IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

VOORHEES CATTLE COMPANY, LLP,
d/b/a Onida Feeding Company, Appeal No. 27124
a South Dakota Limited Liability Partnership,

Plaintiff,

vs.

DAKOTA FEEDING COMPANY, LLC, a
South Dakota Limited Liability Company;
ONIDA FEEDING COMPANY, LLC, a
South Dakota Limited Liability Company;
SCOTT MATHISON, individually; and
RICK JENSEN, individually;

Defendants/Appellants,

and

DAKOTA FEEDING COMPANY, LLC, a
South Dakota Limited Liability Company,

Defendant and Third-Party Plaintiff/Appellant,

vs.

PATRICK VOORHEES, individually;
MERLIN VOORHEES, individually; and
B AND B EQUIPMENT, INC.,
a South Dakota Corporation,

Third Party Defendants/Appellee.

Appeal from the Circuit Court, Sixth Judicial Circuit
Sully County, South Dakota
The Honorable John L. Brown
Circuit Court Judge, Presiding

APPELLANTS' BRIEF

Notice of Appeal was filed on June 30, 2014

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES:

SOUTH DAKOTA STATUTES:

OTHER AUTHORITIES:

PRELIMINARY STATEMENT

For convenience and clarity, Defendants/Third-Party Plaintiff and Appellants, Dakota Feeding Company, LLC, Scott Mathison and Rick Jensen, Plaintiff/Third-Party Defendants, Voorhees Cattle Company, LLP, Patrick Voorhees and Merlin Voorhees, and Third-Party Defendant and Appellee, B and B Equipment, Inc., will each be referred to by name or collectively as "DFC," "Voorhees" and "B and B," respectively. References to the record will be made using the abbreviation "R." followed by the page number(s) assigned by the Sully County Clerk for each document. Transcripts of the relevant pre-trial hearings will be referred to as "Mot. Hrg.Tr.," succeeded by the appropriate page number(s) in each transcript, and will contain the date of the court hearing in them. The trial transcript will be cited as "T.Tr.," and have after it the pertinent page(s) in the transcript. Trial exhibits and jury instructions will carry the designations "T.Ex." and "Jury Instr." and the number specified in each.

JURISDICTIONAL STATEMENT

This is an appeal taken from a judgment entered on May 23, 2014, in the Sixth Judicial Circuit, Sully County, South Dakota, awarding B and B damages, costs and disbursements following a jury trial. DFC filed a notice of appeal on June 30, 2014. Jurisdiction over the appeal exists under SDCL 15-26A-3(1).

STATEMENT OF THE ISSUES

The "broad" issues before this Court are:

1. **Whether the admission and use at trial of correspondence and written admissions, which contained and made references to confidential communications between a limited liability company's attorney and its two principals, violated the attorney-client privilege.**

   The circuit court held in the negative.

   Relevant Cases:

   - *Bertelsen v. Allstate Ins. Co.,* 2011 S.D. 13, 796 N.W.2d 685
   - *Dakota, Minnesota & Eastern R.R. Corp. v. Acuity*, 2009 S.D. 69, 771 N.W.2d 623
   - *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17 (S.D. 1989)
   - *State v. Catch the Bear*, 352 N.W.2d 640 (S.D. 1984)

   Relevant Statutes:

   SDCL 16-18-18
   SDCL 19-9-14
   SDCL 19-13-2
   SDCL 19-13-3

2. **Whether the admission and use of privileged documents as trial evidence, in combination with the jury instructions given that concerned the same, was prejudicial error.**

   The circuit court held in the negative.

   Relevant Cases:

   - *First Premier Bank v. Kolcraft Enterprises, Inc.*, 2004 S.D. 92, 686 N.W.2d 430
   - *Schoon v. Looby*, 2003 S.D. 123, 670 N.W.2d 885
   - *City of Sioux Falls v. Johnson*, 1999 S.D. 16, 588 N.W.2d 904
   - *Kjerstad v. Ravellette Publications, Inc.*, 517 N.W.2d 419 (S.D. 1994)

   Relevant Statutes:

   SDCL 15-6-59(a)(1)
   SDCL 19-9-5

STATEMENT OF THE CASE

After filing suit against DFC for breach of contract and on other theories in Sully County Circuit Court, Voorhees sought to depose DFC's attorney and subpoenaed his file records, including communications with and information provided to its two principals. The trial court[1] denied DFC's motion to quash, on attorney-client privilege grounds, both initially and on reconsideration. Upon submitting to the court-ordered deposition and responding to production requests (for documents and written admissions), DFC moved in limine, again on privilege grounds, to prohibit from use at trial any information, documents and materials obtained from its attorney or his files and all admissions that were objected to. Not only was this motion denied, but an opposing motion, requesting that DFC be prevented from arguing against the admissions, was granted. At trial, correspondence from DFC's attorney to its principals and all of the admissions were admitted into evidence over objection. And the jury was instructed to recognize any matter admitted to in the admissions as having been conclusively established. DFC appealed and now challenges the court's decisions regarding the admission and use of this evidence.

STATEMENT OF THE FACTS

In early 2006, the principals of DFC, Mathison and Jensen, began discussions with a realtor and Voorhees over the purchase of a feedlot located east of Onida, South Dakota. T.Tr. 115-16, 270-71, 338-39. Ultimately, the feedlot was purchased in June, 2006 under a Contract for Deed ("Contract"). T.Ex. 2. Patrick Voorhees was hired as the manager of the feedlot. T.Tr. 125-26, 128, 297, 342. B and B began doing lagoon work on the feedlot shortly after the transaction closed. *Id.* at 347-48, 364, 386, 462. The

[1] The Honorable John L. Brown, Circuit Court Judge, presiding.

nature of this work – whether it was done for a lagoon containment system required by the South Dakota Department of Environment and Natural Resources ("DENR") or for general maintenance and upkeep of the feedlot – was disputed at trial. *Id.* at 386. Patrick Voorhees managed the feedlot until the fall of 2008. *Id.* at 128, 297-99. B and B worked intermittently on it through 2012. T.Ex. 201. DFC and Voorhees's relationship was contentious from the beginning, T.Tr. 365-66, and resulted in a lawsuit being filed and DFC, Voorhees and B and B asserting various claims against each other, R. 2, 7, 9, 14, 16, 28, 29, 34.

Voorhees brought the suit against DFC, Mathison and Jensen seeking foreclosure on the Contract and a Contract for Deed Modification and Lease Agreement ("Lease"). *Id.* at 2, 29. Voorhees also sued for waste and damage to the feedlot, which was the subject of the Contract, and sought damages for violation of the Contract and Lease. *Id.* DFC counterclaimed against Voorhees, and its two partners, Patrick and Merlin Voorhees, for breach of contract, implied covenant of good faith and fair dealing, tortious interference, as well as for fraud and deceit. *Id.* at 7, 9, 28. DFC likewise filed a cross-claim against B and B for breach of contract, which B and B countered with its own contract breach claim against DFC. *Id.* at 9, 14, 28.

A jury trial was held in Sully County on April 2-7, 2014. T.Tr. The jury returned verdicts in favor of Voorhees and B and B on their breach of contract claims but denied relief on DFC and Voorhees's other claims. R. 189-91. And the jury found that the "corporate veil" should be pierced and that Mathison (but not Jensen, who dissociated himself from DFC), *id.* at 190-91, should be held individually liable to both Voorhees

and B and B, T.Tr. 355, 357. The trial court though set aside this portion of the verdict. R. at 198-99.

Before trial, Voorhees sent deposition notices to William Van Camp, the attorney for DFC, and subpoenaed his records concerning the feedlot. *Id.* at 30-31, 43-44, 60-61. DFC moved to quash the deposition notice and subpoenas because some or all of the information sought was subject to attorney-client privilege. *Id.* at 36. The trial court denied the motion and refused to change its ruling when subsequently asked to reconsider the same. *Id.* at 41, 47-48, 58; Mot. Hrg.Tr. 30-31 (Aug. 9, 2013); Mot. Hrg.Tr. 18-21 (Oct. 2, 2013).

After Van Camp was deposed and he produced the subpoenaed documents, Voorhees served DFC with requests for admissions. R. 141 at 2. DFC responded to the requests, objecting to many of them because they sought information that was privileged. T.Ex. 27.

Later, in a motion in limine, DFC sought to prevent any use or reference to privileged information elicited from Van Camp and contained in his files and in the admissions where privilege objections had been made. R. 136-37. The motion was denied and Voorhees's motion, to prohibit arguments against the admissions, was granted in a pretrial motions hearing. *Id*. at 180-81; Mot. Hrg.Tr. 37-40 (March 25, 2014).

At trial, DFC renewed its privilege objections, but these objections, like the prior ones, were overruled. T.Tr. 284-85, 306, 322. Two of the letters Van Camp wrote to Mathison and Jensen, and all of the admissions were used to discredit Mathison and Jensen and to show contract breaches. *Id*. at 71-72, 284-95, 302, 306-07, 322, 378-80, 771-72, 775-777. The trial court even gave a jury instruction, directing the jury to accept,

as conclusively established, any matter that DFC, Mathison and Jensen admitted to in the admissions. Jury Instr. 27.

In the end, the jury sided with Voorhees and B and B on their breach of contract claims. R. 189,191. DFC satisfied the judgment entered in Voorhees's favor and does not seek relief from that judgment. *Id.* at 215. The $103,000.00 judgment awarded to B and B (*id.* at 209), however, is contested as being improvidently granted, and is the subject of this appeal.

STANDARD OF REVIEW

Appellate courts are split on the standard of review for attorney-client privilege determinations. Some courts review these determinations *de novo, see e.g. United States v. Graf*, 610 F.3d 1148, 1157 (9th Cir. 2010); *United States v. Dakota*, 197 F.3d 821, 825 (6th Cir. 1998); *Chaudhry v. Gallerizzo*, 174 F.3d 394, 402 (4th Cir.), *cert. denied*, 528 U.S. 891 (1999), while others look to see if there has been an abuse of discretion, *see e.g. In Re Grand Jury Proceedings*, 219 F.3d 175, 182 (2d Cir. 2000); *In Re Grand Jury*, 138 F.3d 978, 980-81 (3rd Cir. 1998); *Frontier Ref. Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 699 (10th Cir. 1998).

In South Dakota, the standards appear to be well-established. Trial court rulings on discovery matters generally are reviewed for abuse of discretion. *See Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, ¶ 42, 796 N.W.2d 685, 699; *Dakota, Minnesota & Eastern R.R. Corp. v. Acuity*, 2009 S.D. 69 ¶ 45, 771 N.W.2d 623, 636; *Maynard v. Heeren*, 1997 S.D. 60, ¶ 5, 563 N.W.2d 830, 833. But when the court's order is alleged to have violated a privilege, this raises a question of statutory interpretation requiring *de novo* review. *See Maynard*, 1997 S.D. 60, ¶ 5, 563 N.W.2d at 833; *Weisbeck v. Hess*,

524 N.W.2d 363, 364-65 (S.D. 1994). Even so, findings of fact, made as part of the order, are reviewed under a clearly erroneous standard. *See State v. Guthrie*, 2001 S.D. 61, ¶ 61, 627 N.W.2d 401, 424.

Here, the trial court's decisions, authorizing the use of privileged communications at trial, were not based on specific factual findings that were dispositive of the privilege issue. The decisions, therefore, are subject to *de novo* review. *See Hawkins v. Stables*, 148 F.3d 379, 382 (4th Cir. 1998); *see also United States v. Rowe*, 96 F.3d 1294, 1296 (9th Cir. 1996) (whether investigative work qualifies as "professional legal services" for purposes of the attorney-client privilege is a mixed question of fact and law and is reviewed *de novo*).

ARGUMENT

A. THE ADMISSION AT TRIAL OF LETTERS AND WRITTEN ADMISSIONS, WHICH CONTAINED AND MADE REFERENCES TO CONFIDENTIAL COMMUNICATIONS BETWEEN DFC'S ATTORNEY AND ITS PRINCIPALS, VIOLATED THE ATTORNEY-CLIENT PRIVILEGE.

The trial court ordered, over persistent objection, that DFC produce a whole host of materials from attorney Van Camp's file, including letters he wrote to Mathison and Jensen. DFC was also obliged to respond to 54 requests for admissions, many of which asked about confidential communications Van Camp had with Mathison and Jensen. Despite its objections, both the letters and the responses were admitted at trial and used against DFC. The court also gave a separate instruction on the responses, telling the jury that any matter admitted to was conclusively established. Requiring Van Camp to disclose, both orally (in his deposition) and through the production of documents (file records), his communications with Mathison and Jensen, was error. The court then

compounded this error by admitting some of these communications (embraced in letters and written admissions) as trial evidence and instructing the jury on how it should consider them.

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law," *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), and "rests on the need for the advocate and counselor to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out," *Trammel v. United States*, 445 U.S. 40, 51 (1980). The rationale for the privilege is utilitarian: it encourages clients who might otherwise be deterred from seeking legal advice altogether; it promotes full disclosure by clients to their attorneys; and it enables attorneys to act more effectively, justly and expeditiously. *See Upjohn*, 449 U.S. at 389; *Fisher v. United States*, 425 U.S. 391, 403 (1976); *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17, 20-21 (S.D. 1989); *Schutterle v. Schutterle*, 260 N.W.2d 341, 351 (S.D. 1977). When the privilege applies, it affords confidential communication between attorney and client and complete protection from disclosure, *see* SDCL 19-13-3; 16-18-18; *see also* S.D.R. Prof. Conduct 1.6, regardless of what the proceedings may be or the stage (i.e. discovery, trial, etc.) the case may be in, *see* SDCL 19-9-14.

The elements of the privilege are firmly embedded in state law and are set forth by statute. In sum, a client holds a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential communications between the client (or his representatives) and the client's attorney (or certain representatives of the attorney) when the communications were made to facilitate the rendition of professional legal services to

the client. *See* SDCL 19-13-3; *State v. Catch the Bear*, 352 N.W.2d 640, 645 (S.D. 1984). The client is the holder of the privilege, *see Catch the Bear*, 352 N.W.2d at 645, but may waive it if he voluntarily discloses or consents to disclose any significant portion of the privileged matter, *id.* at 647. The burden of establishing that a particular communication is protected by the privilege rests with the party asserting it. *See State v. Rickabaugh*, 361 N.W.2d 623, 624 (S.D. 1985). The burden of establishing waiver of the privilege however is on the party asserting the waiver. *See Catch the Bear*, 352 N.W.2d at 647.

Attorney Van Camp's May 17, 2006 and August 22, 2006 letter communications with Mathison and Jensen were confidential. A communication is confidential if it is "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." SDCL 19-13-2(5). The communications were not intended to be disclosed to third parties and there was an expectation on the part of Van Camp and DFC that the communications were to remain private. *See* T.Exs. 7, 9. The same is true of the various admissions DFC was compelled to respond to. *See* T. Ex. 27 at 9-12, 17, 21-24, 26, 29-32, 38, 46, 47-54.

The information DFC was required to disclose included communications and confidential matters attorney Van Camp discussed with Mathison and Jensen as part of the legal services he provided to DFC in a business transaction (the purchase of a feedlot). The four elements of the attorney-client privilege, therefore, were all met. None of the exceptions to the privilege applied. *See* SDCL 19-13-5. And at no time did DFC ever waive – expressly or impliedly – the privilege that attached to the

communications referred to and found in the materials DFC had to produce. *See Acuity*, 2009 S.D. 69, ¶¶ 51-54, 771 N.W.2d at 637-38; *Rickabaugh*, 361 N.W.2d at 624-25.

Contrary to what the trial court may have believed and held, *see* Mot. Hrg.Tr. 18-19 (Oct. 2, 2013), attorney Van Camp did not act in a role like or analogous to a claims adjuster. *See Acuity*, 2009 S.D. 69, ¶¶ 55-57, 771 N.W.2d at 638-39. Rather, his services were done in a professional capacity as DFC's legal advisor. The work he performed (including any due diligence investigation) was all part and parcel of his broader duties and responsibilities as transactional counsel for DFC. Put another way, his investigatory labors were incidental to and an ancillary component of the legal services rendered to DFC. *See* 24 Charles A. Wright & Kenneth W. Graham, *Federal Practice and Procedure*, § 5478 nn. 171-75, 178-79 (1st ed. 1986 & 2014 supp.) Significantly, DFC retained sole and exclusive decision-making authority over all aspects of the feedlot purchase, *see and compare with* 2009 S.D. 69, ¶ 56, 771 N.W.2d at 638, and at no time delegated to Van Camp the power to act on its behalf or decide what to do, *see and compare with* 2009 S.D. 69, ¶¶ 56-57, 771 N.W.2d at 638-39. While some of what he did may be characterized as investigative work, Van Camp was hired as an attorney, not a "detective," and charged with advising DFC and protecting its interests in a multi-faceted commercial undertaking – functions that are the very essence of "professional legal services." *See* 24 *Federal Practice and Procedure*, § 5478 n. 178. It follows then that the communications and materials DFC was directed to produce and admit to – which were used and exploited at trial – were immunized and did not fall within the legal capacity exception to the privilege. *See Bertelsen*, 2011 S.D. 13, ¶ 48, n. 4 & 5, 796 N.W.2d at 701.

This is not a case where DFC relinquished its privilege by asserting reliance on attorney Van Camp's advice as part of a claim or defense in the litigation. *See* 2011 S.D. 13, ¶¶ 49-54, 796 N.W.2d at 701-03; *Kaarup*, 436 N.W.2d at 21; *see also* 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2016.6 n. 10 (3d ed. 2010 & 2014 supp.). DFC did not put at issue privileged information or attempt to make affirmative use of such information. *See and compare with Kaarup*, 436 N.W.2d at 21; *see also* 8 *Federal Practice and Procedure,* § 2016.6 nn.8-9. Nor did it inject Van Camp's privileged communications and advice into the case and thereby forfeit its ability to invoke, and rely on, the privilege. *See Bertelsen*, 2011 S.D. 13, ¶¶ 53-54, 796 N.W.2d at 703; *see also* 8 *Federal Practice and Procedure*, § 2016.6 nn. 25-26.

DFC is mindful that the "preferred procedure for handling privilege issues is to submit a privilege log and for in-camera review of the documents alleged to contain privileged communications." *Acuity*, 2009 S.D. 69, ¶¶ 48-49, 771 N.W.2d at 636-37; *see also* 8 *Federal Practice and Procedure*, § 2016.1. But the documents in question that were introduced as evidence (as well as the transcript of attorney Van Camp's deposition) are part of the settled record so that this Court can easily conduct "meaningful review" of DFC's privilege claim. *See Acuity*, 2009 S.D. 69, ¶ 49, 771 N.W.2d at 637; *see also Hurley v. State Farm Mut. Auto. Ins. Co., Civ. No. 10-4165-KES*, 2012 WL 1600796 at * 3 (D.S.D. May 7, 2012) (failure to follow the clearly established procedure in *Acuity* should not result in attorney-client privilege documents being released to the detriment of the client). And there can be no question, given DFC's objections – in discovery and before and during trial – that the claim is fully preserved for appeal. *See Arnoldy v. Mahoney*, 2010 S.D. 89, ¶ 35, 791 N.W.2d 645, 657-58.

B. THE ADMISSION AND USE OF PRIVILEGED DOCUMENTS AS TRIAL EVIDENCE, IN COMBINATION WITH THE JURY INSTRUCTIONS GIVEN THAT PERTAINED TO THEM, CONSTITUTED PREJUDICIAL ERROR AND REQUIRES A NEW TRIAL.

A trial court has the duty in jury cases "to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury." SDCL 19-9-5. Evidentiary rulings are reversible, and a new trial should be granted, when the court has committed error that has prejudiced a party or denied him a fair trial. *See Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶ 59, 764 N.W.2d 474, 491; *Kjerstad v. Ravellette Publications, Inc.*, 517 N.W.2d 419, 426 (S.D. 1994). "Whether or not error is prejudicial generally depends on the circumstances of a particular case." *Schoon v. Looby*, 2003 S.D. 123, ¶ 18, 670 N.W.2d 885, 891. "Error is prejudicial if it most likely has had some effect on the verdict and harmed substantial rights of the moving party." 2003 S.D. 123, ¶¶ 18, 21, 670 N.W.2d at 891-92; *Kjerstad*, 517 N.W.2d at 426.

DFC has already demonstrated that the trial court's decisions to admit and instruct on privileged evidence was error. A review of the record in this case also shows that, in all probability, these decisions effected the jury's verdict and denied DFC a fair trial.

Right away, in opening statements, privileged information was utilized to attack the credibility of Mathison and Jensen and DFC's ability to fund the feedlot operation. *See* T.Tr. 71-72. The remarks made to the jury, about what attorney Van Camp told them, were based on and gleaned from information in his files.

During the trial, one of the letters attorney Van Camp sent to Mathison and Jensen was used to discredit their testimony. *See id.* at 284-95, 378-80. The letter itself was

admitted into evidence over DFC's privilege objection. *See id.* at 284-85. The trial court also overruled a privilege objection and admitted a second letter, attorney Van Camp wrote to them, as a trial exhibit. *See id.* at 294-95. Both letters, along with the written admissions, demonstrated that Mathison and Jensen either did not tell Van Camp the facts they claimed in their testimony or did not follow his advice and comply with the terms of the Contract.

An important issue in the litigation was whether or not the lagoon project was completed in accordance with DENR standards. The use of the first letter (T.Ex. 7) supported the claims of contract breach and went to a matter that was at the very heart of the case, namely, whether or not a breach occurred because of the failure to complete the project. Mathison and Jensen were questioned extensively about this at trial, notwithstanding DFC's objections. *See* T.Tr. 302-03, 306-07, 378-80.

DFC made another privilege objection when its admissions were offered into evidence but the trial court overruled the objection and received them into evidence. *See id.* at 322. In the admissions (T.Ex. 27), DFC acknowledged, among other things, that Mathison and Jensen had a number of communications with attorney Van Camp and that he had told, warned, and admonished them about engineering, permit, and other matters related to the feedlot operation – matters DFC did not heed to or follow through on, at least in a timely manner. One such matter was the Attorney General shutting down the operation for non-compliance reasons which, of course, is ultimately what happened. *See id*. at 7, 21; T.Tr. 79-80, 146-48, 783. The admissions were likewise utilized to impeach Mathison and Jensen, and prove that DFC did not have additional time at its disposal to complete the lagoon system, as they testified to, because Van Camp had

expressly informed them that DENR was dismissive of "stretching out" any work on the system. *See* T.Ex. 27, No. 22. Notably, the admissions included numerous citations to Van Camp's deposition transcript, *see* T.Ex. 27, and were specifically discussed, along with one of the letters, in opening statements and closing argument, s*ee* T.Tr. 71-72, 771-72, 775-76.

Another issue in dispute was the timing of the lagoon work that needed to be completed. The letters and admissions were used to show that DFC failed to promptly act, ignored attorney Van Camp's specific advice and breached the terms and conditions of the Contract. *See id*. at 303, 771-72, 776. These documents were given to the jury and it was instructed on how to treat them (as "conclusively established" in the case of the admissions) *see* Jury Instr. 11, 12, 34, and directed to review all of them, *see id.* at 42; T.Tr. 775.

The trial court should have never allowed the letters and admissions into evidence or instructed on them. These documents were riddled with privileged communications that profoundly impacted the credence of Mathison and Jensen's testimony and their overall integrity. Letting the jury consider the documents, not to mention the warnings, admonishments and legal advice that Van Camp provided to Mathison and Jensen, seriously prejudiced DFC's right to a fair trial. The fact that the jury wanted to pierce DFC's "corporate veil," believed Mathison should be held personally liable (on both sets of the contract breach claims), *see* R. 190-91, and gave B and B damages in excess of the amount it asked for, *see and compare* T.Tr. 828 *with* R. 191, is indicative of this. What's more, the pernicious effect of the documents was neither compartmentalized nor isolated

in scope because they contained matters that were germane to both Voorhees's and B and B's claims. *See* T.Ex. 27.

A new trial may be granted for "[i]rregularity in the proceedings of the court, jury, or adverse party or any order of the court or abuse of discretion by which either party was prevented from having a fair trial." SDCL 15-6-59(a)(1). Inasmuch as the court's admission of privileged evidence grievously effected Mathison and Jensen's credibility, tainted the verdict and caused substantial harm to DFC, a new trial must be granted. *See First Premier Bank v. Kolcraft Enterprises, Inc.*, 2004 S.D. 92, ¶ 27, 686 N.W.2d 430, 444; *City of Sioux Falls v. Johnson*, 1999 S.D. 16, ¶ 30, 588 N.W.2d 904, 911.

CONCLUSION

Where legal advice of any kind is sought from an attorney in his capacity as such, the communications relating to it, made in confidence with the client, are permanently protected from disclosure unless waived. DFC's attorney, Van Camp, communicated orally and in writing, with Mathison and Jensen about DFC purchasing a feedlot. Some of these communications were used as evidence against DFC at trial. A jury ultimately found DFC liable and awarded damages. The verdict and damage award though were neither just nor reliable because they were the product of erroneous court rulings and spillover prejudice that resulted in an unfair trial. The judgment in favor of B and B must accordingly be reversed and the case remanded for a new trial that does not include any reference to or use of the privileged communications.

REQUEST FOR ORAL ARGUMENT

DFC hereby requests oral argument on all issues and matters raised in this appeal.

Dated this 23rd day of October, 2014.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

Mark A. Moreno, one of the attorneys for Appellants, hereby certifies that the foregoing brief meets the requirements for proportionally spaced typeface in accordance with SDCL § 15-26A-66(b) as follows:

a. Appellants' Brief does not exceed 40 pages.

b. The body of Appellants' Brief was typed in Times New Roman 12 point typeface; and

c. The body of Appellants' brief contains 4,376 words and 22,156 characters with no spaces and 26,772 characters with spaces, according to the word and character counting system in Microsoft Office 2010 for Windows used by the undersigned.

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CERTIFICATE OF SERVICE

The undersigned, attorneys for Appellants, Dakota Feeding Company, LLC, Scott Mathison and Rick Jensen, hereby certify that on the 23rd day of October, 2014, two true and correct copies of Appellants' Brief (with attached appendix) were hand delivered to:

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and the original and 2 copies were mailed (or hand delivered) to the South Dakota Supreme Court, 500 East Capitol, Pierre, South Dakota 57501, as well as filing by electronic service in Word format to the Clerk of the South Dakota Supreme Court at: SCClerkBriefs@ujs.state.sd.us.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27124

VOORHEES CATTLE COMPANY, LLP, dba Onida Feeding Company,
a South Dakota Limited Liability Partnership,
Plaintiff

vs.

ONIDA FEEDING COMPANY, LLC, a South Dakota Limited Liability
Company; SCOTT MATHISON, individually and
RICK JENSEN, individually,
Defendants

and

DAKOTA FEEDING COMPANY, LLC, a South Dakota Limited
Liability Company,
Defendant and Third Party Plaintiff/Appellant

vs.

PATRICK VOORHEES, individually and MERLIN VOORHEES, individually,
Third Party Defendants; and

B & B EQUIPMENT, INC., a South Dakota Corporation,
Third Party Defendant/Appellee

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
SULLY COUNTY, SOUTH DAKOTA

THE HONORABLE JOHN L. BROWN
CIRCUIT COURT JUDGE

BRIEF OF APPELLEE B & B EQUIPMENT, INC.

Notice of Appeal filed June 30, 2014

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT AND ABBREVIATIONS

Appellee B & B Equipment, Inc., will utilize the following references throughout this brief:

- Defendant and Third Party Plaintiff/Appellant Dakota Feeding Company, LLC -- "DFC".
- The Onida Feeding Company, LLC, the predecessor-in-interest to Dakota Feeding Company, LLC -- "OFC".
- Scott Mathison – "Mathison".
- Rick Jensen – "Jensen".
- Third Party Defendant/Appellee B & B Equipment, Inc. -- "B & B".
- Plaintiff Voorhees Cattle Company, LLP -- "Voorhees".
- Citations to the Circuit Court record – "R." followed by the page number of the document assigned by the Clerk in the Clerk's Alphabetical Index.
- The transcript of the jury trial followed – "T." followed by the page number or numbers to which reference is made.
- Trial exhibits -- "T. Ex." followed by the exhibit number to which reference is made.
- Transcripts of pretrial hearings and motion hearings – "Motion Hearing" further identified by the date of the hearing.

JURISDICTIONAL STATEMENT

DFC appeals from a judgment entered by the Circuit Court pursuant to a jury verdict in favor of B & B and against DFC. R. 2718. The judgment awarded B & B money damages, costs and disbursements in its favor and against DFC and dismissed a

third party complaint brought by DFC against B & B. R. 2718. Notice of Entry of Judgment was given on May 30, 2014. R. 2733. A timely Notice of Appeal was filed by DFC on June 30, 2014. R. 2754. The judgment was a final judgment and this court has jurisdiction pursuant to SDCL §15-26A-3(1).

STATEMENT OF LEGAL ISSUES

B & B chooses to rephrase the issues utilized by DFC in its Initial Brief as follows:

I. WHETHER THE INTRODUCTION OF EVIDENCE AT TRIAL, WHICH WAS ORDERED PRODUCED BY THE CIRCUIT COURT IN RESPONSE TO VARIOUS MOTIONS MADE BY PLAINTIFF VOORHEES, HAD AN IMPACT ON THE JURY VERDICT IN FAVOR OF B & B AND AGAINST DFC TO THE EXTENT THAT IT REQUIRES REVERSAL?

Although this question was never actually addressed by the Circuit Court, by implication the Circuit Court held in the negative.

Relevant cases:

Supreme Pork v. Master Blaster, Inc., 2009 SD 20, 764 NW2d 474.

Ruschenberg v. Eliason, 2014 SD 42, 850 NW2d 810.

Dakota, Minnesota, & Eastern R.R. Corp. v. Acuity, 2009 SD 69, ¶¶ 55-57, 771 NW2d 623, 638-39.

II. WHETHER THE INTRODUCTION OF EVIDENCE ORDERED PRODUCED BY THE CIRCUIT COURT IN RESPONSE TO VARIOUS MOTIONS MADE BY PLAINTIFF VOORHEES DURING TRIAL, IN COMBINATION WITH THE JURY INSTRUCTIONS WHEN READ AS A WHOLE, DEMONSTRATES PREJUDICIAL ERROR AS IT RELATES TO THE JUDGMENT IN FAVOR OF B & B AGAINST DFC?

Although this question was never actually addressed by the Circuit Court, by implication the Circuit Court held in the negative.

Relevant cases:

Alberts v. Mutual Service Casualty Ins. Co., 123 NW2d 96 (SD 1963).

Rosen's, Inc. v. Juhnke, 513 NW2d 575, 577 (SD 1994).

STATEMENT OF THE CASE

Plaintiff Voorhees commenced this action against DFC, OFC, Mathison and Jensen by Summons and Complaint dated August 31, 2012. R 1, 2. The Defendants in that principal action filed an answer to the Complaint and included a Third Party Complaint by DFC against Patrick Voorhees, Merlin Voorhees and B & B. R. 106.

B & B answered the Third Party Complaint and brought a counterclaim against DFC for payments which B & B alleged were due and owing from DFC as a result of construction work performed on a feedlot which was the subject of the litigation. R. 167.

The action brought by Voorhees against DFC sought to foreclose on a contract for deed wherein DFC, through its predecessor-in-interest OFC, agreed to purchase a feedlot in Sully County, South Dakota. R. 2. The Complaint likewise sought damages for waste and other money damages against OFC, DFC and their principals Mathison and Jensen. R. 2.

During the course of discovery, Plaintiff Voorhees brought several motions to compel full and complete responses to discovery requests. *E.g.*, see R. 1417. In addition, Plaintiff Voorhees filed a motion to prohibit DFC, OFC, Mathison and Jensen from arguing against admissions made during the course of discovery. R. 1808.

Following a four-day jury trial, the jury returned a verdict in favor of Voorhees and against all of the Defendants which included a verdict finding personal liability on the part of Mathison and Jensen based on instructions received by the jury which permitted them to "pierce the corporate veil" under certain circumstances. R. 2646. The

jury likewise entered a verdict finding in favor of B & B and dismissing the Third Party Complaint brought by DFC against it, and in favor of B & B and against DFC and Mathison and Jensen individually. R. 2649.

Following the verdict, Defendants moved the Court to set aside the verdicts against Mathison and Jensen individually. T. 851. The Court granted that motion and ultimately judgment was entered in favor of B & B and against DFC. R. 2718. DFC and OFC paid and otherwise satisfied the judgment obtained by Voorhees on Voorhees' complaint. R. 2700.

Because of the above neither Voorhees, Rick Jensen nor Scott Mathison are parties to this appeal in any respect. This is despite the fact that the documents and evidence complained of by DFC were produced in response to motions filed by Voorhees – not by B & B – and were introduced at trial by attorneys representing Voorhees.

After B & B gave Notice of Entry of Judgment (R. 2733) the Notice of Appeal by DFC appealing the judgment in favor of B & B on the third party claim was timely filed. R. 2754.

STATEMENT OF THE FACTS

Voorhees sold a feedlot in Sully County as a going concern to DFC in 2006. See, T. Ex. 2. DFC took possession of the feedlot in June, 2006. T. 239. Pat Voorhees continued to work at the feedlot as manager under contract with DFC. T. 125/126.

B & B is a construction company that, among other things, performs excavation, gravel hauling and dirt moving. T. 160/161. An important part of DFC's performance of the contract for deed with Voorhees was continued compliance with EPA and South Dakota Department of Environment and Natural Resources ("South Dakota DENR")

requirements – especially as it related to wastewater and runoff. DFC knew that it was their duty to comply with these requirements. T. 239. Among other things, this required excavation work and ultimately DFC asked B & B to perform that work. T. 389, T. Ex. 207.

In 2006, Pat Voorhees told DFC that they should get to work on the lagoon since it was dry and earth work would be easier. DFC did not do so. T. 239/240. B & B was hired to do a variety of work at the feedlot in the time span from 2006 through 2008, however. This included hauling manure, which had accumulated over the years and needed to be removed from the premises. T. 240, 262. It included the digging of a drainage ditch around the perimeter of the feedlot premises as well. T. 182/183. It also included hauling hay which was used as feed at the feedlot. T. 183. Pat Voorhees testified that B & B was paid approximately $133,000 over that period of time, but it was not for the lagoon work – it was for other work that had been performed by B & B and to the advantage of DFC.

Although Mathison later threatened B & B with legal action in part to recover funds which they had been paid to build an "alleged drainage ditch" (see T. Ex. 212), Jensen (the LLC member who was on site most often) admitted that B & B did dig the drainage ditch and that the ditch was necessary. Jensen further admitted that hauling manure and dirt was necessary in order to later perform the lagoon project. He admitted B & B was paid. He approved it, they earned it and they were entitled to be paid. T. 386. In fact, Jensen testified: "Me and my partner both approved it." T. 387.

In early 2008 Jensen, on behalf of DFC, discussed actual work on the lagoon project with B & B. Written confirmation of an estimate for B & B to perform work on

the lagoon system was memorialized as T. Ex. 207. *See also*, T. 389. In summary, DFC agreed that the lagoon work identified in that agreement would be performed for a total of $170,296.00. However, this money was never paid to B & B. B & B agreed to accept some equipment as a trade in and both sides agreed that the equipment would have a value of $50,000.00. T. 390. DFC agreed to "pay" $96,164.00 of the sum by a "government payment." See T. Ex. 207, T. 390, 391. Finally, that left a balance of $24,000.00 which DFC agreed to pay, but later renegotiated to be paid in four monthly installments at $6,000.00 per month. T. 392. Jensen admitted that DFC ended up paying only two of those $6,000.00 installments. B & B performed some additional work on culverts for which they were paid $5,600.00. T. 392. Therefore, Exhibit 207 which memorialized payment of $170,296.00 to B & B by DFC actually involved transfer of equipment which was valued at $50,000.00 and payment of $12,000.00 in cash.

The government grant which was used as "payment" was simply an assignment of a grant which would be paid only when and if the project was completed. Jensen and Voorhees took B & B to the Sunrise Bank where B & B borrowed the money to be spent on the lagoon project utilizing the theoretical grant as security. T. 474. In doing so, of course, the financial risk was placed by DFC on B & B and the obligation to repay the bank by B & B existed regardless of the outcome! Jensen admitted that B & B never received a penny of the $96,164.00 from DFC, Jensen, Mathison, the Federal government, or anyone else. T. 392.

Testimony throughout the trial made it clear that the lack of capitalization made it impossible for DFC to pay B & B or anyone else to complete the lagoon project. Jensen testified that although they didn't like doing it, it was necessary to pay B & B for hauling

the manure initially. T. 347. He went on to admit that paying the $50,000.00 impacted their ability to feed more cattle and, therefore -- theoretically at least -- make more money. T. 347. Jensen admitted that their own projections were that they could pay for the lagoon out of operating profits from the feedlot which would generate $40,000.00 to $50,000.00 free cash flow each month, but they were never able to do that. T. 357.

Pat Voorhees testified that despite all the problems, B & B tried to build the lagoon – but DFC never made it possible for them to complete it. T. 130, 134, 137, 172. Pat Voorhees further explained that testimony by describing what was necessary to complete the lagoon. Two significant things had to be done – retain an engineer and obtain the approval of the South Dakota DENR. T. 243. Jason Roggow of the South Dakota DENR, testified that the compliance of DFC with requirements imposed on the feedlot would be something that the engineer representing the feedlot would be doing. T. 413. He stated that you need an engineer on these projects and he works with engineers in gaining approval and compliance on a regular basis. T. 413. The DENR would not issue a permit or a Certificate of Compliance for a feedlot such as this unless these conditions were met. T. 414. In fact, Roggow went on to testify and agree that feedlot permitting is an "engineer intensive process." T. 420/421. He in fact stated that you need a good engineer and must work closely with them to get it done. He went on to clarify that: "It is a requirement. You have to have a licensed South Dakota engineer to stamp the plans and specifications that come to our office." T. 420/421.

Even witness Mathison agreed that he did not expect B & B to be responsible for the design or redesign of the feedlot lagoon system. T. 332. There is no question from the record that hiring and paying an engineer was the responsibility of DFC. Mathison

admitted that in order for the feedlot to be approved, an engineer would have to get paid and a contractor would have to get paid. T. 284. The record as a whole makes it absolutely clear that these two conditions were never met by DFC and it was DFC's sole responsibility to do so.

As noted above, Pat Voorhees testified that DFC chose not to embark on the lagoon project in 2006 because there was no money to pay for it. T. 240. In February, 2008, Pat Voorhees was concerned about finances and wrote a letter to Jensen and Mathison. T. 241, T. Ex. 14. Among other things, Voorhees advised that B & B was then working on the first segment of the lagoon. T. 242. Voorhees was concerned that if B & B continued to work on the feedlot they might not get paid. T. 242, T. Ex. 14. Jensen agreed that it would be reasonable to think that you would have to spend considerable time with engineers and people from DENR on a project like this, although he admitted he had never been involved in a project like this before. T. 384. Regardless of that, when Mathison received a notice from DENR to depopulate (reduce the number of animals at the feedlot), Mathison still never went to see DENR people in person! T. 309. The record is clear that DFC did business with several engineers but never paid an engineer to complete the plans, design or staking of the lagoon project. T. 331/332. Therefore, the approval of DENR of the project was never obtained by DFC. As time went on the existing lagoons themselves filled with runoff and ground water and it was the obligation of DFC to pump the water out of those holes so as to enable B & B to get in and work the earth with their equipment. T. 476. This was done sporadically and usually the holes were not dry enough to perform work on. T. 476/477.

The factual background as noted above comes mainly if not exclusively from witnesses other than B & B representatives who testified at trial, and documents which were introduced without objection. Darrell Beck, one of the principals of B & B, also testified at length about the relationship between B & B and DFC.

Beck agreed that soon after DFC purchased the feedlot, B & B hauled manure and dug a "clean water diversion ditch" which was in fact part of the DENR requirements for the feedlot. T. 464/465. Beck likewise confirmed the testimony of Mathison and Jensen as to the fact that B & B was not hired to design, engineer or survey any of the construction or excavation at the feedlot premises. T. 477. Beck went on to testify that he asked several times, "lots and lots of times" for engineering services to be provided by DFC. The response from DFC was "engineers are expensive." T. 478. Beck was told by DFC to just dig the hole and as long as the requisite capacity was obtained, it would be okay. T. 478. They dug the hole and the capacity came out to be very close to the requirements of DENR. T. 479/480. In fact to make certain that the volume of the hole was sufficient, Beck himself hired engineers to come out and measure the volume or capacity of the hole. T. 479.

In addition to the lack of engineering services – which were the responsibility of DFC – B & B had trouble completing the lagoon system because water would fill up the bottom of the lagoon and make further excavation impossible. T. 482. It was the responsibility of DFC to pump the water out of the holes to enable further excavation to take place – but it was not done. T. 476/477.

Beck likewise confirmed other testimony relating to the assignment of the grant and DFC's agreement to "pay" B & B for excavating the holes. In January, 2007, the

written estimate prepared by B & B for construction of the new lagoon hole was provided to DFC. T. 467/468. The estimate provided for the construction was $170,296. T. 468. To pay this amount DFC gave B & B equipment valued at $50,000 (T. 469), and assigned a government grant or payment. T. 269. In addition DFC agreed to pay $24,000 as noted above. In exchange for these promises, B & B performed the work and paid for the diesel fuel, the equipment and repairs, and the labor. B & B has never been paid a penny from the government assignment or grant. T. 470. Because DFC could not obtain the funds to pay for the lagoon construction, DFC took B & B to Sunrise Bank in Onida so that B & B could borrow the money from the bank, become obligated to the bank and obtain funds to pay for the construction. T. 474/475. Darrell Beck testified at the time of trial he owed the bank $103,000 for funds borrowed by B & B and advanced by the bank to do the work at the feedlot. T. 475.

Although the volume of the hole was very close to requirements (T. 483/484) and no one has ever told Beck that the DENR did not approve the hole (T. 484), B & B eventually quit working on the job. To explain this, Beck testified that he thought it was first like getting guaranteed money, but he realized it was more like receiving a bad check. T. 484. Because the completion of the project was really in the hands of DFC, and project completion was necessary for the government grant to be distributed and repay the B & B bank loan, DFC held the keys to B & B's payment.

Ultimately Mathison sent what Beck referred to as a "threatening e-mail" to him in June, 2010. T. 485/486, T. Ex. 212. In the e-mail, Mathison told Beck "you either sign the contract I just gave you or I am going to sue you." T. 487, T. Ex. 212. One thing Mathison threatened to sue for was return of $50,000 for the "alleged diversion

ditch you charged me for." T. 487, T. Ex. 212. These threats were made by Mathison despite the fact that the other LLC member (Jensen) testified that Mathison and Jensen both agreed that B & B had done the work and was entitled to be paid both for the drainage ditch and the manure hauling. T. 387.

Mathison then went on to make the threat to sue B & B for $100,000, which B & B had borrowed from Sunrise Bank. T. 488, T. Ex. 212. This threat was made despite the fact that B & B was the party obligated to repay the bank and B & B's ability to be paid through the grant was solely in the hands of DFC and Mathison.

Mathison went on to threaten suit for $70,000 for equipment that he had given to B & B. T. 489. As previously noted, Exhibit 207 clearly reflects that the equipment (valued by Mathison and Beck at $50,000.00 – not $70,000.00) was used as payment for a portion of the work done by B & B. See, T. Ex. 207. As Beck testified, "We earned it. And I would take it in cash anytime. He can have his equipment back." T. 489. In response to this, B & B – who was not represented by counsel at the time – was required to go to the office of DFC's attorney and sign a new "contract." T. 490/491.

As noted above, engineering services were never provided, DENR approval was never obtained by DFC, and the jury correctly determined that B & B was unable to complete the contract due to an impossibility created by DFC or DFC's own breach. See Jury Instruction 35.

During final argument, DFC's counsel wisely took the position of <u>admitting</u> that DFC owed B & B money on the project. Rather than arguing to the jury that DFC should obtain a judgment on its third party complaint against B & B, counsel told the jury:

> Is something owed Darrell Beck? I don't think you are going to have my client stand up here to me – and have me argue to you today that nothing

> is owed to Darrell Beck. You have to determine what's owed to Darrell Beck.

T. 802.

The various discovery disputes which form the basis for much if not all of DFC's current argument on appeal were disputes between Voorhees, OFC and DFC. B & B never made a motion to compel the production of any of the evidence now complained of and in fact none of the evidence now complained of impacts the third party claim of DFC or the counterclaim brought against them by B & B. Testimony and evidence totally independent of these issues was clearly the basis for the jury's determination. The fact that DFC now argues that the evidence must have been prejudicial because the jury awarded B & B more than B & B asked for is likewise misplaced. It is true that during final argument counsel for B & B made reference to amounts he thought would correctly compensate B & B. However, as in many cases, the jurors were more astute than the lawyer in this case. The jurors clearly made note of Darrell Beck's testimony that he was required to repay $103,000 to the bank in order to pay for the work done on the feedlot premises. T. 475. The jury was not misled by the evidence or any of the legal counsel. The jury clearly understood and was influenced by undisputed testimony on the record.

Substantial – mainly unrefuted – evidence exists on the record to support the verdict in favor of B & B against DFC on B & B's counterclaim.

STANDARD OF REVIEW

This Court has stated that the rulings of the trial court with regard to evidentiary issues are "presumptively correct" therefore there is no duty upon this Court "to seek reasons to reverse." *Sander v. Geib, Elston, Frost Professional Ass'n*, 506 NW2d 107, 113 (SD

1993). Errors in evidentiary rulings call for reversal only "when error is demonstrated *and* shown to be prejudicial error." *Supreme Pork v. Master Blaster, Inc.*, 2009 SD 20, ¶ 60, 764 NW2d 474, 491 (citation omitted).

ARGUMENT

I. WHETHER THE INTRODUCTION OF EVIDENCE AT TRIAL, WHICH WAS ORDERED PRODUCED BY THE CIRCUIT COURT IN RESPONSE TO VARIOUS MOTIONS MADE BY PLAINTIFF VOORHEES, HAD AN IMPACT ON THE JURY VERDICT IN FAVOR OF B & B AND AGAINST DFC TO THE EXTENT THAT IT REQUIRES REVERSAL?

In order to receive a new trial based on a claimed erroneous evidentiary ruling by the trial court, an appellant must satisfy a two-step analysis. *Ruschenberg v. Eliason*, 2014 SD 42, ¶ 23, 850 NW2d 810, 817 (citation omitted). First, the appellant must prove there was error in the evidentiary ruling, such that the trial court abused its discretion by admitting the evidence. *Id.* Second, the appellant must prove that the error was prejudicial, in that it "in all probability affected the jury's conclusion" and caused "actual prejudice to the party." *Supreme Pork*, ¶¶ 59-60, 764 NW2d at 491.

As to the first step of the analysis, B & B is not well-suited to take a position on whether any, some, or none of the communications and admissions at issue in this case were privileged, such that it was error for the trial court to admit the communications and admissions. B & B did not initiate the discovery requests or actively participate in the hearings on this evidence.

However, the attorney-client privilege is not absolute, and a trial court may find the privilege is waived or does not apply for a variety of reasons. *See, e.g.*, *Dakota, Minnesota, & Eastern R.R. Corp. v. Acuity*, 2009 SD 69, ¶¶ 55-57, 771 NW2d 623, 638-39 (privilege does not apply where attorney acts as investigator or claims adjuster);

Conkling v. Turner, 883 F2d 431, 435 (5th Cir. 1989) ("The attorney-client privilege is waived when a litigant places information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would be manifestly unfair to the opposing party"); *State Farm Mut. Auto. Ins. Co. v. Lee*, 13 P3d 1169, 1181 (Ariz. 2000) (discussing waiver where privilege is used as sword to hide from adversary that party obtained knowledge of a subject from attorney); *State v. Rickabaugh*, 361 NW2d 623, 625 (SD 1985) (client impliedly or explicitly waives privilege). Even though B & B is not arguing that the communications and admissions at issue should or should not have been admitted, the evidence in the record supports Voorhees's claim that DFC was attempting to use the attorney-client privilege to hide knowledge of certain information.

After various hearings and motions on the issue, the trial court determined that the communications and admissions at issue were admissible for one or more of these reasons. Because DFC put its own knowledge at issue (by claiming fraud/concealment of facts by Voorhees), the trial court could have allowed the communications and admissions to be admitted in order to prevent DFC from unfairly using the privilege as a sword, rather than a shield. However, B & B did not actively participate and add to that adversarial process because B & B did not care one way or another whether the communications and admissions were entered into evidence. Nor is there a privilege log in this case upon which the trial court reflected and determined what was admissible for what reason. Accordingly, B & B's argument on appeal will primarily focus on the second prong of the error analysis.

B & B contends that even if the trial court erred by admitting the communications and admissions at issue, which were requested by Voorhees to be admitted, DFC has failed under the second prong of the error analysis to establish affirmatively from the record that the jury probably would have returned a different verdict had the communications and admissions at issue not been admitted. "To show such prejudicial error an appellant must establish affirmatively from the record that under the evidence the jury might and probably would have returned a different verdict if the alleged error had not occurred." *Supreme Pork*, ¶ 58 (quoting *Sander v. Gieb, Elston, From Professional Ass'n*, 506 NW2d 107, 113 (SD 1993)). *See also id.* ¶ 42, ¶ 62 (actual prejudice must be shown to warrant a remand). This Court has indicated that to fulfill this requirement, the party claiming prejudice must show *how* or *why* the introduction of the particular evidence led to a different verdict. *Id.* ¶ 61. The Court will not assume that evidence is inherently prejudicial, simply because it was inadmissible. *Id.*, ¶ 60 (explicitly rejecting idea of inherent prejudice).

Rather than show "affirmatively from the record" how or why the jury probably would have come to a different result in regard to the dispute between DFC and B & B absent the alleged error, Appellant's Brief makes general assertions about the communications being used to "discredit" Mathison and Jensen and makes other general assertions about matters "at issue" in the trial. These assertions are made without demonstrating what evidence could have led the jury to a different result, and without connecting the alleged "issues at trial" to the specific claims between B & B and DFC. Without these connections and without a showing that the evidence supported a finding in DFC's favor, the Appellant has failed to carry its burden on appeal. The Court is

instead left to guess whether the jury could have come to a different conclusion – rather than the Appellant affirmatively establishing it from the record. This Court should not have to seek out a reason to reverse. See *Ruschenberg*, ¶ 23, 850 NW2d at 817.

First and foremost, Appellant asserts that the communications and admissions at issue were used to "discredit" Jensen and Mathison and that this "discrediting" "profoundly impacted the credence of Mathison and Jensen's testimony and their overall integrity." A review of the record in its entirety reflects that Jensen and Mathison (in particular) did an excellent job of bringing discredit on themselves through their own testimony and behavior.

However, this general assertion of discrediting effect should fail for several reasons. First, Appellant's Brief does not cite to a single location where the communications and admissions at issue were being used to attack Jensen or Mathison with regard to B & B's claims. More importantly, Appellant does not cite to a single place in the record where Mathison or Jensen's testimony – if not so "discredited" – would have in any way led the jury to come to a different conclusion as to the dispute between DFC and B & B. Instead, Appellant merely points to places in the record where Voorhees' counsel is using the information to question witnesses, unrelated to B & B's claims. Accordingly, Appellant fails in proving that any error was in this way prejudicial in leading to the verdict in favor of B & B. In fact, the testimony of Mathison and Jensen themselves supports B & B's claim against DFC.

Appellant also makes a number of vague references to a number of matters "at issue in the trial," without distinguishing between the DFC-Voorhees dispute and the DFC-B & B dispute. These assertions also fail for reasons similar to that stated above, in

that Appellant fails to show affirmatively from the record how the jury would have come to a different result. Furthermore, the "issues" were not actually issues in the DFC-B & B dispute. Appellee will attempt to address these assertions in the order in which they were raised in Appellant's Brief.

First, Appellant asserts that "privileged information was utilized to attack . . . DFC's ability to fund the feedlot operation." Appellant's Brief at 12. DFC's ability to fund the feedlot operation was not a matter at issue in the DFC-B & B dispute. Whether DFC *had* paid or *was supposed to pay* (elements at issue in the DFC-B & B dispute), *see* Jury Instructions 26, 27, 35, is a completely different issue than whether DFC was able to fund the feedlot (what Appellant asserts as an issue). Although DFC's failure to pay for work completed was proven at trial as an element of B & B's case, DFC's *ability* to fund the feedlot operation was not at issue with regard to the claims between B & B and DFC. Appellant furthermore fails to explain how or what in the communications at issue affected the jury's perception about DFC's ability to pay or why this likely had an effect on the jury verdict in favor of B & B. Accordingly, this alleged use does not affirmatively establish prejudicial error.

Next Appellant asserts that "Both letters, along with the written admissions, demonstrated that Mathison and Jensen either did not tell Van Camp the facts they claimed in their testimony or did not follow his advice and comply with the terms of the Contract." The Court should note here that the term "the Contract" does not refer to a contract between DFC and B & B, but rather the contract for deed between DFC and Voorhees. Again, this is irrelevant to the B & B verdict. Moreover, even if "the

Contract" did refer to the contractual relationship between B & B and DFC, Van Camp's knowledge was not at issue in that dispute. Thus, there was no prejudicial effect.

Next Appellant asserts that "the first letter supported the claims of contract breach and went to a matter that was at the very heart of the case, namely whether or not a breach occurred because of the failure to complete the project." First, the Court should note that every citation to the transcript with regard to this assertion is to counsel for Voorhees speaking or questioning witnesses about *the DFC-Voorhees dispute*, not the B & B claims. Again, this matter may go to the heart of the DFC-Voorhees dispute, but it is not a central matter to the DFC-B & B dispute. Moreover, Appellant's assertion does not otherwise indicate that testimony by Jensen or Mathison supported a finding that the lagoon was not completed in accordance with DENR standards, or that it was B & B's fault that this was not accomplished. To the contrary, testimony – including testimony by DFC's own witness – indicated that DFC did not expect B & B to supply the engineering necessary to meet the DENR standards and that DFC did not pay for the requisite engineering specifications that would have allowed B & B to accomplish the task to DENR standards. Thus, any failure to complete the project was squarely determined to be the fault of DFC.

Finally, Appellant asserts that the timing of the lagoon work that needed to be completed was at issue, and that with regard to this issue, the "letters and admissions were used to show that DFC failed to promptly act, ignored attorney Van Camp's specific advice and breached terms and conditions of the Contract." Again, "the Contract" referred to is the DFC-Voorhees contract for deed. Accordingly, the Appellant is making an assertion as to an effect on the Voorhees verdict, not the B & B verdict. Appellant's

Brief cites exclusively to counsel for Voorhees speaking and questioning about the Voorhees-DFC dispute. The timing of the lagoon work may have been somewhat at issue in the B & B dispute, but only perhaps as to whether DFC fulfilled its obligation of pumping water out of the holes in a timely manner so that B & B could dig, and more broadly speaking that the project overall needed to be completed in a timely manner. However, these issues were not addressed in the cited material, and therefore Appellant has again failed to establish from the record that the jury could and probably would have reached a different conclusion on the B & B verdict.

In sum, Appellant makes vague assertions of the general discrediting effect of the communications and admissions at issue, and improperly blurs the lines between the Voorhees-DFC dispute and the DFC-B & B dispute in an attempt to draw a conclusion that the evidence in question had greater effect than it did. The DFC-B & B dispute could easily have been, and probably was resolved by the jury without inference to anything DFC now complains of. The Court should ask itself after reading Appellant's brief, "Has the Appellant affirmatively shown to the Court that the jury likely would have come to a different conclusion under the evidence in the record?" Appellee contends that the Court should answer this question in the negative, and accordingly requests that the Court allow the jury's determination to stand.

II. WHETHER THE INTRODUCTION OF EVIDENCE ORDERED PRODUCED BY THE CIRCUIT COURT IN RESPONSE TO VARIOUS MOTIONS MADE BY PLAINTIFF VOORHEES DURING TRIAL, IN COMBINATION WITH THE JURY INSTRUCTIONS WHEN READ AS A WHOLE, DEMONSTRATES PREJUDICIAL ERROR AS IT RELATES TO THE JUDGMENT IN FAVOR OF B & B AGAINST DFC?

To determine whether error is prejudicial, this Court looks at all the evidence in the case, along with jury instructions. *See, Alberts v. Mutual Service Casualty Ins. Co.*,

123 NW2d 96, 103 (SD 1963). The argument above explains that the Appellant has failed to carry its burden of establishing from the record that the jury probably would have come to a different conclusion had the complained-of evidence not been admitted.

Appellant nevertheless contends that certain irregularities in the verdict are indicative that the jury must have been prejudiced, because the conclusions were not supported in the record. Specifically, Appellant asserts that the jury's decision to pierce the corporate veil and hold Mathison and Jensen personally liable for DFC's breaches of contract, and the jury's award in excess of that asked for by counsel in closing arguments is indicative of prejudicial error. As to the verdict holding Mathison and Jensen personally liable, the trial court set aside this verdict. This Court need not consider it.

With regard to the actual amount awarded to B & B, it is true that this amount was greater than that requested in closing arguments. However, after determining whether B & B was prevented from completing the contract because of DFC's actions, the jury was then charged with determining the "amount of damages . . . sustained by B and B Equipment, Inc. as a result of that breach of contract by the defendants/third party plaintiffs." The jury's determination as to the "amount of damages sustained" reflected testimony by Darrell Beck, that he owed the bank $103,000 for funds borrowed by B & B, advanced by the bank, and used to do the work at the feedlot. T. 475.

As a whole, this finding of $103,000 of damages in favor of B & B was supported in the record and was guided by jury instructions that were in no way affected by the allegedly prejudicial communications and admissions. B & B's claims were rather simple and straightforward, and represented most clearly by three jury instructions: 26, 27, and 35 (part 8).

Jury instruction 26 read:

> If you determine that a valid contract was formed between Dakota Feeding Company and B and B Equipment, Inc. to perform certain excavation work on the feedlot premises and you further find that it became impossible for B and B to fully and completely perform its obligations under the contract because of either nonpayment or some other failure of consideration on the part of Dakota Feeding, then you may find that B and B is discharged and relieved from further performance of obligations under the contract.

Jury instruction 27 read:

> If you find that defendant and third party plaintiff B and B Equipment, Inc. was ready, willing and able to complete a contract entered into between B and B and Dakota Feeding Company, LLC, Scott Mathison and/or Rick Jensen for excavation work on the feedlot premises and that B and B Equipment's inability to complete the contract was prevented by conditions or circumstances under the control of Dakota Feeding Company, LLC, Scott Mathison and/or Rick Jensen, then you must find in favor of B and B Equipment and against Dakota Feeding Company, LLC, Scott Mathison and/or Rick Jensen in Regard to the third party claim.

Jury Instruction 35 in pertinent part read:

> As to the claim of Defendants against B & B Equipment, if you find that there was an enforceable contract requiring B and B Equipment, Inc. to complete the lagoon system then you must determine the following issues:
>
> a. Did actions of the defendants/third party plaintiffs prevent the third party defendant B and B Equipment, Inc. from completing the contract?
> b. Did actions of the defendant/third party plaintiffs make completion of the contract by B and B Equipment, Inc. impossible?
> c. Did the defendants/third party plaintiffs themselves breach the contract and did that breach prevent B and B Equipment, Inc. from completing the contract?
> d. Did the defendants/third party plaintiffs act in such a manner so as to create an estoppels or waiver preventing them from enforcing the terms of the contract against B and B Equipment, Inc.
>
> If your answer to any one or more of the above questions was yes, then you must find for the third party defendant B and B Equipment, Inc. on the third party complaint of the defendants/third party plaintiffs. You must then determine whether defendants/third party plaintiffs have failed to pay B and B Equipment, inc. for the work which was performed by B and B

> Equipment, Inc. on the feedlot premises and if so what amount of damages have been sustained by B and B Equipment, Inc. as a result of that breach of contract by the defendants/third party plaintiffs.
>
> If your answer to those questions is no then you will determine the amount of damages, if any, the Defendant and Third Party Plaintiff is entitled to recover and return a Defendant and Third Party Plaintiff's verdict for the amount thereof.

These instructions were not objected to by DFC's counsel. The jury's verdict in this case followed these instructions and was fully supported in the record, with few or none of the necessary factual allegations refuted by any testimony or other evidence by DFC. B & B clearly demonstrated at trial that it had performed the work claimed to have been performed. B & B demonstrated that it deserved to be paid and DFC's own witness agreed that B & B deserved to be paid for its work. DFC's counsel in closing argument stated that B & B was owed something, and it was simply up to the jury to determine how much. T. 802. A judicial admission made by an attorney in open court is binding upon the party represented by that attorney. *See, e.g. Rosen's, Inc. v. Juhnke*, 513 NW2d 575, 577 (SD 1994); *Tunender v. Minnaert*, 563 NW2d 849, 856 (SD 1997). Moreover, B & B proved that it had not been completely paid for the work completed and that it incurred $103,000 in damages as a result. With regard to DFC's claim of breach by B & B, B & B proved that it could not complete the project because it was never given engineering specifications (which DFC agreed was not B & B's responsibility), that DFC failed to pump water from the holes, and that DFC had failed to make payments for work completed. Accordingly, the jury's verdict in this case is supported – not only by substantial, but by unrefuted evidence – and the court should not seek reason to reverse.

CONCLUSION

In this appeal, DFC attempts to claim that prejudicial error affected the jury's verdict with regard to B & B's claims, because of evidence that Voorhees moved to admit. DFC's argument that the circuit court erred in admitting the evidence is far from persuasive. Nevertheless, DFC fails to show that the communications and admissions at issue actually affected the verdict, such that the record supports that the jury probably would have come to a different conclusion had the evidence not been admitted. The jury's verdict is supported overwhelmingly in the record as a whole and was not affected by the trial court's alleged error. Accordingly, B & B respectfully request that this Court allow the jury's verdict to stand.

Dated this 19th day of December, 2014.

MAY, ADAM, GERDES & THOMPSON LLP

BY: /s/ Robert B. Anderson
ROBERT B. ANDERSON
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CERTIFICATE OF SERVICE

I, Robert B. Anderson, do hereby certify that on the 19th day of December, 2014, I caused a true and correct copy of the foregoing *Brief of Appellee B & B Equipment, Inc.* to be served via e-mail upon:

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The undersigned further certifies that two copies of the *Brief of Appellee* in the above-captioned action were hand delivered to Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 E. Capitol Avenue, Pierre, South Dakota, 57501, on the date above written. On that same date a copy of the *Brief of Appellee* in Word format was filed electronically by e-mail attachment to SCClerkBriefs@ujs.state.sd.us.

/s/ Robert B. Anderson
ROBERT B. ANDERSON

CERTIFICATE OF COMPLIANCE

Robert B. Anderson, attorney for Appellee, hereby certifies that the foregoing *Brief of Appellee* complies with the type volume limitation imposed by the Court by Order dated March 15, 1999. Proportionally spaced typeface Times New Roman has been used. *Brief of Appellee* contains 7,920 words and does not exceed 40 pages. Microsoft Word processing software has been used.

Dated this 19th day of December, 2014.

MAY, ADAM, GERDES & THOMPSON LLP

BY: /s/ Robert B. Anderson

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APPENDIX

STATE OF SOUTH DAKOTA)
:SS
COUNTY OF SULLY)

IN CIRCUIT COURT

SIXTH JUDICIAL CIRCUIT

CIV 12-25 209

VOORHEES CATTLE COMPANY, LLP, d/b/a Onida Feeding Company, a South Dakota limited liability partnership,

Plaintiff,

vs.

DAKOTA FEEDING COMPANY, LLC, a South Dakota limited liability company; ONIDA FEEDING COMPANY, LLC, a South Dakota limited liability company; SCOTT MATHISON, individually; and RICK JENSEN, individually;

Defendants,

AND

DAKOTA FEEDING COMPANY, LLC, a South Dakota Limited Liability Company,

Defendant and Third Party Plaintiff,

vs.

PATRICK VOORHEES, individually; MERLIN VOORHEES, individually; and B AND B EQUIPMENT, INC., a South Dakota Corporation,

Third Party Defendants.

CIV. No. 12-25

JUDGMENT FOR THIRD PARTY DEFENDANT B AND B EQUIPMENT, INC.

STATE OF SOUTH DAKOTA
CIRCUIT COURT, SULLY CO.
FILED
MAY 27 2014
Nola La Rosh Clerk
By _____ Deputy

This action came on for trial before the Court and a jury, Honorable John L. Brown, Circuit Court Judge, presiding, and the issues between the Defendant and Third Party Defendant and Third Party Plaintiff Dakota Feeding Company, LLC and B and B Equipment, Inc., and between B and B Equipment, Inc. on its counterclaim against Dakota Feeding Company, LLC,

Scott Mathison individually, and Rick Jensen, individually, having been duly tried and the jury having duly rendered it verdict on April 7, 2014, it is hereby

ORDERED, ADJUDGED AND DECREED, that the Third Party Defendant B and B Equipment, Inc. recover from Dakota Feeding Company, LLC, a South Dakota limited liability company, the total the total principal sum of One Hundred Three Thousand Dollars ($103,000) with prejudgment interest thereon at the rate of ten percent per annum from July 15, 2012; and it is further,

ORDERED, ADJUDGED AND DECREED, that Third Party Defendant Defendant B and B Equipment, Inc. recover nothing from Defendant Rick Jensen, individually; and it is further

ORDERED, ADJUDGED AND DECREED, that pursuant to the Court's prior Order setting aside the verdict against Scott Mathison, individually, that Third Party Defendant B and B Equipment, Inc. recover nothing from Defendant Scott Mathison, individually; and it is further

ORDERED, ADJUDGED AND DECREED, that the Defendant and Third Party Plaintiff Dakota Feeding Company, LLC, a South Dakota limited liability company, take nothing on its third party complaint against Third Party Defendant B and B Equipment, Inc. and that said third party claim be dismissed on its merits and with prejudice; and it is further,

ORDERED, ADJUDGED AND DECREED, that Third Party Defendant B and B Equipment, Inc. be and is hereby awarded costs and disbursements in accordance with SDCL 15-17-37, in the sum of $_____, to be inserted herein by the clerk of courts, upon proper submission by Third Party Defendant B and B Equipment, Inc.; and it is further,

ORDERED, ADJUDGED AND DECREED, that the Clerk shall enter this judgment upon the judgment roles and records of the office of the Clerk of Courts, Sully County, South Dakota.

Dated this 23rd day of May, 2014.

BY THE COURT:

JOHN R. BROWN, Circuit Court Judge

ATTEST:

Nola LaRush
Clerk
(SEAL)

From: mathison <rnmathison@bellsouth.net>
Subject: Contracts for signature
Date: June 4, 2010 1:21:08 AM EDT
To: ddbeck7@aol.com
Cc: Luke Peterson <dakotafeeding@hotmail.com>, Bill Vancamp <bvancamp@olingerlaw.net>

Darrel,

Just so you are clear so you can stop wasting time and money you have 2 options:

Call Vancamp and sign the fair contracts already provided to you by Friday June 4th or not sign the contracts.

With All Moneys/credits received from DFC/OFC and completion of the West Lagoon system. B/B stands to collect $312,000 A full breakdown of all moneys paid to CI 3 is in the contract. ZERO Balance is owed to you on CI 3 and you have cost me attorney fees putting together this contract due to your lack of effort in getting started.

Further I'm not happy you told my attorney that you were ready to dig last fall on a days notice but "WE" didn't pump down the lagoon. You know very well Chris pumped down the lagoon and Max Wilson was after you for 3 months trying to pin you down on a start date. Against my wishes last Fall. Max talked me out of getting the attorneys involved.

During our last meeting we gave you consideration on 17k you added to the project that was never included in your original bid. Equally troubling You borrowed another 20k against the equip fund in March of this year from Sunrise. For what nobody knows? Payments on accrued interest from your non completion of the Job and my Co signature on the sunrise note is NOT a negotiation for you to get moving. For the last 2 years you've been a complete NO show.

If you decide not to sign by Friday the offer is withdrawn and I'm suing for damages for non completion of the project in the full amount already paid out:

100k from the sunrise loan
70k for equipment given
50k from the August 2006 lagoon payment
12k for the alleged diversion ditch you charged me for.

...

All payments and credits are documented and failure to complete the project is confirmed and documented by Jason Roggow of the SD DENR.

I sincerely hope you change your attitude towards the project and complete your responsibility.

Scott Mathison/DFC

EXHIBIT 212

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

VOORHEES CATTLE COMPANY, LLP,
d/b/a Onida Feeding Company,
a South Dakota Limited Liability Partnership,

Appeal No. 27124

Plaintiff,

vs.

DAKOTA FEEDING COMPANY, LLC, a
South Dakota Limited Liability Company;
ONIDA FEEDING COMPANY, LLC, a
South Dakota Limited Liability Company;
SCOTT MATHISON, individually; and
RICK JENSEN, individually;

Defendants/Appellants,

and

DAKOTA FEEDING COMPANY, LLC, a
South Dakota Limited Liability Company,

Defendant and Third-Party Plaintiff/Appellant,

vs.

PATRICK VOORHEES, individually;
MERLIN VOORHEES, individually; and
B AND B EQUIPMENT, INC.,
a South Dakota Corporation,

Third Party Defendants/Appellee.

Appeal from the Circuit Court, Sixth Judicial Circuit
Sully County, South Dakota
The Honorable John L. Brown
Circuit Court Judge, Presiding

APPELLANTS' REPLY BRIEF

Notice of Appeal was filed on June 30, 2014

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Attorneys for Appellee,
B and B Equipment, Inc.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER STATE CASES:

PRELIMINARY STATEMENT

To maintain continuity, the parties and court documents relevant to this appeal will be referred to herein as follows:

- Defendants/Third-Party Plaintiff and Appellants, Dakota Feeding Company, LLC, Scott Mathison and Rick Jensen – by name or collectively as "DFC";
- Third-Party Defendant and Appellee, B and B Equipment, Inc. -- "B and B";
- Plaintiff/Third-Party Defendants, Voorhees Cattle Company, LLP, Patrick Voorhees and Merlin Voorhees – by name or collectively as "Voorhees";
- Third-Party Defendant and Appellee, B and B Equipment, Inc. -- "B and B";
- Record – "R" followed by the page number(s) assigned by the Sully County Clerk;
- Transcripts of pre-trial hearings and of the trial – "Mot. Hrg.Tr." and "T.Tr.", respectively, succeeded by the appropriate page number(s) in each;
- Trial exhibits and jury instructions – "T.Ex." and "Jury Instr.", respectively, and the number specified in each; and
- Appellee's Brief – "Appellee Br." and the page number cited to in the same.

LEGAL ISSUES

B and B omits one of the legal issues raised on appeal and re-characterizes the other. The two issues before this Court are:

1. **Whether the admission and use at trial of correspondence and written admissions, which contained and made references to confidential communications between DFC's attorney and its two principals, violated the attorney-client privilege; and**
2. **Whether the admission and use of privileged documents as trial evidence, in combination with the instructions given to the jury with respect to the same, was prejudicial error.**

By focusing on the impact and prejudicial effect of these documents in its Statement of Issues, B and B tacitly acknowledges the documents just referred to were privileged and the trial court erred in admitting them.

RESPONSE TO FACTUAL STATEMENT

In support of its counterclaim for damages against DFC, B and B claimed, and presented evidence to show:

1. An engineer was needed to build the lagoon and comply with Department of Environment and Natural Resources ("DENR") requirements;

2. DFC did not have an engineer (in part because of cost) or have the construction area properly staked;

3. The lagoon project was never approved by DENR because of these and other compliance issues; and

4. The project was undercapitalized – DFC did not have the money to pay for and to go through with the project.

See T.Tr. 239-48, 247-48, 333-34, 420-21, 466, 477-78, 480-81, 484-85, 595-97, 659, 819-23, 829; T.Exs. 14, 17. B and B makes the same arguments in its appellate brief. *See* Appellee Br. at 6-12.

What B and B conveniently fails to mention is these and other matters were discussed in written correspondence between William Van Camp, DFC's attorney, and its two members, Mathison and Jensen, and in requests for admissions DFC was required to answer. The correspondence and admissions were admitted, as substantive evidence, at trial and then projected on a screen to the jury. *See* T.Tr. 284-85, 294-95, 322. And after B and B's counsel told the jury that certain matters referred to in these documents were "undisputed" and "overwhelming," *see* T.Tr. 819-23, 829-30, the trial court instructed the jury that DFC's written admissions were, from an evidentiary and proof standpoint,

"conclusively established," *see* Jury Instr. 12. The jury was further instructed that Van Camp was DFC's agent and that the acts or omissions in connection with his due diligence inspection and dealings with DENR before the closing on the sale of the feedlot, were to be imputed on DFC and considered its own. *See* Jury Instr. 34. So not only were jurors shown blown up screenshots and given hard copies of privileged information, but they were also directed to treat the information as certain, proven fact.

Now DFC tried mightily to keep this information from being disclosed, allowed into evidence and considered – or proven – but was unsuccessful. B and B laid in the weeds and did nothing to stop the information from being admitted or to limit its use (to the claims Voorhees and DFC had against each other) as evidence. In fact, B and B had no objection to the receipt of the admissions as evidence or to the jury being instructed that the matters enumerated in them were irrefutable. *See* T.Tr. 322, 760-61. B and B was thus able to make use of protected matters found in the letters and admissions to strengthen its case and show, or at least corroborate, that DFC did not hire an engineer, properly stake the lagoon area, comply with DENR requirements, fund the project or heed to Van Camp's advice and recommendations on important matters.

B and B claimed, on multiple occasions at trial, it was entitled to damages of less than $100,000. *See* T.Tr. 96-97, 100-01, 828. The jury, however, awarded more than the amount B and B wanted or asked for. R. 191. Although Darrell Beck did mention B and B owed the bank $103,000.00, he testified the company would finish what was left to be done and accept thousands less for everything. *See* T.Tr. 495. He also made clear in his testimony the amount of B and B's claim was below $100,000.00 and produced an itemized billing statement to substantiate this. *See* T.Tr. 497-98; T.Ex. 201.

It is true the trial court took away the personal liability (piecing the corporate veil) verdicts against Mathison. *See* R. 198-99, 208-09. Even so, the jury's willingness to award damages against Mathison personally is telling and demonstrates the privileged information most likely resonated with and had a penetrating effect on the jury. Not only did this information help validate Voorhees and B and B's claims, but it also proved to be damning evidence against DFC and Mathison because it involved mal/nonfeasance and turning a blind eye to Van Camp's admonishments and guidance.

Make no mistake, B and B rode the wave of Voorhees's case and the evidence Voorhees presented. B and B took full advantage of Voorhees's aggressive posture and attacks on DFC and in particular, evidence relating to its unwillingness to employ an engineer or stake the area to be dug, comply with DENR's mandates and finance the construction project. If it really did not care one way or another whether privileged documents were put before the jury, *see* Appellee Br. 14, why then did B and B present evidence and make arguments that just happened to be found in and supported by these very same documents? B and B certainly utilized and gained favor from evidence Voorhees introduced at trial, including the challenged correspondence and admissions, and cannot legitimately say that such evidence, or at least facets of it, did not sway the jury.

STANDARD OF REVIEW

B and B misstates the standard of review for attorney-client privilege determinations. While trial court rulings on discovery matters are generally reviewed for abuse of discretion, *see Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, ¶ 42, 796 N.W.2d 685, 699; *Dakota, Minnesota & Eastern R.R. Corp. v. Acuity*, 2009 S.D. 69, ¶ 45, 771

N.W.2d 623, when a court's order is alleged to have violated a privilege, questions of statutory interpretation are raised which require *de novo* review, *see Maynard v. Heeren*, 1997 S.D. 60, ¶ 5, 563 N.W.2d 830, 833; *State v. Guthrie*, 2001 S.D. 61, 627 N.W.2d 401, 424. But any findings of fact the trial court makes as a part of its order, are reviewed under a clearly erroneous standard. *See Guthrie*, 2001 S.D. 61, ¶ 61, 627 N.W.2d at 424.

The trial court's decisions here, allowing the use of privileged communications as trial evidence, were not made with specific factual findings that were dispositive of the privilege issue. This being the case, these decisions are subject to *de novo* review. *See Maynard,* 1997 S.D. 60, ¶ 5, 563 N.W.2d at 833 (whether the trial court's order violated a privilege is a statutory interpretation question requiring *de novo* review); *Guthrie,* 2001 S.D. 61, ¶ 61, 627 N.W.2d at 424 (the application of a privilege statute to a particular set of facts involves a question of law and is reviewed *de novo*); *Sandra T.E. v. South Berwyn School Dist. 100,* 600 F.3d 612, 618 (7th Cir. 2010) (when an attorney performs investigative work and is alleged to not be acting as an attorney for purposes of the privilege, this raises a legal issue about the scope of the privilege, making review *de novo*); *Hawkins v. Stables*, 148 F.3d 379, 382 (4th Cir. 1998) (where the district court's decision on the applicability of the attorney-client privilege did not hinge on specific factual findings, review is *de novo*); *People v. Radojcic*, 2013 IL 114197, ¶¶ 33-36, 998 N.E.2d 1212, 1220-21 (the applicability of the attorney-client privilege and any exceptions to it are reviewed *de novo*); *see also Ross v. City of Memphis*, 423 F.3d 596, 600 (6th Cir. 2005) ("Whether the attorney-client privilege applies to a given situation is a mixed question of law and fact that this court reviews *de novo*."); *United States v.*

Bauer, 132 F.3d 504, 507 (9th Cir. 1997) (review of the district court's rulings on the scope of the attorney-client privilege is *de novo*); *In re Grand Jury Matter No. 91-01386*, 969 F.2d 995, 997 (11th Cir. 1992) ("Because it involves a mixed question of law and fact, our standard of review for the district court's determination of the applicability of the attorney-client privilege is plenary."); *Price v. Armour*, 949 P.2d 1251, 1254 (Utah 1997) ("The existence of a privilege is a question of law for the court, which we review for correctness, giving no deference to the trial court's determination."); *Greenwalt v. Walmart Stores, Inc.*, 253 Neb. 32, 39, 567 N.W.2d 560, 566 (1997) ("We determine our standard of review to be independent of the lower court's ruling."); *Tackett v. State Farm Fire and Cas. Ins. Co.*, 653 A.2d 254, 258 (Del. 1995) ("This court exercises *de novo* review on the question of whether a trial court correctly applied the attorney-client privilege….").

VIOLATION OF ATTORNEY-CLIENT PRIVILEGE

B and B does not paint an accurate picture when it attempts to separate itself from and blame Voorhees for the disclosure and admission of the privileged evidence and the jury instruction given concerning the same. Indeed, B and B took a position in response to DFC's motion to quash Van Camp's deposition subpoena (on privilege grounds) and for a protective order, arguing that (1) his communications related to issues in the case and to B and B's "involvement" in it and (2) whatever knowledge he had, was attributable to DFC – an argument that ultimately resulted in a jury instruction being given to this effect. *See* Mot.Hrg.Tr. 22-24, 29 (Aug. 9, 2013); Mot.Hrg.Tr. 14-15 (Oct. 2, 2013); Jury Instr. 34. Notably, B and B had no objection to the written admissions

being admitted into evidence or to an instruction being given as to the treatment of them. *See* T.Tr. 322, 760-61; Jury Instr. 12. B and B thus advocated for the privileged information to be divulged and then did nothing to prevent or limit its use and consideration at trial.

While not asserting the correspondence and admissions should or should not have been admitted, B and B nonetheless suggests the trial court "could" have allowed them into evidence "[b]ecause DFC put its own knowledge at issue (by claiming fraud/concealment of facts by Voorhees)…." Appellee Br. at 14. But the court's decision was based on Van Camp performing investigative functions like or analogous to a lawyer acting as a claims adjuster, *see* Mot.Hrg.Tr. 18-20 (Oct. 2, 2013); *see also Acuity*, 2009 S.D. 69, ¶¶ 55-57, 771 N.W.2d at 638-39, and not on the knowledge issue B and B puts forth now on an *ex post facto* basis. And the court did not alter its decision when the privilege matter was revisited and the admissions were discussed. *See* Mot.Hrg.Tr. 37-40 (March 25, 2014).

Aside from this, the admissions do not deal solely with matters pertinent to the yard assets, DENR's permitting process and the feedlot's future profitability (the matters that make up DFC's fraud and concealment claim, *see* Jury Instrs. 10, 35), but include, as well, privileged evidence relating to a whole host of other matters that show mal/nonfeasance on the part of DFC, *see* T.Ex. 27. This evidence helped establish that DFC failed or refused to do a number of things – hire an engineer, stake the property, comply with DENR requirements and adequately fund the project – which B and B repeatedly pointed out and emphasized to the jury. *See* T.Tr. 98-101, 239-48, 333-34,

420-21, 466, 477-78, 480-81, 484-85, 506, 512, 514-15, 520, 595-97, 659, 819-23, 829; T.Exs. 14, 17.

The admissions are also not confined to pre-sale feedlot matters. Rather, they are open-ended and apply to *any* privileged communications up to and through February 28, 2014 (the date the admissions were signed). Hence, to the extent the trial court's ruling on the privileged issue was premised on and intended to be confined to pre-closing communications and admissions, the ruling is inconsistent with and antithetical to the evidentiary landscape at trial and upon which the jury was instructed on.

What's more, it is difficult to reconcile the jury instruction on how matters in the admissions were supposed to be treated (as having been "conclusively established") with the instruction on Van Camp being DFC's agent (which imputed Van Camp's acts or omissions on DFC but only for those committed before closing). *Compare* Jury Instr. 12 *with* Jury Instr. 34. The former directs the jury to consider any admissions, *irrespective of when they occurred*, as being unchallengeable; while the latter imputes only *pre-closing* acts or omissions on DFC. Another example of error, both in the ruling on the privileged matters and in the application of the same.

Regardless, it is one thing to allow discovery of privileged information; it is an entirely different matter, however, to admit this information at trial, as substantive evidence, and to instruct the jury that the same is firmly established and unimpeachable. Yet this is precisely what the trial court did.

Notwithstanding B and B's gratuitous justification for upholding the ruling below (despite insisting that it is "not well-suited" to take sides on the privilege issue, *see* Appellee Br. 13), it was error for the trial court to admit, use and preferentially instruct

on correspondence and written admissions, containing privileged information, over DFC's timely objections. This information should have been barred altogether from the trial and jury consideration. Because it was not, the propriety of the trial and B and B's verdict are now suspect.

PREJUDICIAL EFFECT

Much of what has already been said in this brief and in DFC's initial brief applies with equal force to and has a bearing on DFC's argument that the admission and use of privileged documents as trial evidence, when considered in conjunction with the jury instruction given that pertains to them, constituted prejudicial error and requires a new trial. The relevant standard is whether the error "most likely [ ] had some effect on the verdict and harmed substantial rights of the [complaining] party." *Schoon v. Looby*, 2003 S.D. 123, ¶¶ 18, 21, 670 N.W.2d 885, 891-92; *Kjerstad v. Ravellette Publications, Inc.*, 517 N.W.2d 419, 426 (S.D. 1994). The trial court's error on the privileged evidence did just this and warrants a retrial.

In its opening brief and in prior sections of this brief, DFC showed "how or why" the admission and instructions given on the privileged information "in all probability" affected the jury's verdict. *See Supreme Pork, Inc. v. Master Blaster, Inc.*, 2009 S.D. 20, ¶¶ 59, 61, 764 N.W.2d 474, 491. Given the arguments B and B makes in its brief, some elaboration on this point is necessary.

The written admissions contain specific references to privileged matters involving the hiring of an engineer, complying with DENR requirements and project costs being substantial. *See* Ex. 27 at ¶¶ 9-12, 17-18, 20-24, 26-27, 29-32. The admissions were

admitted and presented to the jury in a PowerPoint display before B and B put on any evidence in its case. *See* T.Tr. 322, 460. B and B then proceeded to present evidence and argue that DFC did not (1) hire an engineer (something it needed to do in order to complete the lagoon project and comply with permitting requirements), (2) obtain the necessary approval from DENR, (3) pay for work done and (4) adequately fund the project. *See* T.Tr. 239-48, 333-34, 420-21, 466, 477-78, 480-81, 484-85, 595-97, 659, 819-23, 829; T.Exs. 14, 17.

Ordinarily, it would be up to the jury to decide how much weight, if any, should be given to evidence admitted at trial. The matters detailed in the admissions though were not like any other trial evidence. Instead, these matters became uncontroverted "super" evidence that was elevated to a proven, definitive status by virtue of the trial court's instruction to the jury on the admissions. *See* Jury Instr. 12. This instruction took away from the jury its right to determine whether something had or had not been established. Thus, with respect to the matters admitted to in the admissions (and especially those relating to hiring an engineer, DENR compliance, costs and funding), B and B and Voorhees were both given an upper hand in their respective cases.

B and B used and profited from the privileged information that was admitted (and in particular the information in the admissions) when presenting and arguing its case. And it reaped the benefit of having some of this privileged information, set forth in admissions and flaunted through large onscreen projections and probing discussions, *see* T.Tr. 285-297, 306, 322, 378-82, 771-72, 775-81, transformed into definitively manifested evidence through an instruction given to the jury, *see* Jury Instr. 12.

Of course the fact that B and B received a higher sum than it said – over and over again – it was entitled to, *see* T.Tr. 96-97, 100-01, 492, 495-98, 828, is yet another indicator of how the erroneously admitted privileged information (especially from the admissions) might and probably did affect the jury's verdict. In his opening remarks and final argument, B and B's counsel told the jury B and B was entitled to amounts less than what the jury ultimately awarded. *See* T.Tr. 96-97, 100-01, 828. Counsel even provided the exact figure – $99,731.35 – to insert in the verdict form and explained how this number was calculated and the exhibit it came from. *See* T.Tr. 828; T.Ex. 201. B and B's only witness, Beck, corroborated counsel's statements, testifying what it was entitled to be paid now. *See* T.Tr. 492, 495-98. For the jury to ignore or disregard counsel's remarks and the testimonial and documentary evidence offered in support of it speaks volumes and demonstrates the jury was indeed tainted by the privileged evidence.

So too does the jury's decision to pierce the corporate veil and award damages against Mathison individually. Granted, the trial court did set aside this portion of the verdict. Even so, the decision is still weighty evidence of the jury's mindset and its view of DFC and Mathison. Punishing both of them, when there was no basis for piercing the veil, *see* R. 190, 198-99; Jury Instr. 41; T.Tr. 813-14, is indicative of the force and effect the improperly admitted privileged information had on the jury's decision-making.

The privileged evidence also went a long way toward discrediting DFC's claims and defenses in both the Voorhees and B and B cases. The evidence was not limited to the Voorhees controversy but rather overlapped with and spilled over to the B and B dispute – most conspicuously in the pivotal areas of not hiring an engineer, obtaining approval from DENR, complying with its requirements and funding the project. *See*

T.Tr. 71-84, 112-14, 152-53, 239-48, 254-56, 284-96, 313-22, 378-85, 410-20, 466, 477-78, 480-81, 484-85, 548-49, 623-25, 771-85, 819-23, 825, 833-38; T.Exs. 7, 9, 14, 17, 26B, 26C, 27, 33A, 33B, 33D. Proof positive of this is the jury's piercing the corporate veil/personal liability verdicts against Mathison and its damage awards (in excess of $1.1 million against DFC and more money than B and B claimed it was entitled to receive). R. 190-91. The correspondence and admissions additionally showed that Mathison and Jensen communicated with and were admonished by Van Camp and did not take to heart his advice and follow through on his recommendations. *See* T.Exs. 7, 9, 14, 17, 27; T.Tr. 71-84, 284-96, 303-04, 306-07, 378-85, 771-85, 833-38.

Contrary to B and B's contention, DFC's ability to fund the feedlot operation *was* an issue in B and B's case. B and B's counsel argued in closing that DFC was undercapitalized and did not have the money to take care of and manage the asset (feedlot) it bought. *See* T.Tr. 829-30. Counsel maintained that DFC did not have the funds to pay for an engineer (which was needed for a DENR approved permit) or for ongoing work being done on the lagoon project. *See* T.Tr. 830. Project funding and costs were significant issues Van Camp discussed with Mathison and Jensen and were part and parcel of the correspondence and admissions allowed into evidence. *See e.g.* T.Exs. 7, 27 at ¶ 17. These issues were likewise a big part of Voorhees's case. *See e.g.* T.Tr. 286-89, 298-301, 313-22, 375-76, 380-85, 777-85; T.Exs. 7, 14, 17, 26B, 26C, 27, 33A, 33B, 33D.

B and B cites to and makes much of Van Camp's closing remarks, saying he acknowledged B and B was owed something. *See* Appellee Br. 11-12, 22. These remarks though were not evidence, *see State v. Smith*, 1999 S.D. 83, ¶ 48, 599 N.W.2d

344, 354; Jury Instrs. 5, 6, or binding admissions as to damages, *see Tunender v. Minnaert*, 1997 S.D. 63, ¶¶ 20-24, 563 N.W.2d 849, 853-54; *Miller v. Hernandez*, 520 N.W.2d 266, 272 (S.D. 1994). At any rate, Van Camp went on to assert that the contract DFC had with B and B required work that was never done and specifications that were not adhered to. *See* T.Tr. 802. His argument was a mitigation one – namely, that B and B was not entitled to all that it was claiming. *See* T.Tr. 801-02. He never said or even suggested B and B should be awarded at, close to or more than the amount it was seeking. *See Zahn v. Musick,* 2000 S.D. 26, ¶¶ 25-28, 605 N.W.2d 823, 829.

The jury instructions B and B quotes in its brief, *see* Jury Instrs. 26, 27, 35, do nothing to neutralize or undo the prejudicial effect caused by the admission of the privileged evidence and the instruction given, *see* Jury Instr. 12, that relates to some of this evidence (the written admissions). The evidence had a profound impact on DFC's cases with Voorhees and B and B. The instruction on the admissions singled them out and accorded them the status of being "conclusively established" evidence. There is nothing in the instructions B and B makes mention of or, for that matter, in any of the other instructions, that changes this or provides a suitable antidote for the prejudice the trial court created and let stand.

The privileged evidence, or at least some of it:

1. Went directly to critical issues in the case;
2. Was inherently prejudicial and of such character that it would likely impress itself upon the minds of jurors;
3. Was not cured through instructions from the trial court but rather was bolstered by an instruction that told the jury such evidence was indisputable;
4. Was something that could not be erased from the minds of jurors (i.e. was a bell that could not be un-rung); and

5. Permeated the entire trial, from opening statements to final arguments.

As a result, the evidence probably had some effect upon the final result in the B and B case and affected DFC's rights. *See Young v. Oury*, 2013 S.D. 7, ¶¶ 18-26, 827 N.W.2d 561, 567-69; *Schoon*, 2003 S.D. 123, ¶¶ 19-23, 670 N.W.2d at 891-92; *Kjerstead*, 517 N.W.2d at 427-28; *see also Loen v. Anderson*, 2005 S.D. 9, ¶ 21 & n. 7, 692 N.W.2d 194, 200; *City of Sioux Falls v. Johnson*, 1999 S.D. 16, ¶ 30, 588 N.W.2d 904, 911. Reversal of the judgment and remand for a new trial, therefore, is called for.

CONCLUSION

Correspondence and requests for admissions, containing privileged attorney-client communications, were allowed into evidence and used against DFC at trial. The trial court instructed the jury to consider the matters set forth in the admissions as having been "conclusively established." The jury's verdict awarded damages in an amount more than B and B claimed it was entitled to. The verdict and damage award were directly attributable to erroneous court rulings that created prejudice so lethal it resulted in an unfair trial. Because of this, B and B's judgment must be reversed and the case remanded for a new trial free of any references to or use of the privileged information.

REQUEST FOR ORAL ARGUMENT

DFC renews its request for oral argument on the issues and matters raised in this appeal.

Dated this 6th day of January, 2015.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

Mark A. Moreno, one of the attorneys for Appellants, hereby certifies that the foregoing brief meets the requirements for proportionally spaced typeface in accordance with SDCL § 15-26A-66(b) as follows:

a. The body of Appellants' Reply Brief does not exceed 20 pages.

b. The body of Appellants' Reply Brief was typed in Times New Roman 12 point typeface; and

c. The body of Appellants' Reply Brief contains 4,208 words and 21,013 characters with no spaces and 25,464 characters with spaces, according to the word and character counting system in Microsoft Office 2010 for Windows used by the undersigned.

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CERTIFICATE OF SERVICE

The undersigned, attorneys for Appellants, Dakota Feeding Company, LLC, Scott Mathison and Rick Jensen, hereby certify that on the 6th day of January, 2015, two true and correct copies of Appellants' Reply Brief were mailed (via U.S. Mail and electronically) to:

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and the original and 2 copies were hand delivered to the South Dakota Supreme Court, 500 East Capitol, Pierre, South Dakota 57501, as well as filing by electronic service in Word format to the Clerk of the South Dakota Supreme Court at: SCClerkBriefs@ujs.state.sd.us.

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