has been stressed that we must . . . weigh the merits and demerits in each case by looking to **the prior history of the rule in question,**

its purpose and effect, and whether retrospective operation will further or retard its operation.

---Finally, we have weighed the **inequity** imposed by retroactive application; for where a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the injustice or hardship by a holding of nonretroactivity.

Id., ¶¶ 21-24 (citations omitted, deriving from *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971)).

Abandoning *Subsurfco* in the manner proposed by the District would implicate all three *Chevron Oil* factors. The Court would overrule clear precedent with a new rule, not foreshadowed by any intervening case or legislation. Retroactively reversing *Subsurfco* inequitably favors the Sewer District, to the detriment of Excel. And the evidence uniformly demonstrated that the public was not subject to any meaningful harm for which liquidated damages would provide a remedy.⁸ “[T]he litigants and trial court were well placed in relying on this settled law.” *Hohm*, ¶ 23.

It is also not clear that the *Subsurfco* opinion was wrong in the first place. Excel agrees with the analysis presented by Granite Re in its

⁸ “[S]eptic tanks have been used for decades” at Brant Lake. (TT 616:25-617:3) “[O]ne more year of septic tanks wasn’t going to cause a catastrophe....” (TT 582-583).

Appellee's Brief. *Subsurfco* appears to be a sound rule, adopted to protect contractors who continue to work past the deadline, in good faith, to try and complete a public project.⁹

By terminating the contractor, the Sewer District subverted the contractor's good faith. The rule of *Subsurfco* precludes public entities from exploiting that good faith, and public policy rightfully constrains the District's Contract. See, *State v. Nuss*, 114 N.W. 2d 633, 635 ("freedom of contract is a qualified, and not an absolute, right.")

The remainder of the Sewer District's argument and authority relates to the circumstance where a contractor *abandons* the project.

Abandonment is perhaps a circumstance for which *Subsurfco's* holding could be modified. But abandonment is not what happened here. Excel slogged onward. It continued working to bring the project online, and even offered

⁹ In *Subsurfco* and the opinions it relies upon, each contractor was abruptly terminated while making earnest attempts after the deadline to complete the project. *Subsurfco* at 451 (contractor believed problems were from a defective design, and offered to continue repairs and complete project); *United States v. Maryland Cas. Co.*, 25 F.Supp. 778, 779 (D.Me.1938) ("with the consent of the Government, the contractors were making efforts to obtain new equipment and finish the undertaking"); *United States v. American Surety Co.*, 322 U.S. 96 (1944).

to work on the punch list items throughout the winter of 2014. *See*, Exhibit 74 (Record Part 2, 115).

In short, the Sewer District does not present “compelling reasons” to overturn *Subsurfco*. At best, the District presents policy arguments. Those decisions are best left for the Legislature, whose purview includes liquidated damages and public works contracts. *See, e.g.*, SDCL 53-9-4; SDCL 53-9-5; Chapters 5-14; 5-18A; 6-8B; 9-42; and 31-5. (Notably, the Amicus did not join the District’s request to overturn *Subsurfco*.)

The Sewer District’s claim for liquidated damages became moot when the Jury decided that Excel was not responsible for delays. The “optional” liquidated damages provision is void as a matter of law. And there are no compelling reasons to overturn *Subsurfco* with retroactive effect.

We next address the Sewer District’s claim for indemnity, and the effect, if any, that it had upon collateral parties.

2. The dismissal of the indemnity claim against SKA had no collateral effect upon Excel’s underlying claim.

The Sewer District abandoned its own indemnity claim and hoped this dismissal would automatically become binding upon Excel’s entire case. The Sewer District now alleges error from the denial of a motion which it filed

long after the deadline, on an issue without legal precedent, and which embraced only a narrow portion of Excel's damages.

The Trial Court correctly identified the gamesmanship involved with this posture, and it correctly refused to give the dismissal of that claim any more significance than it deserved.

In conjunction with the Trial Court's motions deadline, the Project Engineer filed for summary judgment on the Sewer District's indemnity claim against it. (Record Part 1, 1235-1237; Record Part 1, 2083; Record Part 1, 959-980). For tactical and economic reasons, the Sewer District did not resist the motion: the District had discovered that Schmitz Kalda had neither assets nor insurance to pay a judgment for indemnity. (Record Part 1, 2462; 2428.) But while consenting to dismissal of its indemnity claim, the District asserted that this automatically meant, as a matter of law, that Excel's damage claims were also non-viable.

The Sewer District did not advance this position in a motion, but, instead, merely proffered the theory in its responsive brief: arguing that Schmitz Kalda's victory on the indemnity claim required the dismissal of Excel's claims. (See, Record Part 1, 2018) SKA had not asked for this relief, and the Sewer District did not file a dispositive motion seeking this prior to the motions deadline.

At the first hearing, the Trial Court granted summary judgment to SKA, and determined that any collateral significance of SKA's summary judgment was not properly before the court. (Appellant's Appendix 098) The Trial Court simply granted the motion because the party against whom it had been filed (the Sewer District) had conceded it.

Subsequently, and now long after the motions deadline, the Sewer District filed a summary judgment motion arguing that the SKA Order was collaterally binding upon Excel. The Sewer District had not filed a motion to extend the scheduling order deadline, nor did it provide any cause for its late filing.

At the second hearing, the Trial Court denied the District's summary judgment motion because it was untimely. As the Trial Court noted, "[t]actically Brant Lake made a decision.... It could have filed for summary judgment at the same time [that Schmitz Kalda filed its motion]. [Brant Lake] could have filed the same summary judgment motion in regards to [its] liability." (Record Part 1, 2542.) Because the Trial Court denied the motion as a matter of discretion, it did not need to address the merits..

Excel agrees that the untimeliness of the District's motion is a sufficient basis upon which to affirm the Trial Court. But even on the merits, the motion would still fail because it has legal and factual holes. We address

this issue in three parts: (a) procedurally, this is a scheduling order issue, which is either unreviewable, or, reviewed for an abuse of discretion; (b) legally, the Sewer District offers no actual authority in support of its premise; (c) as a factual issue, the Sewer District overstates the breadth of SKA's motion for summary judgment.

a. The Trial Court correctly denied the Sewer District's untimely motion, by using its discretion to enforce a scheduling order

In the interests of saving space, Excel agrees with Granite Re's treatment of this sub-issue, while offering three additional authorities. "[A] court order is not an invitation, request or even a demand; they are mandatory. Those who totally ignore them . . . should not be heard to complain that a sanction was too severe." *Jenco, Inc. v. United Fire Grp.*, 2003 S.D. 79, ¶ 18. Some courts hold that a summary judgment motion filed after the deadline is *per se* unreviewable. *E.g., Dedge v. Kendrick*, 849 F.2d 1398 (11th Cir. 1988). Alternately, a trial court's enforcement of its scheduling order is reviewed for an abuse of discretion. *E.g., Corson Vill. Sanitary Dist. v. Strozdas*, 539 N.W.2d 876, 879 (S.D. 1995). In either case, the result is the same, and the Trial Court's denial should be affirmed.

Even if the Trial Court had reached the merits, there is no legal authority which made SKA's judgment collaterally binding upon Excel.

b. The Sewer District presents no actual authority for its theory, while ignoring common sense (and three contrary rules of law)

In simplest terms, the Sewer District's legal argument is that an unopposed summary judgment in favor of a third-party defendant becomes automatically and forever binding upon collateral parties. The Sewer District could not find *any* authority for its theory, or even for the proposition that Excel had a duty to defend SKA's motion seeking summary judgment:

the court:	Is there any authority that relates to summary judgments that make a Plaintiff respond to a Third-Party Defendant?
counsel for sewer district:	The Plaintiff responds to a Third-Party Defendant, I'm not aware of any of those....

(Appellant's Appendix, 112.)

There are at least three rules or statutes which directly contradict the Sewer District's theory: Rule 56, Rule 54(b), and the common law of indemnity. The Sewer District's theory also belies common sense.

(i) Common sense tells us this is a bad theory

Practically speaking, there are good reasons for allowing the Trial Court to extinguish a claim like the one against SKA, without affecting other

claims or parties. As a matter of trial efficiency, the Trial Court's decision here allowed SKA to be excused as a party to the trial...a party whom NONE of the other parties needed or wanted there.

The Sewer District's theory would cause unnecessary resistance to summary judgment motions, force non-essential parties to bear the burdens of trial, and make trials needlessly more complicated. The Sewer District's theory also encourages collusion and gamesmanship, where sham claims for indemnity could be brought and then later used for their collateral effect, rather than for their actual merits.

The District asserts that the Trial Court placed it "in an impossible position," and then suggests that the "only way for [the District] to oppose the motion was to abandon its position that Excel was not entitled to any damages...." (Appellant's Brief, 18-19)

In actuality, the District made its own mess. If the District did not want to fight its contractor and its engineer at the same time, it could have simply waited to seek indemnity in a subsequent proceeding after its liability was clear.¹⁰ Or, if it wanted to test the strength of Excel's damages claim, the District could have filed its own timely motion, while, in the alternative,

¹⁰ Appellant's Appendix 110 (HT, lines 20-23) (counsel admission)

challenging SKA's motion. Or, simplest of all, the District could have voluntarily dismissed its indemnity claim when it discovered that it wasn't financially viable.

Rather than address the merits of Excel's actual claims, the District attempted to win the case upon a procedural gimmick that has no basis in any case or statute.

(ii) Rule 56 contradicts the Sewer District's theory

The language of Rule 56 indicates that SKA's motion for summary judgment could be decided on its own, without implicating Excel's claims. By its language, Rule 56 says that summary judgment relief is particular to the party who files for it: "a party ...may...move...for a summary judgment ***in his favor.***" SDCL 15-6-56(b). Nothing within the Rule extends this summary judgment "in favor of" any other parties. If other parties want summary judgment, they need to file their own motion. *Id.*, SDCL 15-6-56(a); SDCL 15-6-7(b).

(iii) Rule 54(b) contradicts the Sewer District's theory

The language of Rule 54(b) also tells us the District is mistaken. Rule 54(b) says that intermediate rulings do not terminate other claims. "[A]ny order...which adjudicates fewer than all the claims ...shall not terminate the action as to ***any of the claims*** or parties...." SDCL 15-6-54(b). *See, also,*

Gander Mt. Co. v. Cabela's, Inc., 540 F.3d 827, 830 (8th Cir. 2008)

("interlocutory orders can always be reconsidered and modified by a district court prior to entry of a final judgment."); *Shaffer v. Honeywell*, 249 N.W.2d 251, 260 (S.D. 1976) (giving "finality" to a decision "prior to entry of [final] judgment would inhibit the trial court"). Rule 54(b) allowed SKA's motion to be decided on its own, without implicating Excel's claims.

(iv) *Our common law of indemnity contradicts the Sewer District's theory*

The law of indemnity also confirms that SKA's motion for summary judgment would be decided independently from Excel's claim for damages.

"Indemnity is a separate cause of action that arises independent of the underlying liability." *Hagemann v. NJS Eng'g, Inc.*, 2001 S.D. 102, ¶ 16.

There is nothing inconsistent about dismissing an indemnity claim while preserving an underlying claim, and it is most certainly not Excel's job to help the District prevail on an indemnity claim.

In contrast to these black and white rules, the Sewer District cites to two out-of-state cases with inapposite facts (*Estate of Rille* and *Johnson v. Bundy*). In both cases, an injured party sued multiple defendants, and an intermediate grant of summary judgment was later deemed to preclude a later claim for contribution. Those are not the facts here.

Furthermore, the court in *Estate of Rille v. Physicians Ins. Co.*, 728 N.W.2d 693, 709 (Wisc. App. 2007) makes it clear that its holding was not based upon an automatic rule, but, instead upon the trial court's discretion to choose the effect of its prior rulings. In simplest terms, the Sewer District demanded judgment as a matter of law, yet premised solely upon a matter of discretion. These concepts are incompatible.

The Sewer District makes the same mistake about the Trial Court's *sua sponte* power to grant summary judgment in *Leonhardt v. Leonhardt*, 2012 S.D. 71, ¶ 12. There is no authority suggesting a Trial Court errs as a matter of law when it fails to exercise its discretion to grant judgment *sua sponte*.

Here, the Sewer District decided to abandon its indemnity claim for financial reasons. The Sewer District's choice not to seek indemnity from its agent has no collateral effect upon Excel's underlying claims.

c. The Sewer District misunderstands and overstates the significance of SKA's original motion

Finally, the Sewer District's theory also suffers from factual problems. The Sewer District mistakenly believed that it could pass-through 100% of Excel's damages to SKA. This belief was mistaken, and SKA actually pointed this out.

As SKA explained, “some of the damages that [the Sewer District] would attempt to pass through to SKA are contract amounts that would be owed to Excel by [the Sewer District] that cannot, as a matter of law, be passed along to SKA.” (SKA’s Brief, Record Part 1, 1245.) In addition, SKA’s motion only challenged a selected portion of Excel’s damages. The Sewer District was therefore mistaken in its assertion that a summary judgment in favor of SKA would nullify Excel’s entire lawsuit.

In conclusion, the District filed an untimely motion premised upon inapposite authority. The Trial Court did not err by denying it.

We turn, next, to the issue of agency.

* * * * *

3. The Agency Instruction caused no prejudice, it is legally correct, and it did not result in the recovery of ‘malpractice’ tort damages.

a. The Agency Instruction caused no prejudice because Excel did not recover any tort damages.

The Sewer District argument about Agency puts the cart before the horse. The Sewer District believes that Excel recovered tort damages for “an apparent malpractice claim” against the Project Engineer premised on “professional negligence” and the theory of *respondeat superior*.

But which of Excel’s damages were recovered under this tort theory?

The District doesn’t address that fundamental question because it can’t. All

three categories of Excel's damages arose from the District's own duties under the Contract:

- Excel recovered \$285,921.81 for its retainage, a sum which the District *conceded* Excel was undisputedly owed **under the Contract.**
- Excel recovered \$483,770.00 for unpaid or underpaid Contract work, which were labeled on the Verdict Form without any objection as, "Other Payments **Under the Contract.**"
- Excel recovered \$800,000 for its lost profits because of the Sewer District's decision to wrongfully **terminate the Contract** and did not pursue its bond claim in good faith.

None of those categories of damages were premised upon a tort theory. In each instance, the Sewer District owed the money because it breached an express or implied promise under the Contract. (In contrast, the Project Engineer did not owe the retainage held by the Sewer District, nor was he the one responsible for paying Excel for its work, nor did he vote to terminate the Contract and file a specious bond claim.)

Absent an actual award of tort damages, there can be no prejudice from the Agency Instruction. The rest of the Sewer District's argument is merely an academic exercise about the nature of agency.

b. The Agency Instruction correctly reflects the law of agency with relation to performance of a contract

The Sewer District’s fundamental error is by equating the word “agent” solely with tort law. The Amicus makes this same error. But the doctrine of agency is not confined to torts; it extends far beyond, including into contract law and the law of corporations.

However, without even consulting a statute or treatise, it is readily apparent that something is wrong with the Sewer District’s *respondeat superior* argument and the Amicus’s “control” argument. If I enter into a contract with someone, I am responsible for breaches of the contract, regardless of whether I perform the contract personally, or through an employee, or by an independent contractor. The duties flow from the contract document itself, not from the legal nuance of who helps me perform it, or how much control I have over that other party.

The essence of the Agency Instruction is to explain that the use of a third-party to perform a contract provides no shield for the principal’s direct contract liability. Yes, in some circumstances, tort duties *might* flow from the independent contractor to injured third parties. But that question arises separately from the contract claim.

The Sewer District and the Amicus get off track by glossing over the distinction between contract duties and tort duties. As this Court has explained, “tort obligations are, in general, obligations that are imposed by

law on policy considerations to avoid some kind of loss to others. They are obligations imposed apart from and independent of promises made and therefore apart from any manifested intention of parties to a contract or other bargaining transaction.” *Fisher Sand & Gravel Co. v. State by & Through S.D. DOT*, 1997 S.D. 8, ¶ 14. To paraphrase the Court in *Fisher*, the Sewer District and the Amicus “fail to recognize that the contract between these parties created their rights and obligations. These duties are implied by the parties' own promises, and not imposed by law.” *Id.*, ¶ 17.

The Sewer District’s *contractual duties* are straightforward, and they are contained within the promises of the Contract. Those promises were the triggers that gave rise to Excel’s damages. For example, the Sewer District made the following promises in its Contract:

- to provide a “good engineer” during the project,¹¹
- to provide Excel with adequate plans from which to work,¹²
- to accept liability for defects in those plans,¹³

¹¹ TT 796:21-25 (footnotes used here for readability)

¹² Instruction 14 (Record Part 1, 2656)

¹³ *Id.* An Owner bears responsibility for defects in the plans. *Mooney’s, Inc. v. South Dakota D.O.T.*, 482 N.W.2d 43, 45 (S.D. 1992).

- to excuse Excel from delays that were beyond its control, including severe weather events,¹⁴
- to pay for the costs of testing not normally conducted,¹⁵
- to obtain all easements ahead of time, including establishing the exact location of the grinder stations,¹⁶
- to pay Excel for the work in a timely manner and in an accurate manner,¹⁷
- to willingly make modifications (change orders) to the contract that reflected a new scope of work,¹⁸ and
- to deal with Excel in good faith, *i.e.*, by not engaging in “evasion of the spirit of the contract, abuse of power to determine compliance, or interfere with (or fail to cooperate with) [Excel’s] performance.”¹⁹

As the Jury evaluated the District’s promises, it necessarily considered who the District assigned to carry out its promises, as well as the manner in

¹⁴ *Id.*; Exhibit 1 (Record Part 1, 2795, Section 14.4); (2791, Section 7.1)

¹⁵ (2861, Section 1.2.E)

¹⁶ Exhibit 1 (2800, Section 25.1; and 2858, Section 1.2.C; and 2843, Section 1.5.A.1)

¹⁷ Exhibit 1 (2796, Section 18.1)

¹⁸ Exhibit 1 (2794, Section 12.1 and 13.1)

¹⁹ Jury Instruction 17 (Record Part 1, 2661).

which the promises were carried out. Part of this inquiry required the Jury to understand the standards by which engineers operate. This was true for evaluating Excel's contract claims against the Sewer District, as well as to evaluate the District's contract claims against Excel.²⁰

The Sewer District is unable to identify *any* instance at trial in which the Agency Instruction created an additional duty beyond the express and implied duties contained within the Contract itself. Instead, the Agency Instruction explained the common-sense rules of contract: that the acts and omissions of the Project Engineer in carrying out the District's duties under this Contract are binding upon the District itself to determine its compliance with the Contract.

The Agency Instruction correctly reflects and embodies several aspects of our state's laws of agency:

- "a corporation can act only through individuals acting as agents for the corporation." *Nelson v. Web Water Dev. Ass'n*, 507 N.W.2d 691, 695 (S.D. 1993).

²⁰ The Sewer District similarly asked its own expert to educate the Jury about what "a reasonable contractor would do" in order to evaluate whether Excel committed contract breaches. TT 1393; 1395.

- when performing a contract, a principal and an agent are each “deemed to have notice of whatever either has notice of” and “[t]he fact that knowledge was not actually communicated to the principal will not prevent operation of the general rule.” SDCL 59-6-5; *Aetna Life Ins. Co. v. McElvain*, 363 N.W.2d 186 (S.D. 1985).
- “[a] principal is bound by an incomplete execution of an authority, when it is consistent with the whole purpose and scope thereof...” SDCL 59-6-6.
- the Agency Instruction is also a corollary to the rule set forth in Instruction 14, which absolves the contractor from responsibility when its engineer’s plans contain defects. (Record Part 1, 2656).

When considering the Instructions as a whole, the Agency Instruction did not create new tort duties. Instead, the Agency Instruction clarified that the Sewer District’s promises would be evaluated the same, whether the District carried them out or assigned someone else to perform its promises. This is not vicarious tort liability or *respondeat superior*. This is basic contract law.

The Trial Court recognized this. During a side-bar to address an objection, the Trial Court explained why the engineer’s standard of care is relevant to the contract claim, and, further, recognized that discussing the

standard of care did *not* make this a trial about negligence claims: “The relevance of [the Project Engineer’s] engineer[ing], or their conduct, is whether or not that led Brant Lake to unlawfully terminate the Contract....What we're not going to get into is whether or not Excel had legal claims against the engineer, and whether or not Excel sued them.” (TT 743-744)

The Sewer District and the Amicus cite to a series of tort cases, which don’t apply here. However, one of the District’s cases also involved a breach of contract, and the holding supports Excel’s argument. In *Collins Co., Inc. v. City of Decatur*, 533 So.2d 1127, 1130 (Ala. 1988), the plaintiff sued the city for breach of contract because its engineer had failed to provide a table of wage rates. But “Collins fails, however, to indicate where this duty to reference wage rates appears in the City-Collins agreement.” *Id.* Without that contractual duty, there could be no breach by either the City or its agent or its independent contractor.

In short, the Agency Instruction was not legal error. The Jury used this instruction to find the Sewer District liable for breaching the promises in its contract.

The undisputed facts also supported the conclusion that the Project Engineer functioned as the Sewer District’s agent for this Contract.

c. *The evidence demonstrated that the Project Engineer was the agent of the Sewer District for carrying out this Contract*

The facts received at trial unequivocally demonstrated that the Project Engineer was the agent of the Sewer District. The President of the Board acknowledged this in his testimony:

Q And during 2012, 2013, and 2014, Mr. Buell and Schmitz Kalda served in the function of the engineer, correct?

A Yes.

Q And they would send letters on behalf of the board, correct?

A Yes.

Q And they would do so at the direction of the board, yes?

A Yes.

...

Q And carried out the functions of an engineer for the project with the full blessing of the board?

A Yes.

The Contract provided that the “ENGINEER shall act as OWNER’S representative during the construction period.” Record Part 1, 2800. See, black’s law dictionary, 134 (7th ed. 2001) (defining *agent* as “a representative”).

By statute, the Engineer was also the District’s agent. In Chapter 34A, the Legislature declares a sewer district’s engineer to be a corporate officer of the district: “The board of trustees shall have the following powers: (1)

To appoint a treasurer and a clerk, an engineer and attorney for such sanitary district and fix their compensation. Such officers shall hold their respective offices during the pleasure of said board, and shall give bond for the faithful performance of their duties.” SDCL 34A-5-26; *and see* Exhibit 31 (Board’s minutes include officer reports, including “treasurer’s report” and “engineer’s report”). “Officers are agents of corporations and act on their behalf.” *Wojewski v. Rapid City Reg’l Hosp., Inc.*, 2007 S.D. 33, ¶ 24 n.6.

The Sewer District also attributed agency to the Project Engineer within its own Third-Party Complaint, stating: “As the engineer, SKA performed services on behalf of BLSD, working with Excel to complete the subject project.” (Record, 960). *See*, american heritage dictionary, 3rd ed., 167 (“On behalf of means as the agent of; on the part of.”)

Even the Engineer himself recognized his role as the agent of the Sewer District: he testified that he had a duty to work “in good faith” with Excel Underground. (TT 501:21-25). Since the Engineer and Excel Underground did not have a contract between them, the only source of this good faith duty was the Sewer District’s contract with Excel.

The Agency Instruction was both legally accurate and factually accurate.

d. Counsel did not ask the Jury to award tort damages, nor did the Jury receive any instructions which would have allowed them to

Finally, the Record is clear that Excel's Counsel did not ask the Jury to award tort damages. On page 24 of its brief, the Sewer District provides a misleading excerpt from Excel's closing argument, using ellipses to hide what was really said. Here is that same passage, with **boldface italics** to show the narrow excerpt quoted by the District:

The Board and the District are precluded from saying, "We relied upon our engineer so it's not our fault." That's not how this works. ***The District has an arm, and its hand includes the members of the board, it's attorney, and the engineer. They are agents of the District. The District can only accomplish things by using that arm and that hand, and so everything that happens on that hand belongs to the body, belongs to the Sanitary District itself.*** They cannot argue, or escape liability by pointing fingers in this trial, it's legally impermissible.

Likewise, I don't think that they can stand up and say we're a volunteer board, and therefore we're held to a different standard. That's not the case. They ran for office, they serve on a public board, and ultimately it's not actually the board that signed the Contract, the District signed the Contract. ***The District is responsible*** for what it does, for the agreements it makes, for the mistakes it makes, and ***for the breaches of all of its agents.*** (TT 1784)

Excel's counsel made this argument immediately after reading the Agency Instruction to the Jury. In proper context, counsel's argument was that the District is responsible for the agreements it makes and for the contract breaches of all of its agents. This was clearly not a request for tort damages.

We do not confine our review to just this single instruction, however. Even if a particular instruction "might suggest the jury considered [an improper theory], all of the jury instructions, including the special-verdict form, must be read together." *Karst v. Shur-Company*, 2016 S.D. 35, ¶ 9. *Id.*, ¶ 32. "Juries are presumed to follow instructions of the circuit court." *Id.*, ¶ 33.

The rest of the instructions uniformly set forth the standard to award damages for a breach of contract, rather than for tort liability. Instructions 12, 15, 16, and 17 addressed Excel's breach of contract claim and the duty of good faith. (Record Part 1, 2654-2657.) Instructions 19, 20, and 21 addressed the measure of damages for a breach of contract. (Record Part 1, 2661-2663.) And the Special Verdict Form provided blanks for damage categories which matched the contract damages described in Instruction 20. (Record Part 1, 2672.)

Taken as a whole, and giving the Jury the presumption of following these instructions, we can conclusively say that the Jury was not instructed to award tort damages upon a vicarious liability theory, and counsel did not ask the Jury for such damages. Instead, every item of damages was required to emanate from the Sewer District's contract with Excel.²¹

Excel argued for and recovered only contract damages arising out of the Sewer District's broken promises. The Agency Instruction correctly stated the law governing this contract dispute, and it matched the evidence.

4. The Trial Court did not err by allowing evidence and an instruction on competitive and emergency bidding.

The Circuit Court correctly instructed the Jury regarding the emergency exception to South Dakota's competitive bidding law. The wording of Instruction 23 quotes directly from SDCL 5-18A-9. In pertinent part, the instruction advised that:

A purchasing agency may make or authorize others to make an emergency procurement without

²¹The Amicus suggests that "the economic loss doctrine prevents tort damages in contract actions." The Amicus misstates and then misapplies the rule.

In *City of Lennox v. Mitek Industries*, 519 N.W.330 (S.D. 1994), this Court held that economic losses in UCC cases are limited to UCC remedies. This is not a UCC case, and the *Lennox* holding has never been extended beyond UCC cases. Instead, consequential contract damages remain available, and, in fact, both sides pursued them in this lawsuit. We discuss Excel's consequential contract damages in Section 5, below.

advertising the procurement if rentals are not practicable and there exists a threat to public health, welfare, or safety or for other urgent and compelling reasons....

Record Part 1, 2665 (Instruction No. 23); *and compare* SDCL 5-18A-9.

A trial court's decision to include a particular instruction is reviewed for abuse of discretion. *Vetter v. Cam Wal Elec. Coop., Inc.*, 2006 S.D. 21, ¶ 10. A trial court's decision to include or exclude evidence is also reviewed for abuse of discretion. *Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶ 30 (objecting party has burden to show that prejudice will "substantially outweigh probative value"). "The term 'prejudice' does not mean damage to the opponent's case that results from the legitimate probative force of the evidence; rather it refers to the unfair advantage that results from the capacity of the evidence to persuade by illegitimate means." *Kaarup v. Schmitz, Kalda & Associates*, 436 N.W.2d 845, 850 (S.D. 1989). The judicial power to exclude relevant evidence "*should be used sparingly*." *Id.* (emphasis in original).

The two questions, then, are whether the Trial Court abused its discretion by allowing evidence about competitive bidding, or by giving Instruction 23.²²

The Trial Court had at least two valid reasons to allow this evidence, and, therefore, to allow Instruction 23. This evidence was relevant to the question of whether the Sewer District mitigated its damages, and also relevant because Excel was entitled to challenge the Sewer District's assertion that the termination was somehow motivated by a public emergency.

Before we address those two reasons, Excel first notes how difficult it is to respond to the Sewer District's argument because it lacks any specifics.

(a) The District makes non-specific claims of 'prejudice'

Although the Sewer District asserts that it was "prejudiced" by certain testimony related to competitive bidding, it offers no citations to the Record, quotes no testimony, and gives no analysis of any such testimony. The Amicus is equally vague, reciting no suspect testimony, and failing to explain any alleged prejudice. The Sewer District offers even less analysis

²² The *wording* of Instruction 23 was not error because it directly quotes a state statute. When instructions "correctly state the law... they are sufficient." *State v. Birdshead*, 2015 S.D. 77, ¶ 14.

about the prejudice it claims from Instruction 23. The entirety of its argument about Instruction 23 is a single phrase: “giving an instruction made the improper argument seem important was reversible error.” (Appellant’s Brief, p. 26.)

It is *the Sewer District’s burden* to demonstrate prejudice with particularity. *Sommervold v. Grevlos*, 518 N.W.2d 733, 743 (S.D. 1994). Failing to cite to any challenged testimony means that the Court has nothing to review. As a matter of law, we ask this Court to reject Issue 4 because the District failed to cite to the Record, failed to carry its burden, and made only conclusory claims of prejudice.

In the alternative, we offer the following arguments.

(b) The topic of “emergency” was relevant to Excel’s termination and the overall project

First, any testimony about the topic of emergency was used to counter assertions the Sewer District made about Excel’s termination. The Sewer District alleged that the situation it was facing in January 2014 was an “emergency” which justified removing Excel from the entire project. (Record Part 2, 1253:25). The Sewer District also introduced Exhibit 549, which contained the minutes in which the Board declared a state of emergency. (Record Part 2, 799).

In response, Excel probed various witnesses about the validity of this claim of an “emergency.” (TT 654:1-655:8; TT 1260:14-20). The testimony demonstrated that the District did not treat this situation like a time-sensitive emergency. Instead, the District waited two months to issue its declaration of emergency, waited four more months after that to hire a completion contractor, and then failed to include any deadlines in its completion contract. (Record Part 2, 2466-2469, Exhibit 549, TT 1288:16-1290-1291; Record Part 2, 799; TT 718:23-719:7)

The testimony also revealed that this half-million dollar completion contract was less of an “emergency” and really just a “punch list.” . (*E.g.*, TT 594:9-11; 713-728)

Excel’s expert found it particularly significant that the completion contract contained no deadlines. (*Id.*) In his opinion, an actual emergency situation would necessitate deadlines in order to ensure that the emergency is rectified. (*Id.*) Instead, without deadlines, the completion contract work lagged on for fifteen months. (TT 719:8-10; TT 1290:21-1291-2).

The completion contract and the alleged emergency were squarely relevant to the overall dispute between the parties, as well as to the District’s justification for termination.

(c) Instruction 23 relates to the Sewer District’s duty to mitigate

The Emergency Instruction and emergency testimony were also appropriate because they related to the Sewer District's duty to mitigate its damages. The preceding instruction (#22) advised the Jury about the duty to mitigate. (Record Part 1, 2664). Recall, the District alleged that Excel was responsible for all of the engineering fees that continued to accrue during this alleged emergency, but for which it established no completion deadlines.

Taken together, Instructions 22 and 23 advised the Jury that the Sewer District had a duty post-termination to use reasonable diligence and effort to minimize the cost of completing the project. The Jury could fairly conclude that following (or ignoring) the rules and typical practices associated with public bidding were evidence of the Sewer District's "reasonable diligence" or lack thereof. This is not error. This is the law.

The Sewer District attempts to argue that Excel lacks "standing" to challenge the completion contract. This is a red herring. Indeed, it would be a rare occasion that *any* party to a breach of contract action would *ever* have standing to challenge the validity of the other party's post-termination contracts. The correct question is not whether the underlying completion contract can be (or was ever) challenged, but, instead, whether the Sewer District used "reasonable diligence and effort" to enter into that contract in the first place. *Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc.*, 2011

S.D. 38, ¶ 16; *Sun Mortg. Corp. v. W. Warner Oils*, 1997 S.D. 101, ¶ 27, (“affirmative steps as are appropriate in the circumstances to avoid loss”).

The Sewer District also claims that Instruction 23 was prohibited because Excel’s expert agreed that the total cost of the completion contract was “reasonable.” That single piece of testimony did not nullify the need for the instruction. For starters, the Jury was free to reject Mr. Carr’s testimony, or to limit its weight. The Jury also heard testimony that the completion contract contained relatively basic items that were merely a “punch list.” (TT 502:19-504:20) In addition, Mr. Carr also agreed that if the matter had been publicly bid, Excel could have participated by bidding \$1.00 in order to complete the work itself. (TT 1293:13-24) Accordingly, the Jury could infer that the half-million-dollar price tag for a privately bid project was not a suitable attempt to mitigate.

In any event, the issue became moot when the Jury rejected the Sewer District’s claims. In a light most favorable to the Verdict, the Jury excused Excel from damages altogether under Section 14.4 because the delays were beyond its control. The Record provides ample evidence upon which the Jury could do so. In light of the Record in its totality, it is not credible that the Jury “punished” the Sewer District because of the

Emergency Instruction, and the District provides no specifics upon which to reach that conclusion.

Instead, the damages awarded to Excel were founded upon contract breaches and ample, reasonable evidence. We address damages next.

* * * * *

5. The Jury's Verdict for damages should be affirmed.

The Sewer District makes four arguments regarding Excel's damages:

- The District suggests that the original, face value of a contract is the upper limit for damages in a breach of contract action (and the Amicus attempts to make this same argument). The District and Amicus ignore this Court's caselaw regarding consequential damages, as well as the principles of a "unit-bid" contract allow for damages in excess of the initial "face value."
- The District suggests that the lost profits award was both speculative and excessive. The District ignores substantial evidence within the Record which corroborated the lost profits figure using two, independent methods. In addition, the District elected not to present any expert testimony of its own on the lost profits issue.
- The Sewer District complains that Excel recovered damages for "items that were not in the contract." The District is mistaken: all six of the challenged items *were* addressed within the Contract language, and the Jury heard credible evidence to support payment of these items.
- The Sewer District claims that the Jury's award for open-trenching in Spawn's Addition is error because Excel could have anticipated the problem. In fact, Excel *did* anticipate the issue, alerted the Engineer, and was told "we will cross that bridge when we get there."

None of these four arguments identifies reversible error. We give great deference to a Jury's award of damages, and each item of damages was supported by substantial evidence.

(a) The recovery of damages is not limited by the “face value” of a unit-bid contract

Although the Sewer District and Amicus assert that that “the maximum Excel can recover is the difference between the [bid amount] and what it was actually paid,” this Court flatly disagrees: “there is no precedent barring a claim for compensation in excess of the contract.” *Mooney's, Inc. v. S.D. Dep't of Transp.*, 482 N.W.2d 43, 45 (S.D. 1992).

There are two reasons why Excel’s recovery of damages can exceed the initial “face value” of \$2.7 million: first, with a unit-bid contract the contract value remains in flux until the end of construction, and, second, the recovery of consequential damages is not dependent upon the contract price.

Unlike a “lump sum” contract which uses a fixed price from the outset, a “unit-bid contract” invites the Contractor to submit unit-price bids for estimated quantities of various work items under the contract. “This type of contract is used where the final quantities of work cannot be determined with accuracy until final completion.” *Prunty Constr., Inc. v. City of Canistota*, 2004 S.D. 78, ¶ 9. Excel’s initial bid of \$2.7 million was “subject to adjustments during the project” and the Contractor is entitled to payment upon final quantities. *Id.* ¶¶ 14, 23.

Second, the Sewer District fails to recognize the distinction between *direct* and *consequential* contract damages. Very recently, this Court explained the difference: “Direct damages refer to those which the party lost from the contract itself—in other words, the benefit of the bargain—while consequential damages refer to economic harm beyond the immediate scope of the contract.” *Stern Oil Co. v. Brown*, 2018 S.D. 15, ¶ 23. *See, also, Beck v. Farmers Ins. Exch.*, 701 P.2d 795, 801 (Utah 1985).

Under South Dakota law, lost profits may fall within either category. *Id.* at ¶ 22. “Lost profits are consequential damages when, as a result of the breach, the non-breaching party suffers loss of profits on collateral business relationships.” *Stern Oil Co. v. Brown*, 2018 S.D. 15, ¶ 22. *See, also*, black’s law dictionary 445-46 (9th ed. 2009) (defining “consequential damages” as “losses that do not flow directly and immediately from an injurious act but that result indirectly from the act”).

For at least seventy years, this Court has allowed breach of contract litigants to recover lost profits from the interruption or depression of its normal business operations. This Court does not require those profits to be based upon existing customers or agreements, and this Court permits such lost profits to be recovered against public entities:

- *Table Steaks v. First Premier Bank, N.A.*, 2002 S.D. 105 (lost profits permitted based on forecasts from past financial records and credit card sales)
- *Arcon Constr. Co. v. S.D. Cement Plant*, 349 N.W.2d 407, 415 (S.D. 1984) (lost profits available for periods when its equipment was idle)
- *Atyeo v. Paulsen*, 319 N.W.2d 164, 166 (S.D. 1982) (lost profits available for future farming operations, in spite of “the inherent uncertainties involved in predicting future farm income”)
- *Drier v. Perfection, Inc.*, 259 N.W.2d 496, 506 (S.D. 1977) (lost profits permitted based on business records and owner’s knowledge of new work that would have been available)
- *Lien v. Nw. Eng'g Co.*, 39 N.W.2d 483, 490 (S.D. 1949) (lost profits recovered by contractor based upon projected resale of quarry rock to unknown, future third parties).

“Lost profits may be recovered under the reasonable certainty test, and admissibility of evidence rests largely in the discretion and practical judgment of the trial court.” *Table Steaks v. First Premier Bank, N.A.*, 2002 S.D. 105, ¶ 38.

(b) Excel offered two methods to verify its lost profits, backed up by expert testimony and extensive evidence

The Jury was correctly instructed on the recovery of lost profits using the *Table Steaks* rule, and, notably, the Sewer District did not object that instruction, #25. (Record Part 1, 2667); TT 1764:22-25. In fact, the Sewer District did not the object to the sufficiency of any of the damages

instructions and did not propose any others.²³ The Jury was also instructed not to award damages based on speculation. *See*, Instruction 20 (TT 1762).

“The difficulty in computing damages should not be confused with the requirement of proving damages as an essential element for recovery. After providing sufficient evidence of damages, the claimant must only produce the best evidence available to allow a jury a reasonable basis for calculating the loss.” *Lord v. Hy-Vee Food Stores*, 2006 S.D. 70, ¶ 32 (citations omitted).

"Uncertainty as to the *fact* is fatal to recovery, but uncertainty as to *the measure or extent* of the damages does not bar recovery." *Landstrom v. Shaver*, 1997 S.D. 25, ¶ 87.

Excel clearly proved the *fact* that it suffered lost profits, and then offered two reasonable methods for *the measure or extent* of those lost

²³ The Amicus Brief suggests (without any authority or evidence) that if this Court affirms Excel’s recovery of lost profits, “then underwriting in South Dakota will significantly change.” Amicus Brief, pp. 4-5. In addition to being unsupported by the Record, this proposition is dubious because South Dakota *already* permits lost profits to be recovered against public entities.

Moreover, Excel demonstrated in post-judgment filings that the District has the **duty** to repay this judgment (R. Part 2, 1134-1156 and 3112-3133) as well as the financial **ability** to repay this judgment by issuing a judgment bond. (R. 3146; 3133-3135). And notably, the Legislature has already adopted statutes which protect public entities from having to pay more than they can afford when forced to issue a judgment bond. SDCL 9-26-21. If that statute is inadequate, the Amicus can find a remedy with the Legislature.

profits.²⁴ First, Excel presented the testimony of a well-qualified expert who created forecasts using data from 13 years of Excel's financials, including before and after the Sewer District job. Second, Excel introduced evidence about Excel's change in corporate net worth from 2012 through the date of trial (as a result of selling off nearly all of its equipment to stay afloat and taking on new debt). These independent methods produced similar figures.

In the following pages, we briefly summarize and examine both methods. The brevity of our summary, however, should not be confused with a lack of evidence. In support of its lost profits, Excel introduced 346 pages of exhibits,²⁵ and approximately 76 pages of testimony.²⁶ In response to this, the Sewer District offered no expert, no exhibits, made only a handful of minor challenges to the revenue method on cross examination, and didn't challenge any of the evidence pertaining to the net-worth method. In fact, the District doesn't even address the net-worth method in its Brief.

²⁴ The District has not argued the *fact* that Excel suffered lost profits, but instead, only the *measure* of them.

²⁵ Exhibits 9, 10, 11, 12, 15 (including tax returns, bonding and project histories, lists of available work, revenue and profit forecasts, and other summary exhibits). See, Record Part 1, 3138-3447; Record Part 2, 13-49;

²⁶ (TT 148-189; TT 115-129; TT 827-830, 839-844, 893-894, 936-938, 980-981, 983, 1047-1052.)

Method 1: EBITDA

Excel introduced the opinions and analysis of Nina Braun, who has practiced as a CPA for over 20 years. (TT 149:5-9). Ms. Braun's clientele includes 25 to 30 construction contractors, similar to Excel Underground. (TT 150). Nearly all of those contractors are repeat clients, year after year. (TT 151). Accordingly, Ms. Braun's experience is informed by in-depth review and preparation of at least 200 fiscal years' worth of financial performance of South Dakota contractors. (TT 152:10-13). Ms. Braun explained that with substantial experience, over time, "you start to notice patterns and commonalities among your clients...and you develop the ability to consult on those as well." (TT 152). One of those trends is that a company's annual profitability tends to remain near its long-term average. "[T]here are ups and downs, or from year to year it may not be smooth, but over time there's a pattern." (TT 162).

Ms. Braun testified that a good measure of true profitability for a company is its EBITDA, an acronym that represents a company's "Earnings Before Interest, Taxes, Depreciation, and Amortization." (TT 154, 162). EBITDA is different from (and generally higher than) taxable income. (TT 155).

Ms. Braun calculated Excel's EBITDA and concluded that Excel's EBITDA average of 14.3% for 2007 to 2012 was an appropriate measure of its profitability. In other words, prior to the major problems on Brant Lake, Excel experienced an average profit margin equal to 14.3 cents out of every dollar of gross revenue, and this profit margin, on average, was reasonably likely to continue. Ms. Braun then reviewed Excel's gross revenue history and created three forecasts for its future gross revenues: one conservative, one moderate, and one aggressive. Finally, Ms. Braun applied the multi-year average profit margin (14.3%) to these three scenarios in order to estimate lost profits. Record Part 1, 1326-27; 1335; Exhibit 12. (In conjunction with this, Reed Olson testified about Exhibits 10 and 11, which showed examples of the available work during this period, documented his Company's history of steady growth, and demonstrated that his Company had a track record of coming in as the low bidder for roughly one out of every seven jobs it bid.)

Ms. Braun's EBITDA method created a range of lost profits, from \$683,178 up to \$2,545,219. Ms. Braun testified that within that range, the figure of \$800,000 was reasonably certain; and she re-confirmed that opinion after cross examination. (TT 176, 188). In closing, Excel's counsel told the Jury they could award *more* than \$800,000 if they thought the evidence warranted it. (TT 1787-1788).

Although Ms. Braun did not have Excel's federal income tax returns for 2015 and 2016, she did have significant information relating to those two years. For example, she reviewed Excel's gross revenues as reported on state sales tax returns for those years, which were markedly lower than prior years. Record Part 2, 1329; Exhibit 12. Ms. Braun testified that the concept of sales tax gross revenues is similar to the gross revenues used for her EBITDA and lost profit calculations. (TT 170-172).

The tax returns provided to Ms. Braun also identified that Excel was consistently able to pay Reed Olson a salary from until 2013, averaging \$111,602, but that it paid him no salary in 2014, and Reed Olson testified that it never could afford to thereafter. (TT 1050-1051; Record Part 2, 49, Exhibit 15.) In addition, Ms. Braun was aware that the reason Excel did not file federal returns for 2015 and 2016 is because it could not afford to pay for a bookkeeper or accountant to prepare them. (Record Part 2, 1326.)²⁷ Ms. Braun's calculations also assumed a "zero" profit for 2017, which matched

²⁷ Excel's inability to pay Reed Olson's salary or hire a bookkeeper is strong circumstantial evidence that Excel was running with zero-profitability in those two years, or, as Ms. Braun noted, quite possibly *negative* profitability. Ms. Braun's assumption of "zero" profitability for 2015 and 2016 was therefore actually *more* favorable to the District than the losses that could have been inferred from the facts.

the testimony of Reed Olson who explained that the company stopped doing business in 2017. (Exhibit 12; TT 825:8-9; Record 1994).

The EBITDA method provided a reasonable method from which to calculate Excel's lost profits.

Method 2: Net Worth (More Debt & Less Equipment)

That lost profits figure of \$800,000 was further corroborated by testimony about how Excel operated its business before and after the Sewer District project. Reed Olson offered extensive testimony about the company's assets and debts. He explained that in 2012, the company owned around a dozen pieces of equipment, worth around \$575,000, and owed general business debt to the bank of around \$300,000. (TT 827-829; TT 1050-1051) As of the date of trial, Excel had sold all but one piece of equipment; it had taken out new loans of \$1.16 million; and its general business debt to the bank was now \$177,000. (TT 1048-1051.)

In closing argument, counsel for Excel showed this math for the Jury, and noted that the company swung from a positive net worth of roughly \$275,000 to a negative net worth of (\$1,265,000), i.e., a downward swing of \$1,540,000. (TT 1788-1789). Counsel then pointed out that this swing was roughly equal to the total amounts that Excel was seeking at trial: unpaid contract items of around \$750,000, and lost profits of \$800,000. In other

words, the net-worth evidence provided an independent measure of Excel's consequential damages, as well as circumstantial evidence that corroborated the EBITDA method. This evidence also showed that Excel's was seeking to be made whole, rather than seeking a windfall.

Taken together, these two methods provide independent and compelling evidence of Excel's damages, both directly and circumstantially. The existence of damages was proven to a reasonable certainty, and the amount of those damages was supported by credible evidence. That is all that the law requires.

(c) The damages for underpaid contract items were not erroneous

The Sewer District's next argument on damages relates to six items which it claims "were not in the contract, and for which BLSD had never agreed to pay." The District agreed to the language of Instruction 20, which explains that these damage items were "for work Excel did under the contract...."

In any event, each of these six items is addressed by contract language, and Excel provided what was essentially uncontroverted evidence for each of them.

i. The manhole, the insulation, and the gravity sewer

The first three items are simple: a manhole, some insulation, and 4-inch pipe. Excel Underground installed three manholes but was paid for two; Excel installed 1120 square feet of insulation sheeting, but was paid for none of it; and Excel installed 1700 feet of four-inch gravity sewer, but was paid for just 22 feet. Therefore, Excel sought damages of \$5,500 for the third manhole, \$11,200 for the unpaid insulation, and \$42,500 for the unpaid gravity sewer. (TT 1020:9—1022:12, insulation; TT 1018:22—1020:8, gravity sewer; TT 862:2, manhole).

Each of these were items listed on the bid form in the contract, which is found in Exhibit 1 (Record Part 1, page 2780) (line item #15, “Air Release Manhole;” item #40 for “Pipe Insulation;” and item #6 for “4-inch gravity sewer.”) Under this “unit bid” contract, Excel was legally correct to seek payment for these items at the bid-prices. *See, Prunty Constr.* at ¶ 15.

The Jury heard undisputed testimony that Excel did the work, and then conflicting testimony about why it wasn’t paid. For the manhole, the Sewer District claims that Kim Buell and Excel agreed to modify the contract

and absolve the District of paying for it.²⁸ Excel, in contrast, offered testimony from Reed Olson, in which he said there was no such agreement, and that it was a “big surprise” that Mr. Buell was refusing payment for the extra manhole. (TT 860:14—861:24). The Jury believed Reed’s testimony.

As for the insulation, the District provides no contract language which would require Excel to install it for free, and again points solely to testimony from Kim Buell. Similar to the manhole issue, the Jury was free to reject Mr. Buell’s testimony, adopt Reed Olson’s testimony, and award \$11,200 for insulation. (R. 1020- 1022)

The Sewer District also argues that Excel’s award of \$42,000 in damages for the 4-inch gravity sewer was erroneous. The Sewer District has never previously raised this issue, and it now offers one, single sentence of argument, without any analysis, explanation, or authority.

At best, the Sewer District appears to be exploiting an ambiguity in the Contract. However, Excel didn’t draft this Contract, so any ambiguity would be resolved in favor of Excel. *Singpiel v. Morris*, 1998 S.D. 86, ¶ 18. The ambiguity involves Line Item #6 (which provides for payment of 4-inch sewer

²⁸ It is notable that the Sewer District claims here that Kim Buell had the authority to modify the District’s contract with Excel, but, in Section 3, the District asserts that Kim Buell was not its agent.

pipe at the rate of \$25 per foot) and Section 1.2.A.1(a) (which says that for “[m]easurement and payment” of 15 linear feet of 4-inch gravity sewer pipe “shall be ***included*** in the payment for the grinder station”). (See, Exhibit 1 at R. 2779 and R. 2930). Reed Olson testified and explained why the provision is ambiguous, he offered his reasonable interpretation of it, and he showed that the Engineer previously interpreted it in the same way that Reed had. (TT 1145:2—1146:13; TT 1018:12-24). The Jury accepted Reed’s testimony and awarded damages. The Sewer District made no argument to the Jury about this issue in its closing.

The Jury’s award of damages for these items is not error, nor does it entitle the Sewer District to a new trial.

ii. Lost time during pressure testing

Excel recovered \$37,200 in damages related to the wrong pressure testing formula. The incorrect formula generated “false positives” for leaks on 30 or 40 separate occasions, causing Excel to search for leaks that did not exist, over a period of approximately 2 months. . (TT 959-960.) Reed alerted the Project Engineer that something was wrong with the testing formula, but it took the engineer several weeks to respond to his concerns. (TT 947-952.) Reed testified about the cost of this wasted manpower, including that

his own full-time job for two months was conducting these useless tests , and that he also brought a crew in to look for non-existent leaks. (TT 960.)

The Contract provides that the “OWNER shall provide all inspection and testing services not required by the Contract documents.” (Record Part 1, 2791.) Excel’s expert concluded that specifying the wrong leakage test was a “defect” in the plans. Thus, under the plain language of the Contract, and under our State’s common law, the cost for needless, useless pressure testing would be borne by the Sewer District. *See, Mooney’s, Inc. v. S.D. Dep’t of Transp.*, 482 N.W.2d 43, 45 (S.D. 1992). *See, also*, Instruction 14. (Record Part 1, 2656.)

The Jury’s award of damages for Excel’s wasted manpower is not error, nor does it entitle the Sewer District to a new trial.

iii. Pipe footage “discrepancy”

Excel recovered damages for unpaid quantities of 1.25-inch pipe and 3-inch pipe (\$16,648.50 and \$3,742.24, respectively). (Exhibit 27; TT 1015:11—1017:20) Excel’s requested damages were based upon Excel’s measurements, multiplied by the per-foot price listed in the Contract. (TT 1016:5-18.)

The Sewer District asks the Court to reverse these damages because of the Engineer's "GPS measurements" and, also, because unused pipe was later found, abandoned in a ditch. Both arguments are factually off-base.

Although the Project Engineer testified about his *plan* to use GPS measurements to calculate final payment for pipe footages, the District failed to introduce any evidence of those GPS quantities. Without that evidence, the Jury relied upon Reed Olson and Exhibit 27. Reed explained that he had requested payment during the project based upon "actual footages" he had installed, and that he "attempt[ed] to calculate these accurately." (TT 1016:9-14). Reed also explained that the Engineer's initial numbers were less reliable and based only upon surface estimates. (TT 1015:19—1016:1.) The did not err by awarding these damages.

The Sewer District claims that Excel's pipe measurement figures were not credible because "hundreds of feet of pipe" were found in a ditch. In support of this, the District makes a misleading citation to page 1702 of the Trial Transcript. On that page, the witness discusses finding *six-inch* pipe in a ditch after the project:

```
9 | Q      Okay.  How about the next photo?
10 | A      That is approximately 200 feet of 6-inch poly
11 | -- poly pipe.
```

But Excel didn't make any claim for unpaid *six-inch* pipe. Instead, its claim for underpayment related solely to 1.25-inch and 3-inch pipe. This abandoned pipe had zero relation to this issue.

The Jury's award of damages for underpaid pipe quantities is not error, nor does it entitle the Sewer District to a new trial.

iv. Open trenching in Spawn's addition

The final issue in the Sewer District's brief involves the issue of "open trenching" in Spawn's Addition. The District misrepresents the Record.

The District begins by trying to fault Excel, claiming there were "conditions [Excel] *discovered* on the site [which] made the work more difficult to perform than it had *initially anticipated*," and that "Excel *should have seen these issues* [of the high water table and tight working conditions] and factored them into its bid." (Appellant's Brief, 32) The Sewer District also says that "any reasonable contractor" would have noticed these issues while bidding the project. (*Id.*)

This is misleading because Excel *did* recognize these issues during the bidding phase, rather than for the first time during construction. During the bidding phase, Reed Olson studied the plans and visited Spawns Addition. (TT 844.) He recognized immediately that it was not feasible to directionally bore in that neighborhood, even though the plans called for it. (TT 845.)

Reed said that he brought his concerns to Kim Buell's attention, prior to bidding, and that Mr. Buell assured Reed that, "We'll cross that bridge when get to it." (*Id.*) Reed bid the project in reliance upon that statement, and expert testimony confirmed that reliance upon this statement was reasonable. (TT 846).

Excel's expert arrived at the same conclusion that Reed Olson did: it was a mistake for the District's plans to specify "directional boring" for Spawns Addition. Indeed, both Excel's expert and the District's expert called this a "defect" in the plans. (TT 1476; 669-670.) Under the Contract, the proper procedure under the Contract to remedy a defect would be for the Owner to issue a change order for the additional cost to do this work. (TT 669-670.)

Thus, Excel faced work that was beyond the scope of the bid items, and it submitted a change order for payment at the rate of \$275 per foot. This amount represented an average price, per house, of \$4,000. (TT 890.) Witnesses credibly testified that this amount was reasonable, and, also, that perhaps the figure should have been as high as \$7,000 per house. (TT 331:10-16) In any event, the District does not challenge the *amount* of these open-trenching damages, and instead, only the legal sufficiency. (Appellant's Brief, 31-32.) It was not error for the Jury to award Excel

damages for its additional work in Spawn's Addition. It selected a reasonable amount, supported by credible evidence.

The Record contains competent and substantial evidence to support all of the damages awarded. The damages were reasonably certain and the method of calculating them was sufficient. We defer to the Jury's decision.

CONCLUSION

After nine long days, the Jury returned a Verdict which sided with Excel's version of the facts. The Jury verdict was based upon sound law and it reflected the evidence. Excel urges its affirmance.

The Circuit Court heard the same testimony and was able to observe the Jury receive the evidence. The Circuit Court correctly rejected a new trial and other relief sought by the Sewer District. We ask this Court to do the same.

Respectfully submitted this 8th day of November, 2018.



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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that Appellee's Brief complies with SDCL 15-26A-66(b) and the Court's order granting a 15,000 word limit, because of the following particulars:

1. Appellee's Brief was prepared and printed in a proportionately spaced typeface using Microsoft Office Word in Equity Text B font, size 13.5.
2. According to the word count function of that program, this Brief contains 14,998 words (including footnotes), exclusive of the table of contents, table of cases, jurisdictional statement, statement of legal issues and certificates of counsel.

Dated this 8th day of November, 2018.



Daniel K. Brendtro

CERTIFICATE OF SERVICE

I, Daniel K. Brendtro, one of the attorneys for Appellee, hereby certify that on November 8, 2018, I filed the original brief and two copies with the Clerk of the Supreme Court by mailing the same on this day, and also served counsel by emailing the brief to each of the following:

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPEAL NO. 28580

EXCEL UNDERGROUND, INC.,
Plaintiff and Appellee,

v.

BRANT LAKE SANITARY DISTRICT,
Defendant and Appellant.

BRANT LAKE SANITARY DISTRICT,
Plaintiff and Appellant,

v.

EXCEL UNDERGROUND, INC. and GRANITE RE, INC.
Defendants and Appellees.

and

GRANITE RE, INC.
Third-Party Plaintiff and Appellee,

v.

REED I. OLSON and MELISSA D. FISCHER-OLSON,
Third-Party Defendants and Appellees.

Appeal from the Circuit Court, Third Judicial Circuit
Lake County, South Dakota

The Honorable Patrick Parly, Presiding
Circuit Court Judge

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JURISDICTIONAL STATEMENT

Appellee Schmitz, Kalda and Associates, Inc., (“SKA”) agrees with Appellant Brant Lake Sanitary District’s (“BLSD”) jurisdictional statement.

STATEMENT OF ISSUES

I. Whether Appellant BLSD and Appellee Excel Underground, Inc. (“Excel”), waived their right to challenge the Circuit Court’s December 11, 2017 Order and Judgment?

This issue was not before the circuit court.

- SDCL 15-26A-60
- SDCL 15-26A-22
- *A.L.S. Properties, Silver Glen v. Graen*, 465 N.W.2d 783, 787 (S.D. 1991)

II. Whether the Circuit Court Erred in Granting SKA’s Motion for Summary Judgment?

The circuit court entered into an Order and Judgment on December 11, 2017, holding that SKA was entitled to judgment as a matter of law as to all claims asserted against SKA.

- *Lamar Advert. of S. Dakota, Inc. v. Heavy Constructors, Inc.*, 2008 S.D. 10, ¶ 15, 745 N.W.2d 371, 376
- *Mega Constr. Co., Inc. v. United States*, 29 Fed.Cl. 396, 424–425, Ct.Fed.Cl.1993)
- *George Sollitt Const. Co. v. United States*, 64 Fed. Cl. 229, 240 (2005)

STATEMENT OF THE CASE

On February 21, 2014, Excel filed suit against BLSD for breach of contract.¹

BLSD filed a contribution claim against SKA on November 14, 2014. Excel never

¹ Citations to the settled record are cited “SR” with reference to the appropriate page. Citations to SKA’s appendix are cited “Appx” with reference to the appropriate page. Citations to Appellant’s Appendix is cited as “BLSD-Appx” with reference to the appropriate page. Citations to the motions hearings transcript on December 6, 2017, which can be found in BLSD-Appx., 44-103, are cited “Tr.” with reference to the appropriate page.

asserted any claims directly against SKA. On November 3, 2017, SKA filed a motion for summary judgment, with supporting briefs, requesting that BLSD's claims be dismissed as a matter of law. (Appx., 327).

A hearing was held on SKA's motion on December 6, 2017, and the Circuit Court granted SKA's Motion for Summary Judgment and entered an Order and Judgment dismissing BLSD's claims against SKA on December 11, 2017 ("the December 11, 2017 Order"). (Appx., 362). On March 30, 2018, BLSD filed a Notice of Appeal and designated the December 11, 2017 Order as one of the items being appealed. In its initial brief, BLSD does not challenge the validity of the December 11, 2017 Order. None of the appellees, including Excel, filed a notice of review or section B of the docketing statement designating errors or issues related to the December 11, 2017 Order and the time to do so has expired.

STATEMENT OF FACTS²

BLSD, a sanitary district incorporated as a public entity under the laws of the State of South Dakota, contracted with SKA of Sioux Falls, South Dakota, for engineering services for Phase 2 of the BLSD Wastewater Collection System ("the Project"). (Appx., 322 at ¶¶ 1 and 2) SKA is a professional engineering firm offering and providing professional engineering services through its Registered Professional Engineers. (*Id.*, ¶ 3) BLSD also selected Excel as the general contractor for the Project, to

² The facts cited come from SKA's Statement of Undisputed Materials Facts ("SUMF") submitted along with its Motion for Summary Judgment. (Appx., 321). Excel, who was the only party opposing SKA's motion, did not submit a response to SKA's SUMF, which was relayed to the trial court. (Tr., 33). The trial court agreed and found that, given Excel's failure to respond to SKA's SUMF, that it had to deem the facts in SKA's SUMF as admitted. (Tr., 50). In fact, pursuant to SDCL § 15-6-56(c)(3), SKA's material

which they entered into a contract consisting of bid documents, the plans and specifications, and other documents (“the Contract Documents”). (*Id.*, ¶¶ 6-7).

Prior to the start of the Project, Reed Olson (“Mr. Olson”), the owner of Excel, took various actions to become acquainted with the scope of the Project. (*Id.*, ¶¶ 8-10) Mr. Olson had driven around the entirety of the location of the Brant Lake project multiple times, specifically driving through Spawn’s Addition. (*Id.*, ¶ 9). Mr. Olson had also reviewed the Project’s plans and specification, and believed that, at the time he prepared his bid, that the Project’s timeline was realistic. (*Id.*, ¶ 10). A notice to proceed was issued on June 25, 2012, and Excel began work on the Project on July 23, 2012. (*Id.*, ¶ 12).

The Contract Documents required Excel to prepare and submit for approval a “project management network scheduling tool (i.e. critical path (CPM), etc.) or a detailed bar chart...for cost value reporting, planning and scheduling of all work required.” (*Id.*, ¶ 13). However, Excel admitted that no such schedule was ever created. (*Id.*, ¶ 14). Although Excel supposedly began work on the project in July, it could not perform any work until the pipe arrived on site, which did not occur until the second week of August due to delays caused by the manufacture and delivery of said pipes. (*Id.*, ¶¶ 15-16). It was about that time that Mr. Olson believed he was not going to be able to meet the substantial completion deadline of December 30, 2012. (*Id.*) Mr. Olson requested an extension and submitted a revised timeline to BLSD on October 23, 2012; he then submitted another similar letter to BLSD on December 2, 2012, and a revised timeline dated January 3, 2013, in which Excel represented that, despite a list of claimed delays,

facts were “admitted” since Excel did not serve a statement, as required, controverting

Excel could complete the Project by May 31, 2013, with minor cleanup to be finished during the first two weeks of June 2013. (*Id.*, ¶¶ 17; Appx. 34).

BLS&D allowed Excel to continue to work on the project until January of 2014, at which point Excel was terminated. (*Id.*, ¶ 29). At the time of Excel's termination, there were still some aspects of the Project not completed, even though the Project's substantial completion date was a year past due and the Project's final completion date was over seven months due. (*Id.*, ¶ 30).

After the initiation of litigation, Excel produced a report by an expert, Michael Carr ("Carr"), raising only two issues whereby it was asserted that SKA violated a professional standard of care for professional engineers: (1) the need for trenching, instead of directional boring, in a portion of the project known as Spawn's Addition; and (2) the hydraulic testing standard for testing pressure sewer lines. (*Id.*, 9-16).

On July 15, 2013, six weeks after the date to which Excel represented that the Project was to be completed, Excel sent a letter to SKA suggesting that trenchless boring was impossible in an area referred to as Spawn's Addition. (*Id.*, 321-326 at ¶ 18). Excel's basis for this assertion was that the lots in Spawn's Addition did not allow, due to the constraints of the lot itself and the rods surrounding the lots, adequate bending capacities and horizontal bending of the rods and piping. (*Id.*, ¶ 19). As such, Excel was given permission to open trench in Spawn's Addition on July 16, 2013, on a case-by-case basis. (*Id.*, ¶ 20).

The expert retained by Excel did not have knowledge or an opinion as to the number of lots or locations where it was not possible to directionally bore; he did not give

those facts.

an opinion that trenching some of the areas in Spawn's Addition slowed down or affect the critical path of the project; Carr admitted he was never provided with a critical path schedule for the Project; he testified he was not asked to give an opinion related to determining delays to the Project's critical path; and he stated that he could not testify whether there were delays to the critical path of the Project as no critical path type schedule was created by Excel. (*Id.*, 9-16). As such, Carr admitted that he could not testify what actual damages, if any, may have been incurred by Excel relating to the trenching issues. (*Id.*)

Moreover, Excel had also requested a \$275-a-foot increase of the contract amount for trenching in Spawn's Addition despite having not supporting that amount with any back-up documentation. (*Id.*, 321-326 at ¶¶ 21-22). Carr admitted that Excel should have provided specific details of the costs, including the manhours, equipment and material costs that showed the increase in cost, as well as documentation of specific delays, as part of a requested change order for the project. (*Id.*, 9-16). Carr admitted this was never done. (*Id.*)

Sometime in July of 2013, Excel started testing the pressure sewer system and initially no leaks were found using the formula found in the specifications that were part of the Contract Documents. (*Id.*, 321-326 at ¶ 23). Excel experienced failures with its pressure sewer system, which it blamed due to the high standard required under the pipe testing formula in the Contract Documents. (*Id.*, ¶ 24). Upon the written request of Excel on September 10, 2013, SKA accepted the use of an alternative testing standard that same day. (*Id.*, ¶ 25). Yet, even using the new standard, some areas of the pressure sewer system still failed the testing. (*Id.*, ¶ 26). Moreover, Excel did not determine any

damages related to the pipe testing issue, despite indicating it would provide any support it had for any resulting damages, although nothing was ever provided. (*Id.*, ¶ 27). In fact, Excel admitted that the pressure testing of the system did not affect the completion of the date of the Project. (*Id.*, ¶ 28). Carr also acknowledged, similar to the trenching issue above, that he could not give an opinion as to whether the pipe testing issue affected the critical path of the Project or whether said issue caused any damages to Excel. (*Id.*, 9-16).

STANDARD OF REVIEW

“In reviewing a trial court’s grant or denial of summary judgment under SDCL 15–6–56(c), we must view evidence in the light most favorable to the non-moving party and decide both ‘whether the moving party has demonstrated the absence of any genuine issue of material fact’ and whether the trial court correctly decided all legal questions.” *Jorgensen Farms, Inc. v. Country Pride Corp., Inc.*, 2012 S.D. 78, ¶ 7, 824 N.W.2d 410, 414 (quoting *Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, ¶ 15, 796 N.W.2d 685, 692; *Advanced Recycling Sys., L.L.C. v. Se. Prop., Ltd.*, 2010 S.D. 70, ¶ 10, 787 N.W.2d 778, 783). “We make these determinations de novo, with ‘no deference to the [trial] court’s ruling.’ *Id.* (quoting *Highmark Fed. Credit Union v. Hunter*, 2012 S.D. 37, ¶ 7, 814 N.W.2d 413, 415; *Adrian v. Vonk*, 2011 S.D. 84, ¶ 8, 807 N.W.2d 119, 122).

ARGUMENT

I. All Parties to this Appeal Have Waived Their Right to Challenge the Validity of the Trial Court’s December 11, 2017 Order and Judgment Granting Appellee SKA’s Motion for Summary Judgment

A. Appellant BLSD Has Waived Any and All Issues and Arguments Challenging or Asserting that the Trial Court’s December 11, 2017 Order Was Errant

Pursuant to SDCL 15-26A-60(4), an appellant’s brief must include a “concise statement of the legal issues or issues involved” and “[e]ach issue shall be stated as an

appellate court would state the broad issue presented.” Moreover, SDCL 15-26A-60(6) requires the appellant’s brief to include an argument containing “the contentions of the party with respect to the issues presented....” “An assignment of error not briefed and argued is deemed abandoned.” *Giesen v. Giesen*, 2018 S.D. 36, ¶ 23, 911 N.W.2d 750, 756 (quoting *Sabhari v. Sapari*, 1998 S.D. 35, ¶ 1 n.3, 576 N.W.2d 886, 888 n.3; *State v. Macy*, 403 N.W.2d 743, 745 (S.D. 1987)). See also *Moore v. Michelin Tire Co., Inc.*, 1999 S.D. 152, 603 N.W.2d 513 (appellant’s argument that was raised for the first time at oral argument and not raised in the appellant’s brief was waived); *State v. Darby*, 1996 S.D. 127, ¶ 44, 556 N.W.2d 311, 322 (“[f]ailure to argue an issue after it has been raised on appeal waives the issue.”); *Sopko v. C & R Transfer Co., Inc.*, 1998 S.D. 8, 575 N.W.2d 225 (employer’s failure to brief statute of limitations question in workers’ compensation case constitute a waiver of that issue).

While BLSD’s “Notice of Appeal” listed the “Trial Court’s Order and Judgment dated December 11, 2017 that granted the Motion for Summary Judgment by Schmitz, Kalda & Associates, Inc.,” none of the issues raised in BLSD’s brief, and none any of the legal arguments asserted by BLSD, challenge or contest the validity of that order. The only issue raised by BLSD that even touches on the December 11, 2017 trial court order is the question of “[w]hether the trial court erred in granting SKA’s motion for summary judgment but denying summary judgment on the same claims to BLSD.” (Brief, 8). However, BLSD does not challenge the validity of the December 11, 2017 order, but instead merely argues that the trial court committed an error by not extending that same ruling to BLSD. In fact, BLSD’s argument on this matter is an implicit agreement with

the December 11, 2017 Order as BLSD is requesting that said valid order be applied to Excel's claims against BLSD.

Also reflective of BLSD's waiver of any issues as to the December 11, 2017 Order is BLSD's failure to attached said order to its appendix. SDCL 15-26A-60 requires that an appellant's appendix include "the judgment, order or decision in question" and, yet, BLSD failed to attach the December 11, 2017 Order to its appendix. BLSD's omission demonstrates that BLSD has waived any issue it may have with said order.

As such, BLSD has voluntarily accepted the December 11, 2017 Order's validity by failing to put the trial court's decision at issue and failing to assert any argument as to why the order was errant. *See* SDCL 15-26A-60(4) and (6). BLSD has abandoned any issue relating to the validity of the December 11, 2017 Order by its failure to include, and argue, such issue in its brief. *Giesen v. Giesen*, 2018 S.D. 36, ¶ 23 Given BLSD's waiver of such issues, the December 11, 2017 Order ought to be affirmed.

B. Appellee Excel Underground Has Not Preserved Its Rights to Obtain Review of the Trial Court's December 11, 2017 Order

Excel (and all other named Appellees) cannot challenge the validity of the December 11, 2017 Order as it failed to file a notice of review, including Section B of the docketing state, which is required pursuant to SDCL 15-26A-22:

An appellee may obtain review of a judgment or order entered in the same action which may adversely affect him by filing a notice of review and Section B of the docketing statement required by subdivision 15-26A-4(2) with the clerk of the Supreme Court within twenty days after the service of the notice of appeal.

Section B of the Docketing Statement requires an appellee to: "State each issue intended to be presented for review." SDCL Appendix of Forms, Ch. 15-26A Form 5.

By failing to file section B of the docketing statement, Excel failed to adequately provide notice to the parties to this appeal of issues that it intended to present any issues relating to the SKA summary judgment for review by this Court, thereby waiving those issues.³ An appellee’s “failure to comply with the notice of review requirements results in a waiver.” *A.L.S. Properties, Silver Glen v. Graen*, 465 N.W.2d 783, 787 (S.D. 1991). *See also Gratzfeld v. Bomgaars Supply*, 391 N.W.2d 200, 202 (S.D. 1986) (where appellee did not comply with notice of review requirements, appellee waived issue and court did not consider it). “Noncompliance with [SDCL 15-26A-22’s] requirements for notice of review results in a waiver of the issues, and this court will not consider them.” *Rowett v. McFarland*, 394 N.W.2d 298, 308 (S.D. 1986). *See also Application of Nw. Bell Tel. Co.*, 326 N.W.2d 100, 104 (S.D. 1982)(court declining to consideration arguments where party had not complied with notice of review requirements). Where an issue is “never raised on notice of review as required by SDCL 15-26A-22[,]” said issue is precluded from consideration by the court. *State v. Holland*, 346 N.W.2d 302, 306 (S.D. 1984).

BLSA’s notice of appeal was filed on March 30, 2018. Excel failed to file a notice of review as it relates to the December 11, 2017 Order and has thereby waived any claim of error as to such order. If an appellee wants to cross-appeal an order by the trial court

³ SKA recognizes that, pursuant to *Lagler v. Menard*, 2018 SD 53, Excel’s failure to file a “Notice of Review” as to the circuit court’s December 11, 2017 Order, which was designated in Appellant’s “Notice of Appeal,” does not mean that this Court is without jurisdiction as to reviewing said order. SKA is not arguing that this Court is without jurisdiction, but instead, that Excel has *waived* its arguments by failing to state the reasons why the circuit court’s December 11, 2017 Order should be reversed or modified when it failed to submit section B of the docketing statement. Excel was required to fill out section B of the docketing statement, which required a statement of the issues to be presented for review. By failing to complete section B of the docketing statement, required by SDCL 15-26A-22, Excel has not preserved its arguments for review by this Court. *Id.*

that it disagrees with, it has an obligation to file a notice of review, along with section B of the docketing statement, as it relates to said order, which was not done here by Excel. *A.L.S. Properties, Silver Glen v. Graen*, 465 N.W.2d 783. Excel cannot now challenge the December 11, 2017 Order in its responsive brief. As such, this Court ought to affirm the December 11, 2017 Order as all parties in this appeal have waived their ability to challenge the validity of said order.

II. The Circuit Court’s Grant of SKA’s Motion for Summary Judgment was Correctly Decided

First, before getting into the specific arguments, it should be clarified once more that SKA’s Motion for Summary Judgment was filed against BLSD—the only party with claims against SKA. BLSD asserted claims against SKA to pass through any liability that BLSD may have owed to Excel for acts or omissions of SKA. As such, SKA’s arguments centered on demonstrating that there was no liability to Excel based on alleged acts or omissions by SKA and, thus, SKA would not be liable to BLSD’s pass-through claims.

Secondly, a significant basis for which the circuit court found in favor of SKA was the fact that Excel never responded to the Statement of Undisputed Facts (“SUMF”) submitted by SKA.⁴ Throughout the hearing on December 6, 2017, the court repeatedly emphasized Excel’s failure to respond to SKA’s SUMF and, consequently, that the effect of that failure meant that those facts contained in SKA’s SUMF were to be deemed admitted. (Tr., 35, 36, 38-40, 43, 47, 50). This is consistent with South Dakota statutory law, which states that all material facts “set forth in the statement that the moving party is

⁴ BLSD did submit a response to SKA’s SUMF, however, it admitted all but three of the facts and, of those three, it simply added context. It should be noted again that BLSD

required to serve shall be admitted unless controverted by the statement required to be served by the opposing party.” SDCL 15-6-56(c). *See also, Hass v. Wentzlauff*, 2012 S.D. 50, ¶ 18, 816 N.W.2d 96, 102 (“By failing to respond, all facts asserted...are deemed admitted. Furthermore, because Hass conceded that there are no genuine issues of material fact, SDCL 15-6-56(e) mandated that summary judgment be entered against Hass...”). Thus, the facts as presented by SKA are to be deemed admitted by Excel and cannot now serve as a basis for challenging the circuit court’s granting of SKA’s motion for summary judgment.

Moreover, as will be shown below, the circuit court evidently did not believe, even with the facts in the record viewed in a light most favorable to Excel, that Excel could prove the element of damages as to its claims against SKA. Excel’s arguments relating to damages asserted against SKA were limited to three areas: (1) damages related to the pipe testing; (2) damages related to the trenching of Spawn’s Addition; and (3) damages related to any other delays. For the reasons below, the circuit court was correct in granting SKA’s motion for summary judgment as Excel could not prove with specificity, as a matter of law, that it suffered injuries/damages from SKA.

A. Excel Could Not Demonstrate, as a Matter of Law, that it Suffered Any Damages Related to the Pipe Testing Issue

The claims asserted by Excel against BLSD (as passed through against SKA) are for breach of contract whose elements includes damages. *Bowes Constr., Inc. v. S. Dakota Dep't of Transp.*, 2010 S.D. 99, ¶ 21, 793 N.W.2d 36, 43. To satisfy the damages element in a breach of contract claim, uncertain and speculative damages are not recoverable. SDCL 21-2-1 (“No damages can be recovered for a breach of contract

was in favor of SKA’s Motion for Summary Judgment as BLSD believed the granting of

which are not clearly ascertainable in both their nature and their origin.”). “In proving damages, the party must...establish a reasonable relationship between the method used to calculate damages and the amount claimed. The damages must also be reasonably certain and not speculative.” *Lamar Advert. of S. Dakota, Inc. v. Heavy Constructors, Inc.*, 2008 S.D. 10, ¶ 15, 745 N.W.2d 371, 376 (internal citations omitted). “Essential to proving contract damages is evidence that damages were in fact caused by the breach.” *McKie v. Huntley*, 2000 S.D. 160, ¶ 18, 620 N.W.2d 599, 603. The court will apply a “reasonable certainty test concerning the proof needed to establish a right to recover damages....[r]easonable certainty requires proof of a rational basis for measuring loss, without allowing a jury to speculate.” *Id.*

As it relates to the pipe testing criticisms, SKA admitted that a specific standard for HDPE pipe could have been included and, in fact, SKA allowed Excel to use said standard the same day Excel raised the issue. (Appx., 321-326 at ¶¶ 24-27) The initial testing standard is very similar to the modified testing standard with the only difference being the amount of loss of water that is allowed for a passing test. (*Id.*) As such, the testing standard included in the specifications was a more stringent standard that Excel did not want to meet—and, in fact, Excel passed the original formula at several locations before the test standard was changed and failed at several locations after the testing standard was changed. (*Id.*)

Despite the need to demonstrate ascertainable damages, Excel admitted that it had not provided any support for any claimed damages relating to the pipe-testing issues. (*Id.*, ¶¶ 26-27). Mr. Olson stated that he would provide such proof but failed to provide

said motion would aid their case of having Excel’s claims against them dismissed.

anything despite discovery requests specifically requesting that information. (*Id.*) As such, SKA adequately demonstrated to the circuit court that Excel had absolutely no ability to show any damages that resulted from the pipe testing issue.

Moreover, the extent of Excel's claim of damages is that it was delayed—generalizing a delay of two to three months or three to four months. However, there was no documentation of any delay. (*Id.*, ¶ 28). In actuality, Excel did not start the pipe testing until July 2013, despite assuring BLSO that the Project would be complete by the end of May 2013. Thereafter, Excel raised the question relating to the pipe testing standard in writing on September 10, 2013 and was allowed to change to the new testing standard that same day. These vague and non-specific claims of delay are insufficient—Excel was required to prove its alleged claim of delay damages with a certain level of specificity, which courts have addressed the level of specificity necessary to prove damages for delays on a construction project.

“A claimant, in the construction industry, must conduct a scheduling analysis of the project's schedule and logs based on corroborating evidence, such as vital records that reflect the costs it incurred relative to each asserted claim, to show that the delays affected activities on the critical path, which delayed the completion date of the project.” *AMEC Civil, LLC v. DMJM Harris, Inc.*, 2009 WL 1883985, at *15 (D.N.J. June 30, 2009). *See also George Sollitt Const. Co. v. United States*, 64 Fed. Cl. 229, 240 (2005)(“[W]hen the contract utilizes CPM scheduling, the contractor must prove that the critical path of work was prolonged in order to prove a delay in project completion.”). Thus, in order to recover for an asserted delay, the contractor must prove that the “delayed activity was on the critical path” of the project. *ADP Marshall, Inc. v. Noresco*,

LLC, 710 F. Supp. 2d 197, 222 (D.R.I. 2010)(citing *Mega Constr. Co., Inc. v. United States*, 29 Fed.Cl. 396, 424–425 (Ct.Fed.Cl.1993) (“It is not enough that an activity is delayed: there must be delay of an activity on the critical path for there to be project, or compensable, delay”); *R.P. Wallace, Inc. v. United States*, 63 Fed.Cl. 402, 409 (Ct.Fed.Cl.2004) (“Contractor must prove that ... the delay affected activities on the critical path”). The critical path is:

[T]he path of activities that controls the end date of a job. The activities are linked together by various relationships and the longest path of activities is the critical path of the project. The United States Court of Claims offers the following definition: The project can be represented by a network of discrete paths that sequence interdependent tasks or milestones leading to project completion. The critical path, the longest path at any point in time, determines the project's expected completion date.

Id. at 245 (internal citations omitted).

As such, “[i]f work on the critical path was delayed, then the eventual completion date of the project was delayed. Delay involving work not on the critical path generally had no impact on the eventual completion date of the project.” *George Sollitt Const. Co.*, 64 Fed. Cl. At 240. Thus, Excel was obligated to prove that any alleged delays caused by SKA affected the Project’s critical path and, as a result, became “compensable delays.”

The Project’s contract required Excel to employ a “project management network scheduling tool (i.e., critical path (CPM), etc.) or a detailed bar chart...for cost value reporting, planning and scheduling of all work required.” (cite) However, by Excel’s own admissions, no such schedule was ever created. (Appx., 321-326 at ¶ 13). Excel’s own expert confirmed not only the necessity of a critical path schedule, but also that Excel never created one.⁵ (Appx., 9-16) There was no critical path schedule, there can be no

⁵ BLSD’s claims against Excel involve the performance of professional engineering services, which required expert testimony. *Hamilton v. Sommers*, 2014 S.D. 76, ¶60;

critical path analysis and, under the numerous cases outlined above, Excel could not have recovered for any delays on the Project—as to all delay damages asserted.

As it relates specifically to the pipe testing issue, Mr. Olson admitted that other work on the Project could be done while the pipeline testing was occurring. (Appx., 17-33). Mr. Olson testified that the pipe testing did not hold up the project and that work could still be done while the pipeline was being tested. (*Id.*) This is exactly the reason why a contractor is required to prove that a delay occurred on the project’s critical path. *See AMEC Civil, LLC v. DMJM Harris, Inc.*, 2009 WL 1883985, at *15 (D.N.J. June 30, 2009). Without knowing whether a delay is causing an interruption of the completion date, a contractor cannot know whether such delay is compensable. Mr. Olson admitted that the pipe testing did not hold up the completion date of the project and, as such, any alleged delays would not be compensable delays, by his own admission. (Appx., 321-326 at ¶¶ 26-28).

Excel could not prove that any of the alleged and speculative delays associated with the pipe testing actually affected activities on the Project’s critical path, which is what was required to show a compensable delay. *See AMEC Civil, LLC v. DMJM Harris, Inc.*, 2009 WL 1883985, at *15 (D.N.J. June 30, 2009). Even assuming that Excel was correct in asserting the existence of delays at some point in the Project, “[i]t is not enough that an activity is delayed: there must be delay of an activity on the critical path for there to be project, or compensable, delay.” *Mega Constr. Co., Inc. v. United States*, 29 Fed.Cl. 396, 424–425 (Ct.Fed.Cl.1993). Without the ability to prove compensable delays, Excel

Mid-Western Elec., Inc., v. DeWild Grant Reckert & Associates Co., 500 N.W.2d 250, 255 (SD 1993). The only expert testimony presented was by Carr, Excel’s expert,

could not prove with “reasonable certainty...a right to recover damages.” *McKie v. Huntley*, 2000 S.D. 160, ¶ 18, 620 N.W.2d 599, 603. Excel’s alleged delay damages were not ascertainable, they were speculative, and, as such, Excel was not entitled to pursue any claims asserting only the speculative delay damages. *See* SDCL 21-2-1.

Because Excel could prove any recoverable damages related to the pipe testing issue with the specificity that was legally required, the circuit court was correct in holding that Excel could not recover from BLSD related to this issue. Thus, BLSD had no damages to pass along to SKA and the circuit court was correct in holding that SKA was entitled to summary judgment as to the pipe testing issue.

B. Excel Could Not Demonstrate, as a Matter of Law, that It Suffered Any Damages Related to the Trenching of Spawn’s Addition

Moreover, the circuit court was correct in concluding that there was no real, legitimate criticism to be directed at SKA related to the trenching issues at Spawn’s Addition—and, more importantly, that Excel failed to demonstrate the level of specificity in asserting damages related to its work at Spawn’s Addition.

Carr, Excel’s expert, testified that the way the issue is typically handled is that a contractor who anticipates impossible or difficult work informs the engineer and requests permission to do the work in a different manner. (Appx., 9-16). That is exactly the way the issue was handled here. Excel asked about trenching in Spawn’s Addition on July 15, 2013 (six weeks after Excel assured BLSD the project was going to be complete). (Appx., 321-326 at ¶ 18). The next day, July 16, 2013, SKA allowed trenching by Excel on an as needed basis. (*Id.*, ¶ 20). In fact, it appears that SKA had even allowed some trenching by Excel prior to that time. The process required by the standard of care, as

relating to (1) the testing standard included in the specifications for the testing of HDPE

offered by Mr. Carr, was exactly what was followed. He said that he understood that it took longer for approval, but the facts showed that he was mistaken in that initial impression.

Carr also verified the position that had been taken by SKA and BLSD concerning the claimed increase in cost related to the trenching. (Appx., 9-16) Excel threw out a number of \$275 a foot for the trenching, but never provided any backup or support of equipment, manpower or other costs to support the amount. (Appx., 321-326 at ¶ 22). That was confirmed by Carr. He never saw any information that verified \$275 a foot as the cost for the work. (Appx., 9-16). In fact, Carr had to try to find ways to justify costs in that range because he acknowledged that Excel had never supported the amount. (*Id.*) Again, damages must be proven with specificity. It is clear that Excel cannot prove that it had increased costs of \$275 a foot for the trenching beyond the cost that was included in the contract for boring. The cost of trenching gravity sewer in this area was included in Excel's contract at \$25 a foot. (Appx., 50). Excel could never demonstrate why it cost \$275 a foot.

As with the claim of delay related to the pipe testing, Excel similarly could not support any delay claim related to the trenching in Spawn's Addition. There was a complete absence of any support or proof of recoverable delay damages related to the trenching at Spawn's Addition. No sort of schedule existed showing whether the issues at Spawn's Addition caused delay damages nor is there any evidence in the record as well. There was absolutely no evidence, as required, to demonstrate the existence of "compensable delay damages." *See AMEC Civil, LLC v. DMJM Harris, Inc.*, 2009 WL

pipe and (2) the issue of trenching in Spawn's Addition. (Appx., 9-16)

1883985. For these reasons, Excel could not recover delay damages from BLSD in relation to the trenching issues and there are no such damages for BLSD to pass along to SKA in relation to that issue.

C. Excel Could Not Demonstrate, as a Matter of Law, that It Suffered Any Damages Related to Any Other Alleged Delays

Finally, the circuit court was correct in finding that Excel could not adequately prove delay damages allegedly occurring at the outset of the project. Again, Excel had no ability to show that these alleged were *recoverable delays*. As with Excel's other delay claims, there is no critical path schedule, there is no critical path delay analysis and there is nothing showing that any of these alleged issues affected the critical path or caused compensable delays. *See Mega Constr. Co., Inc. v. United States*, 29 Fed.Cl. 396, 424–425 (Ct.Fed.Cl.1993).

By Excel's own admission, any delays in the first six months of the project did not affect the completion of the project, and consequently the critical path. (Appx., 321-326 at ¶ 17; Appx., 34). On January 3, 2013, long after these "delays" were known, Excel assured BLSD that it could still finish the project in May 2013, which was essentially on time. (*Id.*) Mr. Olson further affirmed that, even after the occurrence of the alleged delays, that he believed he could still finish the Project on time. (*Id.*) By its own admission, those alleged delays did not affect the critical path of the Project. Not only is Excel unable to prove that any of those issues constituted compensable delays, but Excel actually confirmed that they were not.

The early phase of this Project vividly exemplifies why it is legally necessary for a contractor to show that alleged delays actually have to delay the critical path of the

project for them to be compensable. Even if there is a delay, it cannot be a “concurrent delay” that does not impact the completion of the project.

On this project, Excel initially claimed that a variety of issues delayed its ability to start work on the project. The reality is that Excel could not start work on time due to Excel’s own failure to timely order pipe for the project and delays in manufacturing the pipe. Mr. Olson confirmed several times in writing and in his deposition that the project was delayed because the pipe delivery to the site was delayed by the manufacturer. (Appx., 321-326 at ¶ 16). Therefore, even assuming that some of these initial items caused some delay, which is denied, Excel could not start work, anyway, due to its own concurrent delays. This is but one example of why it is crucial that claimed delays have to be shown to be critical path delays to be legally recoverable.

Excel could not show that any issues delayed the critical path of the project. The circuit court was correct in holding that Excel was precluded, as a matter of law, from recovering from BLSD any amounts for delays and, as such, there are no delay damages that can be passed along to SKA.

D. The Rulings on BLSD’s Other Motions Have No Impact on the Order Granting Summary Judgment to SKA.

The failure of BLSD to obtain summary judgment, directed verdict or other results consistent with the trial court’s Order granting summary judgment to SKA should have no bearing on the ruling in favor of SKA. The trial court’s ruling on the SKA’s motion for summary judgment should be viewed as it was presented to the court for ruling at the December hearing. When the Order granting SKA’s motion for summary judgment is viewed as presented, with BLSD admitting, and Excel failing to challenge, the key facts submitted by SKA in the Statement of Undisputed Facts, it is clear that the

trial court properly granted summary judgment to SKA, particularly when those facts were strongly supported by the record. The failure of BLSD to obtain results that were consistent with SKA's motion for summary judgment should not have any impact on the ruling in favor of SKA.

For all of the above reasons, the trial court correctly granted summary judgment to SKA and the December 11, 2017 Order Granting Summary Judgment to SKA should be affirmed. SKA, therefore, respectfully requests and prays that this Court affirm the trial court's grant of summary judgment to SKA.

Dated this 20th day of September, 2018.

/s/ Gregory H. Wheeler

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellee Schmitz, Kalda and Associates complies with the type volume limitations set forth in SDCL § 15-26A-66. Based on the information provided by Microsoft Word 2016, this Brief contains 6,370 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2016.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing “Brief of Appellee Schmitz, Kalda and Associates” was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capitol Avenue, Pierre, South Dakota, 57501-5070, on September 20, 2018. The undersigned further certifies that an electronic copy of “Brief of Appellee Schmitz, Kalda and Associates” was emailed to the attorneys set forth below, on September 20, 2018:

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

No. 28580

EXCEL UNDERGROUND, INC.,
Plaintiff/Appellee,

vs.

BRANT LAKE SANITARY DISTRICT,
Defendant/Appellant

BRANT LAKE SANITARY DISTRICT,
Plaintiff/Appellant,

vs.

EXCEL UNDERGROUND, INC., and
GRANITE RE, INC.,
Defendants/Appellees.

GRANITE RE, INC.,
Third-Party Plaintiff/Appellee

vs.

REED I. OLSON and MELISSA D. FISCHER-OLSON,
Third-Party Defendants/Appellees

Appeal from the Circuit Court
Third Judicial Circuit, Lake County, South Dakota
The Honorable Patrick Pardy, Presiding Judge

**REPLY BRIEF OF APPELLANT
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PRELIMINARY STATEMENT

Appellant Brant Lake Sanitary District will be referred to as BLSD. Excel Underground, Inc. will be referred to as “Excel.” Granite Re, Inc. will be referred to as “Granite Re.” Schmitz Kalda and Associates, Inc. will be referred to as “SKA.”

STATEMENT OF THE ISSUES

1. Whether the trial court erred in granting Excel’s motion on BLSD’s liquidated damages claims.

- *Aetna Cas. & Sur. Co. v. Butte-Meade Sanitary Dist.*, 500 F.Supp. 193 (D.S.D. 1980)
- *Dave Gustafson & Co. v. State*, 156 N.W.2d 185 (S.D. 1968)
- *Subsurfco, Inc. v. B-Y Water Dist.*, 337 N.W.2d 448 (S.D. 1983)

2. Whether the trial court erred in granting SKA’s motion for summary judgment but denying summary judgment on the same claims to BLSD.

- *In re Estate of Rille ex rel. Rille*, 728 N.W.2d 693 (Wis. 2007)
- *Precision Erecting, Inc. v. M & I Marshall & Illsley Bank*, 592 N.W.2d 5 (Wis. App. 1998)
- SDCL 15-6-56(c)

3. Whether the trial court erred in instructing the jury that SKA was BLSD’s agent.

- *Collins Co., Inc. v. City of Decatur*, 533 So.2d 1127 (Ala. 1988)
- *Egemo v. Flores*, 470 N.W.2d 817 (S.D. 1991)
- *Glenn Const. Co., LLC v. Bell Aerospace Servs., Inc.*, 785 F.Supp.2d 1259 (M.D. Ala. 2011)

4. Whether the trial court erred in allowing evidence, argument, and an instruction concerning an alleged competitive bidding violation.

- *State v. Martin*, 704 N.W.2d 665 (Iowa 2005)

5. Whether the damages award was excessive, speculative, and contrary to law.

- *A-G-E Corp. v. State*, 2006 SD 66, 719 N.W.2d 780
- *Ziegler Furniture and Funeral Home, Inc. v. Cicmanec*, 2006 SD 6, 709 N.W.2d 350

ARGUMENT

I. BLSA had the right to demand liquidated damages

It is important to remember the context in which this issue comes to this Court, which is from a grant of a motion for summary judgment. On such a review, this Court uses the same standards as the trial court. *Fisher v. Kahler*, 2002 SD 30, ¶5, 641 N.W.2d 122, 125. Thus, this Court’s “function...is not to weigh the evidence and determine the matters’ truth’...[but to] view the evidence ‘most favorably to the nonmoving party and resolve reasonable doubts against the moving party.’” *Schaefer v. Sioux Spine & Sport, Prof. LLC*, 2018 SD 5, ¶ 9, 906 N.W.2d 427, 430. A “belief that the non-moving party will not prevail at trial is not an appropriate basis” for summary judgment. *Tibke v. McDougall*, 479 N.W.2d 898, 904 (S.D. 1992). Rather, summary judgment cannot be upheld “unless the moving party... established the right to a judgment with such clarity as to leave no room for controversy.” *Richards v. Lenz*, 539 N.W.2d 80, 83 (S.D. 1995).

Excel does not dispute the authorities that BLSA presented on the issue of liquidated damages in its opening brief. Instead, Excel admits that “[a]bandonment is perhaps a circumstance for which [the] holding [in *Subsurfco, Inc. v. B-Y Water Dist.*, 377 N.W.2d 448, 457-58 (S.D. 1983)] could be modified.” Excel Br. at 30. Granite Re likewise concedes that many other jurisdictions allow claims for liquidated damages where the contractor abandoned the project. Granite Re Br. at 10-11.

These concessions defeat any argument that this is a matter that can be resolved on summary judgment because there is ample evidence in the record to support the fact that Excel had essentially abandoned the project at the time of its termination. *See Cauff, Lippman & Co. v. Apogee Finance Group, Inc.*, 807 F.Supp. 1007, 1021 (S.D. N.Y.

1992) (“When one party refuses to perform a contract...the other party may elect to...treat the contract as abandoned.”). Excel flatly refused to complete duties assigned to it under the contract and that were part of Excel’s bid. (TT 1112, 1218-19; Exhibit 514). This ultimately led BLSO to conclude that Excel was not returning to the project. (TT 821, 1229). BLSO’s conclusion was rational. Reed Olson did not deny that he had previously threatened to quit the project. He also admitted that he had repeatedly considered walking away from it. (TT 1107). *See Weitz Co., LLC v. Mackenzie House, LLC*, 2008 WL 2980093*7 n. 3 (W.D. Mo. 2008), *affirmed* 665 F.3d 970, 976 (8th Cir. 2012) (concluding that under the modern view there is no real difference between the abandonment of a project by a contractor or the owner’s termination of the contractor for repeated delays since a liquidated damages clause is enforceable in both situations). Accordingly, these concessions by both Excel and Granite Re leave no doubt that *Subsurfco* is no longer good law at least where a project owner can show a contractor has abandoned the project. BLSO presented evidence to support its claim that Excel had in fact abandoned this project. Therefore, a jury must determine whether Excel is liable to pay the liquidated damages that it agreed to pay if it did not meet its deadlines.

Subsurfco has no application under this Court’s present rules governing election of remedies. Excel has not addressed this issue, and Granite Re only observed that *Subsurfco*—after strongly intimating that its ruling was based on the doctrine of election of remedies—did not allow the owner an election on remand. However, *Subsurfco* applied the “old rules of pleading” under which “any act” constituted an irrevocable election, and was clearly influenced by the fact the owner had sought more in compensatory damages “than it could have gained by full performance of the contract.”

337 N.W.2d at 455. Notably, thirteen years after *Subsurfco*, this Court repudiated the “old rule of pleading” in *Ripple v. Wold*, 1996 SD 68, ¶ 7, 549 N.W.2d 673, 674-45.

Under current rules, a party may “request remedies in the alternative” and is only barred from a “duplicate recovery for a single wrong.” *Estate of Ducheneaux*, 2018 SD 26, ¶ 34, 909 NW2d 730, 742. This election may even be made on remand. *See ISG, Corp. v. PLE, Inc.*, 2018 SD 64, ¶ 41, 917 N.W. 2d 23, 36 (“On remand, in order to avoid a double recovery ISG must elect its remedy by choosing the contract damages, or the damages for fraudulent inducement or fraudulent misrepresentation.”). BLS D should thus be allowed to choose its remedy.

Excel and Granite Re further argue that any change in *Subsurfco* should be prospective only. There is a “presumption that normally [this Court’s] decisions will be given retroactive effect,” a rule arising “from the theory that the judiciary does not make law, but rather interprets it.” *Burgard v. Benedictine Living Cmtys.*, 2004 SD 58, ¶¶ 9-10, 680 N.W.2d 296, 299. When parties present “no substantial discussion in [their briefs] weighing the merits and demerits with respect [to whether a legal rule should be limited] to prospective only...[this Court will] decline to” provide that analysis itself. *Friske v. Hogan*, 2005 SD 70, ¶ 22, 698 N.W.2d 526, 532. Granite Re offers no discussion whatsoever on this issue, and Excel says little beyond a conclusory assertion that an overruling of *Subsurfco* has not been “foreshadowed.” But BLS D’s opening brief made clear that numerous other jurisdictions have now rejected the rule expressed by *Subsurfco*, and that national trend clearly “foreshadowed” a decision by this Court to do the same. *See, e.g., Brown v. John Morrell & Co.*, 511 N.W.2d 277, 279 (S.D. 1994); *Beitelspacher v. Winther*, 447 N.W.2d 347, 352-53 (S.D. 1989). This Court should join

this trend, modify *Subsurfco*'s outdated ruling, and allow BLSA to pursue its claim for liquidated damages upon remand.

BLSA was prejudiced because the jury was never instructed regarding the apportionment of damages. See *Northern Petrochemical Co. v. Thorsen & Thorshov, Inc.*, 211 N.W.2d 159, 168 (Minn. 1973) (determining that issues of apportionment are questions of fact for a jury). Excel and Granite Re argue, without relevant authority, that the jury's rejection of BLSA's claim for delay damages "mooted" an issue never presented to the jury. Even if the jury's verdict can be interpreted as a finding that Excel was not exclusively responsible for all project delays, BLSA's claim for liquidated damages remains viable. Excel expressly agreed to a substantial completion date of December 30, 2012, meaning that each homeowner's system would be operational, as well as a final completion date of May 30, 2013. (TT 1183-84). These dates were critical to end the environmental hazards that were the very reason for BLSA's project. (TT 508-9, 512). Excel failed to make any homeowner system operational by the spring of 2013 (TT 1195-97), and Reed Olson admitted he had not hooked up some homeowners even by January 2014. (TT 1109-10). As *Aetna Cas. & Sur. Co. v. Butte-Meade Sanitary Dist.*, 500 F.Supp. 193, 197 (D.S.D. 1980), held, where both the owner and contractor contribute to project delays, there must be an "apportionment of fault...[and] simply because [the owner] contributed to the delay in the completion of the project, it should not be barred from recovering liquidated damages." (emphasis supplied). This Court's did not hold otherwise in *Dave Gustafson & Co. v. State*, 156 N.W.2d 185, 188 (S.D. 1968). Rather, *Dave Gustafson* overruled the 1924 language cited by Excel to suggest a contrary rule. Excel Appellee's Brief at 24. The jury

therefore should have been instructed regarding the apportionment of liquidated damages in this case. The failure to do so resulted in prejudicial error, which requires reversal in favor of BLSD. See *Robinson v. All-Star Delivery, Inc.*, 992 P.2d 969, 974 (Utah 1999) (holding the failure to instruct a jury as to the apportionment of damages is prejudicial error); *CSX Transp., Inc. v. Bickerstaff*, 978 A.2d 760, 799 (Md. App. 2007) (same); *Bacigalupi v. Mucker*, 486 N.W.2d 52, 55 (Ky. 1972) (same).

Finally, Excel and Granite Re assert that the liquidated damages clause was a “penalty.” However, the fact that BLSD was obliged to seek delay damages after the trial court barred BLSD’s use of the liquidated damages clause scarcely shows BLSD was seeking a double recovery, as Granite Re asserts. As for Excel, its argument is based on foreign cases—none of which involve construction contracts—that express a continuing “distrust of liquidated damages provisions.” *Catholic Charities of Archdiocese of Chicago v. Thorpe*, 741 N.E.2d 651, 656 n.2 (Ill. App. 2000). However, this view is no longer valid in South Dakota. *Dave Gustafson, supra*, 156 N.W.2d at 188. In South Dakota, the “burden of establishing that [a] liquidated damages clause constitute[s] a penalty” is upon the party who challenges it, “based upon a consideration of the instrument as a whole, the situation of the parties, the subject matter of the contract, the circumstances surrounding its execution, and other factors.” *Prentice v. Classen*, 355 N.W.2d 352, 355 (S.D. 1984). Excel provides no such analysis here, nor did it do so before the trial court. Given this Court’s express recognition that liquidated damages clauses “serve a particularly useful function when damages are uncertain in nature or amount or are unmeasurable, as is the case in many government contracts,” *Dave*

Gustafson, supra, 156 N.W.2d at 188 (emphasis supplied), Excel’s “penalty” argument is without merit.

A trial on remand will require a new trial on all issues. Regardless of which party may have been at fault, the record shows that every dispute regarding responsibility for any delay is closely intertwined with all other disputes. When “multiple issues are so interwoven that they cannot be submitted to the jury independently of one another without confusion and uncertainty, a partial new trial would amount to a denial of a fair trial, and there should be a new trial on all the issues.” *Reinfeld v. Hutcheson*, 2010 SD 42, ¶ 21, 783 NW2d 284, 290. *Accord, Maybee v. Jacobs Motor Co.*, 519 N.W.2d 341, 345 (S.D. 1994). BLS D urges this Court to rule accordingly and to reverse the judgment against BLS D in its entirety.

II. The trial court could not grant SKA’s summary judgment motion and deny BLS D’s

Both Granite Re and Excel argue that SKA’s motion was not addressed at Excel’s claims. However, a cursory review of both the circuit court pleadings and SKA’s appellate brief demonstrates that this is incorrect. SKA addressed only the viability of Excel’s damage claims. It is disingenuous to argue otherwise.

Excel appears to rest its argument on an unsupported belief that SKA and BLS D were somehow conspiring against it. However, it is unclear what advantage any such ‘conspiracy’ would confer. As BLS D has previously argued, the grant of summary judgment is a conclusion that “there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” SDCL 15-6-56(c). If a material fact is not in issue, it is not in issue, regardless of who raises the point. Therefore, a party whose interests are implicated by a summary judgment motion has the

obligation to contest the facts it alleges are in dispute. *In Re Estate of Rille ex rel. Rille*, 728 N.W.2d 693, 708-9 (Wis. 2007); *Precision Erecting, Inc. v. M & I Marshall & Illsley Bank*, 592 N.W.2d 5 (Wis. App. 1998); *Johnson v. Bundy*, 342 N.W.2d 567 (Mich. App. 1984). Conspiracy allegations aside, the identity of the party declaring that facts were undisputed changed nothing for Excel. There was no prejudice to Excel, which had – and took – the chance to argue its damages in response to SKA’s motion, just as it would have done if BLS D had made the initial motion.

Nor is Excel successfully able to distinguish *Rille*, *Johnson*, and *Precision Erecting*. None of these holdings were based on the identity of the parties who declined to contest issues of fact in response to a motion for summary judgment directed at another party. The rule articulated in these cases is that, when a party is aware that facts are being adjudicated in a summary judgment motion, it has an obligation to protect its interests. *Rille*, 728 N.W.2d at 708-9; *Precision Erecting*, 592 N.W.2d at 15; *Johnson*, 342 N.W.2d at 572.

Moreover, BLS D derived no advantage from SKA’s motion. Its options were either to defend Excel’s case for it, running the risk of judicial admissions, or to maintain its litigation-long position that Excel’s claimed damages were specious and ask for summary judgment in its own favor if the trial court agreed with SKA’s argument. BLS D should not have been penalized for choosing the latter.

Excel’s argument about the calendar is another red herring, because BLS D did, in fact, join in SKA’s motion and ask for summary judgment in its favor once it became aware of what SKA was arguing. (R. 2082). The only reason that BLS D was forced to file a successive motion beyond the deadline was because the trial court decided, at some

point during the November hearing, that it would neither hear nor consider BLSD's argument. At the beginning of the hearing, the trial court indicated that it would "come back" to BLSD's argument. (Appx. p. 78, 94). By the end, however, the trial court concluded that the issue was not ripe. (Appx. p. 55).

Summary judgment is not a procedural formality. The grant of a summary judgment motion means that "there is no genuine issue as to any material fact and...the moving party is entitled to judgment as a matter of law." SDCL 15-6-56(c) (emphasis added). Nor is it a matter of discretion. When the movant makes the requisite showing, the "judgment...shall be rendered forthwith." *Id.* (emphasis added). The trial court concluded, as a matter of law, that Excel could not prove certain damages. It could not then fall back on 'discretion' to allow Excel to proceed with a case for those very same damages against BLSD.

III. The agency instruction was reversible error

a. The law of independent contractors is relevant because Instruction 18 made it relevant

Granite Re and Excel complain that BLSD should not be allowed to bring the doctrine of independent contractors into a contract suit. However, it was their position at trial that necessitates a review of these doctrines on appeal. Instruction 18 was based on SDPII 30-50-160, which, in turn, references SDCL 59-6-9 and *Rumpza v. Larsen*, 1996 SD 87, 551 N.W.2d 810. Both the case and the statute explicitly concern the negligence of an agent – the very topic that Excel and Granite Re claim was inappropriate for a contract dispute. *See* SDCL 59-6-9 ("[A] principal is responsible to third persons for the negligence of his agent..."); *Rumpza* at ¶¶23-24, 51 N.W.2d at 814-15 (considering

whether insurance agent's negligence should be imputed to insurer). Appellees cannot have it both ways. If the question of whether SKA was an independent contractor is only relevant in a tort case, then an instruction that was created for tort cases cannot be given to the jury in a contract action.

Excel and Granite Re also fail to address the fact that the contractors in both *Collins Co., Inc. v. City of Decatur*, 533 So.2d 1127 (Ala. 1988) and *Glenn Const. Co., LLC v. Bell Aerospace Servs., Inc.*, 785 F.Supp.2d 1259 (M.D. Ala. 2011) brought claims for breach of contract against the project owners. Neither even cites *Glenn*, and Excel's attempts to distinguish *Collins* are unavailing.

While the court in *Collins* does, in fact, rule on the project owner's contractual duties, this discussion is not part of its holding on the independent contractor issue. After ruling on the specific contractual duties of the project owner, the *Collins* court then addresses the contractor's separate argument that the project owner breached the contract because of the engineer's actions. 533 So.2d at 1130-31. This is a separate discussion of a different theory of the case. When faced with the very issue that is in front of this Court, the Supreme Court of Alabama considered the facts and held as follows: "[The engineer]...was not the City's agent. It was an independent contractor. Collins cannot recover against the city for any alleged breach of contract based upon the activity of an independent contractor." 533 So.2d at 1131 (emphasis added). *See also Glenn*, 785 F.Supp.2d at 1288. The problem is not that BLSD is resorting to legal concepts traditionally associated with tort. It is that Excel and Granite Re shoehorned these issues into the case by demanding Instruction 18.

Similarly, Excel cannot complain that BLSD has not identified which of the damages are attributable to the tort theory of recovery. There was no tort theory pleaded, and the erroneous instruction was never limited to any portion of the case. As Excel itself notes, the jury “used this instruction to find the Sewer District liable for breaching the contract.” That fact, rather than any particular class of damages, is the reason that Instruction 18 was reversible error.

b. The agency analysis must be fact-based

Excel and Granite Re cite a hodgepodge of materials in support of their claim that SKA was BLSD’s agent. However, the real reason Instruction 18 was erroneous was not because it used the word ‘agent,’ but because it made BLSD vicariously liable for SKA’s actions. Therefore, the question the Court must answer is not one of semantics, as asserted by Excel and Granite Re, but if SKA was an independent contractor, or an employee-equivalent for whose acts BLSD is vicariously liable. As this Court has repeatedly held in the past, the relevant analysis must be factual.

Granite Re and Excel assert that SKA should be considered BLSD’s agent due to the contractual language. This argument is flawed for several reasons. First, South Dakota does not follow a ‘magic words’ rule in determining if an entity is an independent contractor. Instead, courts undertake a factual inquiry, in which “all the features of the relationship are to be considered.” *Egemo v. Flores*, 470 N.W.2d 817, 820 (S.D. 1991). Further, this argument was directly and thoroughly addressed in *Glenn* – a case that neither Granite Re nor Excel discusses.

The court in *Glenn* held that the use of the term ‘representative’ to refer to an engineer did not render the engineer an agent of the project owner. Instead, the court

noted that “agency is to be determined by the facts and not by how the parties characterize their relationship,” and, as discussed in BLSD’s opening brief, went on to consider the parties’ conduct under the contracts. 785 F.Supp.2d at 1290-91. This is in keeping with South Dakota’s fact-based analysis for determining if an entity is an independent contractor. Appellees’ argument elevates semantics over the actual working relationship of the parties; the Court should follow the reasoning set out in *Glenn* and its own precedent, and consider the facts underlying the relationship. As in *Glenn*, this analysis leads to the conclusion that the engineer was an independent contractor rather than an agent of the owner.

Finally, even if contractual language were the deciding factor, Instruction 18 would still be reversible error. The BLSD/SKA agreement specifically states that SKA is an independent contractor. If contractual language is truly the deciding factor, then this provision is as worthy of implementation as the one referring to SKA as BLSD’s representative.

Excel cites a number of other random sources and contract provisions in support of its argument for Instruction 18. However, dictionary definitions notwithstanding, the words ‘on behalf of’ do not have the totemic significance accorded to them by Excel and Granite Re. All that Excel has established is that BLSD had a contract with SKA for the sewer project. As BLSD has stated repeatedly, the existence of a contract does not make the project owner liable for each and every act of the contractor.

Excel’s SDCL 34A-5-26 argument is nonsensical. BLSD never appointed SKA or Buell as an officer or employee of the Board. Instead, as the contract makes clear, it hired SKA as an independent contractor for a specific project. This no more made SKA

an officer of the Board than a municipality's entering into a contract for the design a street project constitutes an appointment of a city engineer pursuant to SDCL 9-14-24.

Nor do Excel's vague arguments about the provisions of its own contract with BLSL carry any weight. Excel was free to argue that BLSL had breached the contract. What it was not free to do was tell the jury that it could hold BLSL liable for "breaches" based on the conduct of an entity not party to the contract.

c. BLSL was prejudiced by instruction 18

The purpose and effect of instruction 18 were, as Granite Re and Excel's counsel explained, to ensure that the jury would consider SKA's alleged conduct rather than BLSL's. This was not incidental. As Appellees' closing arguments demonstrate, it was their entire theory of the case. When a particular theory is the heart of a litigant's case, an improper instruction on that topic is clearly prejudicial. *Johnson v. Armfield*, 2003 SD 134, ¶ 15, 672 N.W.2d 478, 482. Rather than consider the issue of whether BLSL breached its contract with Excel, the jury was explicitly asked to focus its attention on SKA's conduct. In the words of Excel, the jury "used this instruction to find the Sewer District liable for breaching the contract." This is the very result that the law does not allow. There is no question that Instruction 18 was prejudicial to BLSL.

d. BLSL did not waive its right to contest the agency instruction

The fact that BLSL raised its objections to Instruction 18 before the trial court cannot be disputed. The issue was extensively briefed and argued, both in open court and in chambers, and BLSL clearly, unequivocally, objected to Instruction 18 and Excel and

Granite Re's attempts to characterize SKA as BLSD's agent. *See* Tr. 741, 1760-61; R. 2635.¹

The question of whether BLSD may seek contribution from SKA is separate from the question of whether BLSD is vicariously liable for SKA's actions. The third party complaint simply says that SKA, as the engineer, "performed services on behalf of BLSD." (R. 960). At no point does BLSD allege that SKA was its agent, or that it was vicariously liable for SKA's acts. This is in no way inconsistent with BLSD's assertion that SKA was an independent contractor.

Even if Granite Re's specious arguments were correct, Rule 8 allows a party to "state as many separate claims or defenses as he has regardless of consistency..." SDCL 15-6-8(e). Therefore, a party is allowed to maintain and argue inconsistent claims and defenses without admitting one and forfeiting the other. *United States v. State*, 1999 SD 94 ¶ 11, 598 N.W.2d 208, 212. BLSD could make a third-party claim against SKA without admitting that it was vicariously liable for SKA's actions, just as making a claim for contribution was not an admission that BLSD had breached the contract.

IV. The references to and jury instruction concerning competitive bidding harmed BLSD

Granite Re and Excel argue that the trial court's decision to allow argument and a jury instruction concerning an alleged competitive bidding violation could not be harmful because competitive bidding was relevant to the reasonableness of the completion

¹ At the trial court's request, further briefing on the jury instructions was submitted directly to the court and to all other parties. A copy of this brief, and the email by which it was submitted to Judge Pardey on January 31, 2018, are attached as a supplement to the appendix. BLSD did not attach these items as part of its initial appendix, as it did not believe there was any conceivable argument that its objection to Instruction 18 had somehow been waived.

contract. However, this ignores the fact that the reasonableness of the completion contract was never in question.

At both his deposition and trial, Excel's expert admitted that the price for the completion contract was fair. (TT 771). Indeed, the only other quote that BLSD was able to get was several hundred thousand dollars higher than what it paid to Dakota Road Builders. (TT 1608-1609). The reasonableness of the completion contract was simply not an issue. Evidence is only admissible if it is relevant, and it is only relevant if it relates to a fact that is of consequence to determining the action. SDCL 19-19-401, 19-19-402. There was no valid reason to raise this issue at all, let alone instruct the jury on it.

Excel makes the curious argument that the jury was free to ignore its expert's testimony on the fairness of the completion contract. However, it is unclear how this scenario supports Excel's argument. Given Carr's testimony on the completion contract, there **was** no evidence that the price was unreasonable. The only way a jury would draw the conclusion that something was wrong with the price was for it to assume that something had been wrong with the selection process.

The suggestion that BLSD was guilty of a competitive bidding violation was formulated to provoke the jury's instinct to punish. This is the definition of unfair prejudice. *State v. Martin*, 704 N.W.2d 665, 672 (Iowa 2005). When presented with a Rule 403 objection, "the trial judge must decide whether the minute peg of relevancy will be entirely obscured by the dirty linen hung upon it." *Id.* When the competitive bidding allegations had no relevance whatsoever and could only encourage the jury to punish

BLSD, it was error for the Court to admit the evidence and then draw further attention to it with an instruction.

V. The damages award was excessive, speculative, and contrary to law

BLSD's argument is not merely that the lost profits cannot be recovered because they were for third party contracts. The lost profits are unrecoverable because they are for nonexistent third-party agreements that, if they came to fruition at all, would do so outside the life of the BLSD contract. Excel's bullet-point list of cases does not dictate a different result. Not one of these cases allows for lost profits from future, uncertain contracts with third parties, which would not have come into being as a direct result of the primary contract for which breach is alleged.

In *Stern Oil, Ateyo*, and *Lien*, the lost profits were for direct damages that reflected a loss of the benefit of the bargain. See *Stern Oil Co., Inc. v. Brown*, 2018 SD 15, 908 N.W.2d 144 (lost profits were what plaintiff would have received from supply agreement with a minimum purchase requirement); *Ateyo v. Paulsen*, 319 N.W.2d 164 (S.D. 1982) (lost income from denial of access to leased land); *Lien v. Northwestern Engineering Co.*, 39 N.W.2d 483 (S.D. 1949) (plaintiff entitled to market value of rock less cost of production when landowner breached exclusive mineral contract by selling rock directly to plaintiff's buyer).

Arcon Const. Co., Inc. v. South Dakota Cement Plant did not even involve a claim for lost profits. In that case, the defendant had contracted to provide cement to the plaintiff for two highway projects. 349 N.W.2d 407, 409 (S.D. 1984). The damages sought were for the cost of idled equipment due to delays caused by the shortage; the court only referenced lost profits as a possible relevant factor in determining the value of

idle time. *Id.* at 415. Moreover, the highway projects were existing contracts that directly necessitated the cement contracts.

Drier v. Perfection, Inc., 259 N.W.2d 496 (S.D.1977), is likewise distinguishable. First, the case was for breach of warranty, and the lost profits alleged were for the warranty period. *Id.* at 499. Although the damages were consequential rather than direct, the element of speculation was removed; the plaintiff sought damages for specific work that that the he had been forced to ‘job out’ to other printers when the machine manufactured by defendants was out of commission. *Id.* at 505.

Table Steaks, Inc. v. First Premier Bank, N.A., 2002 SD 105, 650 N.W.2d 829 also fails to support Excel’s argument. In that case, the lost profit damages were awarded for plaintiff’s claims of tortious interference; the only damages awarded for the contract claim were to compensate for the plaintiff restaurant’s purchase of an ATM machine after the defendants terminated a credit card agreement. *See* Brief of Appellee Table Steaks, Inc., No. 21878, 2001 WL 36004318 at *44 (S.D. Sept. 11, 2001).

For all Excel’s discussion of EBITDA, it fails to address the crucial problem with Braun’s testimony: her lack of actual data for the years following the termination, and her overreliance on a year that included money that Excel had not actually been paid. No method can produce good results from bad data. Excel’s failure to provide actual evidence of its revenues after 2013 dooms its case.

Further, Excel was not entitled to extra payment for its misreading of the contract. A provision is not ambiguous merely because one party asserts that it is. “Rather, a contract is ambiguous only when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire

integrated agreement.” *Ziegler Furniture and Funeral Home, Inc. v. Cicmanec*, 2006 SD 6 ¶ 16, 709 N.W.2d 350 (quotations omitted). The contract states that “grinder pump station includes gravity pipe....15 [feet]...shall be included in the payment for grinder pump station” and that “15 L.F. of...pipe to each Grinder Station...shall be included in the payment for the Grinder Station.” (R. 340, 362). There is no other way to interpret this provision. In the face of this unambiguous language, Reed Olson’s insistence that he had not understood the contract to say that the bid for the grinder pump station included fifteen feet of pipe is beside the point. (TT 1138-39).

Excel also argues that it was entitled to up its contract price because the contract was unit bid. However, a unit bid contract does not give the contractor free rein to change anything at any time. The changes allowed are for changes in the number of units between what was estimated and what was actually installed. Excel, however, did not claim damages based on an increase in the number of units. Instead, as BLSD has previously explained, Excel’s claim was that it was entitled to raise the unit price on a number of items and recover for several others that were never bid at all.

There was no line item in the contract for pressure testing, and Excel knew when it asked to raise the grade that BLSD would not pay for an additional manhole. Further, the pressure testing was done to make the project comply with the specifications. A contractor cannot demand extra money for work that is necessary to complete the project in accord with the specifications. *A-G-E Corp. v. State*, 2006 SD 66 ¶ 41, 719 N.W.2d 780, 791. Nor is the alleged pipe discrepancy cause for additional payment. Excel’s discontent aside, the contract expressly stated how measurement would be taken for pipe quantities. These damages are yet another attempt to change the contract after the fact.

The damages awarded for work in Spawn's Addition are the best example of why the unit bid argument cannot save Excel. Again, Excel had bid \$8.25 a lineal foot to install the 1 ¼ inch line between the grinder pumps and the main line. However, its damages in Spawn's Addition are based on an estimate of \$275 a lineal foot to lay the very same 1 ¼ inch line. (TT 549-51). This is not a change in the quantity of a bid item. It is a unilateral 3,333% increase of the contractual price. Unit bid contract or otherwise, such a verdict cannot be allowed to stand.

Finally, Excel cannot escape its obligation to anticipate conditions on the project by relying on the alleged statement by Buell. Excel had a contractual obligation to investigate the site and obtain additional information that might affect cost. (R. 280). Even if Excel's version of the story is taken at face value, neither Buell nor BLSD ever promised extra money, let alone the aforementioned 3,333% increase. If Excel truly saw that the project might cost an additional quarter million dollars, both the contract and the common law required it to factor that into its bid. A contractor who makes an inadequate investigation assumes all the inherent risks and hazards when it submits its bid. *J.A. Thompson & Son, Inc. v. State*, 465 P.2d 148, 154 (Hawaii 1970). A public entity "should not be placed in a position of encouraging careless bids by contractors who might anticipate that should conditions differ from optimistic expectations reflected in the bids, the State would bear the costs of the bidder's error." *Id.* at 155. BLSD should not be forced to pay for Excel's cavalier attitude towards the bid.

CONCLUSION

Because of the errors below, BLSD was disallowed from pursuing viable claims, while Excel was able to pursue damages that the court had concluded were unrecoverable as a matter of law, based on a theory that has no foundation in the law of this or any other state. The judgment against BLSD must be reversed.

Dated at Sioux Falls, South Dakota, this 29th day of December, 2018.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellant Brant Lake Sanitary District complies with the type volume limitations set forth in SDCL § 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 5,415 words and 27,106 characters, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, this 29th day of November, 2018.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing “Reply Brief of Appellant Brant Lake Sanitary District” was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capitol Avenue, Pierre, South Dakota, 57501-5070, on November 26, 2018.

The undersigned further certifies that an electronic copy of “Reply Brief of Appellant Brant Lake Sanitary District” was emailed to the attorneys set forth below, on November 29, 2018:

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Subject: Jury Instructions.
Date: Wednesday, January 31, 2018 5:19:07 AM
Attachments: [Jury Instruction supplemental brief.docx](#)
[BLSJ verdict form.docx](#)

ARGUMENT AND ANALYSIS

I. There is no need to instruct the jury on insurance

The proposed instructions contain an admonishment against the consideration of insurance. However, given that none of the parties actually have applicable insurance, and no evidence to that effect has been admitted, such an instruction might draw the jury's attention to an idea that they would not have otherwise conceived of on their own. Consequently, Brant Lake asks that this instruction be withdrawn.

II. The proposed "Act of God" instruction is for negligence cases, not contract disputes

There are two problems with Excel's "Act of God" instruction. First, the plain language of the contract requires Excel to give written notice to Brant Lake, and no such notice was given. Secondly, Excel seeks to elide the freezing of the pumps with its failure to assist with the troubleshooting.

Paragraph 14.4, Section 0700 of the contract (Exhibit 503 p. 55) reads as follows:

CONTRACTOR shall not be charged with liquidated damages or any excess cost when the delay in completion of the Work is due to the following, and CONTRACTOR has promptly given Written Notice of such delay to OWNER or ENGINEER....to unforeseeable causes beyond the control and without the fault or negligence of CONTRACTOR, including but not restricted to...acts of nature..."

Excel has not put forth any evidence that it gave written notice to Brant Lake of an act of nature, either with respect to the freezing of the pumps or its apparent new claim related to the rains of spring 2013. Because Excel failed to follow the express terms of the contract, it cannot now seek protection under the common law.

Further, Excel's act of God theory is based on a muddling of the facts and the law. As the included references (and, indeed, the section of the pattern jury instructions from which this

instruction comes) demonstrate, the instruction proposed by Excel is a *negligence* instruction, addressed to whether a plaintiff can recover for damages that were alleged to be caused by an unforeseeable force of nature. See *Thomas v. Sully County*, 2001 SD 73, 629 N.W.2d 590 (“[A] claimant for damages cannot recover if the accident was due to an act of God.”); *Heer v. State*, 432 N.W.2d 559, 567-68 (S.D. 1988) (“[T]o exonerate the defendant an act of God must be the sole proximate cause of the accident.”); *Brasel v. Myers*, 229 N.W.2d 569, 572 (S.D. 1975) (“An act of God must be the sole proximate cause of damages without concurrent negligent participation of the defendant before the defendant is entitled to a verdict.”); *Northwestern Bell Telephone Co. v. Henry Carlson Co.*, 165 N.W.2d 346, 349-50 (S.D. 1969). Brant Lake, however, is not seeking to recover damages for an accident caused by an act of God. Its claimed damages are due to Excel’s nonperformance of its contractual duties.

The act of God doctrine in contract is not about accident causation. It is about whether the alleged act of God made it impossible for the party to perform its duties under the contract. “If a party, by contract, is obligated to a performance that is possible to be performed, the party must make good unless performance is rendered impossible by an Act of God...” *Rohr v. Reliance Bank*, 825 F.3d 1046, 1052 (8th Cir. 2016). See also *McClellan v. Harris*, 64 N.W. 522 (S.D. 1895) (“By the act of God he was prevented from fully performing his contract...”); Restatement (Second) of Contracts Sec. 261. Therefore, the question in contract is not merely whether Excel contributed to the pump problems in the winter of 2013-2014, but whether the cold rendered Excel’s performance of its contractual duties impossible.

The issue that led to the termination was not the freeze-ups, but Excel’s refusal to assist with troubleshooting. The cold might have contributed to the freezing problem, but it did not prevent Excel from fulfilling its contractual duty to assist with the pumps. Therefore, *any* act of

God instruction is inappropriate. However, if one is to be included, it must focus on the contractual aspects of the problem rather than simply citing the existence of an Act of God doctrine. Therefore, if the Court decides to give an Act of God instruction, Brant Lake requests the addition of the following language:

“An Act of God excuses performance of a contractual obligation only when it renders performance impossible.”

III. The final paragraph of the Mooney’s, Inc. instruction is inappropriate because Brant Lake did not prepare the plans and specifications

The final paragraph of the proposed instruction based on *Mooney’s, Inc. v. South Dakota Dept. Of Transp.*, 482 N.W.2d 43 (S.D. 1992) is inappropriate for the present case because it assumes that the owner prepared the plans and specs. However, Brant Lake did not prepare the plans and specs in this case; as will be discussed below, it hired an independent contractor to do that work for it. This is distinct from the situation in *Mooney’s*, because, in that case, the specs used were the South Dakota Standard Specifications for Roads and Bridges, which were, in fact, drafted by the defendant State of South Dakota. *Id.* at 44. Further, the engineers in that case were state employees, and the defendant was the state. *Id.* at 44-45. Therefore, Brant Lake requests its original instructions:

Instruction No. _____

In bidding a contract, a contractor must visit the site, check the plans, and inform itself of the requirements of the work.

Instruction No. _____

A contractor who agrees to do work for a fixed sum is not entitled to additional compensation because unforeseen difficulties are encountered. A contractor may not receive an upward adjustment in price for a job site condition that a reasonable contractor would have anticipated in approaching the project.

Instruction No. ____

When a contractor agrees to do work for a fixed sum, it is not entitled to additional compensation because unforeseen difficulties are encountered. A contractor cannot receive an upward adjustment in price for a condition which a reasonable contractor would have anticipated in approaching the project.

IV. Excel's Proposed Instructions Based on Agency Are Improper and Inapplicable

There are two main problems with Granite Re and Excel's agency argument. First, as has been previously asserted, Excel did not plead vicarious liability. Second, agency is not absolute; the fact that the spec book (which, incidentally, was part of the contract between Brant Lake and Excel) used the word "representative" does not transform Schmitz Kalda from an independent contractor to an alter ego of Brant Lake.

It is important to consider the purpose of agency law, and its ultimate relevance to this dispute. In effect, Excel and Granite Re are attempting to add an unpleaded vicarious liability claim for malpractice against Schmitz Kalda. As Brant Lake has previously asserted and will not reargue here, the instructions must match the pleadings. Further, even if Excel had pleaded this claim, it still would not be entitled to collect damages from Brant Lake for Schmitz Kalda's alleged negligence. It is one thing to argue that Schmitz Kalda's alleged errors, rather than those

of Excel, were the reason that the project was behind schedule. It is quite another to say that Schmitz Kalda was professionally negligent and that Brant Lake, having hired Schmitz Kalda, is liable to Excel for that negligence.

South Dakota law defines an independent contractor as “one who carries on and contracts to do a piece of work according to his own methods, without being subject to the control of the employer, except as to the product or result of the work.” *Moritz v. C & R Transfer Co.*, 266 N.W.2d 568, 571 (S.D. 1978). “The general rule that an employer has no liability for the acts of an independent contractor stems from the concept that the employer has no power of control over the manner in which the work is to be done by the contractor...” *Clausen v. Aberdeen Grain Inspection, Inc.*, 1999 SD 66 ¶ 15, 594 N.W.2d 718, 722. Instead, the work “is regarded as the contractor’s own enterprise”, and the contractor “carries on an independent business and contract work according to their own methods, subject to the employer’s control only as to results.” *Id.*

In determining whether one acting for another is a servant or an independent contractor, the court considers:

- (a) The extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) Whether or not the one employed is engaged in a distinct occupation or business;
- (c) The kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) The skill required in the particular occupation;
- (e) Whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) The length of time for which the person is employed;
- (g) The method of payment, whether by the time or by the job;
- (h) Whether or not the work is a part of the regular business of the employer;
- (i) Whether or not the parties believe they are creating the relation of master and servant; and
- (j) Whether the principal is or is not in business.

Restatement (Second) of Agency, 220. “The important distinction is between service in which the actor’s physical activities and his time are surrendered to the control of the master, and service under an agreement to accomplish results or to use care and skill in accomplishing results. Those rendering service but retaining control over the manner of doing it are not servants.” *Id.* at Cmt. E.

Excel appears to hinge its unpleaded vicarious liability claim on Section 0700, Subsection 24.1 of Exhibit 503, which states that “ENGINEER shall act as OWNER’S representative during the construction period.” However, even if Excel had actually pleaded that Brant Lake was responsible for all of Schmitz Kalda’s actions via this portion of the contract, the claim would still fail. A ‘representative’ is not an agent, and, in any event, Schmitz Kalda did not actually sign this contract. Moreover, at no point in any of the contracts does Brant Lake take responsibility for Schmitz Kalda’s workmanship or design.

Schmitz Kalda, like Excel, was an independent business that contracted with Brant Lake to provide specialized services on a specific project. Brant Lake did not control or provide detailed oversight of Schmitz Kalda’s day to day work, any more than it did of Excel’s. Nor was building a sanitary sewer system part of an ongoing business for Brant Lake; it was a one-time project for which Brant Lake contracted with specialists to complete the work. Indeed, the Professional Services Agreement between Brant Lake and Schmitz Kalda specifically states that the engineer is an independent contractor. (Exhibit 540 p. 1). At no point did *any* of the contracts make Schmitz Kalda Brant Lake’s alter ego for purpose of designing the system or performing its own duties. To turn a simple contractual relationship into one of absolute agency would go against both law and reason. By that logic, the spouse of a patient who underwent a botched surgery could sue the patient for malpractice and loss of consortium, since it was the

patient who chose the doctor. Perhaps more to the point, by that logic, Excel itself is an agent of Brant Lake.

Excel can argue to the jury that Schmitz Kalda was the reason that Excel could not meet its own contractual obligations. It cannot, however, assert that it is entitled to damages from Brant Lake because of alleged negligence by Schmitz Kalda. Such an instruction would go beyond the contents of the pleadings, the contracts, and South Dakota law.

V. No Instruction on Oral Modifications Should Be Given Because The Contract Disallows Oral Modification

The contract between Brant Lake and Excel sets out the procedure for modifications to the work, stating that modifications to price or time must only be made via an executed change order. *See* Ex. 503 p. 54. Further, South Dakota law states that a contract in writing “may be altered by a contract in writing without a new consideration or by an executed oral agreement, and not otherwise.” SDCL 53-8-7. There has been no allegation that any oral agreement was ever executed; without such an allegation, there can be no oral modification. *Von Sternberg v. Caffee*, 2005 SD 14 ¶ 10, 692 N.W.2d 549, 553. An executed agreement is one whose object has been fully performed. *Mettel v. Gales*, 82 N.W. 181, 183 (S.D. 1900). The reason for such a rule is clear: without execution, there is no consideration for the promise. There is no executed agreement here, and no exchange of consideration for any of the alleged modifications. Therefore, the instruction on oral modification will only misdirect the jury.

VI. Proposed Instruction on Liquidated Damages

Brant Lake has noted that the words “liquidated damages” appear in several exhibits that have been entered into evidence, including the Brant Lake/Excel contract. In order to prevent

the jury from attempting to award such damages or assuming they have already been collected,
Brant Lake proposes the following instruction:

You may have seen reference made to liquidated damages in the evidence presented to you in this case. Brant Lake has not collected any liquidated damages from Excel, and the issue of such damages is not before the jury.

Dated at Sioux Falls, South Dakota, this _____ day of January, 2018.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for Brant Lake Sanitary District, hereby certifies that the foregoing was filed electronically with the court and that any associated attorneys were either served automatically by the state's electronic service system or were served via direct email (with mailed hard copies if requested by counsel), on this _____ day of January, 2018:

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