IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27390

MOLLY R. NYLEN and BRENDON W. NYLEN,

Appellees,

v.

MARY ELLEN NYLEN,

Appellant.

Intermediate Appeal from the
Circuit Court, First Judicial Circuit,
Union County, South Dakota.

The Honorable Steven R. Jensen, Judge, presiding.

APPELLANT'S BRIEF

Order Granting Petition for Allowance of Appeal from Intermediate Order filed on April 6, 2015.

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JURISDICTIONAL STATEMENT

On February 25, 2015, the Honorable Steven R. Jensen, Presiding Judge of the First Judicial Circuit of South Dakota, issued an Order directing Mary Ellen Nylen ("Mary Ellen" / "Appellant" / "Defendant") to produce certain documents and allowing Molly Nylen and Brendon Nylen ("Molly and Brendon" / "Appellees" / "Plaintiffs") to take the unsupervised deposition of attorney Irene Schrunk ("Attorney Schrunk"). On March 9, 2015, Mary Ellen submitted her Petition for Discretionary Appeal of Judge Jensen's Order and an Application for Stay of the circuit court proceedings to the South Dakota Supreme Court. On March 11, 2015, Chief Justice Gilbertson issued an Order staying all proceedings in Union County civil file 14-128. On April 6, 2015, Chief Justice Gilbertson issued an Order granting the Petition for appeal of Judge Jensen's intermediate Order.

STATEMENT OF THE LEGAL ISSUES

ISSUE 1: Mary Ellen Nylen's Motion to Quash the Subpoena Duces Tecum to attorney Irene Schrunk should have been granted in its entirety because an attorney – client relationship existed between Mary Ellen and Attorney Schrunk from early December 2013 to November 2014.

Trial Court: Granted the motion in part and denied the motion in part. The court held an attorney – client relationship only existed between Mary Ellen and Attorney Schrunk from early December 2013 to early January 2014.

Most Relevant Cases:

1. *State v. Catch the Bear*, 352 N.W.2d 640 (S.D. 1984).
2. *Pinnacle Pizza Co., Inc. v. Little Caesar Enterprises, Inc*., 627 F. Supp. 2d 1069 (D.S.D. 2007).
3. *Parnes v. Parnes*, 80 A.D.3d 948, 915 N.Y.S.2d 345 [2011].

Most Relevant Statutory Provisions:

1. SDCL 19-13-2.

2. SDCL 19-13-3.

3. SDCL 19-13-4.

ISSUE 2: Mary Ellen Nylen did not waive her attorney – client privilege with her California and South Dakota attorneys when she shared those communications with Attorney Schrunk, because Mary Ellen had an attorney – client relationship with all of those attorneys and therefore sharing her communications with any of them would not constitute a waiver under SDCL 19-13-26 and SDCL 19-13-3(5).

Trial Court: Ruled that Mary Ellen's communications with her California and South Dakota attorneys that were shared with Attorney Schrunk constituted a waiver of the attorney – client privilege, as to those specific communications.

Most Relevant Cases:

1. *State v. Rickabaugh*, 361 N.W.2d 623 (S.D. 1985).

2. *State v. Catch the Bear*, 352 N.W.2d 640 (S.D. 1984).

Most Relevant Statutory Provisions:

1. SDCL 19-13-26.

2. SDCL 19-13-3(5).

STATEMENT OF THE CASE

This litigation arises out of an alleged gift made by Mary Ellen to her adult children, Molly and Brendon, in December 2013. This action was first commenced in Iowa and then later filed in South Dakota. There is a co-pending divorce action in Union County entitled Mark Allen Nylen v. Mary Ellen Nylen, CIV. 14-1, which was commenced on January 1, 2014. There is also a Restraining Order case in the Superior Court of California, County of Santa Barbara that was filed on February 14, 2014, and is entitled Molly Nylen v. Mary Ellen Nylen, Case Number 1440075.

Molly and Brendon issued a subpoena duces tecum to Attorney Schrunk on November 21, 2014. Mary Ellen filed a Motion to Quash that subpoena based on her assertion of the attorney – client privilege on December 31, 2014. Molly and Brendon filed their resistance to that motion on January 8, 2015. A hearing on the Motion to Quash was held on January 13, 2015 at which Mary Ellen testified and arguments were heard. Judge Jensen took the matter under advisement and ordered Mary Ellen to prepare a privilege log and provide the documents requested by the subpoena for an *in camera* review.

On January 22, 2015, Judge Jensen entered an Interim Order to Quash which stayed the deposition of Attorney Schrunk pending the court's review, *in camera*, of requested documents in the possession of Attorney Schrunk that were claimed to be attorney – client privileged. Judge Jensen issued a memorandum decision on February 12, 2015, directing Mary Ellen to produce certain written communications between herself and Attorney Schrunk, allowing Molly and Brendon to take Attorney Schrunk's unsupervised deposition, and permitting questions regarding communications with Mary Ellen occurring after January 1, 2014. Judge Jensen issued an Order to that effect on February 25, 2015. Mary Ellen has appealed that Order.

STATEMENT OF THE FACTS

The parties have conducted extensive discovery in this case. As part of the discovery process, Molly and Brendon subpoenaed Irene Schrunk, a licensed and practicing attorney in Sioux City, Iowa. A29. Her area of expertise is family law. A7. Attorney Schrunk represented Mary Ellen in her first divorce in 1991. A7. Since that

time, Mary Ellen and Attorney Schrunk have been friends. A7-8. In addition to being friends, Attorney Schrunk has been on the board of the Mark and Mary Ellen Nylen Foundation, is appointed as Personal Representative by Mary Ellen's Will, is appointed as a Successor Trustee for the Nylen family trusts, and has provided Mary Ellen with legal advice on those matters as well as other various issues over the past 24 years. A7, 9-10. Attorney Schrunk has also provided legal services to Mark Nylen. A15. Attorney Schrunk did not bill Mary Ellen for most of the work and advice she provided. A14.

From early December 2013 to November of 2014, Mary Ellen communicated with Attorney Schrunk seeking legal advice on various issues in the three lawsuits that Mary Ellen was defending. A29. Some of those communications were by telephone or in person at Attorney Schrunk's office and some were by email. A10-11, 13. Mary Ellen testified that she had an expectation that their communications, whether oral or written, would be confidential. A29. Attorney Schrunk was never formally retained during this time nor did she bill Mary Ellen for her services. A29.

The Appellees' Subpoena Duces Tecum to Irene Schrunk requested testimony and all documents evidencing communications between Attorney Schrunk and Mary Ellen. A1-3. Mary Ellen moved to Quash the Subpoena claiming that the communications between her and Attorney Schrunk are protected from discovery pursuant to the attorney – client privilege. A4-5. A hearing was held where Mary Ellen testified about her relationship with Attorney Schrunk and the court heard argument from counsel. A28.

Mary Ellen testified at the hearing that in late November and early December of 2013, her husband, Mark Nylen, demanded she leave her home in California as a result of estrangement issues amongst the Nylen family. A8. Mary Ellen testified that she first contacted Attorney Schrunk, regarding these events, in early December 2013, because she believed her husband was filing for divorce and she needed legal advice. A29. On January 1, 2014, Mary Ellen was served with a summons and complaint for divorce. A16. That same day, Mary Ellen went to Attorney Schrunk's residence seeking legal advice regarding the pending divorce. A16. At that meeting, Attorney Schrunk advised Mary Ellen that she could not *represent* her in the divorce because she had a conflict of interest in that she had previously provided legal services to Mark Nylen. A16. Attorney Schrunk also advised Mary Ellen that despite not being able to represent her, "she would help her in any way she could and she would continue to give [Mary Ellen] legal advice" regarding *any* of her legal issues. A16.

Mary Ellen continued to seek legal advice from Attorney Schrunk over the next approximately 11 months regarding the three cases in which she was a Defendant. A12-13. During that time, Mary Ellen retained attorneys for the divorce case, restraining order case, and this case. A12-13. The majority of their communications were regarding the legal issues with her children, Molly and Brendon. A17. Attorney Schrunk never advised Mary Ellen that there was a conflict of interest in advising her in matters involving her children. A18-20.

Mary Ellen testified that she considered herself a client of Attorney Schrunk just the same as with her other attorneys and believed their communications would be confidential and that any documents provided to Attorney Schrunk would also be

confidential. A9, 14, 29. She further testified that if that were not the case, she wouldn't have continued to communicate with Attorney Schrunk regarding her legal matters. A13-14.

Prior to the hearing on the Motion to Quash, Mary Ellen was deposed. A29. Molly and Brendon introduced parts of that deposition at the hearing. A29. At the deposition, Mary Ellen testified that Attorney Schrunk had not *represented* her since her first divorce nor was Attorney Schrunk *representing* her in the present action or the co-pending divorce action. A29-30.

At the hearing on the Motion to Quash, Mary Ellen clarified her answers to the questions asked at her deposition by explaining her understanding of "representation." Mary Ellen testified that her "understanding of representation by an attorney is one that sits with you in the courtroom or sits beside you at a deposition." A11. Mary Ellen testified that she did not understand that she was being asked at her deposition if Attorney Schrunk was giving her legal advice. A30. Mary Ellen testified she contacted Attorney Schrunk for the purpose of seeking legal advice. A9, 11. She believed she was a client of Attorney Schrunk and she had an expectation that all their communications would be confidential. A14, 29.

At the conclusion of the hearing, the court postponed Attorney Schrunk's deposition, ordered Mary Ellen to provide the court with copies of the documents evidencing communications with Attorney Schrunk and a privilege log (A22-27) detailing each communication for the Court's *in camera* review, and took the decision under advisement. A28-29.

On February 12, 2015, the court issued a memorandum decision which ruled that there was an attorney – client relationship between Mary Ellen and Attorney Schrunk, but that relationship ended in early January of 2014. A32. The decision also directed Mary Ellen to produce most of the documents that she claimed were privileged and allowed Respondents to take the unsupervised deposition of Attorney Schrunk and ask her about any communications with Mary Ellen that occurred after January 1, 2014. A33. An Order to that affect was signed on February 25, 2015. A43-44. Mary Ellen appeals that Order.

ARGUMENT

Mary Ellen appeals the circuit court's order requiring Attorney Schrunk to give a deposition and produce documents in response to a subpoena duces tecum. Mary Ellen argues that the requested discovery is protected by the attorney – client privilege.

The South Dakota Supreme "Court normally reviews a circuit court's discovery orders under an abuse of discretion standard." *Dakota, Minnesota & E. R.R. Corp. v. Acuity*, 2009 S.D. 69, ¶ 47, 771 N.W.2d 623, 636 (citations omitted). However, when the Court is asked to determine whether the circuit court's order violates a statutory privilege, it raises a question of statutory interpretation requiring de novo review. *Dakota, Minnesota & E. R.R. Corp*., 2009 S.D. 69, ¶ 47, 771 N.W.2d at 636 (citations omitted). The circuit court's interpretation of applicable statutes is given no deference under a de novo standard of review. *Westfield Ins. Co., Inc. v. Rowe ex rel. Estate of Gallant*, 2001 S.D. 87, ¶ 4, 631 N.W.2d 175, 176 (citing *Maryott v. First Nat'l Bank of Eden*, 2001 SD 43, ¶ 17, 624 N.W.2d 96, 102). The

trial court's findings of fact are reviewed under a clearly erroneous standard. *Friesz ex rel. Friesz v. Farm & City Ins. Co*., 2000 S.D. 152, ¶ 5, 619 N.W.2d 677, 679 (citing *Jasper v. Smith*, 540 N.W.2d 399, 401 (S.D.1995)).

ISSUE 1: Mary Ellen Nylen's Motion to Quash the Subpoena Duces Tecum to attorney Irene Schrunk should have been granted in its entirety because an attorney – client relationship existed between Mary Ellen and Attorney Schrunk from early December 2013 to November 2014.

South Dakota's attorney – client privilege is codified at SDCL 19-13-3.[1] The definitions relevant to Chapter 19-13 are codified at SDCL 19-13-2.[2] In *State v. Catch the Bear*, 352 N.W.2d 640, 645 (S.D. 1984) the Court set out four elements that must be established to invoke the attorney – client privilege: "(1) a client; (2) a confidential communication; (3) the communication was made for the purpose of facilitating the rendition of professional legal services to the client; and (4) the communication was made in one of the five relationships enumerated in SDCL 19-13-3." A30.

[1] SDCL 19-13-3: "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
(1) Between himself or his representative and his lawyer or his lawyer's representative;
(2) Between his lawyer and the lawyer's representative;
(3) By him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
(4) Between representatives of the client or between the client and a representative of the client; or
(5) Among lawyers and their representatives representing the same client."

[2] SDCL 19-13-2: As used in §§ 19-13-2 to 19-13-5, inclusive:
(1) A "client" is a person, public officer, or corporation, limited liability company, association, or other organization or entity, either public or private, who is rendered professional legal services by a lawyer, or who consults a lawyer with a view to obtaining professional legal services from him;
(3) A "lawyer" is a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation;
(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

The attorney – client privilege, "however, hinges not on the lawyer's perception of the relationship but on the client's belief that he is consulting a lawyer to obtain professional legal services. *Catch the Bear*, 352 N.W.2d at 645 (citing SDCL 19-13-3). Therefore, "while the lawyer at time of the communication is presumed to have authority to claim the privilege, SDCL 19-13-4[3], his own perceptions are not controlling evidence of existence of the privilege." *Id*. at 645-46. "Once a communication is deemed to come within the attorney-client privilege, courts are loathe to invade that privilege." *Pinnacle Pizza Co., Inc. v. Little Caesar Enterprises, Inc.*, 627 F. Supp. 2d 1069, 1072 (D.S.D. 2007) (citing 8 Charles A. Wright, Arthur R. Miller, & Richard L. Marcus, Federal Practice & Procedure § 2017, p. 258 (2d ed. 1994)).

Mary Ellen believed she was a client of Attorney Schrunk. A7, 9, 14. As the circuit court stated, "[t]here is no dispute that [Mary Ellen's] communications were made to an attorney and that she did not intend her communications with [Attorney] Schrunk to be communicated to a third party." A31. Therefore, there was a client, a confidential communication, and the communication was between the client and her attorney. The only question that remains is whether Mary Ellen and Attorney Schrunk's communications were made for the purpose of facilitating the rendition of professional legal services.

[3] SDCL 19-13-4: "The privilege described in § 19-13-3 may be claimed by the client, his guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. *The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client*." (emphasis added).

A review of the hearing transcript will show that Mary Ellen repeatedly testified she was communicating with Attorney Schrunk for the purpose of seeking her professional legal *advice*. Legal advice is a legal service. "The attorney-client privilege operates to protect communications between an attorney and a client relating to legal advice or strategy." 81 Am. Jur. 2d Witnesses § 344 (2015). Therefore, the four minimum elements required to assert the attorney – client privilege were present between Mary Ellen and Attorney Schrunk.

Mary Ellen has been in a whirlwind of legal actions over the past 18 months. She was forced to hire numerous lawyers. Inevitably, these lawyers would discuss various legal issues that were occurring in the three cases in which Mary Ellen is a defendant. Mary Ellen would then communicate with Attorney Schrunk to seek legal advice, which she trusted, valued, and had confidence in. A9. Mary Ellen would then rely on that advice to assist her in making decisions on legal issues that another attorney representing her would actually carry out.

Attorney Schrunk took on an advisory or consulting role while Mary Ellen's other attorneys represented her in the court room and at depositions. The consulting attorney doesn't appear in court but nonetheless is providing professional legal services to the client in the form of advice.

> Legal services need not be rendered in conjunction with actual or potential litigation to qualify for the attorney-client privilege. The attorney-client privilege applies to communications between lawyers and their clients when lawyers act in a counseling and planning role, as well as when the lawyers represent their clients in litigation.

81 Am. Jur. 2d Witnesses § 344 (2015).

Mary Ellen believed Attorney Schrunk was her attorney and sought and received legal advice from her regarding many issues in the three cases in which she was a defendant.

> To establish an attorney-client relationship, the attorney need not appear in court in the client's behalf (assuming court appearances are contemplated) or even express his consent to accept the client's case. The relationship can arise at any stage of the investigation or proceeding initiated by the attorney, and it can exist regardless of any blood relationship or personal friendship between the parties. It is particularly interesting to note that, if a formal agreement is not mandated by local law, no such agreement is needed to establish an attorney-client relationship even if a local "standard" purports to require the use of one, or even if the parties in question have entered into formal attorney-client contracts on previous occasions, in connection with legal matters now concluded.

48 Am. Jur. Proof of Facts 2d 525 (Originally published in 1987).

The circuit court agreed that Mary Ellen's initial communications with Attorney Schrunk were protected from discovery. A31. However, the court reasoned "that [Mary Ellen] was told and understood early in her communications with [Attorney] Schrunk that [Attorney] Schrunk could not represent [her]." A31. Therefore, the circuit court ruled that the communications occurring on or before January 1, 2014 were privileged and that all communications occurring after January 1, 2014 were not privileged and therefore discoverable. A33. However, that analyses fails to account for Mary Ellen's understanding of "representation," and that an attorney can provide advice to a client even if the attorney is not appearing as counsel of record in litigation.

The circuit court based its decision on the fact that Attorney Schrunk advised Mary Ellen that she couldn't represent her in court in her divorce. That finding is

erroneous for a couple of reasons. First, despite telling Mary Ellen she couldn't represent her, Attorney Schrunk consistently provided legal advice to Mary Ellen from December 2013 to November 2014. A12-13. Second, Mary Ellen understood representation to mean an attorney who appeared with her in court and at depositions. A11-12. Even if Mary Ellen understood Attorney Schrunk couldn't represent her in court, whether it was because she had a conflict or because she was only licensed to practice law in Iowa, Mary Ellen still believed she was a client of Attorney Schrunk and continued to seek and receive legal advice from her.

The New York court in *Parnes v. Parnes*, 80 A.D.3d 948, 915 N.Y.S.2d 345 [2011], decided a case with strikingly similar circumstances. In that case, the parties were experiencing marital difficulties. *Parnes*, 80 AD3d at 949. In anticipation of pending divorce litigation, the defendant husband ("husband") contacted attorney Paul Van Ryn ("Van Ryn"). *Id*. Van Ryn and husband had been friends for many years. *Id*. at 950. In addition to being friends, Van Ryn had represented husband in a prior divorce and other related proceedings. *Id*. at 949. Van Ryn had also represented and dealt with both husband and plaintiff wife ("wife") in their capacities as principals in a limited liability company. *Id*. Van Ryn and husband exchanged emails discussing a strategy for husband to gain an advantage in the anticipated divorce and custody litigation. *Id*.

As anticipated, wife commenced a divorce action. *Id*. Wife gained access to husband's email account and discovered the emails exchanged between him and Van Ryn. *Id*. Husband was questioned about the emails at his deposition. *Id*. Husband testified that although he and Van Ryn had been friends for many years, he contacted

Van Ryn in his capacity as an attorney to seek legal advice regarding a potential divorce and custody battle. *Id*. at 150. Thereafter, wife's counsel served Van Ryn with a subpoena duces tecum. *Id*. at 149. Husband moved to quash the subpoena of Van Ryn claiming that the subject communications were protected by the attorney – client privilege. *Id*.

The context of the emails showed that Van Ryn was giving legal advice, they were being sent from his law firm email address, and that he was billing for his services. *Id*. at 150. The court reasoned that the communications between Van Ryn and husband were privileged because they had been communicating as attorney and client and that the information sought to be protected from disclosure was a confidential communication made to the attorney for the purpose of obtaining legal advice. *Id*.

Like the attorney and client in *Parnes*, Mary Ellen and Attorney Schrunk had been friends for many years. Attorney Schrunk had also represented Mary Ellen in her previous divorce several years earlier, as well as her and her husband, Mark Nylen, in other various legal matters. In anticipation of a pending divorce, Mary Ellen contacted Attorney Schrunk seeking legal advice. Mary Ellen expected those communications to be confidential.

A divorce action was filed and, in addition, two other lawsuits were filed against Mary Ellen. Mary Ellen continued to seek legal advice from Attorney Schrunk throughout this time period. Like the husband in *Parnes*, Mary Ellen was questioned about her relationship and communications with Attorney Schrunk at her deposition and at the motion to quash hearing. Attorney Schrunk was served with a

subpoena duces tecum and Mary Ellen moved to quash. Likewise, the context of the emails and their attachments, in conjunction with Mary Ellen's testimony regarding the oral communications, showed that Mary Ellen was seeking legal advice. Attorney Schrunk was using her law firm email address to communicate with Mary Ellen. Attorney Schrunk did not bill Mary Ellen for her services, however,

> [a]n attorney-client relationship, as an element for the attorney-client privilege, is not dependent on the payment of a fee, nor is there a requirement that the relationship be memorialized by contract; the relationship may be implied from the conduct of the parties. If an attorney is consulted in his or her professional capacity, and he or she allows the consultation to proceed and acts as a legal adviser, the fact that no compensation is paid will not remove the seal of secrecy from the communications made to him or her. As long as the communication is properly within the scope of the attorney-client privilege, it is inessential that no fee has been paid to the attorney.

81 Am. Jur. 2d Witnesses § 341 (2015).

Like *Parnes*, the four elements required to assert the attorney – client privilege were present in this case from early December 2013 to November 2014. Therefore, the circuit court's determination that Mary Ellen "cannot claim the attorney – client privilege for her communications with [Attorney] Schrunk after early January of 2014" and thus the order allowing Molly and Brendon to take Attorney Schrunk's deposition and for Mary Ellen to produce written communications should be reversed. A32.

ISSUE 2: Mary Ellen Nylen did not waive her attorney – client privilege with her California and South Dakota attorneys when she shared those communications with Attorney Schrunk, because Mary Ellen had an attorney – client relationship with all of those attorneys and therefore sharing her communications with any of them would not constitute a waiver under SDCL 19-13-26 and SDCL 19-13-3(5).

Judge Jensen was provided with the privileged documents and a corresponding privilege log. Because he decided that the attorney – client relationship between Mary Ellen and Attorney Schrunk ended in early January of 2014, the court ruled all of the communications occurring after that time were not considered privileged and were discoverable.

There were email communications occurring after January 1, 2014 between Mary Ellen and her California and South Dakota attorneys that were forwarded to Attorney Schrunk. If this Court overrules the circuit court on the first issue and determines that there was an attorney – client relationship from early December 2013 to November 2014, then this Court must decide whether the privilege was waived as to Mary Ellen's communications with her California and South Dakota attorneys which were disclosed to Attorney Schrunk.

The circuit court decided that the email communications between Mary Ellen and her California and South Dakota attorneys were initially privileged, but that privilege was waived by Mary Ellen once she disclosed those communications to Attorney Schrunk. A33. The court reasoned that these communications all occurred between February and June of 2014 and based on the decision on the first issue, Attorney Schrunk was not Mary Ellen's attorney at that time. A33. The court determined disclosure of those communications to Attorney Schrunk was made outside the attorney – client relationship. A33. Therefore, the court held Mary Ellen made a knowing and intentional waiver of the privilege attached to these documents by forwarding the documents to Attorney Schrunk. A33.

SDCL 19-13-26[4] provides that a person upon whom chapter 19-13 "confers a privilege against disclosure waives the privilege if he … voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This section does not apply if the disclosure itself is privileged."

> Thus a lawyer-client privilege may be waived if the client voluntarily or through his attorney discloses the contents of the communication or advice to someone outside that relationship. After an effectual waiver the privilege disappears and the barrier is removed. The burden of establishing waiver of a privilege is on the party asserting the claim of waiver.

Catch the Bear, 352 N.W.2d at 647 (S.D. 1984) (internal citations omitted).

SDCL 19-13-3(5) states in relevant part "[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client: … among lawyers … representing the same client."

If this Court overrules the circuit court on the first issue, deciding that there was an attorney – client relationship between Attorney Schrunk and Mary Ellen from early December 2013 to November 2014, then it follows that Mary Ellen's attorney – client privilege with her California and South Dakota attorneys was not waived when she forwarded their communications to Attorney Schrunk because those communications would be protected under SDCL 19-13-3(5). This Court should overrule the circuit court on the second issue.

[4] SDCL 19-13-26: "A person upon whom this chapter confers a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This section does not apply if the disclosure itself is privileged."

CONCLUSION

Molly and Brendon Nylen have subpoenaed attorney Irene Schrunk requesting she provide documents and testimony regarding her communications with Mary Ellen Nylen. Mary Ellen has moved to quash that subpoena based on her assertion of the attorney – client privilege. The circuit court decided that only the communications occurring between early December 2013 and January 1, 2014, are privileged and that the communications occurring after January 1, 2014, are not privileged because Mary Ellen knew she couldn't be represented by Attorney Schrunk at that time. That finding is clearly erroneous because Mary Ellen has sufficiently shown the existence of the four elements required to assert the attorney – client privilege. Therefore, all communications between Mary Ellen and Attorney Schrunk regarding any legal matters should be protected from disclosure to the Plaintiffs.

For the forgoing reasons, Mary Ellen Nylen prays this Court reverse the circuit court's intermediate Order requiring Mary Ellen to turn over all written evidence of their communications and allowing Plaintiffs to take the unsupervised deposition of attorney Irene Schrunk.

Respectfully submitted this 18th day of May, 2015.

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REQUEST FOR ORAL ARGUMENT

Appellant Mary Ellen Nylen, by and through her attorney of record, Thomas P. Reynolds, respectfully requests that the Court grant time for oral argument in this matter.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of APPELLANT'S BRIEF were served by email and by depositing said copies in the United States Mail, with pre-paid, first class postage thereon to the following: Daniel R. Fritz (dfritz@lindquist.com) and Nicole O. Tupman (ntupman@lindquist.com), Lindquist & Vennum, LLP, 101 South Reid Street – Suite 302, Sioux Falls, South Dakota 57103 and David A. Tank (tank.dave@dorsey.com) and Angela E. Dralle (dralle.angela@dorsey.com), Dorsey & Whitney LLP, 801 Grand Ave – Suite 4100, Des Moines, Iowa 50309-2790, *attorneys for the Appellees* and Steve Huff (steve@jmmwh.com), Johnson, Miner, Marlow, Woodward & Huff Prof. LLC, 200 West 3rd Street, Yankton, SD 57078, *attorney for Irene Schrunk.*

Dated this 18th day of May, 2015.

_/s/ Thomas P. Reynolds____
Thomas P. Reynolds

CERTIFICATE PURSUANT TO S.D. CODIFIED LAWS 15-26A-66 & 15-26A-14(7)

I, Thomas P. Reynolds, hereby certify that the Petition in the above-entitled matter complies with the typeface specifications of S.D. CODIFIED LAWS 15-26A-66 and that the brief contains 23,053 characters not including spaces or 4,358 words and that said brief was typed in Times New Roman font, 12 point.

Dated this 18th day of May, 2015.

KENNEDY PIER KNOFF LOFTUS, LLP

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APPENDIX

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THE SUPREME COURT
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*The additional documents in the record that are contained in Appellees' Appendix have also been cited as "A" followed by the page numbers, which have been continued consecutively from Appellant's Appendix.

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Statutes

JURISDICTIONAL STATEMENT

Appellees Molly and Brendon Nylen, the Plaintiffs in the underlying case (hereinafter "Molly and Brendon"), do not dispute the Jurisdictional Statement submitted by Defendant /Appellant Mary Ellen Nylen ("Mary Ellen") in Appellant's Brief filed on May 18, 2015.

STATEMENT OF LEGAL ISSUES

1. Did the Attorney-Client Privilege Apply to Communications Between Mary Ellen and Irene Schrunk During the Time Period Covered by the Subpoena?

   The Trial Court determined that the attorney-client privilege did not apply after January 1, 2014.

   Most Relevant Authorities:

   State v. Catch the Bear, 352 N.W.2d 640 (S.D. 1984);
   State v. Rickabaugh, 361 N.W.2d 623 (S.D. 1985);
   Pinnacle Pizza Co., Inc. v. Little Caesar Enterprises, Inc., 627 F. Supp. 2d 1069 (D.S.D. 2007).
   Waddell v. Dewey County Bank, 471 N.W.2d 591 (S.D. 1991); and
   South Dakota Codified Laws §§ 19-13-2 and 19-13-3.

2. Did Mary Ellen Waive Any Attorney-Client Privilege That May Have Existed for Correspondence Exchanged Between Mary Ellen and Her California and South Dakota Attorneys by Forwarding Those Materials to Irene Schrunk?

   The Trial Court determined that Mary Ellen did waive the attorney-client privilege as to certain correspondence and documents that Mary Ellen forwarded to Irene Schrunk after January 1, 2014, when no attorney-client privilege existed between Mary Ellen and Irene Schrunk.

   Most Relevant Authorities:

   Dakota, Minnesota & Eastern R.R. Corp. v. Acuity, 771 N.W.2d 623 (S.D. 2009); and

State v. Catch the Bear, 352 N.W.2d 640 (S.D. 1984).

STATEMENT OF THE CASE AND SUMMARY OF RELEVANT FACTS

This case originates from the First Judicial Circuit Court, Union County, South Dakota, before the Honorable Steven R. Jensen. It is stayed, pending the instant intermediate appeal.

On February 12, 2015, Judge Jensen issued a letter decision on Mary Ellen's Motion to Quash a Subpoena to Irene Schrunk, and on February 25, 2015, Findings of Fact and Conclusions of Law (hereinafter the "Findings and Conclusions") were filed along with an Order denying, in substantial part, the Motion to Quash. Mary Ellen filed a Petition for Intermediate Appeal, which was granted on April 6, 2015.

The underlying lawsuit was commenced in July 2014 to determine whether Mary Ellen gifted certain personal property (including a substantial amount of expensive jewelry) to her children, Brendon and Molly, in December 2013.

On November 18, 2014, a discovery deposition was taken of Mary Ellen, during which she was represented by counsel who was able to, and did, pose objections to many questions asked that day.

In particular, during her deposition, Mary Ellen was asked about communications she had with third-parties relating to the case issues. Among those individuals was Irene Schrunk (hereinafter "Ms. Schrunk"). Ms. Schrunk is friend of Mary Ellen, and is also an Iowa attorney residing in Sioux City. Although Ms. Schrunk had previously performed legal work for Mary Ellen and Mark Nylen, Mary Ellen has acknowledged that Ms. Schrunk had not served as counsel for Mary Ellen individually since Mary Ellen's divorce from her first husband in or about 1991 - over 20 years ago (A15).

The following questions and answers are from Mary Ellen's deposition:

> Q (By Mr. Tank) Did you ever -- do you know who Irene Schrunk is?
> A Yes.
> Q And who is that person?
> A She's an attorney in Sioux City.
> Q And have you ever communicated with her with respect to any issues arising out of the kids' claim against you or the divorce in general?
>
> MR. KENNEDY: You can answer yes or no without talking about --
>
> Q (By Mr. Tank) Let me just ask: Have you ever been represented by Irene Schrunk for any purpose?
> A Yes.
> Q When? How long ago?
> A In my first divorce.
> Q All right. And since that time has she ever represented you?
> A I believe the action was just with Mark, not me, so I don't think so.
>
> *Q So you don't have a current attorney/client relationship with her?*
> *A No.*
> *Q And when you spoke to her most recently about either the divorce or the kids' claims against you, she wasn't representing you?*
> *A No.*
>
> Q What was your purpose for contacting her?
> A She's a friend.
> Q And what did you discuss with her?
> A We exchanged e-mails. We -- politics, what's going on in Sioux City, our family.

See Appendix at A67- A68, Deposition page 214, line 19 - page 215 (emphasis added).[1]

[1] On December 5, 2014, Mary Ellen submitted a signed "Correction Sheet" relating to her deposition, which did not include any changes, clarifications, or corrections to the testimony above that related to Ms. Schrunk. See Appendix at A71 – A73.

After the deposition, in light of Mary Ellen Nylen's acknowledgement that no attorney-client relationship would apply to the communications with Ms. Schrunk, and given that phone records subpoenaed from Verizon showed that extensive communications occurred between Mary Ellen and Ms. Schrunk during a time of critical importance to the gift issue, a properly-issued Iowa subpoena was served on Ms. Schrunk seeking production of documents and deposition testimony relating to communications with Mary Ellen from November 1, 2013 to the present (which was then December 31, 2014). See Appendix at A01 – A03 (which only includes the substantive, South Dakota portion of the Subpoena).

On December 31, 2014, Mary Ellen filed a Motion to Quash the Subpoena, and a Resistance to the Motion was filed by Brendon and Molly on January 8, 2015 (Appendix at A45 – A74). On January 13, 2015, an evidentiary Hearing in front of Judge Jensen was conducted, and Mary Ellen testified at the Hearing. See Appendix at A06 – A21 and A75 – A83. At the conclusion of the evidence, Judge Jensen, *sua sponte*, afforded Mary Ellen an opportunity to prepare and submit a "log" of all material claimed to be privileged, for the purpose of enabling the Circuit Court to conduct an *in camera* review of the

documents claimed to be subject to the privilege[2].

On February 12, 2015, the Circuit Court announced its decision on the Motion to Quash in a letter to counsel, which has been referred to by Mary Ellen in her Brief as the Memorandum Decision, and which was included in the Appendix at A28-A33. Findings of Fact and Conclusions of Law (the "Findings and Conclusions") were filed on February 25, 2015, along with an Order regarding same. See A34-A42 and A43-A44, respectively.

As is apparent by a review of the Memorandum Decision and the Findings and Conclusions, the issues presented were carefully reviewed by Judge Jensen, the correct procedures were followed, and the proper standards were applied. Judge Jensen separately analyzed each document submitted to him for *in camera* review, and made a determination based on what he concluded was the evolving nature of the relationship between Mary Ellen and Ms. Schrunk. Judge Jensen also had the opportunity to view the live testimony of Mary Ellen at the Hearing, to assess her credibility in light of the testimony in her

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[2] Prior to the *in camera* review and issuance of the letter decision, there had been no mention of any alleged attorney-client privilege between Mary Ellen and any attorney other than Ms. Schrunk. No other attorneys were identified in the log prepared by Mary Ellen, and there had been no testimony or evidence offered to suggest that any other privilege claims had been raised or needed to be addressed in deciding the Motion to Quash. See Appendix at A22-A27. It was only upon receipt of the letter decision that Counsel for Molly and Brendon learned that Mary Ellen had forwarded to Ms. Schrunk communications she had received from her California and South Dakota attorneys.

Notwithstanding the fact that Mary Ellen had not previously claimed that the communications with lawyers other than Ms. Schrunk were privileged, Judge Jensen appropriately dealt with that issue during the *in camera* review, finding a waiver of the attorney-client privilege.

deposition,[3] and to consider all other available evidence on the issue. See Appendix at A36, paragraph 10.

Ultimately, Judge Jensen did *not* base his decision on the inconstancies between Mary Ellen's deposition testimony and the testimony offered at the time of the Hearing; but instead, on the facts that Mary Ellen admitted during each.

Specifically, and consistent with her deposition testimony, Mary Ellen testified during the Hearing as follows:

> Q. Question, so you don't have a current attorney client relations with her – relationship with her and your answer was no. Was that a truthful answer at the time you gave it?
> A. I stated --
> Q. Was that a truthful answer at the time you gave it, Mrs. Nylen?
> A. My answer was based on her –
>
> THE COURT: Mrs. Nylen, you need to say yes or no to the question.
>
> THE WITNESS: I stated no.
> Q. (BY MR. TANK) And was that the truth?
> A. Yes.
> Q. And is it still the truth?
> A. Yes.
> Q. Al right. So you currently don't have an attorney-client relationship with Irene Schrunk, do you?
> A. Under representation, no.
> *Q. No, no. I didn't ask about representation. I asked – the*

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[3] As set forth above, Mary Ellen not only testified during her Deposition that Ms. Schrunk had not *represented* her since 1991, but *also* that she did not have any current attorney-client *relationship* with Ms. Schrunk. See Appendix at A67 – A68, Deposition page 214, line 19 – page 215.

Then, during the Hearing on the Motion to Quash, Mary Ellen attempted to clarify her earlier testimony by explaining it was her understanding that an attorney can only "represent" you if that attorney "sits with you in the courtroom or sits beside you at a deposition" (A11, lines 17-24 and A12, lines 3-5).

truth is, Mrs. Nylen, you currently do not have an attorney-client relationship with Irene Schrunk, do you?
A. No.

See Appendix at A80 – A81 (emphasis added).

Also significant to Judge Jensen was the fact that Mary Ellen admitted during the Hearing that Ms. Schrunk specifically told her on or about January 1, 2014, that she *could not represent* Mary Ellen based on a conflict of interest. See A16, Hearing Transcript page 18, lines 16-22; A18, Hearing Transcript page 22, lines 17-24.

Based on the evidence, Judge Jensen found that Mary Ellen had not met her burden to prove the existence of an attorney-client relationship with Ms. Schrunk or that any communications were privileged after January 1, 2014:

> The court finds, based upon the evidence presented at the hearing and the deposition of Defendant, that Schrunk was not representing Defendant during the relevant communications between Defendant and Schrunk.

See Appendix at A36, paragraph 11. This conclusion was clearly supported by the evidence, as summarized by Judge Jensen:

> 9. Defendant testified at the hearing that Schrunk advised her in early January of 2014 that Schrunk would have a conflict in representing her or giving her legal advice because she had provided legal services to Mark Nylen and their companies.
>
> ***
>
> 11. Although the Court finds that the initial communications between Defendant and Schrunk are privileged, the record shows that Defendant was told and understood early on in her communications with Schrunk that Schrunk could not represent Defendant.

See Appendix at A36 and A39, respectively.

The Appellant's Brief erroneously contends that the Circuit Court found that an attorney-client *relationship* existed between Mary Ellen and Ms. Schrunk. In summarizing the opinion of the Trial Court, Appellants incorrectly state:

> Trial Court: Granted the motion in part and denied the motion in part. *The court held an attorney – client relationship only existed* between Mary Ellen and Attorney Schrunk from early December 2013 to early January 2014.

See Appellant's Brief at page 2 (emphasis added).

However, as seen in paragraph 11 of the Conclusions (A39), above, the Circuit Court made a contrary finding. Instead, the Circuit Court determined that since Mary Ellen's initial communications with Ms. Schrunk were for the purpose of obtaining legal advice, those initial communications would be covered by the statutory *privilege*, *notwithstanding* the fact that an attorney-client relationship did not result:

> 6. Although Defendant has admitted both in her deposition and at the hearing that Schrunk was not representing her and she was communicating with Schrunk as friend, she testified at the hearing that she initially contacted Schrunk for the purpose of obtaining legal advice and the rendition of legal services from Schrunk.
>
> 7. Under SDCL 19-13-2(1) a client includes both a person who receives legal services from the lawyer and a person that "consults a lawyer with a view to obtaining professional legal services from him .... "

See Appendix at A38.

As seen from the citation above, the Circuit Court concluded that certain communications were made "for the purpose of obtaining legal advice and the rendition of legal services," and as such, need not be produced:

> 8. There is no question that Defendant contacted Schrunk as a long-time friend that had previously represented her as an attorney in similar circumstances. However, Defendant testified at the hearing that she contacted Schrunk because she needed legal advice

concerning her current family issues. Although Defendant testified to the contrary in the deposition that her purpose in contacting Schrunk was as a friend, Defendant's ever evolving family issues and her *initial communications* with Schrunk show that Defendant *initially contacted* Defendant to obtain legal advice.

***

10. Viewed from Defendant's perspective *at the time of the initial contact*, it is apparent that Defendant contacted Schrunk for the purpose of obtaining legal services (advice) from Schrunk. This evidence is sufficient to establish all four elements for the attorney-client privilege existed at the time Defendant *first contacted* Schrunk.

11. Although the Court finds that the *initial communications* between Defendant and Schrunk are privileged, the record shows that Defendant was told and understood early on in her communications with Schrunk that Schrunk could not represent Defendant.

12. Included on page 323 of the documents reviewed in camera was a memo prepared by Schrunk on December 10, 2013. The memo describes discussions between Defendant and Schrunk on or about December 10, 2013, during a phone call. At the conclusion of the memo Schrunk states: "ADVISED that she find a divorce lawyer in CA before she does anything in Florida. I will try to find the name of a top CA divorce firm for her." "Told her I am caught in the middle here because Mark contacted me (not for legal advice)."

13. Although implied, this memo does not specifically state that Schrunk told Defendant she could not represent her or provide legal advice. However, Defendant admitted at the hearing that by early January she understood from what Shrunk told her that Schrunk could not represent her.

14. Based upon Defendant's own testimony, the Court concludes that by early January Defendant could not meet the definition of a client, nor could she claim to have reasonably believed that she was contacting Schrunk for the purpose of facilitating the rendition of legal services.

15. Accordingly, Defendant cannot claim the attorney-client privilege for her communications with Schrunk after early January of 2014.

See Appendix at A39-A40 (emphasis added).

Having found that no attorney-client relationship or privilege could exist between Mary Ellen and Ms. Schrunk after January 1, 2014, the Circuit Court went on to analyze and determine whether communications between Mary Ellen and her other lawyers, which were sent to Ms. Schrunk, could be protected under the circumstances. As to this issue, the Circuit Court concluded:

> 22. The communications between Defendant and her California and South Dakota attorneys were privileged, but that privilege was waived by Defendant once she disclosed these communications to Schrunk. These disclosures were all made by Defendant to Schrunk between February and June of 2014. Schrunk was not Defendant's attorney at this time, nor could she be reasonably seeking the facilitation of legal services from Schrunk at this time, so the disclosure of these communications to Schrunk was made outside the attorney-client relationships between Defendant and her California and South Dakota Counsel. Accordingly, the Court concludes that Defendant made a knowing and intentional waiver of the privilege attached to these documents by forwarding the documents to Schrunk.

See Appendix at A42.

Based on the foregoing, and applying the relevant legal standards outlined below, Judge Jensen's ruling was based on substantial evidence and should be affirmed.

ARGUMENT

A. Standard Of Review

The Circuit Court's decision in this case cannot be overturned unless it was clearly erroneous. See State v. Rickabaugh, 361 N.W.2d 623, 624 (S.D. 1985) ("We are not convinced the trial court's findings of fact [regarding privileged statements] were clearly erroneous, against a clear preponderance of the evidence or not supported by

credible evidence."); See also State v. Catch the Bear, 352 N.W.2d 640, 646 (S.D. 1984) ("From the dearth of evidence in support of a lawyer-client relationship, we cannot conclude that the [trial court's] finding [that a lawyer-client privilege did not exist] was clearly erroneous;" also stating that "hard facts" were needed to show that Catch The Bear was provided "professional legal services" by Attorney Ellison in order to establish the privileged nature of a communication).

Judge Jensen's decision regarding the Motion to Quash was supported by substantial evidence and was not clearly erroneous.[4]

B. The Circuit Court Correctly Concluded That No Colorable Claim of Privilege Existed After January 1, 2014.

South Dakota law requires that, in order to establish the existence of an attorney-client relationship, certain minimum elements must be shown. Moreover, the party claiming the privilege has the burden to establish each element. See, e.g., State v. Catch the Bear, 352 N.W.2d 640, 645 (S.D. 1984) ("The burden of showing entitlement to assert the privilege rests with its claimant."); State v. Rickabaugh, 361 N.W.2d 623, 625 (S.D. 1985) (stating that the person claiming attorney-client privilege has burden of establishing all elements necessary to invoke the privilege, citing SDCL 19-13-3); Pinnacle Pizza Co., Inc. v. Little Caesar Enterprises, Inc., 627 F. Supp. 2d 1069, 1072 (D.S.D. 2007).

> Minimum elements now necessary to invoke that privilege include:

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[4] Mary Ellen appears to acknowledge that the proper standards were applied and makes no argument that the Circuit Court erroneously interpreted the relevant statutes. As such, there is no basis for this Court to engage in a *de novo* review. Finally, Mary Ellen raised no issue below, and makes no argument on appeal, that the Circuit Court incorrectly interpreted any of the documents submitted for *in camera* review.

> (1) a client;
> (2) a confidential communication;
> (3) the communication was made for the purpose of facilitating the rendition of professional legal services to the client; and
> (4) the communication was made in one of the five relationships enumerated in SDCL 19–13–3.

See Catch the Bear, 352 N.W.2d at 645 (footnotes omitted).

Additionally, this Court has rejected a liberal application of the attorney-client privilege (which would err on the side of finding a privilege) and now recognizes that "privileges created by statute [such as SDCL ch. 19-13] are to be strictly construed to avoid suppressing otherwise competent evidence." See id. at 646-67.

The privilege "hinges not on the lawyer's perception of the relationship but on the client's belief that he is consulting a lawyer to obtain professional legal services." See id. at 645 (*citing* SDCL 19-13-3).

Even though the Circuit Court ultimately determined that no attorney-client *relationship* was established, it afforded Mary Ellen the benefit of the doubt, reviewed the documents *in camera*, [5] and found the initial communications from Mary Ellen to Ms. Schrunk to be subject to the attorney-client *privilege*, based on a finding that those communications were "for the purpose of facilitating" legal services, even though no legal

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[5] According to this Court, if a colorable claim of attorney-client privilege has been made, the best course is for the Circuit Court to conduct an *in camera* review:

> The Court has previously stated that the preferred procedure for handling privilege issues is to allow for an in camera review of the documents, and court review or supervision of a deposition in camera.

See Dakota, Minnesota & Eastern R.R. Corp. v. Acuity, 771 N.W.2d 623, 636-37 (S.D. 2009) (internal citations omitted).

services were actually provided to Mary Ellen by Irene Schrunk regarding those issues. See Catch the Bear, 352 N.W.2d at 645.

Mary Ellen's reliance on Parnes v. Parnes**,** 80 A.D.3d 948 (N.Y. App. Div. 2011) is misplaced. In Parnes, the court was satisfied that an actual attorney-client *relationship* had been proven. See 80 A.D.3d at 950. In the present case, however, the Circuit Court found the evidence presented by Mary Ellen insufficient to prove that an attorney-client relationship had been formed.

In addition, the facts in Parnes were clearly different than those in the case at hand and easily supported the conclusion reached in that case:

> The context of the e-mails shows that Van Ryan was giving legal advice, sent from his law firm e-mail address, and billed defendant for his time. Van Ryan provided defendant with a retainer agreement; although they never executed it, Van Ryan averred that he did not require an executed agreement from clients until the matter proceeded to litigation or negotiations, and clients frequently sought advice before those stages without an executed retainer agreement.

See 80 A.D.3d at 950. Although neither the instant case, nor Parnes, involved a signed retention agreement, it is clear from Judge Jensen's ruling that the lack of a signed agreement was not dispositive. Moreover, in Parnes, the party seeking to invoke the privilege contended that an attorney-client relationship existed, where in the present case, Mary Ellen has acknowledged that such a relationship did not exist. See id.

Finally, in Parnes, the attorney friend never told the client that he could not represent him due to a conflict of interest, as Mary Ellen admitted occurred in this case:

> Based upon Defendant's own testimony, the Court concludes that by early January Defendant *could not meet the definition of a client*, *nor could she claim to have reasonably believed that she was* contacting Schrunk for the purpose of facilitating the rendition of legal services.

See Appendix at A40, paragraph 14 (emphasis added); See also Appendix at A36, paragraph 9; and Appendix at A16, lines 16-22; and A18, lines 17-24.

Next, it is also Molly and Brendon's position that Mary Ellen's failure to assert a claim of attorney-client privilege during her deposition constitutes a waiver, which is an alternative basis to uphold the Circuit Court's decision below.[6]

Additionally, although Mary Ellen has tried to explain away her earlier deposition testimony, the truth of those admissions cannot be collaterally attacked by the party who made them. More specifically, a party "cannot claim the benefit of a version of the facts more favorable to his contentions than he himself has given in his own sworn deposition testimony." See Waddell v. Dewey County Bank, 471 N.W.2d 591, 595 fn 3 (S.D. 1991); See also Lalley v. Safway Steel Scaffolds, Inc., 364 N.W.2d 139 (S.D. 1985) Swee v. Myrl & Roy's Paving, Inc., 283 N.W.2d 570, 571-72 (S.D. 1979).

Accordingly, the Circuit Court's decision on this issue must be upheld.

C. Mary Ellen Waived Any Applicable Attorney-Client Privilege by Forwarding Materials To Ms. Schrunk After January 1, 2014

As indicated above, Mary Ellen never claimed that the subpoenaed documents contained privileged information between Mary Ellen and any attorney other than Ms. Schrunk. No other attorneys were identified in the log prepared by Mary Ellen, See Appendix at A22-A27, and there was no testimony or evidence offered to suggest that any

[6] Mary Ellen's response to a direct question regarding communications with Ms. Schrunk, after counsel had assessed and determined not to assert a privilege, is a waiver. See State v. Catch the Bear, 352 N.W.2d 640, 647 (S.D. 1984)(internal citations omitted).

other privilege claims had been raised or needed to be addressed in deciding the Motion to Quash.[7]

It was only upon receipt of the Memorandum Decision that Counsel for Molly and Brendon learned that Mary Ellen had forwarded to Ms. Schrunk communications she had received from her California and South Dakota attorneys. Notwithstanding the fact that privileged communications with lawyers other than Ms. Schrunk had never before been claimed by Mary Ellen, Judge Jensen appropriately dealt with that issue as a result of his *in camera* review.

Specifically, having found no attorney-client relationship, and therefore, no privilege existing, between Mary Ellen and Ms. Schrunk after January 1, 2014, the Circuit Court went on to analyze and determine whether communications between Mary Ellen and her other lawyers, which were sent to Ms. Schrunk, could be protected under the circumstances. As to this issue, the Circuit Court concluded:

> 16. A review of the documents produced by Defendant shows that pages 1-21 include email and text communications between Defendant and Schrunk that occurred between December 3rd and 24th of 2013. Defendants have already produced pages 18-20. Further, pages 9, 12, 16, 17, and 21 contain underlying facts and conversations with third parties which are not confidential, privileged communications.
>
> 17. The only exception is that the brief communications through email between Defendant and Schrunk on pages 16 and 2J. Those communications are privileged and can be redacted from production. Page 323 contains a written memo of Schrunk's summary of her communication with Defendant on December 10, 2013. This memorandum, other than the portion the Court quoted above, is privileged and may be redacted from

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[7] Therefore, it is also Molly and Brendon's position that Mary Ellen effectively waived any claim of privilege she may have had under South Dakota law by not asserting it, which is another reason that the decision of Judge Jensen on this issue must be upheld.

production.

18. *All of the other documents that are in dispute that contain communications between Defendant and Schrunk are from and after February 6, 2014, when the Court determines that there was no attorney-client privilege between Defendant and Schrunk.*

19. Pages 24-29, 36-62, 279-292, 296-297 contain communications between Defendant and her California counsel, of which pages 284-292 is correspondence between Defendant's counsel and opposing counsel in the California litigation. Pages 140-159, 268, 308 contain communications between Defendant and her South Dakota divorce counsel. Pages 160-267, 269-271, 309-312 contain copies of documents forwarded by Defendant's South Dakota divorce counsel to Defendant that include copies of correspondence between counsel for Defendant and opposing counsel in the divorce case, or pleadings which have been filed of record in the South Dakota divorce case. (These documents in the South Dakota divorce are filed under a confidentiality order with the Court, but the record shows that the documents were provided by Defendant to Schrunk before the confidentiality order was entered in the divorce.) *Pages 24-29, 36-62, 279-283, 296-297, 140-159, 267 are subject to a separate attorney client-privilege because they include confidential communications between Defendant and her attorneys retained to represent her in these other proceedings, unless the privilege is waived.*

20. Pages 160-271, 284-292, 209-312 are not privileged because they contain underlying facts and documents which are filed of record and are not confidential for the purpose of applying the attorney-client privilege.

21. "The party asserting a claim of waiver has the burden of establishing a waiver of a privilege." *Dakota, Minnesota & E. R.R. Corp. v. Acuity,* 2009 S.D. 69, 51,771 N.W.2d 623, 637. "The attorney client privilege is personal to the client and may only be waived by the client, or through his attorney." *Id.* "Thus a lawyer-client privilege may be waived if the client voluntarily or through his attorney discloses the contents of the communication or advice to someone outside that relationship." *Catch the Bear,* 352 N.W.2d at 647. "After an effectual waiver the privilege disappears and the barrier is removed." *Id.*

22. *The communications between Defendant and her California and South Dakota attorneys were privileged, but that privilege was*

> *waived by Defendant once she disclosed these communications to Schrunk*. These disclosures were all made by Defendant to Schrunk between February and June of 2014. *Schrunk was not Defendant's attorney at this time, nor could she be reasonably seeking the facilitation of legal services from Schrunk at this time*, so the disclosure of these communications to Schrunk was made outside the attorney-client relationships between Defendant and her California and South Dakota Counsel. *Accordingly, the Court concludes that Defendant made a knowing and intentional waiver of the privilege attached to these documents by forwarding the documents to Schrunk.*

See Appendix at A40 – A42 (emphasis added).

As seen, the Circuit Court performed a careful review of the documents, and made appropriate findings and granted relief in accordance with those findings.

Additionally, and as apparently conceded by Appellant in her Brief, if there was no attorney-client privilege between Mary Ellen and Ms. Schrunk at the time the communications from other counsel were shared, a waiver occurred.

Specifically, the Circuit Court concluded:

> …a lawyer-client privilege may be waived if the client voluntarily or through his attorney discloses the contents of the communication or advice to someone outside that relationship." *Catch the Bear,* 352 N.W.2d at 647. "After an effectual waiver the privilege disappears and the barrier is removed." *Id.*

See Appendix at A41, paragraph 21.

Judge Jensen correctly applied this standard when he made specific findings, such as the following:

> These disclosures were all made by Defendant to Schrunk between February and June of 2014. Schrunk was not Defendant's attorney at this time, nor could she be reasonably seeking the facilitation of legal services from Schrunk at this time, so the disclosure of these communications to Schrunk was made outside the attorney-client relationships…

See Appendix at A42, paragraph 22.

Accordingly, the Circuit Court's decision on this issue must also be upheld.

CONCLUSION

For all of the foregoing reasons, Plaintiffs/Appellees Molly R. Nylen and Brendon W. Nylen respectfully request that the Circuit Court's Decision be Affirmed in its entirety, and the instant Appeal be summarily Denied.

Respectfully submitted this 2nd day of July, 2015.

LINDQUIST & VENNUM LLP

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of Appellees' Brief were served by email and by depositing said copies in the United States Mail, with pre-paid, first class postage thereon to the following: Craig A. Kennedy (ckennedy@yanktonlawyers.com), Steven L. Pier (spier@yanktonlawyers.com), Thomas P. Reynolds (treynolds@yanktonlawyers.com), Kennedy Pier Knoff Loftus, LLP, 322 Walnut Street, Yankton, SD 57078, *Attorneys for Plaintiff/Appellant* and Steve Huff (steve@jmmwh.com), Johnson, Miner, Marlow, Woodward & Huff Prof. LLC, 200 West 3rd Street, Yankton, SD 57078, *Attorney for Irene Schrunk.*

Dated this 2nd day of July, 2015.

/s/ Daniel R. Fritz _____
Daniel R. Fritz
Nicole O. Tupman

CERTIFICATE OF COMPLIANCE

I, Daniel R. Fritz, hereby certify that the Appellees' Brief in the above-entitled matter complies with the typeface and length specifications of SDCL 15-26A-66. Appellees' Brief contains 26,107 characters not including spaces or 4,952 words and that said Appellees' Brief is less than 32 pages and was typed in Times New Roman font, 12 point.

Dated this 2nd day of July, 2015.

/s/ Daniel R. Fritz

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APPENDIX

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 27390

MOLLY R. NYLEN and BRENDON W. NYLEN,

Appellees,

v.

MARY ELLEN NYLEN,

Appellant.

Intermediate Appeal from the
Circuit Court, First Judicial Circuit,
Union County, South Dakota.

The Honorable Steven R. Jensen, Judge, presiding.

APPELLANT'S REPLY BRIEF

Order Granting Petition for Allowance of Appeal from Intermediate Order filed on April 6, 2015.

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TABLE OF CONTENTS

All citations to the record are contained in the Appendix and will be cited "A" followed by the page, which is the same as they are labeled in the Appendix. The Appendix is attached to Appellant's and Appellees' initial briefs.

TABLE OF AUTHORITIES

CASES:

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STATEMENT OF THE LEGAL ISSUES

ISSUE 1: Mary Ellen Nylen's Motion to Quash the Subpoena Duces Tecum to attorney Irene Schrunk should have been granted in its entirety because an attorney-client relationship existed between Mary Ellen and Attorney Schrunk from early December 2013 to November 2014.

Trial Court: Granted the motion in part and denied the motion in part. The court held an attorney-client relationship only existed between Mary Ellen and Attorney Schrunk from early December 2013 to early January 2014.

Most Relevant Cases:

1. *Parnes v. Parnes*, 80 A.D.3d 948 (N.Y. App. Div. 2011)

Most Relevant Statutory Provisions:

1. SDCL 19-19-502(b) (formerly SDCL 19-13-3).

ISSUE 2: Mary Ellen Nylen did not waive her attorney-client privilege with her California and South Dakota attorneys when she shared those communications with Attorney Schrunk, because Mary Ellen had an attorney-client relationship with all of those attorneys and therefore sharing her communications with any of them would not constitute a waiver under SDCL 19-19-510 and SDCL 19-19-502(b)(1) & (5).

Trial Court: Ruled that Mary Ellen's communications with her California and South Dakota attorneys were originally privileged. However, a waiver of the attorney-client privilege occurred, as to those specific communications, when they were shared with Attorney Schrunk.

Most Relevant Statutory Provisions:

1. SDCL 19-19-510 (formerly SDCL 19-13-26).

2. SDCL 19-19-502(b)(1) & (5) (formerly SDCL 19-13-3(1) & (5)).

ARGUMENT

A. Standard of Review

Molly and Brendon Nylen ("Molly and Brendon" / "Appellees"/ "Plaintiffs") state in their brief that "[t]he Circuit Court's decision in this case cannot be

overturned unless it was clearly erroneous." Appellees' Brief at 10. In footnote 4, Molly and Brendon go on to state

> Mary Ellen appears to acknowledge that the proper standards were applied and makes no argument that the Circuit Court erroneously interpreted the relevant statutes. As such, there is no basis for this Court to engage in a *de novo* review. Finally, Mary Ellen raised no issue below, and makes no argument on appeal, that the Circuit Court incorrectly interpreted any of the documents submitted for *in camera* review.

Appellees' Brief at 11.

As previously stated in Mary Ellen Nylen's ("Mary Ellen" / "Appellant" / "Defendant") initial brief,

> [t]he South Dakota Supreme "Court normally reviews a circuit court's discovery orders under an abuse of discretion standard." *Dakota, Minnesota & E. R.R. Corp. v. Acuity*, 2009 S.D. 69, ¶ 47, 771 N.W.2d 623, 636 (citations omitted). However, when the Court is asked to determine whether the circuit court's order violates a statutory privilege, it raises a question of statutory interpretation requiring de novo review. *Dakota, Minnesota & E. R.R. Corp.*, 2009 S.D. 69, ¶ 47, 771 N.W.2d at 636 (citations omitted). The circuit court's interpretation of applicable statutes is given no deference under a de novo standard of review. *Westfield Ins. Co., Inc. v. Rowe ex rel. Estate of Gallant*, 2001 S.D. 87, ¶ 4, 631 N.W.2d 175, 176 (citing *Maryott v. First Nat'l Bank of Eden*, 2001 SD 43, ¶ 17, 624 N.W.2d 96, 102). The trial court's findings of fact are reviewed under a clearly erroneous standard. *Friesz ex rel. Friesz v. Farm & City Ins. Co.*, 2000 S.D. 152, ¶ 5, 619 N.W.2d 677, 679 (citing *Jasper v. Smith*, 540 N.W.2d 399, 401 (S.D.1995)).

Appellant's Brief at 8-9.

Mary Ellen argued in her initial brief and restates herein that the circuit court's Findings of Fact, Conclusions of Law, Memorandum Decision, and Order denying her Motion to Quash the Subpoena Duces Tecum to Irene Schrunk ("Attorney Schrunk") are clearly erroneous. A28 – A43. Furthermore, the circuit

court's Order allowed Molly and Brendon to take the unsupervised deposition of Attorney Schrunk and directed Mary Ellen to turn over documents evidencing communications between herself and Attorney Schrunk. In making that ruling, the circuit court determined whether there was an attorney-client privilege between Attorney Schrunk and Mary Ellen pursuant to SDCL 19-19-502(b) (formerly SDCL 19-13-3).[1] Through this Appeal, Mary Ellen is requesting this Court decide that the circuit court's Order violates her statutory attorney-client privilege. Therefore raising a question of statutory interpretation requiring *de novo* review.

ISSUE 1: Mary Ellen Nylen's Motion to Quash the Subpoena Duces Tecum to attorney Irene Schrunk should have been granted in its entirety because an attorney-client relationship existed between Mary Ellen and Attorney Schrunk from early December 2013 to November 2014.

Molly and Brendon argue that no "legal services" were provided to Mary Ellen by Attorney Schrunk. Appellees' Brief at 11-12. It appears undisputed that Mary Ellen was receiving legal advice from Attorney Schrunk from December 2013 to November 2014. Legal advice is a legal service. See Appellant's Brief at 11. The circuit court agreed in its Conclusions of Law that legal services included advice from an attorney about legal matters. See A39, ¶10. Therefore, "legal services" were provided to Mary Ellen by Attorney Schrunk.

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[1] SDCL 19-19-502(b): "A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
(1) Between himself or his representative and his lawyer or his lawyer's representative;
(2) Between his lawyer and the lawyer's representative;
(3) By him or his representative or his lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
(4) Between representatives of the client or between the client and a representative of the client; or
(5) Among lawyers and their representatives representing the same client."

In their discussion of *Parnes v. Parnes*, 80 A.D.3d 948 (N.Y. App. Div. 2011), Molly and Brendon state Mary Ellen acknowledged that an attorney-client relationship did not exist between herself and Attorney Schrunk. That acknowledgment came at Mary Ellen's deposition which was conducted on November 18, 2014. She was asked, "[s]o you don't have a current attorney/client relationship with [Attorney Schrunk]?" A68. Mary Ellen responded "[n]o." A68. Molly and Brendon's counsel signed the subpoena to Attorney Schrunk on November 21, 2014. A3. At the time of her deposition, Mary Ellen was no longer seeking legal advice from Attorney Schrunk, as evidenced by the privilege log. A22-A27. Mary Ellen was never asked whether there was a confidential "attorney-client relationship" with Attorney Schrunk prior to the date of the deposition.

Molly and Brendon, as well as the circuit court, point out that Attorney Schrunk advised Mary Ellen that she had a conflict of interest in representing Mary Ellen against Mark Nylen in their co-pending divorce action because of her previous representations of him. A36 ¶9 and Appellees' Brief at 13. However, Mark Nylen is not a party to this case. Attorney Schrunk's conflict did not include matters with Molly and Brendon. Mary Ellen testified at the Motion to Quash Hearing that Attorney Schrunk advised her that despite her conflict of interest in matters involving Mark Nylen, "she would help her in any way she could and she would continue to give [Mary Ellen] legal advice" regarding any of her legal issues. A16. Mary Ellen further testified at the hearing that the majority of her communications with Attorney Schrunk were regarding the legal issues with her children, Molly and Brendon. A17. Whether Attorney Schrunk had a conflict of interest with a non-party to this case has

no bearing on whether there was an attorney-client relationship between Attorney Schrunk and Mary Ellen. Attorney Schrunk continued to give Mary Ellen legal advice even after she advised Mary Ellen that she had a conflict with Mark Nylen. This caused Mary Ellen to believe that she was a client of Attorney Schrunk and that their communications were confidential. Attorney Schrunk never advised Mary Ellen to the contrary. Molly and Brendon's reliance on this argument and the circuit court's findings and conclusions related to the conflict of interest issue are clearly erroneous.

Molly and Brendon next argue that Mary Ellen's failure to assert a claim of attorney-client privilege during her deposition constitutes a waiver. Appellees' Brief at 14. However, Mary Ellen only stated that she did not have a *current* attorney-client relationship with Attorney Schrunk as of the day of the deposition. A68. Mary Ellen later asserted the privilege when Molly and Brendon subpoenaed Attorney Schrunk requesting her to produce documentation of their previous communications between November 20, 2013 and November 21, 2014. A2.

Molly and Brendon also argue that a party cannot claim the benefit of a version of the facts more favorable to his contentions than he himself has given in his own sworn deposition testimony. Appellees' Brief at 14. Mary Ellen assumes that Appellees are referring to her clarification of her understanding of the notion of representation by an attorney. Mary Ellen testified at the Motion to Quash Hearing that her "understanding of representation by an attorney is one that sits with you in the courtroom or sits beside you at a deposition." A11. That understanding does not change the fact that she was seeking and receiving legal advice from a licensed

attorney. Mary Ellen had an expectation that those communications would be confidential and Attorney Schrunk never advised her to the contrary. A14, 29.

Accordingly, the circuit court's Order determining that there was not an attorney-client relationship between December 2013 and November 2014 should be reversed.

ISSUE 2: Mary Ellen Nylen did not waive her attorney-client privilege with her California and South Dakota attorneys when she shared those communications with Attorney Schrunk, because Mary Ellen had an attorney-client relationship with all of those attorneys and therefore sharing her communications with any of them would not constitute a waiver under SDCL 19-19-510 (formerly SDCL 19-13-26) and SDCL 19-19-502(b)(1) & (5) (formerly SDCL 19-13-3(5)).

Molly and Brendon argue that Mary Ellen waived her attorney-client privilege with her California and South Dakota attorneys as to certain communications when she forwarded those communications to Attorney Schrunk. However, that argument presupposes that there was not an attorney-client relationship between Mary Ellen and Attorney Schrunk. Mary Ellen did in fact have an attorney-client relationship with Attorney Schrunk. Therefore and pursuant to SDCL 19-19-510[2] and SDCL 19-19-502(b)(1) & (5)[3], Mary Ellen did not waive her attorney-client privilege as to certain communications with her California and South Dakota attorneys when she forwarded those communications to Attorney Schrunk.

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[2] SDCL 19-19-510: A person upon whom this chapter confers a privilege against disclosure waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This section does not apply if the disclosure itself is privileged.

[3] SDCL 19-19-502(b): A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(1) Between himself or his representative and his lawyer or his lawyer's representative;

(5) Among lawyers and their representatives representing the same client.

Accordingly, the circuit court's decision regarding the waiver issue should be reversed.

CONCLUSION

For the forgoing reasons, Mary Ellen Nylen prays this Court reverse the circuit court's intermediate Order requiring Mary Ellen to turn over all written evidence of their communications and allowing Plaintiffs to take the unsupervised deposition of attorney Irene Schrunk.

Respectfully submitted this 16th day of July, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that true and correct copies of APPELLANT'S REPLY BRIEF were served by email and by depositing said copies in the United States Mail, with pre-paid, first class postage thereon to the following: Daniel R. Fritz (dfritz@lindquist.com) and Nicole O. Tupman (ntupman@lindquist.com), Lindquist & Vennum, LLP, 101 South Reid Street – Suite 302, Sioux Falls, South Dakota 57103 and David A. Tank (tank.dave@dorsey.com) and Angela E. Dralle (dralle.angela@dorsey.com), Dorsey & Whitney LLP, 801 Grand Ave – Suite 4100, Des Moines, Iowa 50309-2790, *attorneys for the Appellees* and Steve Huff (steve@jmmwh.com), Johnson, Miner, Marlow, Woodward & Huff Prof. LLC, 200 West 3rd Street, Yankton, SD 57078, *attorney for Irene Schrunk.*

Dated this 16th day of July, 2015.

Thomas P. Reynolds

CERTIFICATE PURSUANT TO S.D. CODIFIED LAWS 15-26A-66 & 15-26A-14(7)

I, Thomas P. Reynolds, hereby certify that the Petition in the above-entitled matter complies with the typeface specifications of S.D. CODIFIED LAWS 15-26A-66 and that the brief contains 10,214 characters not including spaces or 1,870 words and that said brief was typed in Times New Roman font, 12 point.

Dated this 16th day of July, 2015.

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