IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27937

STERN OIL COMPANY, INC.

Plaintiff and Appellant,

v.

JAMES R. BROWN d/b/a EXXON GOODE TO GO and FREEWAY MOBIL,

Defendant and Appellee.

Appeal from the Circuit Court, Second Circuit
Minnehaha County, South Dakota

The Honorable Lawrence E. Long
Circuit Judge

APPELLANT'S BRIEF

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Notice of Appeal filed July 22, 2016

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PRELIMINARY STATEMENT

Appellant Stern Oil Company, Inc. will be referred to as "Stern Oil." Appellee James R. Brown will be referred to as "Brown." References to the settled record will be designated as "SR." References to the transcript for the jury trial will be designated as "TT." References to the transcript for the first court trial will be designated as "TT1." References to exhibits introduced at trial will be referred to as "Ex." References to various hearing transcripts will be designated "HT" followed by the date of the hearing. References to Stern Oil's appendix will be designated as "Stern App."

JURISDICTIONAL STATEMENT

Stern Oil appeals the trial court's oral ruling at the pretrial hearing excluding the bulk of its expert damages testimony, the Order Denying Plaintiff's Motion to Reconsider dated February 3, 2016, and notice of entry of entry filed February 5, 2016; Jury instructions filed February 2, 2016; the Verdict entered February 2, 2016; the trial court's Letter Opinion dated June 8, 2016; and the Judgment entered June 20, 2016 and noticed on June 24, 2016. The Notice of Appeal was filed July 22, 2016.

STATEMENT OF LEGAL ISSUES

I. The Trial Court Erred When it Determined Stern Oil was not the Prevailing Party Because a Sizable Judgment was Entered After a Favorable Jury Verdict.

The trial court failed to designate Stern Oil as the prevailing party when the jury verdict was in its favor and a Judgment was entered for Stern Oil for $401,472. The trial court improperly denied Stern Oil its contractually-mandated attorney's fees and costs, as a result.

- *Crisman v. Determan Chiropractic, Inc.*, 2004 S.D. 103, 687 N.W.2d 507
- *City of Aberdeen v. Lutgen*, 273 N.W.2d 183 (S.D. 1979)
- *Picardi v. Zimmiond*, 2005 S.D. 24, 693 N.W.2d 656

II. The Trial Court Erred in Instructing the Jury that Stern Oil's Damages had to be Foreseeable to Brown Because Stern Oil's Lost Profits are Direct Damages.

The trial court's instructions regarding damages were an incorrect, incomplete and misleading statement of the law. The trial court erred by instructing the jury on consequential damages and foreseeability. Stern Oil's lost profits were not consequential damages, they were direct damages.

Foreseeability is only required for consequential damages. Even then, the only thing that must be foreseeable is the fact that there are lost profits, not how those profits were made.

Additionally, the court instructed that damages must be "reasonably foreseeable" to be recoverable but did not define "reasonable foreseeability." This improperly instructed the jury to reject damages based on Brown's lack of subjective knowledge of how Stern Oil made a profit on its sales. The erroneous instructions resulted in the jury's elimination of an entire category of lost profits damages, which the evidence established with reasonable certainty, constituting prejudicial error.

- *Ducheneaux v. Miller*, 488 N.W.2d 902 (S.D. 1992)
- *Lamar Advertising of South Dakota, Inc. v. Heavy Constructors, Inc*., 2008 S.D. 10, 745 N.W.2d 371
- *Tri-State Refining and Inv. Co. v. Apaloosa Co*., 452 N.W.2d 104 (S.D. 1990)

III. The Trial Court Erred by Excluding Stern Oil's Lost Profits Evidence Because That Evidence was Established with Reasonable Certainty.

Based on its erroneous interpretation of the Motor Fuel Supply Agreements, the trial court excluded the bulk of Stern Oil's lost profits evidence. In fact, the trial court only allowed Stern Oil's expert to present one model of damages rather than a range of damages based on reasonable projections of the fuel Brown would have purchased over the ten-year contract term . As such, the court improperly interpreted the contract and improperly denied reasonable damage models that Stern Oil was entitled to present to the jury.

- *Glanzer v. Joseph Indian Sch.*, 438 N.W.2d 204 (S.D. 1989)
- *Lamar Advertising of South Dakota, Inc. v. Heavy Constructors, Inc*., 2008 S.D. 10, 745 N.W.2d 371
- *Table Steaks v. First Premier Bank, N.A.*, 2002 S.D. 105, 650 N.W.2d 829

INTRODUCTION

Before this Court for a second time is a breach of contract action between Stern Oil and Jim Brown. The Court remanded the case for a new trial on the issues of breach and damages. Following a five-day trial, the jury rejected all of Brown's contractual defenses, found the parties' contracts to be valid, and found that Brown breached his contracts with Stern Oil. A Judgment was entered for $401,472.

Despite the jury verdict and sizable judgment, the trial court found Stern Oil was not the prevailing party and denied contractual costs and attorney's fees. Stern Oil appeals the trial court's failure to designate it as the prevailing party. Stern Oil also appeals the court's pretrial decision which limited Stern Oil's damages evidence. The court excluded nearly all of Stern Oil's lost future profits evidence. This same evidence was admitted in the first trial, and the trial court relied on it in rendering its judgment in Stern Oil's favor. Finally, Stern Oil appeals the court's errors in giving Brown's requested jury instructions regarding damages and injecting a foreseeability requirement for breach of contract damages. Stern Oil seeks reversal on these three issues, any of which requires retrial on damages.

STATEMENT OF THE FACTS

Stern Oil is a family-owned fuel and petroleum business based in Freeman, South Dakota. TT52. Scott Stern and his wife Staci handled the business operations for the company along with Scott's father, Gillas. *Id.* Stern Oil supplies fuels throughout the Midwest. *Id.*

Brown is a successful businessman from Gettysburg, South Dakota. TT449. Brown became involved in the gas station business in the 1990s when his wife's brother lost a partner in a gas station and video lottery casino in North Sioux City. TT450.

Brown invested and was not involved in the daily operations of the store, but he reviewed its financial information weekly. TT451. Brown had a falling out with Zortman, and the two parted ways. *Id.* Brown used his considerable wealth to purchase and renovate two competing gas stations, Goode to Go and Freeway. *Id.*

Stern Oil sells several different brands of gasoline, including ExxonMobil. TT59. Scott and Staci became acquainted with Brown and met with him and his daughter, Missy, to explain the benefits of contracting with them and a fuel supplier like ExxonMobil. TT488. Scott and Staci presented a Power Point demonstration to Brown and Missy explaining those benefits. TT69-87, 421-422; Ex. 17. Scott and Staci touched briefly on an ExxonMobil program called the "hypermarket support program." TT82. Under this program, a store owner can receive up to five cents a gallon in support payments from ExxonMobil if a competitor comes in and begins to sell gas below cost. *Id.*

Brown hired consultant Beth Artis to assist with various aspects of the new Goode to Go store he was constructing. TT391, 486. Artis asked Staci about the hypermarket support program, and Staci said she did not know all the specifics of the program but that ExxonMobil would come make a detailed presentation if Brown wanted to learn more. TT400-401; Ex. 19. Staci also told Artis the hypermarket program had been around for approximately five years but could end anytime. *Id.* The evidence at trial established that Artis, Missy, and Brown understood the program could end anytime and that there was no guarantee of a profit in any amount under the terms of Stern Oil's proposed contracts. TT400; Ex. 19. This understanding was memorialized in Artis's emails. *Id.*

Scott forwarded two fuel contracts to Brown to review in May 2005. TT318. The contracts, each titled a "Motor Fuel Supply Agreement," are mirror images of each other,

with different fuel supply volumes for Brown's two stations. Exs. 6 and 7; TT515. The MFSAs are for ten-year terms, with an open price term. *Id*. Scott testified that all of Stern Oil's contracts with customers are for the same length of time, that Stern Oil calculates price in the same manner in all of its contracts, and that they all have an open price term. TT110, 111. Scott testified this arrangement is standard in the fuel industry. TT110.

Brown took the MFSAs under consideration. The Freeway store was already open, and he started construction on Goode to Go. TT304. In the summer of 2005, Stern Oil began to deliver gas to Freeway. TT88. Scott again discussed with Brown how Stern Oil would charge Brown for the fuel, the same for every Stern Oil customer. TT95-96. Specifically, Stern Oil charges 1.5 cents per gallon above the "rack price," a term of art indicating the price listed at the terminal, plus freight and taxes. TT95-96,103. Every day, Stern Oil sends its customers a price sheet which lists the rack price, freight and taxes, so customers are aware of the cost on a daily basis. TT105,112-113. Scott thoroughly explained to Brown how the price for Brown's purchase of fuel is set. TT95-96,103.

Brown and his employees determined when and how much gas they wanted to buy. TT560. Stern Oil then pulled the gas from the terminal and delivered it to Brown. TT120. Brown's employees then set the sales price. TT560.

Brown and Stern Oil performed under these terms even before the MFSAs were executed. TT 87-90. Stern Oil delivered fuel to Brown's Freeway station for several months, and Brown paid Stern Oil at the price described above. TT95. By the fall of 2005, Brown opened the new Goode to Go store. TT 95,464. Brown executed both MFSAs on October 20, 2005, and Stern Oil continued to deliver fuel just as it had over

the previous months, using the same price computation and process. Exs.6,7,TT97,87-90.

After a few months, Brown indicated his gas stations were struggling because of competition from Casey's. TT536. Scott helped Brown enroll in the hypermarket support program, and Brown began receiving payments. TT127. During the time Brown performed under the MFSAs, he received more than $53,000 in payments from this program. Exs. 35, 47.

It is undisputed that approximately one and one-half years into the ten-year terms Brown abruptly, and without notice, renounced both contracts and stopped purchasing fuel from Stern Oil. TT210-211. When Scott called Brown to find out what was going on, Brown told Scott "your contracts mean nothing to me." TT211.

Stern Oil brought suit for breach of contract and Brown claimed, for the first time in his Answer, that Stern Oil had guaranteed him a five-cent profit on each gallon of gas he sold. SR132. Despite many communications, Brown did not mention this five-cent profit guarantee with Scott or anyone at Stern Oil during the eighteen months he performed. TT 90,96,101,123:16-20,124:18-24,125:11-17,132:12-16,133:25-134:4,135:1-4. It was not offered as justification for abandoning the Stern Oil contracts until pleadings were filed in this case, alleging Stern Oil defrauded him. SR132.

It is undisputed that the contracts contain no provision guaranteeing Brown a profit in any amount. However, the contracts entitle the prevailing party to its costs and attorney's fees in the event of litigation. Ex. 6, 7 at ¶32.

This Court reversed in *Stern Oil I* primarily because it found questions of fact on Brown's fraud claim and other defenses. In the second trial, Brown admitted Scott had not lied and not made a five-cent profit guarantee. TT499. The jury rejected Brown's

fraud claim and all his defenses, found that Brown breached the contracts, and awarded Stern Oil damages. SR3022.

Stern Oil's experts testified and established its lost profits at both trials. Well-known economics expert Professor Ralph Brown calculated four models of future lost profits based on varying volumes of fuel Brown would have sold. His testimony was accepted without exclusion by Judge Zell, who awarded Stern Oil lost profits of $925,317 based on the second of the four models Professor Brown prepared. SR1144.

Before the second trial, Brown asked the trial court to exclude nearly all of Professor Brown's testimony and limit him to presenting one model of lost profits. TT2931. The trial court agreed based on its erroneous interpretation of the MFSAs. HT 1/21/16 at 29. Stern Oil moved for reconsideration. SR3016. The trial court denied it and excluded all but the most conservative of Professor Brown's damages testimony. SR4334. This error is one reason for the discrepancy between the damage awards in the first and second trials.

Professor Brown explained Stern Oil's profit centers on fuel sales. Scott also testified as an expert. Both described Stern Oil's profits centers:

1) 1.5 cents per gallon which was added to the "rack price" of the fuel;

2) freight charges; and

3) a 1.25% "prompt payment" discount for paying the day after the fuel gets pulled from the terminal.[1] TT212.

Stern Oil depends on each of these profit centers, which is why they are described by Professor Brown as a three-legged stool.

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[1] ExxonMobil has required Stern Oil to pay this way for the last twelve years, for all customers. TT228.

The jury was instructed that if Brown met his burden of proof with respect to the defenses he claimed, including fraud, mistake, estoppel and negligent misrepresentation, then it could not award Stern Oil damages in any amount. SR3060, 3061, 3062, 3064, 3066. The court instructed the jury that it is Stern Oil's burden to establish itself as a "lost volume seller" and that if it did not, the jury could not award damages. SR3070. The Verdict for Plaintiff read as follows:

Motor Fuel:	$176,152.00
Diesel Fuel:	$0.00
Freight:	$61,653.00
Stern Oil Discount:	$0.00
BIP Contract Damages:	$22,659.00
Total Award:	**$260,464.00**

SR3022.

In three damages categories, the jury awarded everything Stern Oil requested, as the evidence established. SR3022. The zero amount for "Stern Oil Discount" refers to the 1.25% prompt payment profit Stern Oil made on its sales. *Id*.

After trial, Stern Oil moved for recovery of its costs and attorney's fees as provided by the contracts. Although the court had awarded Stern Oil attorney's fees and costs on two prior occasions, it found that Stern Oil was not the prevailing party and denied the award of any attorney's fees or costs.

ARGUMENT

I. The Court Erred When it Determined Stern Oil was not the Prevailing Party Because a Sizable Judgment was Entered After a Favorable Jury Verdict

A. The Parties Agreed the Prevailing Party Would Recover Attorneys' Fees, Costs, and Expenses

The MFSAs provide that the prevailing party is entitled to its attorney's fees, costs and expenses:

> In any litigation between the parties to enforce any provision or right under this Agreement, the non-prevailing party covenants and agrees to pay to the prevailing party all costs and expenses incurred by the prevailing party in connection with the litigation, including but not limited to reasonable attorney's fees.

Ex. 6 and 7 at ¶32.

At trial, the jury rejected all of Brown's claims, including fraud, estoppel, mistake and negligent misrepresentation, and found Brown breached the contracts, and awarded Stern Oil damages of $260,464. With prejudgment interest, the total judgment was $401,472. SR4658.

Under well-settled South Dakota law, "the party in whose favor the decision or verdict is or should be rendered and judgment entered" is the prevailing party. *Michlitsch v. Myer*, 1999 S.D. 69, ¶12, 594 N.W.2d 731, 733; *Noble v. Shaver*, 1998 S.D. 102, ¶26, 583 N.W.2d 643, 648; *Strand v. Courier*, 434 N.W.2d 60, 65 (S.D. 1988); *City of Aberdeen v. Lutgen*, 273 N.W.2d 183, 185 (S.D. 1979). Because the jury rendered a verdict in Stern Oil's favor and a judgment in excess of $400,000 was entered, the trial court should have ordered attorney's fees. The only issue should have been the amount of fees, not whether Stern Oil prevailed. The court's ruling that Stern Oil is not the prevailing party is found at Stern App. 9-18. Stern Oil appeals this shocking and unprecedented decision.

B. South Dakota's Legal Standard for Determining Prevailing Party Demonstrates the Trial Court's Reversible Error.

Abuse of discretion is the standard of review for determining prevailing party status.[2] *Michlitsch*, 1999 S.D. 69, ¶15. The trial court abused its discretion by making a

[2] Unlike credibility and evidentiary inquiries, the trial court is not particularly better suited to determine a litigant's prevailing party status than is this Court. In other states,

decision clearly against reason and evidence or when a judicial mind, in view of the law and circumstances, could not have reasonably reached the same conclusion.

There are at least nine cases in which this Court has stated the general rule that the prevailing party is "the party in whose favor the decision or verdict is or should be rendered and judgment entered." *Lutgen*, 273 N.W.2d at 185; *Strand*, 434 N.W.2d at 65; *Noble*, 1998 S.D. 102, ¶26; *Geraets v. Halter*, 1999 S.D. 11, ¶20, 588 N.W2d 231; *Michlitsch*, 1999 S.D. 69, ¶12; *Culhane v. Michels*, 2000 S.D. 101, ¶33, 615 N.W.2d 580; *Crisman v. Determan Chiropractic*, 2004 S.D. 103, ¶ 23, 687 N.W.2d 507; *Picardi v. Zimmiond*, 2005 S.D. 24, 693 N.W.2d 656; *Hewitt v. Felderman*, 2013 S.D. 91, 841 N.W.2d 258. When the criteria set forth within the general rule are met, the test for determining which party prevailed is an objective one. In those cases, there is no room for the trial court to subjectively consider other factors, such as the respective parties' wins or losses along the way or the amount of the damages awarded as compared to the highest range of damages the evidence supports. In a case like this, where a jury finds liability and awards significant damages and a judgment is entered, decisions concerning collateral issues and evidentiary rulings are irrelevant to determining the prevailing party. The party who is successful on the merits of the main issue is the prevailing party. *See Lemer v. Campbell*, 602 N.W.2d 686, 689 (N.D. 1999) ("Generally, the prevailing party to a suit, for the purpose of determining who is entitled to costs, is the one who successfully prosecutes the action or successfully defends against it, prevailing on the merits of the main issue, in other words, the prevailing party is the one in whose favor the

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including North Dakota and Wyoming, "[t]he determination of who is a prevailing party is a question of law" reviewed de novo. *Braunberger v. Interstate Eng'g, Inc.*, 607 N.W.2d 904, 908 (N.D. 2000); *Veile v. Bryant*, 123 P.3d 562, 564 (Wyo. 2005). Stern Oil urges this Court to adopt a de novo standard of review for prevailing party status.

decision or verdict is rendered and the judgment entered."); *Picardi,* 2005 S.D. 24, ¶16 (court did not abuse discretion in determining Picardis were prevailing party given they were the party in whose favor the trial verdict was rendered and judgment entered).

There are cases, unlike this one, in which there is no decision or verdict rendered in favor of one party or where there is no judgment that is or should be entered for a particular party. Under those circumstances, the court is left to a more fact-specific review to subjectively determine if one party prevailed. *Strand,* 434 N.W.2d at 65 (party properly denied prevailing party status where jury decided against him and judgment was entered in favor of another party); *Ridley v. Lawrence County*, 2000 S.D. 143, 619 N.W.2d 254 (where petitioners' case was dismissed on procedural grounds rather than its merits, court did not abuse discretion in determining other litigant was not the prevailing party). In many such cases, the court finds that neither party prevailed, leaving the parties to their own costs and fees. *See Noble*, 1998 S.D. 102, ¶26 (designation of any party as prevailing premature in light of need for resolution of additional issues).

The trial court identified various subjective factors which led it to deny Stern Oil prevailing party status: 1) "the discrepancy between the amount of the award in the first trial court and the amount of the award in the jury trial" (SR 4655) (Stern App. 16); 2) the "fact Stern Oil was awarded a significantly lower amount of money than what he was seeking" (*Id.*); 3) the jury's failure to award lost profits damages based on the profit attributable to the 1.25% prompt payment discount[3] (SR 4656) (Stern App. 17); and 4) the jury's failure to award damages for sales of diesel fuel. *Id.*

Rather than applying the rule set forth in South Dakota case law, the trial court

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[3] Ironically, as subsequently addressed, the court's errors on other aspects of the trial led to Stern Oil's decreased award.

sought out cases from other jurisdictions to attempt to justify its decision. None of the cases the court cites involve a jury verdict or damages award. None involve a judgment in favor of a party for any damages at all, much less a judgment in excess of $400,000. Had the court more carefully reviewed this Court's decisions, it may have recognized its error.

The most instructive case is *Crisman*. There, the Court emphasized that the proper consideration was the plaintiff's obtaining a money judgment, which was the "essence of his lawsuit," rather than other non-culminating and non-dispositive decisions throughout the litigation. 2004 S.D. 103, ¶23. The Court expressly rejected the defendants' argument that he prevailed because the trial court awarded the plaintiff significantly less than he demanded in his complaint. *Id*. *Crisman* demonstrates the court's error in denying Stern Oil prevailing party status based on factors which have no bearing on that determination and which this Court has expressly rejected as proper considerations.

Similarly, in *Lutgen*, this Court held "[t]he prevailing party is the party in whose favor the decision or verdict is or should be rendered and judgment entered. In the present case, the verdict was rendered in favor of Lutgen in the amount of $22,877.71, and Lutgen would have to be considered the prevailing party for the purpose of taxing costs even though the City voluntarily dismissed the condemnation proceeding prior to judgment." 273 N.W.2d at 185 (citations omitted). *See also Geraets*, 1999 S.D. 11, ¶20 (defendant's payment of uncontested costs, offered prior to lawsuit, does not deprive it of prevailing party status, where plaintiff lost on primary issue of specific performance); *Picardi,* 2005 S.D. 24, ¶16 (in declaratory judgment action, trial court properly determined Picardi was prevailing party given they were the party in whose favor the trial

verdict was rendered and judgment entered). The only South Dakota case involving a favorable jury verdict in which the party was deemed not to be the prevailing party is *Hewitt*, 2013 S.D. 91, ¶28. There, however, this Court affirmed the trial court's conclusion that neither plaintiff nor defendant prevailed because the jury awarded *zero* damages. *Id.*

If the trial court had reviewed and understood these instructive decisions by this Court, it would have reached the only reasonable conclusion, that is, that Stern Oil is the prevailing party. Instead, the trial court made a decision that is unequivocally contrary to South Dakota law.

C. The Cases the Trial Court Cites from Other Jurisdictions Do Not Support Its Conclusion.

Although the trial court tried to use cases outside the jurisdiction to lend credence to its decision, Stern Oil would also be deemed the prevailing party under the laws of North Dakota, Montana, or Minnesota. The cases cited from those jurisdictions stand for the same general rule as set forth in the South Dakota cases, as well as the proposition that in certain circumstances, where there is no jury verdict or judgment in favor of one party, or if the judgment is equitable in nature, there is no alternative for the court but to weigh relative wins and losses to make a prevailing party determination.

Citing *Marriage of Hebert*, 840 P.2d 584, the trial court stated that "[t]he mere fact that Stern Oil was awarded a monetary judgment does not necessarily make them the successful or prevailing party as no one factor determines who the prevailing party is." Stern App. 14. However, this statement is an open contradiction of the South Dakota rule, where the jury verdict awarding damages *is* the determining factor. Moreover, the *Hebert* case is distinguishable because it is a family law case, there is no verdict, no

favorable opinion. This case lends no value to the discussion. Equally distinguishable is *Parcel v. Myers*, 697 P.2d 89 (Mon. 1984). Stern App. 14. Again, in that case, there was no jury verdict and no judgment was entered in favor of either party.

In one of two North Dakota cases cited, the court is tasked with weighing contract language which "authorizes an award of attorney fees only to a 'substantially prevailing' party,'" a much higher standard than in Brown's contracts with Stern Oil. Stern App. 14 (citing *WFND, LLC v. Fargo Marc, LLC*, 730 N.W.2d 841, 856–57 (N.D. 2007)). In the second North Dakota case, the court articulates a standard very similar to that set forth by this Court and, consistent with South Dakota law, deems the party in whose favor judgment is entered the "prevailing party." *Id.* (citing *Carpenter v. Rohrer*, 714 N.W.2d 804, 814–15 (N.D. 2006)) (client in malpractice action against social worker was entitled to costs as prevailing party even though jury awarded no damages). This case does nothing to bolster the trial court's decision. Rather, it supports reversal.

The Minnesota cases are of no greater value in justifying the trial court's decision. *Minch v. Buffalo-Red River Watershed Dist.,* is an unpublished decision by the Minnesota Court of Appeals where the court describes the litany of the litigants' relative successes and failures in determining there was no prevailing party. Stern App. 15 (citing *Minch*, 2008 WL 4705917 (Minn. Ct. App. Oct. 28, 2008)). This case was very fact specific, with no jury verdict or damages award, and distinguishable from this case in all respects. Finally, in *Borchert v. Maloney,* the Minnesota Supreme Court decides prevailing party status consistently with the South Dakota cases. 581 N.W.2d 838, 840 (Minn. 1998).[4]

[4] The trial court also cites the U.S. Supreme Court decision, *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983), but distinguishes it as a case decided under 42 U.S.C. § 1988, which has its own particularized standard for determining a prevailing party. SR 4654.

The Minnesota rule is the same as South Dakota; a party in whose favor a verdict is rendered and judgment entered is the prevailing party.

There is a common thread among all the cases cited by the trial court in its opinion. None of the cases in which the court determined that neither party prevailed, after engaging in a balancing or subjective analysis, involved a jury verdict for damages. No case involved a damages award in any amount, and certainly not one for more than four hundred thousand dollars.

Even if the circumstances and the law were different and a subjective review of the parties' intermediate successes and failures throughout the litigation were appropriate, Brown suffered losses at every turn. He attempted to invalidate the contracts by claiming a number of formation defenses, alleging he was fraudulently induced to enter the contract by Stern Oil's supposed 5 cent-profit guarantee; that he entered the contracts by mistake; or that he entered the contracts relying on negligent misrepresentations by Scott Stern. The jury heard the parties' testimony and was instructed these affirmative defenses. The jury rejected all of them. Brown's request for rescission from the trial court as an equitable remedy pursuant to SDCL § 53-11-2 was also denied. Stern App. 11-12. Brown has been found liable for breaching his contracts with Stern Oil twice. Stern Oil's damages were hundreds of thousands of dollars both times. Stern Oil was successful in nearly all respects. The jury awarded Stern Oil 100 percent of its requested damages in three out of five damages categories, despite erroneous jury instructions and a flawed interpretation of the contracts. Stern Oil prevailed on the ultimate issue. The trial court was obligated to apply the general rule rather than weighing the parties' relative

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This case supports Stern Oil's position as it holds that a plaintiff can be a prevailing party even if they have not succeeded on every claim on every single aspect of the case. *Id.*

success and failure. Even weighing successes and failures, however, there is no question Stern Oil was far more successful and prevailed on all the issues of significance and on the ultimate issue, that Brown breached the contracts and caused damages.

If Stern Oil is not the prevailing party, it is arguably the most successful non-prevailing party in the history of South Dakota jurisprudence. A judgment in excess of a four hundred thousand dollars in Stern Oil's favor mandates the conclusion that Stern Oil is the prevailing party under our law. The trial court's rationale for concluding Stern Oil did not prevail defies logic.

Allowing the trial court's decision to stand would overrule the entire line of South Dakota cases cited herein. It would also result in a very dangerous and untenable rule, that despite a jury verdict for very substantial damages, a verdict for less than the amount sought, or less than awarded in a prior trial, renders a party in whose favor judgment is entered non-prevailing. The result of the precedent to be created absent reversal would be to preclude prevailing party status to the vast majority of litigants. In fact, it is no exaggeration that allowing this decision to stand would turn the law on prevailing party on its head. It would create precedent that destroys the objective rule and allows, or forces, courts to undertake an exhaustive subjective inquiry in every case, weighing each intermediate decision, including all evidentiary decisions or even decisions regarding discovery matters which occurred throughout the entire course of litigation. It would create uncertainty beyond measure. If Stern Oil is not the prevailing party here, it is difficult to imagine how any party could ever attain that status. This Court must reverse and remand to determine the appropriate amount of costs and attorney's fees to be added to the judgment in Stern Oil's favor.

II. The Trial Court Erred in Instructing the Jury that Stern Oil's Damages had to be Foreseeable to Brown Because Stern Oil's Lost Profits are Direct Damages

A. Breach of Contract Damages are Broadly Construed in Favor of the Injured Party

"In an action for breach of contract, the plaintiff is entitled to recover *all* his detriment proximately caused by the breach, not exceeding the amount he would have gained by full performance." *Ducheneaux v. Miller*, 488 N.W.2d 902, 915 (S.D. 1992) (emphasis added); *see also* SDCL 21-2-1 and 21-1-5. "[T]he ultimate purpose behind allowance of damages for breach of contract is to place the injured party in the position he or she would have occupied if the contract had been performed … or to make the injured party whole." *Id.*

"Under any damage model, 'there need only be a *reasonable basis* for measuring the loss and it is only necessary that damages can be measured with reasonable certainty.'" *Tri-State Refining and Inv. Co. v. Apaloosa Co.*, 452 N.W.2d 104, 110 (S.D. 1990) (emphasis added). Within that framework, damages must simply be "*reasonably certain* and not speculative." *Lamar Advertising of South Dakota, Inc. v. Heavy Contractors, Inc.*, 2008 S.D. 10, ¶14, 745 N.W.2d 371 (emphasis added). In other words, "[a]bsolute certainty is not required." *Glanzer v. Joseph Indian Sch.*, 438 N.W.2d 204, 213 (S.D. 1989). In fact, "[a]ny reasonable method of estimating a prospective profit is acceptable." *Id.*

Furthermore, if "doubt exists as to certainty of damages, those doubts should be resolved against the wrongdoer." *Tri-State Refining*, 452 N.W.2d at 110. That is because "[i]n a large class of cases it is difficult to prove the exact amount of damages a party sustains by a breach of contract, but the ends of justice are not to be defeated by failure of

strict mathematical proof." *Atyeo v. Paulsen*, 319 N.W.2d 164, 166 (S.D. 1981).

B. Lost Profits Damages can be Either Consequential or Direct, Depending on the Circumstances

"This Court has recognized the propriety of awarding lost profits as damages for breach of contract." *Lamar*, 2008 S.D. 10, ¶15. "[T]here are two types of lost profits: (1) lost profits which are direct damages and represent the benefit of the bargain…, and (2) lost profits which are indirect or consequential damages…." *Atlantech Inc. v. American Panel Corp*., 743 F.3d 287, 293 (1st Cir. 2014). As the Eighth Circuit recognized, it would be "incorrect to classify mechanically the prospective lost profits portion of [a plaintiff's] damage award as consequential damages" like the trial court did here. *Computrol, Inc. v. Newtrend L.P*., 203 F.3d 1064, 1071, n. 5 (8th Cir. 1999).

"Direct damages refer to those which the party lost from the contract itself – in other words, the benefit of the bargain – while consequential damages refer to economic harm beyond the immediate scope of the contract." *Penncro Associates, Inc. v. Sprint Spectrum, L.P.*, 499 F.3d 1151, 1156 (10th Cir. 2007). Even where a contract specifically precludes consequential damages, lost profits can be recoverable as a direct damage. *Id.* That is because lost profits are typically considered direct damages in a breach of contract case, while they are considered to be special or indirect damages in a tort case. *Moore v. Boating Indus. Associations*, 754 F.2d 698, 717 (7th Cir. 1985) (remanded 474 U.S. 895) (affirmed in part, reversed in part on other grounds 819 F.2d 693); *D.P. Serv., Inc. v. AM Intern.*, 508 F.Supp. 162, 166–67 (N.D.Ill.1981); *Myers v. Stephens*, 233 Cal.App.2d 104, 43 Cal.Rptr. 420, 433 (1965).

An example of a direct lost profit would be "a general contractor suing for the remainder of the contract price less his saved expenses." *Atlantech Inc.*, 743 F.3d at 293.

That is because any profit the plaintiff derives from the supply chain is a direct, rather than consequential damage. *Id*. at 840 (citation omitted). As a result, Stern Oil's lost profits are direct, rather than consequential, damages.

C. The Trial Court Erred by Labeling Stern Oil's Lost Profits as Consequential Damages, Rather than Direct Damages, and Compounded that Error by Submitting Incorrect Instructions to the Jury

1. Brown Provided an Incomplete Picture of the Case Law Regarding Lost Profits and Foreseeability

Stern Oil repeatedly objected to Brown's attempt to insert foreseeability into the breach of contract jury instructions on damages, which occurred just before closing arguments were delivered. TT728-732. When settling the instructions, Stern Oil argued that the jury should be instructed based on the pattern instructions and South Dakota caselaw to award damages to place Stern Oil in the position it would be in if Brown had not breached. Brown's counsel returned from a break with a handwritten instruction injecting a quote from a Pennsylvania case on *consequential* damages into the pattern. TT732. Stern Oil objected, but the trial court gave the instruction. The jury was instructed as follows:

> Instruction No. 30: The measure of damages for a breach of contract is the amount which will compensate the aggrieved party for all determent legally caused by the breach, or which, in the ordinary course of things, would be likely to result from the breach. Damages for a breach of contract which are not clearly ascertainable in both their nature and original are unrecoverable. Consequential damages must be reasonably foreseeable by the breaching party at the time of contracting. If consequential damages were not reasonably foreseeable, then they are not recoverable.
>
> Instruction No. 30A. Consequential damages are damages that do not arise within the scope of the buyer-seller transaction, but rather stem from losses incurred by the non-breaching party in its dealings, often with third parties, which were a proximate result of the breach, and which were reasonably foreseeable by the breaching party at the time of contracting.

TT3068, 3069. This is the extent to which the jury was instructed concerning damages.

The case Brown referred to in the handwritten instruction was a decision from the Eastern District of Pennsylvania, *Atlantic Paper Box Co. v. Whitman's Chocolates*, 844 F.Supp. 1038. TT 438-41. *See also* SR3069 (Instruction 30A). Brown, however, misinterpreted *Atlantic Paper*. In fact, *Atlantic Paper Box* does not even address whether lost profits are direct or consequential damages in a breach of contract case.

What *Atlantic Paper* does address is whether lost profits can be allowed as a consequential damage of the tort of "loss of business opportunity." As that court noted, "Count V of plaintiff's complaint attempts to state a claim for 'loss of business opportunity.' Atlantic alleges that as a 'direct and proximate result' of defendant's actions, Atlantic suffered an 'immediate and irreparable diminution of value,' which caused a potential buyer of Atlantic to withdraw its offer to purchase Atlantic…." *Id*. at 1045. In other words, Atlantic was trying to recover the profits it thought it might have recovered from *another contract* it could not realize because of the defendant's actions. That is completely different than the lost profits a seller, like Stern Oil, incurs when a buyer, like Brown, breaches a sales contract. Stern Oil never claimed it lost sales with potential customers because of Brown's breach. This case actually proves that Stern Oil's damages are direct damages and *not* consequential damages.

Coincidentally, the applicable Federal Circuit has explicitly rejected Brown's interpretation of *Atlantic Paper*. The loss of *other* business (or business value), as described in *Atlantic Paper*, is collateral to the contract. *Atlantic City. Assoc., LLC v. Carter & Burgess Consultants, Inc.*, 453 Fed. Appx. 174, 179 (3rd Cir. 2011). Thus, it is a *consequential* damage rather than a direct damage. On the other hand, "when the non-breaching party seeks only to recover money that the breaching party agreed to pay under

the contract, the damages sought are general damages." *Id*. Such direct damages, as described by the Third Circuit Court of Appeals, are what Stern Oil seeks in this case.

If Stern Oil had claimed that Brown's breach affected Stern Oil's contracts with other buyers or that it had caused a diminution in value to Stern Oil itself, those would have been consequential damages. Because Stern Oil's claimed damages were the transactional net profits it had with Brown, however, Stern Oil was claiming direct damages rather than consequential damages. There was no need for an instruction regarding third parties. It was reversible error to include those instructions.

Brown's instructions only tell the jury what consequential damages are. They do not make clear that consequential damages only pertain to losses on third-party contracts *following* the breach or profits on *other* sales which might have been possible if the breaching party had performed, as opposed to the benefit of the bargain damages Stern Oil was seeking. Brown denied the court and jury this critical distinction by proposing an incomplete statement of the law minutes before closing arguments.

Furthermore, insertion of the term "third parties" in the instruction all but directed the jury to deny damages for lost profits based on the prompt payment discount. Brown's focus on how Stern Oil acquired fuel from ExxonMobil misstated what a "third party" was from the perspective of direct versus consequential damages. Stern Oil got fuel from ExxonMobil. Stern Oil then supplied that fuel to buyers, like Brown. The difference between how much Stern Oil acquires that fuel for and how much it sells that fuel for was Stern Oil's direct damages.

Brown's jury instructions and interpretation of direct versus consequential damages have repercussions beyond this case. Under Brown's theory, every seller would have to explain each aspect of its profit margins to buyers or it would not be able to

recover damages from buyers who breached. According to Brown, merely disclosing that the seller has a profit margin built into the sale is not enough. The seller would have to explain – in detail – what that profit margin is and how it is calculated.

Brown's theory regarding the need to specifically disclose the profits that will be lost in the event of breach has been rejected by the courts and commentators:

> While the [comments from the Restatement (Second) of Contracts] limit damages awards when unforeseeable events result in enhanced losses to the non-breaching party, it does not suggest that the specific loss in question must have been within the contemplation of the parties at the time of contracting. The Restatement makes that point clear, stating that "the party in breach need not have made a 'tacit agreement' to be liable for the loss. Nor must he have had the loss in mind when making the contract, for the test is an objective one based on what he had reason to foresee." As a leading commentator has explained, summarizing the foreseeability limitation on expectancy damages,[t]he magnitude of the loss need not have been foreseeable, *and a party is not disadvantaged by its failure to disclose the profits that it expected to make from the contract*…. "Just as reason to foresee does not mean actual foresight, so also it is not required that the facts actually known to the defendant are enough to enable the defendant to foresee that a breach will cause a specific injury or a particular amount in money." *Id; see also* Farnsworth, *supra,* § 12.14, at 260–61 ("There is no requirement that the breach itself or the particular way that the loss came about be foreseeable.").

Anchor Sav. Bank, FSB v. United States, 597 F.3d 1356, 1364 (Fed. Cir. 2010) (emphasis added) (citations omitted). Parties to a contract are not required to disclose how they expect to make a profit on the contract or the amount of the expected profit.

By giving the jury instructions on foreseeability that Brown requested, the trial court committed reversible error. That error was compounded by the failure to instruct the jury on the difference between reasonable foreseeability and actual foresight. The court essentially instructed the jury to ignore any profit other than the 1.5 cent difference between the rack and the sales price. We know that the trial court's instructions had that effect because the jury failed to award any damages for Stern Oil's cash discount profits.

SR3022. That would have been $380,351. Ex. 12; Brown trial depo. at 17-18 and 33-34. The erroneous instructions "effected the verdict and were harmful to the substantial rights" of Stern Oil, requiring reversal.

2. By Instructing the Jury as it did, the Trial Court Ignored the UCC Requirement that Stern Oil be Compensated for all of its Lost Profits

According to South Dakota's UCC, when a buyer refuses to accept goods or repudiates the contract, a seller's measure of damages is generally the difference between the market and the contract prices. SDCL § 57A–2–708(1). If, however, this does not put the seller in the position it would have been had the buyer fully performed, another formula applies:

> If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this chapter (§ 57A-2-710) due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

SDCL § 57A-2-708(2).

Any "lost volume seller" may recover these expanded damages. *Vanderwerff Implement, Inc. v. McCance*, 1997 S.D. 32, ¶11, 561 N.W.2d 24. To be a "lost volume seller," one must prove that "even though [it] resold the contract goods, that sale to the third party would have been made regardless of the buyer's breach[,]" using the inventory on hand at the time. *Id*. Furthermore, "[t]he lost volume seller must establish that had the breaching buyer performed, the seller would have realized profits from two sales." *Id*. The main inquiry is whether the seller had the ability to sell the product to both the buyer who breached and the resale buyer. *Id*.

The testimony proved Stern Oil was a lost volume seller, and the jury agreed.

Scott Stern testified that Stern Oil would have been able to provide the Maximum Annual Volume amount of fuel to Brown and another buyer. TT107. First, "that was the volumetric projections we communicated to ExxonMobil, so that would have been the amount of product and infrastructure that they would have applied to accommodate that volume." *Id.* Second, "ExxonMobil does not give [Stern Oil] a finite amount or fixed amount of product we can sell. In fact, it's really an infinite number. The profitability of their business is based upon the sales of gasoline, so they encourage us to sell more and more." TT107-108. Third, "ExxonMobil is the largest domestic gasoline supplier in the United States," so it has the ability to supply incredible volumes of fuel to its Franchise Dealers. TT109. Stern testified, "we lost the opportunity to sell this volume to these particular stations because there's still a pipeline of material, a pipeline of product, an infinite amount of product to sell to everybody else." TT108. Professor Brown also testified Stern Oil is a lost volume seller: "basically the amount that Stern Oil could sell of fuel relative to the capacity of ExxonMobil to provide is that they could sell all that they could and Exxon would be in a position to provide fuel." TT162-163. Professor Brown testified similarly at his trial deposition for the second trial. Brown trial depo. at 40.

The jury agreed. Instruction 31 told the jury that it could *only* award Stern Oil lost profits if the jury determined that Stern Oil was a lost volume seller. SR3070. The jury, in turn, awarded Stern Oil lost profits in the verdict form. SR3022.

The problem, however, is that the jury instructions did not differentiate between the common law breach of contract damages and how damages are calculated under the UCC. Had it done so, the jury would have awarded Stern Oil all three of its profit sources. By failing to make that distinction, the trial court committed reversible error.

III. The Trial Court Erred by Excluding Stern Oil's Lost Profits Evidence Because That Evidence was Established with Reasonable Certainty

The trial court misinterpreted the MFSAs and improperly refused to allow Stern Oil to present lost profit damages evidence to the jury. Because this evidence was based on a reasonable method of estimating lost profits considering the amount of fuel Brown more likely than not would have purchased if he complied with the agreements, the jury should have been allowed to consider it.

Judge Long based his decision on an erroneous interpretation of the parties' contract. Because contract interpretation is reviewed de novo, this issue is also reviewed de novo. *See, e.g., Coffey v. Coffey*, 2016 S.D. 96, ¶7, 888 N.W.2d 805 ("Contract interpretation is a question of law reviewed de novo.").

A. Lost Profits Need Only be Established with Reasonable Certainty

Lost profits are determined under the "reasonable certainty test." *Table Steaks v. First Premier Bank*, 2002 S.D. 105, ¶38, 650 N.W.2d 829 (citation omitted). Under the reasonable certainty test, a plaintiff does not need to prove its lost profits with absolute certainty. *Drier v. Perfection, Inc.*, 259 N.W.2d 496, 506 (S.D. 1977). Rather, "[a]ny reasonable method of estimating a prospective profit is acceptable." *Glanzer*, 438 N.W.2d at 213. This Court follows the reasonably certain rule because "[i]n a large class of cases it is difficult to prove the exact amount of damages a party sustains by a breach of contract, but the ends of justice are not to be defeated by failure of strict mathematical proof." *Atyeo*, 319 N.W.2d at 166.

As this Court also observed, "it is hardly novel in the law for damages to be projected in the future." *Lamar*, 2008 S.D. 10 at ¶17 (citation omitted). In fact, the Court in *Lamar* squarely rejected the contention that South Dakota law does not allow for

recovery of anticipated lost profits or revenues. *Id.* at ¶¶21-22 ("In such cases involving actual leases, revenues and expenses, lost profits are a proper measure of damages for at least the period of the contract."). *See also Glanzer*, 438 N.W.2d at 213 (holding expert's calculation based on sales and profit projections was "an acceptable, reasonable method of estimating lost profits").

B. Stern Oil's Lost Profit Evidence was Reasonably Certain

Stern Oil called two experts to testify about the damages it sustained from Brown's breach, Scott Stern and Ralph Brown. Scott Stern was the vice president of Stern Oil and has nearly thirty years' experience in the motor fuel and petroleum industry. TT52. He discussed this experience, including the 8 years he served on the ExxonMobil distributor advisory council. TT53-58. For two of those years he served as the council's president. TT56. Through this experience, Stern participated in and led high-level discussions regarding motor fuel supply and demand issues, consumer behavior, industry trends, operation efficiencies and best industry practices. TT57. He discussed the information he received regarding ExxonMobil-branded convenience stores located nationwide, noting that ExxonMobil has some 12,000 facilities so it has the capability to identify what works and what doesn't. TT57-58. Stern used this information to coordinate supply and demand for Stern Oil's branded fuels and to assist Stern Oil's clients. TT58.

Stern has also served on the advisory boards for Texaco and PetroCanada. TT56. He has served as president of the South Dakota Petroleum Marketers Association. *Id.* He has been the South Dakota representative for the national Petroleum Marketers Association. *Id.* Stern discussed the various industry publications he reviews on a regular basis and the industry meetings and trade shows he attends, all of which expand

his specialized knowledge of this industry. TT58. Stern's qualification as an expert witness in the motor fuel industry was never undermined during trial.

Dr. Ralph Brown's reputation precedes him. He has a PhD in economics and is professor emeritus at USD, where he taught for 29 years. Brown depo. at 7-8. He has published dozens of articles dealing with economics and the law. *Id.* at 8-9. He has consulted with numerous state agencies, including the Bureau of Finance and Management, the Governor's Council of Economic Advisors, the Department of Labor, the Attorney General's Office and the South Dakota Investment Council. *Id.* at 9. He has worked for the federal government, including the Department of Interior, National Parks Service, Bureau of Indian Affairs and US Attorney's Office. *Id.* He has served as an expert witness for the state of South Dakota and the US government and has testified in numerous States. *Id.* at 10, 13.

1. Stern Oil has Three Profit Centers from its MFSAs

Scott Stern testified that Stern Oil makes a profit on the sale of fuel in three ways. The first is through its 1.5 cent per gallon markup above the "rack" or terminal price. TT88. It is undisputed that Stern Oil charged Brown (and all its customers) this same 1.5 cent per gallon markup before Stern Oil and Brown entered into the MFSAs, while the agreements were in effect, and after Brown stopped buying fuel from Stern Oil. TT104. Stern testified this is a fair and reasonable markup in the industry since other distributors charge from 1 cent to 5 cents a gallon above the rack price. TT199-200. Stern testified no one has ever said the 1.5 cent per gallon markup was not reasonable. TT200. Brown introduced no evidence Stern Oil's markup was not set in good faith.

The second way Stern Oil makes a profit on fuel is through its delivery charge. TT88-89, 197. Stern testified that Stern Oil makes a profit because it charges more to

deliver the fuel than the cost of delivery. TT204-05. Stern testified he regularly reviewed the freight charge to make sure the fees are in line and capturing costs and creating a profit margin. TT203. Stern testified their freight charge is reasonable. TT203. First, Stern Oil's freight charge is in line with what other freight carriers charge. *Id.* Second, Stern Oil's transportation division charges the same mileage rate to its own lubricants and fuels divisions internally as it charges to its Franchise Dealers like Brown. TT205-06. Stern testified no has ever said the freight charges are not reasonable. TT203. Brown introduced no evidence that the freight charge was not set in good faith.

The third way Stern Oil makes a profit is through its 1.25% "prompt payment" cash discount. TT197. Stern testified that when Stern Oil pulls fuel from the terminal, ExxonMobil debits Stern Oil's bank account for the fuel cost the next business day. *Id.* In turn, Stern Oil gets a credit of 1.25% off the purchase price. *Id.* Stern testified that they are not given an option regarding these terms. TT213-14. ExxonMobil has provided this prompt pay discount for at least 15 years. TT213.

Stern described the three profit centers as a three-legged stool. TT197. Stern Oil's 1.5 cent per gallon markup and its freight charges are set with the assumption Stern Oil would get profit from the 1.25% cash discount. *Id.* In other words, without the 1.25% cash discount, the 1.5 cent per gallon markup and the freight charges would have to be increased.

2. Stern Oil's Method to Calculate Brown's Future Fuel Purchases was Reasonable

Stern Oil's lost profits damages are based on the amount of fuel Brown would have bought while the agreements were in effect. Because of the trial court's ruling that Stern Oil could not present its lost profits evidence to the jury, Stern Oil did not discuss

this evidence. However, the parties agreed Stern Oil could use the trial transcript from the first trial as its offer of proof to preserve this issue for appeal. HT 1/21/16 at 30. As such, Stern Oil will refer to that testimony.

Scott Stern testified he is regularly involved with making fuel sales projections, not just for each of Stern Oil's franchise dealers,[5] but also for third parties. TT1 41; 98-99. For example, banks ask him to provide fuel sales projections when making lending and financing decisions, and realtors rely on his projections when evaluating purchases and sales of convenience stores. TT1 99. Of course, the most important use Stern makes of his fuel sales projections is when he incorporates them as purchase and supply requirements in Stern Oil's various motor fuel supply agreements. TT1 101-102. Stern testified there are "a number of criteria that we use to analyze and determine volumetric projections." TT1 99-100. He prepared fuel sales projections for Brown's convenience stores based on these criteria and his industry experience, and he incorporated those projections into the MFSAs that Brown signed. Stern App. 28, ¶4a.

Stern Oil's fuel sales projection for Freeway Mobil was 1.38 million gallons per year. TT1 104. The fuel sales projection for Goode to Go was 1.5 million gallons of gasoline per year. TT1 105. These amounts are referred to as the "Maximum Annual Volume." Stern App. 28, ¶4a. The Maximum Annual Volume is the maximum amount of fuel Stern Oil is required to sell Brown. *Id.* The Maximum Annual Volume is adjusted each year based on the prior years' sales. *Id.*, ¶4b. Brown is required to purchase "*a minimum* of seventy-five percent (75%) of the Maximum Annual Volume" of fuel listed in the agreements, or Stern Oil can terminate the Agreements. *Id.*, ¶4c

[5] Brown is the "Franchise Dealer" under the agreements. Stern App. 27. Stern Oil is referred the "Distributor." *Id.* Brown's stations are the "Marketing Premises." *Id.*

(emphasis added). Thus, this is the floor on Brown's fuel sales. He can sell more, and he was expected to sell more. Brown is required to "use good faith and best efforts to maximize the sale at the Marketing Premises" of ExxonMobil fuels. *Id.*, ¶4a. Brown obviously has every incentive to sell as much fuel as possible to maximize his profits. It is undisputed that Stern Oil never told Brown it intended to terminate the Agreements despite the fact that Brown did not meet this target in the first year under the Agreements.

Stern Oil regularly evaluates the accuracy of the fuel sales projections in its MFSAs. TT1 102. When asked how his Franchise Dealers do in terms of meeting the Maximum Annual Volume requirements, Stern said "[m]aybe the best way to answer that is I believe that minimum annual threshold is 75 percent [of the Maximum Annual Volume]. Currently, we do not have any dealers that are even close to that minimum annual volume level. They are far exceeding that number." TT1 103. He testified that over half of Stern Oil's Franchise Dealers exceed their Maximum Annual Volume requirements. TT1 262. As for the rest of the Franchise Dealers, "[w]ithin a percentage point or two, they would meet that 100 percent number." TT1 104. Thus, *all* of Stern Oil's Franchise Dealers are either exceptionally close to meeting their Maximum Annual Volume numbers or they exceed them. TT1 104. The jury should have been allowed to hear this testimony to determine the factual issue of how much fuel Brown would more likely than not have sold had he complied with the Agreements. *Ganzer*, 438 N.W.2d at 213 ("Any reasonable method of estimating a prospective profit is acceptable."). Instead, the trial court limited Stern Oil's damages to the floor on Brown's fuel sales.

3. Stern Oil's Fuel Sales Projections were Accurate and Reliable

Professor Brown calculated Stern Oil's damages using four fuel sales scenarios. In his first scenario, he used the Maximum Annual Volume of fuel sales listed in the

Agreements. Stern Oil's damages for this amount of fuel are shown in proposed Trial Exhibit 2. Stern App. 21. If Brown purchased the Maximum Annual Volume of fuel Stern projected he would sell, Professor Brown determined that Stern Oil's damages would have been $1,514,725 over the term of the Agreements. *Id.* Stern testified that, based on his experience and the criteria used to project fuel sales, this was the most likely fuel sales scenario for the remaining years under the Agreements. TT1 106-107. He based this statement on the fact that over half of Stern Oil's Franchise Dealers exceed their Maximum Annual Volume requirements and the rest are within "a percentage point or two" of meeting that 100 percent number." TT1 262, 104.

In his second scenario, Professor Brown used 75% of the Maximum Annual Volume sales numbers listed in the Agreements. Stern Oil's damages for this amount of fuel are shown in proposed Trial Exhibit 3. Stern App. 22. This is the scenario Judge Zell utilized in assessing damages at the first trial. If Brown purchased 75% of the Maximum Annual Volume of fuel Stern projected, Stern Oil's damages would have been $1,133,582. Stern testified that this projection was the next most likely amount of fuel Brown would have purchased. TT1 105-107. This is because all of Stern Oil's Franchise Dealers exceed 75% of their Maximum Annual Volume sales numbers. TT1 261. Brown's expert, Don Frankenfeld, testified in the first trial that this is a reasonable scenario. TT1 345.

In his third scenario, Professor Brown used the actual volumes of fuel Brown sold in the first twelve months under the Agreements. Damages for the third scenario are shown in proposed Trial Exhibit 4. Stern App. 23. If Brown purchased the amount of fuel in this scenario over the term of the Agreements, Stern Oil's damages would have been $978,486.

In his fourth scenario, Professor Brown used 75% of the actual volumes of fuel Brown sold in the first twelve months under the Agreements. Damages for this scenario are shown in Trial Exhibit 5. Stern App. 24. This was the only fuel sales scenario the trial court allowed the jury to consider. Stern testified that scenarios three and four are not likely to have occurred. TT1 107. Frankenfeld testified at the first trial that this is the least likely of all the fuel sales scenarios. TT1 348.

Brown convinced the trial court that Stern Oil's damages should be limited to 75% of the amount of fuel he purchased in the first year under the Agreements. This ignores the reality that Brown was required to maximize his sales. Stern App. 28, ¶4a. It also incorrectly assumes that Brown's fuel sales would *never* have increased for the remainder of the years left under the Agreements, which even Brown's own expert said was unlikely. The jury should have been allowed to determine the question of how much fuel Brown would have purchased; instead the trial court did so as a matter of law. Stern Oil's damages evidence was based on a reasonable method of calculating lost profits. *See, e.g. Glanzer*, 438 N.W.2d at 213 ("Any reasonable method of estimating a prospective profit is acceptable.").

Scott Stern's fuel sales projections were reasonable. His track record of projecting fuel sales for realtors, banks, and their own motor fuel supply agreements demonstrates as much. Even if there was some doubt, defendants like Brown "may not complain when the task is made difficult by their own acts." *McKie v. Huntley*, 620 NW2d 599, 604 (S.D. 2000)(citation omitted). Where, as here, any "doubt exists as to certainty of damages, those doubts should be resolved *against* the wrongdoer." *Tri-State Refining*, 452 NW2d at 110 (emphasis added). Because there is a factual and legal basis for the award of lost profits, the trial court erred in precluding Stern Oil from presenting

its damages evidence to the jury.

CONCLUSION

Brown contracted to purchase all his fuel from Stern Oil for ten years. He breached. Stern's direct damages come from three different sources, which were proved with reasonable certainty. That is all the law requires. The court improperly denied Stern Oil the ability to present those damages scenarios to the jury. The court further erred by failing to recognize the difference between direct and consequential lost profits and by instructing the jury under this mistaken understanding. Finally, the court wrongly concluded that Stern Oil was not the prevailing party, ignoring the long-standing holdings of this Court.

Dated this 23rd day of June, 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 9,833 words, exclusive of the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel.

/s/ Michael D. Bornitz
Michael D. Bornitz

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of June, 2017, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

Shirley Jameson-Fergel
Clerk of the Supreme Court
South Dakota Supreme Court
500 East Capitol Avenue
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and via email attachment to the following address: scclerkbriefs@ujs.state.sd.us.

I also hereby certify that on this 23rd day of June, 2017, I sent an electronic copy of Appellant's Brief via email to counsel for Appellee as follows:

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INDEX TO APPELLANT'S APPENDIX

APPENDIX TAB 1

STATE OF SOUTH DAKOTA)   IN CIRCUIT COURT
: SS
COUNTY OF MINNEHAHA)   SECOND JUDICIAL CIRCUIT

* *

STERN OIL COMPANY, INC., Plaintiff,	*	CIV 07-2391
vs.	*	MOTIONS & PRETRIAL HEARING
JAMES R. BROWN d/b/a EXXON GOODE-TO-GO and FREEWAY MOBIL, Defendant.	*	

* *

BEFORE: The Hon. Lawrence E. Long, Circuit Court Judge in and for the Second Judicial Circuit, Sioux Falls, South Dakota.

APPEARANCES: Mr. Michael D. Bornitz
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Attorney for the Defendant.

PROCEEDINGS: The above-entitled matter commenced at 10:00 a.m. on the 21st day of January, 2016 in the Minnehaha County Courthouse, Sioux Falls, South Dakota.

effectively without ever mentioning or hinting at this guy's net worth, okay? You don't have to ask him how many cattle he has got, okay? You don't have to ask him how many acres of real estate he owns, okay? None of that is relevant. And the only reason you would ask it is to show the jury that this guy is well-off, which the jury is precluded from knowing, okay? You can make your point.

Now, I'm going to let you beat him up about the gas station that he already owned. That is really fair game, okay? But his real estate holdings are not relevant. The other contracts that he signed, particularly with that provision in them, I think are fair game. You get to ask a lot. I mean, you can ask him those questions until the jury is sick of it. I don't care, okay? All right?

Now, let's get back to what is left, which I think is the motion which addresses the editing of the deposition.

I have read through everybody's stuff. I'm inclined to rule in favor of the defendant. I think the maximum measure of damages for breach of this contract is the seventy-five percent of the historic purchases as Mr. McMahon has argued it in his brief, and so I'm going to attempt to finish editing the deposition consistent with that. So, that is my ruling on that one.

MR. BORNITZ: Judge, just for the record, I mean, I

think that is going to be reversible error.
THE COURT: Well, I hope not.
MR. BORNITZ: Okay.
THE COURT: And I understand that there are five judges who will grade my opinion.
MR. BORNITZ: In terms of making an offer of proof --
THE COURT: Yeah, you can make whatever kind of record that you want to make.
MR. BORNITZ: Here's my suggestion: That -- maybe we can just deal with this now, Jim, if it's okay with you. We went through this at the first trial.

Can we use the transcript of that first trial as our offer of proof of what Scott's testimony was on the issue?
MR. McMAHON: Well, I don't have any objection to that. If they want to use that as their offer of proof, fine.
MR. BORNITZ: I mean, I don't want to have to put him on the stand --
MR. McMAHON: No. That's --
MR. BORNITZ: -- out of the presence of the jury for an hour to go through this.
MR. McMAHON: I have no objection to that procedure.
THE COURT: All right. That's fine.

I will take -- you wanted me to take judicial notice

of Zell's findings?
MR. McMAHON: No.
THE COURT: Or Scott's testimony? Or --
MR. McMAHON: Just Scott's testimony, is all he's talking about.
THE COURT: At the previous trial?
MR. BORNITZ: Correct. And that should be in the record already.
THE COURt: And the exhibits that support that I assume are basically the same as they are now?
MR. BORNITZ: Well, the numbers are different because we actually have the fuel sales that -- the cost, but I just want to make sure that I don't have to do anything else because I think that the transcript and those trial exhibits should already be in the record.
THE COURT: All right. Understood.
MR. BORNITZ: And just incorporate my brief.
THE COURT: Your offer is received procedurally, but it's denied substantively.
MR. BORNITZ: I think I understand. And I assume that our motion for the ruling is in the record and that I'm just going to incorporate the argument that we made there by reference here. I know you have already indicated that -- you know, I don't think you care to hear argument on the issue.

THE COURT: No. I mean, you guys have both briefed it well. And as I say, Mr. Bornitz, you know, I may be wrong, but I don't think I am. So, I'm not --

MR. BORNITZ: Do you have anything in terms of, you know, a basis for that, that we can put on the record now, Judge? I don't want to put you on the spot here, but maybe that would be a good idea.

Maybe you just relied on Mr. McMahon's brief, but I don't know.

THE COURT: Well, essentially, yeah. Essentially, my view is that the contract requires -- and I'm assuming that Dr. Brown's calculations are correct -- but the contract requires Mr. Brown to purchase a minimum amount of fuel. And if the contract is breached, I don't think the plaintiff is entitled to recover anything more than the minimum that -- the minimum performance that was required by the defendant. And there isn't any question he didn't perform. He breached the contract. That's not at issue. And it's also apparently not at issue, as I read Dr. Brown's deposition, he was able to calculate that.

I'm going to -- and that ruling is only with reference to the maximum amount of motor fuels. Well, I should say, that reference and that ruling is to the minimum amount required under the contract for Mr.

McMahon's client to purchase.

Now, I'm going to let your client argue about whatever he lost on freight -- or claims he lost on freight for hauling it. Mr. McMahon has got an alternate argument for that. I'm going to let you -- you know, you and Mr. McMahon can fight that out. Then I'm also going to let your client talk about the suit in -- or one-and-a-half or one-and-a-quarter-percent discount that he gets from Exxon, but I don't think -- I'm not going to allow testimony which suggests that he is entitled to compensation for breach of contract in excess of the minimum required fuel purchases under the two contracts at issue.

Does that help?

MR. BORNITZ: It helps. I mean, I still disagree with it for reasons in our brief.

THE COURT: You can still disagree with me, but that's my ruling. That's my view.

MR. McMAHON: Judge, there is -- I'm sorry -- are you done with that one?

THE COURT: Yes.

MR. McMAHON: Okay. There is one other -- plaintiffs had a motion in limine that we haven't done.

THE COURT: Okay. And now did I --

MR. McMAHON: I was just reminded of it because I think

you touched on it in a comment you made there, but --

THE COURT: All right.

Then, Mr. McMahon, I'll let you address plaintiff's motions.

MR. McMAHON: Do you want to make --

MR. BORNITZ: Well, it's not really very artfully crafted, but the point is this, Judge: You know, in some of the post-remand pleadings and in some of the -- well, Dr. Brown's deposition, there are questions that have been asked. Well, it's not in the contract in terms of the one-point-five-cent-per-gallon markup. The freight rate is not in the contract. The one-point-two-five-percent rebate that Stern Oil got from Exxon Mobile, it's not in the contract.

I understand what the point is there, but the case law I think in South Dakota is very clear that the point of breach of contract is to place the injured party in the position they would have been in had the contract been performed. And the Supreme Court has never said in this state, or anywhere else that I've seen, that the selling party has to enumerate in its contract where its profit centers are. There is nothing like that. And so the point is, the Defense should not be able to argue that because these contracts don't disclose the profit margin on freight, because they don't disclose what Stern Oil was

APPENDIX TAB 2

STATE OF SOUTH DAKOTA

COUNTY OF MINNEHAHA

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

STERN OIL COMPANY, INC., Plaintiff, v. JAMES R. BROWN d/b/a EXXON GOODE TO GO and FREEWAY MOBIL, Defendant.	CIV. 07-2391 **ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER**

This matter came before the Court pursuant to Plaintiff's motion to reconsider the limitation on Plaintiff's damages evidence. Plaintiff's motion for reconsideration is Denied.

Dated this 3rd day of Feb., 2016.

BY THE COURT:

The Honorable Lawrence E. Long
Circuit Court Judge

ATTEST:
Angelia M. Gries
CLERK OF COURTS

BY: _____, Deputy

FILED
FEB 03 2016
Minnehaha County, S.D.
Clerk Circuit Court

APPENDIX TAB 3

CIRCUIT COURT OF SOUTH DAKOTA
SECOND JUDICIAL CIRCUIT
LINCOLN & MINNEHAHA COUNTIES
425 North Dakota Avenue
Sioux Falls, SD 57104-2471

CIRCUIT JUDGES
Lawrence E. Long, Presiding Judge
Joseph Neiles
Bradley G. Zell
Patricia C. Riepel
Douglas E. Hoffman
Robin J. Houwman
Mark E. Salter
Susan M. Sabers
Joni M. Cutler
John R. Pekas
Jon C. Sogn

COURT ADMINISTRATOR
Karl E. Thoennes III

STAFF ATTORNEY
Jill Moraine

Telephone: 605-367-5920
Fax: 605-367-5979

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June 8, 2016

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RE: Stern Oil Company Inc. v. James R. Brown, CIV 07-2391
Defendant's Request for Judicial Rescission
Plaintiff's Motion for Attorneys' Fees
Plaintiff's Motion for Pre-judgment Interest

Dear Counsel,

This matter was before the Court at 2:30 p.m. on June 3, 2016. Defendant, James R. Brown d/b/a Exxon Goode-to-Go and Freeway Mobil ("Brown") requests the Court provide the relief of rescission. Plaintiff, Stern Oil Company Inc. ("Stern Oil") resists the application for rescission and also asks the Court to award attorney's fees and pre-judgment interest. At the hearing, Jim McMahon of Redstone Law was present on behalf of Brown and Michael Bornitz of Cutler Law was present on behalf of Stern Oil.

The Court has reviewed the numerous briefs, exhibits, and affidavits. The Court oversaw the jury trial and has heard the oral argument of counsel. Upon due consideration, the Court issues this written decision.

FACTS & PROCEDURE

The Court and the parties are very familiar with the facts of this matter and they will not be rehashed here. The Court will note that a jury trial was held from January 26, 2016 to February 1, 2016. The jury returned a verdict that indicated the relief to be granted. The verdict read:

Motor Fuel:	$176,152.00
Diesel Fuel:	$0.00
Freight:	$61,653.00
Stern Oil Discount:	$0.00
BIP Contract Damages:	$22,659.00
Total Award[1]:	**$260,464.00**

Stern Oil has motioned this Court for an award of pre-judgment interest. In addition to seeking pre-judgment interest, Stern Oil is seeking attorneys' fees totaling roughly $512,623.46.

The request for attorney's fees is based on a provision in the contract between the parties. The provision reads as follows:

> In any litigation between the parties to enforce any provision or right under this Agreement, the non-prevailing party covenants and agrees to pay the prevailing party all costs and expenses incurred by the prevailing party in connection with litigation, including but not limited to reasonable attorney's fees.

Meanwhile, Brown has requested that the Court grant him the relief of rescission based on the fraud claims he asserted in his counterclaim. The parties stipulated at the time of trial that the Court would serve as fact-finder with regard to Brown's counterclaim for rescission.

Additional facts will be provided as needed.

---

[1] The grand total was not an actual part of the verdict form but is included here to aid the Court's analysis.

LAW & ANALYSIS

Judicial Relief of Rescission

Rescission can be brought as a legal action, pursuant to SDCL chapter 53-11 or as an equitable one under SDCL chapter 21-12. Rescission is not granted lightly. "The equitable relief of rescission, being extraordinary, should never be granted, except where the evidence is clear and convincing." *Knudsen v. Jensen*, 521 N.W.2d 415, 418 (S.D. 1994).

While the Court serves as finder of fact as to the rescission claim, it will keep in mind the verdict issued by the jury.

> It is the province of the jury to weigh and pass upon the evidence; to reconcile conflicting testimony; to determine the truth or value of evidence; to ascertain and declare, from all the evidence and testimony, the facts of the case; and from the facts, when ascertained by them, and the law as given to them by the court, to arrive at and announce their decision, which is their verdict.

Bakker v. Irvine, 519 N.W.2d 41, 49 (S.D. 1994) (quoting *Drew v. Lawrence*, 159 N.W.2d 274, 275 (S.D. 1916) (citations omitted)). While the jury's verdict is not binding on the Court, it provides guidance on the rescission claim.

Under SDCL § 53-11-2 (cases where rescission is available), the party seeking rescission has to show:

> [C]onsent of the party rescinding or of any party jointly contracting with him was given by mistake or obtained through duress, fraud, or undue influence exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party.

S.D. Codified Laws § 53-11-2(1). Under this statute, Brown would need to successfully prove mistake, duress, fraud, or undue influence. Brown argues that he is entitled to the equitable relief of rescission because it is consistent with the jury's verdict. The Court does not agree.

The jury in this case was instructed as to Brown's affirmative defenses of fraud, mistake, and negligent misrepresentation. *See* Final Jury Instructions Nos. 22,

23, and 26, respectively. Additionally, the jury was instructed that damages must have been foreseeable. *See* Final Jury Instruction No. 30. It is undisputed that Brown was not aware of the 1.25% discount that Stern Oil received, this was the basis for Brown's fraud claim.

Brown insists that the threshold question is how the jury viewed the 1.25% discount received by Stern Oil and the effect of that discount on whether the price was set in good faith. The question of good faith is a fact question for the jury. Final Jury Instruction No. 33 specifically states, "In order to recover from defendant, plaintiff has the burden of showing it set the price of fuel in good faith." By virtue of awarding any damages under the contract, the jury determined that Stern Oil set the price in good faith. The Supreme Court ruling on the appeal addressed the issue of good faith relative to Stern Oil's breach of contract claim. *See Stern Oil Co. Inc. v. Brown*, 2012 S.D. 56, 817 N.W.2d 395. The Supreme Court reversed the trial court's Partial Summary Judgment on Liability and remanded the matter for a new trial. The Supreme Court stated that under the open price term contract, argued by Stern Oil, the contract would need to comply with SDCL § 57A-2-305(2), which requires the seller to fix the price in good faith. The Supreme Court left this question to the jury on remand, "a fact finder must then determine whether Stern Oil actually set the prices in good faith by examining the factual evidence presented by the parties." *Id.* at ¶ 20, 403.

The Court will not invade the purview of the jury and determine the issue of good faith. With respect to the request for rescission, the Court can only determine whether the alleged lack of good faith rises to the level of fraud, or one of the other grounds for rescission. The Court does not find that there was clear and convincing evidence that the price was fraudulently set.

It is not the practice of this Court to dissect the jury's verdict. However, there are at least three plausible explanations for the jury verdict; (1) The jury believed Stern Oil; however, it could not award damages on the 1.25% discount due to lack of foreseeability, (2) The jury believed Brown and found that the 1.25% constituted fraud and thus did not award damages for that claim, or (3) The jury split the difference. The Court will respect the verdict of the jury by denying Brown's request for judicial rescission and allow Stern Oil to recover under contract.

Attorneys' Fees

Although South Dakota follows the American rule in that each party bears the burden of their own attorneys' fees, there is an exception to this rule when a contractual agreement between the parties entitles the prevailing party to attorneys' fees. *Eagle Ridge Estates Homeowners Ass'n, Inc. v. Anderson*, 2013 S.D. 21, ¶ 28, 827 N.W.2d 859, 867 (citations omitted). Here, the BIPs do not contain an attorney fee provision and Stern Oil is not entitled to recover any attorneys' fees that were incurred with respect to the BIPs. However, the MFSAs do allow for the recovery of attorneys' fees only by the prevailing party:

> In any litigation between the parties to enforce any provision or right under this Agreement, the non-prevailing party covenants and agrees to pay the prevailing party all costs and expenses incurred by the prevailing party in connection with the litigation, including but not limited to reasonable attorney's fees.

The question before this Court then centers on whether Stern Oil is the prevailing party in this litigation. The Supreme Court of South Dakota has held "[t]he prevailing party is the party in whose favor the decision or verdict is or should be rendered and judgment entered." *Crisman v. Determan Chiropractic*, Inc., 2004 S.D. 103, ¶ 23, 687 N.W.2d 507, 513 (quoting *City of Aberdeen v. Lutgen*, 273 N.W.2d 183, 185 (S.D. 1979)). In *Crisman*, the trial court awarded the plaintiff an amount significantly less than what the plaintiff had demanded in their complaint. The court held that:

> While Dr. Determan did succeed in cutting his losses, Dr. Determan still did not prevail. Dr. Crisman not only obtained a money judgment, which was the essence of his lawsuit, but also he prevailed on the noncompetition clause and vacation pay. Dr. Crisman prevailed. Dr. Crisman was not required to prevail on every issue to be the prevailing party.

Id. (citing *Alvine v. Mercedes-Benz of North America*, 2001 SD 3, ¶ 25, 620 N.W.2d 608, 613).

The Supreme Court of South Dakota ultimately found that the trial court had not abused its discretion in determining that plaintiff was the prevailing party. *Id.* Other than *Crisman*, South Dakota case law regarding prevailing parties is sparse. In *Alvine*, cited above, the South Dakota Supreme Court stated "even

though the jury did not adopt every theory advanced, and plaintiff did not prevail on every motion, he would still be entitled to recover his full attorney fees." *Alvine*, 2001 SD 3, at ¶ 25 (citing *Hensley v. Eckerhart*, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). Quoting *Hensley*, the court went on to state that [w]here a defendant has obtained excellent results, his attorney should recover a fully compensatory fee." *Id.* However, *Alvine* dealt with a complaint that alleged a violation of the Magnuson-Moss Warranty Act, which entitled the plaintiff to recover attorney fees "[i]f a consumer finally prevails in *any action* brought under paragraph (1) of this subsection." *Id.* at ¶ 24 (emphasis added). Thus, the court in *Alvine* was not necessarily determining who the prevailing party was, but whether or not a party prevailed on specific action. *Alvine* is not particularly insightful to the case at hand where the question revolves around determining who the prevailing party is where there are multiple significant issues and the jury has found in favor of both Stern Oil and Brown in regards to those issues.

Other jurisdictions have informed the issue of prevailing party. In a Montana case, the court held that "there is no prevailing party where both parties gain a victory but also suffer a loss." *Parcel v. Myers*, 214 Mont. 220, 224, 697 P.2d 89, 91 (1984), decision supplemented, 214 Mont. 225, 697 P.2d 92 (1985)(citing *Knudsen v. Taylor* (1984), 685 P.2d 354, 357, 41 St.Rep. 1490, 1493). In *Parcel*, the plaintiff sought reformation of a contract and also asserted claims of fraud and negligent misrepresentation. The plaintiff succeeded on his reformation claim, but lost on his fraud and misrepresentation claims. The court found that since both parties won and lost, that the "trial court's order that each party bear his own costs and attorney's fees was proper" as there was no prevailing party. *Id.* "No one factor should be considered in determining the prevailing party for the purpose of attorney fees. The party that is awarded a money judgment in a lawsuit is not necessarily the successful or prevailing party." *In re Marriage of Hebert*, 255 Mont. 69, 72, 840 P.2d 584, 586 (1992).

Moreover, in a North Dakota case where one party prevailed on a claim for fraud and the other party prevailed on a breach of contract counterclaim, the Supreme Court of North Dakota held that "[b]ecause both parties prevailed on their respective claims, we conclude there is no prevailing party." *WFND, LLC v. Fargo Marc, LLC*, 2007 ND 67, ¶ 50, 730 N.W.2d 841, 858. The Supreme Court of North Dakota has held, in a separate case, that "[i]f opposing litigants each prevail on some issues, there may not be a single prevailing party..." *Carpenter v. Rohrer*, 2006 ND 111, ¶ 34, 714 N.W.2d 804, 814 (determining who the prevailing

party is for an award of disbursements under N.D.C.C. § 28-26-06).

In an unpublished opinion by the Court of Appeals of Minnesota, the court held that "the prevailing party in any action is one in whose favor the decision or verdict is rendered and judgment entered." *Minch v. Buffalo-Red River Watershed Dist.*, No. A07-1969, 2008 WL 4705917, at *1 (Minn. Ct. App. Oct. 28, 2008)(citing *Borchert v. Maloney*, 581 N.W.2d 838, 840 (Minn.1998))(substantially similar language to South Dakota case law). "[W]hen determining which party, if any, is prevailing, a district court should consider "the general result" and make an "inquiry as to who has, in the view of the law, succeeded in the action." *Id.* "When both parties prevail on certain issues, the district court has discretion to conclude that neither party is a prevailing party." *Id.* In *Minch*, the court ultimately denied an appellant's motion for attorney fees and costs as that court found that there was no prevailing party.

Lastly, the United States Supreme Court has briefly addressed the issue of who a prevailing party is where a plaintiff is attempting to recover an attorneys' fee under § 1988. The U.S. Supreme Court held that a party is to be considered a prevailing party for attorney's fees purposes "if they succeed on any significant issue in litigation which achieves some of the benefit the parties sought in bringing suit." *Hensley v. Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939, 76 L. Ed. 2d 40 (1983). However, it is important to note that 42 U.S.C. § 1988 authorized the *Hensley* court to award a reasonable attorney's fee to prevailing parties in civil rights litigation. *Id.* at 429. "The purpose of § 1988 is to ensure effective access to the judicial process for persons with civil rights grievances...[a]ccordingly, a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* Moreover, under § 1988, a prevailing defendant may be awarded attorney fees only if the district court finds that the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Christiansburg Garment Co. v. Equal Employment Opportunity Comm'n*, 434 U.S. 412, 421, 98 S. Ct. 694, 700, 54 L. Ed. 2d 648 (1978).

Thus, the holding in *Hensley* that a plaintiff can be a prevailing party even though "they had not succeeded on every claim" is not entirely applicable to the case at hand given the different standards in analyzing who the prevailing party is. In a civil rights action, the U.S. Supreme Court has given different standards that have to be met in order to find a prevailing plaintiff or a prevailing defendant. Here, we have a contractual

agreement whereby the non-prevailing party is responsible for the attorney's fees of the prevailing party. The contract allows for a prevailing defendant even if the court could not find that the plaintiff's actions were "frivolous, unreasonable, or without foundation." The standards used to find a prevailing party under a contractual agreement are not the same as those used by the *Henlsey* court in finding a prevailing party under § 1988. Thus, the standard in analyzing who is a prevailing party under *Hensley* is not determinative given that the term "prevailing party" entails different meanings and burdens under §1988 than it does in a contractual agreement.

In analyzing the facts of this case, this Court concludes that there is no prevailing party. The first fact that this Court looks to in issuing this decision is the discrepancy between amount of the award in the first trial court and the amount of the award in the jury trial. Prior to the October 26-27, 2009 court trial, Stern Oil had moved for partial summary judgment on its breach of contract claim and Brown's fraudulent inducement counterclaim. Judge Caldwell issued a memorandum decision granting Stern Oil's motion for summary judgment in regards to both claims on February 20, 2008. However, the issue of damages was left to the court trial, which ultimately resulted in a judgment of $925,317. On October 12, 2010, Brown appealed the trial court's order granting Stern Oil's motion for partial summary judgment. The South Dakota Supreme Court held that there were indeed questions of disputed material fact and, therefore, reversed the trial court's entry of summary judgment and remanded the case for further proceedings. A jury trial then took place on January 26, 2016. At trial, Stern Oil requested $731,445 in damages with respect to the MFSAs and $22,659 with respect to the BIPs. However, prior to trial, Stern Oil relied upon a table constructed by its expert witness in calculating damages, the highest of which calculated Stern Oil's damages at $1,514,735. This expert's testimony was ultimately limited by this Court as being inconsistent with the terms of the MFSAs. Ultimately, the trial ensued and the jury came back with an award for Stern Oil in the amount of $260,464, a fraction of what Stern Oil had initially sought.

While the fact that Stern Oil was awarded a significantly lower amount of money than what he was seeking cannot be the determinative factor in analyzing who the prevailing party is, it is one factor that this Court can look to. It is especially relevant here given that Stern Oil had initially been awarded $925,317 at the first court trial, but only $260,464 at the subsequent jury trial. This Court finds that the significant reduction in the jury award from what was initially awarded in

the court trial weighs heavily against finding that Stern Oil was the prevailing party.

Secondly, Stern Oil lost on two significant issues at trial that preclude this Court from holding that Stern Oil was the prevailing party. The first significant issue was whether Stern Oil was entitled to damages for lost profits attributable to a 1.25 percent discount to be received from Exxon Mobil. Brown argued that Stern Oil had concealed the 1.25 percent discount and also failed to incorporate it into Stern Oil's calculation of the price of fuel it sold to Brown and, therefore, Stern Oil failed to set the price of its fuel in good faith. The jury awarded Stern Oil no damages with respect to the 1.25 percent discount. No matter how the jury verdict is viewed, Stern Oil lost on this significant issue and, accordingly, their damages were significantly reduced. The second issue that Stern Oil lost at trial was whether Stern Oil was entitled to damages with respect to diesel fuel. Brown argued that Stern Oil had released Brown from any obligation to purchase diesel under the MFSAs. The jury agreed and awarded no damages with respect to diesel fuel.

While the jury did award Stern Oil $176,152 in damages for motor fuel and $61,653 for freight under the MFSAs, that amount only accounts for a fraction of what Stern Oil was initially seeking. More importantly, the reduction of the award by the jury was due in part because Brown prevailed on two major issues at trial that significantly limited the damages the jury eventually awarded. Although Stern Oil is "not required to prevail on every issue to be the prevailing party," this Court finds that the issues Stern Oil lost on are so significant that it cannot in good faith find Stern Oil to be the prevailing party. *Crisman v. Determan Chiropractic, Inc.*, 2004 S.D. 103, ¶ 23, 687 N.W.2d 507, 513. As held by the Supreme Court of Montana, there is no prevailing party here as both parties gained victories and suffered losses. *See Parcel v. Myers*, 214 Mont. 220. The mere fact that Stern Oil was awarded a monetary judgment does not necessarily make them the successful or prevailing party as no one factor determines who the prevailing party is. *In re Marriage of Hebert*, 255 Mont. 69, 72, 840 P.2d 584, 586 (1992). As both Stern Oil and Brown prevailed on significant issues, this Court finds that there is no prevailing party. As such, Stern Oil is not entitled to attorneys' fees under the MFSA.

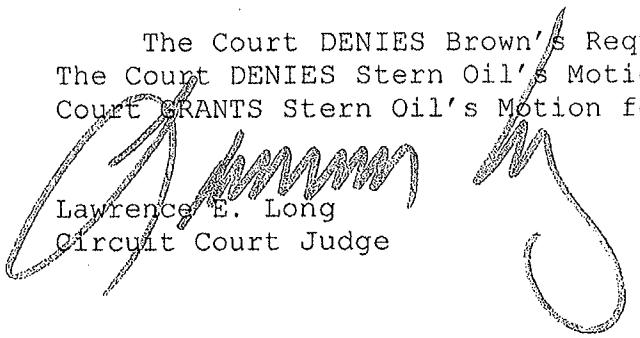
Pre-judgment Interest

Brown argues that pre-judgment interest is not appropriated for the period of time spent on appeal and remand proceedings. "Any person who is entitled to recover damages...is entitled to

recover interest thereon from the day that loss or damage occurred, except during such time as the debtor is prevented by law, or by act of the creditor, from paying the debt." *Reuben C. Setliff, III, M.D., P.C. v. Stewart*, 2005 S.D. 40, ¶ 46, 694 N.W.2d 859, 871. Brown's appeal of Judge Caldwell's grant of summary judgment was not contemplated as an event that would toll pre-judgment interest. Stern Oil is entitled to pre-judgment interest from the date of loss, May 8, 2007, which is the day Brown abandoned the contract and unilaterally stopped paying Stern Oil for fuel.

CONCLUSION

The Court DENIES Brown's Request for Judicial Rescission. The Court DENIES Stern Oil's Motion for Attorneys' Fees. The Court GRANTS Stern Oil's Motion for Pre-Judgment Interest.



Lawrence E. Long
Circuit Court Judge

APPENDIX TAB 4

Instruction No. 30

The measure of damages for a breach of contract is the amount which will compensate the aggrieved party for all detriment legally caused by the breach, or which, in the ordinary course of things, would be likely to result from the breach.

Damages for a breach of contract which are not clearly ascertainable in both their nature and origin are unrecoverable. Consequential damages must be reasonably foreseeable by the breaching party at the time of contracting. If consequential damages were not reasonably foreseeable, then they are not recoverable.

Instruction No. 30A

Consequential damages are damages that do not arise within the scope of the buyer-seller transaction, but rather stem from losses incurred by the non-breaching party in its dealings, often with third parties, which were a proximate result of the breach, and which were reasonably foreseeable by the breaching party at the time of contracting.

APPENDIX TAB 5

TABLE 4: MAXIMUM ANNUAL VOLUME FOR FREEWAY MOBIL AND GOODE TO GO

A: SUMMARY OF LOSSES BASED ON 100% OF MAXIMUM ANNUAL VOLUME FOR FREEWAY MOBIL AND GOODE TO GO 3.6 mil/gal/year RJB					
Year	Risk Factor	Total Loss	Variable Expenses*	Net Loss	Adj Loss
2007	0.99	$141,880	$656	$141,223	$139,289
2008	0.98	$187,268	$1,125	$186,143	$181,806
2009	0.97	$155,152	$1,159	$153,993	$149,774
2010	0.97	$171,459	$1,194	$170,265	$165,515
2011	0.97	$210,417	$1,230	$209,188	$202,473
2012	0.96	$205,018	$1,266	$203,752	$195,194
2013	0.96	$205,116	$1,304	$203,812	$196,372
2014	0.97	$200,416	$1,344	$199,072	$192,184
2015	0.96	$96,820	$923	$95,897	$92,129
Total		$1,573,547	$10,201	$1,563,345	$1,514,735

*Based on postage, telephone calls, trips, and giveaways.

30.2 mil/gal — remainder of contract

RJB

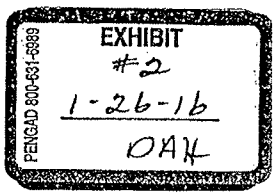


TABLE 5: 75% OF 1ST YEAR CONTRACT MAXIMUM ANNUAL VOLUME

B: 75% OF THE MAXIMUM ANNUAL VOLUME FREEWAY MOBIL AND GOODE TO GO 2.7 mil/gal/year PTB					
Year	Risk Factor	Total Loss	Variable Expenses*	Net Loss	Adj Loss
2007	0.99	$106,410	$656	$105,753	$104,305
2008	0.98	$140,451	$1,125	$139,326	$136,080
2009	0.97	$116,364	$1,159	$115,205	$112,049
2010	0.97	$128,594	$1,194	$127,400	$123,846
2011	0.97	$157,813	$1,230	$156,584	$151,557
2012	0.96	$153,764	$1,266	$152,497	$146,092
2013	0.96	$153,837	$1,304	$152,533	$146,965
2014	0.97	$150,312	$1,344	$148,968	$143,814
2015	0.96	$72,615	$923	$71,692	$68,875
Total		$1,180,160	$10,201	$1,169,959	$1,133,582

*Based on postage, telephone calls, trips, and giveaways.

22.7 mil/gal remainder of contract
RTD

EXHIBIT
#3
1-26-16
OAH
PENGAD 800-631-6989

TABLE 6: 11/05 THROUGH 10/06 PURCHASES

C: SUMMARY OF LOSSES BASED ON 11/05 THROUGH 10/06 PURCHASES
FREEWAY MOBIL AND GOODE TO GO 2.4 mil/gal/year RJB

Year	Risk Factor	Total Loss	Variable Expenses*	Net Loss	Adj Loss
2007	0.99	$82,465	$656	$81,809	$80,688
2008	0.98	$122,623	$1,125	$121,498	$118,6677
2009	0.97	$101,498	$1,159	$100,259	$97,512
2010	0.97	$112,110	$1,194	$110,916	$107,821
2011	0.97	$137,633	$1,230	$136,404	$132,025
2012	0.96	$134,115	$1,266	$132,848	$127,268
2013	0.96	$134,171	$1,304	$132,866	$128,017
2014	0.97	$131,045	$1,344	$129,702	$125,214
2015	0.96	$64,702	$923	$63,770	$61,263
Total		$1,020,283	$10,201	$1,010,081	$978,486

*Based on postage, telephone calls, trips, and giveaways.

19.6 mil/gal remainder of contract
RJB

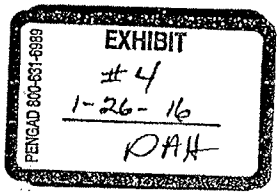


TABLE 7: 75% 11/05 THROUGH 10/06 PURCHASES

D: SUMMARY OF LOSSES BASED ON 11/05 THROUGH 10/06 PURCHASES
FREEWAY MOBIL AND GOODE TO GO 1.8 mil/gal 75% year RTB

Year	Risk Factor	Total Loss	Variable Expenses*	Net Loss	Adj Loss
2007	0.99	$61,849	$656	$61,193	$60,354
2008	0.98	$91,967	$1,125	$90,842	$88,726
2009	0.97	$76,063	$1,159	$74,904	$72,852
2010	0.97	$84,082	$1,194	$82,889	$80,576
2011	0.97	$103,225	$1,230	$101,995	$98,721
2012	0.96	$100,586	$1,266	$99,319	$95,148
2013	0.96	$100,628	$1,304	$99,324	$95,698
2014	0.97	$98,343	$1,344	$97,000	$93,644
2015	0.96	$48,519	$923	$47,596	$45,726
Total		$765,264	$10,201	$755,062	$731,445

*Based on postage, telephone calls, trips, and giveaways.

14.7 mil/gal remainder of contract
RTB

APPENDIX TAB 6

STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
STERN OIL COMPANY, INC., Plaintiff, vs. **JAMES R. BROWN, d/b/a EXXON GOODE TO GO and FREEWAY MOBIL,** Defendant.	CIV. 07-2391 **VERDICT FOR PLAINTIFF**

We, the jury, duly impaneled in the above-entitled action and sworn to try the issues therein, find for the plaintiff and assess plaintiff's damages as follows:

- Motor Fuel: $ 176152.00
- Diesel Fuel: $ $0
- Freight: $ 61,653
- Stern Oil Discount of 1.25% $ 0
- BIP Contract Damages: $ 22.659

Dated this 1 day of February, 2016.

Foreperson

FILED
FEB 02 2016
Minnehaha County, S.D.
Clerk Circuit Court

APPENDIX TAB 7

STATE OF SOUTH DAKOTA

COUNTY OF MINNEHAHA

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

STERN OIL COMPANY, INC., Plaintiff, v. JAMES R. BROWN d/b/a EXXON GOODE TO GO and FREEWAY MOBIL, Defendant.	CIV. 07-2391 **JUDGMENT**

The above-captioned action having been tried to a jury on January 26 through February 1, 2016, the Honorable Lawrence E. Long, presiding, and the jury having entered a verdict for the Plaintiff herein,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Plaintiff have and recover from the Defendant the sum of $260,464.00; prejudgment interest in the amount of $143,708.77; no costs or disbursements; and post-judgment interest at the statutory rate each day from and after the date of this Judgment.

Dated this 16 day of June, 2016.

BY THE COURT:

Honorable Lawrence E. Long
Circuit Court Judge

ATTEST: Angela M. Gries, Clerk

By _____
Deputy

UNIFIED JUDICIAL SYSTEM STATE OF SOUTH DAKOTA

FILED
JUN 20 2016
Minnehaha County, S.D.
Clerk Circuit Court

APPENDIX TAB 8

MOTOR FUEL SUPPLY AGREEMENT
MOBIL-BRANDED MOTOR FUELS

This Agreement is made on October 20, 2005 (the "Effective Date") between Stern Oil Company, Inc. having its principal office at Freeman, SD, hereinafter called "Distributor", and Jim Brown – Freeway Mobil having a motor fuels "Marketing Premises" located at Gettysburg, SD and North Sioux City, SD, hereinafter called "Franchise Dealer."

RECITALS

Based on its marketing strategies ExxonMobil has established the following core values ("Core Values")

ExxonMobil's tradition of excellence is aimed at building and maintaining a lasting relationship with its customers, the motoring public. In continuing this tradition, the dedication of ExxonMobil and its distributors to the customer is reflected in these commitments:

- **To deliver quality products that customers can trust.**
- **To employ friendly, helpful people.**
- **To provide speedy, reliable service.**
- **To provide clean and attractive retail facilities.**
- **To be a responsible, environmentally conscious neighbor.**

Living up to these commitments is the key to success and prosperity for ExxonMobil's brands.

1. Grant. By this Agreement, Distributor and Franchise Dealer establish a "Franchise" and "Franchise Relationship" as defined by the Petroleum Marketing Practices Act, 15 U.S.C. Sections 2801-2806 ("PMPA"). Distributor, under a Distributor PMPA Franchise Agreement with ExxonMobil Oil Corporation ("ExxonMobil") has the right to grant to Franchise Dealer the use of certain ExxonMobil owned proprietary marks. Subject to the terms and conditions of this Agreement, Distributor grants Franchise Dealer the right to use the "Mobil" mark and such other proprietary marks specified by ExxonMobil, from time to time, for use in connection with the sale of Mobil-branded motor fuels ("Proprietary Marks") at the Marketing Premises. Franchise Dealer hereby agrees to conduct its business in a manner consistent with the commitments in the Core Values and agrees to comply with ExxonMobil business standards and policies, including, without limitation ExxonMobil's National Standards Handbook as amended and updated (including Minimum Acceptable Ratings, if any) and training requirements, as communicated by Distributor from time to time. FRANCHISE DEALER ACKNOWLEDGES THAT ITS FRANCHISE RELATIONSHIP IS EXCLUSIVELY WITH DISTRIBUTOR. NOTHING IN THIS AGREEMENT MAY BE CONTRUED AS CREATING A FRANCHISE RELATIONSHIP BETWEEN FRANCHISE DEALER AND EXXONMOBIL.

2. Related Businesses. Distributor acknowledges that Franchise Dealer may wish to operate, during the term of this Agreement, additional businesses ("Related Businesses") at the Marketing Premises using either the Proprietary Marks specified by ExxonMobil from time to time in connection with any such Related Businesses, Distributor's trademarks, Franchise Dealer's own trademarks or third party trademarks. Franchise Dealer acknowledges that the operation of the Related Businesses, whether branded with Proprietary Marks or other trademarks, impacts the customers' perception and acceptance of the Mobil-branded motor fuels and Proprietary Marks. Accordingly, Franchise Dealer may operate a Related Business at the Marketing Premises only in compliance with this Agreement and any and all requirements for that Related Business communicated by Distributor to Franchise Dealer or required by ExxonMobil from time to time. If Franchise Dealer fails to comply with this Agreement or any such requirements, and without limiting Distributor's other rights or remedies under applicable laws or under this Agreement or any related or supplemental agreement, including termination or non-renewal of this Agreement, Distributor may require Franchise Dealer to stop operating the Related Business and for Related Businesses bearing Proprietary Marks, or the Distributor's trademarks, may also withdraw its approval for the use of any such Proprietary Marks or trademarks. From the Effective Date, Franchise Dealer shall not operate any Related

Businesses or other businesses or activities, or change, delete or add any Related Businesses or other businesses or activities at the Marketing Premises unless agreed in writing by the parties hereto. However, the campground and bar/restaurant business which will be operated adjacent to the Marketing Premises are not included in the definition of Related Businesses.

3. Term. The term of this Agreement is for a fixed period of ten (10) years, beginning on June 1st, 2005 and ending on June 1st 2015, unless terminated earlier in accordance with either this Agreement or the PMPA.

4. Products; Quantities.

a. Distributor shall sell and Franchise Dealer shall purchase, and use good faith and best efforts to maximize the sale at the Marketing Premises, of the types and amounts of Mobil-branded motor fuels listed below, such quantities being subject always to any changes prescribed by government rules, regulations or orders or resulting from any plan of allocation by ExxonMobil. The motor fuels purchased by Franchise Dealer from Distributor under this Agreement shall be for resale at the Marketing Premises only. Franchise Dealer agrees to purchase, receive and pay for the same on the terms and conditions herein stated. The quantity for each of the motor fuels listed below, or such other prescribed or allocated quantity, is the maximum volume Distributor is obligated to sell during any contract year ("contract year" meaning the twelve (12) months beginning on the Effective Date and each subsequent twelve (12) month period). The maximum volume of each type of Mobil-branded motor fuel that Distributor is obligated to offer to sell to Franchise Dealer in any contract year, or in any calendar month of such year, shall be referred to as the "Maximum Annual Volume" or the "Maximum Monthly Volume," respectively. The Maximum Monthly Volumes for the first contract year are set out below.

Month	Gasoline Maximum Volume (gals)	Diesel Maximum Volume (gals)
Month 1	115,000	NA
Month 2	115,000	NA
Month 3	115,000	NA
Month 4	115,000	NA
Month 5	115,000	NA
Month 6	115,000	NA
Month 7	115,000	NA
Month 8	115,000	NA
Month 9	115,000	NA
Month 10	115,000	NA
Month 11	115,000	NA
Month 12	115,000	NA
Maximum Annual Volume	1.38 million	

b. For each month of the remaining contract years, the Maximum Monthly Volume for the current month shall be the greater of actual volume in the prior month or actual volume in the current month of the prior year purchased by Franchise Dealer from Distributor. The Maximum Annual Volume for the current contract year will be the sum of the Maximum Monthly Volumes in the current contract year.

c. In each contract year, Franchise Dealer must purchase from Distributor a minimum of seventy-five percent (75%) of the Maximum Annual Volume for Mobil-branded gasoline. Should Franchise Dealer fail, in any contract year, to purchase the aforementioned minimum volume of Mobil-branded gasoline, Distributor may terminate or non-renew this Agreement and the Franchise Relationship.

5. Price. Unless otherwise specified, all prices shall include applicable taxes, and are subject to change by Distributor at any time and without notice. All prices are payable in cash in U.S. dollars at time of delivery, or other payment terms as Distributor may specify, except to the extent credit is extended on such terms and conditions as Distributor may determine in its sole discretion. Franchise Dealer acknowledges and agrees that security may be required by Distributor or ExxonMobil, for any credit issued to or other obligations owed by Franchise Dealer, including, but not limited to, an irrevocable letter of credit. At any time on notice to Franchise Dealer, Distributor may, without cause, suspend or withdraw any credit granted to Franchise Dealer. Cash discounts, if any, are not applicable to taxes, freight, or container charges.

6. Delivery.

a. Tank Delivery. Unless otherwise agreed, delivery will be through tank truck into Franchise Dealer's storage tanks. Title and risk of loss shall pass as motor fuel is discharged from Distributor's tank truck and passes the truck flange.

b. Rack Delivery. If parties agree that any delivery will be through loading rack into Franchise Dealer's transportation equipment at supply points designated by Distributor, title and risk shall pass as motor fuel passes the loading flange of the transportation equipment. Transportation from the supply points shall be paid by Franchise Dealer. Distributor reserves the right to change any supply point upon notice to Franchise Dealer.

c. Terminal Access. If any delivery is at a storage terminal, Franchise Dealer shall comply with all operating and safety procedures of such terminal and shall execute and deliver to Distributor such agreements as may be required by Distributor or third party storage terminal owner from time to time in connection with Franchise Dealer's access to such terminal.

7. Product Control.

a. Franchise Dealer shall exercise the highest degree of care in handling, storing, selling and using the Mobil-branded motor fuel delivered to the Marketing Premises. Franchise Dealer shall not cause or allow any contamination, mixing, commingling, adulteration or otherwise change in the composition of any Mobil-branded motor fuel. Franchise Dealer shall not sell from the Marketing Premises Mobil-branded motor fuels that are contaminated or adulterated or fail to meet the fuel requirements under applicable law in effect at the time of delivery including, without limitation, requirements relating to octane, oxygen content, sulfur content, and all other regulated components or characteristics of a motor fuel or motor fuel additive, or unleaded gasoline requirements. Distributor may refuse to make deliveries into tank until in Distributor's judgment, quality problems are corrected.

b. Access to Premises. Franchise Dealer grants Distributor and ExxonMobil (including their employees, agents and contractors) the right to enter the Marketing Premises, or other properties of Franchise Dealer during normal business hours to examine the contents of Franchise Dealer's tanks, containers, drums, pumps and tanks of any delivery vehicles in which said motor fuels purchased hereunder are handled or stored. Distributor and ExxonMobil (including their employees, agents and contractors) may obtain samples from any of the aforementioned equipment or property and may otherwise review all documents and records relating either directly or indirectly to Franchise Dealer's obligations under this Agreement.

8. Contingencies. Any delays in or failure of performance by Distributor shall not constitute default hereunder or give rise to any claims for damages if and to the extent that such delay or failure is caused:

a. Because of compliance with any order, request, or control of any governmental authority; or

b. When the supply of motor fuel at any facility or the production, manufacture, storage, transportation, distribution or delivery contemplated by Distributor is interrupted, unavailable or inadequate for any reason or cause which Distributor determines is beyond its reasonable control when acting in good faith in the ordinary course of business.

arising out of this Agreement, are barred unless Franchise Dealer gives Distributor and/or ExxonMobil, as the case may be, notice within ninety (90) days after the event, act or omission to which the claim relates. Whether or not Franchise Dealer provides timely notice of a claim, any claim by Franchise Dealer is barred unless asserted by the commencement of a lawsuit naming Distributor and/or ExxonMobil as defendant in a court of competent jurisdiction within twelve (12) months after the event, act or omission to which the claim relates.

b. Franchise Dealer recognizes that, at any time during the term of this Agreement, any of the grades or brands of motor fuels sold hereunder or any of the Proprietary Marks may be changed, altered, amended or eliminated. Franchise Dealer also recognizes that, at any time during the term of this Agreement, the quality or specification of any of the motor fuels sold hereunder may be changed or altered. If any such change or alteration materially affects the performance of such motor fuels or the needs of Franchise Dealer therefor for the purposes intended by Franchise Dealer, Franchise Dealer may terminate this Agreement as to any such motor fuels so affected on thirty (30) days' prior written notice to Distributor. However, Franchise Dealer may not terminate this Agreement for any change in quality or specification of any said motor fuels resulting from compliance with federal, state, county or local laws, statutes, ordinances, codes, regulations, rules, orders, or permits. In the event that the manufacture of certain of the Mobil-branded motor fuels sold hereunder is discontinued, Distributor shall notify Franchise Dealer of such an event and this Agreement shall terminate as to such motor fuels when such notice is effective.

19. Entire Agreement; Modifications. This Agreement, any documents referred to in this Agreement and any attachments to this Agreement constitute the entire, full and complete agreement between Distributor and Franchise Dealer concerning the subject matter, and supersede all prior agreements relating to that subject matter. Except for any permitted to be made unilaterally by Distributor under this Agreement, no amendment, change or variance from this Agreement is binding on either party unless agreed in writing by Distributor's and Franchise Dealer's authorized representative.

20. Assignment; Miscellaneous. Any purported assignment of this Agreement by Franchise Dealer or delegation of its duties hereunder without Distributor's written consent shall be null and void and of no force or effect. Distributor's right to require strict performance shall not be affected by any previous waiver or course of dealing. Neither this Agreement nor any modification or waiver shall be binding on Distributor unless in writing signed by an authorized representative. Past performance shall not be deemed a waiver of this requirement. Notices shall be in writing and shall be delivered personally (to an officer or manager in the case of Distributor); sent by electronic facsimile or other electronic transmission; or, sent by certified or registered mail to the address specified above unless changed by notice. Notice by personal delivery, facsimile or other electronic transmission, or by certified or registered mail shall be deemed given when personally delivered, transmitted via facsimile or other electronic means with confirmation of completed and proper transmission, or when such notice is deposited in U. S. Mail. The date upon which the notice is deemed given hereunder shall be deemed the date of giving such notice, except of change of address, which must be received to be effective.

21. Quality Assurance. Franchise Dealer agrees to store, handle, sell and dispense motor fuels in compliance with all laws, rules, regulations and ordinances and the procedures provided by Distributor from time to time.

22. Right of Entry. In addition to any other rights of Distributor under this Agreement, Franchise Dealer hereby permits Distributor, ExxonMobil and their respective affiliates, employees, agents, vendors, contractors and representatives to enter, during normal operating hours, the Marketing Premises and other places where Franchise Dealer conducts any business covered by the terms of this Agreement, to enforce any and all rights and remedies under this Agreement including taking action to preserve the integrity of the Proprietary Marks and determine Franchise Dealer's compliance with this Agreement. Neither Distributor nor ExxonMobil is liable to Franchise Dealer for any interference with Franchise Dealer's business as a result of Distributor or ExxonMobil entering the Marketing Premises and other places where Franchise Dealer conducts any business covered by the terms of this Agreement.

31. Benefit. This Agreement shall inure to the benefit of and be binding upon the parties and also upon their respective heirs, representatives, successors and permitted assigns.

32. Attorneys' Fees. In any litigation between the parties to enforce any provision or right under this Agreement, the non-prevailing party covenants and agrees to pay to the prevailing party all costs and expenses incurred by the prevailing party in connection with the litigation, including but not limited to reasonable attorneys' fees.

33. Unenforceability. Unenforceability of any provision contained in this Agreement shall not affect or impair the validity of any other provision of this Agreement.

34. Confidentiality. This Agreement and any documents obtained in the course of the transaction contemplated herein shall remain confidential and shall not be disclosed by Franchise Dealer to any party, except for Franchise Dealer's senior management or advisors that agree to hold such information on a confidential basis.

35. Security Interest. In order to secure payment and performance by Franchise Dealer of all of its obligations hereunder and in any other agreement between the parties, including, without limitation, payment of any monies owed to Distributor, Franchise Dealer hereby grants the Distributor a security interest in any and all personal property, inventory, equipment and fixtures, whether now owned or hereafter owned, including, without limitation, any fuel, signs, canopies, fascia, decals, equipment, pumps, tanks, computer equipment, credit card equipment or any other items delivered to the Marketing Premises by Distributor, ExxonMobil, or otherwise paid for or financed by the same, and any and all accounts receivable of Franchise Dealer derived from the operation of either the Business or Related Business as defined within this Agreement and proceeds of the same (collectively "Collateral"). Franchise Dealer hereby irrevocably authorizes Distributor at any time and from time to time to filing any appropriate filing office, any initial financing statement and amendments thereto or any fixture financing statement in order to perfect Distributor's security interest in the Collateral. Franchise Dealer agrees to furnish any such information to Distributor as Distributor may request in order to complete such financing statements, including, but not limited to, a specific list of the Collateral. Franchise Dealer shall provide Distributor with the legal description of the Marketing Premises in order that Distributor may file a fixture financing statement in the register of deeds office in the county in which the Marketing Premises is located. Franchise Dealer acknowledges that this Agreement shall constitute a security agreement and no further or separate document must be executed in order for Distributor to have a security interest in the Collateral. In the event Franchise Dealer defaults under this Agreement or any other agreement between the parties, Distributor shall have all rights and remedies under the Uniform Commercial Code of the State of South Dakota , or any other state in which the Collateral is located, and any additional rights and remedies under law or in equity that may be afforded a secured party in the event of such default.

EXECUTED as of the date first herein specified.

WITNESS:

Stern Oil Co., Inc.
DISTRIBUTOR

By: ______________________
Title: Vice-President

WITNESS:

Melissa Steep

Freeway Mobil
Name of Franchise Dealer (printed)

By: Jim Brown
Title: Owner

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NOS. 27937, 27948

STERN OIL COMPANY, INC.,

Plaintiff and Appellant,

vs.

JAMES R. BROWN
d/b/a/ EXXON GOODE TO GO and FREEWAY MOBIL,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT, SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE LAWRENCE E. LONG
PRESIDING JUDGE

BRIEF OF APPELLEE

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Notice of appeal filed July 22, 2016
Notice of review filed August 10, 2016

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PRELIMINARY STATEMENT

References to the settled record as reflected by the Clerk's Index are cited as (R.) with the page number. In addition to the page number on which they appear in the record, trial exhibits will be cited as (Ex.) with the exhibit number.

STATEMENT REGARDING ORAL ARGUMENT

Appellee Jim Brown respectfully requests the privilege of appearing for oral argument before this Court.

STATEMENT OF ADDITIONAL ISSUE RAISED BY NOTICE OF REVIEW

I. Did the circuit court commit legal error in its calculation of prejudgment interest?

- SDCL 21-1-13.1
- *Casper Lodging, LLC v. Akers*, 2015 S.D. 80, 871 N.W.2d 477
- *JAS Enterprises, Inc. v. BBS Enterprises, Inc.*, 2013 S.D. 54, 835 N.W.2d 117
- *Reuben C. Setliff, III, M.D., P.C. v. Stewart*, 2005 S.D. 40, 694 N.W.2d 859

STATEMENT OF THE CASE

On June 15, 2007, Plaintiff Stern Oil Company, Inc. brought this action in Minnehaha County Circuit Court of the Second Judicial Circuit against Defendant Jim Brown, doing business as Exxon Goode-to-Go and Freeway Mobil, for the alleged breach of two motor fuel supply agreements executed on October 20, 2005. (R. 2, 92). Brown counterclaimed, alleging that Stern Oil had fraudulently induced him into entering into the agreements by guaranteeing he would make a profit of five cents on each gallon of gasoline that he sold. (R. 37, 88).

Motion for Partial Summary Judgment

In the first stage of litigation, Stern Oil moved for partial summary judgment on its breach of contract claim and Brown's counterclaim. (R. 57). On February 20, 2008, the circuit court erroneously granted the motion both on the issue of liability for breach of the agreements and Brown's counterclaim. (R. 69, 75).

Court Trial

A court trial on damages was held on October 26-27, 2009, at which Stern Oil sought $1,236,684 in damages. (R. 166, 4456). The trial court awarded Stern Oil eight years of supposed "lost profits" in the amount of $925,317. (R. 1034, 1144).

First Appeal

Brown appealed. In *Stern Oil Company, Inc. v. Brown*, 2012 S.D. 56, ¶ 23, 817 N.W.2d 395, 403-04, this Court reversed, holding that the circuit court erred in granting Stern Oil summary judgment in light of disputed material facts. (R. 1424). The case was remanded for further proceedings. (R. 1424).

Post-Remand Proceedings

On remand, the case was assigned to the Honorable Lawrence E. Long, presiding judge. The circuit court granted Brown's motion to file a second amended answer and counterclaim, which included a counterclaim for equitable rescission and demand for jury trial. (R. 1972). On September 23, 2015, the circuit court granted Stern Oil's motion for a continuance of the trial in order to accommodate the schedule of one of its witnesses. (R. 2858). The parties stipulated that Judge Long would serve as the fact finder and render a verdict on Brown's counterclaim for equitable rescission, with the jury deciding the remaining issues. (R. 4810-16).

In calculating its damages this time around, Stern Oil sought to rely upon a table constructed by its expert witness showing alternative damage models, the highest of which calculated its damages at $1,514,735, approximately $270,000 more than it had sought at the previous court trial. (R. 4463-64). Brown filed a motion to limit the testimony of Stern Oil's expert because some of the damage models the expert relied upon contradicted the terms of the agreements, which only obligated Brown to purchase 75 percent of the maximum annual volume of gasoline listed in the agreements. (R. 2972). In essence, Stern Oil wanted to hold Brown in breach of contract for failing to purchase *more* fuel than the agreements required him to buy. The circuit court agreed with Brown and granted the motion. (R. 4793). "[T]he contract requires Mr. Brown to purchase a minimum amount of fuel," explained Judge Long. "And if the contract is breached, I don't think the plaintiff is entitled to

recover anything more than the minimum that – the minimum performance that was required by the defendant." (R. 4796).

Trial Following Remand

On January 26, 2016, jury trial commenced. As the result of the court's evidentiary ruling, Stern Oil requested $731,445 in damages with respect to the motor fuel supply agreements, as well as $22,659 with respect to the Repayment Agreements (BIPs). At the close of the plaintiffs' case, Brown moved for a directed verdict on the issue of mistake of fact as grounds for rescission of the contract, renewed his summary judgment motion, and raised other legal grounds related to Stern Oil's various attempts to inflate its alleged damages. (R. 5276-86). The circuit court denied the motion. (R. 5277-86). At the close of all of the evidence, Stern Oil moved for a directed verdict, which the court denied. (R. 5520). As Judge Long explained, "my view of the evidence at this point on the five-cent guarantee and a 5 percent imputed margin, which is how the plaintiff characterizes it, is a matter of semantics that the jury ought to sort out." (R. 5520-21). Brown renewed his motions for directed verdict, which also were denied. (R. 5522).

One of the ways that Stern Oil alleged it made a profit on the fuel it sold to Brown was through a hidden, automatic 1.25 percent discount on the listed price of fuel that it received from ExxonMobil. (R. 4800). Brown argued that by concealing the 1.25 percent discount and failing to include it in its calculation of the price of the fuel it sold to Brown, which Stern Oil had represented was subject to only a 1.5 percent markup from Stern Oil's cost, Stern Oil failed to set the price of its fuel in

good faith. (R. 4800). The jury awarded Stern Oil no damages on its claim regarding the hidden 1.25 percent discount. (R. 3022).

Another significant issue was whether Stern Oil was entitled to damages with respect to diesel fuel. Brown argued that although diesel was originally included under the terms of the motor fuel supply agreements, Stern Oil later released him from any obligation to purchase diesel. Specifically, Stern Oil sent a memorandum to Brown on December 6, 2006 stating: "you can purchase your diesel and E-85 from an alternative source. We will respond to your needs on a transactional basis." (R. 3275 - Ex. 40). Based on that release, Brown contended that Stern Oil waived any claim to lost profits for supposed future sales of diesel. The jury awarded Stern Oil no damages on its diesel fuel claim. (R. 3022).

Ultimately, the jury awarded Stern Oil only $176,152 in damages for lost profits attributable to motor fuel and $61,653 for lost profits attributable to freight under the motor fuel supply agreements. (R. 3022). The jury also awarded $22,659 in repayments costs under the BIP contracts (which did not have an attorney fee provision) that Brown did not contest. (R. 3022). The total verdict was $260,464, a fraction of the $1,514,735 that Stern Oil had sought. (R. 4463-64).

Post-Trial Proceedings

Following trial, Brown filed a brief in support of his claim for equitable rescission of the contract. In addition, Stern Oil filed motions for attorney fees and prejudgment interest, which Brown opposed. (R. 4354, 4358). Despite the jury awarding just $237,805 in damages related to the motor fuel supply agreements, Stern

Oil sought more than twice that amount, $512,623.46, in attorney fees and expenses, including for its unsuccessful efforts over the years to obtain partial summary judgment, its unsuccessful appeal, and its unsuccessful efforts on each of the claims that it lost. (R. 4363). In addition, Stern Oil sought $135,502 in prejudgment interest from the date of notice Brown provided that he would stop buying fuel, including for time involved in its unsuccessful efforts on summary judgment and appeal and during the continuance it obtained from the circuit court. (R. 4356).

A hearing on the motions was held before Judge Long on June 3, 2016. (R. 4726). Brown maintained that equitable rescission of the agreements should be granted as the result of fraud, lack of good faith, or mistake of fact regarding Stern Oil's broken promises regarding its pricing of fuel. (R. 4728). On the attorney fees issue, Brown argued that Stern Oil was not entitled to attorney fees under the fuel agreements because, both sides having prevailed and lost on various issues and Stern Oil only obtaining a fraction of what it sought, neither side was properly considered the "prevailing party" under the agreements. (R. 4743-44). Having prevailed on several issues, Brown certainly was not the "non-prevailing party." Brown also contested the excessive prejudgment interest. (R. 4752).

On June 8, 2016, the circuit court issued detailed findings of fact and conclusions of law in a memorandum decision resolving the motions. (R. 4638). On the rescission issue, the court held that it would "respect the verdict of the jury by denying Brown's request for judicial rescission and allow Stern Oil to recover under

contract." (R. 4651). The circuit court then denied Stern Oil's motion for attorney fees. As Judge Long explained:

> While the jury did award Stern Oil $176,152 in damages for motor fuel and 461,653 for freight under the MFSAs [motor fuel supply agreements], that amount only accounts for a fraction of what Stern Oil was initially seeking. More importantly, the reduction of the award by the jury was due in part because Brown prevailed on two major issues at trial that significantly limited the damages the jury eventually awarded. Although Stern Oil is "not required to prevail on every issue to be the prevailing party," this Court finds that the issues Stern Oil lost on are so significant that it cannot in good faith find Stern Oil to be the prevailing party. *Crisman v. Determan Chiropractic, Inc.*, 2004 S.D. 103, ¶ 23, 687 N.W.2d 507, 513.
>
> **…** As both Stern Oil and Brown prevailed on significant issues, this Court finds that there is no prevailing party. As such, Stern Oil is not entitled to attorneys' fees under the MFSA.

(R. 4656). In addition, the court held that "Stern Oil is entitled to pre-judgment interest from the date of loss, May 8, 2007, which is the day Brown abandoned the contract and unilaterally stopped paying Stern Oil for fuel." (R. 4657).

Judgment was entered on June 20, 2016. (R. 4658). On July 22, 2016, Stern Oil filed its notice of appeal. (R. 4666). Brown timely filed a notice of review.

STATEMENT OF THE FACTS

Jim Brown, 72 years old at the time of trial, is a farmer and business owner who lives in Gettysburg with his wife of fifty years, with whom he raised three children. (R. 5289). In late 2004, Brown purchased and began remodeling two convenience stores on opposite sides of Exit 2 on Interstate 29 in North Sioux City, South Dakota, an area considered a "hypermarket" with intense local competition over the sale of gasoline. (R. 4885-86, 5116, 5289-90).

Stern Oil Company, Inc. is a fuel distributor for Exxon Mobil Corporation (ExxonMobil). Scott Stern, its Vice-President, had learned of Brown's purchase and contacted him to solicit his business. (R. 4883, 4885, 5293). Stern Oil had become a fuel distributor for ExxonMobil only a year or so earlier, in 2003. (R. 4884, 5061-62).

In soliciting Brown's business, Scott Stern and his wife, Staci Stern, told Brown and his daughter, Melissa Brown, that Stern Oil would be his "partner" and would set the price of the fuel that it sold to him at 1.5 cents per gallon over its own cost to obtain the fuel from ExxonMobil. (R. 4912, 5060, 5131, 5345-46, 5348). As Jim Brown testified:

> Q: … Now during this same meeting where they went through the brochure, did you have any discussion with Scott and Staci about how Stern would price the fuel that it was going to sell you?
>
> A: Yes. It was supposed to be priced at cost, plus freight, plus the markup.
>
> Q: And what was your understanding of what the markup was going to be?
>
> A: One and a half cents.
>
> Q: So you knew they were going to put a penny and half on top of their cost?
>
> A: I knew that, yes.

(R. 5298). In addition to the promise that Stern Oil's markup would be limited to 1.5 cents per gallon over its cost, both Jim Brown and his daughter testified that when Scott Stern was attempting to entice them into signing the fuel supply agreements for Brown's stores at a meeting in Gettysburg, Stern verbally assured them of an

"unwritten" support program that would guarantee them a "five cents per gallon profit" on the sale of gasoline. (R. 5213, 5229-30, 5243, 5261, 5295-96). Brown told certain of his employees about Stern Oil's five-cent guarantee contemporaneously with that conversation. (R. 5231, 5244).

One of the programs that ExxonMobil offered for "hypermarkets" such as the location of Brown's two stations was subsidy support if his stations were making less than five cents per gallon. (R. 4905). This program was referred to by Stern Oil variously as "hypermarket support," "format B pricing," "option B," "imputed profit margin," and "a five-cent imputed margin." (R. 4908, 4945, 5068-69, 5245, 5251). Unfortunately, nobody at Stern Oil understood the "hypermarket-format B pricing-option B-imputed profit margin" program or how it worked when using it as a selling point in attempting to solicit Brown's business. (R. 4906, 5058, 5252).

At trial, Stern vehemently testified that he "absolutely, positively, unequivocally" never, ever told Brown "in any way, shape or form" that Stern Oil would guarantee him a five-cent-per-gallon profit on the sale of fuel. (R. 4909, 4945). But he did admit at trial that he told Brown that "there's a support program of five cents a gallon" and then admitted on cross-examination that he used the term "profit margin" when making that representation to Brown. (R. 5055-57). In Stern's view, that was just "semantics." (R. 5057). But as he was also forced to admit on cross-examination:

> Q: … You always described it [to Brown] as a five-cent profit margin.

A: But to calculate to the five cents required a lot more background detail associated with that.

Q: Okay. But as far as your description to Jim Brown, you always said five-cent profit margin.

A: I said five cents and I qualified it with an imputed average margin, weighted average margin. I was very specific because it was all across three grades of gasoline. Because you can make three cents on one grade, six cents on another and nine cents on another on your premium, so that it would be calculated at an average of five. So there's just a lot of components and moving parts to that.

(R. 5069). Despite those concessions, Stern testified that he believes that Brown was "just making this whole thing up just to defend this lawsuit." (R. 5069). But Stern later admitted that in addition to Brown and his daughter, at least two other people working for them also understood years before Stern Oil ever filed its lawsuit that there was a five-cent per gallon profit guarantee. (R. 5069-71, 5076-77, 5449, 5454; Exs. 19, 43). It is also undisputed that before Stern Oil ever filed suit, Scott Stern told his father, Gillas Stern, that he *knew* that Jim Brown was under the impression that there was a five cent margin guarantee. (R. 5509-11).

In attempting to solicit Brown's business, Stern also incorrectly told him that the five cent margin would continue indefinitely or "go on forever." (R. 4908, 5059-60, 5296, 5336, 5339). In truth, as Stern later revealed, it could end at any time. (R. 5059-60, 5296). And again, both Scott and Staci Stern admitted that when they were explaining the five cent per gallon "profit margin" to Brown, they had no true understanding about how the program actually worked:

Q: And the reason you said that is you really didn't know how that program worked, did you?

A: There was a lot of mechanics to that. There was imputed values that ExxonMobil put in for margin. ExxonMobil did not know what the daily consumption or daily sales of gasoline was, so it was a calculation that was done based upon a subsidy or support. It was not an exact, to-the-penny calculation. It was intended to be a subsidy support that came up below cost.

Q: You really didn't know how it worked, did you?

A: I was never – let me back up. We had not used the program with any other client, nor did we need to with any other client, so I did – I had not been trained on it in detail. I just had a strategic overview that this was a component of multiple programs that ExxonMobil made available. This program was very limited because typically you think in the framework of ten years that something like this activity would take place over one, two or three months and so over a ten-year time frame is rather insignificant.

Q: So, again, my question is you really at this point in time didn't know how this program functioned.

A: I would say yes, at that time, because we had not utilized it.

(R. 5058) (emphasis supplied).

Q: … I think you said you described it as an imputed – five-cent imputed margin?

A: Correct.

…

Q: Okay. And what do you mean by that?

A: Five-cent imputed margin basically – I don't understand what it means and that's one of the difficulties with explaining the program because we don't have the formula. **…**

(R. 5252) (emphasis supplied). Scott Stern also admitted at trial that there was nothing in writing about the five cent market support program, because ExxonMobil

"did not give anything to us." (R. 5061, 5084). And Stern admitted that he did not think that ExxonMobil's own territorial representative even understood how the program supposedly worked. (R. 5067-68).

Motor Fuel Supply Agreements

Although Brown had been negotiating with another fuel supplier, he ultimately decided to do business with Stern Oil based upon the five cent profit margin representation. (R. 5297, 5299). Were it not for that promise by Stern, Brown would have gone with the deal offered by British Petroleum (BP), which otherwise had much more favorable financial terms. (R. 5299-5300).

In October 2005, Brown and Stern Oil executed a Motor Fuel Supply Agreement for each of Brown's two convenience stores. (Exs. 6, 7; R. 3110-23, 3124-37, 4924, 5222). One of Brown's convenience stores was branded Exxon Goode-To-Go, and the other was branded Freeway Mobil. (R. 5291). The two agreements are identical with the exception of the store name and the annual maximum volume of fuel that it lists. (R. 5126, 5355). Both agreements extended for a period of ten (10) years. (R. 3111, 3125). Scott Stern assured Brown that there was no need for him to consult a lawyer because another Stern Oil customer had already paid an attorney "thousands of dollars" to go over it and Stern was giving him the revised version that this other person's lawyer had negotiated. (R. 5300).

The motor fuel supply agreements provided that Stern Oil would "offer to sell" Brown a maximum volume of fuel each year. (Section 4.a) (R. 3111, 3125). After the first contract year, the maximum annual volume of fuel was adjusted each

year based on sales volume. (Section 4.b) (R. 3111, 3125). The agreements provided that Brown "must purchase" at least seventy-five percent of the maximum annual volume of fuel "for Exxon-branded gasoline." (Section 4.c) (R. 3111, 3125). If Brown did not purchase the minimum amount of fuel required, Stern Oil could terminate or refuse to renew the agreements. (Section 4.c) (R. 3111, 3125). The volume requirements were set by Stern with no input from Brown. (R. 5301).

Scott Stern assured Brown that the large volumes were "put in there because we need to lock up this much gas from Mobil to make sure that we've got gas to keep these stations going." (R. 5301, 5339). The agreements did not set the price for the fuel, but, as discussed above, Stern Oil had promised that it would only charge Brown 1.5 cents per gallon over its own cost to obtain the fuel. (R. 4912, 4927, 5060, 5131, 5298, 5345-46, 5348). Importantly, Stern Oil did not have any similar contract with ExxonMobil requiring it to purchase any minimum amount of fuel to supply to Brown. (R. 5140). In fact, Stern Oil had no obligation to purchase any amount of fuel from ExxonMobil or anyone else. (R. 5140).

Repayment Agreements

Brown and Stern Oil also executed a Repayment Agreement ("BIP") as part of a brand incentive program for both of Brown's stores. (Exs. 26, 27; R. 3211, 3223). Under the terms of the BIPs, Brown was reimbursed for the cost of certain franchise related improvements to the stores, such as signage. (Section 1.a) (R. 3211, 3223). If Brown prematurely terminated the motor fuel supply agreements, the BIPs gave Stern Oil the option to recover the payments. (Section 2.a) (R. 3211, 3223).

Fuel Pricing Issues

As discussed above, the agreements did not set forth the price of the fuel Brown could purchase from Stern Oil. Instead, Stern Oil set the price of the fuel daily by faxing and emailing Brown a fuel price sheet, which listed the total price of the various types of fuel he could purchase from Stern Oil. Unbeknownst to Brown, instead of charging him 1.5 cents per gallon over its own cost to obtain the fuel as promised, Stern Oil instead charged Brown 2.75 cents per gallon over its own cost from the very beginning. Stern Oil concealed the additional 1.25 cents per gallon that it was charging from Brown by means of a hidden mechanism where ExxonMobil did not actually charge Stern Oil the price per gallon advertised on its fuel price sheets, but rather charged 1.25 cents less than advertised. (R. 4935).

Stern Oil has referred to this as a "prompt payment discount," but there was not any option for Stern Oil not to pay ExxonMobil immediately whenever it purchased fuel. (R. 5162). Rather, ExxonMobil had a separate contractual right to automatically deduct the money from Stern Oil's bank account when the sale occurred. (R. 4935, 5045-46, 5094). The inflated amount that ExxonMobil "invoiced" Stern Oil was not the amount that Stern Oil was contractually obligated to pay. (R. 5162). Rather, as a result of this "automatic discount," the true price for every single gallon of fuel that Stern Oil purchased from ExxonMobil was actually 1.25 cents per gallon less than the price it represented to Brown. (R. 5093, 5098).

And so every day that Stern Oil told Brown that it had paid ExxonMobil a certain price for fuel and was charging Brown only 1.5 cents per gallon more than

that price for the same fuel, as it had promised to do, that was a lie. (R. 3240, 5097-99; Ex. 29 – falsely listing Stern Oil's "COST" with a "MARKUP" of "0.0150"). Instead, Stern Oil was actually charging Brown a 2.75 cents per gallon markup over its own cost to obtain the fuel on every gallon that it sold him.

In order to remain competitive, Brown's stations had to price gasoline at levels consistent with the local competition. As Brown quickly learned, however, the prices offered by Stern Oil were so high and the competition at this location so fierce that Brown was unable to maintain a five cent margin between the purchase price and selling price of the gasoline. (R. 5306-07). Although promised during contract negotiations, Stern Oil failed to provide the support to maintain the five cent margin. (R. 5306-08). Consequently, on May 8, 2007, Brown informed Stern Oil that he could no longer purchase any fuel. (R. 5027-28, 5314-15).

Stern Oil promptly sued him.

STANDARD OF REVIEW

As with most appellate courts, this Court reviews the circuit court's determination of prevailing party status only for an abuse of discretion. *See Crisman v. Determan Chiropractic, Inc.*, 2004 S.D. 103, ¶ 19, 687 N.W.2d 507, 512.

As this Court has explained, it also reviews jury instructions under an abuse of discretion standard:

> A trial court has discretion in the wording and arrangement of its jury instructions, and therefore we generally review a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard. However, no court has discretion to give incorrect, misleading, conflicting, or confusing instructions; to do so constitutes

> reversible error if it is shown not only that the instructions were erroneous, but also that they were prejudicial.

Wangsness v. Builders Cashway, Inc., 2010 S.D. 13, ¶ 10, 779 N.W.2d 136, 140. "Erroneous instructions are prejudicial when in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party." *Id.* (citing SDCL 15-6-61).

This Court presumes that a trial court's evidentiary rulings are correct and will reverse such rulings only for an abuse of discretion. *See Table Steaks v. First Premier Bank, N.A.*, 2002 S.D. 105, ¶ 36, 650 N.W.2d 829, 838.

This Court will uphold a jury verdict if it can be explained with reference to the evidence when viewing that evidence in the light most favorable to the verdict. *See Lenards v. DeBoer*, 2015 S.D. 49, ¶ 10, 865 N.W.2d 867, 870 (citation omitted). This Court will only set aside a jury's verdict on extreme cases where the jury has acted under passion or prejudice or palpably mistaken the rules of law. *See id.* "[I]f a verdict is susceptible to more than one construction, the construction which sustains the verdict must be applied." *Id.*

Prejudgment interest calculations are done by the circuit court as a matter of law, which this Court reviews de novo. *See JAS Enterprises, Inc. v. BBS Enterprises, Inc.*, 2013 S.D. 54, ¶ 44, 835 N.W.2d 117, 129.

ARGUMENT

I. In this ten-year litigation in which both Stern Oil and Brown prevailed and lost on substantial issues and Stern Oil recovered only a small fraction of the relief it sought, the circuit court did not abuse its discretion in finding that neither party was the prevailing party.

In South Dakota, attorney fees may only be awarded when specifically authorized by statute or contract. *See Bertelsen v. Allstate Ins. Co.*, 2013 S.D. 44, ¶ 28, 833 N.W.2d 545, 557. "The party requesting an award of attorneys' fees has the burden to show its basis by a preponderance of the evidence." *Id.* (citing *Arrowhead Ridge I, LLC v. Cold Stone Creamery, Inc.*, 2011 S.D. 38, ¶ 25, 800 N.W.2d 730, 737).

The motor fuel supply agreements contain the following provision:

> Attorneys' Fees. In any litigation between the parties to enforce any provision or right under this Agreement, the non-prevailing party covenants and agrees to pay the prevailing party all costs and expenses incurred by the prevailing party in connection with the litigation, including but not limited to reasonable attorneys' fees.

(Section 32) (R. 3122, 3136) (emphasis supplied).

Following trial, the circuit court entered findings in its decision that neither Stern Oil nor Jim Brown was the "prevailing party" or "non-prevailing party" so as warrant an award of attorney fees under this provision: "As both Stern Oil and Brown prevailed on significant issues, this Court finds that there is no prevailing party. As such, Stern Oil is not entitled to attorneys' fees under the MFSA." (R. 4656). On appeal, Stern Oil presents itself as aghast at "this shocking and unprecedented decision." (Brief at 7).

According to Stern Oil, "[a]llowing the trial court's decision to stand would overrule the entire line of South Dakota cases" in this area of the law, and "result in a

very dangerous and untenable rule" that "defies logic" and would "preclude prevailing party status to the vast majority of litigants" and "turn the law of prevailing party on its head" to "create uncertainty beyond measure," so much so that "[i]f Stern Oil is not the prevailing party here, it is difficult to imagine how any party could ever attain that status." (Brief at 14). To stand as a barricade against such chaos, Stern Oil instructs that "[t]his Court must reverse and remand[.]" (Brief at 14).

The law and the facts of this case do not live up to the rhetoric presented in Stern Oil's brief. Unlike many contracts containing attorney fee provisions, the agreements do not define the terms "non-prevailing party" or "prevailing party." (R. 3122, 3136). Under South Dakota law, most of which concerns statutory disbursements under SDCL 15-17-37, the prevailing party generally is "the party in whose favor the decision or verdict is rendered and judgment is entered." *Crisman,* 2004 S.D. 103, ¶ 23, 687 N.W.2d at 513 (quoting *City of Aberdeen v. Lutgen*, 273 N.W.2d 183, 185 (S.D. 1979)); *see also Hewitt v. Felderman*, 2013 S.D. 91, ¶ 28, 841 N.W.2d 258, 266; *Picardi v. Zimmiond*, 2005 S.D. 24, ¶ 16, 693 N.W.2d 656, 661 (explaining that "[t]he prevailing party for purposes of SDCL 15-17-37 is 'the party in whose favor the decision or verdict is or should be rendered and judgment entered'").

As this Court has recognized, "[u]sually, the non prevailing party appeals and the prevailing party does not appeal." *Crisman,* 2004 S.D. 103, ¶ 22, 687 N.W.2d at 513. In *Crisman* and other decisions, however, this Court has rejected a simplistic "cookie-cutter" approach to this issue, cautioning that "in the law, nothing is as simple as it looks." *Id.* (holding that trial court "did not abuse its discretion" in

determining that plaintiff was the prevailing party even though he did not prevail on every issue); *see also Culhane v. Michels*, 2000 S.D. 101, ¶ 31, 615 N.W.2d 580, 590 (affirming circuit court's denial of request for disbursements as not against reason and evidence and therefore not an abuse of discretion where "both parties prevailed on some of the issues and lost on some of the issues"); *Geraets v. Halter*, 1999 S.D. 11, ¶ 21, 588 N.W.2d 231, 235 (affirming circuit court's finding that plaintiff was not prevailing party even though judgment of compensatory damages was awarded to plaintiff); *Michlitsch v. Meyer*, 1999 S.D. 69, ¶ 15, 594 N.W.2d 731, 734 (holding that trial court did not abuse its discretion in denying of recovery of disbursements where there was "no innocence on either side"); *Noble for Drenker v. Shaver*, 1998 S.D. 102, ¶ 26, 583 N.W.2d 643, 648 (affirming trial court's determination that no party was a "prevailing party").

This Court's in-depth approach is well established and has a sound basis in the law. *See Southern Wine and Spirits of Nevada v. Mountain Valley Spring Co.*, LLC, 712 F.3d 397, 401 (8th Cir. 2013) (holding that "[t]he district court was within its discretion to find that neither party qualified as the prevailing party under Nevada law"); *Bowen Investment, Inc. v. Carneiro Donuts, Inc.*, 490 F.3d 27, 30 (1st Cir. 2007) (holding that marginal success at trial warranted denial of award of attorney fees that otherwise were available pursuant to contract); *Green River Ranches, LLC v. Silva Land Co., LLC*, 395 P.3d 804, 808 (Idaho 2017) (holding that where party appealing denial of attorney fees successfully defended some claims brought against him and was unsuccessful on other claims, appellant did not demonstrate "that the district court abused its

discretion when it held that neither party prevailed in the action"); *Bobrow v. Bobrow*, 391 P.3d 646, 652 (Ariz Ct. App. 2017) (holding that because "neither party was successful with respect to all of the relief requested," the trial court's finding that neither party was entitled to attorney fees as prevailing party under contractual provision was not an abuse of discretion); *Sullivan v. Cherewick*, 391 P.3d 62, 70 (Mont. 2017) (affirming denial of prevailing party status because "[t]here is no prevailing party" where both sides "gain a victory but also suffer a loss"); *Dewey v. Wentland*, 38 P.3d 402, 420 (Wyo. 2002) (explaining that contrary to claim on appeal that prevailing party's identity was clear, "the record tells a quite different story" and holding that "the trial court exercised sound judgment in concluding neither party prevailed and denying all requests for attorney's fees and costs"); *Glenbrook Homeowners Ass'n v. Glenbrook Co.*, 901 P.2d 132, 141 (Nev. 1995) (holding that because "[e]ach party won on some issues and lost on others … the district court did not abuse its discretion in refusing to award attorney's fees"); *American Nursery Products, Inc. v. Indian Wells Orchards,* 797 P.2d 477, 487 (Wash. 1990) (en banc) (holding that "because both parties have prevailed on major issues, neither qualifies as the prevailing party under the contract").

Stern Oil acknowledges, as it must, that the standard of review on this issue is abuse of discretion. *See Crisman,* 2004 S.D. 103, ¶ 19, 687 N.W.2d at 512. That is the same deferential standard applied by most appellate courts to prevailing party determinations. *See, e.g., Southern Wine and Spirits of Nevada*, 712 F.3d at 399; *Bowen Investment*, 490 F.3d at 30; *Green River Ranches*, 395 P.3d at 808; *Sullivan*, 391 P.3d at 65;

Bobrow, 391 P.3d at 652 (citation omitted) (explaining that "[g]enerally, if a contract contains a prevailing party provision, '[t]he decision as to who is the successful party for purposes of awarding attorneys' fees is within the sole discretion of the trial court, and will not be disturbed on appeal if any reasonable basis exists for it'").

The abuse of discretion standard is appropriate for this fact-based assessment, as this Court has explained, because "[h]aving just presided over the case, the trial court was in the best position to determine which party prevailed." *Crisman*, 2004 S.D. 103, ¶ 22, 687 N.W.2d at 513. An abuse of discretion is "a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary and unreasonable." *Erickson v. Earley*, 2016 S.D. 37, ¶ 8, 878 N.W.2d 631, 634.

Judge Long's thoughtful decision on this issue made perfect sense and certainly did not constitute an abuse of his discretion, representing a fundamental error of judgment outside the range of permissible choices that was arbitrary and unreasonable. And Stern Oil's accusation that Judge Long neither "reviewed" nor "understood" this Court's precedent, preventing him from reaching "the only reasonable conclusion," lacks persuasive force. (Brief at 11). Although perhaps not determinative, it is notable that Stern Oil is the *appellant* in this case. First, Stern Oil strenuously argues to this Court that it obviously was the prevailing party, and then, in the same breath and without a hint of irony, demands that it be granted a new trial because of all of the issues that it lost.

As Judge Long recognized, two of the major issues in this litigation with respect to the motor fuel supply agreements were (1) whether Stern Oil was entitled to lost profit damages for the supposed 1.25 percent "discount" on motor fuel; and (2) whether Stern Oil was entitled to lost profit damages for diesel fuel. Brown contended that Stern Oil was not entitled to damages for the 1.25 percent "discount" because it failed to disclose its true cost for fuel to Brown and thus failed to set the price in good faith. Brown also contended that Stern Oil was not entitled to damages for diesel fuel because it had released him from any obligation to purchase diesel fuel. Brown prevailed on both of those issues – the jury awarded no damages to Stern Oil on its claim regarding the supposed 1.25 percent "discount" or its claim regarding the purchase of diesel fuel.

Brown also prevailed in his motion to limit the testimony of Stern Oil's expert witness, which greatly reduced the total amount of damages it could claim. During the first trial, Stern Oil's expert claimed that it had sustained $1,236,684 in damages. (R. 4462). Following remand, that number somehow swelled to $1,514,735. (R. 4463, 5514). Prior to the second trial, Brown filed a motion to limit the damages claim because some of the models sought to be introduced contradicted the terms of the motor fuel supply agreements and inexplicably calculated damages seeking to hold Brown liable for failing to purchase more fuel than the contracts required. (R. 2972). The circuit court granted the motion. (R. 4793). Stern Oil thus was limited to requesting $731,445 in damages with respect to the fuel agreements. (R. 4464). That was another major issue on which Brown prevailed.

Ultimately, the jury did award $176,152 in damages for motor fuel and $61,653 for freight under the motor fuel supply agreements.[1] However, that was only a small fraction of the more than $1.5 million in damages Stern Oil sought. Given that Brown prevailed on at least three major issues and the jury awarded a fraction of the total damages Stern Oil sought, the circuit court cannot be said to have abused its substantial discretion in finding that neither Stern Oil nor Brown was the "prevailing party" or "non-prevailing party" in this case. *See, e.g., Crisman,* 2004 S.D. 103, ¶ 22, 687 N.W.2d at 513; *Culhane*, 2000 S.D. 101, ¶ 31, 615 N.W.2d at 590; *Geraets*, 1999 S.D. 11, ¶ 21, 588 N.W.2d at 235; *Michlitsch*, 1999 S.D. 69, ¶ 15, 594 N.W.2d at 734; *Noble for Drenker*, 1998 S.D. 102, ¶ 26, 583 N.W.2d at 648.

As the Idaho Supreme Court recently held in affirming denial of prevailing party status in a similar case:

> In the instant case, the district court recited the correct standard for determining the prevailing party and conducted the same analysis we recited in the *Hobson Fabricating* case. It considered the final result in relation to the relief sought by the parties, the multiple claims and issues between the parties, and the extent to which each had prevailed on those issues. It noted that American Semiconductor sought to recover $1,025,087 from the engineers and Sage, but only received $195,175, and that the engineers and Sage sought to recover $76,975.25 on their counterclaims, but recovered nothing. Obviously, American

[1] The jury also granted $22,659 in reimbursement under the BIPs (which have no attorney fee provision) that Brown did not contest. Stern Oil's counsel admitted: "We didn't make a dog and pony show out of it, Judge, because it's literally like 2 or 3 percent of the damage. I mean, it's like $20,000, compared to what we were looking at initially, which was about 1.5 million." (R. 5514).

> Semiconductor was not satisfied with its recovery because it filed this appeal seeking a new trial on damages.
>
> The district court's determination of prevailing party status for the purpose of awarding attorney fees and costs is within the court's sound discretion, and will not be disturbed on appeal unless there is an abuse of discretion.' American Semiconductor has not shown that the district court abused its discretion in determining that there was no prevailing party in this case.

American Semiconductor, Inc. v. Sage Silicon Solutions, LLC, 395 P.3d 338, 356 (Idaho 2017) (citation omitted). The same holds true here. Stern Oil has failed to carry its burden on appeal to demonstrate that Judge Long abused his discretion in denying its motion for $512,623.46 in attorney fees and expenses.

II. The circuit court did not abuse its discretion instructing the jury on damages.

Next, Stern Oil seeks a new trial, contending that "breach of contract damages are broadly construed in favor of the injured party" and that the circuit court's jury instructions violated that philosophical position. (Brief at 15). The only instructions that Stern Oil specifically challenges are Instructions 30 and 30A. (Brief at 17-18).

A. The jury was properly instructed that consequential damages must be reasonably foreseeable.

Instruction 30 stated:

> The measure of damages for a breach of contract is the amount which will compensate the aggrieved party for all detriment legally caused by the breach, or which, in the ordinary course of things, would be likely to result from the breach.
>
> Damages for a breach of contract which are not clearly ascertainable in both their nature and origin are unrecoverable. Consequential damages must be reasonably foreseeable by the breaching party at the time of contracting. If consequential damages were not reasonably foreseeable, then they are not recoverable.

(R. 3068). Stern Oil's original objection to this instruction was as follows:

> First of all, Judge, there is language in here that says that consequential damages must be reasonably foreseeable. I searched over the weekend for language in our case law that says consequential damages must be reasonably foreseeable, and I'll represent to the Court that I could not find it. And I don't think there is a foreseeability requirement. We – one of the cases I looked at was a case that we previously cited. It was the *Table Steaks vs. First Premier Bank* case. And that is 650 N.W.2d 829. And there is no language in this case at all that talks about consequential damages being reasonably foreseeable.
>
> And the Court is saying that SDCL 21-2-1 provides that the measure of damages, quote, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom, end quote. So to say that consequential damages have to be proven to a reasonable foreseeability standard is not the law.

(R. 5559, 5588).[2] When the instructions were finally settled, Stern Oil again objected "on the basis of consequential damages being reasonably foreseeable." (R. 5602).

As given to the jury, Instruction 30 is an entirely accurate statement of the law. Stern Oil's assertion that consequential damages do not have to be reasonably foreseeable, on the other hand, is *not* a correct a statement of the law. As this Court has explained, "[c]onsequential damages must be reasonably foreseeable by the breaching party at the time of contracting." *Colton v. Decker*, 540 N.W.2d 172, 177 (S.D. 1995); *see also Mash v. Cutler*, 488 N.W.2d 642, 646 (S.D. 1992) (holding that "[d]amages not reasonably anticipated by the parties when they contracted are not

[2] Stern Oil also objected to language included in the initial draft of Instruction 30 that was subsequently removed by the circuit court. (R. 5560).

recoverable"); *Northern Farm Supply Inc. v. Sprecher*, 307 N.W.2d 870, 873 (S.D. 1981) (holding that "the measure of damages for breach of contract is limited to those damages which my reasonably have been in the contemplation of both parties at the time they entered the contract").

This Court should reject Stern Oil's invitation to change South Dakota law to eliminate the fundamental foreseeability requirement for consequential damages resulting from a breach of contract, which has its genesis in *Hadley v. Baxendale*, 9 Ex. 341, 354-55, 156 Eng. Rep. 145, 151 (1854) and has been blackletter law for more than a century and a half. *See* 24 Williston on Contracts, § 64:13 (4th ed. May 2017 Update) ("Consequential damages include those damages that were reasonably foreseeable or contemplated by the parties at the time the contract was entered into as the probable result of a breach"); Restatement (Second) of Contracts, § 351 ("Damages are not recoverable for a lost that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made:"); SDCL 57A-2-715 (Buyer's Incidental and Consequential Damages). Because it was a complete and accurate statement of the law, the circuit court did not abuse its discretion in giving Instruction 30.

B. The jury was properly instructed on the definition of consequential damages.

The only other jury instruction that Stern Oil takes issue with on appeal is Instruction 30A, which stated:

> Consequential damages are damages that do not arise within the scope of the buyer-seller transaction, but rather stem from losses incurred by the non-breaching party in its dealings, often with third parties, which

> were a proximate result of the breach, and which were reasonably foreseeable by the breaching party at the time of contracting.

(R. 3069). This instruction also was an entirely accurate statement of applicable law.

SDCL 57A-2-708 governs the damages a seller is entitled to recover for a buyer's repudiation. SDCL 57A-2-708(1) sets forth the general rule that "a seller's measure of damages in the event of a breach is the difference between the market and the contract prices." *Vanderwerff Implement, Inc. v. McCance*, 1997 S.D. 32, ¶ 11, 561 N.W.2d 24, 25-26 (citing SDCL 57A-2-708(1)). An alternative measure of damages is available to those sellers who are inadequately compensated by the standard contract/market price differential of SDCL 57A-2-708(1). This alternative measure of damages, which is set forth under SDCL 57A-2-708(2), is the measure of damages Stern Oil sought to apply in this case. SDCL 57A-2-708(2) provides:

> (2) If the measure of damages provided in subsection (1) is inadequate to put the seller in as good a position as performance would have done then the measure of damages is the profit (including reasonable overhead) which the seller would have made from full performance by the buyer, together with any incidental damages provided in this chapter (§ 57A-2-710), due allowance for costs reasonably incurred and due credit for payments or proceeds of resale.

A seller also may recover "incidental damages," as defined in SDCL 57A-2-710, under SDCL 57A-2-708(2).

However, neither SDCL 57A-2-708(1) or (2) allow for the recovery of consequential damages by a *seller* such as Stern Oil is here. *See, e.g., Florida Mining & Materials Corp. v. Standard Gypsum Corp.*, 550 So.2d 47, 48 (Fla. Ct. App. 1989); *Atlantic*

Paper Box Co. v. Whitman's Chocolates, 844 F. Supp. 1038 (E.D. Pa. 1994) (holding that sellers are not allowed to recover consequential damages under the UCC).[3] That is so because neither of the subsections in SDCL 57A-2-708 specifically provide for the recovery of consequential damages as required by SDCL 57A-1-305(a), which states:

> [t]he remedies provided by this title must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed but *neither consequential* or special damages nor penal damages may be had *except as specifically provided in this title or by other rule of law*.

SDCL 57A-1-305(a) (emphasis supplied).

At trial, Brown objected to the instructions on consequential damages on the basis that, as a seller under the UCC, Stern Oil was entitled only to direct and incidental damages, and cannot recover consequential damages under the law. (R. 5560-61). But since the circuit court allowed Stern Oil to argue to the jury that it was entitled to consequential damages, such as the hidden 1.25 percent "discount" that it arranged for in its third-party contractual dealings with ExxonMobil, it was necessary to define the term for the jury. (R. 5560-61).

The definition of consequential damages provided to the jury was an accurate statement of the law. As set forth in South Dakota's version of the UCC, "'Consequential' or 'special' damages and 'penal' damages are not defined in the Uniform Commercial Code; rather, these terms are used in the sense in which they are used outside the Uniform Commercial Code." SDCL 57A-1-305 (comment 3).

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[3] A *buyer* may recover both "incidental and consequential damages" under SDCL 57A-2-715 in a proper case. SDCL 57A-2-714(3).

The Eighth Circuit has recognized that "[c]onsequential damages are defined as losses that do not flow directly and immediately from an injurious act, but that result indirectly from the act." *United States v. DeRosier*, 501 F.3d 888, 895 (8th Cir. 2007) (citing Black's Law Dictionary 394 (7th ed.1990)); *see Rain & Hail Ins. Service, Inc. v. Federal Crop Ins. Corp.*, 426 F.3d 976, 981 (8th Cir. 2005). In other words, they are damages for "economic harm beyond the immediate scope of the contract." *Penncro Assocs., Inc. v. Sprint Spectrum, L.P.,* 499 F.3d 1151, 1156 (10th Cir. 2007).

In defining the distinction between incidental and consequential damages, one commentator has called the definition set forth in *Petroleo Brasileiro, S.A., Petrobras v. Ameropan Oil Corp.,* 372 F. Supp. 503, 508-09 (E.D.N.Y. 1974), "[t]he salient judicial pronouncement on the subject." R. Anderson, *Incidental and Consequential Damages*, 7 Journal of Law and Commerce 327, 334 (1987). It provides:

> While the distinction between [incidental and consequential damages] is not an obvious one, the Code makes plain that incidental damages are normally incurred when a buyer (or seller) repudiates the contract or wrongly rejects the goods, causing the other to incur such expenses as transporting, storing, or reselling the goods. On the other hand, consequential damages do not arise within the scope of the buyer-seller transaction, but rather stem from losses incurred by the non-breaching party in its dealings, often with third parties, which were a proximate result of the breach, and which were reasonably foreseeable by the breaching party at the time of contracting.

Atlantic Paper Box, 844 F. Supp. at 1046 (quoting *Petroleo Brasileiro,* 372 F. Supp. at 508-09; *see also Hofmann v. Stroller*, 320 NW.2d 786 (N.D. 1982); Anderson, *supra*, 7 *Journal of Law and Commerce* at 467 ("The most common form of consequential damages is the recovery of the buyer's lost profits resulting from the breach of contract"). That

is the essential definition provided by the circuit court in this case and it is an accurate statement of the law.

C. Any perceived instructional error on the issue of damages was harmless to Stern Oil.

Having been accurately instructed on the uncontroversial legal principle that consequential damages must be reasonably foreseeable and given an accurate definition of consequential damages, it was within the province of the jury in this case to determine the amount of damages to which Stern Oil was entitled. *See Schuldies v. Millar*, 1996 S.D. 120, ¶ 27, 555 N.W.2d 90, 99; *Kent v. Allied Oil & Supply, Inc.*, 264 N.W.2d 512, 514 (S.D. 1978); *see also Lenards*, 2015 S.D. 49, ¶ 10, 865 N.W.2d at 870 (holding that this Court views the evidence in the light most favorable to the jury verdict). Stern Oil cannot demonstrate any prejudicial error warranting a second trial.

The first claim for lost profits that Stern Oil faults the jury for declining to award is its claim based on the supposed 1.25 percent "discount" or kickback arising out of its payment arrangements with ExxonMobil. Plainly, this third-party side deal was not within the scope of the motor fuel supply agreements. Rather, the alleged damages are based upon a third-party contractual arrangement that Stern Oil reached with ExxonMobil. Brown was not a party to this third-party agreement and was never informed of its terms.

It was not reasonably foreseeable to Brown that Stern Oil could recover lost profits for the 1.25 percent discount derived from its automatic deduction banking

arrangements with ExxonMobil. Such damages are a classic example of consequential damages that are not recoverable by a seller under SDCL 57A-2-708. Even so, the circuit court permitted Stern Oil to seek those claimed damages from the jury. And even though the jury was instructed that such damages could be awarded to Stern Oil if they were reasonably foreseeable to Brown as required under the law of consequential damages, the jury concluded that they should *not* be awarded and Brown prevailed on that claim.

Simply showing up at trial and calling a third-party account deduction agreement with ExxonMobil a "profit center" of the motor fuel supply agreements with Brown does not make it so. The jury fully considered this issue, which was argued *ad infinitum* at trial, and rejected Stern Oil's argument, placing a "zero" on the verdict form for this claim. (R. 3022). This issue provides no basis for a new trial.

The other claim for loss profits that Stern Oil faults the jury for declining to award was its claim for diesel fuel sales. But that claim was subject to Brown's waiver defense. "[I]f a verdict is susceptible to more than one construction, the construction which sustains the verdict must be applied." *Lenards*, 2015 S.D. 49, ¶ 10, 865 N.W.2d at 870. It is undisputed that on December 6, 2006, Stern told Brown in writing: "[Y]ou can purchase your diesel and E-85 from an alternate source. We will respond to your needs on a transactional basis." (R. 3275, 5164-65, 5312-13, 5439-40; Ex. 40). Although Scott Stern protested at trial that the written memorandum did not mean what it plainly said, the jury was able to evaluate his spin on the evidence and give it the credence they thought it deserved.

The jury was properly instructed on the applicable law regarding waiver and Stern Oil has not challenged that instruction on appeal. (R. 3063). Based on the evidence, the jury was well within its discretion to conclude that Stern Oil waived any claim to lost profit damages for diesel. As even Stern Oil's counsel ultimately admitted at trial: "This obviously – the question of a release is for the jury." (R. 5283). This issue provides no basis for a new trial.

In sum, the jury instructions were legally accurate and any way in which they might be deemed incomplete or extraneous – such as by permitting the jury to consider awarding consequential damages to Stern Oil even though as a seller it legally was not entitled to receive such damages – such leeway favored Stern Oil. The jury heard all of the evidence, weighed the arguments of counsel, and then expressly decided not to award the damages that Stern Oil now claims it should have received, eliminating any conceivable prejudice.

III. The circuit court did not abuse its discretion in granting Brown's motion to exclude damages models that assumed he could be held liable for failing to purchase *more* fuel than the agreements required him to purchase.

For its final issue, Stern Oil contends that the circuit court abused its discretion in declining to allow "damages models" that assumed that Brown could be held liable for failing to purchase millions of gallons more in fuel that he was required to purchase under the agreements. As this Court has explained, "[e]videntiary rulings made by a trial court are presumed to be correct and are reversed only if there is an abuse of discretion." *Table Steaks*, 2002 S.D. 105, ¶ 36, 650 N.W.2d at 838. Judge

Long did not abuse his discretion in declining to allow the presentation of such evidence.

This claim relates to Stern Oil's attempt following remand to rely upon a table constructed by its expert witness showing alternative damage models, the highest of which calculated its damages at $1,514,735 based on Brown purchasing 100 percent of the maximum annual volume of fuel designated in each of the motor fuel supply agreements. (R. 4463 – "Summary of Losses Based on 100% of Maximum Annual Volume for Freeway Mobil and Goode to Go"). But the agreements only required Brown to purchase 75 percent of the maximum annual volume of fuel designated in each of them. (R. 3111, 3125).

Specifically, while the agreements required *Stern Oil* to "offer to sell" Brown a maximum volume of fuel each year, (Section 4.a) (R. 3111, 3125), they only provided that *Brown* "must purchase" at least "seventy-five percent" of that maximum annual volume of fuel. (Section 4.c) (R. 3111, 3125). In granting Brown's motion to exclude evidence of the inflated damages based on fuel sales over the amounts required by the agreements, Judge Long held that "the contract requires Mr. Brown to purchase a minimum amount of fuel. And if the contract is breached, I don't think the plaintiff is entitled to recover anything more than the minimum that – the minimum performance that was required by the defendant." (R. 4796).

This ruling was correct as a matter of law and certainly did not constitute an abuse of discretion. "The purpose of contract damages is to put the injured party in the same position it would have been had there been no breach." *Lamar Advertising of*

South Dakota, Inc. v. Heavy Constructors, Inc., 2008 S.D. 10, ¶ 36, 745 N.W.2d 371, 376. Put another way: "Notwithstanding the provisions of these statutes, no person may recover a greater amount in damages for the breach of an obligation than he could have gained by the full performance thereof on both sides[.]" SDCL 21-1-5; *see also Gul v. Center for Family Medicine*, 2009 S.D. 12, ¶ 14 n.6, 762 N.W.2d 629, 635 n.6; *Bad Wound v. Lakota Community Homes, Inc.*, 1999 S.D. 165, ¶ 9, 603 N.W.2d 723, 725. That has been the law in South Dakota since Territorial Days.

If Brown had purchased 75 percent of the maximum annual volume of fuel designated in the agreements, it is undisputed that he would have fully performed them and there would have been no breach. Thus, awarding Stern Oil lost profits based on Brown purchasing 75 percent of the maximum annual volume of fuel he was required to purchase would place Stern Oil in the same position as it would have been had there been no alleged breach. Awarding Stern Oil *more* than that in lost profits is prohibited by SDCL 21-1-5 and this Court's precedent.

Stern was permitted to present its expert testimony to the jury regarding its alleged lost profits up to the point of full performance under the contracts by Brown. The only evidence excluded by the circuit court was the inflated damages summary that would have allowed Stern Oil to argue that it should recover damages based on Brown failing to buy *more* gasoline than the agreements required him to buy. Admitting such evidence would have been reversible error. *See, e.g., Arcon Construction Co. v. South Dakota Cement Plant*, 349 N.W.2d 407, 414 (S.D. 1984) (reversing jury

award for damages for equipment costs that were more than contractor would have received for equipment costs under its bid).

IV. The award of prejudgment interest was erroneously calculated and should be reduced.

Pursuant to a notice of review, Brown respectfully appeals from the circuit court's award of prejudgment interest. In its post-trial decision, the court overruled Brown's objections and held that "Stern Oil is entitled to pre-judgment interest from the date of loss, May 8, 2007, which is the day Brown abandoned the contract and unilaterally stopped paying Stern Oil for fuel." (R. 4657).

SDCL 21-1-13.1 allows for prejudgment interest calculated "from the day that the loss or damage occurred, except during such time as the debtor is prevented by law, or by act of the creditor, from paying the debt." This Court has recognized that "[t]he purpose of prejudgment interest is to do 'justice to one who has suffered a loss at the hands of another person.'" *Reuben C. Setliff, III, M.D., P.C. v. Stewart*, 2005 S.D. 40, ¶ 47, 694 N.W.2d 859, 871 (citation omitted). Prejudgment interest seeks to "'compensate an injured party for [the] wrongful detention of money owed.'" *Id.*

Here, prejudgment interest was not calculated from the day that the loss or damage occurred as the statute requires, and it was calculated as continuing to run during the entire time that this case was subject to the erroneous summary judgment ruling and subject to stay on appeal in which that ruling was reversed. This case involved two contracts for the purchase of gasoline over a period of ten years, with the Freeway Mobil contract beginning on June 1, 2005 and ending on September 1,

2015, and the Exxon Goode to Go contract beginning in September 1, 2005 and ending on September 1, 2015. (Section 3) (R. 3111, 3215).

The circuit court, however, held that Stern Oil is entitled to pre-judgment interest for damages awarded for the entire contract terms running from May 8, 2007, the date Brown first notified Stern Oil that it did not intend to continue to purchase fuel. (R. 4356). But any loss to Stern Oil did not occur all at once on that spring day in 2007, but rather occurred in annual increments over a period of almost nine years from that date, in each year that Brown failed to purchase at least 75 percent of the maximum annual volume for that particular year and Stern Oil was deprived of the use of the finds for that year. *See Casper Lodging, LLC v. Akers*, 2015 S.D. 80, ¶¶ 47, 871 N.W.2d 477, 499-500.

Allowance of 8.75 years of prejudgment interest for lost profits from the entire remaining terms of both agreements (R. 4356) from the date of the first notice of intent to breach violated SDCL 21-1-13.1 and resulted in a large windfall to Stern Oil, as did awarding it prejudgment interest for the entire time that was wasted while it unsuccessfully sought to defend the first appeal and when it obtained a continuance to delay the scheduled trial of this action. (R. 2851). In its de novo review, this Court should reverse the circuit court's legally erroneous award of prejudgment interest and remand for proper calculation.

CONCLUSION

WHEREFORE, Appellee Jim Brown respectfully request that this Honorable Court affirm, with the exception of the prejudgment interest award.

Dated this 1st day of September, 2017.

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The undersigned certifies that a true and correct copy of the foregoing brief and appendix was served electronically upon:

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CERTIFICATE OF COMPLIANCE

Under SDCL 15-26A-66(b)(4), I certify that this brief complies with the requirements of the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 9,980 words from the Statement of the Case through

the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Ronald A. Parsons
Ronald A. Parsons, Jr.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Nos. 27937, 27948

STERN OIL COMPANY, INC.

Plaintiff and Appellant,

v.

JAMES R. BROWN d/b/a EXXON GOODE TO GO and FREEWAY MOBIL,

Defendant and Appellee.

Appeal from the Circuit Court, Second Circuit
Minnehaha County, South Dakota

The Honorable Lawrence E. Long
Circuit Judge

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Notice of Appeal filed July 22, 2016
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PRELIMINARY STATEMENT

Appellant Stern Oil Company, Inc. will be referred to as "Stern Oil." Appellee James R. Brown will be referred to as "Brown." References to the settled record will be designated as "SR." References to the transcript for the jury trial will be designated as "TT." References to the transcript for the first court trial will be designated as "TT1." References to exhibits introduced at trial will be referred to as "Ex." References to various hearing transcripts will be designated "HT" followed by the date of the hearing. References to Stern Oil's appendix will be designated as "App." References to Brown's Brown Brief shall be designated as "Brown Brief."

ARGUMENT

I. The Trial Court Ignored 40 Years of Legal Precedent by Refusing to Enforce the Parties' Contractually-Mandated Attorneys' Fees Provision

A. According to Long-Standing South Dakota Law, Stern Oil was the Prevailing Party

1. South Dakota Statutes and Supreme Court Precedence Dictate that the Prevailing Party is the Party in Whose Favor Judgment was Entered

Although the standard of review is abuse of discretion, that does not empower the trial court to commit an error of law. *Credit Collection Servs., Inc. v. Pesicka*, 2006 SD 81, ¶5 ("by definition, a decision based on an error of law is an abuse of discretion."). Here, the trial court *lacked* the discretion to deny Stern Oil its contractually-mandated attorney's fees and costs.

According to this Court, the prevailing party is "the party in whose favor the decision or verdict is or should be rendered and judgment entered." *City of Aberdeen v. Lutgen*, 273 N.W.2d 183, 185 (S.D. 1979); *Picardi v. Zimmiond*, 2005 SD 24, ¶17; *Highmark, Inc. v. Nw. Pipe Co.*, 2016 WL 7017260, *2-3 (D.S.D. Nov. 30, 2016). In light of forty years of clear precedent, the trial court had no legal basis to deny that Stern Oil is the prevailing party. It should have applied this rule and awarded Stern Oil its attorneys' fees and costs.

Brown's argument hinged on the idea that, because Stern Oil did not get all the money it requested, it was not the prevailing party. This Court, however, has explicitly rejected that argument. In *Crisman v. Determan Chiropractic, Inc.*, 2004 SD 103, ¶¶20-23, the defendant made the same argument as Brown: Dr. Crisman was not the prevailing party because he was the appellant and did not get all the money he demanded. This Court rejected that view because, "while [Defendant Determan] succeeded in cutting

his losses, [Plaintiff Crisman] not only obtained a money judgment, which was the essence of his lawsuit, but also he prevailed on the noncompetition clause and vacation pay. Dr. Crisman prevailed." *Id.*

A party "cutting its losses" does not negate the other party's prevailing status. *Id.* Stern Oil prevailed on all the major issues of the case. While the trial court, mistakenly, denied some of Stern Oil's damages models, Brown lost all his substantive arguments. As such, the general rule of the law applies because the verdict was in Stern Oil's favor, and Stern Oil received a judgment for $404,172.77 against Brown. The trial court could not deny fees and costs under those facts.

2. Brown Misreads the Applicable South Dakota Cases and Relies on Inapplicable Law from other Jurisdictions

Brown parenthetically cites several South Dakota cases purportedly supporting his position but, because these cases do not actually support his argument, Brown relies on other jurisdictions. Brown leaves out critical facts of the South Dakota cases and fails to disclose that the jurisdictions he relies on, for the most part, have different underlying standards.

Brown first cites *Culhane v. Michels*, 2000 SD 101. That case, however, is not a breach of contract case. It is a family law case. Furthermore, *Culhane* hinged on whether a prevailing party was automatically entitled to costs and fees under SDCL 15-17-37, rather than who was actually the prevailing party. In fact, as this Court observed, although "SDCL 15–17–37 grants no discretion, SDCL 15–17–52 allows a court to 'limit the taxation of disbursements in the interests of justice.'" These statutes create a different standard entirely, a subjective one founded in equity and with no applicability in this case. Contrary to Brown's representations, this Court never addressed who was the

prevailing party in *Culhane*. It only noted that a trial court could decline to tax costs if it were "in the interests of justice." That analysis never occurred here and would be inapplicable because the issue is not taxation of costs; it is the application of contractually-mandated attorneys' fees.

Brown next cites *Geraets v. Halter*, 1999 SD 11. Brown claims the "plaintiff was not prevailing [sic] party even though judgment of compensatory damages was awarded to plaintiff." Brown Brief at 19. Brown conveniently omits, however, that the plaintiff lost the only issue in dispute: specific performance. *Geraets*, 1999 SD 11, ¶21. Unlike here, the defendant in *Gereats* "offered to reimburse Geraets prior to [that] lawsuit." *Id*. Because the defendant won the only contested issue, the defendant was the prevailing party. The opposite occurred here.

Brown also cites *Nobel for Drenker v. Shaver*, 1998 SD 102. In that case, however, there was no judgment. There were also derivative issues for the trial court to determine. As such, the trial court was correct in saying there was no prevailing party. That is not the case here, where we have a verdict and judgment in Stern Oil's favor.

Finally, Brown cites *Michlitsch v. Meyer*, 1999 SD 69, claiming it supports the trial court's discretion to deny fees and costs. That is not so. In *Michlitsch*, the parties were involved in a bar fight. *Id.*, ¶2. Michlitsch claimed Meyer severely beat him, while Meyer claimed Michlitsch tripped and fell. *Id*. Meyer was charged with simple assault. *Id*., ¶3. Michlitsch brought, but voluntarily dismissed, a personal injury suit against Meyer, after which Meyer filed an application for an award of costs, disbursements, and attorneys' fees, claiming he was the prevailing party. *Id*., ¶7.

Like *Culhane*, this Court noted in *Mitchlitsch* that, even though "SDCL 15–17–37

does not provide the court discretion to deny the recovery of disbursements," a trial court is "granted such discretion in SDCL 15–17–52 and SDCL 15–17–53." *Id*., ¶15. In fact, as this Court noted, for the purposes of SDCL 15–17–52 and 15–17–53, "[a]chieving prevailing party status does not require a trial court to grant recovery for disbursements." *Id*., ¶13. Here, the issue is not whether the trial court should have awarded Stern Oil its disbursements. The issue, instead, is whether the trial court had discretion to refuse to enforce contractually-mandated attorneys' fees. None of Brown's South Dakota cases support the position he contends they do.

Ultimately, Brown's South Dakota cases are not comparable to this case. None of those cases addressed the issues here: an attorneys' fees provision in an enforceable contract. Instead, they treaded the murky water of equitable taxing of costs. Not only are those two completely different standards, they are based on wholly different legal foundations.

Brown's other cases are similarly inapplicable, but for different reasons. That is because the jurisdictions Brown relies on have different underlying standards than those here in South Dakota.

Most illustrative of that point is the law in Idaho, which Brown cites and quotes extensively. To determine prevailing party there, Idaho Civil Procedure requires the trial court to "consider the final judgment or result of the action in relation to the relief sought by the respective parties" and to apportion costs in mixed result cases. I.R.C.P. 54. This is much different than the standard in South Dakota. The Idaho cases thus have no persuasive value. Arizona follows a similar mixed outcome standard. *See Associated Indem. Corp. v. Warner*, 694 P.2d 1181 (Ariz. 1985) (prevailing party depends on "all the

circumstances, the reasonableness of the parties' positions, and their respective financial positions"). Wyoming and Nevada likewise require an in-depth analysis of the underlying issues of the case, which is not the standard in South Dakota. *Schaub v. Wilson*, 969 P.2d 552, 561 (Wyo.1998) (a party prevails "if his or her position is improved by the litigation."); *Valley Elec. Ass'n v. Overfield*, 106 P.3d 1198, 1200 (Nev. 2005) (a party prevails "if it succeeds on any significant issue in litigation which achieves some of the benefit it sought in bringing suit.").

The law in Montana and Washington is similar to South Dakota, in that the prevailing party is the one "who has an affirmative judgment rendered in his favor at the conclusion of the entire case." *Schmidt v. Colonial Terrace Assocs.*, 694 P.2d 1340, 1344 (Mont. 1985); *Riss v. Angel*, 934 P.2d 669, 681 (Wash. 1997) (further holding if neither party obtains an affirmative judgment, the court determines the substantially prevailing party). However, both parties obtained summary judgment against one another in Brown's Montana case, making it inapplicable here. *Sullivan v. Cherewick*, 391 P.3d 62, 64, 70 (Mont. 2017) ("The District Court granted summary judgment against all parties on their respective claims.").

This Court should proceed with caution with Brown's cited case law because many of those cases rely on situations where there is no verdict or judgment entered, falling outside our general rule. Those cases, often referenced by commentators as "mixed outcome" cases, require more in-depth analysis than our "verdict and judgment in favor" standard. Moreover, those cases are inapplicable, irrelevant to the inquiry here, and lend nothing to the analysis.

The trial court inexplicably determined that a party who won every substantive

issue and obtained a verdict of $260,464 and judgment of $404,172.77 was somehow not the prevailing party. Stern Oil prevailed on all its causes of action. Brown lost all five counts of his counterclaim. R1577-1611. Brown also asserted 19 affirmative defenses and lost all but – arguably – one. *Id*. That one affirmative defense only applied to the smallest portion of Stern Oil's claimed damages.

Under pretty much any standard, even those proffered by Brown, Stern Oil should have been the prevailing party. *See Highmark*, 2016 WL 7017260, at *2-3 (interpreting South Dakota standard to include notion that "a prevailing party is the party prevailing on the main issue in dispute," along with the general rule of verdict rendered/judgment entered). The trial court's failure to award Stern Oil contractual fees and costs is an abuse of discretion and error of law requiring reversal and remand.

B. The Trial Court Lacked the Discretion to Disregard the MFSAs' Attorneys' Fees Provision

It is undisputed that the parties' contracts include a term by which the prevailing party is entitled to its costs and attorney's fees in any action to enforce the contracts. App. 31, ¶32. The MFSAs are unambiguous, and this term is a bargained-for exchange the parties expressly included in their contracts. In fact, parties include such terms in their contracts to dissuade contracting parties from unjustified failures to perform or from asserting contract defenses that lack merit.

The jury found the contracts are valid, rejecting Brown's litany of affirmative defenses, upon all of which the jury was instructed. R3035-3075. The jury found Brown breached the MFSAs and awarded Stern Oil lost profit damages of $260,464.00. A judgment was entered in Stern Oil's favor for $404,172.77.

In this case, the trial court was *required, as a matter of contract*, to award Stern

Oil its attorneys' fees and its costs. Those matters are not within the trial court's discretion. "If a contract provides for the payment of attorneys' fees and expenses incurred in the enforcement of a contract provision, the trial court must comply with the terms of the contract and award them to the prevailing party." *DocMagic, Inc. v. Mortg. P'ship of Am., L.L.C.*, 729 F.3d 808, 812 (8th Cir. 2013) (prevailing party is who obtains a judgment from the court) (applying Missouri law). This is black-letter law in South Dakota and in every jurisdiction Stern Oil surveyed. *Cotton v. Manning*, 1999 SD 128, ¶15 (the court is "to enforce and give effect to the unambiguous language and terms of [a] contract"); *Stabler v. First State Bank of Roscoe*, 2015 SD 44, ¶32 ("[P]arties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, *but which the courts are bound to enforce*…Plaintiff had their chance to object, but specifically agreed that the terms of the contract granted Defendant's attorney fees if they prevailed.") (emphasis added); *Cobabe v. Crawford*, 780 P.2d 834, 836 (Utah Ct.App. 1989) (provisions in written contracts for attorney fees must be honored and trial court does not possess the same equitable discretion to deny such fees as in cases without contracts for fees); *Singleton v. Frost*, 742 P.2d 1224, 1228 (Wash. 1987) (Washington law clearly provides a court with no discretion to deny contractual attorneys' fees to a prevailing party); *Jacobson v. Jacobson*, 595 So. 2d 292, 294 (Fla.Dist.Ct.App. 1992) (court has no discretion to decline to enforce contractual provisions for an award of prevailing party attorneys' fees any more than any other valid contractual provision); *Albright v. Mercer*, 945 S.W.2d 749, 751 (Tenn.Ct.App. 1996) (where parties' contract provides prevailing party is entitled to reasonable attorneys' fees in litigation to enforce contract, the party who prevails is contractually entitled to recover

its reasonable attorneys' fees, and trial court has no discretion regarding whether to award attorneys' fees or not); *Omega v. Wells Fargo & Co.*, 2012 WL 2906240, *3 (N.D.Cal. July 16, 2012) (under California statutory and Supreme Court law, prevailing parties are entitled to contractual attorneys' fees as a matter of right and district courts have no discretion to deny such fees); *Remarc Homes, Inc. v. Kumar*, 616 So.2d 498, 499 (Fla.Dist.Ct.App. 1993) (attorneys' fee provision in a contract cannot be ignored and courts have no discretion to decline to enforce them); *Yim K. Cheung v. Wing Ki Wu*, 919 A.2d 619, 625 (Me. 2007) ("If a contract provides for the payment of attorneys' fees and expenses incurred in the enforcement of a contract provision, the trial court must comply with the terms of the contract and award them to the prevailing party.").

Stern Oil was "the party in whose favor the decision or verdict [was] rendered and judgment entered." *City of Aberdeen*, 273 N.W.2d at 185. It won all of the substantive issues and received a $404,172.77 judgment. The trial court abused its discretion by finding otherwise. Its mistake can only be rectified by reversing and remanding.

II. The Trial Court Abused its Discretion by Instructing the Jury Regarding Consequential Damages for Stern Oil's Direct Damages

Brown's brief misses the same issue the trial court missed: whether Stern Oil's damages were direct or consequential. Brown ignores the fact that there is near unanimity amongst other courts that when a buyer, like Brown, breaches a contract with his supplier, the supplier's lost profits are its *direct* rather than consequential damages. Such direct damages do not require foreseeability, while consequential damages do. The trial court abused its discretion by allowing Brown to try to characterize Stern Oil's damages as consequential, rather than direct damages. Brown ignores the general rule that "lost profits are considered to be general or direct damages in a breach of contract

case, while they are considered to be special or indirect damages in a tort case." *Computrol, Inc. v. Newtrend, L.P.*, 203 F.3d 1064, 1071 (8th Cir. 2000) (citations omitted).

A court abuses its discretion when, like here, it mischaracterizes benefit of the bargain damages as consequential rather than direct damages. *Jewish Federation of Greater Des Moines v. Cedar Forest Products Co*., 2003 WL 23008855, *3 (Ia.Ct.App. 2003). That is because a lost volume seller, like Stern Oil, is entitled to "the amount it would have profited on the payments [the breaching party] promised to make for the remaining years of the contract." *Id.*

"The rationale for these holdings appears to be that a lost volume seller can handle a certain number of sales during the year and when one negotiated sale is lost, the seller simply cannot recoup that anticipated profit. Instead, the seller is one sale short of normal capacity." *Id.* (citation omitted). As a result, "the lost profits are the direct and probable consequence of the breach." *Tractebel Energy v. AEP Power*, 487 F.3d 89, 109 (2d Cir. 2007).

"The profits are precisely what the non-breaching party bargained for, and only an award of damages equal to lost profits will put the non-breaching party in the same position he would have occupied had the contract been performed." *Id.* at 109-110 (citation omitted). "[T]raditional contract damages would not fully compensate the damaged party for its losses because the second sale would likely mitigate nearly all of the party's lost profit damages from the first sale, thus depriving the party of its profit on the second sale." *Chicago Title Ins. v. Magnuson*, 487 F.3d 985, 996 (6th Cir. 2007).

A lost volume seller should be allowed to recover its lost profits to "ameliorate this unjust result." *Id.*

This distinction is important because direct damages do not require foreseeability. "[A]n aggrieved seller entitled to lost profits as general damages need not show that this form of recovery was within the parties' contemplation absent exceptional circumstances." *M & G Polymers v. Carestream Health, 2*010 WL 1611042, *34 (Del. Sup. 2010). In fact, "it makes little sense . . . to require an aggrieved seller otherwise entitled to proceed under § 2-708(2) to show that the parties specifically contemplated that its direct damages were to be calculated based upon lost profits." *Id.*, *35.

Brown concedes that Stern Oil is a lost volume seller under SDCL 57A-2-708(2). The jury determined that Stern Oil was a lost volume seller, and Brown did not appeal that decision. The only remaining question, then, should have been what profits did Stern Oil lose when Brown breached the MFSAs. It was error, therefore, for the trial court to insert foreseeability as a prerequisite to Stern Oil's damages.

Additionally, Brown never distinguishes amongst the three ways Stern Oil makes a profit. Brown simply follows the trial court's ruling that these were all consequential, rather than direct, damages. As Stern Oil observed in its Appellant's brief, however, the Restatement "does not suggest that the specific loss in question must have been within the contemplation of the parties at the time of contracting." Brief at 20 (*citing Anchor Sav. Bank, FSB v. United States,* 597 F.3d 1356, 1364 (Fed.Cir. 2010)). In fact, Brown makes no attempt to dispute the fact that his argument was explicitly rejected. *Anchor Sav. Bank, FSB*, 597 F.3d at 1364 ("As a leading commentator has explained, summarizing the foreseeability limitation on expectancy damages, [t]he magnitude of the loss need not have been foreseeable, and a party is not disadvantaged by its failure to disclose the profits that it

expected to make from the contract….").

This Court should not confuse Stern Oil's *lost profits*, which case law dictates are legally foreseeable direct damages, with the *components* of *how* Stern Oil earns a profit, which do not need to be disclosed. Appellant's Brief at 26. S*ee also Midland Hotel Corp. v. Reuben H. Donnelley Corp.*, 515 N.E.2d 61, 67 (Ill. 1987) ("Clearly, the plaintiff's profits formed the very basis of its contract with defendant; it cannot be said that such profits were only collateral to the contract. Thus, as plaintiff's lost profits were a direct and foreseeable consequence of defendant's breach as a matter of law, the *trial court properly refused to tender a 'reasonable contemplation' instruction to the jury*."); 25A C.J.S. Damages § 432 ("A jury instruction that lost profits must have been within the reasonable contemplation of the defendant when the contract was formed is improper where the plaintiff's lost profits are a direct and foreseeable consequence, as a matter of law, of the defendant's breach of contract.").

Brown further compounds these problems by baselessly claiming Stern Oil was not damaged by this error. Brown attempts to take the waiver argument, which only applied to diesel sales, and apply it to the gas sales, which was inapplicable under the contract. The trial court recognized this difference, App. 17, but now Brown conflates the issue to confuse the Court. The court's decision to instruct the jury on foreseeability should be reversed.

III. The Trial Court Erred by Excluding Stern Oil's Lost Profits Evidence

Brown attempts to completely remake how damages are calculated in South Dakota. According to Brown, the rule is no longer that any *reasonably certain* method of calculating damages should be presented to the jury. Instead, Brown asks this Court to rule that breach of contract damages are limited to the *minimum possible* instead of the

reasonably certain.

Ultimately, because the damages here are governed by contractual provisions, they should be reviewed *de novo*. *Brown v. Douglas School District*, 2002 SD 92, ¶ 9 ("When factual determinations are made on the basis of documentary evidence, however, we review the matter de novo…."). Even under the abuse of discretion standard, however, the trial court erred by not letting Stern Oil present *reasonably certain* damage models to the jury. *Table Steaks*, 2002 S.D. 105, ¶ 38.

A. The Trial Court Misinterpreted the MFSAs, Requiring Reversal

Brown and the trial court's error started with a faulty assumption: that the MFSAs assumed a static minimum fuel purchase requirement. To the contrary, the MFSAs require a continual recalculation of the minimum amount of fuel Brown had to purchase each year. App. 28, ¶4(b). Under this provision, Brown had to buy *no less* than 75% of "the *greater* of *actual* volume in the prior month or *actual* volume in the current month of the prior year…." *Id*. (emphasis added).

The trial court compounded its error by ruling that the MFSAs limited damages to the *minimum* amount that could possibly be purchased:

> [T]he contract requires Mr. Brown to purchase a minimum amount of fuel. And if the contract is breached, I don't think the plaintiff is entitled to recover anything more than the minimum that – the minimum performance that was required by the defendant.

(R. 4796). That runs contrary to the provision in the MFSAs that required Brown to "use good faith and best efforts to *maximize* the sale" of the fuel he purchased from Stern Oil. App. 28, ¶4(a) (emphasis added). In other words, the MFSAs required the jury to consider more than just the minimum possible amount of damages. The MFSAs dictated that the jury determine how much gas Brown would have purchased had he exercised

"good faith and best efforts to maximize" the amount of fuel that he sold. *Id*.

Brown's argument ignores the *whole meaning* of the contract in favor of a narrow reading of one section. *See Standard Fire Ins. Co. v. Continental Resources, Inc.*, 2017 SD 41, ¶ 21 ("It is well established that we review contracts as a whole and 'give effect to the language of the entire contract and particular words and phrases are not interpreted in isolation."). By ignoring the whole meaning of the MFSAs and by focusing, instead, on isolated passages, the trial court erred. Its ruling should be reversed.

Brown concedes that the MFSAs are *requirements contracts*. Per statute, a requirements contract is not limited to the *minimum possible* amount of damages. SDCL 57A-2-306(2). Instead, requirements contracts, like the MFSAs, obligate Brown to "use best efforts to promote their sale." *Id*. By not allowing the jury to determine how much gas Brown would have purchased had he "use[d] best efforts to promote their sale," the trial court rejected the applicable contractual and statutory rules. That, in itself, further requires reversal.

B. The Trial Court Rejected Reasonably Certain Damage Models, Requiring Reversal

Brown's brief fails to dispute that Stern Oil's damages models were reasonable. Instead, Brown only claims that the damages models run counter to the MFSAs. Brown Brief at 32-33. As noted above, however, that argument lacks merit because it misreads the applicable section and ignores other sections that give further guidance.

A jury is entitled to hear any model of damages that is *reasonably certain*. *Table Steaks*, 2002 S.D. 105, ¶ 38. So long as a damages model is "not wholly speculative," it should be presented to the jury. *Pillsbury Co. v. Illinois Cent. R.R.*, 687 F.2d 241, 246 (8th Cir.1982).

The trial court made no finding that Stern Oil's damages models were not reasonably certain. In fact, the trial court assumed the opposite; that Stern Oil's damages models were reasonably accurate. *See* App. 5 ("I'm assuming that Dr. Brown's calculations are correct" and "he was able to calculate [Stern Oil's damages]."). By rejecting models that are reasonably accurate, the trial court abused its discretion.

The trial court rejected expert testimony regarding how much fuel Brown would have purchased had Brown exercised his best efforts. *See Ducheneaux v. Miller*, 488 N.W.2d, 902, 915 (S.D. 1992) ("the plaintiff is entitled to recover all his detriment proximately caused by the breach, not exceeding the amount he would have gained by full performance"). Brown, also, never disputed these estimates.

Brown completely ignores Scott Stern's expert testimony that "[w]ithin a percentage point or two, [SternOil's franchise dealers] would meet that 100 percent [of maximum annual volume] number." TT1 104; Table 4. That testimony considered numerous factors that were reasonable and certain. Those factors included traffic count and type, road type, turning activity (i.e., whether customers have to turn left or right to access the station), the gas station's functional capacity (i.e., number of pumps), and demographic Metropolitan Statistical Analysis data such as household income, business opportunities, and economic growth. TT1 99-101.

Brown also repeatedly claims that Stern Oil's markup would be limited to 1.5 cents "over its cost." Brown Brief, p. 8. That statement is factually inaccurate and typifies Brown's word games that were rejected by the jury. Rather than Stern Oil's "cost," the price Brown had to pay was 1.5 cents above the "rack price," which is a specific term of art. TT95-96, 103.

Because the MFSAs were requirements contracts, the jury should have learned how much fuel Brown would have purchased, using reasonable estimates. *Empire Gas Corp. v. Am. Bakeries Co*., 840 F.2d 1333, 1340 (7th Cir.1988) ("[A] seller is entitled to expect that the buyer will buy something like the estimated requirements, unless it has a valid business reason for buying less."). In fact, the multiple models that Stern Oil relied on are regularly permitted in these kinds of cases. *See, e.g., John Morrell & Co. v. Local Union 304A of United Food & Commercial Workers, AFL-CIO*, 913 F.2d 544, 559 (8th Cir. 1990) (district court allowed expert to discuss eight models of damage calculations with a range of estimates from $20 million to $31 million). The MFSAs did not give Brown the discretion to just turn off his pumps once he reached the minimum. Brown had to use his best efforts to maximize his sales.

Judge Zell relied on these excluded damage models in his decision. He found Brown would have sold the second highest volume of fuel projected by Stern. App. 41. During the first appeal, this Court never concluded that Zell's decision was erroneous. The jury must determine – as it is a question of fact – the size of the gap between Brown's actual performance and what that performance while have been had he exercised his best efforts to maximize sales. Stern Oil's evidence was sufficient because it would have allowed the jury to "approximate damages on the basis of just and reasonable inferences." *Wagner Elec. Corp. v. Local 1104, Int'l Union of Elec. Workers*, 496 F.2d 954, 957 (8th Cir. 1974).

By disallowing admittedly accurate damage models, the trial court ruled contrary to reason and evidence. *Jensen v. Lincoln Cty. Bd. Of Comm'rs*, 2006 SD 61, ¶ 10 ("A circuit court abuses its discretion if its decision is clearly against reason and evidence.").

Furthermore, because the trial court made an error of law in what kinds of damage models are allowed in requirements cases, it further abused its discretion. *Credit Collection Servs*, 2006 S.D. 81, ¶5 ("by definition, a decision based on an error of law is an abuse of discretion.").

IV. Brown Agreed to the Prejudgment Calculation Presented to the Court

Brown appeals from the circuit court's award of prejudgment interest. Brown Brief at 34. Brown failed to object and in fact agreed to the calculation. App. 43-44.

A party cannot appeal an issue it did not object to before the trial court. *Truck Ins Exch. v. Kubal*, 1997 SD 37, ¶13 (citing multiple cases). In fact, "[i]n a litany of cases, [this Court has] noted that 'issues not addressed or ruled upon by the [circuit] court will not be addressed by this Court for the first time on appeal.'" *Id.* Furthermore, any argument not supported by authority is waived. *Corbly v. Matheson*, 335 N.W.2d 347, 348 (S.D. 1983); SDCL 15-26A-60(6), 61.

Brown did not object to the prejudgment interest calculation. Brown cites no objection in the record in his brief. That is because Brown consented to it. App. 43-44. Stern Oil Counsel disclosed its calculation on February 8, 2016. App 46-47. Brown's Counsel replied "we will accept the interest due as calculated by Kent [Cutler]." App 43. The only remaining issue was attorneys' fees. App. 48-55.

Brown cites no supporting authority that prejudgment interest gets tolled if there is an appeal. In fact, Brown conceded the argument in post-trial discussions. App. 56 (Brown questioning interest), 59 (Stern Oil asking Brown to provide authority), 44 (Brown accepting judgment with proposed interest calculation). Brown did not provide the requested authority during negotiations and failed to do so in his brief to this Court.

Brown's argument should be rejected on that basis alone. In fact, other Courts have rejected Brown's argument and affirmed prejudgment interest calculated from the date of repudiation. *See State Mortgage Co v. Rieken Dev., Inc*., 664 P.2d 358, 359 (Nev. 1983) (reversing because trial court did not calculate prejudgment interest starting on the date of repudiation).

The prejudgment interest was submitted in the Proposed Order on June 16, 2016. App. 62-63. Brown's Counsel replied: "Judge Long, I have no objection to this form. I assume you will or have filed your opinion." *Id.*, 44. Despite this stipulation, Brown now asserts he objected. Consistent with the long line of authority of this Court, his argument is waived. *Corbly*, 335 N.W.2d at 348.

Brown further erroneously claims that prejudgment interest was calculated from 2007, which is disproven by the parties' communications. App. 47. Interest was calculated in annual increments for each year of the contract starting in 2008, precisely how Brown asserts it should have been done.

Dated this 19th day of September, 2017.

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellant's Reply Brief does not exceed the word limit set forth in SDCL § 15-26A-66, said Brief containing 4,992 words, exclusive of the table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, any signature blocks, and any certificates of counsel.

Michael D. Bornitz

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of September, 2017, I sent the original and two (2) copies of the foregoing by United States Mail, first class postage prepaid to the Supreme Court Clerk at the following address:

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I also hereby certify that on this 19th day of September, 2017, I sent an electronic copy of Appellant's Reply Brief via email to counsel for Appellee as follows:

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