IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30748

KEVIN ROWE,

Plaintiff and Appellee,

v.

DIONE ROWE,

Defendant and Appellant.

Appeal from the Circuit Court, Sixth Judicial Circuit
Tripp County, South Dakota

THE HONORABLE CHRISTINA KLINGER
Circuit Court Judge

APPELLANT'S BRIEF

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This Court's Order Granting Petition for Allowance of Appeal from Intermediate Order was filed on the 16th day of August, 2024.

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Jurisdictional Statement

Pursuant to SDCL § 15-26A-13, Dione Rowe ("Dione") petitioned this Court for permission to take discretionary appeal from the circuit court's[1] order denying her motion for summary judgment. The petition was granted via this Court's August 16, 2024, Order Granting Petition for Allowance of Appeal from Intermediate Order. Therefore, this Court has jurisdiction to hear this appeal pursuant to SDCL § 15-26A-3(6).

Statement of Legal Issues

Whether the circuit court erred in denying Dione's motion for summary judgment on the basis that her letter to the Tribal Land Enterprise board of directors was absolutely privileged under SDCL § 20-11-5(2), thus making her immune from this suit?

Yes. Dione's letter to the Tribal Land Enterprise board of directors, which the board considered at one of its regularly scheduled meetings, was a communication considered in an official proceeding authorized by law, and therefore the letter was absolutely privileged consistent with SDCL § 20-11-5(2) and this Court's decisions interpreting the same.

SDCL § 20-11-5(2)
Janklow v. Keller, 241 N.W.2d 364 (S.D. 1976)
Flugge v. Wagner, 532 N.W.2d 419 (S.D. 1995)
Harris v. Riggenbach, 2001 S.D. 110, 633 N.W.2d 193
Gantvoort v. Ranschau, 2022 S.D. 22, 973 N.W.2d 225

Statement of the Case & Undisputed Facts

Dione and Kevin Rowe ("Kevin") were married almost 30 years. (SR at 34). They had two daughters: Hannah and Heather Rowe. (*Id.*). During the marriage, Dione and Kevin owned and leased farm and ranch land in Tripp and Mellette counties. (*Id.*). Kevin leased some of the land from the Rosebud Sioux Tribe through its subsidiary corporation, the Tribal Land Enterprise ("TLE"). (*Id.*).

[1] The Honorable Christina Klinger, Sixth Judicial Circuit.

In 2018, Dione filed for divorce. (*Id.*). The divorce proceeding lasted approximately two years. (SR at 35). The divorce was contentious and resulted in multiple protection orders being granted against Kevin and in favor of Dione. (*Id.* at 325-330). Kevin was involuntarily committed for a period of time in Yankton, South Dakota. (*Id.* at p. 92: 17-23).

Dione and Kevin were granted a judgment and decree of divorce in July of 2020. (*Id.* at 538: 1-5). Kevin continued leasing land from the TLE. (SR 551: 7-21). Some of the land Kevin leased was tribal land directly adjacent to Dione's family farm. (*Id.*). Although the farm is owned by Dione's mother, Dione is present at the farm regularly to check cattle, put out mineral, and perform other tasks. (*Id.* at 560: 4-14). Unfortunately, to access some of the tribal land Kevin leases, he is required to cross Dione's family farm. (*Id.* at 98: 11-14). Based upon the contentious nature of their divorce and the history of protection orders, Dione was fearful of Kevin and feared for the safety of her mother and daughters. (*Id.* at 567: 1-6; 574: 13-18; 41: 5-15).

In approximately April of 2022, Hannah and Heather drafted a letter to the TLE. (*Id.* at 246: 3-9; 280: 1-10). The letter was written as a first-person statement from Dione. (App. 2-3). The letter was addressed to the "Ladies and Gentlemen of the Tribal Land Enterprise Board." (*Id.*). The letter alleged that Dione, her daughters, and her mother were fearful of Kevin and requested that the TLE "consider relinquishing his [Kevin's] leases that are located near my [Dione's] mother, Donna Brown's property." (*Id.*).

The letter was mailed to the TLE on April 16, 2022. (SR 252: 11-17). On June 14, 2022, the TLE held its regular board of directors meeting. (App. at 4). A motion was

made to rescind the leases that had been entered into with Kevin. (*Id.*). The motion carried with four members voting in favor and one member abstaining. (*Id.*). The TLE notified Kevin of its decision on June 15, 2022, and forwarded a copy to the Bureau of Indian Affairs Superintendent Office "for review and further processing...." (App. at 5).

Kevin subsequently brought this action against Dione. (App. 6-8). The Complaint alleges that Dione's letter to the TLE constitutes tortious interference with a business relationship. (*Id.* at 7).

Dione moved for summary judgment. (SR at 21). She argued that her letter, which was considered at a TLE board of directors meeting, was absolutely privileged pursuant to SDCL § 20-11-5(2) because the meeting was an "official proceeding authorized by law." Kevin made a cross-motion for partial summary judgment, claiming that Dione's letter constituted tortious interference as a matter of law. (SR at 345).

The circuit court denied both motions. (SR 683-684). With respect to Dione's motion, the circuit court took judicial notice of the TLE's lease policy posted on its website. (SR at 674: 23-25; 675: 1-8). The circuit court then held that the TLE's failure to give Kevin notice and an opportunity to be heard violated the TLE's lease policy, rendered the TLE's meeting and action "unauthorized," and rendered Dione's letter not privileged. (SR 676: 13-19).[2]

This Court granted Dione's Petition for Permission to Take Discretionary Appeal on August 16, 2024.

[2] The circuit court acknowledged that neither party had submitted any evidence or made any arguments related to the lease policy. (SR at 674: 23-25; 675: 1-8).

Standard of Review

Summary judgment is properly granted when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Burgi v. East Winds Court, Inc.*, 2022 S.D. 6, ¶ 15, 969 N.W.2d 919, 923. Neither party claimed there were any genuine issues of material fact and the circuit court concluded that the facts were few and that they were undisputed.

The existence of a privilege is a question of law. *Schwaiger v. Avera Queen of Peace Health Servs.*, 2006 S.D. 44, ¶ 8, 714 N.W.2d 874, 878; *Paint Brush Corp. v. Neu*, 1999 S.D. 120, ¶ 55, 599 N.W.2d 384, 398. The subissue of whether a communication has some connection or logical relation to an official proceeding is also a question of law. *Flugge v. Wagner*, 532 N.W.2d 419, 421 (S.D. 1995).

Argument

Dione's letter to the TLE Board is absolutely privileged and the circuit court erred in denying Dione's motion for summary judgment.

A. Communications to a governmental entity, requesting that the entity take official action, are absolutely privileged.

South Dakota has protected certain forms of communications by creating statutory privileges. *See e.g.*, SDCL § 20-11-5(2). This includes a privilege for communications made "[i]n any legislative or judicial proceeding, or in *any other* official proceeding authorized by law...." SDCL § 20-11-5(2) (emphasis added).

The privilege for communications made in an official proceeding is absolute, which is the functional equivalent of absolute immunity. *Harris v. Riggenbach*, 2001 S.D. 110, ¶ 7, 633 N.W.2d 193, 194 ("A privileged communication under SDCL § 20-11-5(2) is absolute and remain[s] privileged whether made with or without malice"); *Brech v.*

Seacat, 170 N.W.2d 348, 348 (S.D. 1969) (circuit court judge's comments at sentencing were absolutely privileged because "in the circumstances alleged he enjoyed absolute immunity"). "Because of this absolute privilege, the purpose behind the communication, or the state of mind of the one making the communication is neither material nor relevant." *Harris*, 2001 S.D. 110, ¶ 11, 633 N.W.2d at 195.

The absolute privilege is not limited to defamation actions, however; instead, it "avoids all liability." *Gantvoort v. Ranschau*, 2022 S.D. 22, ¶ 33, 973 N.W.2d 225, 236. In other words, a party cannot circumvent the privilege by pleading a different cause of action or, as this Court has noted, by "putting a new label on the complaint." *Id.*; *see also Harris*, 2001 S.D. 110, ¶ 14, 633 N.W.2d at 193-196 (holding claims based upon negligence, intentional infliction of emotional distress, and negligent infliction of emotional distress were barred by the absolute privilege under SDCL § 20-11-5(2)). To allow an individual to be immune from defamation but subject to other claims would be to "remove one concern and saddle him with another for doing precisely the same thing." *Janklow v. Keller*, 241 N.W.2d 364, 370 (S.D. 1976). Indeed, the privilege is designed to protect people from "the vexation of defending actions." *Id.* at 330.

Significantly, the privilege is not limited only to communications made at or during the official proceeding itself. Instead, the privilege also protects communications that precede the official proceeding that are intended to prompt official action or that are otherwise related to the proceeding. As this Court held in *Janklow*:

> The publication of defamatory matter by an attorney is protected not only when made in the institution of the proceedings or in the conduct of litigation before a judicial tribunal, but in conferences and other communications preliminary thereto. The institution of a judicial proceeding includes all pleadings and affidavits necessary to set the judicial machinery in motion.

Id. at 328.

This Court has held that the privilege set forth in SDCL § 20-11-5(2) also encompasses communications made to administrative agencies. *Blote v. First Fed. Sav. and Loan Ass'n of Rapid City*, 422 N.W.2d 834, 838 (S.D. 1988) (communications made by former employer to the South Dakota Unemployment Insurance Division were absolutely privileged under SDCL § 20-11-5(2)). Further, it has been held to apply to statements made to the South Dakota Board of Accountancy related to an investigation, even though no official proceeding was ultimately held. *Flugge*, 532 N.W.2d at 421-422 (rejecting the plaintiff's contention that the privilege was inapplicable because "no official proceeding authorized by law occurred").[3]

When South Dakota became a state, it adopted the Civil Code and Code of Civil Procedure of the State of California. *Sparagon v. Native Am. Publishers*, 1996 S.D. 3, ¶ 32, 542 N.W.2d 125, 133. California's Civil Code, like South Dakota's Civil Code, provides an absolute privilege for communications made in any legislative or judicial proceeding "or any other official proceeding authorized by law." Cal. Civ. Code § 47(b)(3). As a result, this Court has examined California decisional law related to the absolute privilege set forth in SDCL § 20-11-5(2). *Janklow*, 241 N.W.2d at 329.

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[3] This Court cited with approval decisional law from other jurisdictions that held the privilege applicable to communications made to governmental boards and commissions that had the authority to revoke a license (i.e., professional associations). *Id.* at 422. In comparison, this Court has been reluctant to extend the privilege to communications made to non-governmental entities. *See Pawlovich v. Linke*, 2004 S.D. 109, 688 N.W.2d 218 (communications made during a hospital investigation were not absolutely privileged); *Waln v. Putnam*, 196 N.W.2d 579, 583 (S.D. 1972) (plurality opinion) (comments made at a board of directors meeting for a private, non-profit corporation, were not absolutely privileged). As set forth in more detail in the next section, however, the TLE is an arm of tribal government engaged in a governmental function.

California's decisional law is consistent with the decisional law of this Court. A plaintiff may not avoid the absolute privilege for communications in official proceedings by pleading a cause of action other than defamation. *Fontani v. Wells Fargo Invs., LLC*, 28 Cal. Rptr. 3d 833, 843 (Cal. Ct. App. 2005) (*disapproved of on other grounds by Kibler v. N. Inyo Cnty. Loc. Hosp. Dist.*, 138 P.3d 193 (Cal. 2006)) (privilege against defamation also applied to claim of tortious interference). Further, the privilege extends to government agencies and boards. *Pettitt v. Levy*, 104 Cal. Rptr. 650, 652 (Cal. Ct. App. 1972) (privilege applied to communications with the Fresno Planning Commission and City Council though the proceedings were "not strictly judicial"). And communications intended to prompt official action are considered part of the official proceeding itself and therefore are absolutely privileged. *Lee v. Fick*, 37 Cal. Rptr. 3d 375, 379 (Cal. Ct. App. 2005) ("Accordingly, communications to an official agency intended to induce the agency to initiate action are part of an 'official proceeding.'"); *Brody v. Montalbano*, 87 Cal. App. 3d 725, 732 (Cal. Ct. App. 1978) ("This court concluded that letters sent to the employer of a school teacher, which are designed to prompt official action with respect to the conduct of that person as a school teacher, are absolutely privileged...."); *Tiedemann v. Superior Ct. of Alameda Cnty.*, 83 Cal. App. 3d 918, 926 (Cal. Ct. App. 1978) ("And communications to such an official agency designed to prompt regulatory enforcement action must be considered a part of the official proceeding itself.").

The right of citizens to petition the government for a redress of grievances is among the most precious of liberties. *Hobart v. Ferebee*, 2004 S.D. 138, ¶ 16, 692 N.W.2d 509, 514. In enacting SDCL § 20-11-5(2), the South Dakota Legislature, like the

California Legislature, sought to ensure that its citizens could do so without fear of being harassed by legal actions from third parties. *Janklow*, 241 N.W.2d at 367-368; *see also Brody*, 87 Cal. App. 3d at 738 ("It has been determined that justification for interference with contractual relations is closely analogous to privilege in defamation, and that the tort of inducing breach of contract cannot be used to close the channel of communication through which citizens may express their grievances to public officials."). And this Court has repeatedly applied the absolute privilege consistent with the policy that underlies it—that the benefits of citizens communicating freely with their government outweigh the harm that may result to an individual's reputation or business interest.

B. The TLE is "authorized by law" to manage and administer all of the land owned by the Rosebud Sioux Tribe.

In 1934, Congress passed the Indian Reorganization Act (the "Act"). 25 U.S.C. § 5124. The Act permits Indian tribes to organize corporations to manage tribal business affairs. *U.S. v. Zephier*, 916 F.2d 1368, 1372-73 (8th Cir. 1990). Approximately ten years later, the Rosebud Sioux Tribe (the "Tribe") created the TLE as a "subordinate organization" and authorized the TLE to manage tribal land on behalf of the Tribe. (SR at 205); *see also Rosebud Sioux Tribe v. Strain*, 432 N.W.2d 259, 260 (S.D. 1988) ("TLE is a Rosebud subsidiary and is responsible for the management and administration of all land owned by Rosebud.").

The TLE is operated by the Tribe via the TLE's board of directors. (SR at 205). The TLE's board of directors must include, at all times, the tribal President. (*Id.*). The TLE's board of directors meets monthly, and its actions are reviewed by the Bureau of Indian Affairs, which is a bureau of the United States Department of the Interior. *U.S. v. Vanderwalker*, 2010 WL 5140476 *1 (D.S.D. Dec. 10, 2010) (noting that the Bureau of

Indian Affairs "approved" the action of the TLE); (App. at 5) ("A copy of this letter will be forwarded to the BIA Superintendent Office for review and further processing."). Consequently, the TLE is authorized by law, both federal and tribal, to take official action with respect to tribal lands on behalf of the Tribe.

It is undisputed that the TLE rescinded Kevin's leases at one of the TLE's regularly scheduled board of directors' meetings and submitted its decision to the Bureau of Indian Affairs. Thus, Dione's letter to the TLE board members requesting the TLE rescind Kevins's leases of the land adjacent to her family farm was related to an "official proceeding authorized by law" and is therefore absolutely privileged under SDCL § 20-11-5(2).

C. Dione's letter was related to the TLE's function of administering and managing Rosebud's tribal land.

A communication made in a legislative, judicial, or in any other official proceeding must have some "connection or logical relation" to the proceeding in order to be absolutely privileged. *Flugge*, 532 N.W.2d at 422; *Janklow*, 241 N.W.2d at 368. "Courts have favored a liberal rule that statements are related to the proceedings, thereby retaining the absolute privilege." *Flugge*, 532 N.W.2d at 422 (*quoting* 50 Am. Jur. 2d, *Libel and Slander*, § 303). Therefore, the relevancy of the communication is not a "technical legal relevancy but instead a general frame of reference and relationship to the subject matter of the action." *Id.* (*quoting Sinnett v. Albert*, 195 N.W.2d 506, 508 (Neb. 1972)). "Doubts are resolved in favor of relevancy and pertinency." *Id.* (*quoting* 50 Am. Jur. 2d, *Libel and Slander*, § 303).

The Tribe created the TLE as a "subordinate organization" and authorized the TLE to manage tribal land on behalf of the Tribe. (SR at 205); *see also Rosebud Sioux*

Tribe, 432 N.W.2d at 260 ("TLE is a Rosebud subsidiary and is responsible for the management and administration of all land owned by Rosebud."). Dione simply requested that her ex-spouse, with whom she had gone through a contentious divorce, lease tribal land situated somewhere other than adjacent to her family farm. That request was at the core of the TLE's function.

D. The circuit court's decision undermines the policy behind the absolute privilege.

The circuit court reviewed the TLE's "lease policy" online and concluded that the TLE violated its own policies by failing to give Kevin notice and an opportunity to be heard. (SR at 677). According to the circuit court, the TLE's failure to follow its policies rendered its actions "unauthorized" and Dione's letter unprivileged.

The circuit court's reasoning is flawed for several reasons. As an initial matter, the circuit court's ruling is contrary to the text of SDCL § 20-11-5(2). The statute does not require an official *action* authorized by law. Instead, the statute creates an absolute privilege for communications related to a "legislative or judicial *proceeding*, or in any other official *proceeding* authorized by law." SDCL § 20-11-5(2) (emphasis added). It is the *proceeding* that must be authorized by law, not the action or the decision made by the legislature, jurist, agency, or official. Indeed, the communication is absolutely privileged even if *no* proceeding is ultimately conducted. *Flugge*, 532 N.W.2d at 421 (complaints made in an effort to prompt official action are absolutely privileged even if no action is taken); *Tiedemann*, 83 Cal. App. 3d at 926 ("And communications to such an official agency designed to prompt regulatory enforcement action must be considered a part of the official proceeding itself").

The circuit court's ruling also undermines the purpose of the privilege, which is to open the channel of communication between citizens and government. Under the circuit court's reasoning, citizens are subject to suit if the government official or agency acts upon a citizen's complaint and is subsequently found to have committed error. In that respect, the circuit court converted an absolute privilege into a conditional privilege. But unlike a conditional privilege that attaches when an individual communicates without malice, the circuit court's ruling makes the privilege entirely dependent upon the third-party recipient's subsequent acts or omissions. This would undoubtedly make citizens reluctant to communicate their grievances, which is precisely what the legislature sought to avoid when it created the absolute privilege. *Janklow*, 241 N.W.2d at 330 (noting the policy underlying SDCL § 20-11-5(2) is to protect people from the fear of "the vexation of defending actions") (additional citations omitted).[4]

In addition, the circuit court acting on its own accord to find some deficiency with the TLE's decision was error. While courts of general jurisdiction have a very wide jurisdictional lane, the circuit court veered from it. It is not the province of South Dakota courts to review the decisions of tribal agencies. Instead, that is the function of the BIA's Superintendent's Office. While the TLE made Kevin aware that its decision was being forwarded to the BIA for "review and further processing," the record is devoid of what steps, if any, Kevin took to challenge the TLE's decision. (App. at 5). In any event, Kevin's subsequent attempt to "shoot the messenger" in state court should fail because the message is absolutely privileged under SDCL § 20-11-5(2).

[4] It would also subject citizens who made complaints the government deemed meritorious enough to take action on to suit but provide immunity for citizens who made complaints for which the government took no action.

Conclusion

Kevin's tortious interference action against Dione, based solely upon her letter to the TLE, is not actionable because Dione's letter is absolutely privileged under SDCL § 20-11-5(2). For all the reason's set forth above, Dione respectfully requests that this Court reverse the circuit court's decision and direct it to enter summary judgment in Dione's favor.

Respectfully submitted this 26th day of September, 2024.

WOODS, FULLER, SHULTZ & SMITH, P.C.

By: */s/ Andrew R. Damgaard*
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Certificate of Compliance

In accordance with SDCL § 15-26A-66(b)(4), we certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 365, Times New Roman (12 point) and contains 3,149 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, and certificates of counsel. We have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 26th day of September, 2024.

WOODS, FULLER, SHULTZ & SMITH, P.C.

By: */s/ Andrew R. Damgaard*

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Certificate of Service

I hereby certify that on the 26th day of September, 2024, a true and correct copy of the foregoing Appellant's Brief and Appendix was electronically filed via the Odyssey File & Serve system, which will automatically send email notification of the same to the following:

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One of the Attorneys for the Appellant

Appendix

STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF TRIPP	)	SIXTH JUDICIAL CIRCUIT
KEVIN ROWE,	:	61CIV22-76
Plaintiff,	:	
v.	:	**ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**
DIONE ROWE,	:	
Defendant.	:	

The Court held a hearing on the Plaintiff's Motion for Partial Summary Judgment via Zoom on June 20, 2024, at 10:00 a.m. The Plaintiff was represented by his attorney, Quentin Riggins of Gunderson, Palmer, Nelson & Ashmore. The Defendant was represented by her attorney, Andrew Damgaard of Woods, Fuller, Shultz & Smith. Having reviewed the submissions of the parties, considered the relevant legal authorities, and the arguments of counsel, it is hereby:

ORDERED that the Plaintiff's Motion for Partial Summary Judgment is DENIED as the Court finds the Rosebud Sioux Tribe, Tribal Land Enterprises ("TLE") meeting at issue was not an official proceeding because the process authorized by law by the TLE was not followed.

Attest:
Calhoon, Jodi
Clerk/Deputy

7/8/2024 2:52:22 PM
BY THE COURT:

Honorable Christina Klinger
Circuit Court Judge

Ladies and Gentlemen of the Tribal Land Enterprise Board,

My name is Dione Rowe. I am the mother of Hanna and Heather Rowe. My mother is Donna Brown who owns a farm/ranch north of Wood, South Dakota. Myself and my two daughters assist Donna on her farm and ranch. In July of 2018, I separated from Kevin. Kevin was using drugs and alcohol…

I am requesting that you consider relinquishing his leases that are located near my mother, Donna Brown's property. My daughters have submitted bids in the past and most recently a couple of months ago in order to provide a safe place for their animals to reside on. Kevin has threatened, numerous times, to kill their animals (horses, cattle, etc.). He calls them up and threatened them while they were at college, telling them "I'm gonna shoot your fucking animals." My daughters have videos and phone recordings of such events.

As I mentioned, my daughters again recently tried to bid on land near my mom's property. Last week I had found out that he bid against my daughter Hanna, to obtain land adjacent to my mother's land. He also did this in the Fall of 2021. Donna has become fearful, as am I, due to his previous attempts to isolate me alone with him. He has a history of drug and alcohol abuse and has been physically and emotionally.

It appeared he had been a part of 47 pair of buffalo grazing my mother's land in August of 2021. When my daughter, Hanna, approached him about this, he laughed at her and said "Well maybe your grandmother should come out and fix the fucking fence. (A brand-new fence was installed around Donna's entire property of that area in 2019).

Not only has he been threatening my daughters, but he has also attempted to lure me to various areas on the tribal land near my mother's property. For example, "Meet me at the bottom of the crick pasture" (referring to TLE tract numbers: A367.5, A556.5, A380, A380.5a, A380.5b, and A380.5c), "Meet me by the dam so we can talk, etc."

He is now a hunting guide for TLE land, which I believe he uses as a way to access other land near my mother that is leased by other producers.

My daughters would be willing to take over his leases near my mom's property and are asking for your consideration to do so. I appreciate your consideration and support and look forward to visiting with you about this issue.

Thank you,

Dione, Hanna, and Heather Rowe

A Sub-ordinate Organization of the
Rosebud Sioux Tribe

Incorporated Under Act of June 18, 1934, (48 Stat 984)

2443 Legion Ave P.O. Box 159
Rosebud, S.D. 57570
Telephone 605 747-2371
Fax # 605 747-2400
Website: www.rsttle.com

June 15, 2022

Kevin Rowe
30120 269th St.
Carter, SD 57580

RE: Rescind Award Letters

Dear Mr. Rowe:

This letter is in reference to the TLE Leases bids and proposals that you submitted to Tribal Land Enterprise.

The lease bids and proposal(s) were presented to the Board of Directors of Tribal Land Enterprise on June 14, 2022 for review and consideration. The TLE Board made the motion to rescind all the award letters and to have the TLE Lease Manager renegotiate all the leases.

A copy of this letter will be forwarded to the BIA Superintendent Office for review and further processing of this TLE Board action.

If you have questions, please contact Ernest Blacksmith Jr., TLE Lease Manager, at 747-2371 or stop in at Tribal Land Enterprise.

Sincerely,

Ernest Blacksmith Jr.

Ernest Blacksmith Jr., Lease Manager

Concur

Ieshia Poignee

Ieshia Poignee, Acting Executive Director

Cc: Gerald Dillon, Realty Specialist, BIA Lease Office
TLE Lease Office Outgoing Correspondence

IP/ebjr/06-14-2022/7472371.0223

Tribal Land Enterprise

A Sub-ordinate Organization of the
Rosebud Sioux Tribe
Incorporated Under Act of June 18, 1934, (48 Stat 984)
2443 Legion Ave. P.O. Box 159
Rosebud, S.D. 57570
Telephone 605 747-2371
Fax # 605 747-2400

MOTION EXCERPT

DATE: June 15, 2022

TO: LEASE MANAGER, Ernest Blacksmith, Jr.

FROM: ACTING BOARD SECRETARY, Viviana B. Running VBR

RE: **Rescind Motion – Kevin Rowe**

The following action was taken during the Regular TLE Board of Director's Meeting held on June 14, 2022 with a quorum of five (5) members present:

Motion made by Dera Iyotte to rescind motion awarding leases to Kevin Rowe and to have the T.L.E. Lease Manager renegotiate lease letters. Seconded by Vanessa Red Hawk-Thompson.

Vote: 4 - in favor, 0 - opposed, 1 - not voting. MOTION CARRIED.

STATE OF SOUTH DAKOTA	) SS.	IN CIRCUIT COURT
COUNTY OF TRIPP	)	SIXTH JUDICIAL CIRCUIT

KEVIN ROWE, Plaintiff, v. DIONE ROWE Defendant.	)	**COMPLAINT**

COMES NOW, Kevin Rowe, plaintiffs in the above-entitled matter, by and through his attorneys of record, Quentin L. Riggins and Owen R. Wiese of Gunderson, Palmer, Nelson & Ashmore, LLP, and hereby states and alleges as follows:

1. Plaintiff is a resident of Tripp County, South Dakota, and intends to maintain such residency until this action is completed.

2. Defendant is a resident of Tripp County, South Dakota.

3. The venue of this action is Tripp County based on SDCL § 15-5-6.

4. Plaintiff and Defendant used to be married to one another.

5. Plaintiff owns and operates a farming and ranching operating.

6. Plaintiff had multiple leases with Tribal Land Enterprises (the "TLE"), a subordinate organization of the Rosebud Sioux Tribe, for activities related to his farming and ranching operating.

7. Prior to June 22, 2022, TLE had awarded Plaintiff multiple leases that would have given him the continued ability to farm and ranch on TLE property.

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8. Defendant has knowledge of the relationship between Plaintiff and TLE, for Plaintiff to lease land for Plaintiff's farming and ranching operation.

9. On information and belief, at some time prior to June 14, 2022, Defendant wrote a letter to TLE regarding Plaintiff.

10. On June 14, 2022, TLE discussed the contents of the letter during a board meeting.

11. TLE decided to rescind all leases it had awarded to Plaintiff.

12. Plaintiff did not have an opportunity to be heard during the TLE board meeting.

13. On June 22, 2022, Plaintiff received a letter from TLE rescinding all the leases it had awarded Plaintiff.

14. Plaintiff requested an opportunity to meet with TLE to discuss reinstatement of the leases and was denied.

15. Plaintiff was denied access to the letter drafted by Defendant to TLE, which was relied upon in making the decision to cancel the leases.

COUNT I TORTIOUS INTERFERENCE WITH BUSINESS RELATIONSHIP

16. Plaintiff restates and realleges paragraphs 1-15 above, as fully set forth herein.

17. Defendant has intentionally and unjustifiably acted to interfere with Plaintiff's business relationship with TLE.

18. The intentional and unjustifiable actions of the Defendant to interfere in the farming and ranching operation has harmed the Plaintiff's ability to continue the farming and ranching operation.

19. Plaintiff is dependent upon the farming and ranching operation for his livelihood.

Filed: 12/12/2022 10:23 AM CST Tripp County, South Dakota 61CIV22-000076

20. Defendant's actions have been with malice toward Plaintiff and their ability to conduct Plaintiff's business and maintain his livelihood.

21. Defendant's intentional and unjustifiable actions have caused damage to the Plaintiff in that he has lost opportunities and has lost income as a proximate cause of Defendant's actions.

WHEREFORE, Plaintiff prays judgment against Defendant as follows:

1. For consequential damage and other damages proximately caused by Defendant and as determined by a jury.

2. For punitive damages as determined by a jury and to set a hearing pursuant to SDCL § 21-1-4.1 on the issue of punitive damages

3. For prejudgment interest on any award.

4. For such other and further relief as the Court deems just and equitable in the premises.

PLAINTIFF DEMANDS A TRIAL BY JURY

Dated: December 12, 2022.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By: 

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STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	:SS	
COUNTY OF TRIPP	)	SIXTH JUDICIAL CIRCUIT

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KEVIN ROWE,	:	61CIV22-76
Plaintiff,	:	
v.	:	
DIONE ROWE,	:	**DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**
Defendant.	:	

0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0-0

Pursuant to SDCL § 15-6-56, Defendant, Dione Rowe, submits the following Statement of Undisputed Material Facts.

1. Kevin and Dione Rowe were married on March 14, 1992. (*See* Verified Compl. of Divorce at ¶ 2, attached as Ex. 6 to Aff. of Counsel).

2. They had two children together: Hanna and Heather Rowe. (*Id.* at ¶ 3).

3. During their marriage, the couple owned and leased farm and ranch land in Tripp and Mellette counties. (*See* Dep. of Dione Rowe at 16:10–25, 17:1–21, attached as Ex. 2 to Aff. of Counsel).

4. Some of the ranch land was leased by Kevin Rowe from the Rosebud Sioux Tribe through its subsidiary corporation, the Tribal Land Enterprise (TLE). (*See* Dep. of Kevin Rowe at 10:7–25, 11:1–3, attached as Ex. 1 to Aff. of Counsel).

5. In 2018, Dione filed for divorce. (*See* Verified Compl. of Divorce at 4).

6. The divorce was contentious, with Dione filing a petition for emergency commitment directed at Kevin, as well as multiple petitions for protective orders directed at Kevin. (Dep. of Kevin Rowe at 26:19–25, 27–32; Dep. of Dione Rowe at 3:24–25, 4:1).

7. A judgment and decree of divorce was entered on July 31, 2020. (Dep. of Dione Rowe at 4:4–5).

8. During the pendency of the divorce, Kevin continued renting ground from the TLE. (Dep. of Kevin Rowe at 12:5–15).

9. Some of the tribal ground leased by Kevin before and during the divorce was adjacent to land owned by Dione's mother, Donna Brown. (Dep. of Dione Rowe at 17:7–21).

10. To access some of the ground Kevin leased from the TLE, he was required to physically access and cross property owned by Donna Brown. (Dep. of Kevin Rowe at 57:13–18).

11. After the divorce had been finalized, Dione was still required to be present on Donna Brown's property—which was adjacent to tribal land still leased by Kevin—to check cattle, put out mineral, or conduct other similar tasks. (Dep. of Dione Rowe at 26:5–14; *see also* Def.'s Obj. and Answers to Pl.'s First Set of Interrog. and Req. for Produc. at 3, attached as Ex. 7 to Aff. of Counsel).

12. Based on the contentious nature of their divorce and the various threats made by Kevin (as detailed in the petition for emergency commitment and petitions for protective order), Dione feared for her safety and the safety of her daughters and mother—particularly when Dione or Donna were on property owned by Donna while Kevin was present on the adjacent property he leased from the TLE. (Dep. of Dione Rowe at 25:4–7, 33:1–6, 40:15–18, 41:5–15, 44:19–25, 45:1–2; Def.'s Obj. and Answers to Pl.'s First Set of Interrog. and Req. for Produc. at 3, 5).

13. In approximately April 2022, Hanna and Heather Rowe drafted a letter to the TLE. (*See* Dep. of Hanna Rowe at 15:3–9, attached as Ex. 8 to Aff. of Counsel; Dep. of Heather Rowe at 4:22–25, 5:1–10, attached as Ex. 9 to Aff. of Counsel; Letter to Tribal Land Enterprise, attached as Ex. 13 to Aff. of Counsel).

14. The letter was written as a first-person statement from Dione and asked the TLE to consider rescinding Kevin's leases on the tribal land located adjacent to Donna Brown's property. (Dep. of Dione Rowe at 9:24–25, 10:1–5; 33:13–25, 34:1–20; Def.'s Obj. and Answers to Pl.'s First Set of Interrog. and Req. for Produc. at Ex. 3; Letter to Tribal Land Enterprise).

15. Hanna and Heather received input from Dione when drafting the letter. (Dep. of Dione Rowe at 10:2–3).

16. The letter was sent to members of the TLE Board of Directors on April 16, 2022. (Dep. of Hanna Rowe at 21:11–17).

17. The letter was not delivered to anyone outside of Rosebud's Tribal government. (Def.'s Obj. and Answers to Pl.'s First Set of Interrog. and Req. for Produc. at 5).

18. On June 14, 2022, the Board of Directors of the TLE held its monthly meeting at the TLE offices in Rosebud, South Dakota. (Dep. of Kevin Rowe at 56:14–25).

19. At the June 14 meeting, the TLE Board of Directors entertained a formal motion to rescind all of Kevin Rowe's leases with the TLE. The motion was approved by a vote of the Board and certain of Kevin's leases were thereafter rescinded. (Dep. of Kevin Rowe at 38:5–13, 56:14–25).

20. Neither Kevin nor Dione was present at the June 14 meeting. (Dep. of Kevin Rowe at 15:17–19; Dep. of Dione Rowe at 48:11–13).

21. Kevin was informed that some of his leases were rescinded when he received a certified letter from the TLE dated June 15, 2022. (Dep. of Kevin Rowe at 17:25, 18:1–6; Certified Letter, attached as Ex. 15 to Aff. of Counsel).

22. The letter from the TLE made no reference to Dione's letter sent to the TLE on April 16, 2022 asking the TLE to consider rescinding Kevin's leases. (Dep. of Dione Rowe at 48:3–10; Certified Letter).

23. The Rosebud Sioux Tribe is a federally recognized Indian Tribe, incorporated pursuant to the Indian Reorganization Act of 1934. (Ex. 4 to Aff. of Counsel); *see also Rosebud Sioux Tribe of South Dakota v. Driving Hawk*, 407 F.Supp. 1191, 1194 (D.S.D. 1976).

24. On April 16, 1943, the Rosebud Sioux Tribe formed the TLE as a subsidiary organization and a Section 17 corporation under the authority of what is now 25 U.S.C. § 5124. *United States v. Vanderwalker*, 2010 WL 5140476 *1 (D.S.D. Dec. 10, 2010). The TLE is empowered to act "on behalf of the Tribe[.]" (*See* Bylaws of the Rosebud Sioux Tribe Tribal Land Enterprise at 2, "Powers of the Board of Directors" available at https://www.rsttle.com and attached as Ex. 5 to Aff. of Counsel).

Dated this 25th day of March, 2024.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ Thomas P. Schartz

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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of March, 2024, a true and correct copy of the foregoing *Motion for Summary Judgment* was served, via Odyssey File and Serve, upon Quentin L. Riggins, Gunderson, Palmer, Nelson & Ashmore, LLP, PO Box 8045, Rapid City, SD 57709, Attorneys for Plaintiff.

/s/Thomas P. Schartz
One of the Attorneys for Dione Rowe

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS.	
COUNTY OF TRIPP	)	SIXTH JUDICIAL CIRCUIT
KEVIN ROWE,	)	61CIV22-000076
Plaintiff,	)	
v.	)	**PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**
DIONE ROWE,	)	
Defendant.	)	

COMES NOW Plaintiff, Kevin Rowe, by and through Quentin L. Riggins of Gunderson, Palmer, Nelson & Ashmore, LLP, its attorneys, and respectfully submits this Response to Defendant's Statement of Undisputed Material Facts pursuant to SDCL 15-6-56(c).

1. Kevin and Dione Rowe were married on March 14, 1992. (*See* Verified Compl. of Divorce at ¶ 2, attached as Ex. 6 to Aff. of Counsel).

RESPONSE: Undisputed.

2. They had two children together: Hanna and Heather Rowe. (*Id.* at ¶ 3).

RESPONSE: Undisputed.

3. During their marriage, the couple owned and leased farm and ranch land in Tripp and Mellette counties. (*See* Dep. of Dione Rowe at 16:10-25, 17:1-21, attached as Ex. 2 to Aff. of Counsel).

RESPONSE: Undisputed.

4. Some of the ranch land was leased by Kevin Rowe from the Rosebud Sioux Tribe through its subsidiary corporation, the Tribal Land Enterprise (TLE). (*See* Dep. of Kevin Rowe at 10:7-25, 11:1-3, attached as Ex. 1 to Aff. of Counsel).

RESPONSE: Undisputed.

5. In 2018, Dione filed for divorce. (*See* Verified Compl. of Divorce at 4).

RESPONSE: Undisputed.

6. The divorce was contentious, with Dione filing a petition for emergency commitment directed at Kevin, as well as multiple petitions for protective orders directed at Kevin. (Dep. of Kevin Rowe at 26:19-25, 27-32; Dep. of Dione Rowe at 3:24-25, 4:1).

RESPONSE: Undisputed that (1) the divorce was contentious; (2) Dione filed the petition for emergency commitment; and (3) Dione filed petitions for protective orders. Disputed, however, as to the veracity of the allegations in the petition for emergency commitment. *See* Dep. of Kevin Rowe at 28:16-25, 29:1-2. Further disputed as to the veracity of the allegations in the petitions for protective orders. *See* Dep. of Kevin Rowe at 30:11-25, 31:1-25, 32:1-25, 33:1-6.

7. A judgment and decree of divorce was entered on July 31, 2020. (Dep. of Dione Rowe at 4:4-5).

RESPONSE: Undisputed.

8. During the pendency of the divorce, Kevin continued renting ground from the TLE. (Dep. of Kevin Rowe at 12:5-15).

RESPONSE: Undisputed.

9. Some of the tribal ground leased by Kevin before and during the divorce was adjacent to land owned by Dione's mother, Donna Brown. (Dep. of Dione Rowe at 17:7-21).

RESPONSE: Undisputed.

10. To access some of the ground Kevin leased from the TLE, he was required to physically access and cross property owned by Donna Brown. (Dep. of Kevin Rowe at 57:13-18).

RESPONSE: Undisputed.

11. After the divorce had been finalized, Dione was still required to be present on Donna Brown's property—which was adjacent to tribal land still leased by Kevin—to check cattle, put out mineral, or conduct other similar tasks. (Dep. of Dione Rowe at 26:5 14; *see also* Def. 's Obj. and Answers to Pl. 's First Set of Interrog. and Req. for Produc. at 3, attached as Ex. 7 to Aff. of Counsel).

RESPONSE: Disputed to the extent that nothing in the record cited by Defendant indicates Defendant was *required* to be present on Donna Brown's property.

12. Based on the contentious nature of their divorce and the various threats made by Kevin (as detailed in the petition for emergency commitment and petitions for protective order), Dione feared for her safety and the safety of her daughters and mother—particularly when Dione or Donna were on property owned by Donna while Kevin was present on the adjacent property he leased from the TLE. (Dep. of Dione Rowe at 25:4-7, 33:1-6, 40:15-18, 41:5-15, 44:19-25, 45:1- 2; Def. 's Obj. and Answers to Pl. 's First Set of Interrog. and Req. for Produc. at 3, 5).

RESPONSE: Disputed as to the veracity of the allegations contained in the petition for emergency commitment and petitions for protective order. Dep. of Kevin Rowe at 28:16-25, 29:1-2, 30:11-25, 31:1-25, 32:1-25, 33:1-6; *see also* Plaintiff's Statement of Undisputed Material Fact ¶¶ 15-18 filed in support of Plaintiff's Motion for Partial Summary Judgment.

13. In approximately April 2022, Hanna and Heather Rowe drafted a letter to the TLE. (*See* Dep. of Hanna Rowe at 15:3-9, attached as Ex. 8 to Aff. of Counsel; Dep. of Heather Rowe at 4:22-25, 5:1-10, attached as Ex. 9 to Aff. of Counsel; Letter to Tribal Land Enterprise, attached as Ex. 13 to Aff. of Counsel).

RESPONSE: Disputed to the extent this statement of undisputed material fact seeks to omit Defendant's participation in, contribution to, and responsibility for the letter to the TLE. Dep. of Dione Rowe at 6:14-25, 7:1-3, 9:24-25, 10:1-5, 11:1-25.

14. The letter was written as a first-person statement from Dione and asked the TLE to consider rescinding Kevin's leases on the tribal land located adjacent to Donna Brown's property. (Dep. of Dione Rowe at 9:24-25, 10:1-5; 33:13-25, 34:1-20; Def.'s Obj. and Answers to Pl. 's First Set of Interrog. and Req. for Produc. at Ex. 3; Letter to Tribal Land Enterprise).

RESPONSE: Undisputed.

15. Hanna and Heather received input from Dione when drafting the letter. (Dep. Of Dione Rowe at 10:2-3).

RESPONSE: Undisputed but clarify that Dione's input was significant. Dep. of Dione Rowe at 6:14-25, 7:1-3, 9:24-25, 10:1-5, 11:1-25.

16. The letter was sent to members of the TLE Board of Directors on April 16, 2022. (Dep. of Hanna Rowe at 21:11-17).

RESPONSE: Undisputed.

17. The letter was not delivered to anyone outside of Rosebud's Tribal government. (Def.'s Obj. and Answers to Pl. 's First Set of Interrog. and Req. for Produc. at 5).

RESPONSE: Disputed. The letter was sent to Hanna Rowe, Heather Rowe, and Donna Brown. *See* Dione Rowe's Answers to Interrogatories 6 and 7 attached as Exhibit 7 to the Affidavit of Thomas P. Schartz.

18. On June 14, 2022, the Board of Directors of the TLE held its monthly meeting at the TLE offices in Rosebud, South Dakota. (Dep. of Kevin Rowe at 56:14-25).

RESPONSE: Undisputed.

19. At the June 14 meeting, the TLE Board of Directors entertained a formal motion to rescind all of Kevin Rowe's leases with the TLE. The motion was approved by a vote of the Board and certain of Kevin's leases were thereafter rescinded. (Dep. of Kevin Rowe at 38:5-13, 56:14-25).

RESPONSE: Undisputed but clarify that the TLE rescinded the vast majority of Kevin's leases. Dep. of Kevin Rowe at 38:5-13.

20. Neither Kevin nor Dione was present at the June 14 meeting. (Dep. of Kevin Rowe at 15:17-19; Dep. of Dione Rowe at 48:11-13).

RESPONSE: Undisputed.

21. Kevin was informed that some of his leases were rescinded when he received a certified letter from the TLE dated June 15, 2022. (Dep. of Kevin Rowe at 17:25, 18:1-6; Certified Letter, attached as Ex. 15 to Aff. of Counsel).

RESPONSE: Disputed. The letter states "[t]he TLE Board made the motion to rescind *all* the award letters and to have the TLE Lease Manager renegotiate all the leases." Ex. 15 attached to the Affidavit of Thomas P. Schartz (emphasis added).

22. The letter from the TLE made no reference to Dione's letter sent to the TLE on April 16, 2022 asking the TLE to consider rescinding Kevin's leases. (Dep. of Dione Rowe at 48:3-10; Certified Letter).

RESPONSE: Undisputed but further add that then-TLE Lease Manager Ernest Blacksmith informed Kevin that his leases were rescinded because Dione wrote the letter to the TLE. Dep. of Kevin Rowe at 18:7-17.

23. The Rosebud Sioux Tribe is a federally recognized Indian Tribe, incorporated pursuant to the Indian Reorganization Act of 1934. (Ex. 4 to Aff. of Counsel); *see also Rosebud Sioux Tribe of South Dakota v. Driving Hawk,* 407 F.Supp. 1191, 1194 (D.S.D. 1976).

RESPONSE: Undisputed.

24. On April 16, 1943, the Rosebud Sioux Tribe formed the TLE as a subsidiary organization and a Section 17 corporation under the authority of what is now 25 U.S.C. § 5124. *United States v. Vanderwalker,* 2010 WL 5140476 * 1 (D.S.D. Dec. 10, 2010). The TLE is empowered to act "on behalf of the Tribe[.]" *(See* Bylaws of the Rosebud Sioux Tribe Tribal Land Enterprise at 2, "Powers of the Board of Directors" available at https://www.rsttle.com and attached as Ex. 5 to Aff. of Counsel).

RESPONSE: Undisputed.

GUNDERSON, PALMER, NELSON
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By: Quentin L. Riggins

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CERTIFICATE OF SERVICE

I hereby certify June 6, 2024, I served a true and correct copy of **PLAINTIFF'S RESPONSE TO DEFENDANT'S STATEMENT OF UNDISPUTED MATERIAL FACTS** through South Dakota's Odyssey File and Serve Portal upon the following individuals:

Andrew R. Damgaard
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Sioux Falls, SD 57104

Thomas R. Schartz
300 S. Phillips Ave Ste 300
Sioux Falls, SD 57104

By: */s/ Quentin L. Riggins*
Quentin L. Riggins

South Dakota Codified Laws
Title 20. Personal Rights and Obligations
Chapter 20-11. Liability for Defamation (Refs & Annos)

SDCL § 20-11-5

20-11-5. Privileged communications--Malice not inferred from publication

Currentness

A privileged communication is one made:

(1) In the proper discharge of an official duty;

(2) In any legislative or judicial proceeding, or in any other official proceeding authorized by law;

(3) In a communication, without malice, to a person interested therein, by one who is also interested, or by one who stands in such relation to the person interested as to afford a reasonable ground for supposing the motive for the communication innocent, or who is requested by the person interested to give the information;

(4) By a fair and true report, without malice, of a judicial, legislative, or other public official proceeding or of anything said in the course thereof.

In the cases provided for in subdivisions (3) and (4) of this section, malice is not inferred from the communication or publication.

Credits
Source: CivC 1877, § 31; CL 1887, § 2530; RCivC 1903, § 31; RC 1919, § 99; SDC 1939, § 47.0503.

S D C L § 20-11-5, SD ST § 20-11-5
Current through the 2024 Regular Session, Ex. Ord. 24-1, and Supreme Court Rule 24-11

End of Document

Appeal No. 30748

In the

Supreme Court of the State of South Dakota

KEVIN ROWE,

Plaintiff and Appellee,

vs.

DIONE ROWE,

Defendant and Appellant.

Appeal from the Circuit Court
Sixth Judicial Circuit
Tripp County, South Dakota

The Honorable Christina Klinger

Order Granting Petition for Allowance of Appeal from Intermediate Order
filed August 16, 2024
Notice of Review filed September 3, 2024

BRIEF OF APPELLEE KEVIN ROWE

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Filed: 11/27/2024 3:06 PM CST Supreme Court, State of South Dakota #30748

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TABLE OF AUTHORITIES

Cases

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PRELIMINARY STATEMENT

Citations to the record will appear as "R. __" with the page number from the Clerk's Appeal Index. Appellee Kevin Rowe will be referred to as "Kevin" and Appellant Dione Rowe will be referred to as "Dione." References to Kevin's Appendix will be referred to as "K. App. __."

JURISDICTIONAL STATEMENT

By order dated August 16, 2024, this Court granted Defendant Dione Rowe's petition for permission to take discretionary appeal from the circuit court's order denying her motion for summary judgment. On September 3, 2024, Plaintiff Kevin Rowe noticed additional issues for this Court's review pursuant to SDCL § 15-26A-22. This Court has jurisdiction to hear this appeal pursuant to SDCL § 15-26A-3(6).

STATEMENT OF THE LEGAL ISSUES

Dione articulates the issue on review as follows:

> Whether the circuit court erred in denying Dione's motion for summary judgment on the basis that her letter to the Tribal Land Enterprise board of directors was absolutely privileged under SDCL § 20-11-5(2), thus making her immune from this suit?
>
> The circuit court did not err. Defendant Dione Rowe's letter sent to the Tribal Land Enterprise (TLE) does not constitute a privileged communication under SDCL § 20-11-5(2) because the letter was not made in relation to an official proceeding authorized by law as it was not related to or sent for purposes of which the TLE is authorized to act.
>
> SDCL § 20-11-5(2)
> *Gantvoort v. Ranschau*, 2022 SD 22, 973 N.W.2d 225
> *Flugge v. Wagner*, 532 N.W.2d 419 (S.D. 1995)
> *Waln v. Putnam*, 196 N.W.2d 579 (S.D. 1972)

Additional issues noticed for appeal by Kevin's notice of review include:

> Whether Defendant/Petitioner waived the statutory privilege defense under SDCL § 20-11-5(2) by failing to plead it in her Answer?
>
> Yes. Dione waived the statutory privilege defense under SDCL § 20-11-5(2) because she failed to plead it in her Answer. Dione never sought to amend her Answer to include the affirmative defense, and Kevin did not explicitly or impliedly consent to the affirmative defense.
>
> SDCL § 15-6-8(c)
> SDCL § 15-6-15(b)
> *Schecher v. Shakstad Elec. & Mach. Works, Inc.*, 414 N.W.2d 303 (S.D. 1987)
> *Murphey v. Pearson*, 2022 S.D. 62, 981 N.W.2d 410

STATEMENT OF THE CASE

In December 2022, Kevin initiated a lawsuit against Dione in Tripp County, South Dakota, for her tortious interference with his business relationship with the Rosebud Sioux Tribe. Dione filed an Answer in the lawsuit in which she denied liability but failed to allege any affirmative defenses. After the parties engaged in considerable discovery, Dione moved the circuit court for summary judgment on the basis that her interference was privileged under SDCL § 20-11-5(2). The circuit court, Presiding Judge Christina Klinger, considered the briefs and arguments of the parties and denied Dione's motion for summary judgment by signed order dated July 8, 2024. This Court granted Dione's petition for permission to take discretionary appeal under SDCL § 15-26A-3(6) on August 16, 2024. Kevin filed his notice of review on September 3, 2024.

STATEMENT OF THE FACTS

Kevin and Dione Rowe were married in 1992, and welcomed two daughters to their union, Hanna and Heather. R. 644. Throughout most of their marriage, Kevin's primary occupation consisted of farm and ranch activities on land that he and Dione owned and on nearly 7,000 acres of land that he leased from the Rosebud Sioux Tribe. R. 645. Some of the land that Kevin leased from the Rosebud Sioux Tribe was adjacent to property owned by Dione's mother. R. 645-46. Dione was aware of Kevin's business relationship with the Rosebud Sioux Tribe through these leases. R 538-39, 549-51; K. App. 5-9.

In 2018, Dione initiated divorce proceedings, and in 2020, Kevin and Dione's divorce was finalized. R. 538, 645. Both parties acknowledge that the divorce could objectively be considered contentious. R. 538, 645. During the pendency of the divorce proceedings, Dione obtained two separate ex parte temporary protection orders against Kevin, but she voluntarily dismissed both prior to a contested hearing on them. R. 437-452. Dione also filed a petition for emergency commitment during this time period due to Kevin's allegedly suicidal comments. R. 434.

The parties worked toward settlement in their divorce proceedings, and during those negotiations, Dione suggested that Kevin arrange for certain parcels that he leased from the Rosebud Sioux Tribe be given to one of their daughters and that the improvement Kevin made to that parcel be given to Dione. R. 538-40. This suggestion did not become part of the parties' divorce settlement. R. 540.

Following the parties' divorce in 2020, Kevin continued to lease land from the Rosebud Sioux Tribe. R. 549-50; K. App. 5-9. The Tribal Land Enterprises (TLE), a

subordinate organization of the Rosebud Sioux Tribe, has some authority to manage the fractionated interests that members of the Rosebud Sioux Tribe have in certain parcels of land and to oversee and manage some of that land. R. 205. Accordingly, Kevin leased land from the Rosebud Sioux Tribe through the TLE. R. 645.

In 2022, well after Kevin and Dione's divorce had been finalized, Dione, Hanna, and Heather worked together to prepare a letter to certain members of TLE's board of directors. R. 544-46; K. App. 1-2. The letter was written from Dione's perspective and claimed that (1) Kevin used drugs and alcohol; (2) Kevin threatened to kill Hanna and Heather's animals; and (3) Dione, her mother, and her daughters were fearful of Kevin. R. 524-25; K. App. 1-2. The letter requested the TLE revoke the leases that it had recently granted to Kevin because Dione did not want Kevin to operate near her mother's property. R. 524-25; K. App. 1-2. The letter suggested that the TLE revoke the leases and instead issue them to Hanna and Heather. R. 524-25; K. App. 1-2. Dione, Hanna, and Heather mailed the letter to the TLE on April 16, 2022. R. 647.

After receiving Dione's letter, the TLE held its regular board of directors meeting on June 14, 2022. R. 648; K. App. 3. Neither Dione nor the TLE informed Kevin of the letter regarding his leases, and neither he nor Dione were present at the TLE's board meeting. R. 413-14, 587. At that meeting, based on the letter sent by Dione, a motion was made to rescind all of the leases that the TLE previously awarded to Kevin. R. 411-413, 476; K. App. 3, 10-11. At that same meeting, without notice to Kevin, the TLE voted to rescind Kevin's leases. R. 411-13, 476; K. App. 3, 10-11. The TLE notified Kevin of its decision to rescind his leases by certified letter dated June 15, 2022. R. 413; K. App. 4, 10. Following this notification, Kevin attempted to get on the agenda for a

TLE meeting, but the board refused to acknowledge him or to let him be heard on the issue. R. 412-414; K. App. 11-13.

STANDARD OF REVIEW

"This Court reviews a circuit court's decision on a motion for summary judgment under the de novo standard of review." *Geidel v. De Smet Farm Mut. Ins. Co. of S.D.*, 2019 S.D. 20, ¶ 7, 926 N.W.2d 478, 481 (citation omitted). Summary judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* (citation omitted); SDCL 15-6-56(c)). In reviewing summary judgment decisions, "[t]he evidence must be viewed in the light most favorable to the non-moving party[,] and reasonable doubts should be resolved against the moving party." *Holecek v. Sundby*, 2007 S.D. 128, ¶ 8, 743 N.W.2d 131, 133 (citation omitted).

"The existence of a privilege is a question of law." *Paint Brush Corp., Parts Brush Div. v. Neu*, 1999 S.D. 120, ¶ 55, 599 N.W.2d 384, 398. Furthermore, "[t]he question of some connection or logical relation to the proceedings is one of law." *Flugge v. Wagner*, 532 N.W.2d 419, 422 (1995).

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN DETERMINING THAT DIONE'S LETTER WAS NOT PRIVILEGED UNDER SDCL § 20-11-5(2) AND DIONE WAS, THEREFORE, NOT IMMUNE FROM SUIT.

A. This Court Should Not Extend the Privilege under SDCL § 20-11-5(2) to Claims for Tortious Interference with a Business Relationship.

South Dakota Codified Law contains a chapter relating specifically to actions for defamation. *See* SDCL Ch. 20-11. Pursuant to that chapter, defamation can consist of

either libel or slander, both of which require a publication that is "false and unprivileged." SDCL §§ 20-11-3, 20-11-4. It is not surprising then that section 20-11-5 provides a definition of a privileged communication, which states in part that a communication is privileged if it is made "in any legislative or judicial proceeding, or in any other official proceeding authorized by law." SDCL § 20-11-5(2).

Despite Dione's arguments to the contrary, this Court has not extended the privilege found in SDCL § 20-11-5 as an absolute defense to cases for intentional interference with a business relationship. Dione cites three cases for this position: *Gantvoort v. Ranschau*, 2022 S.D. 22, 973 N.W.2d 225; *Harris v. Riggenbach*, 2001 S.D. 110, 633 N.W.2d 193; and *Janklow v. Keller*, 241 N.W.2d 364 (S.D. 1976). But each of those cases is distinguishable from the present situation before this Court, and none stand for the proposition that an absolute privilege exists to bar claims for tortious interference with a business relationship.

Most recently, in *Gantvoort* this Court considered whether the absolute litigation privilege found in SDCL § 20-11-5(2) could apply to an invasion of privacy claim to shield an attorney from liability for attempting to publish surreptitious recordings during court proceedings. *Gantvoort*, 2022 SD 22, ¶¶ 31-35, 973 N.W.2d at 235-36. In its analysis, this Court noted that it had not yet considered the issue in an invasion of privacy claim, and the Court focused carefully on the content of the communication or publication. *Id.* ¶ 33. It noted that the circumstances relevant to publishing defamatory matter and publishing matter that is an invasion of privacy are the same in all respects, so it undertook an analysis to determine whether the privilege could apply to invasion of

privacy claims. *Id.* It held that "in appropriate circumstances," the privilege could apply to invasion of privacy claims. *Id.*

The Court articulated four conditions that must be met before it would apply the litigation privilege: "the publication (1) was made in a judicial proceeding; (2) had some connection or logical relation to the action; (3) was made to achieve the objects of the litigation; and (4) involved litigants or other participants authorized by law." *Id.* ¶ 34 (quoting *Janklow*, 241 N.W.2d at 368). This Court further noted that, when applying the litigation privilege, special emphasis should be placed on the requirement that the statement be made in furtherance of the litigation and to promote the interest of justice. *Id.* Ultimately, the *Gantvoort* Court determined that the recordings the attorney introduced during the underlying proceedings were minimally relevant to the contested issues, so the privilege applied. *Id.* ¶ 35.

This Court's decision in *Harris* and its similar opinion in *Janklow* also do not lend support for the notion that the privilege found in SDCL § 20-11-5(2) applies to claims for tortious interference with a business relationship. The *Harris* and *Janklow* cases both involve an instance where the plaintiff asserted defamation claims with additional claims based on the same set of facts. *Harris*, 2001 S.D. 110, ¶ 14, 633 N.W.2d at 195-96; *Janklow*, 241 N.W.2d at 370. As noted above, a necessary element of any defamation claim is that a publication is *unprivileged*, therefore an analysis of whether the privilege applied to the defamation claim was necessary. Only after considering the same four conditions articulated in *Gantvoort* did the Court determine that the privilege applied in both cases. *Harris*, 2001 S.D. 110, ¶ 12, 633 N.W.2d at 195; *Janklow*, 241 N.W.2d at 369. This Court went on to say that only because the other claims brought by the

parties—negligence, intentional infliction of emotional distress, and deceit, to name a few—were premised on the same facts as the defamation claim, they were subject to dismissal or summary disposition as well. *Harris*, 2001 S.D. 110, ¶ 14, 633 N.W.2d at 195; *Janklow*, 241 N.W.2d at 370.

Here, unlike *Gantvoort*, *Harris*, and *Janklow*, the claim for tortious interference with a business relationship is substantially different from a defamation action, and therefore, the privilege found in SDCL § 20-11-5(2) does not apply. Libel and slander both relate to false and unprivileged publications, whereas tortious interference with a business relationship is far more broad and can consist of any intentional and unjustified act of interference by a defendant when the defendant knew of the plaintiff's valid business relationship and the interference caused the plaintiff damage. *Compare* SDCL §§ 20-11-3 (noting the definition of libel) and 20-11-4 (noting the definition of slander), *with Table Steaks v. First Premier Bank, N.A.*, 2002 S.D. 105, ¶ 19, 650 N.W.2d 829, 835 (providing the elements of a claim for tortious interference with a business relationship or expectancy). Importantly, both theories of defamation involve the *contents* of a publication, whereas tortious interference claims have no such limitation. Although this Court has extended the privilege under SDCL § 20-11-5(2) to invasion of privacy claims because invasion of privacy claims are substantially similar to defamation claims, it should not extend the privilege further. *See Gantvoort*, 2022 S.D. 22, ¶ 33, 973 N.W.2d at 236 (noting that the circumstances relating publishing defamatory material is the same as publishing matter that is an invasion of privacy); *see also* 57 A.L.R.4th 22 (Originally published in 1987) (noting that there is considerable overlap between the torts of defamation and invasion of privacy); *Montgomery Ward v. Shope*, 286 N.W.2d 806, 808

(S.D. 1979) (noting that the invasion in an invasion of privacy claim "must be one which would be offensive and objectionable to a reasonable man of ordinary sensibilities").

Contrary to Dione's contentions, this Court has never extended SDCL § 20-11-5(2)'s statutory privilege to claims for tortious interference. The cases Dione relies upon do not support that the privilege be extended here. Instead, those cases all relate to claims sounding in defamation, invasion of privacy, or arise from the same set of facts as defamation claims. That is not the case here. Kevin's tortious interference claim does not focus on the content of Dione's letter to the TLE and does not require that the letter be unprivileged—instead, it focuses on the act of Dione sending the letter to the TLE and the consequences thereof. Thus, because Kevin's tortious interference claim is substantially different from defamation and invasion of privacy claims, this Court should not extend SDCL § 20-11-5(2)'s privilege to the facts of this case.

B. Dione Waived Her Statutory Privilege Affirmative Defense.[1]

Even if this Court finds that the statutory privilege defense under SDCL § 20-11-5(2) generally extends to claims for tortious interference with a business relationship, Dione waived that defense by failing to affirmatively plead it in her Answer.

Under SDCL § 15-6-8(c), "[i]n a pleading to a preceding pleading, a party *shall* set forth affirmatively . . . any other matter constituting an avoidance or affirmative defense." (emphasis added). This Court has "held that a defendant 'ha[s] a duty to plead' affirmative defenses and failure to do so [will] result in the defense being barred." *Schecher v. Shakstad Elec. & Mach. Works, Inc.*, 414 N.W.2d 303, 304 (S.D. 1987)

[1] This Court has jurisdiction over this issue because Kevin preserved it in his notice of review filed on September 3, 2024.

(quoting *Farmers Coop. Elevator Co. of Revillo v. Johnson*, 237 N.W.2d 671, 673 (S.D. 1976)).

Here, Dione waived her statutory privilege defense. The statutory privilege defense constitutes an affirmative defense because, according to Dione, it "avoids all liability." App. Br. at 5 (quoting *Gantvoort*, ¶ 33, 973 N.W.2d at 236); *see also Paint Brush Corp.*, 1999 S.D. 120, ¶ 52, 599 N.W.2d at 397 (noting that privilege may be raised as a defense to defamation). Under SDCL § 15-6-8(c), "any . . . matter constituting an avoidance" must be affirmatively pled in an answer. Dione's Answer is devoid of any mention of a statutory privilege affirmative defense. R. 7-9. In fact, she failed to list any affirmative defenses in her Answer. *Id.* at 8. Instead, Dione averred that Kevin's Complaint fails to state a claim upon which relief can be granted, and Dione purported to reserve the right to assert additional affirmative defenses if discovery revealed a basis for doing so. *Id.* Dione did not raise any affirmative defenses throughout discovery and, instead, raised the statutory privilege defense for the first time at the summary judgment stage. *See* R. 23-33. Because Dione failed to assert any affirmative defenses in her Answer, she is barred from raising such a defense under SDCL § 15-6-8(c). *Schecher*, 414 N.W.2d at 304.

Further, no exception exists to the general rule that unpled affirmative defenses are waived. Under South Dakota law, "an affirmative defense is not waived if the pleadings are properly amended to include the defense or if the issue was tried by express or implied consent." *Id.* Here, the first exception does not apply because Dione never sought to amend her Answer to assert the statutory privilege affirmative defense.

Likewise, the second exception—express or implied consent—does not apply to allow Dione to assert the statutory privilege affirmative defense. Amendment of pleadings to conform to the evidence is governed by SDCL § 15-6-15(b). *See e.g.*, *Murphey v. Pearson*, 2022 S.D. 62, ¶ 32, 981 N.W.2d 410, 419. That rule states, in part, "[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised the pleadings." SDCL § 15-6-15(b).

Here, Kevin expressly did not consent to amendment of Dione's Answer when he filed his memorandum in opposition to Dione's motion for summary judgment. R. 638. Further, the critical inquiry to determine whether an issue was tried by implied consent under SDCL § 15-6-15(b) "is whether the opposing party will be prejudiced by the implied amendment, i.e., did he have a fair opportunity to litigate the issue and could he have offered any additional evidence if the case had been tried on a different issue." *Murphey*, ¶ 34, 981 N.W.2d at 420 (quotation omitted). If the Court were to consider Dione's statutory privilege defense, Kevin would be prejudiced. Had Dione properly pled the affirmative defense, Kevin could have asked for information vis-à-vis the statutory privilege in written discovery. Further, Kevin could have asked Dione about the defense during her deposition. In particular, Kevin could have asked about (1) how Dione contends she made a communication to the TLE in an official proceeding; (2) how Dione's letter was related to the TLE's purpose; (3) the TLE's role as a market participant; and (4) how the TLE functions. All of these considerations are relevant to the merit of the defense. Allowing implied amendment at this juncture deprives Kevin of the

opportunity to obtain necessary information about the defense. Because Kevin did not have a fair opportunity to litigate this issue, implied consent to amendment is lacking.

Finally, although Dione argued below that she need not affirmatively plead the privilege defense, her reasoning in that contention is flawed. Dione argued to the circuit court—and Kevin anticipates that she will argue in her reply brief—that she was not required to plead the privilege as an avoidance or affirmative defense because the unprivileged nature of the statements was elemental to Kevin's claim. R. 657. Dione attempts to characterize Kevin's claim as one for defamation, arguing Kevin has the burden of proving that Dione's statement was an unprivileged communication. *Id.* As discussed above, Dione fails to recognize the differences between a defamation claim and a claim for tortious interference with a business relationship. *See* Argument *supra* Section I.A (distinguishing the elements of defamation and tortious interference). While it is true that slander and libel cannot be maintained unless the publication is unprivileged, that is not the established law for tortious interference claims. *Id.* Despite Dione's attempts to characterize Kevin's claim as one for defamation, Kevin clearly pleaded a cause of action for tortious interference, and that claim arises from facts separate from a defamation claim. Thus, because a tortious interference claim does not require Kevin to establish that Dione's letter to the TLE was unprivileged, Dione's argument is meritless.

South Dakota law is clear: when a party wants to assert an affirmative defense, it *shall* do so "[i]n a pleading to a preceding pleading." SDCL § 15-6-8(c). Dione's answer is devoid of any affirmative defenses. Instead, at the summary judgment stage, Dione attempted to assert a previously undisclosed affirmative defense for the first time. But

because Dione failed to heed the mandates of Rule 8(c) and Rule 15(a) and (b), Dione is deemed to have waived the statutory privilege defense. Thus, this Court should affirm the circuit court's order denying Dione's motion for summary judgment.

C. The TLE Board Meeting Was Not an "Other Official Proceeding Authorized by Law."

Even if SDCL § 20-11-5(2)'s statutory privilege applies generally to tortious interference claims, and even if Dione did not waive the affirmative defense, Dione's letter to the TLE is not privileged because it was not made in the course of a "proceeding authorized by law."

"An official proceeding is that which resembles judicial and legislative proceedings, such as transactions of administrative boards and quasi-judicial and quasi-legislative proceedings." *Flugge*, 532 N.W.2d at 421 (internal quotations omitted) (cleaned up and citation omitted). In *Waln*, this Court considered whether the statutory privilege under SDCL § 20-11-5(2) could apply to statements made during a brand committee meeting when the brand committee was a part of the South Dakota Stock Growers' Association, which was in turn an agent of the South Dakota State Brand Board. *Waln v. Putnam*, 196 N.W.2d 579, 580 (S.D. 1972). There, this Court did not apply the privilege and expressed a limitation on the types of proceedings in which the statutory privilege could apply:

> [s]urely it was not the legislative intent to grant an absolute privilege for every defamatory utterance made in every lawful meeting. We are persuaded that the 'official proceeding' embraced in the purview of the statute is that which resembles judicial and legislative proceedings, such as transactions of administrative boards and quasi-judicial and quasi-legislative proceedings, *not a meeting of a board of directors of a nonprofit corporation or the like.*

Id. at 583 (citation omitted) (emphasis added).

This Court later reaffirmed its limitation on the types of proceedings where the statutory privilege applies in *Pawlovich v. Linke*, 2004 S.D. 109, 688 N.W.2d 218. There, plaintiff—a nurse—brought suit against a patient's sister. *Id.* ¶¶ 1-6, 688 N.W.2d at 220-21. According to plaintiff, defendant falsely accused plaintiff of improperly disclosing that a patient had a sexually transmitted disease. *Id.* ¶¶ 3-4. After patient learned of this disclosure of confidential information, patient informed plaintiff's hospital administrator/supervisor, who in turn informed the hospital's director of human services. *Id.* ¶ 4. Plaintiff's hospital administrator/supervisor and the hospital's director of human services conducted an investigation and ultimately terminated plaintiff's employment at the hospital. *Id.* ¶ 5. Plaintiff subsequently filed suit against defendant—the patient's sister—alleging defamation. *Id.* ¶ 6. Defendant asserted the affirmative defense that her statements were privileged under SDCL § 20-11-5(2) because they were made during an official proceeding. *Id.*

This Court disagreed. The *Pawlovich* Court looked to prior cases where the privilege applied to determine the scope of "other proceeding[s] authorized by law" under SDCL § 20-11-5(2) and stressed the importance of the boards at issue being "vested, either directly or indirectly, with oversight authority by the legislature." *Id.* ¶ 15. Specifically, this Court looked to its decisions in *Flugge* and *Blote*. In *Flugge*, the privileged complaint was made to the South Dakota Board of Accountancy—a peer review board; and in *Blote*, the communication at issue was made in the course of an unemployment compensation proceeding. *Flugge*, 532 N.W.2d at 420; *Blote v. First Federal Sav. and Loan Ass'n of Rapid City*, 422 N.W.2d 834, 836 (S.D. 1988).

The *Pawlovich* Court noted that, because the agency in *Blote* and the peer review board in *Flugge* had the authority to act on the information it received and because that information was relevant to their statutorily authorized role, the statutory privilege should apply. *Pawlovich*, 2004 S.D. 109, ¶¶ 14-16, 688 N.W.2d at 223-24. Particularly, with respect to *Flugge*, the Court noted that the peer review board "perform[s] a great public service by exercising control over those persons placed in a position of trust. It is beyond dispute that communication initiated during such proceedings are an indispensable part thereof." *Pawlovich*, ¶ 14, 688 N.W.2d at 223.

Here, Dione's letter addressed to the TLE Board of Directors is not a privileged communication. It is undisputed that Dione's letter was not made in a judicial or legislative proceeding. Further, Dione cannot show that her letter is privileged as a communication made in any other official proceeding as authorized by law. Similar to the brand committee in *Waln*, the TLE may have had some authority to act under the Bylaws of the Rosebud Sioux Tribe,[2] but it is nonetheless a separate subordinate organization and every regular meeting of its board of directors should not constitute a proceeding authorized by law.

Prior to Dione sending the letter to the TLE Board of Directors, nobody from the TLE advised Kevin that his leases were under review or that the TLE intended to change or modify them. In short, when Dione sent the letter to certain members of the TLE Board of Directors, there was no pending proceeding for which the letter was intended

[2] Because Dione failed to plead the statutory privilege defense, Kevin has not been able to fully develop a record on the authority and actions of the TLE because it was not made relevant until the statutory privilege defense was raised for the first time in Dione's motion for summary judgment. Accordingly, Kevin does not concede that the TLE has certain authorities or the extent of the same.

and it asked the TLE to consider information outside of its authorized purview. Dione's unsolicited letter to the TLE Board of Directors was certainly not for the purpose of peer review or an administrative hearing. It is undisputed that Dione sent the letter to the TLE for the purpose of interfering with Kevin's established business relationship with the Rosebud Sioux Tribe and to have his leases cancelled—a purpose that the TLE did not even have authority to consider.

This Court has never recognized absolute immunity for communications made to boards like the TLE board of directors. Instead, the Court on at least two occasions has denied the privilege defense to communications made to a "meeting of a board of directors of a nonprofit corporation or the like." *Waln*, 196 N.W.2d at 583. If this Court were to extend absolute immunity to Dione's statements to the TLE, nothing could stop a person from sending disparaging letters about another to any state, local, or federal court or agency or any of their subsidiaries with impunity and intention to harm, regardless of the impacts they would have on the other's business relations and opportunities and regardless of the letter's relevance to each agency's or organization's authorized purpose. This is not a result that this Court should sanction.

In the case at hand, Kevin would be without any recourse if such a privilege were allowed. In peer review settings and administrative hearings, individuals that are the subject of complaints are provided an opportunity to respond. Here, Kevin received no notification from Dione that she sent the letter, nor did the TLE provide Kevin an opportunity to rebut the statements in the letter. Instead, the TLE summarily rescinded Kevin's leases. Dione's letter is more akin to the statements made in *Pawlovich* and *Waln*—it was a statement made to "meeting of a board of directors of a nonprofit

corporation or the like." *Id.* Dione's letter is precisely the type of communication the Court sought to preclude from the protections of SDCL § 20-11-5(2) when it decided *Waln* and *Pawlovich*. Thus, because Dione's letter was not made in the context of an "official proceeding authorized by law," it is not subject to SDCL § 20-11-5(2)'s privilege, and the circuit court correctly denied Dione's motion for summary judgment.

D. Even if the Regular Board Meeting of the TLE Was an Official Proceeding Authorized by Law, Dione's Letter Is Not Privileged Because Its Contents And Its Purpose are Unrelated to the TLE's Official Authority.

As noted in Section I. A., the four conditions that must be met before a court may apply the litigation privilege found in SDCL § 20-11-5(2) are: "the publication (1) was made in a judicial proceeding; (2) had some connection or logical relation to the action; (3) was made to achieve the objects of the litigation; and (4) involved litigants or other participants authorized by law." *Gantvoort*, 2022 S.D. 22, ¶ 34, 973 N.W.2d at 236 (quoting *Janklow*, 241 N.W.2d at 368). Furthermore, special emphasis should be placed on the requirement that the statement be made in furtherance of the litigation and to promote the interest of justice. *Id.* Those same concepts should apply before applying the same privilege to "other official proceedings authorized by law" under SDCL § 20-11-5(2).

In the context of the litigation privilege in SDCL § 20-11-5(2), this Court has noted that, "the privilege does not cover the … publication of defamatory matter which has no connection whatever with the litigation." *Janklow*, 241 N.W.2d at 367 (quoting Restatement, Torts at page 229, Comment c). "The relevancy of the defamatory matters is not a technical legal relevancy but instead a general frame of reference and relationship to the subject matter of the action." *Flugge*, 532 N.W.2d at 422.

Dione's letter to the TLE bore no relevance to the subject matter of the June 14, 2022 TLE Board of Directors meeting. Although the TLE may have authority to manage the fractionated ownership interest of tribal land and to propose lease agreements with tenants to the Bureau of Indian Affairs, it does not have any authority—inherent or specifically designated—to manage the interpersonal relationships of individuals. Dione's letter asked the TLE to do just that.

Dione has adamantly maintained that she sent the letter which effectively divested Kevin of all his leases with the Rosebud Sioux Tribe to the TLE because she was scared of Kevin and did not want him on the land next to the land her mother owns. That request has no connection with the fractionated ownership interest of tribal members or with the management of tribal land. Rather, Dione's letter asked the TLE to manage and restrict the social interactions between Dione and Kevin. This is not within the authority of the TLE, and it was in no way connected with any proceeding held by its board of directors.

This Court has previously noted that when a person's statement falls outside of the scope of one's interest, it should not be considered privileged. In *Waln*, when considering the common interest privilege articulated in SDCL § 20-11-5(3), this Court found that when a defendant's statement did not support his own interest, the common interest privilege could not apply. *Waln*, 196 N.W.2d at 584. Similarly then, when a person's statements to or in an "other official proceeding authorized by law," fall outside of the scope of the proceeding or the authorization, they likewise should not be considered privileged under SDCL § 20-11-5(2).

Because Dione's letter did not have some connection or logical relation to the TLE board of director's meeting and because the letter was not made to assist with the objects of the proceeding, it should not be granted privilege under SDCL § 20-11-5(2).

E. The Circuit Court Correctly Determined That the June 14, 2022 TLE Meeting Was Not an Official Proceeding Authorized by Law as Necessary to Impart Privilege under SDCL § 20-11-5(2).

Although not fully briefed or argued by either party, the circuit court found that the TLE failed to provide due process and failed to follow its own procedures outlined in its bylaws at the June 14, 2024 TLE board meeting. Accordingly, the circuit court found that the TLE board meeting was not an official proceeding authorized by law.

The TLE's failure to provide procedural due process to Kevin rendered the proceedings deficient, and therefore, they were not authorized by law. "To establish a procedural due process violation, [one] must demonstrate that he has a protected property or liberty interest at stake and that he was deprived of that interest without due process of law." *Morris Family, LLC ex rel. Morris v. South Dakota Dept. of Transp.*, 2014 S.D. 97, ¶ 14, 857 N.W.2d 865, 870. A fundamental principal of the South Dakota Constitution is that "[d]ue process guarantees that notice and the right to be heard are granted in a meaningful time and in a meaningful manner." *City of Pierre v. Blackwell*, 2001 S.D. 127, ¶ 13, 635 N.W.2d 581, 585 (quotation omitted).

The privilege articulated in SDCL § 20-11-5(2) was enacted by the South Dakota Legislature in 1939 under the authority granted it by the Constitution. Accordingly, when that statute references that a proceeding authorized by law, such proceeding must be conducted in accordance with the laws of South Dakota.

Kevin had a protected property interest in the leases he held with the Rosebud Sioux Tribe. Therefore, he had a right to receive notice that the property issue was at stake when the TLE considered that interest. He also had a right to be heard on the issue. He was denied both, yet he was deprived of his protected property interest.

Because the TLE Board of Directors meeting failed to afford Kevin the due process required by law, its proceeding was not authorized by the laws of the State of South Dakota. Accordingly, the circuit court did not err in finding that the letter Dione submitted to the TLE is not a privileged communication under South Dakota Codified Law section 20-11-5(2).

CONCLUSION

Dione's letter to the TLE is not a privileged communication under SDCL § 20-11-5(2). First, the statutory privilege under SDCL § 20-11-5(2) has never been held to extend to claims for tortious interference, and this Court should not extend the privilege here. Second, Dione waived the statutory privilege affirmative defense when she failed to plead it in her Answer. Instead, Dione raised the affirmative the defense for the first time at the summary judgment stage. Third, Dione's letter to the TLE is not privileged because it was not made at an "other official proceeding authorized by law." Fourth, the purpose and contents of Dione's letter to the TLE were unrelated to the TLE authority. Finally, the circuit court correctly denied Dione's motion for summary judgment because the TLE failed to provide Kevin with procedural due process. Thus, this Court should affirm the circuit court and allow this case to proceed to trial on the merits of Kevin's tortious interference claim.

REQUEST FOR ORAL ARGUMENT

Appellee respectfully requests oral argument before this Honorable Court.

Dated: November 27, 2024.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with SDCL 15-26A-66(b). The font is Times New Roman size 12, which includes serifs. The brief is 23 pages long and the word count is 5,886, exclusive of the Cover, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service. The word processing software used to prepare this brief is Microsoft Word and the word count from that program was relied upon in determining the word count of this brief.

Dated this 27th day of November, 2024.

GUNDERSON, PALMER, NELSON
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CERTIFICATE OF SERVICE

I certify that on November 27, 2024, a true and correct copy of **Appellee's Brief and Appendix** was electronically served through South Dakota's Odyssey File and Serve Portal upon the following individuals:

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/s/ Quentin L. Riggins
One of the Attorneys for the Appellee

Ladies and Gentlemen of the Tribal Land Enterprise Board,

My name is Diane Rowe. I am the mother of Hanna and Heather Rowe. My mother is Donna Brown who owns a farm/ranch north of Wood, South Dakota. Myself and my two daughters assist Donna on her farm and ranch. In July of 2018, I separated from Kevin. Kevin was using drugs and alcohol…

I am requesting that you consider relinquishing his leases that are located near my mother, Donna Brown's property. My daughters have submitted bids in the past and most recently a couple of months ago in order to provide a safe place for their animals to reside on. Kevin has threatened, numerous times, to kill their animals (horses, cattle, etc.). He calls them up and threatened them while they were at college, telling them "I'm gonna shoot your fucking animals." My daughters have videos and phone recordings of such events.

As I mentioned, my daughters again recently tried to bid on land near my mom's property. Last week I had found out that he bid against my daughter Hanna, to obtain land adjacent to my mother's land. He also did this in the Fall of 2021. Donna has become fearful, as am I, due to his previous attempts to isolate me alone with him. He has a history of drug and alcohol abuse and has been physically and emotionally.

It appeared he had been a part of 47 pair of buffalo grazing my mother's land in August of 2021. When my daughter, Hanna, approached him about this, he laughed at her and said "Well maybe your grandmother should come out and fix the fucking fence. (A brand-new fence was installed around Donna's entire property of that area in 2019).

Not only has he been threatening my daughters, but he has also attempted to lure me to various areas on the tribal land near my mother's property. For example, "Meet me at the bottom of the crick pasture" (referring to TLE tract numbers: A367.5, A556.5, A380, A380.3a, A380.5b, and A380.5c), "Meet me by the dam so we can talk, etc."

He is now a hunting guide for TLE land, which I believe he uses as a way to access other land near my mother that is leased by other producers.

My daughters would be willing to take over his leases near my mom's property and are asking for your consideration to do so. I appreciate your consideration and support and look forward to visiting with you about this issue.

{05605361}

Exhibit 11
C. BACHAND

Thank you,

Dione, Hanna, and Heather Rowe

RFP 9 000007

Tribal Land Enterprise
A Sub-ordinate Organization of the
Rosebud Sioux Tribe
Incorporated Under Act of June 18, 1934, (48 Stat 984)
2443 Legion Ave. P.O. Box 159
Rosebud, S.D. 57570
Telephone 605 747-2371
Fax # 605 747-2400

MOTION EXCERPT

DATE: June 15, 2022

TO: LEASE MANAGER, Ernest Blacksmith, Jr.

FROM: ACTING BOARD SECRETARY, Viviana B. Running

RE: **Rescind Motion -- Kevin Rowe**

The following action was taken during the Regular TLE Board of Director's Meeting held on June 14, 2022 with a quorum of five (5) members present:

Motion made by Dera Iyotte to rescind motion awarding leases to Kevin Rowe and to have the T.L.E. Lease Manager renegotiate lease letters. Seconded by Vanessa Red Hawk-Thompson.

Vote: 4 - in favor, 0 - apposed, 1 - not voting. MOTION CARRIED.

RFP 9 000006

A Sub-ordinate Organization of the
Rosebud Sioux Tribe

Incorporated Under Act of June 18, 1934, (48 Stat 984)

2443 Legion Ave P.O. Box 159
Rosebud, S.D. 57570
Telephone 605 747-2371
Fax # 605 747-2400
Website: www.rsttle.com

June 15, 2022

Kevin Rowe
30120 269th St.
Carter, SD 57580

RE: Rescind Award Letters

Dear Mr. Rowe:

This letter is in reference to the TLE Leases bids and proposals that you submitted to Tribal Land Enterprise.

The lease bids and proposal(s) were presented to the Board of Directors of Tribal Land Enterprise on June 14, 2022 for review and consideration. The TLE Board made the motion to rescind all the award letters and to have the TLE Lease Manager renegotiate all the leases.

A copy of this letter will be forwarded to the BIA Superintendent Office for review and further processing of this TLE Board action.

If you have questions, please contact Ernest Blacksmith Jr., TLE Lease Manager, at 747-2371 or stop in at Tribal Land Enterprise.

Sincerely,

Ernest Blacksmith Jr.

Ernest Blacksmith Jr., Lease Manager

Concur

Ieshia Poignee

Ieshia Poignee, Acting Executive Director

Cc: Gerald Dillon, Realty Specialist, BIA Lease Office
TLE Lease Office Outgoing Correspondence

IP/ebjr/06-14-2022/7472371.0223

Exhibit 15

with one wire. He didn't have it that year either. So I believe he had the bid, June 7th he got the bid, and then he got the rescindment letter right after that.

Q. Are there other parcels of tribal trust ground on Exhibit 6 that Kevin was the tenant of prior to your divorce?

A. These right here.

Q. What are those numbers?

A. A367.5, A, it's either 556.5 or 558, A390, T380.5A, T380.5B, and this one says A380.5C.

Q. Okay. Do you know when Kevin first started leasing those tracts?

A. So after he sued his mom for the 880 acres, he obtained a quarter just south of the house, which that was like in 2004, '5, I think we got the home quarter in 2006 after she paid the taxes, and then he had that one tract. And then we took a trip to Rosebud and went to talk to Ernie because we wanted to lease more land, and we walked in and asked if this piece was ever going to come up for bid or what was going on, because no one had had a hoof in it. And we bid on it because Poncho Maderis (phonetic) had relinquished it.

Q. So that would have been about 2006?

A. It was later than that, but I would have to look back at the papers. I honestly can't tell you the year.

Q. Sure, but it was probably more than 10 years before you got divorced?

A. No, not more. I don't know, right in there probably. We bought our first piece of land in 2000; so everything happened kind of after that, and then when he sued his mom, that litigation was finished in like '04 and then we got like the land in '06 or something like that, and then things started happening after that.

Q. That land is located near land owned by your mom, correct?

A. This here?

Q. Yes.

A. Yes.

Q. When you say this here, I'm referring to the land that --

A. Dennis Brown.

Q. -- that Kevin and yourself or Kevin had leased going back to approximately 2006, correct?

A. Not '06 but before 2010.

Q. Well before you got divorced?

A. Yes.

Q. That's located by your mom?

A. Correct. Adjacent, touches, yes.

Q. What prompted your daughters to draft Exhibit 11? Did they discuss that with you?

A. So they had a discussion amongst the two of them and they had talked about it in December of -- I have to think --

Q. You testified that one of the main purposes of Exhibit 11 was to take away certain leases from Kevin for lands located near your mother, correct?

A. We wanted them to consider it, and we wanted them to understand that we were scared; so we wanted to take over the leases, Hanna or Heather to take over the leases, yes.

Q. And if Kevin were to lose leased acres, that would impact him financially; isn't that fair?

A. It would.

Q. You testified that you were surprised that Kevin lost all of his leases; is that correct?

A. Yes.

Q. Do you believe that Kevin lost his leases because of Exhibit 11?

A. No.

Q. Why do you think Kevin lost all the other leases?

A. I don't think they would take away all of his leases because of this letter.

Q. You thought that would only result in him losing the leases that you wanted?

A. Adjacent to my mother. Not that I wanted, just the ones that were nearby my mom.

Q. You said not that you wanted. You obviously didn't want Kevin to have them.

A. And honestly, like it wouldn't have mattered who got

than your letter. And I asked Heather a little bit about pocket gophers and weeds and things like that. Was it your opinion that Kevin faithfully managed the leased ground that he had prior to June 2022?

A. No.

Q. Why not?

A. He didn't take care of the weed pressure. He didn't take care of prairie dogs. My mom didn't have any prairie dogs on her two half sections here, none, and the prairie dogs started here. I encouraged him, I said, *Let's poison them before they get out of hand.* Oh, no, whatever. So now my mom has a large number of prairie dogs here, over 220 holes, that we recently poisoned.

So weed pressure, varmints. He didn't take care of the fences, that was a chronic issue, cattle were out a lot. Those were phone calls I got multiple times from people just even when we had cattle out around the house and on the highway.

Q. You were asked about the negotiations in the early stages of your divorce, and Exhibit 15 references the desire to transfer the leases around Donna Brown's property to Hanna. Would it be accurate to say that your intention in asking for that in the negotiation was the same as it was in the letter, meaning that you didn't want Kevin around your mom's property?

A. Yes, because by this time -- I didn't realize the

date, but by this time there had been multiple threats and multiple concerning instances. I was scared. I was scared.

Q. So what was the overarching reason for you in approving of and giving some context to Exhibit 11, the letter that you sent?

A. Because I continued to be afraid, as I do today, it hasn't changed.

MR. SCHARTZ: I think that's all I have.

EXAMINATION

BY MR. RIGGINS:

Q. I just have a few follow-up questions. You were talking about the protection orders against Kevin and said that they were violated frequently. Do you recall that testimony?

A. Yes.

Q. Were there ever any instances where you reported to law enforcement that Kevin was violating those protection orders?

A. Yes.

Q. So it's your testimony that the police department didn't do their jobs in enforcing the protection orders?

A. I don't remember what had happened during that, but I had told them. I don't know if he contacted them, I have no idea. Things did get better for a while. I know he had conversations with my daughters about that he violated and he was in big trouble and that he was going to go to the pen and

three to four months.

Q. And why did you get out after three days?

A. Because when I went in to talk with all the doctors, whatever day that was, there was six doctors in there and probably five analysts or I don't know if you call them analysts but people that I interviewed with when I was in there, and the head doctor, of which I don't know his name, but Dione would know it and it's in the report, they all agreed that this was a complete conflict of interest, and there was some other quote in there that I just can't remember right off the top of my head, abuse of power, abuse of power and conflict of interest.

Q. So you were originally taken into custody because you had threatened to harm yourself and Dione.

A. I never, ever threatened to hurt her, ever.

Q. But they took you into custody that night and took you to jail first?

A. Yes.

Q. That same Exhibit 7, page 12, question 22 says, *State the full legal and factual justification for the damages claimed in paragraph 21 of your complaint.* The third sentence in your answer says, *TLE relied upon the letter*, by Dione, I added that part, *and canceled my leases.* What evidence do you have that the TLE relied upon that letter to cancel your leases?

A. That's exactly what they told me.
Q. Who told you?
A. Ernie Blacksmith.
Q. Is there anything that you received from TLE that states because of this letter, we canceled your leases?
A. Yeah, following my conversation with Ernie and what he had told me, that this letter does not belong in the lease office, he suggested that I get on the agenda and come to the meeting. I got on the agenda, we went to the meeting on the 12th of July, and the guy that oversees Ernie, which is Her Many Horses, I can't think of his first name, Carl, I think it's Carl.
Q. Cleve?
A. Cleve Her Many Horses. We sat in the front office for probably an hour and a half and watched all the members come in so we knew they had a quorum. I'm having trouble with names, I guess it doesn't matter, but the president, he visited with us and knew that we were on the agenda and what we was there for and didn't seem to have much of a problem, but the rest of them, of course they didn't know who we was anyway so it doesn't matter.

So anyway, we sat there for a long time and Cleve come out and he said, *The board refuses to acknowledge you*, and I said, *What does that mean, refuses to acknowledge us?* He said, *They don't want to talk to you, they don't want to see you,*

they want you to leave. I said, I'm on the agenda, I think I deserve the right to be heard. And so then he went back into the meeting, came back out and said, *They don't see it that way. As it stands, your leases are all rescinded and that's the end of it for now.*

Q. So other than the phone call from Ernie, you don't have any evidence to show that they relied on the letter to cancel those leases?

A. Cleve, yeah, Cleve said that -- I mean, yeah, the office all knows about it.

Q. But what evidence do you have that says the TLE relied on the letter to cancel the leases?

A. It says the motion was brought to the meeting, because Ernie told me they weren't going to act on it, but Iyotte was I think her name, she had pushed it through to the meeting, and it says at the bottom of it that, what do I want to call it, its board of director, whatever Iyotte introduced the letter, it was discussed and voted on.

Q. Where does it say that?

A. At the bottom of that certified letter that I got.

Q. So the certified letter you are saying contained reference to the letter from Dione that says that was the reason?

A. Yes.

Q. You weren't at the meeting, correct?

A. No.

Q. And I think you said earlier you don't know whether Ernie was at the meeting either.

A. I do not know whether Ernie was there or not. He wasn't there the 12th because Cleve was running the show that day.

Q. So the fourth sentence of question 22 of your answer, it says, *The result is that my cattle operation, which I worked to build up over a number of years, has been gutted. I will go from receiving approximately $700,000 in income each year to being forced to liquidate my herd because I no longer have ground available for my cattle to graze.* You still have 80 head of cattle I think you said earlier, correct?

A. Yes, I do. They are on a question of whether they are going to town this year or not.

Q. You still own 80 head of cattle?

A. At this time, yes.

Q. Where do you come up with that $700,000 number?

A. That would be the number of dollars that I take in on 7,000 acres.

Q. Based on what?

A. Based on cattle that I run, crops that I have. There's a simple $100,000 loss that occurred on a piece of ground that had been in my family since the 1930s.

Q. What caused that loss, 100,000, based on what?

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30748

KEVIN ROWE,

Plaintiff and Appellee,

v.

DIONE ROWE,

Defendant and Appellant.

Appeal from the Circuit Court, Sixth Judicial Circuit
Tripp County, South Dakota

THE HONORABLE CHRISTINA KLINGER
Circuit Court Judge

APPELLANT'S REPLY BRIEF

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This Court's Order Granting Petition for Allowance of Appeal
from Intermediate Order was filed on the 16th day of August, 2024

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ARGUMENT

The Appellant, Dione Rowe ("Dione") respectfully submits the following Reply Brief.

A. The absolute privilege in SDCL § 20-11-5(2) is applicable to claims of tortious interference and all other torts when the tort is based solely on a publication.

Kevin argues that this Court should not extend the absolute privilege set forth in SDCL § 20-11-5(2) to claims of tortious interference with a business relationship. (Appellee's Br. 8). According to Kevin, this Court has only extended the privilege to torts that are substantially similar to or have considerable overlap with defamation. (*Id.*). Contrary to Kevin's assertions, this Court has not analyzed absolute privilege on a tort-by-tort basis.

Instead, this Court has set forth a rule: when a tort is based solely on a publication, the privilege under SDCL § 20-11-5(2) is implicated. If the publication is determined to be privileged, it cannot provide the basis for any tort because the publication is not actionable. *Gantvoort v. Ranschau*, 2022 S.D. 22, ¶ 236, 973 N.W.2d 225, 236 ("However, when such publications or communications are made under an existing privilege, they are not actionable"); *Harris v. Riggenbauch*, 2001 S.D. 110, ¶ 14, 633 N.W.2d 193, 196 ("The defense of absolute privilege or immunity under the law of defamation avoids all liability") (emphasis added); *Janklow v. Keller*, 241 N.W.2d 364, 370 (S.D. 1976) (noting that that the purpose of the absolute privilege is to allow people in certain circumstances to communicate without fear of being subject to libel and slander actions and that to make those people subject to suit for different torts based upon the same communication would be to "remove one concern and saddle [them] with another for doing precisely the same thing"). In short, if a publication is absolutely privileged, its

author is immune from suit for defamation and any other tort based solely upon that publication. *Gantvoort*, 2022 S.D. 22, ¶ 33, 973 N.W.2d at 236 (Absolute privilege required dismissal of claim for invasion of privacy); *Harris*, 2001 S.D. 110, ¶ 14, 633 N.W.2d at 196 (trial court properly granted summary judgment on negligence, intentional infliction of emotional distress, and contribution claims when the communication that formed the basis of those claims was absolutely privileged); *Janklow*, 241 N.W.2d 364, 370 ("We hold that the absolute privilege as a defense to the defamation count also requires dismissal of the count for deceit").

Here, Kevin's claim for tortious interference is based solely on Dione's letter to the TLE requesting it rescind Kevin's leases for the tribal land adjacent to Dione's family farm.[1] (Appellant's App. 7, ¶¶ 9-11). As set forth in Dione's opening brief, her letter is absolutely privileged and therefore not actionable under any theory of liability. The circuit court's decision should be reversed.

B. When the sole basis for a tort claim is a defendant's publication, the plaintiff has the burden of proving the publication is an "unprivileged communication."

Kevin claims the absolute privilege in SDCL § 20-11-5(2) is an affirmative defense and Dione's failure to plead it constitutes a waiver. Affirmative defenses are set forth in SDCL § 15-6-8(c). Privilege is not specifically set forth in that rule. *Id.*

[1] Kevin claims that his cause of action is based less on the content of Dione's letter and more on her act of sending it and the resulting consequences. (Appellee's Br. 9). Dione sending a postcard or a holiday greeting to the TLE, however, would not have been adequate to state a claim for tortious interference, so the act of mailing the letter cannot be parsed from its content. Moreover, Kevin's Complaint makes clear that Dione's request that the leases be rescinded constituted the act of interference and that the TLE's decision to rescind the leases was the resulting damage. (Appellant's App. 6-8).

However, the list is a nonexclusive list of examples. *Century 21 Associated Realty v. Hoffman*, 503 N.W.2d 861, 865 (S.D. 1993).

It does not appear that this Court has ever been asked to determine whether the absolute privilege set forth in SDCL § 20-11-5(2) is an affirmative defense. This Court has, however, referred to the privilege as an affirmative defense while reciting the procedural history of a case. *Flugge v. Wagner*, 532 N.W.2d 419, 420 (S.D. 1995) ("Flugge asserted two affirmative defenses: (1) truth and (2) privilege under SDCL 20-11-5").

On the other hand, defamation is statutorily defined as an "unprivileged communication." SDCL § 20-11-3, -4. Therefore, while privilege may always be raised as a defense, the plaintiff has the burden of proving an "unprivileged communication" because it is an essential element of the tort. *Setliff v. Akins*, 2000 S.D. 124, ¶ 44, 616 N.W.2d 878, 890 (citing *Miessner v. All Dakota Ins. Assocs., Inc.*, 515 N.W.2d 198, 203-04 (S.D. 1994) ("The distinction is not critical, however, because both libel and slander require that [the Plaintiff] prove that the Defendant made a false and unprivileged communication"); *Sparagon v. Native Am. Publishers, Inc.* 1996 S.D. 3, ¶ 25, 542 N.W.2d 125, 132 ("Plaintiff must prove the communications were unprivileged").

To hold that absolute privilege is an affirmative defense would shift the burden from the plaintiff to the defendant. Indeed, this Court has consistently held that the burden of proving an affirmative defense is on the party seeking to rely on it (i.e., the defendant). *Clark Cnty. v. Sioux Equip. Corp.*, 2008 S.D. 60, ¶ 17, 753 N.W.2d 406, 412 (citing *Clancy v. Callan*, 238 N.W.2d 295, 297 (S.D. 1976)); *Anderson v. Keller*, 2007 S.D. 89, ¶ 30, 739 N.W.2d 35, 42 (Defendant bore the burden of proving the affirmative

defense). Placing the burden on a speaker or an author to prove his or her communication is privileged would also seem to be inconsistent with years of United States Supreme Court precedent. *See e.g., New York Times v. Sullivan*, 376 U.S. 254 (1964); *Curtis Publ'g Co. v. Butts*, 388 U.S. 130 (1967).[2]

In jurisdictions where privilege is an affirmative defense, defendants are unable to move to dismiss the plaintiff's complaint. 51 A.L.R.2d 552, *Pleading or raising defense of privilege in defamation action*, § 4(a) (1957). Instead, the defendant must plead and prove the affirmative defense. *Id.*

Contrary to those jurisdictions, this Court has affirmed the dismissal of complaints on the grounds that the defendants' comments were absolutely privileged. *Brech v. Seacat*, 84 S.D. 264 (S.D. 1969); *Janklow*, 90 S.D. 322. This Court's decisions are consistent with the principle that in South Dakota, the existence of a privilege is a question of law. *Paint Brush Corp. v. Neu*, 1999 S.D. 120, ¶ 13, 599 N.W.2d 384, 398; *Sparagon*, 1996 S.D. 3, ¶ 26, 542 N.W.2d at 132; *see also Ashe v. Hatfield*, 300 N.E.2d 545, 548 (Ill. App. Ct. 1973) (rejecting the contention that privilege was an affirmative defense to be raised in an answer because the issue of privilege is a "question of law for the court only, not a question of fact for the jury").

In his brief, Kevin seems to concede that an "unprivileged communication" is an affirmative element of the plaintiff's case. (Appellee's Br. 7). However, Kevin claims that only applies in defamation cases—not to his claim of tortious interference. (*Id.*).

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[2] Requiring a plaintiff to prove malice to escape a conditional privilege is simply a method of placing the burden on the plaintiff to prove *the absence of a privilege*.

As set forth above, however, this Court has extended the privilege to other torts that are based solely on a writing or a communication. And if a plaintiff cannot avoid the privilege by pleading a different cause of action, a plaintiff also should not be able to avoid what would otherwise be his or her burden of proving an "unprivileged communication."

C. Even if absolute privilege was an affirmative defense, courts should dismiss cases where the complaint and the evidence demonstrate a publication is absolutely privileged.

Even in jurisdictions where absolute privilege is an affirmative defense, courts may dismiss a plaintiff's case if it appears on the face of the complaint and the evidence that the communications are absolutely privileged. *O'Callaghan v. Satherlie*, 36 N.E.3d 999, 1007 (Ill. Ct. App. 2015) (when the litigation privilege appears on the face of the complaint, dismissal is appropriate); *Sexter & Warmflash, P.C. v. Margrabe*, 38 A.D.3d 163, 170 (N.Y. App. Div. 2007) (*abrogated on other grounds*) ("Although the [defendants] have not argued for dismissal based on the judicial proceedings privilege, we decide the appeal on this ground because the facts that make the absolute privilege applicable appear on the face of the record—indeed, most of those facts are alleged by [plaintiff] in the complaint itself—and [plaintiff] could not have avoided the effect of the privilege had it been raised by [defendant]…."); *Gulf Atlantic Life Ins. Co. v. Hurlbut*, 696 S.W.2d 83, 100 (Tex. App. 1985) (*reversed on other grounds*) (holding that absolute privilege is not an affirmative defense and failing to plead it does not result in a waiver when the "pleadings and evidence show that the statements complained of were not actionable"); *Gardner v. Hollifield*, 533 P.2d 730, 733 (Idaho 1975) (a complaint is subject to dismissal if it discloses the existence of an absolute privilege); *Scott v. Statesville Plywood & Veneer Co., Inc.*, 81 S.E.2d 146, 149-50 (N.C. 1954) ("Thus it

appears from the face of the complaint that the statements alleged therein, however defamatory they may be, are protected by the rule of absolute privilege and cannot be made the subject of an action for damages on behalf of the plaintiff and against the defendant"); *Garcia v. Hilton Hotels Intern.*, 97 F. Supp. 5 (D.P.R. 1951).

In Kevin's Complaint, he alleges that he had multiple leases with the TLE and that the TLE is a "subordinate organization of the Rosebud Sioux Tribe." (Appellant's App. 6, ¶ 6). He further alleges that Dione wrote a letter to the TLE, which was discussed at a TLE "board meeting" and resulted in the TLE rescinding its leases with Kevin. (*Id.* at 7, ¶¶ 9-11). The allegations in Kevin's Complaint plainly implicate the absolute privilege for communications in an official proceeding as set forth in SDCL § 20-11-5(2).

In addition, the undisputed material facts demonstrate that Dione sent a letter to a governmental entity, which was entirely related to the governmental entity's function, and which was considered at an official proceeding of the governmental entity. As a result, Dione's communications with that entity are absolutely privileged. Accordingly, Kevin's claims are not actionable regardless of whether Dione pled the absolute privilege as an affirmative defense.[3] *Ranschau*, 2022 S.D. 22, ¶ 236, 973 N.W.2d at 236 (publications and communications that are absolutely privileged are "not actionable").

Kevin claims he was prejudiced by Dione's failure to plead the absolute privilege because he could have asked Dione about the absolute privilege in discovery. (Appellee's Br. 11). However, the existence of a privilege is a question of law. *Schwaiger v. Avera*

[3] As a practical matter, Kevin's argument, even if he were to prevail, may not advance his cause. No scheduling order had been entered, no trial date had been set, and Dione had not previously amended her Answer.

Queen of Peace Health Servs., 2006 S.D. 44, ¶ 8, 714 N.W.2d 874, 878; *Paint Brush Corp.*, 1999 S.D. 120, ¶ 55, 599 N.W.2d at 398. The subissue of whether a communication has some connection or logical relation to an official proceeding is also a question of law. *Flugge*, 532 N.W.2d at 421. Thus, as a lay person, Dione's thoughts on the matter are irrelevant.

The only evidence necessary to decide the issue of absolute privilege is copies of Dione's letter to the TLE, the TLE's motion excerpt, and a copy of the TLE's letter to Kevin. To the extent Kevin disagrees, he should have made a motion with the trial court for additional discovery pursuant to SDCL § 15-6-56(f). He did not. Instead, Kevin defended Dione's summary judgment motion and also made his own motion for partial summary judgment. *Wolff v. Sec'y of South Dakota Game, Fish and Parks Dept.*, 1996 S.D. 23, ¶ 16, 544 N.W.2d 531, 534 (Plaintiff was not prejudiced by defendant's failure to plead an affirmative defense when the plaintiff served written responses to the motion on that defense without any claim of prejudice or lack of a fair opportunity to litigate the issue).

D. This Court's decisions in *Waln* and *Pawlovich* are of no assistance to Kevin because the communications in those cases were not made to governmental entities.

Kevin relies upon this Court's decisions in *Waln v. Putnam*, 196 N.W.2d 579 (S.D. 1972) and *Pawlovich v. Linke*, 2004 S.D. 109, 688 N.W.2d 218 in support of his claim that the TLE's regularly scheduled board of director's meeting was not an "official proceeding authorized by law." In *Waln*, which was a plurality opinion, this Court refused to extend the absolute privilege to a "meeting of a board of directors of a non-profit corporation or the like." 196 N.W.2d at 583. Similarly, in *Pawlovich*, this Court refused to apply the privilege to communications made during a non-governmental

hospital's investigation. 2004 S.D. 109, ¶ 14, 688 N.W.2d at 223. The fact that the complaint in *Pawlovich* "was not made to a body charged with the professional licensing of nurses, nor even [the hospital's] disciplinary board" further negated the existence of an absolute privilege. *Id.*

In this case, the TLE derives its authority from Congress and was created by the Rosebud Sioux Tribe to manage all tribal lands. This Court has never held that communications from a citizen to a governmental entity, that were even tangentially related to the entity's function, were not privileged. Kevin has not provided any compelling reason for this Court to depart from that precedent.[4]

E. The absolute privilege for official proceedings is not limited to proceedings conducted pursuant to state law.

Kevin claims that the absolute privilege is limited to official proceedings "conducted in accordance with the laws of South Dakota." (Appellee's Br. 19). He further claims that the TLE violated the due process clause of the South Dakota Constitution. (*Id.*). According to Kevin, this renders Dione's letter to the TLE unprivileged. (*Id.*).

The text of the statute disposes of Kevin's first argument. Indeed, the privilege extends to communications in "any legislative or judicial proceeding, or in any other official proceeding authorized by law...." SDCL § 20-11-5(2). Nothing in the text of the

[4] The "TLE is a Rosebud subsidiary, and it is responsible for the management and administration of all land owned by Rosebud." *Rosebud Sioux Tribe v. Strain*, 432 N.W.2d 259, 260 (S.D. 1988). The TLE's board of directors voted to rescind Kevin's leases of tribal land at one of the board of directors' regularly scheduled meetings. (Appellant's App. 5). Because the issue of whether statements relate to proceedings is viewed liberally in favor of retaining the privilege, Dione will not dedicate a section in this brief to counter Kevin's argument that the TLE was engaged in social work as opposed to land management. (Appellee's Br. 18).

statute limits its application to "state" legislative, judicial or official proceedings as none of those terms are preceded by the word "state." As a result, the notion that the intent behind the statute was to provide immunity to citizens who participate in state legislative hearings and state court proceedings but subject citizens who participate in local, tribal, or federal proceedings to actions in state court is untenable. Nowhere is that more evident than in this Court's opinion in *Janklow*, which held that assertions made in a petition filed in United States District Court were absolutely privileged and therefore not actionable in state court. *Janklow*, 241 N.W.2d at 323-26.

Kevin's due process claim is further flawed because, as set forth in Dione's opening brief, it is the *proceeding* that must be authorized by law—not the action that was taken. Congress allowed the tribes to create subordinate corporations to manage tribal affairs and the Rosebud Sioux Tribe in turn created the TLE, which holds regular board of director meetings to carry out that function. The TLE's meeting where the board voted to rescind Kevin's leases of tribal land was therefore "an official proceeding authorized by law."

Finally, even if the TLE's decision could be scrutinized, neither the South Dakota Constitution nor the United States Constitution applies to the actions of tribal governments because tribes are "not creatures of either federal or state governments." *Barta v. Oglala Sioux Tribe of Pine Ridge Reservation of S.D.*, 259 F.2d 553, 557 (8th Cir. 1958). Instead, tribal government action is limited by the Indian Civil Rights Act. 28 U.S.C. §§ 1301-1304. So, to the extent Kevin believes the TLE erred, the proper forums would be tribal and later federal court—not this Court.

CONCLUSION

For all the reasons set forth above, the circuit court's decision denying Dione summary judgment should be reversed and this Court should direct the circuit court to enter summary judgment in Dione's favor on remand.

Respectfully submitted this 19th day of December, 2024.

WOODS, FULLER, SHULTZ & SMITH, P.C.

By: */s/ Andrew R. Damgaard*

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), we certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word 365, Times New Roman (12 point) and contains 2,823 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, and certificates of counsel. We have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 19th day of December, 2024.

WOODS, FULLER, SHULTZ & SMITH, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December, 2024, a true and correct copy of the foregoing Appellant's Reply Brief was electronically filed via the Odyssey File & Serve system, which will automatically send email notification of the same to the following:

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