IN THE

Supreme Court

of the

State of South Dakota

Nos. 29038; 29265

DOUG GANTVOORT,

PLAINTIFF/APPELLANT

AND

DOROTHY JEAN NOVAK,

PLAINTIFF

VS.

MARY ANN RANSCHAU,

DEFENDANT,

DAVID STRAIT,

DEFENDANT/APPELLEE

AND

DAVID R. STRAIT, P.C.,

DEFENDANT/APPELLEE

An appeal from the Circuit Court, Third Judicial Circuit
Deuel County, South Dakota

The Hon. Jon R. Erickson
CIRCUIT COURT JUDGE

APPELLANT'S BRIEF

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Notice of Appeal filed on February 27, 2020

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JURISDICTIONAL STATEMENT

Appellant appeals the decision of the Honorable Jon. R. Erickson's June 5, 2019, order granting Appellees' motion for summary judgment with notice of entry of judgment filed on February 7, 2020. This Court has jurisdiction under SDCL § 15-26A-3. Appellant filed his notice of appeal on February 27, 2020.

REQUEST FOR ORAL ARGUMENT

Appellant requests the privilege of appearing before this Court for Oral Argument.

STATEMENT OF THE ISSUES

I. Did the trial court err by granting Defendant Strait and Defendant Strait, P.C.'s Motion for Summary Judgment?

Yes, the trial court erred. The trial court erred by interpreting disputed material facts in Defendant Strait's favor. First, the trial court erred by finding that Strait thought that the recordings Mary Ann made might be helpful during the divorce proceedings; this was error because, e Strait testified to the contrary. Second, trial court erred in finding that Strait's conduct was not intentional; this was error because there was conflicting testimony on that issue. Third, the trial court erred when it found that Strait advised Mary Ann about the potential consequences of her actions; this was error because Mary Ann testified that Strait did not advise her about this. Due, in part, of those factual interpretation errors, the trial court ruled incorrectly on Doug's aiding and abetting and conspiracy counts.

- Restatement (Second) of Torts § 876(b) (1977)
- *Setliff v. Stewart*, 2005 SD 40, 694 N.W.2d 859

INTRODUCTION

The trial court found that Doug had satisfied almost all the elements that his privacy had been invaded. The trial court, however, found that Defendant Strait "merely preserved the recording [sic] when they were brought to him" and that "[h]is role was passive as an observer." R. 1006. Those findings ignored what the evidence described.

Defendant Strait knew from the beginning what was happening. He knew that Defendant Mary Ann Ranschau was making recordings that he believed could constitute criminal activity. He helped Defendant Mary Ann Ranschau collect, collate, and organize those illicit recordings. And, even though he knew that the recordings had "no bearing whatsoever" on the legal issue in Defendant Mary Ann Ranschau's divorce trial, he personally selected two recordings to introduce. One of those recordings included embarrassing audio of Doug engaging in adult behavior in the privacy of his office.

Defendant Strait was more than a passive observer. He was the central actor in a scheme to embarrass and harass Doug. The trial court's order granting Defendant Strait summary judgment should be reversed.

STATEMENT OF THE CASE

Doug filed suit on January 18, 2018. R. 1-11. Defendant Strait and Defendant Strait, P.C. (collectively "Defendant Strait") moved for summary judgment on February 11, 2019. R. 71-105. The trial court heard argument, R. 1011, and issued a memorandum opinion granting the motion. R. 1014-19. Doug stipulated to dismissing Defendant Mary Ann Ranschau from this case on January 2, 2020. R. 1095-96.

Judgment and Final Order Dismissing Claims and Taxing Costs was signed on February 6, 2020. R. 1106-07. Doug appealed on February 27, 2020. R. 1112-14.

STATEMENT OF THE FACTS

Defendant Strait, an attorney, began representing Defendant Mary Ann Ranschau (then Mary Ann Gantvoort) ("Mary Ann") for a divorce against her then-husband, Doug, in December of 2014. Doug and Mary Ann had not gotten along for years. R. 521. They were living separate lives. R. 521. They had discussed divorcing several times. R. 531.

At a December 3, 2014, meeting, Defendant Strait and Mary Ann discussed recordings that Mary Ann had secretly made of her then-husband, Doug. R. 790. A few days earlier, Mary Ann had hidden a voice-activated recorder on the windowsill in Doug's office. R. 751. Mary Ann knew that Doug's shop had not been open to the public for years. R. 759. That was due to a 2006 motorcycle accident[1] where Doug had been seriously injured. R. 760. Doug and Mary Ann had even "put cardboard on every window" of his office so Doug would have more privacy. R. 764. She also knew that Doug's office was his man cave. R. 756.

There was a dispute over what Defendant Strait said to Mary Ann at the meeting she set up to bring Defendant Strait the first recordings. Defendant Strait claimed he told Mary Ann to stop surreptitiously recording Doug. R. 790. Mary

[1] Because the accident was so serious, Doug had to let all his employees go. R. 760. Doug changed his business model and started doing "things more privately." R. 760. He had trouble dealing with too many people around. R. 764. Though possible to access Doug's restoration shop through Doug's office, "everybody would just pull up to the big door [to the shop] and go in that door there." R. 763.

Ann, on the other hand, testified that Defendant Strait never told her to stop recording Doug until much later, after Doug's divorce attorney finally found out what Mary Ann and Defendant Strait were doing. R. 556, 733, 790.

In any case, over the next several weeks, Defendant Strait collected at least 50 electronic files from the hidden recording device that Mary Ann brought him. R. 690-703, 725-26. Mary Ann testified that "[e]very day or every two days" she brought Defendant Strait the secret recorder to have the files downloaded. R. 726. Defendant Strait's billing records confirm 14 occasions when Mary Ann brought in the secret recorder and its files were copied and stored. E.g. R. 945-50. Strait typically had his staff handle the recording files, R. 906, though on at least one occasion, he personally took the recorder from Mary Ann. R. 727.

Defendant Strait not only had the secret recordings copied and stored, but he and his staff reviewed the content of the recordings several times with Mary Ann and discussed them at length. R. 949, 741. Mary Ann prepared and provided a summary of what each recording contained. R. 898-99. Mary Ann and Defendant Strait both specifically remembered discussing the recordings captured while Doug was watching pornography. R. 741, 829-30.

Defendant Strait knew the recordings "had no relevance to the legal issues in the divorce." R. 836. Defendant Strait admitted that fact in his deposition. R. 836. Defendant Strait claimed in his deposition that he told Mary Ann he would not use the recordings at trial. R. 880. His assistant, however, testified that in the days leading up to trial, Defendant Strait directed his staff to burn copy recordings to portable disks. R.

932, 934. Defendant Strait gave his assistant specific dates of recordings he wanted on disks. R. 933. One of the recordings Defendant Strait requested be prepared for trial included audio of Doug watching pornography and masturbating in the privacy of his office. R. 829-30.

Knowing the recordings were not relevant to the parties' divorce, Defendant Strait then proceeded to try to introduce two lengthy recordings at the divorce trial. Doug's attorney objected, citing SDCL § 23A-35A-20 and SDCL § 25-4-33.1. R. 957-58. The Honorable Robert L. Timm, presiding over the divorce trial, took a brief recess to research the issue. R. 958. Judge Timm then sustained the objection, noting the apparently unlawful nature of the conduct yielding the recordings:

> THE COURT: All right. I'm going to sustain the objection, I think the exclusionary rule for illicitly received communications applies in this case and I'm not going to hear any of that recorded testimony. We have a statute that requires the consent of one party to the conversation in order for it to be legal and in this case that is not the case, so that's the ruling of the Court.[2]

R. 959.

Defendant Strait then tried another tactic to get the recordings into the public record, though he knew they were not even relevant. R. 836. He asked Mary Ann some follow up questions about Doug's office, then offered the tapes into evidence. R. 959. Judge Timm again refused to admit the recordings.

Determined, Defendant Strait persisted by making a formal offer of proof of the recordings. R. 960-62. Defendant Strait falsely claimed at his deposition that he never

[2] *Id*. at Strait000874:1-7.

tried to introduce the recordings themselves in the public record as part of his offer of proof. R. 832-33. The trial transcript showed the opposite; according to the trial transcript, Defendant Strait tried to introduce the recordings as part of his offer of proof. R. 960-62. In short, the evidence showed that Defendant Strait knowingly attempted three times to introduce irrelevant, improper recordings into the public record.

STANDARD OF REVIEW

This Court "review[s] a circuit court's entry of summary judgment under the *de novo* standard of review." *Larimer v. Am. Family Mut. Ins. Co*., 2019 SD 21, ¶ 6, 926 N.W.2d 472, 475. It "give[s] no deference to the circuit's decision…." *Id* (citations omitted) (ellipses in original). That is because "[s]ummary judgment 'should not be granted unless the moving party has established the right to a judgment with such clarity as to leave no room for controversy.'" *Hanson v. Big Stone Therapies, Inc.*, 2018 SD 60, ¶ 38, 916 N.W.2d 151, 161 (citations omitted). "If there are genuine issues of material fact, then summary judgment is improper." *Fisher v. Kahler*, 2002 S.D. 30, ¶ 5, 641 N.W.2d 122, 125 (citations omitted).

ARGUMENT

I. The Trial Court Found that Undisputed Facts Supported Almost All the Elements of Invasion of Privacy.

"To recover on an invasion of the right to privacy claim, a claimant must show an 'unreasonable, unwarranted, serious and offensive intrusion upon the seclusion of another." *Roth v. Farner-Bocken Co*., 2003 SD 80, ¶ 19, 667 N.W.2d 561 (*quoting Kjerstad v. Ravellette Publ'ns, Inc*., 517 N.W.2d 419, 424 (S.D. 1994)) (other citations excluded). That invasion must "be offensive and objectionable to a reasonable man of ordinary sensibilities." *Montgomery Ward v. Shope*, 286 N.W.2d 806, 808 (S.D. 1979) (citations omitted). Actionable invasions of privacy include the opening and reading of

personal mail,[3] watching someone in a restroom,[4] taking photographs of someone without their consent,[5] hacking into a computer,[6] entering someone's home without permission,[7] and reviewing medical records without permission.[8]

While this Court has yet to rule on whether audio recordings can constitute an invasion of privacy, there are several different statutes that govern what audio can be recorded. According to SDCL § 23A-35A-20, it is illegal to record other peoples' conversations or to permit another person to record those conversations:

> …[A] person is guilty of a Class 5 felony who is not:
>
> (1) A sender or receiver of a communication who intentionally and by means of an eavesdropping device overhears or records a communication, or aids, authorizes, employs, procures, or permits another to overhear or record, without the consent of either a sender or receiver of the communication….

---

[3] *Roth*, 2003 SD 80, ¶ 21 (*citing Birnbaum v. United States*, 588 F.2d 319, 326 (2d Cir. 1978) (recognizing state law claim against private person for intrusion of privacy based on opening and reading sealed mail); *Vernars v. Young*, 539 F.2d 966, 969 (3d Cir. 1976) (recognizing cause of action and indicating private individuals have a "reasonable expectation that their personal mail will not be opened and read by authorized persons"); *Doe v. Kohn, Nast, & Graf, P.C.*, 866 F. Supp. 190, 195-96 (E.D. Pa. 1994) (indicating "[a]n employer is not authorized to open mail addressed to a person at his workplace that appears to be personal").

[4] *Kjerstad*, 517 N.W.2d 419.

[5] *See e.g.*, *Peoples Bank and Trust Co. of Mountain Home v. Globe Intern. Pub., Inc.*, 978 F.2d 1065 (8th Cir. 1992)

[6] *Coalition for an Airline Passengers' Bill of Rights v. Delta Air Lines, Inc.*, 693 F. Supp. 2d 667, 676 (S.D. Tex. 2010).

[7] *Garay v. Liriano*, 839 F. Supp. 2d 138 (D.D.C. 2012).

[8] *French v. United States ex re. HHS*, 55 F. Supp.2d 379, 383 (W.D.N.C. 1999) ("Plaintiff had every expectation of privacy in her medical records and wrongfully obtaining and using those records would be highly offensive to a reasonable person."). *See also Perez-Denison v. Kaiser Found. Health Plan of the Nw.* 868 F. Supp. 2d 1065, 1090 (D. Or. 2012) ("HIPAA suggests Congress has determined reasonable people want their medical records private and strongly object to those records being inappropriately accessed.").

SDCL § 23A-35A-20.

An "eavesdropping device" includes "any electronic, mechanical, or other apparatus which is intentionally used to intercept a wire, electronic, or oral communication other than" various common carrier devices or hearing aids. SDCL § 23A-35A-1(6). That is mirrored by South Dakota's invasion of privacy criminal statute which indicates that it is a criminal invasion of privacy for someone to "install[] in any private place, without the consent of the person or persons entitled to privacy there, any device for observing, photographing, recording, amplifying, or broadcasting sounds or events in such place, or uses any such unauthorized installation…." SDCL § 22-21-1(2).

The trial court found that "[t]he secret, voice-activated recording took place in [Doug's] private office, not in the public display area. That placement of the recording device was *unreasonable, unwarranted, serious and offensive*." R. 1005 (*citing Roth*, 2003 SD 80, ¶ 19) (emphasis added). The trial court also found that Mary Ann's "conduct was intentional; it did intrude upon conversations in which [Doug] had a reasonable expectation of privacy and it is a jury question whether under these circumstances the intrusion was highly offensive." R. 1006. In other words, the trial court found that almost all of the elements of the tort of invasion of privacy had been satisfied. The trial court, however, erroneously found that Defendant Strait's participation in that invasion had been minimal, if not nonexistent. The trial court's error should be reversed.

II. The Trial Court Erred by Interpreting Disputed Material Facts in Defendant Strait's Favor.

The trial court repeatedly ignored facts showing how much Defendant Strait was an active participant in Mary Ann's attempts to illicitly record Doug. Each time, the trial court accepted Defendant Strait's position and ignored Doug's reasonable interpretations. The trial court should be reversed.

A. The trial court erred by finding that Defendant Strait thought that the recordings Mary Ann made might be helpful during the divorce proceedings despite Defendant Strait's testimony to the contrary.

The trial court's primary error was that it made multiple factual findings based solely upon inference, and, the trial court allowed all of those inferences to favor the moving party, rather than the non-moving party. For example, the trial court found that Defendant Strait "reviewed and kept copies of the secret recordings thinking they may be helpful to him in the pending divorce proceedings." R. 1004. But Defendant Strait never testified to that conclusion. Instead, his attorneys made the argument at hearing. Or, in other words, Defendant Strait's attorneys advocated for an inference to be drawn from his ongoing possession of these illicit recordings. Not only was this inference contrary to other evidence in the Record, it was also contrary to his own testimony.

Defendant Strait actual testimony was that the tapes were irrelevant to any legal issue in the divorce. R. 836 ("A. [The tapes] had no relevance to the legal issues in the divorce. Q. No bearing whatsoever? A. On the legal issues in the divorce? Q. Correct. A. That is correct."). Defendant Strait admitted that he intentionally introduced those exhibits knowing that they were irrelevant to the case. R. 836. Defendant Strait

testified that he tried to introduce those irrelevant recordings because "[t]hey were relevant to Mary's emotional 'I want to get on with my life.'" R. 836.

Defendant Strait was not passively preserving evidence. Defendant Strait conceded that the only point of installing secret recording devices in private areas would be to "harass" the other party. R. 840. A reasonably jury could conclude that Defendant Strait knew and helped Mary Ann harass Doug by not just preserving but *trying to introduce into the public record* recordings that were both personal and embarrassing to Doug, such as audio of Doug watching pornography. The trial court's factual finding was in error, and its order should be reversed.

B. The trial court erred in finding that Strait's conduct was not intentional even though there was conflicting testimony on that issue.

The trial court found that Defendant "Strait's conduct was not intentional." R. 1006. Defendant Strait, however, admitted that he "intentionally" tried to introduce recordings of Doug watching pornography at trial. R. 836. Defendant Strait further agreed that the point of recording adverse parties in private places would be to "harass" them. R. 840. According to Defendant Strait, he told Mary Ann at their first meeting that secretly recording Doug "could amount to criminal activity." R. 791. Mary Ann denied he ever told her that, however. R. 744.

Even so, Defendant Strait's office processed 51 recordings. R. 725-26. Defendant Strait, personally, accepted at least one of those recordings. R. 726. In a light most favorable to the non-moving party, the fact that the recordings did not stop until *after* Doug and his attorney discovered the misconduct suggests that the only

reason Defendant Strait told Mary Ann to stop was because they got caught. R. 556, 733, 790.

A reasonable jury could conclude that, based on Defendant Strait's statements and actions, he was not merely a passive preserver of evidence. His own assistant testified that he directed her to prepare the recordings for trial, and that he selected those recordings to include on the disk. R. 932-34. Defendant Strait did not advise Mary Ann to stop recording until after Doug's attorney found out what was happening. R. 556, 733, 790. Defendant Strait made the choice to intentionally introduce irrelevant – but *embarrassing* and admittedly *harassing* – evidence into open court.[9] Defendant Strait made the choice to cherry pick the most embarrassing materials to introduce. R. 932-34. Those choices were all Defendant Strait's, not Mary Ann's. (Nowhere in the Trial Transcript does Mary Ann attempt to introduce these recordings as evidence.) The trial court erred when it found that Defendant Strait was "passive as an observer." R. 1006. In a light most favorable to the non-moving party, Defendant Strait was an active participant. The trial court's order granting summary judgment should be reversed.

C. The trial court erred when it found that Defendant Strait advised Mary Ann the potential consequences of her actions when Mary Ann testified that Defendant Strait did not.

In finding that Defendant Strait did not "substantially assist or encourage [Mary Ann's] wrongful conduct," the trial court found that Defendant Strait "mere [sic]

[9] Defendant Strait's conduct was also in violation of Rule 1.2(d) of the Rules of Professional Conduct because he knew that Mary Ann's conduct could be criminal, R. 791, but he failed to advise her of that fact. R. 744. A jury could infer intent from that failure, alone.

preserved the evidence as it was brought to him and eventually told [Mary Ann] it was a violation of the law and that she should stop doing it." R. 1007. This factual finding is disputed in numerous places. For example, Mary Ann, disputed that finding in several ways:

- Mary Ann testified that Defendant Strait failed to tell her that recording Doug when she was not present could be a crime. R. 744.
- Mary Ann testified that Defendant Strait failed to disclose that recording Doug when she was not present could violate Doug's civil rights. R. 746.
- Mary Ann testified that Defendant Strait never told her that she could be sued for recording Doug when she was not there. R. 746.
- Mary Ann testified that she delivered these recordings to Defendant Strait's office on every day or every other day. R. 726.

According to Mary Ann, had Defendant Strait done any of these things, she would never have made the recordings. R. 746.

Yet, the bulk of the trial court's analysis of aiding and abetting the commission of a tort centered upon this factual finding that Defendant Strait did not "substantially assist" Mary Ann. The trial court accepted Defendant Strait's version of events without considering Mary Ann's testimony or Doug's. The trial court should be reversed.

III. The trial court erred in finding that Defendant Strait did not substantially assist or encourage Mary Ann's wrongful conduct.

The trial court found that Mary Ann's "conduct was intentional; it did intrude upon conversations in which [Doug] had a reasonable expectation of privacy and it is a

jury question whether under these circumstances the intrusion was highly offensive." R. 1006. As a result, the trial court found, as a matter of law, that Mary Ann's recording of Doug was wrongful.

The trial court found that Defendant Strait "did ***nothing*** to 'substantially assist or encourage that wrongful conduct.'" R. 1007 (emphasis added). It granted Defendant Strait's motion for summary judgment, based on that finding. Although this Court has not laid out the elements for aiding and abetting in the civil context, it has made passing reference to the doctrine. *See Andrews v. Ridco*, 2015 S.D. 24, ¶ 3, 863 N.W.2d 540, 542. The Minnesota Supreme Court has described a three-part test for aiding and abetting claims:

> (1) the primary tort-feasor must commit a tort that causes an injury to the plaintiff;
>
> (2) the defendant must know that the primary tort-feasor's conduct constitutes a breach of duty; and
>
> (3) the defendant must substantially assist or encourage the primary tort-feasor in the achievement of the breach

Witzman v. Lehrman, Lerhman & Flom, 601 N.W.2d 179, 187 (Minn. 1999) (*citing* Restatement (Second) of Torts § 876(b) (1977)).

The trial court made factual findings supporting the first two factors. In other words, the Plaintiff survived summary judgment on those first two factors.

The only factor that the trial court found against Doug was the third, that Defendant Strait failed to "substantially assist or encourage" Mary Ann. R. 1006. As described above, Defendant Strait was more than a passive preserver of evidence. In a light most favorable to the Plaintiff, his involvement in this process was at a level more

than "*nothing.*" A reasonable jury could conclude that Mary Ann's primary motivation for continuing to record Doug after the adultery issue was settled was to embarrass him. And, Defendant Strait explicitly provided the rationale for why he and his Client would participate in an improper scheme like this: n Defendant Strait's own words, these recording "were relevant to Mary's emotional 'I want to get on with my life.'" R. 836. In short, a Jury could infer that Defendant Strait actively participated in this scheme because his Client was paying him to.

Mary Ann, of course, never tried to publish the embarrassing recordings. Defendant Strait did. He picked out recordings of Doug watching pornography for his assistant to prepare for trial. He chose to try and introduce those recordings in open court. He persisted in trying to introduce those recordings multiple times, despite the divorce court's admonitions that they were improper, if not criminal.

Defendant Strait also oversaw the collection, organization, and dissemination of those 51 recordings. Mary Ann came in *every day or every other day* to give him those recordings. The sheer volume of recordings and frequency of their delivery suggest that this was not some passive preservation. Defendant Strait played an active role in getting them from Mary Ann and using them to her advantage.

Moreover, the recordings did not need to be published into the public record in order for the Defendants' misconduct to have its intended effect. One can only imagine the horror and dread facing the Plaintiff as he watched Defendant Strait attempt to publish this information. Not once. Not twice. But three times.

IV. The Trial Court Erred in Finding that there was no Meeting of the Minds

The trial court found that, because Defendant Strait did not, himself, commit the tort of invasion of privacy, he therefore could not have participated in a conspiracy to invade Doug's privacy. R. 1007. That finding is incorrect and based on erroneous factual presumptions. This finding also misses the point of a *conspiracy*, which is the name for the commission of a wrongful act using multiple actors who *collectively* perform all of the elements.

Under a civil conspiracy, two or more persons must have an object to be accomplished, a meeting of the minds on the actions to be taken, the commission of those acts, and resulting damages. *Setliff v. Stewart*, 2005 S.D. 40, ¶ 27, 694 N.W.2d 859, 866 (citations omitted). A conspiracy may be isolated or continuing. 2008 SD 6, ¶¶ 27-28, 744 N.W.2d 578. A conspiracy continues until its central aim is accomplished. *State v. Smith*, 353 N.W.2d 338, 342 (S.D. 1984).

Defendant Strait knew that Mary Ann's conduct was unlawful. R. 1007. He knew that Mary Ann was continuing to record Doug illicitly. R. 725-26. He knew that Mary Ann wanted embarrassing recordings of Doug to be introduced at trial, even though they had no bearing on her divorce case. Defendant Strait obliged his client in order to make her feel better, rather than for a valid legal purpose. To accomplish their objective, Defendant Strait instructed his assistant to put two recordings on a CD for him to introduce at trial. R. 932-34. One of those recordings included audio of Doug watching pornography. R. 741, 829-30. Defendant Strait then committed the act of trying to introduce that illicitly recorded audio at trial, and then persisted two more times in the face of sustained objections. All of this effort had the effect of

embarrassing the Plaintiff, and, in any event, all of this effort was continuously exerted for the purpose of harassing the Plaintiff.

Defendant Strait's actions mirror the elements of civil conspiracy. The trial court was wrong to dismiss Defendant Strait.

CONCLUSION

The trial court erroneously found that Defendant Strait was merely a passive observer in Mary Ann's efforts to invade Doug's privacy. The trial court repeatedly ignored evidence or interpreted evidence in Defendant Strait's favor. The trial court's order granting Defendant Strait's motion for summary judgment should be reversed.

Dated this 14th day of April, 2020.

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CERTIFICATE OF COMPLIANCE

I certify that this brief does not exceed the word limit described by SDCL § 15-26A-66. This brief contains 4,123 words, excluding the Table of Contents, Table of Authorities, any addendum materials, and any certificates of counsel.

/s/ Robert D. Trzynka
One of the attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of April, 2020, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

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I also hereby certify that on this same day, I sent copies of the foregoing by email to Appellants' counsel, as follows:

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RE: 19CIV18-000008 Doug Gantvoort and Dorothy Jean Novak v. Mary Ann Ranschau, David R. Strait and David R. Strait, PC; and 19CIV18-000009 Keith Diekman v. Mary Ann Ranschau, David R. Strait and David R. Strait, PC—Memorandum Opinion

E-MAIL ONLY

Counsel:

APP. 1

On April 30, 2019 a hearing was held concerning certain motions filed in these cases, which were consolidated for the purpose of these motions. Motions heard and yet to be decided were:

1. Strait's Motion for Summary Judgment;
2. Ranschau's Motion for Summary Judgment;
3. Motion for Discovery and Trial on Punitive Damages; and
4. Motion to Strike.

David Strait's Motion for Summary Judgment—Expectation of Privacy:

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show 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); Mark Inc. v. Maquire Ins. Agency, Inc.*, 518 NW2d 227, 229 (SD 1994). The Court must review the evidence most favorable to the non-moving party and resolve reasonable doubts about the facts in its favor. *Id.* The party opposing the motion for summary judgment must establish the specific facts, and said facts must show that a genuine material issue for trial exists. *Anderson v. Prod. Credit Ass'n,* 482 NW2d 642, 644 (SD 1992).

David Strait—Facts Most Favorable to the Non-Moving Part:

- On or about November 18, 2014 Mary Ranschau placed a concealed voice activated recording device in the office of Doug Gantvoort and continued recording conversations in his office for approximately two months. It secretly recorded conversations that occurred at times when Mary was not present in the office. No consent had been obtained.

- Mary would enter the office periodically, pick up the device and take it to her attorney's office where a staff member would copy the tape and preserve it. The recorder would e returned to Mary who would once again return it to it's place of concealment.

- Between November 30, 2014 and January 24, 2015, Mary made approximately 50 secret recordings.

- David Strait reviewed and kept copies of the secret recordings thinking they may be helpful to him in the pending divorce proceedings.[1]

- Strait did not advise Mary that her actions constituted a Class 5 felony, or if he did, she does not remember being so advised. At any rate, she continued the recordings and on at least 14 occasions Mary brought tapes to Strain's office where he had an assistant copy and preserve them.

[1] While it is not found in the record, all parties admit that the issue of adultery was settled before the divorce trial.

APP. 2

- At the divorced trial, Strait attempted to offer two (2) of the secret recordings into evidence to prove some elements of Mary's divorce claim.
- The trial judge did not accept the tapes as evidence and instructed Mary that the tapings were a violation of the law, but allowed Strait to make an offer of proof.
- Mary claims she did this in an attempt to determine if Doug was having an extramarital affair and determine if the marriage was over.
- On December 18, 2014, David R. Strait filed a Divorce Action on behalf of Mary Ranschau against Doug Gantvoort alleging adultery. 14DIV14-94.
- On December 12, 2015, Doug Gantvoort filed an Answer denying adultery.
- On March 10, 2015, Doug Gantvoort filed answers to Interrogatories and particularly in Interrogatory 60 admitted to having a relationship with and traveling with Dorothy Novak, but denied a sexual relationship.
- No one other than the parties and counsel have reviewed the transcripts of the two tapes offered into evidence and rejected.

Analysis:

This has been a bitter fought divorce. Mary is charged by the pliantiffs with committing a Class 5 felony and, during the course of the divorce case, Doug was held in contempt at least once.

As to the Invasion of Privacy claim, Strait argues there is no evidence that he committed an intentional act; there were no economic damages; and even Gantoort admits he has no injuries. Further, that Mary had an economic interest in the business; possessed a key; and there was no expectation of privacy by either Gantvoort or Dorothy Novak.

The secret, voice-activated recording took place in Gantvoort's private office, not in the public display area. That placement of the recording device was unreasonable, unwarranted, serious and offensive. *Roth v. Farner-Bocken Co.*, 2003 SD 80, ¶ 19, 667NW2d 651,660.

The question is whether Strait's conduct violated the parties' rights. At best, Strait's culpability stems from the following circumstances:

1. Just before the second recording, he became aware of the taping of Gantvoort's conversations in Gantvoort's office;

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2. He then had his staff record and preserve the transcripts of that tape and all subsequent tapes;

3. And he offered two of the tapes at trial when all parties agree they were not relevant to any contested issues.

In the divorce case Attorney Strait and Mary Ann Ranschau had an attorney-client relationship. He owed no duty to Doug Gantvoort, Keith Diekman or Dorothy Novak. In addition, Gantvoort and Kovak suffered no monetary injury. At best, it forced them to admit they were involved in an extra-marital relationship and, at least for Gantvoort, it recorded him watching pornography. More importantly, their right to privacy was violated.

The recordings were not heard by anyone other than the parties and their lawyers, although Gantvoort's daughter became aware of their existence.

A privacy violation occurs when:

1. The defendant intentionally intrudes into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy; and

2. The intrusion must occur in a matter highly offensive to a reasonable person, *Hernandez*, 47 Cal 4th T 285, 211 P3D AT 1072.

Based on the foregoing, I find that Strait's conduct was not intentional. Strait did not advise Mary Ann to secretly place the recording device. He did not encourage her to continue recording the conversations, and somewhere along the line he advised her to stop the recordings, which she eventually did. He did not intentionally intrude into the plaintiff's conversations, He merely preserved the recording when they were brought to him. Which arguably, he was obligated to do. His role was passive as an observer.

David Strait's Motion for Summary Judgment is granted.

Mary Ranschau's Motion for Summary Judgment—Expectation of Privacy:

Based on the foregoing, I find that Ranschau's conduct was intentional; it did intrude upon conversations in which the plaintiffs had a reasonable expectation of privacy and it is a jury question whether under these circumstances the intrusion was highly offensive.

David Strait's Motion for Summary Judgment—Aiding and Abetting the Commission of a Tort Claim:

The elements of Aiding and Abetting the Commission of a Tort Claim are:

APP. 4

1. The primary tortfeasor, Mary Ann Ranschau, must commit a tort that injures the Plaintiffs;

2. The defendants must know that the primary tortfeasor's conduct breached a duty owed by the primary tortfeasor to the Plaintiffs; and

3. The tortfeasor's wrongful conduct.

David Strait admits he knew Mary Ann was violating the law. However, he did nothing to "substantially assist or encourage that wrongful conduct." He mere preserved the evidence as it was brought to him and eventually told her it was a violation of the law and that she should stop doing it.

David Strait's Motion for Summary Judgment on this count is granted.

The Aiding and Abetting count appears to only involve David Strait not Mary Ann Ranschau.

David Strait's Motion for Summary Judgment—Civil Conspiracy and Punitive Damages:

Civil conspiracy is not an independent cause of action but instead "is sustainable only after an underlying tort claim has been established." *Reuben C. Setliff, III, MD, PC v. Stewart,* 2005 SD 40, ¶ 27, 694 NW2d 866.

With the first two cause of action dismissed there is now no underlying tort claim." Additionally, the first element of civil conspiracy is the requirement that there be "two or more persons" involved. That was not the case. There was no meeting of the mines.

Therefore, David Strait's Motion for Summary Judgment on the Civil Conspiracy count is granted.

Because, the case against David Strait is dismissed, there is no need to address the issue of punitive damages as to his case.

Mary Ann Ranschau's Motion for Summary Judgment—Civil Conspiracy:

Now that David Strait has been dismissed from the case, the first element of Civil Conspiracy requiring there be "two or more persons involved" cannot be met. Therefore, Mary Ann's Motion for Summary Judgment on Civil Conspiracy is granted.

Mary Ann Ranschau's Motion for Summary Judgment—Punitive Damages:

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Mary Ann argues the is no evidence that she committed malice. However, both Judge Timm and this court have found that there is evidence that she committed an unlawful act. Now it will be for a jury to decide. The Plaintiff's Motion for discovery and trial on the issue of punitive damages is granted.

Mr. Welk is asked to draft Orders conforming to this opinion as it relates to David Strait. Mr. Trzynka is asked to draft an Order conforming to this opinion as it relate Mary Ann's Motion for Summary Judgment—Civil Conspiracy. Ms Turbak-Berry is asked to draft an Order conforming to the issues of Invasion of Privacy and Punitive Damages.

Sincerely yours,

Jon R. Erickson
Circuit Court Judge, Retired

APP. 6

STATE OF SOUTH DAKOTA):SS COUNTY OF DEUEL	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT

KEITH DIEKMAN, Plaintiff, v. MARY ANN RANSCHAU, DAVID R. STRAIT, and DAVID R. STRAIT, P.C., Defendants.	19CIV18-000009 **JUDGMENT DISMISSING CLAIMS AGAINST STRAIT DEFENDANTS**

STATE OF SOUTH DAKOTA):SS COUNTY OF DEUEL	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT

DOUG GANTVOORT and DOROTHY JEAN NOVAK, Plaintiffs, v. MARY ANN RANSCHAU, DAVID R. STRAIT, and DAVID R. STRAIT, P.C., Defendants.	19CIV18-000008

This matter came before the Court, the Honorable Jon R. Erickson, Retired, presiding, on April 30, 2019 regarding the Motion for Summary Judgment of Defendants David R. Strait ("Strait") and David R. Strait, P.C. ("Strait P.C.") (collectively referred to as the "Strait Defendants"). The Motion for Summary Judgment was filed in both cases and was consolidated for purposes of hearing. The Plaintiffs in both actions appeared through their attorneys, Nancy J. Turbak-Berry and Seamus W. Culhane of Turbak Law Office, P.C. and Robert Trzynka of

Brendtro Law Firm. The Strait Defendants appeared through Thomas J. Welk and Jason R. Sutton of Boyce Law Firm, LLP. Defendant Mary Ann Ranschau personally appeared and also appeared through her attorney, Steven C. Landon of Cadwell, Sanford, Deibert & Garry, LLP. The Court having considered the written and oral arguments of counsel, the pleadings and written submissions and granting the Motion to Take Judicial Notice and the Court contemporaneously having entered an order granting summary judgment in Strait Defendants' favor, now, therefore, it is

ORDERED, ADJUDGED AND DECREED that a judgment be entered in both of these actions that Plaintiffs recover nothing from the Strait Defendants and that the Plaintiffs' amended complaint against the Strait Defendants be dismissed with prejudice. It is

FURTHER ORDERED, ADJUDGED AND DECREED that the Strait Defendants shall have and recover its costs in the amount of $_____, the amount thereof to be taxed and inserted by the Clerk of this Court in accordance with SDCL 15-6-54(d)

Signed: 6/5/2019 8:52:49 PM

Attest:
Reichling, Sandy
Clerk/Deputy

Jon R. Erickson
Circuit Court Judge, Retired

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	):SS	
COUNTY OF DEUEL	)	THIRD JUDICIAL CIRCUIT

DOUG GANTVOORT and DOROTHY JEAN NOVAK, Plaintiffs, v. MARY ANN RANSCHAU, DAVID R. STRAIT, and DAVID R. STRAIT, P.C., Defendants.	19CIV18-000008 **JUDGMENT AND FINAL ORDER DISMISSING CLAIMS AND TAXING COSTS**

On July 11, 2019, this Court entered a Judgment Dismissing Claims Against Strait Defendants granting summary judgment to the Defendants David R. Strait and David R. Strait, P.C. ("Strait Defendants"). On January 2, 2020, this Court entered an order dismissing the claims against Defendant Mary Ann Ranschau with prejudice pursuant to stipulation. On January 16, 2020, this Court entered a Memorandum Opinion awarding disbursements to Strait Defendants. Strait Defendants filed a Motion to Reconsider on January 28, 2020. The Court has granted the motion to reconsider. Based on all of the foregoing and the Court's review of the file as a whole, it is hereby

ORDERED, ADJUDGED and DECREED that any and all claims asserted by Plaintiffs against Defendants David R. Strait and David R. Strait, P.C. are hereby dismissed with prejudice. It is further

ORDERED that Defendants David R. Strait and David R. Strait, P.C. are jointly awarded a judgment against the Plaintiffs, jointly and severally, in the amount of $4,863.84.

Signed: 2/6/2020 3:09:49 PM

Jon R. Erickson
Circuit Court Judge, Retired

Attest:
Reichling, Sandy
Clerk/Deputy

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPEAL NO. 29265

DOUG GANTVOORT,

Plaintiff-Appellant,

and

DOROTHY JEAN NOVAK,

Plaintiff,

v.

MARY ANN RANSCHAU,

Defendant,

DAVID STRAIT,

Defendant-Appellee,

and

DAVID R. STRAIT, P.C.,

Defendant-Appellee

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

The Honorable Jon R. Erickson
Circuit Court Judge

APPELLEES' BRIEF

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NOTICE OF APPEAL FILED FEBRUARY 27, 2020

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TABLE OF AUTHORITIES

South Dakota Case Law

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JURISDICTIONAL STATEMENT

Defendants/Appellees David Strait and David R. Strait, P.C. (collectively "Strait") agree with Plaintiff/Appellant Doug Gantvoort ("Doug")'s jurisdictional statement.

STATEMENT OF THE ISSUES

I. Whether the Circuit Court properly concluded that Strait did not commit the tort of invasion of privacy as a matter of law when Strait merely preserved potential evidence received from Strait's client, gave his client legal advice, and offered two recordings at evidence at the divorce trial.

The Circuit Court granted summary judgment dismissing the invasion of privacy claim asserted against attorney Strait.

Roth v. Farner-Bocken Co., 2003 SD 80, 667 N.W.2d 660
Kjerstad v. Raellette Publ'n, Inc., 517 N.W.2d 419 (S.D. 1994)
Janklow v. Keller, 90 SD 322, 241 N.W.2d 364
SDCL 20-11-5(2)

II. Whether the Circuit Court properly concluded that Strait, who was merely providing legal services to his client and preserving potential evidence, could not be liable for aiding and abetting invasion of privacy as a matter of law.

The Circuit Court granted summary judgment dismissing aiding and abetting claim asserted against attorney Strait.

Chem-Age Industries, Inc. v. Glover, 2002 SD 122, 652 N.W.2d 756

III. Whether the Circuit Court properly concluded that Strait cannot be held liable for conspiracy as a matter of law based upon his actions in representing Mary Ann in the divorce.

The Circuit Court granted summary judgment dismissing the conspiracy claim asserted against Strait.

Sisney v. Best, Inc., 2008 SD 70, 754 N.W.2d 804
Kirlin v. Halverson, 2008 SD 107, 758 N.W.2d 436

STATEMENT OF THE CASE

Doug and Dorothy Novak commenced an action against co-defendants Strait and Mary Ann Ranschau. Attorney Strait represented Mary Ann in her divorce from Doug. Based upon actions of Mary Ann and Strait in the divorce proceeding, Doug and his mistress (now wife) Novak sued Mary Ann and Strait asserting three claims: (1) invasion of privacy; (2) aiding and abetting; and (3) conspiracy. The Honorable Judge Jon Erickson granted Strait's motion for summary judgment. Later, the claims against Mary Ann were dismissed with prejudice based upon settlement. Doug appealed the grant of summary judgment to Strait. Novak has not appealed.[1]

STATEMENT OF FACTS

A. Doug and Mary Ann, as Husband and Wife, Worked Together in the Business They Own, Which is Where Mary Ann Audio Recorded Doug to Catch Him Having an Affair

Doug and Mary Ann were previously married. Statement of Undisputed Material Facts in Support of Strait Defendants' Motion for Summary Judgment ("SUMF") ¶ 1; Plaintiff's Response to Defendant Strait's Statement of Undisputed Material Facts and Statement of Additional Material Facts ("RSUMF") ¶ 1.[2] Mary Ann sued Doug for divorce. CR 166.[3] Strait represented Mary Ann in the divorce proceeding. *Id.*. Doug was represented by attorney Karen Crew. *Id.* The divorce was contentious.

Doug and Mary Ann jointly owned a business in Clear Lake, South Dakota, where they restored antique tractors and vehicles. SUMF ¶ 1; RSUMF ¶ 1. Mary Ann worked in the

[1] Keith Diekman, a friend of Gantvoort, also sued Strait and Mary Ann in a companion case alleging the same counts. These cases were consolidated for discovery and motions practice. CR 67-70. The Court granted summary judgment dismissing Diekman's claims against Strait, and Diekman never appealed.

[2] DEF-APPX 1 to 8 contains the SUMF and 9 to 14 contains the RSUMF.

business for nearly two decades. SUMF ¶¶ 5-6; RSUMF ¶¶ 5-6. Mary Ann also had a key to the shop. SUMF ¶ 6; RSUMF ¶ 6. The interior door between the shop and the office did not have a lock. SUMF ¶ 7; RSUMF ¶ 7. Although no one else worked in the shop since 2006, customers and friends would stop into the shop and walk around. SUMF ¶ 8; RSUMF ¶ 8. The business was included in the marital estate at the divorce trial. SUMF ¶ 5; RSUMF ¶ 5.

The business' building contained a large open shop area where tractors and cars were restored and a smaller office area containing a computer, desk, and other items. SUMF ¶ 2; RSUMF ¶ 2. There are two ways to enter the shop from the outside. SUMF ¶ 3; RSUMF ¶ 3. First, someone could enter through a door from the exterior of the building into the office. *Id.* Or, someone could enter through an exterior door that opens directly into the shop, which was more frequently used. *Id.*

B. Mary Ann Hires Strait to Represent Her in the Divorce After She Had Already Started Recording Doug

Mary Ann first consulted with Strait on December 3, 2014. SUMF ¶ 14; RSUMF ¶ 14. Before this initial consultation, Mary Ann had spoken with Jodi Hoffman, a private investigator, and Larry Peart, a former FBI agent, about surveillance of Doug because she suspected Doug was having an affair. SUMF ¶¶ 9-10; RSUMF ¶¶ 9-10. After her conversation with Peart, Mary Ann purchased a voice activated audio recording device and hid the device in the windowsill of the office at the shop. SUMF ¶ 11; RSUMF ¶ 11. Mary Ann started recording Doug before her initial consultation with Strait. SUMF ¶¶ 12, 14-15, RSUMF ¶¶ 12, 14-15.

Mary Ann would place the recording device in the office during the hours she knew Doug would be there. SUMF ¶ 12, RSUMF ¶ 12. She would then remove the device when Doug left. *Id.* She would listen to the portions of the recordings that contained Doug's voice.

[3] Citations to the Certified Record are cited "CR" with reference to the appropriate page.

Id. Many of the recordings occurred when Mary Ann was not present. SUMF ¶ 13, RSUMF ¶ 13.

When Mary Ann first met with Strait on December 3, 2014, she told Strait that she was placing the recording device because she was concerned Doug was having an affair. SUMF ¶ 14, RSUMF ¶ 14. Strait advised her that given the nature of the issues in the divorce, whether Doug was having an affair likely would have little outcome on the case. SUMF ¶ 15; RSUMF ¶ 15.

As part of Strait's representation of her, Mary Ann would bring the recording device to Strait's office; and Strait's paralegal, Paula Newman, would download the recordings, copy them to compact disks for Mary Ann, and save them to Strait's computer system. SUMF ¶¶ 18-20, RSUMF ¶¶ 18-20. Mary Ann would bring the recorder to Strait's office approximately 3 to 4 times a week. SUMF ¶ 19, RSUMF ¶ 19. Newman would only listen to the recordings long enough to make sure the sound recorded and to confirm the transfer was successful. SUMF ¶ 21, RSUMF ¶ 21.

By no later than January 8, 2015, Strait advised Mary Ann to strop recording Doug.[4] SUMF ¶ 23, RSUMF ¶ 23. Mary Ann continued to record Doug, and she provided additional recordings to Newman for saving on January 12, 2015. CR 264.

At some point, Mary Ann's daughter advised Doug of the placement of the recordings. SUMF ¶ 27, RSUMF ¶ 27. Doug left the recording device in the office for several additional days after learning about its existence. SUMF ¶ 28, RSUMF ¶ 28. After Doug discovered the

[4] The exact date Strait provided this advice is a disputed fact. Strait testified that he advised Mary Ann to stop recording in the initial divorce consultation on December 3, 2014. CR 388-89. Mary Ann does not recall being told to stop by attorney Strait until January of 2015. CR 354. Regardless, Strait testified that he also met with Mary Ann on January 8, 2015, and told her stop

recording device, Mary Ann stopped recording him. In total, Mary Ann created 51 separate recordings. SUMF ¶ 41; RSUMF ¶ 41. All of the audio recordings were produced to Doug's divorce attorney through discovery in the divorce action. SUMF ¶ 31, RSUMF ¶ 31. The audio recordings have been transcribed by a court reporter in this case into 1,102 pages of transcripts. CR 185.

As part of the recordings, Doug was audio recorded speaking on the telephone with his mistress, Dorothy Novak. CR 185. The audio also records Doug watching pornography and masturbating. CR 353; 399.

C. Strait Offers Two Recordings As Exhibits During the Divorce Trial

Doug's and Mary Ann's divorce went to trial on May 5 to 7, 2015. SUMF ¶ 32, RSUMF ¶ 32. During the divorce trial, Strait offered excerpts of two of the fifty-one recordings into evidence. SUMF ¶ 33, RSUMF ¶ 33. These are the recordings from December 17 and 18. SUMF ¶ 33, RSUMF ¶ 33. Circuit Court Judge Robert Timm excluded the proposed exhibits as being improper audio recordings. CR 425-27. Attorney Strait marked the exhibits and made an offer of proof during the divorce trial. CF 428-31. In the offer of proof, Strait states the recordings should be admitted because Doug makes two statements on them: (1) Mary Ann moved fast with the divorce, he is exposed, it may cost him a few hundred thousand dollars, and he is worth a couple million; and (2) he tells someone he loves her, and that he's going to say they are just friends, and no one would have sex with him with his prostate issues. CR 364. The recordings were never played during the trial. SUMF ¶ 36, RSUMF ¶ 36. Other than producing the recordings to Doug's attorney in discovery, the only time Strait ever disclosed to anyone any

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recording during that meeting. CR 408. There is no evidence in the record disputing this testimony.

of the recordings made by Mary Ann was the offering of the two refused exhibits at the divorce trial. SUMF ¶ 49, RSUMF ¶ 49.

After the trial, Judge Timm issued a decision. CR 371-382. In his memorandum decision, Judge Timm stated "getting to the truth in this case where testimony conflicts, with few exceptions, borders on the impossible due to the glaring lack of credibility of both parties." CR 371. There were extensive post-trial motions and an appeal to this Court. SUMF ¶ 37, RSUMF ¶ 37. In an attempt to stay execution of the divorce judgment pending the appeal, Doug asked that his personal friend, Keith Diekman, be the surety. SUMF ¶ 38, RSUMF ¶ 38. Doug was also held in contempt of court and jailed for hiding assets awarded to Mary Ann. SUMF ¶ 39, RSUMF ¶ 39, CR 224-26.

D. Upset with the Outcome of the Divorce, Doug Sues Mary Ann and Her Attorney In This Lawsuit

All of the recordings were produced in discovery in the divorce. Further, Doug was present when Strait offered the recordings as exhibits at trial in May of 2014. CR 166; 425-31. Despite having this information, Doug waited until 2018 well after the divorce was final to bring this invasion of privacy lawsuit. Then, when deposed in this case, Doug testified about his true motivation for the lawsuit. When asked what he thought would be a fair judgment in the case, Doug stated that he never should have lost his land in the divorce, and he wanted his land back. SUMF ¶ 45; RSUMF ¶ 45; CR 297.

Doug sued Strait and Mary Ann for three causes of action: (1) invasion of privacy; (2) aiding and abetting; and (3) conspiracy. CR 46-55. The purported liability against Strait is solely based upon his preserving the recordings, providing legal advice to Mary Ann, and offering the two recordings as exhibits at trial. SUMF ¶ 48; RSUMF ¶ 48.

Following discovery, Strait moved for summary judgment. Retired Judge Jon Erickson granted the motion for summary judgment. After the claims against Mary Ann were dismissed with prejudice, Doug appeals the summary judgment to this Court.

ARGUMENT

Relying on factual arguments while ignoring the controlling law,[5] Doug argues that the Circuit Court erred in granting Strait summary judgment. Doug's arguments overlook a key fatal flaw: Strait, as the attorney representing the adverse party in litigation, does now owe Doug a duty. Doug's attempt to manufacture a claim allowing him to sue his ex-wife's divorce attorney through theories of invasion of privacy, aiding and abetting, and conspiracy all fail as a matter of law. As a result, the Circuit Court properly granted summary judgment.

I. Standard of Review

This Court reviews a decision granting summary judgment *de novo* with no deference to the Circuit Court. *Larimer v. Am. Family Mut. Ins. Co.*, 2019 SD 21, ¶ 6, 926 N.W.2d 472, 475. This Court "'will [also] affirm the circuit court on summary judgment if it is correct for any reason.'" *Clay v. Weber*, 2007 SD 45, ¶ 6, 733 N.W.2d 278, 282 (quoting *A-G-E Corp. v. State*, 2006 SD 66, ¶ 13, 719 N.W.2d 780, 785 (alteration in original)).

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." SDCL 15-6-56(c); *Mark, Inc. v. Maquire Ins. Agency, Inc.*, 518 N.W.2d 227, 229 (S.D. 1994). The court must review the evidence most favorably to the non-moving party and resolve

[5] Incredibly, Doug never cites *Chem-Age Industries v. Glover*, 2002 SD 122, 652 N.W.2d 756. This case was argued about at length before the trial court. CR 87-89; 965-66; 972-73. Doug

reasonable doubts about the facts in its favor. *Id.* The party opposing the motion for summary judgment must establish the specific facts, and said facts must show that a genuine, material issue for trial exists. *Anderson v. Prod. Credit Ass'n.*, 482 N.W.2d 642, 644 (S.D. 1992). Mere allegations are not sufficient to preclude summary judgment. *Mark, Inc.*, 518 N.W.2d at 229. When a plaintiff fails to make a sufficient showing regarding an essential element of her case for which she bears the burden of proof, a trial court is obligated to grant defendant's motion for summary judgment. *Celotex Corp v. Catrett*, 477 U.S. 317, 322 (1986).

"[S]ummary judgment is a preferred process to dispose of meritless claims." *Farm Credit Servs. of Am. v. Dougan*, 2005 SD 94, ¶ 7, 704 N.W.2d 24, 27. It should never be viewed as "a disfavored procedural shortcut, but rather as an integral part of [our rules] as a whole, which are designed 'to secure the just, speedy, and inexpensive determination of every action.'" *Accounts Mgmt., Inc. v. Litchfield*, 1998 SD 24, ¶ 4, 576 N.W.2d 233, 234 (quoting *Celotex*, 477 U.S. at 327).

II. Attorneys Do Not and Should Not Owe Duties to Opposing Parties, Particularly in Litigation

Doug has sued his ex-wife's divorce attorney for alleged torts arising out of Strait's representation of Mary Ann. Critically, Strait "did nothing but preserve records, provide legal advice to Mary Ann, and present the two recordings in court." SUMF ¶ 48; RSUMF ¶ 48.[6]

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knows Strait's position was this case is the controlling authority. Doug ignores this case for one reason—the case requires affirming summary judgment for Strait.

[6] In responding to Strait's statement of undisputed material facts, Doug purported to dispute ¶ 48 but merely cited his brief without presenting any evidence. RSUMF ¶ 48. Doug cited no record evidence supporting his denial of paragraph 48. *Id.* Because the responsive statement does not actually cite responsive evidence, Doug is deemed to have admitted paragraph 48. *See* SDCL

Essentially, Doug claims that Strait's actions while representing Mary Ann in the divorce created claims for Doug. All of Doug's claims arise from Strait's professional conduct as a lawyer representing Mary Ann. Thus, these claims really sound in legal malpractice. *See Rehm v. Lenz*, 1996 SD 51, ¶ 49, 547 N.W.2d 560, 570 ("Malpractice has as its central core a professional's liability for failure to properly render services provided to another *in the context of that party's practice of his or her profession*.") (emphasis in original).

Generally, attorneys only owe duties to their clients, and a non-client cannot sue an attorney for committing malpractice. *Chem-Age Indus., Inc. v. Glover*, 2002 SD 122, ¶ 30, 652 N.W.2d 756, 769. This is known as the "privity rule." *Id.* This Court has "long subscribed to the strict privity rule in attorney malpractice cases." *Id.* "'[T]he existence of a duty is a question of law to be determined by the court . . . .'" *Hamilton v. Sommers*, 2014 SD 76, ¶ 22, 855 N.W.2d 855, 862 (quoting *Janis v. Nash Finch Co.*, 2010 SD 27, ¶ 8, 780 N.W.2d 497, 500 (alternation in original).

Sound policy reasons support strict application of the privity rule:

> First, the rule preserves an attorney's duty of loyalty to and effective advocacy for the client. Second, adding responsibilities to nonclients creates the danger of conflicting duties. Third, once the privity rule is relaxed, the number of persons a

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15-6-56(e) ("When a motion for summary judgment is made and supported as provided in § 15-6-56, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in § 15-6-56, must set forth specific facts showing that there is a genuine issue for trial."). Nor can Doug rely on a legal brief which argues the law as a form of evidence. *See Maryland Cas. Co. v. Delzer*, 283 N.W.2d 244, 249 (S.D. 1979) (finding an affidavit insufficient to prevent summary judgment where it merely argued law). Because Plaintiffs have failed to support their "dispute" with specific facts on the record, the statement of fact is deemed admitted. *Id.* ("If he does not so respond, summary judgment, if appropriate, shall be entered against him."); *see also Delka v. Continental Cas. Co.*, 2008 SD 28, ¶ 29, 748 N.W.2d 140, 151 (deeming admitted statements of material fact where opposing party responded with general statement of dispute without asserting specific facts as evidence).

> lawyer might be accountable to could be limitless. Fourth, a relaxation of the strict privity rule would imperil attorney-client confidentiality.[7]

Id. at ¶ 31, 652 N.W.2d at 769 (internal citation omitted); *accord Friske v. Hogan*, 2005 SD 70, ¶ 11, 698 N.W.2d 526, 530.

"Attorneys acting in their professional capacity should be free to render advice without fear of personal liability to third persons if the advice later goes awry." *Id.* at ¶ 43 (citing *Schott v. Glover*, 440 N.E.2d 376, 379 (Ill. App. 1982)).

> Although incorrect advice as to a client's contractual obligations might cause that client to become liable to a third party in contract, it does not follow that the attorney would also be liable to that party. To impose such liability on an attorney would have the undesirable effect of creating a duty to third parties which would take precedence over an attorney's fiduciary duty to his client. Public policy requires that an attorney, when acting in his professional capacity, be free to advise his client without fear of personal liability to third persons if the advice later proves to be incorrect.

Schott, 440 N.E.2d at 234–35. Attorneys are not liable to third parties for merely giving their client legal advice. *See Chem-Age*, at ¶ 43, 652 N.W.2d at 773.

Furthermore, when an attorney represents a client in litigation, additional policy considerations prohibit exposing the attorney to liability to the opposing party. Permitting an attorney to be held liable to the opposing party for litigation conduct "would dilute the vigor in which [South Dakota] attorneys represent their clients . . . ." *White v. Bayless*, 32 S.W.3d 271, 276 (Tex. Ct. App. 2000). Allowing a disgruntled litigant to sue the opposing party's attorney

[7] There is one limited exception to this general rule. "[T]o establish a duty owed by the attorney to the nonclient, the nonclient 'must allege and prove that the intent of the client to benefit the nonclient was a direct purpose of the transaction or relationship.'" *Chem-Age Indus., Inc. v. Glover*, 2002 SD 122 at ¶ 34, 652 N.W.2d 756, 771. This exception cannot apply here where Strait represented Mary Ann in divorce litigation opposite of Doug.

"would act as a severe and crippling deterrent to the ends of justice because a litigant might be denied a full development of his case if his attorney were subject to the threat of liability for defending his client's position to the best and fullest extent allowed by law, and availing his client of all rights which he is entitled." *Id.* It also may impede access to the courts by discouraging "attorneys from bringing close cases or advancing innovative theories, or taking actions against defendants who can be expected to retaliate." *Friedman v. Dozorc,* 312 N.W.2d 585, 593 (Mich. 1981). Recognizing a duty owed to opposing parties in litigation also would create an "an unacceptable conflict of interest which would seriously hamper an attorney's effectiveness as counsel for his client." *Id.* at 593 (internal citations omitted). *See also* 4 Ronald Mallen, *Legal Malpractice*, § 33:23 (2020 ed) (describing "strong policy reasons" against recognizing a duty owed by an attorney to the opposing party in litigation). Family law attorneys are particularly susceptible to retaliatory litigation due to the highly emotional nature of divorce litigation. *Cf. S.A. v. Maiden,* 176 Cal. Rptr. 567, 573-74 (Cal. Ct. App. 2014) (ruling that malicious prosecution claims against family law attorneys are barred as a matter of law for policy considerations).

These policy considerations limiting an attorney's duty and liability to non-clients provide the necessary backdrop for evaluating Doug's claims. Upset with the legal advice given by Strait, Doug attempts to circumvent the strict privity rule by recasting his malpractice claim as an alleged intentional tort. Because Doug's claims seek to "end run" the privity rule, this Court should consider the policy considerations supporting the strict privity rule when evaluating Doug's claims, Otherwise, the policy considerations supporting the privity rule will be thwarted

because attorneys, particularly in litigation, will have to consider whether their litigation strategy subjects them to suit by the opposing party.

III. Strait Never Committed Any Act that Could be Considered An Invasion of Privacy

Doug sued Mary Ann and Strait for invasion of privacy. There are multiple ways a tortfeasor can be liable for invasion of privacy. *See Krueger v. Austad*, 1996 SD 26, ¶ 33, 545 N.W.2d 205, 215–16 (describing three types of invasion of privacy claims). Here, Doug claims Strait and Mary Ann wrongfully intruded in his privacy by the placement of the recording device. "[T]o recover on an invasion of the right to privacy claim, a claimant must show an unreasonable, unwarranted, serious and offensive intrusion upon the seclusion of another." *Roth v. Farner-Bocken Co.*, 2003 SD 80, ¶ 19, 667 N.W.2d 651, 660 (internal quotation marks and citations omitted). "One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person." Restatement (Second) Torts § 652B; *see also Montgomery Ward v. Shope*, 286 N.W.2d 806, 808 (S.D. 1979) ("The invasion must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities." (internal citations omitted)).

An invasion of privacy claim based upon intrusion has two elements: 1) "the defendant must *intentionally intrude* into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy," and 2) "the intrusion must occur in a manner highly offensive to a reasonable person." *Hernandez v. Hillsides, Inc.*, 97 Cal. Rptr. 274, 285, 211 P.3d 1063, 1072 (Cal. 2009) (emphasis added). "[W]hether there is an offensive invasion of privacy involves a question of law." *Montgomery Ward*, 286 N.W.2d at 808. "If the court first decides

there is substantial evidence tending to show a serious, unreasonable, unwarranted and offensive interference with another's private affairs, then the case is one to be submitted to the jury." *Id.*

Here, the circuit court properly granted summary judgment to Strait on the invasion of privacy claim for two separate reasons: (A) Strait did not intentionally invade Doug's privacy; and (B) Doug did not have a legally protected privacy interest in the office.

A. Strait Never Invaded Doug's Privacy

There is no evidence in the record that Strait committed an intentional act for the purpose of invading Plaintiffs' privacy. "Intent in the law of torts means that the actor acts for the purpose of causing an invasion of another's interest (invasion of privacy, for example) or knows that such an invasion is resulting, or is substantially certain to result from ***his conduct***." *Kjerstad v. Raellette Publ'n, Inc.*, 517 N.W.2d 419, 429 (S.D. 1994) (emphasis added). "Intent requires more than the existence and appreciation of risk. It requires an act done either for the purpose of invading the legally protected interest of another or knowledge to a substantial certainty that such an invasion will occur." *Id.* Proof beyond that of negligence and beyond that of recklessness is required. "Substantial certainty of an injury . . . should be equated with virtual certainty to be considered an intentional tort." *Harn v. Cont'l Lumber Co.*, 506 N.W.2d 92, 100 (S.D. 1993).

It is undisputed that Strait never placed the recorder in Doug's office. In fact, the recorder had already been placed in the office prior to Strait's first consultation with Mary Ann based on the advice of someone else. SUMF ¶¶ 12, 14; RSUMF ¶¶ 12, 14. Strait "did nothing but preserve records, provide legal advice to Mary Ann, and present the two recordings in court." SUMF at ¶ 48; RSUMF at ¶ 48. None of Strait's actions amounted to anything beyond the rendering of professional legal services, and, as a result, these acts cannot support an invasion of privacy claim. *See Sacks v. Zimmerman*, 401 S.W.3d 336, 342 (Tex. App. 2013) (ruling adverse

litigant could not sue attorney for invasion of privacy based upon attorney gathering potential evidence and offering it into court because the alleged conduct was not "entirely foreign to the duties of any attorney").

Doug argues that Strait intentionally invaded his privacy by failing to tell Mary Ann to stop recording. (Doug's Brief at pp.10-11). Analytically, Doug is trying to sue Strait for malpractice. Strait does not, however, owe any duty to Doug. *Chem-Age Indus., Inc.*, at ¶ 30, 652 N.W.2d at 769. In turn, this Court should not allow Doug to circumvent the policy reasons for the privity rule by repackaging a malpractice claim into an invasion of privacy claim. Furthermore, Doug's claim, at most, suggests that Strait was allegedly negligent in appreciating the problems with Mary Ann's continued recording of Doug. Negligence is not sufficient to show an "intentional" act. *See Kjerstad*, 517 N.W.2d at 429.

Doug also argues that Strait's preservation of the recordings was an "intentional act" making him liable for invasion of privacy. (Doug's Brief at pp.10-11). This is incorrect. Strait should not be held liable for preserving the recordings, which are potential evidence. Indeed, Strait had a duty as an attorney to preserve potential evidence. S.D. Rule of Prof. Conduct 3.4(a) ("A lawyer shall not: (a) Unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act . . . ."). It may even be a crime to destroy potential evidence. *See* SDCL 19-7-14.

Doug argues that Strait was not preserving evidence because Strait testified the recordings were not legally relevant to the issue in the divorce. (Doug's Brief at pp.9-10). This misstates the issue. Certainly, this Court does not want to incentivize attorneys to destroy potential evidence during litigation because at the time the information did not seem relevant.

Instead, as noted above, attorneys have a duty to preserve all potential evidence, regardless of its relevance. Doug's argument really is that Strait should have recognized sooner that Mary Ann secretly recording Doug was "wrong," and Strait should have told Mary Ann to stop sooner. Again, this is a basic malpractice claim, which Doug cannot assert as a matter of law.

Doug also argues that Strait conceded the only reason to record persons in private places would be to "harass" the person. (Doug's Brief at p.10). To make this assertion, Doug distorts the record. Doug relies on a portion of Strait's deposition. The question was not the generic conclusion described by Doug in his brief, but instead, Doug's attorney asked Strait whether Strait would have objected if Doug placed a recording device in the marital home after Mary Ann had exclusive possession of it. CR 401. Strait testified that he would because the act of recording Mary Ann at the marital home would serve no purpose other than harassment. *Id.* Because there were no allegations that Mary Ann had engaged in an affair, this testimony makes sense. Strait did not testify that Mary Ann's placing of recorder in a public accessible office where both Doug and Mary Ann worked to catch Doug having an affair was for harassment.

Finally, Doug argues that Strait "invaded" Doug's privacy by offering two of the recordings at the divorce trial. Strait offered the exhibits because Mary Ann wanted him to do so. CR 398-99; 403-04. She wanted Doug to hear two things she heard: (1) that Doug admitted to having the best sexual experience of his life; and (2) that Doug was worth over $2 million dollars. *Id.*

Doug's claim that Strait invaded his privacy by offering the exhibits fails for three separate reasons. First, the offering of the evidence months after the recordings stopped had no bearing whatsoever on the intrusion into Doug's privacy months earlier. Second, as noted above, an attorney cannot be held liable for invasion of privacy by merely providing legal services.

Finally, Strait is entitled to immunity for the offering of the evidence at trial based upon the litigation privilege.

Strait's offerings of the exhibits at trial is absolutely privileged and cannot form the basis for liability. South Dakota law recognizing and absolute privilege for communications made in judicial and administrative proceedings. *See* SDCL 20-11-5(2); *Harris v. Riggenbauch*, 2001 SD 110, 633 N.W.2d 193. "A privileged communication is one made: . . . (2) In any legislative or judicial proceeding, or any other official proceeding authorized by law." SDCL 20-11-5(2). This privilege is "absolute and remain[s] privileged whether made with or without malice.'" *Harris*, 2001 SD 110 at ¶ 7, 633 N.W.2d at 194 (quoting *Flugge v. Wagner*, 532 N.W.2d 419, 421 (S.D. 1995)). "Because of this absolute privilege, the purpose behind the communication, or the state of mind of the one making the communication is neither material nor relevant." *Id.* at ¶ 11, 633 N.W.2d at 195.

South Dakota first recognized the privilege set forth in SDCL 20-11-5(2) in 1877. From 1877 until 1939, the statute was located within the Chapter entitled "Personal Rights." Though it is currently located within Chapter 21-11 entitled "Liability for Defamation" the Supreme Court of South Dakota has previously held that the privilege extends to claims other than defamation. Specifically, in *Harris*, the Court extended the privilege to claims for negligence, intentional infliction of emotional distress and negligent infliction of emotional distress because they were all based on the same facts as the defamation claim asserted. *See Harris*, 2001 SD 110 at ¶ 4, 633 N.W.2d at 194.

As the South Dakota Supreme Court previously recognized in *Janklow v. Keller*, SDCL 20-11-5(2) "is identical to a portion of § 47 of California's Civil Code[.]" 90 SD at 322, 241

N.W.2d at 367. In fact, the current and original source reference for SDCL 20-11-5 is California Civil Code § 47.

California courts have asserted that this absolute privilege bars any cause of action based upon a communication or publication that occurs in a judicial pleading. *See Silberg v. Anderson*, 50 Cal. 3d 205, 215, 266 Cal. Rptr. 638, 786 P.2d 365, 370–71 (1990) (citing *Albertson v. Raboff*, 46 Cal.2d 375, 295 P.2d 405 (1956)) ("the policy of encouraging free access to the courts was so important as to require application of the privilege to torts other than defamation"). Section 47(2) has specifically been held to immunize defendants from tort liability based on theories of invasion of privacy. *See id.* (citing *Ribas v. Clark*, 212 Cal. Rptr. 143, 696 P.2d 637 (1985)); *see also Ficaro v. Funkhouser, Vegosen, Liebman & Dunn, Ltd.*, No. 1-07-1469, 2009 WL 10688908, at *8 (Ill. App. Ct. July 31, 2009) (affirming dismissal of invasion of privacy claim based upon absolute litigation privilege applied to evidence submitted to the court).[8] As previously recognized by this Court, California case law interpreting California statutes are "particularly persuasive" when the applicable South Dakota statute was drafted based upon the

[8] California is not the only state to extend such privileges to torts beyond defamation. *See, e.g.*, *Bell v. George*, 2003 WL 22250350, 2 (Pa Com Pl 2003) (statements made in the regular course of judicial proceedings which are pertinent and material to the litigation are barred regardless of the tort claimed); *Franson v. Radich*, 84 Or. App. 715, 735 P.2d 632 (1987) ("The absolute privilege applies not only to defamation actions, but to any tort action based on statements made in connection with a judicial proceeding."); *Jeckle v. Crotty*, 120 Wash. App. 374, 85 P.3d 931 (2004) (granting motion to dismiss complaint alleging infliction of emotional distress, invasion of privacy, civil conspiracy, and other claim for failure to state a claim on the basis of absolute immunity); *Bennett v. Jones, Waldo, Holbrook & McConough*, 70 P.3d 17 (Utah 2003) (citing *Janklow v. Keller*, 90 SD 322, 241 N.W.2d 364 (S.D. 1976) as authority for the proposition that the claim for deceit was also barred by absolute privilege); *Sullivan v. Birmingham*, 11 Mass. App. Ct. 359, 416 N.Ed 528 (1981) (upholding dismissal of allegations of libel, abuse of process, negligence, and ethical violations because "the policy underlying the absolute privilege also immunizes the defendants from any civil liability based on the allegations in these complaints"); *Ranney v. Nelson*, 2004 WL 1318882 (Va. Cir. Court 2004) (holding the privilege bars all civil liability, not merely liability for defamation).

corollary California statute. *See Olson-Roti v. Kilcoin*, 2002 SD 131, ¶ 41 n. 4, 653 N.W.2d 254, 262 n. 4 (Gilbertson, J., concurring).

The litigation privilege applies when four elements are met. *Keller*, 90 SD 322, 241 N.W.2d 364 (1976). These include that the communication "(1) was made in a judicial proceeding; (2) had some connection or logical relation to the action; (3) was made to achieve the objects of the litigation; and (4) involved litigants or other participants as authorized by law." *Id.* at 331–32, 241 N.W.2d at 365 (quoting *Bradley v. Hartford Accident & Indemnity Co.*, 30 Cal. App. 3d 818, 106 Cal. Rptr. 718 (1973)).

Here, each of these elements is satisfied. Strait offered the recordings during the divorce trial. CR 359-65. Although Strait admitted that the recordings would not affect the issues in the divorce, they certainly were had a logical connection to the proceedings. Based upon the offer of proof, the recordings confirmed Doug was having an affair, and that he was trying to hide assets. *Id.* Finally, the voice on the recording was Doug's, who is the other litigant in the divorce proceeding. *Id.*. Therefore, the communications made regarding the recordings during the divorce trial fall squarely within the absolute privilege of SDCL 20-11-5(2).

In short, Strait never took any intentional steps to invade Doug's privacy. As a result, summary judgment dismissing Count 1 should be affirmed.

B. *Doug Did Not Have a Reasonable Expectation of Privacy in the Public Shop As a Matter of Law*

As a separate basis, Strait is entitled to summary judgment because Doug does not have a reasonable expectation of privacy in the shop vis-à-vis Doug's co-worker and wife, Mary Ann. "[T]o recover on an invasion of the right to privacy claim, a claimant must show an unreasonable, unwarranted, serious and offensive intrusion upon the seclusion of another." *Roth v. Farner-Bocken Co.*, 2003 SD 80, ¶ 19, 667 N.W.2d 651, 660 (internal quotation marks and

citations omitted). For an invasion of privacy claim, Strait must have engaged in an intentional act that invaded a "legally protected interest." *Kjerstad*, 517 N.W.2d at 429. For an act to invade a "legally protected" privacy interest, one must have a reasonable expectation of privacy in the matter intruded upon. *See Gates v. Black Hills Health Care Sys*, 997 F. Supp.2d 1024, 1033 (D.S.D. 2014) (granting summary judgment against the plaintiff on a civil invasion of privacy claim under South Dakota law because the plaintiff "could not expect his actions in public areas to remain private" and because a reasonable person would not find the monitoring of public areas to be offensive). A privacy violation based on the common law tort of intrusion necessarily requires the defendant to "intentionally intrude into a place, conversation, or matter as to which the plaintiff has a *reasonable expectation of privacy*," *Hernandez*, 47 Cal 4th at 285, 211 P.3d at 1072 (emphasis added). "[W]hether there is an offensive invasion of privacy involves a question of law." *Montgomery Ward v. Shope*, 286 N.W.2d 806, 810 (S.D. 1979).

While a civil claim for invasion of privacy is distinct from a Fourth Amendment constitutional claim, the latter is useful in understanding the former.[9] For a search and seizure to be unconstitutional under the Fourth Amendment, the search must violate the person's reasonable expectation of privacy. The legitimacy of a privacy interest under the Fourth Amendment is determined by a two-prong test: (1) whether the defendant has exhibited an actual subjective expectation of privacy; and (2) whether society is willing to recognize this expectation as being reasonable. *United States v. Katz*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

[9] "We recognize that the privacy rights characterized by the Court as 'grounded' in the Fourteenth Amendment apply only in cases alleging unreasonable and intrusive action by a government actor. Here, plaintiffs allege their right to privacy was violated by private actors, thus rendering inapplicable the Fourteenth Amendment's laudable protection. We nevertheless view the Fourteenth Amendment as a national expression of public policy, a moral compass to help us focus on the values that are at stake in this case." *Soliman v. Kushner Companies, Inc.*, 433 N.J. Super. 153, 168, 77 A.3d 1214, 1223–24 (2013).

Under South Dakota civil law, a similar reasonable man test is applied: "[t]he invasion must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities." *Montgomery Ward*, 286 N.W.2d at 808 (internal citations omitted). In other words, the invasion must be one which a reasonable man would find objectionable. This necessarily requires that society be willing to recognize the expectation of privacy in the office as being reasonable. *Katz*, 389 U.S. at 361. Thus, Doug can only sustain his invasion of privacy claim if a reasonable man would find that Doug had a privacy interest in the business office.

Doug has also failed to produce evidence of a reasonable expectation of privacy in the business office. On the contrary, Mary Ann had a key to the office and had been worked in the business for nearly two decades. SUMF ¶¶ 5-6; RSUMF ¶¶ 5-6; CR 270-71; 280-81; 321. There is no evidence that the outside doors were locked to keep individuals out of his conversations or that any other actions were taken to preserve his privacy. In fact, the door between the office and the shop does not even have a lock on it. CR 322. Further, when Doug discovered the recording device, he left it undisturbed. CR 283. The shop and the office were not a place of residence, but a place where business is conducted.

"An expectation of privacy in commercial premises . . . is different from, and indeed less than, a similar expectation in an individual's home." *New York v. Burger*, 482 U.S. 691, 700 (1987). While a worker may in some circumstances be able to claim a reasonable expectation of privacy in his own workplace, *O'Connor v. Ortega*, 480 U.S. 709 (1987), a guest "merely permitted on the premises" cannot claim a reasonable privacy interest in that premises. *Minnesota v. Carter*, 525 U.S. 83, 91 (1998). "Even a business owner or operator does not have a reasonable expectation of privacy in the portions of a business open to the public, at least during

normal business hours." *United States v. Long*, 797 F.3d 558, 565 (8th Cir. 2015) (citing *Maryland v. Macon*, 472 U.S. 463, 469 (1985)).

The undisputed evidence indicates that many people continued to frequent the office for restoration and repair services, as well as just to speak with Doug. CR 286, 322, 358. At the time of the recordings, Mary Ann was Doug's spouse with equal rights to the use and access of the office. Therefore, the undisputed material facts show that Plaintiff did not have a reasonable expectation of privacy in the office.

Doug argues that Mary Ann's recording of Doug violated two criminal statutes, and as a result, the audio recordings automatically support a civil tort for invasion privacy. (Doug's Brief at pp.6-8). Essentially, Doug asks this Court to conflate the elements of South Dakota's criminal statutes with the civil invasion of privacy claim. Even assuming a violation of these statutes, Doug does not have a private cause of action for a violation of a criminal statute. *See Frison v. Zebro*, 339 F.3d 994, 999 (8th Cir. 2003) ("The Supreme Court historically has been loath to infer a private right of action from 'a bare criminal statute,' because criminal statutes are usually couched in terms that afford protection to the general public instead of a discrete, well-defined group. . . . And . . . the Supreme Court rejected the view that 'a victim of any crime would be deemed an especial beneficiary of a criminal statute's proscription.'"); *see also Highmark Fed. Credit Union v. Hunter*, 2012 SD 37, ¶ 16, 814 N.W.2d 413, 418 ("If the [statute] does not create a private right of action, then it follows that an individual cannot use the [statute] to establish a duty in an individual civil claim.").

In short, the undisputed evidence indicates that Doug's privacy was not invaded as a matter of law when his wife, Mary Ann, placed a recording device in a public business in which both Doug and Mary Ann worked and had access. This is not an "unreasonable, unwarranted,

serious and offensive intrusion into [Doug's] seclusion." *Roth*, at ¶ 19, 667 N.W.2d at 660. In turn, the invasion of privacy claim fails as a matter of law, and this Court should affirm the grant of summary judgment.[10]

IV. Even if Mary Ann Invaded Doug's Privacy, Strait Cannot Be Held Liable for Aiding and Abetting Mary Ann's Alleged Invasion of Doug's Privacy as a Matter of Law

As noted above, the general rule is that opposing litigants cannot sue attorneys for litigation related conduct. Completely disregarding this general rule, Doug simply assumes Strait can be liable for aiding and abetting Mary Ann's breach of privacy. Doug does not cite a single case in which an attorney has been held liable for aiding and abetting an invasion of privacy.

This Court has only recognized a limited exception to the strict privity rule for aiding and abetting a *breach of fiduciary duty*. *See Chem-Age Indus. Inc.*, at ¶¶ 41-50, 652 N.W.2d at 774-76. This Court has not extended an attorney's aiding and abetting liability to other torts, and the policy considerations supporting application of the strict privity rule weigh against expanding an attorney's third-party liability to allegations of aiding and abetting other torts.

Furthermore, even if an attorney could be liable for aiding and abetting an invasion of privacy in South Dakota, Strait cannot be liable here for aiding and abetting Mary Ann. The controlling case law on an attorney's liability for aiding and abetting is *Chem-Age Indus., Inc. v. Glover*, 2002 SD 122, 652 N.W.2d 756.[11] That is the only case where this Court has recognized

[10] If this Court decides that Mary Ann's recording of Doug did not constitute an invasion of privacy, then the remaining claims in Doug's complaint fail as a matter of law because both the aiding and abetting claim and the conspiracy claim are based upon the premise Mary Ann invaded Doug's privacy in recording him. Without the underlying invasion of privacy tort, the other claims fail as a matter of law.

[11] Disregarding *Chem-Age Industries*, Doug states that although this Court has not stated the elements of aiding and abetting, "it has made passing reference to the doctrine." (Doug's Brief at p.13). Doug then cites *Andrews v. Ridco*, 2015 SD 24, 863 N.W.2d 240. (*Id.*). Doug then

a claim against an attorney for aiding and abetting. In doing so, this Court carefully crafted the limits of that claim to avoid thwarting the policy considerations of the strict privity rule for legal malpractice.

In *Chem-Age Industries,* this Court recognized a claim against an attorney for aiding and abetting a client's breach of fiduciary duty toward that third party. Relying on the Restatement of Torts, this Court stated that "one is subject to liability if he knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself." *Id.* at ¶ 41, 652 N.W.2d at 773. Recognizing the danger of holding an attorney liable to a third-party based upon the attorney's advice to his or her client, the Supreme Court in *Glover* emphasized that aiding and abetting claims must be strictly scrutinized. *Id.* at ¶¶ 43–44.

An attorney is only liable if the attorney "substantially assists their client in committing the tortious act." *Id.* at ¶ 43. This requires that the attorney must actively participate in the tortious conduct. *Id.* at ¶ 44. Critically, attorneys are not liable for merely giving their client's legal advice. *Id.* at ¶ 43. Nor is the basic provision of legal services "substantial assistance" that will support an aiding and abetting claim. *Id.* at ¶¶ 43–44.

Further, the attorney must act knowingly. *Id.* at ¶ 45. This requires proof that the attorney knew the client's conduct is tortious and improper. *Id.*

Here, Strait cannot be liable to Doug for aiding and abetting Mary Ann's alleged invasion of Doug's privacy. Doug alleges that Strait (and Strait's office) provided substantial assistance to Mary Ann's invasion of privacy three ways: (1) Strait failed to advise Mary Ann to stop recording soon enough; (2) Strait's office downloaded and preserved the recordings as potential

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proceeds to rely on Minnesota case law as the key legal authority. (Doug's Brief at p.13). Any claim that Doug "overlooked" *Chem-Age Industries,* which involves aiding and abetting claims against lawyers, is incredible.

evidence; and (3) Strait offered two recordings at the divorce trial and made an offer of proof when refused. (Strait's Brief at pp.9-11, 12, 13-14). In each of these instances, Strait's actions fit squarely within the typical acts of an attorney in litigation. Strait gave his client, Mary Ann, legal advice. Strait had his office download and keep the recordings, which were potential evidence. Strait, as counsel of record at a trial, offered recordings as potential exhibits. Then, when the exhibits were refused, Strait made an offer of proof and asked the proffered exhibits to be filed in the record. Each of these things are the actions of an attorney in his professional capacity.

Whether Strait made mistakes, gave bad advice, or collected and offered improper evidence does not matter. Instead, the question was whether Strait was "substantially assisting" Mary Ann by doing something outside the scope of what an attorney would be expected to do in representing a client. *Chem-Age Indus., Inc.*, at ¶ 44. Because Strait was merely acting like a lawyer, he cannot be liable to Doug for aiding and abetting.

This case illustrates why this Court was careful to limit an attorney's duty to third parties for aiding and abetting in *Chem-Age Industries, Inc.* Fundamentally, Doug is claiming that Strait did not do a good enough job because he failed to prevent his client from committing alleged tortious conduct. Or, in other words, Strait should have told his client to stop right away. Even viewing the evidence most favorable to Doug and assuming Strait failed to give this advice, the logical conclusion of Doug's argument would be an explosion of attorneys' potential liability to third parties. Suddenly, an attorney can be sued *by the adverse litigant* for giving the incorrect legal advice. Recognizing such a duty conflicts with all of the strong policy considerations supporting the strict privity rule.

In short, the undisputed evidence indicates that all Strait's allegedly wrongful acts were within the scope of conduct an attorney typically does in representing a client. Regardless of whether Strait made mistakes in representing Mary Ann, this conduct cannot form the basis for an aiding and abetting claim as a matter of law because Strait did not substantially assist Mary Ann's alleged invasion of privacy. In turn, this Court should affirm summary judgment dismissing the aiding and abetting claim.

V. The Conspiracy Claim Against Strait Fails As A Matter of Law Because An Attorney Cannot Conspire with a Client and Because Strait Never Agreed with Mary Ann to Commit a Tort.

Civil conspiracy is not an independent cause of action but instead "is sustainable only after an underlying tort claim has been established." *Reuben C. Setliff, III, M.D., P.C. v. Stewart*, 2005 SD 40, ¶ 27, 694 N.W.2d 859, 866. Under South Dakota law, the essential elements of a civil conspiracy are "(1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action to be taken; (4) the commission of one or more unlawful overt acts; and (5) damages as the proximate result of the conspiracy." *Kirlin v. Halverson*, 2008 SD 107, ¶ 59, 758 N.W.2d 436, 455. "The purpose of a civil conspiracy claim is to impose civil liability for damages on those who agree to join in a tortfeasor's conduct and, thereby, become liable for the ensuing damage, simply by virtue of their agreement to engage in the wrongdoing." *Huether v. Mihm Transp. Co.*, 2014 SD 93, ¶ 18, 857 N.W.2d 854, 861.

As a matter of law, attorney Strait, as an agent of the client Mary Ann, cannot be liable for allegedly conspiring with Mary Ann. Courts that have addressed the question have found that because the lawyer-client relationship is one of agency, a meeting of the minds between the two is a legal impossibility. "An attorney, being the agent of his principal, cannot be held liable for conspiracy with his principal where the agent acts within the scope of his authority and do

not rise to the level of active participation in a fraud." *Asarte, Inc. v. Pacific Indus. Sys., Inc.*, 865 F. Supp. 693, 708 (D. Colo. 1994) (citing *Worldwide Marine Trading Corp. v. Marine Transport Service, Inc.*, 527 F.Supp. 581, 586 (E.D. Pa. 1981); *Fraidin v. Weitzman*, 93 Md. App. 168, 611 A.2d 1046, 1079 (1992)); *see also Wiles v. Capitol Indemnity Corp.*, 75 F.Supp.2d 1003, 1005–1006 (E.D. Mo. 1999); *Prokop v. Cannon*, 7 Neb. App. 334, 583 N.W. 2d 51, 61 (1998); *Skarbrevik v. Cohen, England & Whitfield*, 231 Cal. App. 3d 692, 709, 282 Cal. Rptr. 627, 638–39 (2 Dist. 1991); *Salaymeh v. InterQual, Inc.*, 155 Ill. App. 3d 1040, 508 N.E.2d 1155, 1158–59 (1987).

This Court has similarly recognized that an agent cannot be liable for allegedly conspiring with the principal. *See Sisney v. Best Inc.*, 2008 SD 70, ¶ 10.n3, 754 N.W.2d 804, 809 n.3. In *Sisney*, the plaintiff claimed the alleged bad actor employee engaged in a conspiracy with the corporate employer. *Id.* This Court rejected the conspiracy claim because the employee/employer relationship (or agent/principal) "failed to satisfy the separate identity requirement necessary to sustain an alleged conspiracy between two parties." *See Sisney v. Best Inc.*, 2008 SD 70, ¶ 10 n.3, 754 N.W.2d 804, 809 n. 3 (citing *Larson v. Miller*, 76 F.3d 1446, 1456 n.6 (8th Cir. 1996) (providing: "According to the intracorporate conspiracy doctrine, a corporation cannot conspire with itself through its agents when the acts of the agents are within the scope of their employment."); *Meyers v. Starke*, 420 F.3d 738, 742 (8th Cir. 2005) (providing, "any conspiracy claim under 42 U.S.C. § 1985(2) is barred under the intracorporate conspiracy doctrine, which allows corporate agents acting within the scope of their employment to be shielded from constituting a conspiracy under § 1985")). Similarly, an attorney who is the agent of the client-principal cannot conspire with the client because there are not two parties to the alleged agreement. Instead, the client is deemed to have "agreed" with itself.

Further, even if an attorney can be liable for conspiring with the client, the undisputed evidence proves Doug's conspiracy claim failed as a matter of law. "A civil conspiracy is, fundamentally, an *agreement* to commit a tort." *Kirlin*, at ¶ 59, 758 N.W.2d at 455 (internal quotation omitted and emphasis in original). A plaintiff alleging conspiracy must show that the defendants direct themselves toward an unlawful action "by virtue of a mutual understanding." *Sisney*, at ¶ 12, 754 N.W.2d at 810. The undisputed evidence does not support a finding of a mutual understanding between Mary Ann and Strait regarding the recordings. Mary Ann had already committed to recording Doug's conversations and had already recorded events prior to meeting with Strait on December 3, 2014. SUMF at ¶¶ 11, 14; RSUMF at ¶¶ 11, 14.

Moreover, Mary Ann's stated purpose of recording Doug was to confirm her suspicions of his affair. CR 429. Mary Ann conceded that she knew the recordings and evidence of an affair had no impact on the legal issues in the divorce; rather, Mary Ann needed to know if the marriage was salvageable. CR 352 The evidence shows that Strait had no intention of even bothering with evidence of an affair in the divorce proceedings because he saw the case as primarily dealing with the division of property, on which infidelity had no bearing. *See* SDCL 25-4-45.1 ("Fault shall not be taken into account with regard to the awarding of property or the awarding of child custody."). Moreover, it is undisputed that no later than by January 8, 2015, Strait told Mary Ann to stop recording Doug. SUMF ¶ 23, RSUMF ¶ 23. Mary Ann nevertheless continued. CR 264.

Ultimately, the Court should affirm summary judgment dismissing the conspiracy claims for two separate reasons: (1) Strait cannot conspire with his client as a matter of law; and (2) there is no evidence of an agreement to commit a tort.

CONCLUSION

Based on the foregoing, this Court should affirm summary judgment dismissing all claims against Strait.

Dated this 25th day of June, 2020.

/s/ Jason R. Sutton

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This brief complies with the length requirements of SDCL 15-26A-66(b). Excluding the cover page, Table of Contents, Table of Authorities, Jurisdictional Statement, and Statement of Legal Issues, this brief contains 9,083 words as counted by Microsoft Word.

/s/ Jason R. Sutton
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STATE OF SOUTH DAKOTA):SS COUNTY OF DEUEL	)	IN CIRCUIT COURT THIRD JUDICIAL CIRCUIT

DOUG GANTVOORT and DOROTHY JEAN NOVAK, Plaintiffs, v. MARY ANN RANSCHAU, DAVID R. STRAIT, and DAVID R. STRAIT P.C. Defendants.	19CIV18-000008 **STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF STRAIT DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

Defendants David R. Strait ("Strait") and David R. Strait P.C. (referred to collectively as "Strait Defendants"), by and through their attorneys of record, respectfully submit this Statement of Undisputed Material Facts pursuant to SDCL 15-6-56(c). The citations below refer to attachments to the Affidavit of Jason R. Sutton[1] or the files and records of this action. The following facts are not in dispute and support the motion for summary judgment:

1) In 2014, Mary Ann Ranschau ("Mary Ann") Doug Gantvoort ("Doug") were married, and the two of them owned a business in Clear Lake, SD, where they restored antique tractors and vehicles. *Deposition of Douglas Gantvoort ("Doug Depo.")* at 29:16–30:20.

2) The business is located in a building composed of a large open shop area where the tractors and cars are restored and repaired, along with a smaller office area containing a computer, a desk, and other items. *Id.* at 53:11–22; 198:21–23.

[1] For the Court's ease of reference, deposition exhibits contain the same numbers as they were marked during the depositions. Exhibits identified with a letter are either deposition transcripts or documents that were not marked as deposition exhibits.

3) There are two ways to enter into the shop. The first is through the exterior door that opens into the office and then through the door between the office and the shop. The other, more frequently used door is the back door on the east side of the building which opens directly into the shop area. *Deposition of Mary Ann Ranschau* (*Mary Ann Depo.*") at 44:21–45:7; Doug Depo. at 199:6–25.

4) The office has multiple windows through which someone may look into the office from the outside. *Id.* at 33:25–34:3; *Doug Depo.* at 192:25–193:12.

5) Mary Ann worked in the business with Doug, and the business was adjudged to be part of the marital estate by the divorce court. *Doug Depo.* at 194:8–14; *Letter Decision of Honorable Robert L. Timm, Sutton Aff.*, Ex. C at 35, 38.

6) Mary Ann had a key to the office and had been employed in the business for nearly two decades. *Doug Depo.* at 194:8–14; *Sutton Aff.*, Ex. C at 35, 38; *Sutton Aff.*, Ex. L at 3.

7) The door between the office and the shop does not have a lock on it. *Doug Depo.* at 199:22–25.

8) After Doug's motorcycle accident in 2006, no one other than Mary Ann and Doug worked in the shop. People still would still stop-in to the shop and walk around. *Mary Ann Depo.* at 41:10–21.

9) Prior to consulting with Strait, Mary Ann had spoken to Jodi Hoffman, a private investigator, and Larry Peart, a former FBI agent. *Id.* at 5:25–7:18, 13:17–20; *Deposition of David Strait* ("Strait Depo.") at 11:25–12:2; 13:20–14:1.

10) Mary Ann suspected that Doug was having an affair and consulted with Hoffman and Peart regarding potential electronic surveillance of Doug. *Mary Ann Depo.* at 6:21–25.

11) After her conversation with Peart, Mary Ann purchased a voice-activated audio recording device and proceeded to hide it behind a sign in the windowsill of the office. *Id.* at 33:4–24.

12) Starting on November 30, 2014, Mary Ann would leave the recorder there during the hours she knew Doug would be there, remove it when he was gone, and listen to the portions where she could hear his voice. *Id.* at 7:19–22.

13) Many of the conversations recorded on the device were recorded when Mary Ann was not present. *See Separate Answer and Affirmative Defenses of Defendant Mary Ann Ranschau*, Dkt. 7 at 1.

14) Strait's first consultation with Mary Ann regarding a potential divorce was on December 3, 2014. *Exhibit 7.*

15) At that time, Mary Ann informed Strait that she had placed the recording device in the office to record Doug because she was concerned he was having an affair. *Strait Depo.* at 13:25–14:1; Ex. F at 363:20–23.

16) Strait told her that given the nature of the issues in the divorce case, whether Doug was having an affair likely would have little to no impact on the outcome of the case. *Strait Depo.* at 16:2–7.

17) Mary Ann knew that evidence of the affair likely would not have an outcome on the legal issues in her divorce. Instead, she recorded Doug to confirm whether he was merely flirting with his girlfriend, or whether he was serious with her. *Mary Ann Depo.* at 17:6–18:3.

18) After the first consultation, Mary Ann would bring the recorder to Strait's office, where his paralegal, Paula Newman, would transfer the recordings from the recorder to the Law

Firm's server, then onto CDs for Mary Ann. *Paula Newman Deposition ("Newman Depo.")* at 13:25–14:4, 11:23–12:4.

19) Mary Ann would bring the recorder to Strait's office anywhere from one to three times a week. *Id.* at 12:10–12.

20) Paula would transfer the files and return the recorder and the new CDs to Mary Ann, either by handing them to her if her workload allowed her to complete the transfer right away, or by leaving them at the front desk for Mary Ann to pick up later. *Id.* at 6:7–15.

21) Paula would listen to the individual files just long enough to determine if there was sound recorded and if the transfer had been successful. *Id.* at 13:21–14:4.

22) At first, Paula would indicate to Strait that she had transferred recordings for Mary Ann, but when she did not receive feedback from Strait about the recordings, she stopped informing Strait of the times Mary Ann would come in. *Id.* at 6:16–24.

23) On January 8, 2016, Strait again met with Mary Ann and Mary Ann discussed in greater detail the extent of her recordings of Doug. *Strait Depo.* at 93:21–94:3.

24) Strait looked at the billing statement detailing how many times she had come in with recordings and told Mary Ann that she needed to stop recording immediately. *Id.* at 95:11–19.

25) Strait also informed Mary Ann that she needed to stop recorded because he was concerned she might capture a privileged conversation between Doug and his attorney. *Id.* at 95:20–96:20.

26) Nevertheless, Mary Ann delivered additional recordings to Strait's office on January 12, 2015, though Strait was not informed by staff of her arrival. *Sutton Aff.*, Ex. H.

27) Mary Ann's daughter informed Doug of the recordings. *Doug Depo.* at 36:25–37:4.

28) Despite being informed of the existence of the recording device, Doug left the device in the office for several additional days. *Id.* at 42:12-20.

29) At some point in late February 2015, Mary Ann delivered to Paula a list of portions of recordings that Mary Ann wanted for the hearing in the divorce case the following day. *Paula Depo.* at 9:14–18.

30) Strait informed Paula it was unnecessary to pull the files on Mary Ann's list. *Id.* at 9:22–25.

31) Eventually all the audio files of the recordings were turned over in response to Doug's interrogatories in the divorce case. *Id.* at 28:20–29:8, 31:3–18.

32) Doug and Mary Ann's divorce case went to trial on May 5 to 7, 2015. *Judgment and Decree of Divorce, Sutton Aff.*, Ex. G at 1.

33) During the divorce trial, on Mary Ann's behalf, Strait attempted to introduce two excerpts of recordings from December 17 and 18, 2014. *Excerpt of Transcript of Divorce Trial, Sutton Aff.*, Ex. F.

34) Doug's attorney objected to their introduction, the court refused the offer, and Strait made an "offer of proof" as to the components of the recordings. *Id.*; *Strait Depo.* at 59:19–23.

35) Mary Ann wanted Doug to know that she knew he was having an affair and thus was adamant that Strait offer the recordings. *Strait Depo.* at 76:2–8; 104:13–23.

36) The recordings were ultimately never introduced as exhibits or played in open court and were merely filed with the court file. *Id.* at 56:8–9.

37) Following the trial, there were extensive post-trial motions, including an appeal to the South Dakota Supreme Court. *Notice of Appeal, Sutton Aff.*, Ex. N.

38) While the appeal was pending, Doug requested a stay of the judgment of divorce, which required Doug to procure a bond. Doug requested that the surety on the bond be his friend, Keith Diekma. *Defendant's Application for Approval of Form and Amount of Supersedeas Bond for Appeal, Sutton Aff.*, Ex. O.

39) Doug was also held in contempt of court for hiding assets which had been deemed marital property and ordered make the property available to Mary Ann. *Judgment and Order of Contempt, Sutton Aff.*, Ex. P.

40) It was Diekman who had to collect the property and deliver it to the sheriff's department. *Deposition of Keith Diekman* ("*Diekman Depo.*"), *Sutton Aff.*, Ex. J at 25:11–26:2.

41) Mary Ann created a total of fifty-one recordings. *Mary Ann Depo.* at 7:24–8:5.

42) Plaintiff Dorothy ("DJ") Novak's voice is not recorded on any of the recordings. *Plaintiff Dorothy Jean Novak's Responses to Interrogatories, Requests for Production, and Requests for Admissions from Defendant Strait (Second), Sutton Aff.*, Ex. I at No. 38.

43) Doug has suffered seizure-like episodes for over 30 years, especially after his motorcycle accident in 2006. *Doug Depo.* at 63:14–17; 109:25–110:3.

44) Despite his history of suffering from seizure-like episodes in times of stress, Doug did not experience a seizure upon his discovery of the recording device. *Id.* at 46:21–47:2.

45) When asked what a fair judgment would be in this case, Doug referred to the land awarded to Mary Ann in the divorce, replying, "[w]ell, I should have never lost my land" and that "[i]t would be nice if I got my land back." *Id.* at 98:21–99:2.

46) DJ was the woman with whom Doug was having an affair during his marriage to Mary Ann. *Letter Decision of Honorable Judge Robert Timm, Sutton Aff.*, Ex. C at 35.

47) DJ had never even set foot in the office until after the recordings had taken place. *Sutton Aff.*, Ex. I, at No. 38.

48) Strait Defendants did nothing but preserve records, provide legal advice to Mary Ann, and present the two recordings in court. *Doug Depo.* at 172:11–16; *Diekman Depo.* at 24:21–25:1.

49) There is no evidence that Strait Defendants disclosed any of the recordings Mary Ann made except the two December recordings which were disclosed as part of a judicial proceeding. *Doug Depo.* at 172:24–173:3; *Diekman Depo.* at 25:3–7.

Dated this 11th day of February, 2019.

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STATE OF SOUTH DAKOTA	IN CIRCUIT COURT
COUNTY OF DEUEL	THIRD JUDICIAL CIRCUIT

DOUG GANTVOORT and DOROTHY JEAN NOVAK, Plaintiffs, vs. MARY ANN RANSCHAU and DAVID R. STRAIT, Defendants.	19CIV18-000008 **PLAINTIFFS' RESPONSE TO DEFENDANT STRAIT'S STATEMENT OF UNDISPUTED MATERIAL FACTS AND STATEMENT OF ADDITIONAL MATERIAL FACTS**

PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS

1. Not material.

2. Admit.

3. Admit.

4. Denied. The windows were covered by cardboard. *See* Ranschau Depo. at 46:10-16.

5. Not material.

6. Admit that, after the motorcycle accident, no other employees worked for the business. Not material as to any other allegation.

7. Not material.

8. Admit.

9. Not material.

10. Not material.

11. Admit.

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12. Admit.

13. Admit.

14. Admit.

15. Admit.

16. Admit.

17. Admit that Defendant Ranschau knew that the affair would not have an outcome on the legal issues of the divorce. Disputed that the sole purpose was to determine if he was serious with his new girlfriend. Defendant Ranschau knew that Plaintiff Gantvoort had no intention of returning to her on the first recording. Nonetheless, she continued to record.

18. Admit.

19. Admit.

20. Admit.

21. Admit that Defendant Strait's staff listened to the recording. It will be up to the jury to determine the extent of how much was listened to.

22. Disputed. Defendant Strait's office sent him memoranda indicating that the recordings had been brought in. Strait Depo. at 58:11-16. Defendant Strait would have also seen the notations in his billing statements, and he reviewed Defendant Ranschau's handwritten notes. *See* Affidavit of Counsel, Exhibit L (billing statements), Exhibit J (notes).

23. Not material.

24. Disputed. Defendant Strait claims that he told Defendant Ranschau to stop recording at their first meeting. Strait Depo. at 14:16-21.

25. Admit.

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26. Disputed. Defendants discussed these recordings in preparation for trial and then relied on the notes that Defendant Ranschau made. *See* Affidavit of Counsel, Exhibit J.

27. Not material.

28. Not material. Neither relevant nor inadmissible. *Fultz v. Gilliam*, 942 F.2d 396 (5th Cir. 1991).

29. Admit.

30. Disputed. Defendant Strait told his staff to prepare two CDs of recorded conversations for trial. Newman Depo. at 33:10-15.

31. Not material.

32. Admit.

33. Admit.

34. Disputed. Defendant Strait included the recordings as exhibits as part of his offer of proof. *See* Affidavit of Counsel, Exhibit M at Strait000875-77.

35. Disputed. The Defendants gave varying descriptions of why the recordings were introduced.

36. Not material.

37. Admit as material as to res judicata issue. Otherwise, not material.

38. Not material.

39. Not material.

40. Not material

41. Admit.

42. Not material

43. Not material

44. Not material

45. Not material. Inadmissible as settlement negotiations.

46. Not material.

47. Not material.

48. Disputed. *See, generally,* Brief in Opposition to Motion for Summary Judgment.

49. Admit.

STATEMENT OF ADDITIONAL MATERIAL FACTS

Plaintiffs, through counsel, present the following additional material facts:

1. Defendant Ranschau testified that Doug's office was his man cave. Ranschau Depo. at 38:23-39:4.

2. Defendant Ranschau and Doug put cardboard into the windows of his business to afford him more privacy there after his motorcycle accident. Ranschau Depo at 23:20-22.

3. After Doug's motorcycle accident, he did his business "more privately" in the building where she hid an eavesdropping device. *Id.* at 42:14-17.

4. Defendant Strait testified that the recordings "had nothing to do with the divorce." Strait Depo. at 31:3-4.

5. Defendant Strait agreed that the recordings had "no bearing whatsoever" on the legal issues in the divorce. Strait Depo. at 60:3-17.

6. The divorce court ruled that "'[w]e have a statute that requires the consent of one party to the conversation in order for it to be legal and in this case that is not the case, so that's the ruling of the Court." Affidavit of Counsel, Exhibit M.

7. Defendant Strait has no written evidence that he ever told Defendant Ranschau to stop recording Doug. Strait Depo. at 57:19-59:9.

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Dated this 6th day of March, 2019.

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IN THE

Supreme Court

of the

State of South Dakota

Nos. 29038; 29265

DOUG GANTVOORT,

PLAINTIFF/APPELLANT

AND

DOROTHY JEAN NOVAK,

PLAINTIFF

VS.

MARY ANN RANSCHAU,

DEFENDANT,

DAVID STRAIT,

DEFENDANT/APPELLEE

AND

DAVID R. STRAIT, P.C.,

DEFENDANT/APPELLEE

An appeal from the Circuit Court, Third Judicial Circuit
Deuel County, South Dakota

The Hon. Jon R. Erickson
CIRCUIT COURT JUDGE

APPELLANT'S REPLY BRIEF

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Notice of Appeal filed on February 27, 2020

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INTRODUCTION

The trial court granted summary judgment based on the idea that Appellees were merely passive observers when Defendant Ranschau invaded Appellant Doug Gantvoort's ("Doug") privacy. On appeal, the Appellees effectively concede that their conduct was *more* than merely passive observers. They contend, however, that those wrongful actions were subject to immunity because they were privileged.

But attorney immunity does not apply to invasion of privacy claims. First, immunity extends only to conduct "inside" a judicial proceeding. Thus, when an attorney collates and accepts illicit recordings at his office, that conduct occurs outside of a judicial proceeding and is therefore not afforded immunity. Second, some conduct is considered so egregious that even when it does occur inside a judicial proceeding, immunity still does not apply. In those cases, courts have held that providing a client with any form of assistance while the client invades another's privacy is "foreign to the duties of an attorney" and therefore not subject to protection. Based on either of these two rationales, the trial court's order granting summary judgment should be reversed.

ARGUMENT-IN-REPLY

I. Appellees Raise Issues Beyond the Scope of this Appeal

Appellees devote a significant portion of their brief on the argument that Doug had no expectation of privacy and that his privacy could not have been invaded. Appellees, however, are precluded from making that argument for two reasons: (1) Doug's expectation of privacy (and its *per se* invasion) are matters subject to issue preclusion; and, (2) Appellees did not file a notice of review regarding the trial court's findings that the recordings were illegal.

A. These Matters are Subject to Issue Preclusion

Res judicata bars a party from relitigating matters that were finalized and not appealed. *Moe v. Moe*, 496 N.W.2d 593, 595 (S.D. 1993) (citations omitted). A 'final judgment … by a court of competent jurisdiction … 'is conclusive as to all rights, questions, or facts directly involved and actually, or by necessary implication, determined therein' whether the court was correct at the time or not.'" *Id*. (citations omitted).

"[R]es judicata consists of two preclusion concepts: issue preclusion and claim preclusion." *Link v. L.S.I., Inc*., 2010 S.D. 103, ¶34, 793 N.W.2d 44, 54 (citations omitted). "Collateral estoppel [(aka issue preclusion)] 'prevents relitigation of issues that were actually litigated in a prior proceeding.'" *Id*. at ¶ 35 (citations omitted). The issue in dispute must have been "'actually and directly in issue in a former action and [it must have been] judicially passed upon and determined by a domestic court of competent jurisdiction.'" *Id*. (citations omitted).

The issue of Doug's expectation of privacy, and the *per se* violation of that privacy has already been litigated. South Dakota's wiretap statutes preclude a person from recording conversations that he or she is not a party to. Violating that statute is a class 5 felony. SDCL § 23A-35A-20.

During the divorce, Appellees tried to introduce recordings that Defendant Ranchau recorded through an eavesdropping device (a voice activated recorder). Judge Timm called a recess to research the issue. After the recess Judge Timm excluded the evidence because it was the product of criminal conduct:

> THE COURT: All right. I'm going to sustain the objection, I think the exclusionary rule for illicitly received communications applies in this case and I'm not going to hear any of that recorded testimony. We have a statute

> that requires the consent of one party to the conversation in order for it to be legal and in this case that is not the case, so that's the ruling of the Court.[1]

R. 959. Neither Defendant nor Appellee appealed that ruling. As a result, they are bound by those factual findings, namely, that the recordings Defendant Ranchau made with Appellees knowledge and tacit approval were illegal and violated South Dakota's wiretap statutes. Appellees' arguments regarding these issues have already been litigated (and rejected).

B. Appellees did not Cross Appeal the Trial Court's Findings Regarding Doug's Expectation of Privacy

"SDCL 15-26A-22 provides [an] appellee with the right to obtain review of a judgment or order entered in the same action which may adversely affect him." *Deuchar v. Foland Ranch, Inc*., 410 N.W.2d 177, 183 (S.D. 1987). A trial court's rulings become the law of the case subject to reversal *only* if the appellee presents that issue for cross appeal. *Id*. *See also Orr v. Kneip*, 287 N.W.2d 480, 484-85 (S.D. 1979) *("*"The court's instructions became the law of the case subject to reversal on appeal only if the record of objection, exception and the proposal of correct instructions is preserved. While counsel for plaintiffs assiduously made his record to preserve the issue, we must decline to address it since it has not been properly presented to us due to plaintiffs' failure to cross-appeal.").

The trial court found that Doug had a reasonable expectation of privacy and that Defendant Ranchau invaded that privacy:

> Based on the foregoing, I find that Ranschau's conduct was intentional; it did intrude upon conversations in which the plaintiffs had a reasonable expectation of privacy and it is a jury question whether under these circumstances the intrusion was highly offensive.

R. 1006, App. 004.

---

[1] *Id*. at Strait000874:1-7.

Appellees never cross-appealed those findings. As a result, they cannot challenge them now. The law of the case is that Doug had a reasonable expectation of privacy and that Defendant Ranschau intentionally intruded on that expectation of privacy. The only issue left for the jury to decide, therefore, would have been whether that intrusion was highly offensive.

As a result, for the purposes of this Appeal, the only issue for this Court to address is whether Appellees were part of a conspiracy to invade Doug's privacy, and whether Appellees are liable for Defendant Ranschau's acts because Appellees aided and abetted those actions.

II. Aiding and Abetting Invasion of Privacy is not Privileged Conduct

A. Appellees Fail to Satisfy the Factual Predicate for Asserting the Privilege

Appellees argue that their conscious act of playing in open court surreptitiously (and illegally) obtained audio of Doug watching pornography was privileged. That argument is misplaced for several reasons, not least of which was the fact that Appellees admitted that the audio in question had "no bearing whatsoever" on the issues to be tried at Court. We begin with a review of the limited scope of litigation privilege. It is not an infinite shield for lawyers.

"A communication made in any legislative or judicial proceeding is a privileged communication. *Harris v. Riggenbach*, 2001 S.D. 110, ¶ 7, 633 N.W.2d 193, 194 (citation omitted). An attorney must satisfy a four-part test to invoke that privilege Absolute privilege attaches only for a statement that:

> (1) was made in a judicial proceeding; (2) had some connection or logical relation to the action; (3) was made to achieve the objects of the litigation; and (4) involved litigants or other participants authorized by law.

Id., ¶ 12 (citations omitted).

Also inherent within this four-part test, however, are the implicit boundaries within which attorneys may carry out their function as officers of the court. As the Texas Supreme Court reasoned when evaluating a similar standard, "attorneys are not protected from liability to non-clients for their actions when they do not qualify as 'the kind of conduct in which an attorney engages when discharging his duties to his client.'" *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 482 (Tex. 2015) (*quoting Dixon Fin. Servs. v. Greenberg, Peden, Siegmyer & Oshman, P.C.*, No. 01-06-00696-CV, 2008 Tex. App. LEXIS 2064, at *24 (Tex. App. Mar. 20, 2008)). *See, also, Hageman v. Sw. Gen. Health Ctr*., 2008-Ohio-3343, ¶ 17, 119 Ohio St. 3d 185, 190, 893 N.E.2d 153, 157-58 (attorney liable for improper disclosure of unrelated medical information in court).[2]

Appellees argue that the recordings "certainly were [sic] had a logical connection to the proceedings." Appellees' Brief, p. 19. That statement, however, was not made by Appellees; it was made by their attorneys, instead. At his deposition, Appellee Strait

[2] There is a range of behaviors that takes an attorney's conduct outside of the privilege. *See, e.g.Poole v. Hous. & T.C. Ry. Co.*, 58 Tex. 134, 137 (1882) (an attorney "will not be heard to deny his liability" for participating in a fraudulent business scheme with his client); *Essex Crane Rental Corp. v. Carter*, 371 S.W.3d 366, 382 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (attorneys not immune from claims that they knowingly assisted their clients in evading a judgment through a fraudulent transfer); *Clark v. Druckman*, 218 W. Va. 427, 435, 624 S.E.2d 864 (2005) ("[T]he litigation privilege generally operates to preclude actions for civil damages arising from an attorney's conduct in the litigation process. However, the litigation privilege does not apply to claims of malicious prosecution and fraud.");

conceded that the recordings had "no bearing whatsoever" on any issues that would be decided by the trial court:

> Q. And just so it's clear, you intentionally tried to put those tapes into evidence even though you knew they weren't relevant to the divorce?
>
> A. They were not relevant to the legal issues in the divorce. They were relevant to Mary's emotional "I want to get on with my life."
>
> Q. Correct, and if you were just trying the legal issues related to the divorce, you wouldn't have put in the tapes that Mary Ann Ranschau recorded of Doug, true?
>
> A. They had no relevance to the legal issues in the divorce.
>
> Q. No bearing whatsoever?
>
> A. On the legal issues in the divorce?
>
> Q. Correct.
>
> A. That is correct.

R. 836. Appellee Strait *further conceded* that the reason he introduced those recordings was because Defendant Ranschau wanted Doug to know that she knew everything Doug said or did in his office. R. 852.

It has been a long-standing rule of this court that "one cannot claim a better version of the facts than her own testimony." *Tucek v. Mueller*, 511 N.W.2d 832, 837 (S.D. 1994) (citations omitted). That extends to a party's conclusory statements. *Petersen v. Dacy*, 1996 S.D. 72, ¶ 16, 550 N.W.2d 91, 95.

Appellees' attorneys can argue as much as they like; it does not change Appellee Strait's own deposition admissions. He admitted and agreed that there was no logical relation between the tapes and the divorce proceeding. As he put it, "[t]hey had no relevance to the legal issues in the divorce." R. 836. He, therefore, cannot satisfy the

test's second prong two of the test. *Harris*, 2001 S.D. 110, ¶ 12. By his own admission, the recordings did not have a "connection or logical relation to the action."

Likewise, Appellee Strait conceded the recordings did not achieve an objective of the litigation. Instead, he introduced the tapes to serve his Client on an emotional level, i.e., to help Defendant Ranschau get on with her life, R. 836, and to "make sure that Doug knew that she knew" what he had been saying in the privacy of his office. R. 852. In fact, as Appellee Strait admitted, the only reason he could think of to install a secret recording device would be to "harass" the other party. R. 840.

In short, Strait has conceded that the only purposes of sharing illegal recordings in open court was to attempt harm upon Doug and make his Client feel good. That is not what trials are for. And this is not what lawyers do. A license to zealously advocate may not disregard the ordinary boundaries in which attorneys are permitted to act. *E.g.*, *Gregerson v. Farm Bureau Prop. & Cas. Ins. Co.*, 2020 U.S. Dist. LEXIS 92341, at *31 n.15 (D.S.D. May 27, 2020) (noting that a party's briefing had "continually and materially misrepresent[ed]" certain facts, and advising that, "Although the court appreciates defense counsel's responsibility to zealously represent his client, he is reminded he also has a duty not to misrepresent facts to a court. S.D. R. Prof'l. Conduct 3.3(a)(1)." Appellee Strait's admissions preclude immunity. The evidence he introduced had no logical relationship to the case; those issues had already been decided. He introduced this evidence for an improper purpose rather than to further an actual litigation goal. Appellee Strait should not be afforded immunity.

B. Aiding and Abetting Invasion of Privacy is Noncommunicative Conduct and thus not Privileged; Nor Does the Privilege Extend to Activities "In Anticipation of Litigation"

As several courts have ruled, an attorney is not subject to immunity when giving assistance to a client that is invading someone else's privacy. As the California Supreme Court observed, an attorney violates his or her basic duties to the Court when he or she aids, *in any way*, a client that is invading someone's privacy:

> The profession of the law possesses extraordinary powers. Lawyers can make the arrogant humble and the weak strong. In control of the course of litigation and armed with the knowledge of right and wrong, they are most able to abjure illegal or tortious conduct; it is their duty to do so. As occupants of a high public trust and officers of the court, they are expected to conform their behavior in legal affairs to a higher standard of rectitude and spirit of obedience than those who are willing to endure the dust of transgression.
>
> Guided by oath, duty and obligation, the lawyer's path avoids the vices from which the virtuous abstain. Thus, it ill suits the profession to seek immunity for injuries inflicted while engaged in legal warfare under the protective tarpaulin of the privilege for "judicial proceedings."
>
> We conclude, therefore, that Attorney Farnell is not immune under section 47(2) from liability for his alleged conduct in aiding and abetting a violation of the privacy act.

Kimmel v. Goland, 51 Cal. 3d 202, 214, 271 Cal. Rptr. 191, 198, 793 P.2d 524, 531 (1990).

In *Kimmel*, plaintiffs then began recording conversations between themselves and management of a mobilehome park "without their consent or knowledge." *Id*. at 206. Those recordings were made to preserve the answers that the management had given. *Id*.

The plaintiffs' attorney, like Appellants here, "was not present during the actual recording of the conversations." *Id*. at 207. He only "transcribed the tapes," much like Appellants here. *Id*.

Upon discovery of these recordings, the park management filed a cross-complaint against the plaintiffs and their attorney for invasion of privacy. The park management

alleged, like Appellant does here, that they attorney "'furthered the unlawful agreement [to record the confidential conversations] by aiding, abetting, counseling, advising and encouraging' plaintiffs in their recording of the calls." *Id*. at 207-08.

Similar to the Appellees here, the attorney in *Kimmel* asserted litigation privilege; the trial court agreed that the privilege applied; but the California Supreme Court reversed, holding that these types of pre-trial activities are beyond the scope of litigation privilege. *Id*. at 208.

This case is instructive for several reasons. The California Supreme Court relies on virtually the same test for immunity as South Dakota. In California, the attorney immunity privilege "extends to any communication: (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that [has] some connection or logical relation to the action." *Id*. at 209.[3]

As the California Supreme Court reasoned, providing a client assistance while the client invades another's privacy is "noncommunicative conduct" outside a judicial proceeding. *Id*. at 211. Such conduct is not subject to immunity because *it is not made* ***in*** *a judicial or quasi-judicial proceeding*. *Id.*

Immunity likewise does not apply "to unlawful conduct undertaken to obtain evidence ***in anticipation of litigation***." *Id*. at 212 (emphasis added). Such conduct would lead to unacceptable consequences:

> Suppose, a prospective defendant kept important documents at home. If a prospective plaintiff, in anticipation of litigation, burglarized defendant's premises in order to obtain evidence, plaintiffs here would apparently apply the privilege to protect the criminal conduct. Such an extension of

[3] *Compare* with *Harris v. Riggenbach*, 2001 S.D. 110, ¶ 12.

> section 47(2) is untenable. The instant case and the example are comparable in that both involve violation of a penal statute, and in both cases the offending party seeks immunity from civil liability. In both, the claim must fail.

Id.

If anything, Appellee's actions were more extreme than the attorney's in *Kimmel*. Unlike *Kimmel*, Appellees here *knew* that the information Defendant Ranschau was gathering had "no bearing whatsoever" on the legal issues to be decided. R. 836. In *Kimmel*, there was, at least, evidentiary value to the recordings. Nonetheless, the attorneys were still liable for the invasion of privacy because, among other things, the "high public trust" given to attorneys means that "they are expected to conform their behavior in legal affairs to a higher standard of rectitude and spirit of obedience than those who are willing to endure the dust of transgression." *Id*. at 214. "[I]t ill suits the profession to seek immunity for injuries inflicted while engag[ing] in legal warfare under the protective tarpaulin of the privilege for 'judicial proceedings.'" *Id*.

C. Utilizing Illicit Recordings in Court is not Privileged

As the Texas Supreme Court recently ruled, an attorney can be liable for invasion of privacy for both making and playing illicit recordings in a family law matter. In *Tolbert v. Taylor*, Mark Broome filed a child-custody modification proceeding against his ex-wife, appellant/plaintiff Vivian Robbins, regarding custody of their daughter. No. 14-18-00001-CV, 2020 Tex. App. LEXIS 2870, at *1 (Tex. App. Apr. 7, 2020). Taylor was Broome's attorney. At some point, Robbins' text messages and emails "began appearing on an iPad owed by Broome's sister-in-law." *Id*. at *2. Broome shared those text messages with attorney Taylor. *Id*.

Robbins sued attorney Taylor for various invasion of privacy violations. *Id*. at *2-3. Attorney Taylor moved for summary judgment, arguing attorney immunity, like Appellees do here. *Id*. at *3-5. The trial court granted attorney Taylor's motion, based on the attorney immunity statute. *Id*.

As the Texas Supreme Court observed, "[a]ttorney immunity is an affirmative defense that protects attorneys from liability to nonclients." *Id*. at *5-6. (citations omitted). The Robbins appealed, assering "that attorney-immunity does not apply to … alleged criminal conduct by [attorney] Taylor in violation of the Texas Wiretap Statute and the Federal Wiretap Statute – because criminal conduct is 'foreign to the duties of an attorney.'" *Id*. at *8.

Attorney Taylor's conduct also mirrors Appellees. Like Appellees, attorney Taylor gathered or, as Appellees characterize, preserved the illicitly-obtained communications. *Id*. Attorney Taylor then produced those recordings to the other party's attorney. *Id*. Eventually, attorney Taylor utilized those recordings in Court, like Appellees did here. *Id*. at *9.

The Texas Supreme Court ruled that such conduct is "foreign to the duties of an attorney and thus precludes application of attorney-immunity." *Id*. at *13. As a result, the Texas Supreme Court reversed the trial court's summary judgment ruling. *Id*.

CONCLUSION

. Appellees accepted and processed 51 illegal recordings. R. 725-26. In fact, over the course of several months, Appellees accepted these illicit recordings almost daily. R. 726. Appellees then cherry-picked the most embarrassing materials to introduce in open court. R. 932-34. Rather than cherry-pick the recordings which would

be the best *evidence* for a divorce trial, they cherry-picked the ones that would cause Doug the most *embarrassment* and which would give Ranschau the best *feelings* about her divorce.

It cannot be said any more simply: this is not what lawyers do. No privilege attaches to this type of conduct. Appellees' actions were not *bona fide* litigation communications. Instead, Appellee Strait knew that he was introducing embarrassing and scandalous evidence that had no bearing on the divorce for nonlitigation purposes.

Based upon these facts, the trial court correctly found that an invasion of privacy occurred, and correctly found that the only remaining issue for trial was whether the invasion was offensive, but incorrectly determined that Appellees had little to no involvement in it. Because this is not privileged behavior, Doug seeks a reversal and remand for trial on the issue of offensiveness and an award of damages.

Dated this 24th day of August, 2020.

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CERTIFICATE OF COMPLIANCE

I certify that this brief does not exceed the word limit described by SDCL § 15-26A-66. This brief contains 3,318 words, excluding the caption and any certificates of counsel.

One of the attorneys for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of August, 2020, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

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I also hereby certify that on this same day, I sent copies of the foregoing by email to Appellants' counsel, as follows:

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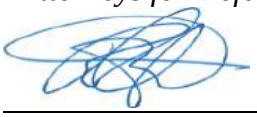

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