IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

Appeal No. 26891

TIMOTHY ANDREWS,

Plaintiff/Appellee,

vs.

RIDCO, INC.,

Defendant,

and

TWIN CITY FIRE INSURANCE COMPANY,

Defendant/Appellant.

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

The Honorable Wally Eklund
Circuit Court Judge

Petition for Intermediate Appeal filed December 6, 2013

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

TREATISES

PRELIMINARY STATEMENT

Defendant/Appellant Twin City Fire Insurance Company is referred to as "Twin City," Plaintiff/Appellee Timothy Andrews is referred to as "Andrews," and Defendant Ridco, Inc. a/k/a Riddle's is referred to as "Ridco." The Seventh Judicial Circuit Court in Pennington County is referred to as the "trial court." Citations to the certified record shall be designated as "R" followed by the applicable page number(s). The entries and exhibits in the Appendix will be designated as "App" followed by the appropriate page number(s). Citations to the transcripts from the applicable hearings before the trial court are designated as "HT" followed by the hearing date, then the appropriate page number(s).[1]

JURISDICTIONAL STATEMENT

Twin City appeals from the following discovery orders issued by the trial court:

(1) Order Granting Plaintiff's Motion to Compel Production of Unredacted Privilege Logs/Claim Files and Personnel Files and Denying Defendant Twin City Fire Insurance Company's Motion for Reconsideration and Protective Order. This Order was signed on November 14, 2013, and filed with the clerk of court on November 15, 2013. (R. at 2447; App. at 3.) Andrews' Notice of Entry of the Order was provided on November 21, 2013. (R. at 2474; App. at 1-2.)

(2) Order Denying Twin City's Motion for Reconsideration. This Order, which also includes denial of Twin City's motion to file the redacted materials under seal, was signed on December 3, 2013, and filed with the clerk of court on December 6,

[1] For example, if the brief is referencing the transcript from the hearing on December 3, 2013, the citation would read "HT 12.3.13," followed by the page number from the transcript.

2013. (R. at 2477; App. at 6.) Andrews' Notice of Entry of the Order was provided on December 6, 2013. (R. at 2478; App. at 4-5.)

Twin City filed a Petition for Intermediate Appeal regarding both of the above-referenced discovery orders on December 6, 2013. This Court initially dismissed Twin City's Petition on December 11, 2013, on the ground that it was not timely filed pursuant to SDCL § 15-26A-13. (R. at 2484.) Twin City filed a Petition to Reinstate the Intermediate Appeal on December 12, 2013. This Court issued an Order reinstating Twin City's Petition for Intermediate Appeal on January 10, 2014. (R. at 2491.) Andrews filed a response to Twin City's Petition for Intermediate Appeal on January 17, 2014. This Court granted the Petition for Intermediate Appeal on March 14, 2014, and stayed all proceedings in the underlying action pending resolution of the appeal. The Court has jurisdiction of this appeal pursuant to SDCL § 15-26A-3(6).

STATEMENT OF THE ISSUES

1. **WHETHER TWIN CITY'S ATTORNEY-CLIENT COMMUNICATIONS REGARDING THE ANDREWS CLAIM ARE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE WHERE TWIN CITY DID NOT DELEGATE ITS CLAIM HANDLING FUNCTION TO OUTSIDE COUNSEL.**

The trial court determined Twin City waived the attorney-client privilege with respect to communications claim file with the workers' compensation (WC) attorney retained to defend Ridco against Andrews' claims for WC benefits. The trial court held, based upon a blanket conclusion, that Twin City by implication delegated its claim handling function to outside counsel and is, therefore, relying on the "advice of counsel" in defense of Andrews' bad faith claims. The trial court did not make any factual findings detailing Twin City's supposed delegation or waiver, nor did it conduct an *in camera* inspection of the Andrews' claim file materials to determine which, if any,

of the attorney-client communications constituted a delegation of Twin City's claims handling function.

- *Dakota, Minn. & Eastern R.R. Corp. v. Acuity*, 2009 S.D. 69, 771 N.W.2d 623.
- *Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, 796 N.W.2d 685.
- *Kaarup v. St. Paul Fire & Marine Ins. Co.*, 436 N.W.2d 17 (S.D. 1989).
- *Arnoldy v. Mahoney*, 2010 S.D. 89, 791 N.W.2d 645.

2. WHETHER THE TRIAL COURT ERRED IN HOLDING TWIN CITY WAIVED THE ATTORNEY-CLIENT PRIVILEGE FOR COMMUNICATIONS IN THE 199 "OTHER" CLAIM FILES WHERE THERE HAS BEEN NO *IN CAMERA* INSPECTION OR EVIDENTIARY FINDING THAT TWIN CITY DELEGATED ITS CLAIMS HANDLING FUNCTION TO OUTSIDE COUNSEL.

The trial court ruled that Twin City waived the attorney-client privilege with respect to all 199 "other" claim files, which were ordered to be produced over objection. The trial court's blanket determination on these otherwise unrelated files was based upon its conclusion that Twin City by implication delegated its claims handling function on each of these claims. The trial court declined to conduct an *in camera* review of the redacted information, did not make factual findings regarding waiver, and denied Twin City's request to submit the disputed materials under seal for purpose of creating a record for appeal.

- *Dakota, Minn. & Eastern R.R. Corp. v. Acuity*, 2009 S.D. 69, 771 N.W.2d 623.
- *Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, 796 N.W.2d 685.
- *Kaarup v. St. Paul Fire & Marine Ins. Co.*, 436 N.W.2d 17 (S.D. 1989).
- *Arnoldy v. Mahoney*, 2010 S.D. 89, 791 N.W.2d 645.

3. WHETHER THE TRIAL COURT MUST ANALYZE WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE UNDER THE RESPECTIVE STATE LAW WHERE EACH OF THE 199 "OTHER" CLAIM FILES AROSE.

Pursuant to the trial court's order requiring production of claim notes for 199 "other" WC claims made in various states, Twin City produced the notes after redacting privileged communications with WC defense counsel. Rather than analyze Andrews'

waiver argument under the state law where each claim arose, the trial court held without analysis or explanation that Twin City waived the privilege. The only materials from the "other" claim files considered by the trial court were three selectively-provided *redacted* pages from a single "other" claim file. The trial court did not consider nor address what law should be applied in determining whether the attorney-client privilege was waived. The court did not conduct an *in camera* inspection of the materials contained in the 199 "other" claim files to ascertain what was contained therein or which States the claims arose. Instead, the trial court applied South Dakota law, finding, through review of three pages of redacted material from a single claim, that Twin City delegated its claim handling to outside counsel and thereby waived the attorney-client privilege for each of the other 199 "other" claim files. The trial could should have conducted an *in camera* review of the *unredacted* claim notes information and made a determination based on the law of the state where the claim arose, whether Twin City waived the privilege for every attorney-client communication in the 199 "other" claim files.

- *Chambers v. Dakotah Charter, Inc.*, 488 N.W.2d 63 (S.D. 1992).
- Restatement (Second) of Conflict of Laws § 139 (1971).

STATEMENT OF THE CASE

Andrews sued Twin City and Ridco in the Circuit Court, Seventh Judicial District, Pennington County on July 27, 2010 for injuries he sustained in 2005 while working at Ridco. (R. at 1-15.) The case is currently pending before The Honorable Wally Eklund and, pursuant to the Order of this Court, is stayed pending the outcome of the present appeal. The lawsuit concerns Twin City's conduct in handling Andrews' WC claim for vocational rehabilitation and disability benefits under a Twin City

insurance policy. (R. 36-63.) Andrews' claim for workers' compensation benefits was resolved before the South Dakota Workers Compensation Board and is not part of the present matter. (R. at 65-75.)

Andrews sought production of an unredacted version of Twin City's claim file, including production of all attorney-client communications. (R. at 2342-2357.) In addition, Andrews moved to compel production of the claim notes—and potentially the complete claim file—from 199 "other" WC claim files from around the country relating to WC claimants that have no connection to the present matter—other than the fact that Andrews' demanded production of their claim file.[2] Twin City produced these materials with the attorney-client communications redacted. Andrews insisted on the right to all attorney-client communications, and filed a motion to compel production.

The trial court held that Twin City waived its right to assert the attorney-client privilege, for both the Andrews claim file and the 199 "other" claim files, stating, without a factual or evidentiary basis, that Twin City delegated its claim handling responsibility and thus, impliedly relied on the "advice of counsel" while adjusting the workers' compensation claims. (R. at 2477; App. at 6.) Twin City is neither explicitly nor impliedly asserting the advice of counsel defense because it has not delegated its claim handling responsibility in *any* of the claims at issue. As this Court's precedent recognizes, the only way for the trial court to know whether Twin City actually delegated its claim handling to WC defense counsel is to review the redactions made

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[2] Twin City's use of the term "claim notes" refers to the contemporaneous diary of activity conducted with respect to a claim, which are proprietary records kept as part of its regular business and in accordance with applicable law. "Claim file," refers to all materials maintained by Twin City for a particular workers compensation claim (*i.e.*, correspondence, medical records, reports, transcripts).

from the attorney-client communications. The trial court's application of a blanket waiver of the attorney-client privilege was not based upon an *in camera* inspection of the disputed materials and there were no evidentiary findings concerning waiver of the attorney-client privilege for the Andrews claim nor the 199 other claims Twin City was compelled to produce.

STATEMENT OF THE FACTS

1. Workers' Compensation Claim

Andrews sustained injuries in the course of his employment as a gold polisher at Ridco. (R. at 66, ¶¶ 1-2.) Andrews' injuries were not the result of a single definitive event; instead, his symptoms gradually increased over the several months leading up to March 2005 due to the repetitive nature of his work, which he had performed since 1988. (*Id.* at ¶ 4.)

On March 7, 2005, Andrews first sought medical treatment for his injuries from Jeanie Lembke, M.D., who released him from work through March 9, 2005. (R. at 66-67, ¶¶ 6, 20.) Dr. Lembke also referred Andrews to Clark Duchene, M.D., an orthopedist. (R. at 66, ¶ 6.) Dr. Duchene diagnosed Andrews with right shoulder injuries and scheduled to see him on an as-needed basis, but did not issue any work restrictions. (R. at 66, ¶ 7; 68, ¶ 23.)

Andrews also sought treatment from chiropractor Patrick Clinch, D.C. on March 21, 2005. (R. at 66, ¶ 8.) Dr. Clinch diagnosed Andrews with a neck and shoulder injury, and completed a radiology report that noted issues in his cervical spine. (*Id.*) In addition, Dr. Clinch determined that Andrews was "totally incapacitated at this time." (R. at 68, ¶ 22.) Dr. Clinch released Andrews to sedentary work on April 4, 2005, and

light duty work on April 18, 2005. (*Id.* at ¶ 23.) On June 6, 2005, Dr. Clinch indicated Andrews' condition was worsening. (R. at 67, ¶ 11.) Following that note, on July 1, 2005, Dr. Clinch returned Andrews' work restrictions back to sedentary. (R. at 68, ¶ 23.) The work restrictions were provided to Ridco and they were able to provide accommodating employment. (R. at 68, ¶ 27.) Dr. Clinch continued to treat Andrews through August 26, 2006. (R. at 67, ¶ 15.)

Twin City referred Andrews to Brett D. Lawlor, M.D. for a consultation with an option to treat. (*Id.* at ¶ 12.) Dr. Lawlor examined Andrews on June 8, 2005, and diagnosed him with neck and arm pain, possible carpel tunnel syndrome, and atypical blackout spells. (*Id.*) At Dr. Lawlor's recommendation, Andrews underwent an MRI that revealed a disc herniation at C7-T1 with some nerve root compression. (*Id.*) Dr. Lawlor completely removed Andrews from work June 8-22, 2005, while awaiting the results of the MRI. (R. at 68, ¶ 24.) Following the MRI, Dr. Lawlor issued a work restriction which provided "max lift 10 lbs.; change position for sitting-stand-walk every 30 minutes, avoid static neck flexion and occasional overhead activity." (*Id.*) On June 24, 2005, Dr. Lawlor revised the work restrictions to remove the 30 minute time limit for changing positions. (*Id.* at ¶ 25.)

Based on Dr. Lawlor's initial work restrictions, Ridco and Twin City determined that Andrews could return to work to perform a box sorting job. (*Id.* at ¶ 27.) Ridco and the case manager wrote Andrews a letter informing him that he could return to work on July 5, 2005, but Andrews did not receive the letter until July 6, 2005. (*Id.*) After receiving the letter, Andrews failed to contact Ridco about the employment and

failed to appear at work. (*Id.* at ¶¶ 28-29.) After failing to contact Ridco or appear for work, Andrews' employment was terminated approximately a week later. (*Id.* at ¶ 28.)

On October 6, 2005, Dr. Lawlor issued a five percent whole person impairment rating.[3] (R. at 67, ¶ 13.) Andrews continued to treat with Dr. Lawlor, who issued three opinion letters—dated November 16, 2005, December 7, 2005, and February 14, 2006—regarding the causation of Andrews' injuries and his continued need for treatment. (R. at 81, ¶ 32.) Twin City exercised its right to conduct an independent medical examination (IME), which occurred on March 30, 2006, by Wayne Anderson, M.D., an occupational physician. (*Id.* at ¶ 14.) As part of the IME, Dr. Anderson reviewed Andrews' medical records and determined that he suffered from work related myofacial pain in his trapezius area. (R. at 69, ¶ 39.) Dr. Anderson determined that no further treatment was necessary after March 6, 2006, for Andrews' neck pain. (*Id.*) Based upon the results of the IME, Twin City discontinued payment for Andrews' continued medical treatment. (R. at 67, ¶ 14.)

On April 11, 2007, Andrews filed an action before the South Dakota Department of Labor, Division of Labor and Management, Workers Compensation Board seeking additional workers' compensation benefits. On October 24, 2007, Andrews began treatment with Stephen Frost, M.D. and Troy Nesbit, M.D. for chronic pain. (R. at 67, ¶ 16.) They began providing Andrews with trigger point injections to treat his pain symptoms. (*Id.*) Drs. Frost and Nesbit continued to treat Andrews for the next fifteen

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[3] For purposes of workers compensation benefits "impairment shall be determined by a medical impairment rating, expressed as a percentage to the affected body part, using the Guidelines to the Evaluation of Permanent Impairment established by the American Medical Association, Sixth Edition, July 2009 reprint." SDCL § 62-1-1.2.

months. (*Id.* at ¶ 17.) Andrews' final treatment with them was on January 30, 2009. (*Id.* at ¶ 19.)

Dr. Anderson conducted a second IME on July 24, 2008, to address whether Andrews' continued pain symptoms were caused by the work-related accident. (*Id.* at ¶ 18.) In his second IME report, Dr. Anderson concluded that Andrews' pain at the time was the result of multi-level degenerative disease of his cervical spine. (R. at 69, ¶ 40.) Dr. Anderson determined that Andrews' injury of March 4, 2005, was not a major contributing cause of Andrews' medical condition as of the date of his second report. (*Id.*) In addition, Dr. Anderson found that the March 4, 2005, injuries were not a major contributing cause of any medical treatment rendered after March 30, 2006. (*Id.*)

During the workers' compensation proceeding, Andrews engaged in substantial discovery. He obtained a complete copy of his claim file, which included all of the materials considered by Twin City in adjusting his workers' compensation claim. (R. at 930.) Additionally, Andrews twice deposed Nicole Heglin, the Twin City adjuster assigned to his claim. (*Id.*)

During the deposition that occurred on September 8, 2010, Andrews asked Heglin a series of questions concerning other claims she adjusted on behalf of Twin City. (R. at 966, ¶ 3.) Counsel for Twin City and Ridco objected to the line of questions and instructed her not to answer them. (*Id.*) Andrews opined that the questions about other claims were appropriate because he was pursuing a claim that Heglin's actions were "vexatious or without reasonable cause" and supported a claim under SDCL § 58-12-3. (R. at 968.) Andrews then filed a certified question to the workers' compensation administrative law judge (ALJ) seeking deposition testimony

and production of all documents related to all other claims Heglin handled on behalf of Twin City. (R. at 966.) In response to the certified question, the ALJ rejected Andrews' attempt to expand discovery, finding that "[n]ot only is [Andrews] involved in a 'fishing expedition', but is unlikely that there are any fish in the pond in which [Andrews] is seeking to fish." (R. at 967.) Following the ruling, Andrews withdrew his attorney fee claim under SDCL § 58-12-3. (R. at 930.)

On April 16-18, 2011, the parties conducted a hearing before the ALJ to resolve whether (1) Andrews' injuries were caused by work related activities; (2) he was entitled to temporary total disability (TTD) or temporary permanent disability (TPD) benefits, if any; and (3) vocational rehabilitation benefits were appropriate.[4] (R. at 65-75) In his April 25, 2012 decision, the ALJ determined that Andrews' 2005 work-related injury was a major contributing factor to his cervical neck pain and continued need for treatment. (R. at 70-71.) However, the ALJ found that Andrews did not establish that all of his injuries were caused by the work-related injury, nor did he prove that his cervical spine condition became chronic as a result of Twin City's denial of WC benefits. (R. at 71.) Based on the conclusion that Andrews' condition was, in part, caused by the work-related injury, the ALJ awarded Andrews a combination of TTD and TPD benefits through October 6, 2005. (R. 71-73.) Finally, the ALJ determined Andrews was entitled to vocational rehabilitation benefits to become a photographer. (R. at 73-75.)

[4] Andrews requested permanent total disability (PTD) benefits as an alternative to vocational rehabilitation benefits.

2. Lawsuit

Andrews filed the present lawsuit against Twin City and Ridco on July 27, 2010, while the proceedings before the Workers' compensation Board were still pending. (R. 1-15.) After the administrative proceedings resolved, Andrews filed an amended complaint on October 30, 2012. (R. at 36-567.) Andrews asserts the following claims in the amended complaint:

- Count I: Common Law Bad Faith against Twin City and Ridco;
- Count II: Aiding and Abetting/Civil Conspiracy (1) To Commit Fraud/Statutory Deceit (SDCL § 20-10-1 *et seq.*) and (2) To Deny First Party Insurance Benefits in Bad Faith against Twin City and Ridco;
- Count III: Fraud/Statutory Deceit (SDCL § 20-10-1 *et seq*.) against Twin City and Ridco; and
- Count IV: Retaliatory discharge (SDCL § 62-1-16) against Ridco.

(R. at 58-62, ¶¶ 87-104.) Twin City has and continues to deny adamantly Andrews' allegations underlying these claims; specifically, that it handled Andrews' claim in bad faith, fraudulently, in a deceitful manner, or that it conspired with Ridco to harm Andrews. (R. at 916-923.) Rather, as reflected by the ALJ decision and the Andrews' claim file, there was a legitimate dispute between the parties regarding the extent of WC benefits Andrews was entitled to under the policy and South Dakota law. (R. at 65-75.)

Andrews' claims against Twin City are based on allegations that Twin City systematically handled workers' compensation claims, including his claim, in bad faith under the "Large Loss Initiative" program (the "Initiative"), or so-called "Million Dollar List." (R. at 49-58, ¶¶ 62-86.) The Initiative originated in 1998 to give extra attention to claims that had reserves in excess of $1 million, either through settlement or other appropriate claim handling measures. *Hammonds v. Hartford Fire Ins. Co.*, 501

F.3d 991, 997 (8th Cir. 2007). This same Initiative was addressed in *Hammonds v. Hartford Fire Ins. Co.*, U.S. District Court for the District of South Dakota, Western Division, Case No. 5:04-cv-05055-RHB, a case brought by Andrews' counsel. The *Hammonds* trial court granted Hartford's motion for summary judgment, finding that the Initiative did not constitute bad faith under South Dakota law. The U.S. Court of Appeals for the Eighth Circuit affirmed the grant of summary judgment on the insured's bad faith claim. *Hammonds*, *supra*. Despite that ruling, Andrews continues to litigate a theory that the Initiative constitutes bad faith claims handling.

Near completion of the Initiative, a single e-mail message dated March 6, 2001, mentions the possibility of conducting a similar review of claims with a $500,000 reserve. (R. at 2098.) Andrews surmises, without evidentiary support, that at an unknown point Twin City extended the Initiative to claims reserved lower than $500,000 and that his WC claim was adjusted pursuant to its protocols—the same protocols approved by the trial and appellate courts in *Hammonds*. (R. at 2097-2100.)

Twin City rejects Andrews' contentions regarding the Initiative. First, Andrews' WC claim was never reserved for more than $322,688, of which $144,896 has been paid. (R. at 949.) This amount does not satisfy even the lower threshold reserve of $500,000. Second, review of the large loss claims subject to the Initiative was completed in approximately 2000. (R. at 2401.) Andrews filed his workers' compensation claim in 2005, five years later. Third, in the *Hammonds* case, the trial and appellate courts rejected the same arguments Andrews is making here, attacking the Initiative as evidence of systematic bad faith handling of workers' compensation claims. (R. at 949.); *see generally Hammonds*, *supra*.

3. Discovery

The discovery sought in this matter by Andrews has been extensive and contentious. Twin City has produced in excess of 60,000 documents in response to Andrews' requests for production, including file materials from workers' compensation claims for other individuals, complete personnel files for eleven Twin City employees (some of whom did not handle Andrews' claim), information about bad faith suits brought against Twin City throughout the United States, public complaints, underwriting materials, and claim handling guidelines. (R. at 2401, fn. 1.) Andrews' discovery requests have been the subject of several discovery motions by both parties.

On May 23, 2012, Andrews served Twin City with Plaintiff's First Set of Requests for Production to Twin City Fire Insurance Company, which included the following requests for production (collectively, "the Requests") at issue in this appeal:

> **REQUEST NO. 26:** Please produce a copy of the Hartford [sic] claim file relating to each and every workers' compensation claim involving Ridco, Inc., or Riddle's employee handled by Nicole Heglin during the course of her employment with the Hartford [sic], regardless of whether such claim involved a South Dakota claimant.
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> * * *
>
> **REQUEST NO. 46:** Please produce any and all documents relating to 'large loss initiative' program files which stem or stemmed from workers' compensation policies issued by Twin City Fire Insurance Company, whether such files were included in the 247 'million dollar' claims included in the initial stage of this program or the unknown number of '$500,000' or smaller claims included in the later stages of this program. The time-frame covered by this request is from the October 1998 hiring date of Mark Deluse (and the subsequent creation of the 'million dollar list' or 'large loss initiative' program) to the present date.

(R. at 2399.) Twin City objected to the Requests on a number of grounds, including to the extent they sought documents protected by the attorney-client privilege. (*Id.*) Based on its objection, Twin City refused to provide any responsive materials containing attorney-client privileged information. (*Id.*)

On November 26, 2012, Andrews filed a 104-page motion to compel production of, among other things, all documents responsive to the Requests. (R. at 571-842.) Twin City responded in opposition to Andrews' motion and also moved for a protective order pursuant to SDCL § 15-6-26 on December 14, 2012. (R. at 925-968.) Twin City reiterated its objections to the Requests and requested that the trial court reject Andrews' demand for all documents. (*Id.*) Andrews replied with an 81-page reply in support of his motion, which reiterated many of the positions already set forth in the pleadings. (R. at 969-1048.) The trial court heard oral argument on the competing motions on December 19, 2012.

On February 11, 2013, the trial court entered an Order on the motions which required Twin City to produce the claim notes for each of Nicole Heglin's other claim files (Request No. 26), and the 247 "large loss initiative" claims (Request No. 46). (R. at 1155, 1160-1161.) The Order did not find, nor otherwise address, whether Twin City was precluded from asserting the attorney-client privilege in any of the materials covered by the Order. In accordance with the Order, Twin City produced the claim notes for 199 of the 247 "large loss initiative" claims, which constituted the files that existed at the time of the Order. (R. at 2399.) Twin City redacted attorney-client privileged communications contained in the claim notes. (*Id.*) With respect to the other

discovery requests specifically pertaining to Andrews' claim file, the trial court's February 11, 2013, Order stated:

> [Twin City] shall provide to the [trial court] … for its *in camera* review the documents regarding which it continues to assert the [attorney-client] privilege. The [trial court] will then make a final determination as to whether some or all such documents are subject to discovery.

(R. at 1142.) Twin City provided those materials to the trial court for *in camera* review in accordance with the Order; however, no ruling was forthcoming.[5]

The trial court conducted a status conference on May 28, 2013. During the conference, the trial court determined that all communications between Twin City representatives and its attorneys that involved the solicitation or rendering of legal advice were privileged and not discoverable. (HT 5.28.13 at 3-5; App. at 13-15.) The trial court entered a second Order dated June 7, 2013, confirming the findings during the status conference. (R. at 1397-1401.) The Order did not, however, make any specific factual findings or otherwise refer to any *in camera* inspection of Andrews' claim file. (*Id.*) In particular, the trial court did not find that Twin City had waived the attorney-client privilege for the Andrews' file based upon its express or implied reliance on South Dakota's "advice of counsel defense" by delegating its claim adjustment duty to outside counsel. (*Id.*) Instead, the Order generally stated:

> "Here, it has not been alleged that Heglin 'completely' delegated her claim handling decisions to outside counsel. Nevertheless, the Supreme Court's reasoning in both *Acuity* and *Berelsen* is applicable. To the extent that Nicole Heglin embedded attorney-client communications going to the factual grounds (i.e., the reasonable basis or lack

[5] The February 11, 2013, Order did not require Twin City to submit the claim notes from the 199 "other" claims for an *in camera* inspection. (R. at 1136-1168.)

> thereof) of her benefits decisions in the claim file's central document (i.e., the activity log), the statutory purpose of which document is to provide a record of the insurer's claim-handling decisions, she 'inject[ed] the attorney's advice into the case.'".

(R. at 1399.) The additional discovery was ordered to be produced by July 31, 2013. (R. at 1631.) Based upon the trial court's Order, Twin City undertook a review of each previously redacted attorney-client privileged communication and un-redacted most—but not all—of the previously redacted attorney-client communications in Andrews' claim file, which it then reproduced on July 31, 2013. (R. at 2399-2402.) Twin City also provided a privilege log. (R. at 1633.)

On July 24, 2013, without waiting for Twin City's production, Andrews moved for sanctions against Twin City pursuant to SDCL § 15-6-37. (R. at 1483-1615.) The motion was based, in large part, upon Andrews' argument that Twin City failed to timely produce the materials in accordance with the June 7, 2013, Order. (*Id.*) The trial court denied Andrews' motion for sanctions in an Order dated September 23, 2013. (R. at 2249.)

On October 22, 2013, Andrews filed a motion to compel which demanded that Twin City be ordered to produce wholly un-redacted claim file notes for Andrews' file and the 199 "other" claim file notes. (R. at 2342-2357.) Andrews argued that he was entitled to production of the attorney-client privileged materials based upon:

> "(i) the facts of the present proceeding;
>
> (ii) SDCL § 58-3-7.4 regarding the legally mandated contents of an insurer's claim file;
>
> (iii) previously briefed generally applicable law pertaining to the status of attorney-client communications included in otherwise discoverable material in bad faith actions,

> particularly where the insurer defendant is (as here) implicitly relying on an 'advice of counsel' defense;
>
> (iv) [the trial court's] February 11, 2013, discovery order; and
>
> (v) [the trial court's] June 7, 2013, order specifically addressing the status of attorney-client communications in the activity logs at issue."

(R. at 2404-2405.) In support of the argument, Andrews provided the trial court with three hand-selected pages of heavily-redacted claim notes—from the *Hammonds* claim file—as anecdotal evidence that given the extent of attorney-client privileged communications removed from these pages, Twin City must be delegating its claim function to outside counsel across the board. (R. at 2374-2376.) Based upon these three pages, Andrews extrapolated that all claim file notes for the remaining 198 files were redacted in a similar fashion and conjectured that Twin City systematically interjected outside counsel's advice into its claim handling function. (R. at 2372-2374.)

The three pages provided by Andrews in support of the motion had been redacted to remove attorney-client communications relating to defense of the WC claims asserted in the *Hammonds* WC litigation. (R. at 2374-2376.) Twin City has and continues to assert that redactions in those three pages were appropriate under the legal framework provided by this Court in that the communications constituted protected legal correspondence, not a delegation of Twin City's claims handling responsibility. An *in camera* inspection of the materials by the trial court would have confirmed Twin City's position.

Twin City opposed Andrews' motion to compel and filed a motion for protective order pursuant to SDCL § 15-6-26. (R. at 2398-2435.) Twin City requested the trial court enter an order that the claim file notes were properly redacted. (R. at 2398-2408.)

At oral argument, on November 5, 2013, Twin City offered to provide all of the redacted materials for an *in camera* inspection—as this Court has suggested is the preferred approach for determining whether a party has waived its right to rely on the attorney-client privilege—so that the trial court could assess the propriety of Twin City's redactions based upon its assertion of the attorney-client privilege. (HT 11.5.13 at 12; App. at 33.) The trial court orally declined Twin City's requests and ruled in favor of Andrews. (HT 11.5.13 at 14; App. at 35.) The trial court entered an Order confirming its rulings on November 14, 2013, without explanation. (R. at 2447; App. at 3.)

Between the time of oral argument and entry of the Order, on November 12, 2013, Twin City filed a motion for reconsideration again requesting that the trial court conduct an *in camera* inspection of the claim file notes and make specific factual findings regarding application of the attorney-client privilege. (R. at 2438-2442.) Alternatively, Twin City requested that the trial court enter an order allowing it to file the disputed material under seal for purposes of appeal. (*Id.*) At oral argument on December 3, 2013, the trial court rejected Twin City's motion for reconsideration and allowed its prior discovery order to stand. (HT 12.3.13 at 16-17; App. at 52-53.) The trial court also refused to permit Twin City to file the disputed materials under seal. (HT 12.3.13 at 17; App. at 53.) Accordingly, Twin City was precluded from making the disputed materials from the 199 "other" files part of the record in this case. The trial court signed an Order dated December 3, 2013, confirming its rulings. (R. at 2447; App. at 6.)

STANDARD OF REVIEW

This Court typically reviews the trial court's rulings on discovery matters under an abuse of discretion standard. *Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, ¶ 57, 796 N.W.2d 685, 704 (review of trial court's grant of a protective order); *see also Weisbeck v. Hess*, 524 N.W.2d 363, 364 (S.D. 1994). "When we are asked to determine whether the [circuit] court's order violated [a statutory privilege], however, it raises a question of statutory interpretation requiring de novo review." *Dakota, Minnesota & Eastern R.R. Corp. v. Acuity ("Acuity")*, 2009 S.D. 69, ¶ 47, 771 N.W.2d 623, 636 (quoting *Maynard v. Heeren*, 1997 S.D. 60, ¶ 5, 563 N.W.2d 830, 833); *see also Arnoldy v. Mahoney*, 2010 S.D. 89, ¶ 13, 791 N.W.2d 645, 652. The attorney-client privilege is based in statute. *See* SDCL § 19-13-3. The issues raised in this appeal implicate the attorney-client privilege and, therefore, must be reviewed de novo.

ARGUMENT

1. The redacted communications in the Andrews and 199 "other" claim files fall within the parameters of the attorney-client privilege and Twin City has followed proper procedure in asserting the privilege.

"Parties may obtain discovery regarding any matter, *not privileged*, which is relevant to the subject matter involved in the pending action." SDCL § 15-6-26(b)(1) (emphasis added). Confidential communications between an attorney and client are privileged, and not subject to discovery:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> (1) Between himself or his representative and his lawyer or his lawyer's representative;
>
> (2) Between his lawyer and the lawyer's representative;

> (3) By him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
>
> (4) Between representatives of the client or between the client and a representative of the client; and
>
> (5) Among lawyers and their representatives representing the same client.

SDCL § 19-13-3. The attorney-client privilege serves the interests of justice by encouraging full and frank communication between an attorney and his client. *Upjohn v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 682, 66 L.Ed.2d 584 (1981); *see also State Highway Comm'n v. Earl*, 82 S.D. 139, 147, 143 N.W.2d 88, 92 (1966) (holding that the purpose of the attorney-client privilege is to encourage a client to communicate freely with counsel without fear of disclosure). Once a communication is deemed to come within the parameters of the attorney-client privilege, courts are loathe to invade that privilege. *See Pinnacle Pizza Co., Inc. v. Little Caesar Enterprises, Inc.*, 627 F.Supp.2d 1069, 1072 (D.S.D. 2007) (citing 8 Charles A. Wright, Arthur R. Miller, & Richard L. Marcus, *Federal Practice & Procedure* § 2017, p. 258 (2d ed. 1994) (describing attorney-client communications as being "zealously protected")).

The party claiming the privilege has the burden of establishing that it exists. *State v. Catch the Bear*, 352 N.W.2d 640, 645 (S.D. 1984). Four elements are required: (1) a client; (2) a confidential communication; (3) the communication was made for the purpose of facilitating the rendition of legal services to the client; and (4) the communication was made in one of the five relationships articulated in SDCL § 19-13-3. *State v. Rickabaugh*, 361 N.W.2d 623, 624-25 (S.D. 1985). Ordinarily, private communications and the work product of an attorney are confidential communications

that are incapable of discovery by an opposing party. *Knecht v. Weber*, 2002 S.D. 21, ¶ 13, 640 N.W.2d 491, 497 (citing SDCL §§ 19-13-2(5), 19-13-3).

The communications at issue here satisfy the requirements necessary to invoke the protections afforded by the attorney-client privilege. The redacted communications constitute legal advice provided by outside counsel to Twin City—and other related insuring entities—concerning WC proceedings filed by individuals seeking WC benefits. As detailed below, an *in camera* inspection would confirm that the redacted materials are attorney-client communications. Andrews does not argue that the redacted content does not contain attorney-client communications. Instead, they challenge Twin City's right to the privilege asserting that by delegating claim handling to outside counsel it has waived the privilege.[6]

Where, as here, a party challenges an assertion that attorney-client communications are protected by the privilege, the preferred procedure for assessing the privilege claim is for the trial court to conduct an *in camera* inspection of the documents. *Arnoldy*, 2010 S.D. 89, ¶ 33, 791 N.W.2d 645, 657; *Maynard*, 1997 S.D. 60, ¶ 28, 563 N.W.2d at 839-40; *see also State v. Cates*, 2001 S.D. 99, ¶ 17, 632 N.W.2d 28, 35-36 (considering the psychologist-patient privilege); *Weisbeck*, 524 N.W.2d at 373 (considering the psychologist-patient privilege). This Court has cautioned that a party asserting the attorney-client must provide the trial court with sufficient information to assess the claim:

> As a starting point, it is clear that ultimately a party asserting privilege must make a showing to justify

[6] The basis of Andrews' argument is that Twin City waived its ability to assert the privilege because it has systematically delegated its claim handing function to outside counsel in an effort to shield otherwise discoverable information.

> withholding materials if that is challenged. The question whether the materials are privileged is for the court, not the party, to decide, and the court has a right to insist on being presented with sufficient information to make that decision. It is not sufficient for the party merely to offer up the document for in camera scrutiny by the court. Ultimately, then, a general objection cannot suffice for a decision by a court although it may suffice for a time as the parties deal with issues of privilege in discovery.

Acuity, 2009 S.D. 69, ¶ 48, 771 N.W.2d at 636-37 (citing 8 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2016.1 (2009)). In effect, the party claiming the protection of the privilege must submit a privilege log and offer the documents for *in camera* inspection. *Acuity*, 2009 S.D. 69, ¶ 47, 771 N.W.2d at 637. The trial court must then make factual findings concerning application of the attorney-client privilege based upon its *in camera* inspection. *Arnoldy*, 2010 S.D. 89, ¶ 34, 791 N.W.2d at 657.

In this case, Twin City followed the procedures outlined by this Court: it redacted the privileged materials, prepared and produced a privilege log, and offered the materials for *in camera* inspection. Twin City submitted the entire Andrews claim file to the trial court so it could review the redactions, but it has not made any evidentiary findings regarding Twin City's assertion of the privilege. With respect to the 199 "other" claim files, Twin City offered to provide the materials for *in camera* inspection—even going so far as to offer to file the materials under seal for purposes of appeal. The trail court declined Twin City's invitation to provide the disputed materials, including under seal, which has significantly inhibited its ability to create an appropriate record for purposes of appeal.

Aside from the three largely blank pages of redactions proffered by Andrews, the trial court did not review the materials or make any specific findings regarding Twin

City's claim of privilege. Rather than following the procedure outlined in *Acuity* and its progeny, the trial court determined there was a blanket waiver of attorney-client privileged communications and ordered all materials be produced. The trial court erred in this case by failing to review the documents *in camera* and to make specific factual findings regarding application of the attorney-client privilege.

2. Twin City has not waived the attorney-client privilege by delegating its claim handling function and relying solely on the "advice of counsel" on Andrews' claim nor any of the 199 "other" claims.

The trial court, without evidentiary or legal support, applied a blanket waiver of the attorney-client privilege in the Andrews' claim, along with all 199 "other" claim notes at issue here. The evidence of record does not support any waiver, let alone a blanket waiver, nor does it support a finding that Twin City delegated its claim handling function and thus, impliedly relied upon the advice of counsel. The trial court's finding of a blanket waiver, without conducting an *in camera* inspection or allowing Twin City to submit the claim notes from the 199 "other" claim files under seal, was in error.

The attorney-client privilege is personal to the client and may only by waived by the client or through its attorney. SDCL § 19-13-4; *Catch the Bear*, 352 N.W.2d at 645. The party asserting waiver bears the burden of establishing that the attorney-client privilege was waived. *Catch the Bear*, *supra* (citing *Hogue v. Massa*, 80 S.D. 319, 325, 123 N.W.2d 131, 134 (1963)). To find the privilege was waived, the record must "demonstrate that [the client] impliedly or explicitly consent to his attorney waiving the attorney-client privilege on his behalf." *Rickabaugh*, 361 N.W.2d at 625.

The specific basis for the waiver advanced by Andrews is that Twin City impliedly waived the attorney-client privilege in this and all other matters because it relies on the advice of WC counsel to reach a coverage determination, effectively

delegating its claim handing function to outside counsel. Andrews asserts that Twin City used outside WC counsel in a concerted effort to shield claim handling communications under the attorney-client privilege—a charge Twin City denies adamantly. If the trial court conducted a review of the redacted claim notes, it would be apparent that Twin City retains WC counsel to defend its insureds when claimants initiate WC proceedings and not for purposes of handling a claim. Indeed, the only way to know whether Twin City used counsel to make its coverage and claim determinations and thereby waived its attorney-client privilege was to review the redacted claim notes. The trial court's ruling, without conducting a review of the disputed materials, finds no legal support in this Court's precedent. The finding of an across-the-board waiver provides Andrews with carte blanche review of attorney-client communications contained in 200 claim files, which invades the near-sacrosanct protection afforded by the attorney-client privilege.

The "advice of counsel" exception to the attorney-client privilege applies "[w]hen a party asserts reliance upon the advice of counsel as an essential element of his defense." *Kaarup v. St. Paul Fire & Marine Ins. Co.*, 436 N.W.2d 17, 21 (S.D. 1989). Although it is recognized as an exception, the advice of counsel defense does not waive the attorney-client privilege with respect to all communications concerning the matter for which counsel's advice was sought. *Id*. Instead, the advice of counsel defense *only* waives the privilege "to the extent necessary to reveal the advice given by an attorney that is placed in issue by the defense of advice of counsel." *Id.*.; *see also Acuity*, 2009 S.D. 69, ¶ 56, 771 N.W.2d at 638 ("[W] here an insurer unequivocally delegates its initial claims function and relies *exclusively* upon outside counsel to

conduct the investigation and determination of coverage, the attorney-client privilege does not protect such communications." (emphasis in original)).

This Court has adopted the following criteria to determine whether a party impliedly waived the attorney-client privilege by relying on the advice of counsel to reach a coverage determination:

> (1) assertion of the privilege was a result of some affirmative act, such as filing suit [or raising an affirmative defense], by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and, (3) application of the privilege would have denied the opposing party access to information vital to his defense. … "[W]here these three conditions exist, a court should find that the party asserting [the] privilege has impliedly waived it through his affirmative conduct." … Because it balances the need for discovery with the importance of maintaining the privilege ….

Bertelsen, 2011 S.D. 13, ¶ 50 (quoting *Hearn v. Rhay*, 68 F.R.D. 574, 581 (E.D. Wash. 1975) (citations omitted)). This Court has supplemented the *Hearn* test, however, to further emphasize the importance of the attorney-client privilege:

> First, the analysis of this issue should begin with a presumption in favor of preserving the privilege. Second, a client only waives the privilege by expressly or impliedly injecting his attorney's advice into the case. A denial of bad faith or an assertion of good faith alone is not an implied waiver of the privilege. … "Rather, the issue is whether [the insurer], in attempting to demonstrate that it acted in good faith, actually injected its reliance upon such advice into the litigation." … The key factor is reliance upon the advice of his attorney. … Finally, a client only waives the privilege to the extent necessary to reveal the advice of counsel at issue.

Bertelsen, 2011 S.D. 13, ¶ 53, 796 N.W.2d at 703 (internal citations omitted).

Andrews has failed to satisfy his burden to establish Twin City waived the attorney-client privilege. Twin City has never exclusively relied upon—expressly or

impliedly—the advice of counsel to investigate and make a coverage determination in Andrews' WC claim. By extension, Twin City does not rely on the advice of counsel as a defense to Andrews' bad faith allegations. There is no evidence to support that Twin City delegated its claim adjustment function to outside counsel or relied on outside counsel to make a coverage determination; instead, it has simply denied it acted in bad faith while adjusting Andrews' claim, which is not sufficient to find waiver. *See Bertelsen*, *supra*. In fact, in its June 7, 2013, discovery order the court found that the advice of counsel waiver did not apply to Andrews' claim file, expressly stating, "it has not been alleged that [Twin City adjuster Nicole] Heglin 'completely' delegated her claim handling decisions to outside counsel." *See Acuity*, *supra*. Indeed, Twin City retained counsel on behalf of its insured, Ridco, in order to defend Andrews' claims for workers' compensation benefits he initiated before the South Dakota Workers' Compensation Board. The attorney-client communications relating to the proceedings before the Workers' Compensation Board, which is what has been redacted from Andrews' claim file, are protected under the privilege. Andrews' arguments otherwise are based solely upon speculation, conjecture, and unconfirmed hypotheses, which are not sufficient to carry his burden to establish Twin City waived the privilege. Despite that, the trial court ruled that Twin City must produce attorney-client privileged materials.

Furthermore, the trial court's failure to adhere to the procedure outlined by this Court's precedent means the record lacks support to find Twin City waived the privilege. In particular, the trial court failed to conduct an *in camera* review and make findings that specific communications constituted claims adjustment activities as

opposed to legal advice. Instead, it based its decision of waiver upon three selectively-provided pages of material containing redactions of attorney-client communications. The record is devoid of any factual findings to support Twin City waived the attorney-client privilege with respect to *any* of the redacted communications. Without conducting an *in camera* inspection and making specific findings, the trial court's blanket application of waiver of the attorney-client waiver cannot stand.

a. Andrews is not entitled to the attorney-client privileged communications contained in the 199 "other" claim files.

The claim notes for the 199 "other" WC claims relate to distinct claimants, insureds, issues, and insurance policies that span a period of more than a decade and originated in numerous jurisdictions across the United States. The claim files address a diverse set of legal and factual issues wholly distinct from Andrews' claim, which Twin City was compelled to produce over objection. Despite Andrews' repeated assertions otherwise, Twin City has not interjected into this case *any* advice obtained from *any* outside counsel in *any* of the 199 "other" files. Under the standards issued by this Court, which are addressed in detail above, Twin City has not waived the attorney-client privilege for any of these files based upon an advice of counsel defense.

The trial court declined to permit Twin City the opportunity to submit the redacted materials for *in camera* inspection, or for purposes of this appeal. As a result, the disputed materials are not part of the record in this matter. Without reviewing the materials, the trial court has not made any specific factual finding that Twin City substituted the work of outside counsel in any of the 199 "other" files for its adjusting function in this or any other case. Absent review of the material or specific findings

concerning waiver, the trial court's conclusion that Twin City waived the attorney-client privilege cannot stand.

b. SDCL § 58-3-7.4 does not provide a basis for waiver of the attorney-client privilege.

In support of his waiver argument, Andrews cites SDCL § 58-3-7.4, which sets forth an insurance company's requirements for maintaining proper claim files:

> Each insurer's claim files for policies or certificates are subject to examination pursuant to chapter 58-3 by the director of insurance. To aid in the examination:
>
> (1) The insurer shall maintain claim data that is accessible and retrievable for examination. An insurer shall be able to provide the claim number, line of coverage, date of loss, and date of payment of the claim, date of denial, or date closed without payment. This claim data shall be available for all open and closed files for five years;
>
> (2) Detailed documentation shall be contained in each claim file in order to permit reconstruction of the insurer's activities relative to each claim;
>
> (3) Each relevant document within the claim file shall be noted as to date received, date processed, or date mailed. Dated correspondence is sufficient to document the date mailed for the purposes of this subdivision;
>
> (4) For those insurers that do not maintain hard copy files, claim files shall be accessible from a computer, microfilm, Cathode Ray Tube (CRT), micrographics, or other similar electronic means and be capable of duplication to hard copy; and
>
> (5) Claim information obtained in a telephone conversation or personal interview with any source which is used in the claim determination shall be documented in the claim file.

Andrews argues that Twin City's redaction of attorney-client privileged materials renders the claim files non-compliant with this statute. The statute does not speak one way or another to the issue of whether, when, or how an insurance company may waive

the attorney-client privilege, nor does it address whether an insurance company may summarize or detail attorney-client correspondence in its claim file. Importantly, the statute also does not suggest that by keeping detailed documentation in the claim file, as required, an insurer loses all protection of the attorney-client privilege.

SDCL § 58-3-7.4 simply sets forth an insurance company's obligation to maintain a complete claim file. It does not provide a private party with the ability to enforce or seek a remedy under its provisions. The issue presented here—namely, whether Twin City waived the attorney-client privilege—is adjudged under the statutes and case law detailed above. SDCL § 58-3-7.4 is inapposite and Andrews' reliance upon it should be rejected.

3. Any argument that the attorney-client privilege was waived in the 199 "other" claim files must be analyzed under the applicable state law governing the workers' compensation claim.

The proper legal analysis of whether Twin City waived the attorney-client privilege with respect to the 199 "other" claim files should be conducted pursuant to the state law governing the claim file. South Dakota has not addressed the issue presented here. The importance of the attorney-client privilege and unique jurisprudence developed in each state, warrants application of each state's law particularly where South Dakota—in the context of the Andrews' case— has no connection to communications addressed in the 199 "other" claim files that originated in other jurisdictions.

This Court has adopted the "most significant relationship" test outlined in the Restatement (Second) of Conflicts of Laws to determine choice of law issues in tort claims. *Chambers v. Dakotah Charter, Inc.*, 488 N.W.2d 63, 67 (S.D. 1992) (adopting Restatement (Second) of Conflict of Laws §§ 6, 145 (1971)); *see also Buhrenn v.*

Dennis Supply Co., 2004 S.D. 91, 685 N.W.2d 778 (applying the "most significant relationship" test); *Rothluebbers v. Obee*, 2003 S.D. 95, ¶ 21, 668 N.W.2d 313, 321 (emphasizing that "these contacts are to be evaluated according to their relative importance with respect to the particular issue"). The Restatement contains a similar provision addressing choice of law issues regarding assertion of a privilege:

> (1) Evidence that is not privileged under the local law of the state which has the most significant relationship with the communication will be admitted, even though it would be privileged under the local law of the forum, unless the admission of such evidence would be contrary to the strong public policy of the forum.
>
> (2) Evidence that is privileged under the local law of the state which has the most significant relationship with the communication but which is not privileged under the local law of the forum will be admitted *unless there is some special reason why the forum policy favoring admission should not be given effect*.

Restatement (Second) of Conflict of Laws § 139 (1971) (emphasis added). The Restatement applies to the attorney-client privilege. Id., cmt. b. These provisions establish that the privileged communications in the 199 other claim files must be reviewed by application of the state law where the communication occurred.

Initially, the state where the communication occurred has the most significant relationship to the disputed assertion of the attorney-client privilege. "The state which has the most significant relationship with a communication will usually be the state where the communication took place." *Id*., cmt. e. Here, the communications at issue took place in the state where the individual claims were pending. Aside from the trial court compelling production of these other claims in Andrews case, the communications have *no* connection to South Dakota. Accordingly, the state with the "most significant relationship" to the disputed communication is the state where the claims were pending,

and its law on the issue of waiver of the attorney-client privilege should be considered in analyzing the appropriateness of Twin City's redactions.

There also is a "special reason" to apply the law of the state where the claim was pending, as opposed to South Dakota law. The Restatement articulates the following factors when considering whether there is a "special reason":

> Among the factors that the forum will consider in determining whether or not to admit the evidence are (1) the number and nature of the contacts that the state of the forum has with the parties and with the transaction involved, (2) the relative materiality of the evidence that is sought to be excluded, (3) the kind of privilege involved and (4) fairness to the parties.

Id., cmt. e. Each of these factors supports a finding that South Dakota law should not be applied.[7] First, South Dakota has no connection to the disputed communications aside from Andrews' attempt to convert this case about how Twin City handled Andrews' claim into an indictment against Twin City and any affiliated company's handling of all WC claims. Second, the attorney-client communications from these other files are not relevant or material to whether Twin City handled Andrews' workers' compensation claim improperly. Third, general notions of fairness dictate that the communications be adjudged under the state law where they were made. Any different ruling may lead to disparate outcomes concerning the admissibility and discoverability of attorney-client communications.

CONCLUSION

Appellant Twin City respectfully requests that this Court find that the trial court erred as a matter of law in finding that Twin City impliedly waived the attorney-client

[7] Twin City's argument does not apply to the extent any of the 199 "other" claims originated in South Dakota.

privilege with respect to Andrews' claim file and the 199 "other" claim file notes. Twin City has not waived the attorney-client privilege by expressly or impliedly relying on the advice of counsel when handling Andrews' WC claim or as a defense to his bad faith claims, and it should not be required to reveal legal advice it received from its outside counsel regarding Andrews' WC claim. Further, there has been no evidentiary showing that Twin City waived the attorney-client privilege in the 199 "other" claim file notes—particularly, when the issue of waiver is asserted in an unrelated matter. Andrews has failed to provide, and there has been no evidentiary finding that would justify piercing the vital protection provided by the attorney-client privilege.

Furthermore, the trial court erred by failing to conduct an *in camera* review of the attorney-client privileged materials, which this Court has described as the appropriate procedure for analyzing such claims. The trial court also refused Twin City's invitation to submit the disputed materials under seal in order to create a complete record. Twin City followed the procedure outlined by this Court to assert the privilege: it redacted the subject communications, prepared a privilege log outlining the basis for the redactions, and offered the redacted materials for an *in camera* inspection to determine whether the claim of privilege was proper. The redacted communications fall within the parameters of the attorney-client privilege based upon this Court's prior holdings. Any determination that the privilege has been waived, however, must be based upon the trial court's specific factual findings following an *in camera* inspection. This Court should permit Twin City to file the disputed materials to this Court for an *in camera* inspection to determine whether Twin City's redactions were proper. Alternatively, the Court should Order the trial court to conduct an *in camera* inspection

of the redacted communications and make specific findings regarding whether the redacted communications are protected by the attorney-client privilege.

Finally, any analysis of the attorney-client privilege communications in the 199 "other" claim files, must be conducted pursuant to the state law governing each claim file. The other states have the "most significant relationship" with each communication, and the Restatement instructs application of the law of the state where the communication occurred. If necessary, this Court should require that the trial court apply the law of the state where the file originated in making specific findings concerning waiver of the attorney-client privilege in the 199 "other" files.

REQUEST FOR ORAL ARGUMENT

Appellant Twin City Fire Insurance Company respectfully requests oral argument in this case.

Respectfully submitted this 28th day of April, 2014.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellant's Brief complies with the type volume limitation provided for in South Dakota Codified Laws. This Appellant's Brief, including footnotes, contains 8,524 words. I have relied upon the word count of our word processing system as used to prepare this Appellant's Brief. The original Appellant's Brief and all copies are in compliance with this rule.

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CERTIFICATE OF SERVICE

I certify that on April 28, 2014, I e-mailed a true and correct copy of the foregoing Appellant's Brief to the following at their last-known e-mail addresses:

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APPENDIX

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

Appeal No. 26891

TIMOTHY ANDREWS,

Plaintiff/Appellee

vs.

RIDCO, INC.,

Defendant,

and

TWIN CITY FIRE INSURANCE COMPANY and
HARTFORD FINANCIAL SERVICES GROUP, INC.

Defendants/Appellants

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

The Honorable Wally Eklund
Circuit Court Judge

Petition for Intermediate Appeal filed December 6, 2013

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

Pursuant to South Dakota Codified Laws (hereafter, "SDCL") § 15-26A-61, and on the basis of the facts, legal authority, and reasoning set forth below, Plaintiff-Appellee Timothy Andrews ("Plaintiff", "Andrews", or "Timothy Andrews") submits this *Appellee's Brief* opposing the relief sought on appeal by Defendant-Appellant Twin City Fire Insurance Company ("the Hartford"[1]) from the trial court's November 15 and December 6, 2013, discovery orders.

PRELIMINARY STATEMENT

The reference conventions herein follow those established in *Appellant's Brief*. The Appendix submitted concurrently with this brief is formatted as a continuation of the Appendix accompanying *Appellant's Brief*. Citations to documents in the record are typically to first page only, e.g., "(R. at 36)" or "(R. at 2447; App. at 1)", although pinpoint citations are used where potentially helpful, e.g., "(R. at 293; App. at ___; *Findings and Conclusions* at 10, ¶ 54)".

JURISDICTIONAL STATEMENT

The South Dakota Supreme Court has granted the Hartford's petition for appeal under SDCL §§ 15-26A-3(6) and 15-26A-6, which together permit appeal of an intermediate order at the discretion of this Court, but *only* where a petition for such appeal is filed within "thirty days after the . . . order shall be signed, attested, filed and written notice of entry thereof shall have been given to the adverse party." This Court, thus, has no jurisdiction over an untimely appeal. *Smith v. Rustic Home Builders, LLC*, 2013 SD 9, ¶ 5, 826 N.W.2d 357, 359; see also, *Johnson v. Lebert Construction, Inc.*,

[1] Two Hartford defendants are named in the present proceeding. Where a reference is intended to one but not the other, the intended party is identified by its full legal name, e.g., "Twin City Fire Insurance Company" or "Hartford Financial Services Group, Inc."

2007 S.D. 74, ¶ 4, 736 N.W.2d 878, 879 ("[t]he appellate jurisdiction of [the Supreme] Court will not be presumed but must affirmatively appear from the record").

The Hartford asserts that the issues raised in its appeal stem from two orders filed with the clerk of court on November 15 and December 6, 2013, respectively. (*Appellant's Brief* at 1.) The December 6 order (R. at 2477; App. at 4), however, imposes no new substantive obligations on the Hartford; it is simply a denial of the Hartford's motion to reconsider the November 15 order (R. at 2447; App. at 1).

This point matters, because it means that the substantive obligations from which the Hartford here seeks relief *must* have arisen from the November 15, 2013, order, or, *jurisdictionally*, they cannot be raised at all on *intermediate* appeal. That is, if they were not imposed by the November 15, 2013, order, but rather by an *earlier* order, then, so far as those substantive obligations are concerned, the Hartford's December 6, 2013, petition for intermediate appeal was untimely.

In fact, the essential obligations from which the Hartford here seeks relief were *not* imposed by *either* of the orders from which the Hartford timely petitioned for intermediate appeal, but rather by a pair of *much* earlier discovery orders – the first entered on February 13, 2013 (R. at 1172) and the second entered on June 10, 2013 (R. at 1397) – in regard to which the time for filing a petition for an intermediate appeal had run *long* before the Hartford filed its December 6, 2013, Petition for Intermediate Appeal.[2]

Pursuant to the earlier of those orders, the trial court instructed the Hartford to produce, *inter alia*, the claim file for Timothy Andrews' workers' compensation claim (R. at 1136; *Order* at 6-7) and the 'other claim' activity logs (R. at 1136; *Order* at 17-20).

Four months later, on June 10, 2013, the trial court issued a follow-up order, more specifically articulating the pertinent requirements of the February 13 order:

> Generally speaking, private communications between an attorney and client are confidential, not subject to discovery by the opposing party in the course of litigation. *Knecht v. Weber*, 2002 SD 21, ¶ 13, 640 N.W.2d 491, 497. However, under South Dakota law, statutory privileges are to be construed strictly in order "to avoid suppressing otherwise competent evidence." *State v. Catch The Bear*, 352 N.W.2d 640, 645 (S.D. 1984). The requirements of S.D.C.L § 58-3-7.4 further complicate the status of attorney-client communications embedded in a claim file.
>
> Pursuant to 58-3-7.4, an insurer is required to maintain "[d]etailed documentation . . . in each claim file [sufficient] to permit reconstruction of the insurer's activities relative to each claim." Thus, where a plaintiff in a bad faith action alleges that a defendant insurer's denial or termination of the plaintiff's claim for insurance benefits lacked a reasonable basis, *and* the insurer denies such allegation, the contents of the claim file are placed directly at issue.
>
> In the present bad faith proceeding, where the central facts at issue are (i) whether the Hartford had any reasonable basis for denying and/or terminating Timothy Andrews' claims for workers' compensation benefits and (ii) whether the Hartford acted with knowledge (or reckless disregard) as to the lack of any such reasonable basis (see, *Sawyer v. Farm Bureau Mut. Ins. Co.*, 2000 SD 144, ¶ 18, 619 N.W.2d 644, 649), Plaintiff argues that any attorney-client communications contained in the claim file's activity log which go to the factual grounds (i.e., the existence or non-existence of a 'reasonable basis' for Nicole Heglin's decisions to terminate and/or deny benefits) are non-privileged communications.
>
> Plaintiff alleges that the claim file, in the redacted form thusfar produced, does not set forth legally adequate grounds to support the Hartford's denials and/or terminations of Timothy Andrews' claims for workers' compensation benefits. Plaintiff argued at hearing that, to the extent the attorney-client communications contained in the activity log go to the alleged grounds for Hartford adjuster Nicole Heglin's denials and/or terminations of the benefit claims at issue in the underlying Department of Labor benefits proceeding, they are not privileged.
>
> The Court agrees. In *Dakota, Minnesota & Eastern Railroad Corp. v. Acuity*, 2009 SD 69, ¶ 56, 771 N.W.2d 623, 638-39, the South Dakota Supreme Court held that, where an insurer "completely delegated its claims function to outside counsel . . . the attorney-client privilege does not protect such communications." It went on to note that "[a] contrary holding would permit an insurer to insulate its

[2] In the trial court documents quoted extensively in this *Appellee's Brief*, references to the February 13 and June 10, 2013, orders are frequently to those orders' dates of issuance or filing, rather than dates of entry.

> claims handling process from any disclosure or review by simply delegating the claims process to its attorneys and asserting privilege." *Id.* at ¶ 57, 639. Two years later, in *Bertelsen v. Allstate Insurance Co.*, 2011 SD 13, ¶ 53, 796 N.W.2d 685, the South Dakota Supreme Court, *again* writing *specifically* about an insurer's assertion of the privilege, further held that an insurer need not expressly assert the advice-of-counsel defense in order to have effectively waived attorney-client privilege. Such insurer "waives the privilege by expressly *or impliedly* injecting [its] attorney's advice into the case." (Emphasis added) *Id.* The key factor is the insurer's reliance on the advice of its attorney. *Id*.
>
> Here, it has not been alleged that Heglin 'completely' delegated her claim handling decisions to outside counsel. Nevertheless, the Supreme Court's reasoning in both *Acuity* and *Bertelsen* is applicable. To the extent that Nicole Heglin embedded attorney-client communications going to the factual grounds (i.e., the reasonable basis or lack thereof) of her benefits decisions in the claim file's central document (i.e., the activity log), the statutory purpose of which document is to provide a record of the insurer's claim-handling decisions, she "inject[ed] the attorney's advice into the case." See, *Bertelsen* at ¶ 53.
>
> It does not matter whether the attorney-client communications were embedded by the Hartford in the claim file for the purpose of "insulat[ing] its claims handling process from any disclosure or review" (see, *Acuity* at ¶ 57, 639) or whether embedding such communications merely had the effect of insulating the claim handling process. Pursuant to SDCL 58-3-7.4, and to the extent necessary to ascertain the factual grounds (or, lack thereof) supporting Heglin's denials and/or terminations of Timothy Andrews' claims for workers' compensation benefits, attorney-client communications embedded in the claim file's activity log are not privileged and are subject to discovery.
>
> This is the standard the Court will apply to its *in camera* review of the Andrews activity log. The same standard applies to attorney-client communications contained in the 'other claim' activity logs falling within the scope of the February 11, 2013, order and, accordingly, it is hereby ORDERED that such standard be applied by the Hartford in its decisions as to appropriate redactions of attorney-client communications embedded in such 'other claim' activity logs.

(R. at 1397; *6/10/13 Order* at 1-4.) Thus, pursuant to the June 10, 2013, order, the Hartford was given the opportunity to determine for itself which redactions might need be restored in order to permit one to 'ascertain the factual grounds (or, lack thereof) supporting [the Hartford's] denials and/or terminations of [a claimant's] [benefits] claims'.

However, in the *five months* between June 10 and November 15, 2013, the Hartford made only the most minimal of modifications to the Andrews activity log redactions, *and not a single modification to the redactions of any of the 'other claim' logs*. Ultimately, it was this continuing refusal to comply with the terms of the June 10, 2013, order which led the trial court to order the restoration of *all* attorney-client communications to *all* of the activity logs. (R. at 2447, App. at 1.)

There is no doubt that this *new* obligation is properly before this Court on intermediate appeal. However, the issue at hand with regard to it is simply this: Whether the trial court, in imposing such a sanction, exceeded its discretionary powers under SDCL § 15-6-37(b)(2), which provision authorizes a trial court to "make such orders in regard to [a] failure [to obey an order compelling discovery] *as are just*" (emphasis added).[3]

STATEMENT OF LEGAL ISSUES

The issues as stated by the Hartford are:

I. WHETHER TWIN CITY'S ATTORNEY-CLIENT COMMUNICATIONS REGARDING THE ANDREWS CLAIM ARE PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE WHERE TWIN CITY DID NOT DELEGATE ITS CLAIM HANDLING FUNCTION TO OUTSIDE COUNSEL.

The trial court held in the negative.

- *Bertelsen v. Allstate*, 2011 SD 13, 796 N.W.2d 685.
- *DM&E v. Acuity*, 2009 SD 69, 771 N.W.2d 623.
- SDCL § 58-3-7.4.

[3] See, *Maynard v. Heeren*, 1997 SD 60, ¶ 5, 563 N.W.2d 830, 833 ("a trial court's rulings on discovery matters [are reviewed] under an abuse of discretion standard").

II. WHETHER THE TRIAL COURT ERRED IN HOLDING TWIN CITY WAIVED THE ATTORNEY-CLIENT PRIVILEGE FOR COMMUNICATIONS IN THE 199 "OTHER" CLAIM FILES WHERE THERE HAS BEEN NO *IN CAMERA* INSPECTION OR EVIDENTIARY FINDING THAT TWIN CITY DELEGATED ITS CLAIM HANDLING FUNCTION TO OUTSIDE COUNSEL.

The trial court held in the negative.

- *Arnoldy v. Mahoney*, 2010 SD 89, 791 N.W.2d 645.
- *DM&E v. Acuity*, 2009 SD 69, 771 N.W.2d 623.
- *Hurley v. State Farm Mut. Auto. Ins. Co.*, 2012 U.S. Dist. LEXIS 63602 (U.S.D.C. D.S.D.).
- *Veith v. O'Brien*, 2007 SD 88, 739 N.W.2d 15.

III. WHETHER THE TRIAL COURT MUST ANALYZE WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE UNDER THE RESPECTIVE STATE LAW WHERE EACH OF THE 199 "OTHER" CLAIM FILES AROSE.

The trial court held in the negative.

STATEMENT OF THE CASE AND FACTS

I. THE DEPARTMENT OF LABOR'S *DECISION* AND *FINDINGS OF FACT AND CONCLUSIONS OF LAW* ARE RES JUDICATA IN THE PRESENT PROCEEDING.

A significant portion of the factual record in this case comes from the underlying Department of Labor ("DOL") proceeding, wherein the DOL made detailed findings of fact in both its April 25, 2012, *Decision* (R. at 65; App. at 55) and its July 13, 2012, *Findings of Fact and Conclusions of Law* ("*Findings and Conclusions"*) (R. at 76; App. at 66). Those findings have special status in the present proceeding.

"An unappealed administrative decision becomes final and should be accorded res judicata effect." *Jundt v. Fuller*, 2007 SD 62, ¶ 12, 736 N.W.2d 508, 513. "Res judicata prevents the relitigation of a claim or issue that was 'actually litigated or which could have been properly raised.'" *DM&E v. Acuity*, 2006 SD 72, ¶ 15, 720 N.W.2d 655, 660, (quoting *Nelson v. Hawkeye Ins. Co.*, 369 N.W.2d 379, 380 (S.D. 1985)). "A judgment

which bars a second action upon the same claim extends not only to every matter offered and received to sustain or defeat the claim or demand but also to all other admissible matters which might have been offered to the same purpose." *Id.* at ¶ 16.

The DOL's findings are thus conclusive, *both* as to matters 'actually litigated' *and* as to matters 'which could have been properly raised'. Accordingly, the *Decision* and the *Findings and Conclusions* are both included, in their entirety, in Plaintiff's concurrently filed continuation of the Appendix.

II. TIMOTHY ANDREWS' WORK-RELATED INJURY, WORKERS' COMPENSATION CLAIM, AND THE DOL PROCEEDING.

Timothy Andrews suffered a work-related injury on March 4, 2005, while employed by Ridco, Inc. ("Ridco") as a jewelry polisher. (R. at 76; App. at 66; *Findings and Conclusions* at 1, ¶¶ 1-3.) Despite initially paying Andrews' medical treatment costs and temporary disability benefits, the Hartford soon acted to terminate all benefits and medical treatment rights. (See, R. at 76; App. at 66; *Findings and Conclusions* at 3, ¶¶ 15-16, at 5, ¶¶ 27-29, and at 7, ¶ 37). Timothy Andrews' petition for benefits was heard by the DOL on August 16-18, 2011 (R. at 65; App. at 55; *Decision* at 1).

The DOL ruled in Timothy Andrews' favor, deciding that Andrews was entitled to (i) resumption of his right to medical treatment (R. at 65; App. at 55; *Decision* at 7), (ii) payment of past medical expenses (R. at 76; App. at 66; *Findings and Conclusions* at 11, ¶ 62), (iii) payment of past temporary disability benefits (R. at 76; App. at 66; *Findings and Conclusions* at 11, ¶¶ 65-74), and (iv) payment of vocational rehabilitation benefits (R. at 76; App. at 66; *Findings and Conclusions* at 13-14, ¶¶ 75-80).

III. THE BACKGROUND OF THE PRESENT PROCEEDING.

A. The Summary of Claim File

Within the matter of a few days after the September 10, 2010, filing of the original *Complaint* (R. at 2) in the present proceeding, the Hartford indicated it would file a motion to dismiss under SDCL § 15-6-9(b) unless Plaintiff agreed to amend its complaint to allege with greater particularity "who, when, where, or how the alleged fraud was committed."[4] Plaintiff agreed, but did not refile immediately.

In late 2012, after the time for appeal of the DOL rulings had passed Plaintiff filed his *Amended Complaint* (R. at 36); and, pursuant to the above-referenced agreement with the Hartford, alleged his claims therein with greater particularity, in part by using a system of bracketed, numeric citations to integrate into the *Amended Complaint* three detailed exhibits.

The first exhibit consisted of the DOL's *Decision* and *Findings and Conclusions*; the second exhibit included a working document, titled *Summary of Claim File – With Analysis* ("*Summary of Claim File"*), which details Plaintiff's understanding of the Hartford's handling of Timothy Andrews' claim for workers' compensation and identifies "at least **46 discrete acts** of claim handling misconduct, which total includes at least **12 instances** of confirmed or likely affirmative falsification of the claim file" (emphasis in original). (R. at 293; App. at 94; *Summary of Claim File* at 3-4.)

Like the DOL's *Decision* and *Findings and Conclusions*, the *Summary of Claim File* is an important part of the record the trial court had available to it when it made the rulings now at issue. Accordingly, it is included in the Appendix at 94.

B. The Hammonds Claim/The "Million Dollar List"

The third exhibit to the *Amended Complaint* relates to the Eighth Circuit's opinion in *Hammonds v. Hartford Fire Insurance Company*, 501 F.3d 991 (8th Cir. 2007), a South Dakota case involving a Hartford claim-handling program known as the "Million Dollar List". The *Hammonds* material was included because it documents two important facts: (1) the abusive claim-handling practices employed by the Hartford in its handling of Timothy Andrews' claim were closely similar to those employed by the Hartford in its handling of the "Million Dollar List" claims and (2) some of the very same Hartford claim department personnel involved in handling and supervising "Million Dollar List" program claims were also involved in the handling of Timothy Andrews' claim (despite the fact that the Hammonds claim arose from a Hartford Fire Insurance Company issued policy, while the Andrews claim arose from a Twin City Fire Insurance Company issued policy). (See, R. at 36; *Amended Complaint*, generally.)

The *Hammonds* materials comprising Exhibit 3 of the *Amended Complaint* are included in the Appendix at 297. (The opinion's dissent by Judge Bye and the supporting briefs filed by the parties are of particular significance.)

1. *Plaintiff's "Institutionalized Wrong-Doing" Brief*

Plaintiff's *Institutionalized Wrong-Doing: The Hartford's "Million Dollar List" Program, Its Progeny & Its Ongoing Impact* ("*Institutionalized Wrong-Doing*") was filed on August 16, 2013, in reply to the Hartford's opposition to Plaintiff's motion to add Twin City Fire Insurance Company's corporate parent (Hartford Financial Services

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[4] See, R. at 71; *Plaintiff's Brief in Support of Plaintiff's Motion to Compel Production of Documents in Response to Plaintiff's First Set of Requests for Production of Documents to Twin City Fire Insurance Company ("The Hartford")* at 2, footnote 3.

Group, Inc.) as a named defendant in the present proceeding. (R. at 2078; App. at 370; *Institutionalized Wrong-Doing* at 1.)

Twin City Fire Insurance Company's opposition was based on a vigorous denial that the parent corporation had any connection whatsoever to the wrongdoing alleged in the present proceeding. (See, R. at 1616.) In reply, Plaintiff pointed out the corporate parent's extensive involvement in workers' compensation claim-handling practices, one directly pertinent instance of which was the "Million Dollar List" program:

> In October 1998, Hartford Financial Services, Inc. (the 'Home Office'), launched a new claim-handling program called 'the large loss initiative', which program was under the management of 'special project manager' Mark Deluse . . . Under Deluse's direction, and pursuant to a written set of policy guidelines, Home Office personnel identified 247 'large loss' claims. Those claims, with cumulative reserves of $250 million, were drawn from across the spectrum of the various Hartford subsidiaries and/or Hartford-affiliated companies handling workers' compensation policies. Cumulatively, the claims became known as 'the million dollar list', which label was quickly adopted as the short-hand name for the program as a whole. . . .
>
> . . . From the beginning, there was an implicit awareness of the fact that once 'the [Hartford's] handlers' were made 'to feel confident in their ability to handle large loss claims' it would no longer be necessary for the Home Office to retain exclusive control of targeting authority (i.e., the authority to identify *which* claims should be subjected to "Million Dollar List" program claim handling practices). . .
>
> By the "Million Dollar List" program's later stages, a significant number of the claims subjected to the "Million Dollar List" program's abusive claim-handling practices were 'field office' targeted claims. Any given later stage "Million Dollar List" program claim was likely to have been identified and targeted much earlier in the claim's history than was possible with the 247 claims on the original 'million dollar list', with the result that the illegal profit realized by the Hartford during the "Million Dollar List" program's later stages included a significant under-reserve component.

(Citations and footnotes omitted) (R. at 2078; App. at 370; *Institutionalized Wrong-Doing* at 7-9.)

Plaintiff's *Institutionalized Wrong-Doing* brief presents a great deal of detail regarding the extent of the Hartford Home Office's direct involvement in the claim-handling activities of the various Hartford subsidiaries. It also describes the evolution of the "Million Dollar List" program its connections to the abusive claim-handling practices applied to Timothy Andrews' claim.

It is included in the Appendix at 370.

2. *Plaintiff's Motion to Unseal & the DELUSE Records*

On August 19, 2013, in a motion seeking to unseal a set of records produced in the course of discovery (the "DELUSE records") relating to the design, implementation and later evolution of the "Million Dollar List" program, Plaintiff further detailed his allegations regarding the connections between the "Million Dollar List" program and the Hartford's handling of Timothy Andrews' claim:

> As [the DELUSE] records confirm, the "Million Dollar List" program was not and is not limited to any one Hartford subsidiary or –affiliated company. It was originated in the Home Office, which Plaintiff continues to believe is essentially the parent corporation. It was operated by a team of 15-20 Home Office personnel whose names appear repeatedly in the various e-mails included in [the DELUSE records]. . . .
>
> The essential plan of the program was to make use of abusive claim-handling techniques to intimidate, coerce, and (as in the case of Jackie Hammonds' claim) sometimes simply blackmail seriously injured claimants into agreeing to reductions in the workers' compensation benefits to which they were legally entitled. (As has been illustrated by our previous analyses of the Hartford's handling of Jackie Hammonds' and Timothy Andrews' claims, these techniques – although described euphemistically by the involved Hartford personnel – are brutally direct.)
>
> . . .
>
> Because we've seen the claim-handling practices applied to Jackie Hammonds' and Timothy Andrews' claims, we know exactly what terms such as 'using leverage', 'settlement tools', 'an appropriate negotiation plan', 'to empower the handlers', 'a focus around the medical aspect of these claims', and making use of

'medical strategies' meant to the Hartford personnel who implemented the "Million Dollar List" program.

Because we've seen the claim-handling practices applied to Jackie Hammonds' and Timothy Andrews' claims, we know what happens when 'special attention is given to the medical status of a file'; and, we know what it means – regarding files such as Jackie Hammonds', whose claim was *already subject* to a long-term care plan when it was included in the large loss initiative – when the memo states that the program's projected savings will mostly result from the Hartford's opportunity 'to further develop the files'.

And, because we've seen, and thoroughly documented, how the same abusive claim-handling practices the "Million Dollar List" program Home Office team applied to Jackie Hammonds' claim were pre-emptively applied to Timothy Andrews' claim *before it ever had the chance to become a large reserve claim*, we know what the following e-mail chain signals about the new direction the "Million Dollar List" program would take in the future:

> From: Dave Korch
> Sent: March 6, 2001 6:01 PM
> To: Fuerher, Harry A (CLAIM, claims)
> Subject: WC Large Loss
>
> I sorted the spreadsheet we received from Don Kreh by office and for losses in excess of $500,000.00. When I did the sort, I also made an adjustment of the sheet to show the balance remaining on the reserves.
>
> If we, again, prioritize and attack on a section of these claims, with the emphasis on the right decision for settlement like we did last year, we should be able to increase the number of cases settled via SBS in workers comp.
>
> We need to present this to the senior management in WC line of business and obtain their buy in into the process. We will also need someone as our point person within the HO consultants to keep this in the forefront.
>
> Once you have had a chance to review these lists, I would like to discuss this with you and obtain your help in formulating an action plan for moving this forward.
>
> [From Dave Korch]
>
> From: Fuehrer, Harry A (CLAIM, Claims)
> Sent: Wednesday, March 7, 2001 9:25 AM
> To: Ballantyne, Chris N (CLAIM, Claims)
> CC: Fuehrer, Harry A (CLAIM, Claims); Korch, Dave

(CLAIM, Claims); Sadak, John M (CLAIMS, Claims)
Subject: FW: WC Large Loss

Chris:

See attached from Dave. Mark DeLuse was extremely helpful during the past year as "special projects" consultant. Are you going to appoint another person who will act as liaison to make sure that the potential opportunities for CMA and/or structure disposition and Safe-Haven accounts are not missed by either the H.O. consultants or field staff? According to Dave, the number of WC assignments going to him have dropped dramatically. We need to keep the "flow" coming continually in order for SBS to maximize its support.

Harry

From: Ballantyne, Chris N (CLAIM, Claims)
Sent: Thursday, March 8, 2001 2:10 PM
To: Ekem, Stephen G (CLAIM, Claims); Deluse, Mark F (CLAIM, Claims)
CC: Henderson, James A (CLAIM, Claims), Fuehrer, Harry A (CLAIM, Claims)
Subject: FW: WC Large Loss

Steve and Mark:

Please see attached from Harry. We shouldn't need a Special Projects Consultant to keep this in the forefront.

What can we do to ensure that this is getting the attention it deserves? We need to ensure that the Consultants are working with the HEX Managers to identify and work the appropriate cases.

From: Henderson, James A (CLAIM, Claims)
Sent: Tuesday, March 13, 2001 8:16 AM
To: Ballantyne, Chris N (CLAIM, claims); Ekem, Stephen G (CLAIM, Claims); Deluse, Mark F (CLAIM, Claims)
CC: Fuehrer, Harry A (CLAIM, Claims),
Subject: RE: WC Large Loss

I agree with Chris. The emphasis Mark brought to the table should begin in the HO Functional ranks and extend to the field as outlined by Chris. Mark may need to hold an education/training session for the current HO consultants.

(Footnotes omitted) (R. at 1726; App. at 538; *Motion to Unseal* at 3, and 9-10.)

Plaintiff's *Motion to Unseal* was granted. The motion itself (without exhibits) is included in the Appendix at 538, and the redacted versions of the DELUSE records (which were attached to the motion as Exhibit 1) are included in the Appendix at 556.[5]

In recent months, Plaintiff's knowledge of the connections between the "Million Dollar List" program and the abusive claim-handling practices applied to Timothy Andrews' claim has continued to develop. For instance, discovery has revealed that Jim Carlson, the supervisor currently assigned to Timothy Andrews' claim (a Twin City Fire Insurance Company claim) was also involved in the handling of Jackie Hammonds' claim (*not* a Twin City Fire Insurance Company claim, but rather a Hartford Fire Insurance Company claim!) during the period when it was being handled as a "Million Dollar List" program claim.[6]

IV. THE DISCOVERY MOTIONS AND ORDERS.

Following the trial court's June 10, 2013, order to produce activity logs which would permit one to "ascertain the factual grounds (or, lack thereof) supporting [the Hartford's] denials and/or terminations of [a claimant's] [benefits] claims"(R. at 1397; *6/10/13 Order* at p4.), the Hartford continued to produce non-compliant logs. It soon became evident that the Hartford had developed a practice Plaintiff labeled 'embedding and redacting'. The Hartford activity logs contained unusual numbers of entries referencing attorney-client communications, which communications were then used as the basis for equally numerous attorney-client communication based redactions. These

[5] Exhibit 2 to Plaintiff's *Motion to Unseal* consisted of a less heavily redacted set of the DELUSE records. Plaintiff has not sought to unseal those records, and they are not included in the Appendix.

[6] See, R. at 2342; App. at 724; *Plaintiff's Reply Re Motion to Compel Production of Unredacted Privilege Logs/Claim Files and Personnel Files* at 5 and 10.

redactions were rarely selective, typically encompassing the entirety of any involved entry.

In a series of trial court briefs and hearings, Plaintiff argued that this practice significantly compromised Plaintiff's ability to establish (i) whether the Hartford had a reasonable basis for denying and/or terminating a particular claim and (ii) whether the Hartford acted with knowledge (or reckless disregard) as to the lack of any such reasonable basis. See, *Sawyer v. Farm Bureau Mut. Ins. Co.*, 2000 SD 144, ¶ 18, 619 N.W.2d 644, 649 (setting forth the elements of a bad faith insurance claim).

A. *Plaintiff's Supplemental Filing re: Attorney-Client Privilege* (R. at 2250; App. at 699.)

On September 26, 2013, with the Hartford continuing to assure the trial court that the activity logs it was producing were consistent with the trial court's February 13 and June 10, 2013, orders, Plaintiff filed the above-referenced brief arguing that the Hartford's representations on the issue were simply not accurate:

> The activity logs produced by the Hartford have been subjected to extensive redactions on the ground of attorney-client privilege, which redactions are inconsistent with the applicable law generally, and the Court's June 7 order more specifically. ***Plaintiff believes the tables below conclusively illustrate this point.*** Jackie Hammonds' activity log, for instance, has ***171 redactions in a 155 page activity log, most of which remove 1-3 inches of material each***. Timothy Andrews' activity log and the 'other claim' activity logs have been redacted similarly.
>
> Pursuant to 58-3-7.4, an insurer is required to maintain "[d]etailed documentation . . . in each claim file [sufficient] to permit reconstruction of the insurer's activities relative to each claim." In the context of an insurance bad faith action, a plaintiff must establish (i) whether the insurer had a reasonable basis for denying and/or terminating the plaintiff's claims and (ii) whether the insurer acted with knowledge (or reckless disregard) as to the lack of any such reasonable basis. See, *Sawyer v. Farm Bureau Mut. Ins. Co.*, 2000 SD 144, ¶ 18, 619 N.W.2d 644, 649.

> As regards a defendant insurer's assertion of attorney-client privilege in a bad action, then, there are only two possible types of activity-log-embedded attorney-client communications:
>
> - There are attorney-client communications the redaction of which would leave the claim file ***still in compliance*** with SDCL 58-3-7.4's mandate that the claim file contain sufficiently "[d]etailed documentation . . . to permit reconstruction of the insurer's activities relative to [the] claim"; and,
> - There are attorney-client communications the redaction of which would alter the claim file so as to make it ***no longer possible to reconstruct the insurer's claim-handling activities***.
>
> This uncontroversial distinction makes the problem posed by the Hartford's activity-log-embedded attorney-client communications absolutely clear: As produced, the Hartford activity logs do not meet the requirements of SDCL 58-3-7.4.

(R. at 2250; App. at 699; *Plaintiff's Supplemental Filing re: Attorney-Client Privilege* at 1-2.) The brief goes on to discuss Plaintiff's assertion that the Hartford's practice of 'embedding and redacting' impermissibly renders its assertion of attorney-client privilege into a sword rather than a shield, which point is illustrated via a series of tables showing how even an insurer which might wish to adopt the unusual practice of including frequent and extensive references to attorney-client communications in its activity logs might do so without violating the requirements of SDCL § 58-3-7.4, before concluding as follows:

> [T]he Hartford's practice of inserting numerous attorney-client communications into its activity logs in an effort to conceal its claim-handling decisions and their bases from scrutiny does ***not*** serve to conceal the substance of those communications; it does ***not*** inoculate those portions of the activity log into which such attorney-client communications have been embedded. Rather, in accord with the South Dakota Supreme Court's holdings in *Bertelsen* and *Acuity*, it ***infects*** those portions of the log into which such communications have been inserted; that is, it constitutes a waiver of such privilege to the extent necessary to bring the activity logs as produced into compliance with the requirements of SDCL 58-3-7.4.

(R. at 2250; App. at 699; *Plaintiff's Supplemental Filing re: Attorney-Client Privilege* at 5-7.)

A copy of this brief is included in the Appendix at 699.

B. ***Plaintiff's Motion to Compel Production of Unredacted Privilege Logs/Claim Files and Personnel Files and Notice of Hearing* (R. at 2342; App. at 707.)**[7]

On October 23, 2013, with the Hartford continuing to resist turning over SDCL § 58-3-7.4 compliant activity logs, Plaintiff moved to compel production. Prior to filing the motion, Plaintiff's counsel explained Plaintiff's position in an October 8, 2013, meet-and-confer letter to defense counsel:

> I first raised my concerns about the Hartford's intent regarding those communications early last summer, when the Hartford first indicated that the production of the 'other claims' activity logs was taking such a long period of time because of the need to 'review' and 'prepare' the logs. . . . What the Hartford proceeded to do instead was to redact (in its entirety) every single entry, in every single activity log, which included any reference at all to an attorney-client communication and went to *either* (i) whether the Hartford had a reasonable basis for denying and/or terminating a particular claim *or* (ii) whether the Hartford acted with knowledge (or reckless disregard) as to the lack of any such reasonable basis. See, *Sawyer v. Farm Bureau Mut. Ins. Co.*, 2000 SD 144, ¶ 18, 619 N.W.2d 644, 649 (setting forth the elements of a bad faith insurance claim).
>
> The end result was that Plaintiff can determine from what is left of the activity logs *neither* the bases for the Hartford's claim handling decisions *nor* whether the Hartford acted with knowledge or reckless disregard as to the lack of reasonable bases for those decisions.
>
> Because the Hartford has redacted the very information a plaintiff needs to establish in a bad faith action, the activity logs as produced accord with neither generally applicable law nor the specific reasoning of the Court's June 7 discovery order.

(Footnotes omitted) (R. at 2342; App. at 707; *Plaintiff's Motion to Compel Production of Unredacted Privilege Logs/Claim Files and Personnel Files*, Exhibit 1, October 8, 2013, Letter from Mark A. Koehn to Beth Cupani.)

[7] The title of this document includes a typographical error. The word 'Activity' should be substituted for 'Privilege'.

A copy of this letter was attached as an exhibit to Plaintiff's brief, both of which are included in the Appendix at 713.

C. ***Plaintiff's Reply re: Motion to Compel Production of Unredacted Privilege Logs/Claim Files and Personnel Files*** **(R. at 2365; App. at 724.)**

Plaintiff's October 31, 2013, reply brief reproduces three pages from Jackie Hammonds' activity log, which pages pertain to a 2-1/2 month time period, and from which 90-95% of the information originally contained is simply gone – redacted in its entirety. (R. at 2365; App. at 724; *Plaintiff's Reply re Motion to Compel Production of Unredacted Privilege Logs/Claim Files and Personnel Files* at 10-12.) As a result the reader is left with absolutely no idea of what decisions were made during that time period or of the grounds for those decisions.

Similarly, with regard to the redactions in the Timothy Andrews activity log, the brief (i) identifies three key periods in the handling of the claim, (ii) explains what was at issue during each of those periods, and (iii) illustrates the failure of the Andrews activity log as produced to comply with the requirements of SDCL § 58-3-7.4 *by reproducing the heavily-redacted portions of the log relating to each such period*. (R. at 2365; App. at 724; *Plaintiff's Reply re Motion to Compel Production of Unredacted Privilege Logs/Claim Files and Personnel Files* at 13-20.)

Plaintiff contends those illustrations are *conclusive* as to the failure of these two logs at least to comply with the requirements of SDCL § 58-3-7.4 in their redacted form.[8]

A copy of this brief is included in the Appendix at 724.

[8] SDCL § 58-3-7.4(2) requires an insurer to maintain in its claim file "[d]etailed documentation [sufficient] to permit reconstruction of the insurer's activities relative to each claim".

D. ***Plaintiff's Opposition to the Hartford's 10/29/13 Motion for Reconsideration and Motion for Protective Order* (R. at 2385; App. at 745.)**

This October 31, 2013, brief is a point-by-point rebuttal of the Hartford's arguments in support of its October 29, 2013, motion for reconsideration and protective order in regard to the attorney-client communication activity log redactions. One of the points specifically addressed is the Hartford's assertion that the "'large loss initiative' was discontinued in 2000" (R. at 2398; *Twin City Fire Insurance Company's Response to Plaintiff's Motion to Compel Production of Unredacted Privilege Log/Claim Files and Personnel Files and Motion for Reconsideration and Protective Order* at 4):

> This contention, which the Hartford has made many times, is contradicted by the Hartford's own documents. . . . However, the Hartford's own e-mails (quoted in Plaintiff's "Institutionalized Wrong-Doing" brief and Motion to Unseal) unambiguously document the fact that the "Million Dollar List" program was not only still very active in 2001, but that the 'Home Office' personnel in charge of the program were planning to modify the program from a purely 'Home Office' based operation to include the possibility of 'field office' driven identification and targeting of claims for application of "Million Dollar List" program abusive claim-handling treatment.
>
> Thus, far from being shut down in 2000, the "Million Dollar List" program or "Large Loss Initiative" was being ramped up for expansion into a new, 'field office' driven phase in 2001. The discovery conducted thusfar supports Plaintiff's contention that, regardless of what name the Hartford operates the program under today, the abusive claim-handling practices first collected under the label 'large loss initiative' in 1998-1999 continue to be applied consciously and intentionally to targeted claims across the entirety of the Hartford's workers' compensation organization. (That is, in all of the Hartford subsidiaries and –affiliated companies which are involved in the handling and policy-making decisions as to workers' compensation claims brought under Hartford-issued policies.)

(R. at 2385; App. at 745; *Plaintiff's Opposition to the Hartford's 10/29/13 Motion for Reconsideration and Motion for Protective Order* at 4-5.)

A copy of this brief is included in the Appendix at 745.

E. The *November 5, 2013, Hearing* (H.T. 11.5.13; App. at 22)

One of the great difficulties with the Hartford's argument that the trial court erred in failing to conduct an *in camera* review of the 'other claim' activity logs is that there is no evidence in the record of the Hartford's ever having sought any such review prior to the trial court's bench ruling at the close of the November 5, 2013, hearing.[9] In its *Appellant's Brief*, the Hartford attempts to 'correct' the record in that regard, claiming that it offered to provide the trial court with unredacted versions of the 'other claim' activity logs for *in camera* review *at* the November 5, 2013, hearing:

> At oral argument, on November 5, 2013, Twin City offered to provide all of the redacted materials for an *in camera* inspection . . . so that the trial court could assess the propriety of Twin City's redactions based upon its assertion of the attorney-client privilege. (HT 11.5.13 at 12; App. at 33.)

(*Appellant's Brief* at 18.)

It is absolutely essential to the Hartford's argument that, at *some* point prior to the trial court's November 5, 2013, bench ruling, the Hartford have *offered* the 'other claim' activity logs for *in camera* review. As it happens, however, no such offer was ever made. The Hartford's assertion to the contrary is simply and demonstrably wrong.

The *only* offer for *in camera* review made by the Hartford at the November 5, 2013, hearing was an offer to *provide the Andrews activity log* – not the 'other claim' logs – to the trial court for (another) *in camera* review:

> **MR. MALONEY:** Your Honor, there's two issues here. There's the Andrews' claim file and then there's the other 199 other claim files. . . There is nothing more to produce on this. Anything else that is compelled to be produced, Your Honor, is clearly attorney-client privilege. If the Court would like us to produce, you know, samples, it's a lot of materials, but we would be happy to produce it *again* for in camera review. *That's as to the Andrews' claim file, Your Honor*. There's

[9] Plaintiff contends this was not an oversight, but rather a tactical decision.

> not been any showing of waiver. . . The other 199 claim files are a completely different issue. . . .

(Emphasis added) (HT 11.5.13 at 10:9-12:8; App. at 31-33.)

The other 199 claim files clearly *were* a completely different issue to the Hartford. The Hartford made absolutely no effort, at *any* point either before the November 5 hearing or during it, to provide *any* of the 'other claim' activity logs to the trial court for *in camera* inspection. No such offer was ever made until *after* trial court's November 5, 2013, bench ruling.

The earliest documented offer to inspect is found in the Hartford's November 12, 2013, *(1) Motion for Reconsideration of the Court's November 5, 2013, Oral Ruling on Plaintiff's Motion to Compel and (2) Request for Order to File Disputed Materials Under Seal* at 4 (R. at 2438), where it states: "Twin City asks this Court to allow it to submit for an *in camera* review all of the materials at issue, and requests this Court to make specific findings as to each file relating to the attorney-client communications at issue."

A copy of the November 5, 2013, hearing transcript is included in the Appendix at 22.

F. The *December 3, 2013, Hearing* (H.T. 12.3.13; App. at 37)

At the December 3, 2013, hearing on the Hartford's motion for reconsideration, the trial court made it plain that the Hartford's failure to even *offer* the 'other claim' activity log materials for *in camera* review at any point *prior* to the court's November 5, 2013, oral ruling mattered:

> **MR. MALONEY:** Your Honor, as set forth in our motion, the *Bertelsen* and the *DM&E* cases pretty much set out the procedure, which is to conduct an in camera review of the disputed documents, and we respectfully assert that that has not occurred here. . . . [T]he documents at issue have never

been provided – other than those three pages [from the Hammonds activity log reproduced in *Plaintiff's Reply re Motion to Compel Production of Unredacted Privilege Logs/Claim Files and Personnel Files* at 10-12 (R. 2365: App. at 724)], the documents have never been provided to the Court, and we believe it would be appropriate for the Court to review them. . . . [N]o portion of the 199 other claim files has ever been provided to the Court for review . . . and [w]e would respectfully ask the Court to conduct an in camera review of the disputed materials, and if the Court declines to do so, we would respectively request in the alternative that the Court allow Twin City to file a CD with the disputed materials under seal for purposes of an intermediate appeal. . . .

Kaarup v. St. Paul goes to the reasons for the denial of the underlying claim. We don't dispute that. That's why an in camera review would be appropriate here . . . for the Court to review the redactions and see if there was an insertion of the reasons for the denial or the handing over of the claim adjustments to the attorney. The Court would see that that did not occur here.

. . . . The bottom line, Your Honor, is the Court has had the opportunity to review three pages of redacted materials and from that ruled that 60,000 pages of materials are essentially containing any attorney-client communications have been waived. We respectfully believe that is an incorrect ruling and would ask the Court, as we have in the past[10], to review the materials for yourself. We can provide copies of the documents . . .

THE COURT: I'm going to adhere to my earlier ruling on this. Quite frankly, I think without a privilege log on this, I don't think there's anything that the Supreme Court is going to come forward. They don't know what I've not allowed . . . I think that the process was not followed in this matter from the outset, and my ruling stands. . . .

(H.T. 12.3.13 at 3:21-17:12; App. at 37.)

A copy of the December 3, 2013, hearing transcript is included in the Appendix at 37.

STANDARD OF REVIEW

Discovery rulings are heavily fact dependent. This Court has held that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *First Bank of Biwabik, MN v. Bank of Lemmon*, 535 N.W.2d 866, 869 (SD 1995). "Doubts . . . are to be resolved in favor of the successful party's 'version of the evidence and of all inferences fairly deducible therefrom which are favorable to the [trial] court's action." *Osman v. Karlen and Associates*, 2008 SD 16, ¶ 15, 746 N.W.2d 437, 443 (quoting *Fin-Ag, Inc. v. Feldman Bros.*, 2007 SD 105, ¶ 19, 740 N.W.2d 857, 862-863). An appellant's "biased view of the record will not support a determination of clear error in a trial court's findings." *White v. Bain*, 2008 SD 52, ¶ 12, 752 N.W.2d 203, 207.

A decision to impose sanctions under SDCL § 15-6-37(b)(2) is a discovery ruling, which rulings are reviewed "under an abuse of discretion standard". *Maynard v. Heeren*, 1997 SD 60, ¶ 5, 563 N.W.2d 830, 833 . "An abuse of discretion occurs only if no judicial mind, in view of the law and circumstances of the particular case, could reasonably have reached such a conclusion." *Baddou v. Hall*, 2008 SD 90, ¶ 12, 756 N.W.2d 554, 558.

LEGAL ANALYSIS AND ARGUMENT

I. TWIN CITY'S ATTORNEY-CLIENT COMMUNICATIONS REGARDING THE ANDREWS CLAIM ARE NOT PROTECTED BY THE ATTORNEY-CLIENT PRIVILEGE, WHERE TWIN CITY DID NOT DELEGATE ITS CLAIM HANDLING FUNCTION TO OUTSIDE COUNSEL.

[10] As noted above, this is a misrepresentation. No requests 'in the past' are evident in the record.

A common thread running through each of the issues the Hartford raises on appeal is, at least with regard to the Hartford's *phrasing* of those issues, an insistence on the essentially subjective nature of the questions at hand. Thus, the Hartford frames *this* particular issue in terms of the *subjective* question of *delegation*; then, on the basis of that phrasing, it proceeds to argue in favor of a subtly subjective *test* in regard to whether such delegation occurred. Plaintiff contends, however, that any proper test of a party's claim of attorney-client privilege must look to the evidentiary *effect* the successful assertion of such claim would have on the opposing party's ability to make its case.

This precise issue has not previously been addressed by the South Dakota Supreme Court. However, this Court's most nearly applicable holdings are consistent with Plaintiff's contention.

In *DM&E v. Acuity*, 2009 SD 69, 771 N.W.2d 623, this Court rejected a defendant insurer's claim of attorney-client privilege based on a finding that the insurer had "unequivocally delegate[d] its initial claims function and relie[d] *exclusively* upon outside counsel to conduct the investigation" (emphasis in original) (*DM&E* at ¶ 56). However, it is this Court's *reasoning* in support of its decision that matters most:

> [T]his holding is consistent with our legislature's codification of the attorney-client privilege, which is "in accord with modern authorities which hold that privileges created by statute are to be strictly construed to avoid suppressing otherwise competent evidence." *Catch the Bear, 352 NW2d at 646-47* (citations omitted). A contrary holding would permit an insurer to insulate its claims handling process from any disclosure or review by simply delegating the claims process to its attorneys and asserting privilege.

DM&E at ¶ 57.

The logical *weight* of the *DM&E* holding does not rest on the fact that Acuity "unequivocally delegate[d] its . . . claims function [to] . . . outside counsel" (*DM&E* at ¶

56); rather, it rests on the evidentiary *effect* the successful assertion of privilege would have had on the opposing party. The danger of 'insulation' of the 'claims handling process' from 'disclosure or review' is by no means limited to situations in which an insurer's claims functions are 'unequivocally' or 'exclusively' delegated to outside counsel. The operative question is not the defendant insurer's *intent*, or the *extent* of its delegation, but rather the *effect* its assertion of privilege has on the transparency of the claim-handling process: "A contrary holding would permit an insurer to insulate its claims handling process from any disclosure or review by simply delegating the claims process to its attorneys and asserting privilege." *DM&E* at ¶ 57.

Two years later, in *Bertelsen v. Allstate*, 2011 SD 13, 796 N.W.2d 685, this Court used slightly different language to make the same essential point:

> A denial of bad faith or an assertion of good faith alone is not an implied waiver of the privilege. "Rather, *the issue is whether [the defendant insurer]*, in attempting to demonstrate that it acted in good faith, *actually injected its reliance upon such advice into the litigation*." The key factor is reliance of the client upon the advice of his attorney.

(Emphasis added) (Citations omitted) *Bertelsen* at ¶ 53.

As in *DM&E*, the weight of the *Bertelsen* holding rests on the evidentiary *effect* the successful assertion of the privilege would have on the opposing party: "[T]he issue is whether [the defendant insurer], in attempting to demonstrate that it acted in good faith, *actually* injected its reliance upon such advice into the litigation." (Emphasis added) *Bertelsen* at ¶ 53.

Here, the Hartford is "rel[ying] . . . upon the advice of [its] attorney" (*Bertelsen* at ¶ 53) and has "injected its reliance upon such advice into the litigation" (*Id.*), insofar as its activity log redactions of attorney-client communications have compromised

Plaintiff's ability to determine the Hartford's claim handling decisions and the grounds thereof. The *effect* of the redactions is to "insulate [the Hartford's] claims handling process from any disclosure or review" (*DM&E* at ¶ 57), and the measure of when such insulation has effected a waiver of privilege is where it results in the production of claim file materials that do not meet the requirements of SDCL § 58-3-7.4(2): "Detailed documentation shall be contained in each claim file in order to permit reconstruction of the insurer's activities relative to each claim".

Thus, regardless of whether the Hartford's practice of 'embedding and redacting' is best described as according more closely with *DM&E*, because it "would permit [the] insurer to insulate its claims handling process from any disclosure or review by delegating the claims process to its attorneys and asserting privilege" (*DM&E* at ¶ 57), or *Bertelsen*, because it would permit the insurer to "impliedly inject[ ] its counsel's advice into the case" (*Bertelsen* at ¶ 54), the plain fact of the matter is this: The heavily redacted activity logs the Hartford has produced pursuant to that practice are inconsistent with the requirement of SDCL § 58-3-7.4 and the needs of a plaintiff in a South Dakota bad faith litigation. Accordingly, the trial court's rulings requiring the Hartford to produce unredacted versions of the subject activity logs should be upheld.

II. THE TRIAL COURT DID NOT ERR IN HOLDING THAT TWIN CITY HAD WAIVED THE ATTORNEY-CLIENT PRIVILEGE FOR COMMUNICATIONS IN THE 199 "OTHER" CLAIM FILES, WHERE THERE HAD BEEN NO *IN CAMERA* INSPECTION OR EVIDENTIARY FINDING THAT TWIN CITY DELEGATED ITS CLAIM HANDLING FUNCTION TO OUTSIDE COUNSEL.

Again, the Hartford, with its phrasing of the issue, invites this Court on a wild goose chase (or, rather, 199 *separate* wild goose chases) in search of evidence as to whether the Hartford manifested a subjective intent to waive or not waive attorney-client

privilege. In reality, this issue can be broken down into two questions, neither of which has much, if anything, to do with ascertaining the Hartford's subjective intent.

The first question is whether South Dakota law *requires* a trial court to conduct an *in camera* review of disputed materials as a procedural prerequisite to denying a party's claim of attorney-client privilege.

The second question has to do with the burden of initiating such a review (regardless of whether it is procedurally mandated or not). Does the burden of initiating such review fall on the trial court or the party resisting discovery? That is, when the Hartford failed to offer the 'other claim' logs to the trial court for *in camera* review by the conclusion of the November 5, 2013, hearing, did the trial court have an obligation before ruling to demand from the Hartford that it provide the court with disputed materials for an *in camera* review?

Plaintiff contends, based on *DM&E* and *Arnoldy v. Mahoney*, 2010 SD 89, 791 N.W.2d 645, that the answer to both of these questions is 'no'.

In the earlier of the two cases, *DM&E*, this Court explicitly noted as follows:

> The failure *of a party* to provide a court with sufficient information to determine the question of privilege raises substantial questions concerning the efficacy of the objection:
>
> > As a starting point, it is clear that ultimately *a party asserting privilege* must make a showing to justify withholding materials if that is challenged. The question whether the materials are privileged is for the court, not the party, to decide, and the court has a right to insist on being presented with sufficient information to make that decision. It is not sufficient for the party merely to offer up the documents for in camera scrutiny by the court. . . .
>
> *Acuity failed to submit a privilege log*, or offer *in camera* review to consider the privilege issue. The Court has previously stated that the preferred procedure for handling privilege issues is to allow for an *in camera* review of the documents . . . We will review the issue here based upon the record before this Court, but future

> *litigants* asserting a privilege objection should be aware of the obligation to create a record sufficient for meaningful review of a claim of privilege.

(Emphasis added) (Citations omitted) *DM&E* ¶¶ 48-49. The Court in *Arnoldy* essentially reiterates the holding from *DM&E*, again stating that the "*preferred* procedure for handling privilege issues is to *allow for* an in camera review of the documents". (Emphasis added) *Arnoldy* at ¶ 33 (quoting from *DM&E* at ¶ 49).

Plainly, there is no procedural *requirement* that a trial court conduct an *in camera* review before ruling on a party's assertion of attorney-client privilege. Whether it would be reversible error for a trial court to refuse a timely made *offer* of disputed materials for *in camera* review is a more difficult question, but one which is not at hand. The demonstrable facts of the matter are that: (1) the record does *not* reflect that the Hartford 'prepared and produced' a privilege log regarding the privilege-based redactions from the 'other claim' activity logs *to the court* and (2) the record does *not* reflect that the Hartford 'offered the materials for *in camera* inspection until *after* the court had already ruled against it and it desperately included such offer in its November 13, 2013, motion for reconsideration.

As discussed above, the Hartford never made an offer of the disputed materials for *in camera* review, which fact the trial court noted in the course of the December 3, 2013, hearing:

> [W]ithout a privilege log on this, I don't think there's anything that the Supreme Court is going to come forward. . . . I think that the process was not followed in this matter from the outset, and my ruling stands.

(H.T. 12/3/13 at 13:14-23; App. at 37.)

The most recent judicial analysis of the proper procedure for the assertion of a claim of attorney-client privilege under South Dakota law is consistent with the *DM&E* analysis above, and consistent as well with the trial court's ruling on this issue:

> If [the defendant insurer] wants the court to review the documents that are allegedly protected by the attorney-client privilege, it must create a proper privilege log and submit those documents under seal for the court's in camera review. After the court conducts an in camera review, it will also review the parties' briefing on whether the information sought is relevant in a bad faith case and whether [the defendant insurer] waived the attorney-client privilege. [citation omitted] In the alternative, [the defendant insurer] must produce the documents sought directly to [the plaintiff].

Hurley v. State Farm Mut. Auto. Ins. Co., 2012 U.S. Dist. LEXIS 63602, p. 3 (U.S.D.C. D.S.D.).

The Hartford presumably made a tactical decision not to offer the disputed materials for *in camera* review. Once the trial court ruled, it was under no obligation to permit the Hartford to rectify its original decision to not offer the disputed materials for review. Accordingly, the Hartford's contention that the trial court's November 15 and December 6, 2013, orders were in error should be rejected.

III. WHETHER THE TRIAL COURT MUST ANALYZE WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE UNDER THE RESPECTIVE STATE LAW WHERE EACH OF THE 199 "OTHER" CLAIM FILES AROSE.

Here, too, Plaintiff contends the Hartford's statement of the issue would be better phrased to read "whether, as a prerequisite to its holding that the attorney-client communications in the 'other claim' activity logs are not protected by the attorney-client privilege for purposes of the present proceeding, the trial court was required to conduct a separate analysis for each such 'other claim' of the legal principles that might potentially be considered relevant in a hypothetical proceeding in the state where such claim arose."

Once the issue is properly phrased, it becomes clear that the threshold problem with the Hartford's proposed requirement is not the practical *difficulty* of conducting such an analysis with regard to 199 'other claim' activity logs, but rather the fundamental incoherence of the proposal.[11]

Moreover, the Hartford is not in any position to assert that it was somehow deprived of its legal rights by the trial court's failure to engage in such mental acrobatics on the Hartford's behalf, given the Hartford's absolute failure to request any such analysis on a timely basis (i.e., at any point before its motion for reconsideration of the trial court's November 15, 2013, order). See, *Veith v. O'Brien*, 2007 SD 88, ¶ 27, 739 N.W.2d 15, 24, quoting *Taylor Realty Co. v. Haberling*, 365 N.W.2d 870, 873 (SD 1985), quoting *5 AmJur2d Appeal and Error § 713* ("'[t]he doctrine of 'invited error' embodies the principle that a party will not be heard to complain on appeal of errors he himself induced or provoked the court or the opposite party to commit. It has been held that for the doctrine to apply it is sufficient that the party who on appeal complains of the error has contributed to it'").

CONCLUSION

This situation is entirely of the Hartford's own creation. This central issues raised by this appeal have not previously come before this Court simply because most insurers do *not* liberally sprinkle attorney-client communications over the key entries of their

[11] How exactly would such an analysis even be done? Would it be the trial court's responsibility to dream up possible fact patterns, or would the parties dream them up themselves and ask the trial court to try them on for size? Would the analyses be limited to hypothetical proceedings brought in the state where the claim arose, as the Hartford suggests? Why stop there? What about the state where the worker was injured? The state where the employer had its principal place of business? The state where it had a satellite office? The possibilities are virtually endless.

activity logs; and, when ordered to produce activity logs consistent with the mandates of SDCL § 58-3-7.4, most insurers do *not* produce logs with the entirety of virtually every key entry redacted out. The Hartford's practice of 'embedding and redacting' converts the doctrine of attorney-client privilege from shield to sword, thereby impermissibly "insulat[ing] its claims handling process from any disclosure or review." *DM&E v. Acuity*, 2009 SD 69, ¶ 57, 771 N.W.2d 623.

That practice is, thusfar, uncommon. However, if this Court were to uphold the Hartford's use of the practice, such holding would stand as an open invitation to *every* other insurer doing business in South Dakota to adopt it as well – to the great detriment of every South Dakota insured.

Accordingly, and for all of the reasons set forth above, the Hartford's appeal should be denied in its entirety.

Dated this 12th day of June, 2014.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellee's Brief complies with the type volume limitation provided for in South Dakota Codified Laws. This Appellee's Brief, including footnotes, contains 10,368 words. I have relied upon the word count of our word processing system as used to prepare this Appellee's Brief. The original Appellee's Brief and all copies are in compliance with this rule.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 12th day of June, 2014, a true and correct copy of the foregoing ***APPELLEE'S BRIEF*** relative to the above-entitled matter to the following at their last known e-mail addresses:

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I further certify that on June 12th, 2014, I e-mailed the foregoing Appellee's Brief and sent the original and two copies of it by United States mail, first-class postage prepaid, to:

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APPENDIX

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

Appeal No. 26891

TIMOTHY ANDREWS,

Plaintiff/Appellee,

vs.

RIDCO, INC.,

Defendant,

and

TWIN CITY FIRE INSURANCE COMPANY,

Defendant/Appellant.

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

The Honorable Wally Eklund
Circuit Court Judge

Petition for Intermediate Appeal filed December 6, 2013

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REPLY TO JURISDICTIONAL STATEMENT

Plaintiff/Appellee Timothy Andrews ("Andrews") raises a limited objection that the Court does not properly have jurisdiction because, to the extent Defendant/Appellant Twin City Fire Insurance Company ("Twin City") seeks review of the discovery Orders of February 13, 2013 (R. at 1172), or June 10, 2013 (R. at 1397), the appeal is untimely. *See Appellee's Brief* at 1-5; SDCL §§ 15-26A-3(6), 15-26A-6. Andrews' jurisdictional objection is off point because Twin City appeals from the trial court's Orders dated November 15, 2013 (R. at 2447; App. at 1), and December 6, 2013 (R. at 2477; App. at 4), which were timely appealed and are properly before this Court.

The February 2013 and June 2013 Orders required Twin City to produce certain attorney-client communications "to the extent" they constituted a delegation of Twin City's claim handling function. Following those Orders, Twin City revised its redactions of attorney-client communications to comply with the mandate and reproduced the materials to Andrews.

Andrews continued to insist, without objective support, that Twin City should produce *all* attorney-client communications, above and beyond those subject to the February and June 2013 Orders. In September 2013, Andrews moved to compel production of *all* attorney-client communications. That motion resulted in the November and December 2013 Orders, which applied a "blanket" waiver of the attorney-client privilege. Prior to issuing these Orders, the trial court did not conduct an *in camera* inspection of the disputed attorney-client communications.

The issues framed in Twin City's appeal concern the blanket waiver imposed by the trial court's November and December 2013 Orders, not the prior Orders of February

and June of 2013. Andrews concedes that these obligations are properly before the Court: "There is no doubt that this *new* obligation is properly before this Court on intermediate appeal." *Appellee's Brief* at 5. This Court has jurisdiction to decide the issues posed by Twin City's appeal because they were appealed in accordance with SDCL §§ 15-26A-3(6) and 15-26A-6.

Twin City objects to Andrews' attempt to inject Hartford Financial Services Group, Inc. ("Hartford") into this appeal. *Appellee's Brief* at 1, fn. 1. On October 21, 2013, over Twin City's objection, the trial court granted Andrews' motion to amend to include Hartford. (R. at 2360.) Andrews did not serve the Summons and Second Amended Complaint that formally names Hartford, until February 21, 2014 (R. at 2643), which was more than three months after Twin City filed its Notice of Appeal. Additionally, the Orders at issue in this appeal do not impose any obligations on or otherwise relate to Hartford. Andrews' attempt to include Hartford in this appeal is improper and should be rejected.

Finally, the Court should reject Andrews' argument, asserted for the first time, that the Orders of November and December 2013 constituted sanctions against Twin City, and that the issue is whether the trial court properly imposed sanctions pursuant to SDCL § 15-6-37(b)(2). Andrews did not make this argument before the trial court and there is nothing in the record to support that the Orders at issue in this appeal were a "sanction." Andrews' motion was styled a motion to compel, and the resulting Orders compelled Twin City to provide additional discovery. Andrews did, however, file a motion for sanctions against Twin City, which was denied by the trial court on September 23, 2013. (R. at 2249.) Andrews' motion for sanctions is not before the

Court, and should not be considered. As detailed below in the *Reply to Standard of Review*, Andrews' argument that the Orders are sanctions is an attempt to apply abuse of discretion review instead of the proper *de novo* standard. The Court should reject Andrews' position.

REPLY TO STATEMENT OF THE CASE AND FACTS

Andrews devotes a significant portion of his Brief by continuing to litigate the merits of his claims, which are not before the Court; rather, Twin City asks the Court to determine whether the trial court erred when it applied a blanket waiver of the attorney-client privilege without conducting an *in camera* inspection of the disputed materials. Andrews' alleged—and inaccurate—underlying claims are not relevant to determining the appropriate procedure a trial court must undertake to find an insurance company waived the attorney-client privilege. Twin City's appeal is focused on the lack of process undertaken by the trial court.

This Court has clearly articulated the proper procedure for determining whether an insurer has waived the attorney-client privilege. *See, e.g., Bertelsen v. Allstate Ins. Co.*, 2011 S.D. 13, 796 N.W.2d 685. Twin City proceeded through discovery with the guidance of this Court's precedent and the expectation that it would be followed. The crux of Twin City's appeal is that the trial court failed to adhere to this well-established method of review and, instead, improperly applied a blanket waiver of the attorney client privilege—not only as to the Andrews claim file, but to 199 "other" claim files from jurisdictions throughout the United States. Despite the clear focus of this appeal, Andrews continues to attempt to argue the merits of the case largely by citing to his own subjective beliefs and briefing filed below. Those arguments are inapposite to the

issue before the Court: Whether the trial court erred in applying a blanket waiver of the attorney-client privilege without conducting an *in camera* inspection. As detailed below and in Twin City's Opening Brief, the facts of this case and this Court's precedent require that the question be answered in the affirmative.

I. The Department of Labor's *Decision* and *Findings of Fact and Conclusions of Law* are *Res Judicata* in the Present Proceeding.

Twin City does not dispute the substance of the Department of Labor's ruling on Andrews' claim. In fact, Twin City relied extensively on the Department of Labor ("DOL") findings to support its factual account of Andrews' workers' compensation ("WC") claim. *See Appellant's Brief* at 6-10. Twin City does, however, dispute the importance of that decision on the underlying discovery issues and this appeal. The primary point to be taken from the administrative proceedings is that once Andrews filed a petition with the DOL, Twin City retained counsel; thereafter, Twin City's communications with counsel were in furtherance of ongoing litigation and not a delegation of Twin City's claim handling function as Andrews contends. Resolution of this disputed point highlights the importance of an *in camera* review and resultant findings.

Andrews correctly states that an un-appealed administrative decision is given *res judicata* effect. *Dakota, Minnesota & Eastern R.R. Corp. v. Acuity ("Acuity I")*, 2006 S.D. 72, ¶ 15, 720 N.W.2d 655, 660 (citing *Nelson v. Hawkeye Sec. Ins. Co.*, 369 N.W.2d 379, 381 (S.D. 1985)). This legal point is of little impact here, however, because the claims at issue in this litigation—which all relate to Twin City's allegedly improper claim handling—are distinct from Andrews' contractual entitlement to WC benefits, which was at issue in the administrative proceeding. The only issue that may

be impacted by *res judicata* is the administrative law judge's ("ALJ") response to Andrews' attempt to raise issues that the adjuster's actions were "vexatious or without reasonable cause" under SDCL § 58-12-3 when he found that "[n]ot only is [Andrews] involved in a 'fishing expedition', but is unlikely that there is any fish in the pond in which [Andrews] is seeking to fish." (R. at 967.)

II. Andrews' Work-Related Injury, Workers' Compensation Claim, and the DOL Proceeding.

Twin City largely concurs with Andrews' brief summary of his injury and the administrative decision set forth in the factual section of the *Appellee's Brief*, with the exception of: the statement that Twin City "soon acted to terminate all benefits and medical treatment" and his argument that the decision was made without objective justification. *Appellee's Brief* at 7. In support of these contentions, Andrews cites to paragraphs 15-16, 27-29, and 37 of the ALJ's Findings of Fact and Conclusions of Law. *Id.* A closer examination of the citations reveals they do not support Andrews' position:

- Paragraph 15: Twin City properly paid the correct amounts for Andrews' treatment from the date of his injury to May 12, 2005, but should have classified the benefits paid between April 4, 2005, and May 12, 2005, as total permanent disability (TPD) instead of total temporary disability (TTD).
- Paragraph 16: Based on the fact that Dr. Duchene did not authorize chiropractic care, Twin City terminated Andrews' temporary disability benefits beginning on May 17, 2005.
- Paragraphs 27-29: These paragraphs concern Riddle's unsuccessful attempt to find Andrews equivalent replacement employment.

- Paragraph 37: On April 11, 2006, on the basis of Dr. Anderson's IME report, Twin City discontinued payment for additional benefits.

(App. at 68, 70, 72.) The Court should disregard Andrews' mischaracterization of the ALJ's decision on his claim.

III. Background of the Present Proceeding.

Throughout his recitation of the background of this case, Andrews relies almost exclusively on excerpts from his argument and briefings filed on various discovery issues. Andrews essentially cites to himself and his own subjective opinions of the facts and Twin City's motive—not to verifiable objective information that is part of the record. Many of the citations and quotations are not relevant to the issues before the Court, and Twin City's objections to Andrews' account of the background are too numerous to detail here. For the sake of brevity and clarity, Twin City limits its response to those issues raised by Andrews that are directly relevant to the attorney-client privilege waiver issue before the Court. Twin City requests that the Court take a hard look at the underlying "authority" cited by Andrews.

A. The Summary of the Claim File

Andrews' *Summary of the Claim File* document underscores his reliance on his subjective interpretation of the claims file and Twin City's motive in handling his claim. In fact, Andrews admits that the document is "Plaintiff's understanding of [Twin City]'s handling of Timothy Andrews' claim." *Appellee's Brief* at 8. Further, the *Summary of the Claim File* document does not provide any relevant information with respect to the issues to be addressed by this Court because it does not analyze the proper procedure for analyzing an insurance company's claim of attorney-client privilege.

B. The Hammonds Claim/The "Million Dollar List"

The Hammonds claim file and so-called "Million Dollar List," or Large Loss Initiative program, have been the primary bases of Andrews' theory that Twin City, and its related companies, have engaged in "Institutionalized Wrong-Doing"—a charge that is vehemently denied. Andrews also cited the Hammonds file and Initiative as a predicate for engaging in wide-ranging discovery. These materials do not provide *any* information that supports the trial court's "blanket" waiver of the attorney-client privilege. Aside from Andrews' speculation, neither the Hammonds claim file nor the Initiative provide support for the argument that Twin City systematically delegates its claim handling function to outside counsel.

Further, the Hammonds file and Initiative do not support allegations for institutionalized bad faith as alleged by Andrews. First, the South Dakota federal district court dismissed Hammonds' bad faith and related claims, which were based on application the Initiative, on summary judgment.[1] *Hammonds v. Hartford Fire Ins. Co.*, U.S. Dist. Court for the Dist. of South Dakota, Western Division, Case No. 5:04-cv-05055-RHB. (App. at 758.) The U.S. Court of Appeals for the Eighth Circuit upheld the ruling. *Hammonds v. Hartford Fire Ins. Co.*, 501 F.3d 991 (8th Cir. 2007). Although the courts conclusively determined that the Initiative did not constitute bad faith as a matter of law, Andrews is asserting the same theories in this case. Second,

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[1] In his opinion, the Honorable Richard H. Battey noted that Hammonds, who was represented by some of the same counsel as Andrews, advanced arguments that were not supported by the record and were disingenuous:

> Hammonds makes several arguments that are not supported by the record. … [T]he insinuation that [application of the Initiative] is in someway bad faith is disingenuous. Such claims are a misuse of this Court's and counsels' time. (App. at 769-70.)

unlike the Hammonds case, the procedures adopted as part of the Initiative were not actually applied to Andrews' claim. The Initiative was discontinued in 2001, five years *before* Andrews sustained the injuries that were the subject of his workers' compensation claim. Third, Andrews' claim did not satisfy the threshold reserve amount necessary to be included in the Initiative. As addressed in Twin City's Opening Brief, Andrews' arguments are speculative and at best wholly unsupported by the record before the Court.

IV. The Discovery Motions and Orders.

Andrews' account of the voluminous discovery disputes in this case cites exclusively to the briefing he submitted to the trial court. One of the primary grounds Andrews has cited in support of his position that Twin City has waived the attorney-client privilege is the length of the redactions and the percentage of the page the redactions constitute. This argument is based on nothing more than conjecture. No *reasonable* conclusion can be drawn from the length of a redaction or the percentage of the page it takes up—the content of those communications is the determinative factor. Any argument that an insurance company has waived the attorney-client privilege based solely on length or volume is baseless. Not surprisingly, attorney-client communications come in all shapes and sizes—from long, detailed opinions to one-line e-mail analysis. Regardless of their size, the communications are entitled to a presumption of protection pursuant to SDCL § 19-13-3. If length or volume were the determinative factor on waiver, all attorney-client communications would be sent in short snippets so as to avoid any argument that the privilege was waived. Twin City makes this point not to be facetious, but to illustrate the importance of *in camera*

inspection which provides the trial court with the ability to review the communication and consider whether the insurer has actually delegated its claims handling responsibility. Without the availability of *in camera* review, an insurer is left with the impossible task of proving a negative.

Another frequent focus of Andrews is his speculative concept of "embedding and redacting" in which Twin City shields information from insureds by including attorney-client communications in the claims log. Twin City is aware of no authority that prohibits an insurer from including protected communications in the claim log. In fact, as noted by Andrews, SDCL § 58-3-7.4 imposes an obligation on the insurer to keep a complete file. To the extent the claim includes outside counsel, SDCL § 58-3-7.4 seemingly requires the insurer to include that correspondence in the claim log.

One factor that Andrews fails to address is the timing of the redactions in the claims process. Many of the redactions, including those in Andrews' claim file, occur after the claimant has initiated administrative proceedings against the employer and/or insurer. This is important because once an administrative action is commenced, Twin City retains outside counsel to represent its insureds before the DOL. Any attorney-client communications at that point would be in the context of litigation and not necessarily in the claims process. Those communications are included in the claim log, however, because they pertain to the underlying claim. The timing of the redactions undercuts Andrews' theory that Twin City is systematically shielding claims adjustment information from claimants.

Finally, Twin City offers the following passage from the November 5, 2013, hearing, which was conspicuously omitted by Andrews:

> **MR. MALONEY:** … I would note, Your Honor, the plaintiff has the burden of proof of showing there has been a waiver, and there has not been a waiver here. There's no evidence of it. There's no rational argument to support it. In no instance have we expressly or impliedly relied upon advice of counsel.
>
> The plaintiff cannot point to one example of Twin City saying to the effect that, [w] e acted this way or handled the claim this was because our attorney told us to.
>
> We provided the redactions. If you recall, Your Honor, we provided—the Court asked for an in camera review of the claim file notes that have been redacted and we provided those to you in early 2013. Then there was a hearing we had on May 28, 2013. We attached that as Exhibit 3 to our response brief, and in this—in that hearing, the Court ruled that on Page 4, Line 10, "If it relates to a factual matter not seeking legal advice, it should be produced." And everything else—then the Court went on to say that if it was a claim person asking for legal advice or the attorney giving legal advice in response of that—this is on Page 5—then it's privileged. It's not to be produced.
>
> So what we did, Your Honor, is we went back and we unredacted, based on your ruling, the vast majority of those things that had been previously redacted. We erred on the side of overproducing.
>
> So what you—I question, if Mr. Koehn is waiving documents and said they're basically useless, I question whether those were the first set or the second set because only a fraction of what was previously redacted was produced again as redacted after the May 28 hearing, Your Honor.
>
> We have only withheld those things that were—that provided a legal opinion or legal advice from counsel to Twin City. Everything else, if it was a factual recitation such as the attorney saying, Hey, I went to the hearing today and this is what happened, these are my thoughts on that. That type of stuff was all produced.

(HT 11.5.13 at 10-11; App. at 31-32.) The above passage, the substance of which remains unchallenged, fully and accurately summarizes the circumstances of Twin City's continued efforts to comply with the trial court's Orders.

REPLY TO STANDARD OF REVIEW

Andrews contends that this Court should apply an abuse of discretion standard in this case because the Orders at issue constituted the trial court's decision to impose sanctions pursuant SDCL § 15-6-37(b)(2).[2] In support, Andrews selectively quotes from this Court's decision in *Maynard v. Heeren*, 1997 SD 60, 563 N.W.2d 830, 833. *See Appellee's Brief* at 23. When the complete quote is considered, however, it becomes clear that the appropriate standard of review is de novo:

> We review the trial court's rulings on discovery matters under an abuse of discretion standard. When we are asked to determine whether the trial court's order violated the psychologist-patient confidentiality privilege, however, it raises a question of statutory interpretation requiring de novo review.

Id., 1997 SD 60, ¶ 5, 563 N.W.2d at 833 (internal citations omitted) (emphasis added). The attorney-client privilege is based in statute. SDCL § 19-13-3. This Court's precedent addressing issues of an insurance company's waiver of the attorney client privilege have been reviewed de novo, not for abuse of discretion. *See, e.g., Dakota, Minnesota & Eastern R.R. Corp. v. Acuity ("Acuity II")*, 2009 S.D. 69, ¶ 47, 771 N.W.2d 623, 636 (citing *Maynard*, *supra*, and *Delzer v. Penn*, 534 N.W.2d 58, 61 (S.D. 1995)). Like those cases, the issue in this case is whether the trial court's Orders from November 2013 and December 2013 violated the attorney-client privilege, which "raises a question of statutory interpretation requiring de novo review." *Maynard*, *supra*.

[2] As noted above, the record is devoid of support for Andrews' contention that the trial court imposed sanctions on Twin City pursuant to SDCL § 15-6-37(b)(2).

REPLY TO LEGAL ANALYSIS ARGUMENT

I. Andrews' Proposed Test for Determining Attorney-Client Privilege is Contrary to this Court's Precedent.

Andrews contends "that any proper test of a party's claim of attorney client privilege must look at the evidentiary *effect* the successful assertion of such claim would have on the opposing party's ability to make its case." *Appellee's Brief* at 24. This results-driven analysis, being proposed for the first time, bypasses this Court's clear precedent on the issue. The Court should reject Andrews' proposed analysis.

The practical effect of Andrews' test would be to eviscerate the important protection afforded by the attorney-client privilege. It would shift the focus of the analysis from the party holding the privilege to the detrimental effect on the adverse party. Any privilege necessarily imposes a hardship on the adverse party's ability to respond because only the holder of the privilege is privy to the content of the communication. If the focus of the waiver analysis shifts to the adverse party's detriment, as opposed to the privilege holder's interest in "full and frank communication between an attorney and client," *all* attorney-client communications should be produced because protecting them would inhibit the adverse party's ability to respond. The proposed test misses the point, and should be rejected.

Andrews' test also runs contrary to this Court's precedent, which emphasizes the importance of protecting the privilege when considering the following factors:

(1) The analysis begins with a presumption that the privilege applies. *Bertelsen*, 2011 S.D. 13, ¶ 53, 796 N.W.2d 685, 703. Andrews' test ignores this presumption and, instead, turns the focus to the impact on the adverse party's ability to present a case.

(2) The privilege is only waived if the insurance company expressly or impliedly injects the attorney's advice into the case. *Id.* An insurance company's denial of bad faith is not sufficient to satisfy this standard. *Id.* (citing approvingly *Allstate Ins. Co. v. Clancy*, 936 N.E.2d 272, 277-78 (Ind.Ct.App. 2010) and *Nat'l Union Fire Ins. Co. v. Dominguez*, 873 S.W.2d 373, 375 (Tex. 1994)). Andrews' proposed test would omit this threshold consideration.

Twin City denies, and the record does not support that it injected counsel's advice in the defense of this case; instead, Twin City has simply denied it acted in bad faith. Andrews' arguments that Twin City injected counsel's advice into this case are based on pure speculation. An *in camera* inspection would confirm that Twin City is not relying on counsel's advice.[3] There can be no *reasonable* dispute that it has not injected counsel's advice in any of the 199 "other" files into this matter.

(3) If there is a finding of waiver, it only extends to the extent necessary to reveal the advice of counsel the insurer placed in issue. *Bertelsen*, *supra*; *Acuity II*, 2009 S.D. 69, ¶ 54, 771 N.W.2d at 638; *Kaarup v. St. Paul Fire and Marine Ins. Co.*, 436 N.W.2d 17, 21 (S.D. 1989). The trial court's finding of a "blanket" waiver of the privilege runs contrary to this principle; particularly where there are no evidentiary findings supporting the claim of waiver. Andrews' test ignores this rule.

These considerations underscore the importance of conducting an *in camera* inspection to analyze attorney-client privilege issues. The process outlined in this Court's precedent upholds the vital protection afforded by the privilege. Andrews' proposed test would, in effect, erase that protection.

[3] It should also be noted that Andrews has yet to depose Twin City's adjuster to explore whether the adjustment of Andrews' claim was delegated to outside counsel.

II. The Preferred Procedure Requires the Trial Court to Conduct an *In Camera* Inspection of Attorney-Client Communications and Issue Evidentiary Findings Prior to finding the Privilege was Waived.

Andrews contends that Twin City "invites the Court on a wild goose chase" to ascertain its subjective intent in determining whether it waived the attorney-client privilege. *Appellee's Brief* at 26-27. This statement mischaracterizes Twin City's position, which relies on and aligns with this Court's precedent. Twin City does not ask the Court to make a subjective determination, but seeks an *in camera* review of the materials. The review would be based on the objective information, not the subjective intent as suggested by Andrews.

Next, Andrews poses two questions: (1) whether an *in camera* inspection is actually required, and (2) who has the burden of initiating an *in camera* inspection. Regarding the first question, this Court's precedent is clear that the preferred approach for assessing the validity of privilege claims is for the trial court to conduct an *in camera* inspection. *Arnoldy v. Mahoney*, 2010 S.D. 89, ¶ 33, 791 N.W.2d 645, 657; *Maynard*, 1997 S.D. 60, ¶ 28, 563 N.W.2d at 839-40. While the Court has not stated that an *in camera* inspection is an absolute requirement, the precedent makes clear that absent extenuating circumstances not present here it is the preferred method because it provides complete and accurate analysis of the issue. while protecting the privilege. The trial court's failure to avail itself of this procedure was reversible error because there are no evidentiary or legal findings underlying its decision to require Twin City to produce completely unredacted versions of 200 claim files.

As for the second question, this Court has never placed the burden on either party to demand *in camera* inspection, nor has it placed a timing requirement for a party to request such review. It is undisputed that Twin City provided the Andrews claim file

for *in camera* review in early 2013, and that the trial court found "[i]f it relates to a factual matter not seeking legal advice, it should be produced. That's my position." (HT 5.28.13. at 4; App. at 14.) In response, Twin City revised its redactions to comply with the Order and reproduced the materials to Andrews. It is equally undisputed that Twin City again offered to provide the Andrews materials for additional inspection during the November 5, 2013, hearing. (HT 11.5.13 at 10-11; App. at 31-32.) It is also clear that Twin City offered to provide all 199 "other" claim files it is motion for reconsideration and during the December 3, 2013, hearing. (R. at 2438; HT 12.3.13 at 3-7; App. at 39-43.) Twin City's offer was rejected by the trial court.

Finally, Andrews contends that Twin City did not provide the trial court with sufficient information to make a determination on waiver. *See Acuity II*, 2009 S.D. 69, ¶ 47, 771 N.W.2d at 637. This argument ignores the fact that Twin City's attempts to submit the necessary materials were rejected. It could not comply with the requirement where it was not permitted to submit them.

Andrews' arguments regarding Twin City's failure to submit a privilege log is a red herring. Through use of technology, the Andrews claim file materials that Twin City provided to the trial court for *in camera* review had the redactions highlighted in yellow. The only redactions at issue were for attorney-client privilege. This procedure enabled the trial court to quickly and easily review what was redacted, within its surrounding context, without the need for cross-referencing a privilege log. The process employed by Twin City complied with the requirements set forth in SDCL § 15-6-26(b)(5), which states that a claim of privilege should be expressly made the documents being withheld should be described in such a manner so as to permit the parties to

assess the applicability of the privilege. The redacted claim notes did precisely that, rendering a separate privilege log superfluous and unnecessary.[4] The fact that the trial court accepted Twin City's prior *in camera* submission, without objection, in this fashion led Twin City to reasonably anticipate the same streamlined process would be followed in November and December 2013.

III. The State Law Governing the 199 "Other" Claim Files Must be Applied in Analyzing Attorney-Client Privilege Waiver.

Twin City contends that the state law applying to each of the 199 "other" claim files must be applied to determine whether the attorney-client privilege was waived. Andrews disingenuously responds with a series of "slippery slope" questions and hypothetical scenarios. *Appellee's Brief* at 29-30. Twin City's proposal, although arduous in this case due to the number of claim files demanded by Andrews, is actually very straightforward: the claim file materials must be reviewed and analyzed in the context of the state law applying to that claim to determine whether the attorney-client privilege was waived under that state's legal precedent.

CONCLUSION

Twin City requests that the Court find as a matter of law that the trial court erred when it applied a "blanket" waiver of the attorney-client privilege with respect to Andrews' and the 199 "other" claim files. The trial court's error resulted because it failed to conduct an *in camera* inspection of the disputed communications to determine whether Twin City improperly delegated its claims handling function, which is the procedure outlined in this Court's precedent. The failure to conduct an *in camera*

[4] If Andrews' complaint is that the documents were not sufficiently described, the remedy should be that Twin City should describe them in greater detail—not that the attorney-client privilege was waived.

inspection means there have been no evidentiary findings supporting the conclusion that it waived the important protection provided by the attorney-client privilege with respect to *any* communications—let alone finding that it was waived across-the-board.

The trial court also erred in refusing to permit Twin City to submit the disputed communications under seal to create a complete record. Twin City requests that the Court permit it to submit the materials under seal so that the Court may conduct an *in camera* inspection of the communications to analyze whether they were properly redacted. Alternatively, Twin City requests that the Court remand the case with instructions to (1) conduct an *in camera* inspection, and (2) make specific and detailed written factual findings regarding whether the communications are protected by the attorney-client privilege, or that Twin City waived the privilege. To the extent the case is remanded, the Court should require the trial court to analyze claims from other states according to the legal requirements for waiver in that jurisdiction.

Twin City respectfully requests that the Court reverse the trial court's application of a "blanket" waiver of the attorney-client privilege.

Respectfully submitted this 27th day of June, 2014.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellant's Brief complies with the type volume limitation provided for in South Dakota Codified Laws. This Appellant's Reply Brief, including footnotes, contains 4,905 words. I have relied upon the word count of our word processing system as used to prepare this Appellant's Brief. The original Appellant's Brief and all copies are in compliance with this rule.

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I certify that on June 27, 2014, I e-mailed a true and correct copy of the foregoing Appellant's Reply Brief to the following at their last-known e-mail addresses:

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I further certify that on June 27, 2014, I e-mailed the foregoing Appellant's Reply Brief and sent the original and two copies of it by United States mail, first-class postage prepaid, to:

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APPENDIX