STATE OF SOUTH DAKOTA) :SS COUNTY OF MINNEHAHA)	IN CIRCUIT COURT SECOND JUDICIAL CIRCUIT
ARGUS LEADER MEDIA, Plaintiff, vs. LORIE HOGSTAD, in her official capacity a Sioux Falls City Clerk, TRACY TURBAK, in this official capacity as Sioux Falls Finance Officer, the CITY OF SIOUX FALLS, Defendants.	CIV. 15-3268 Memorandum and Order on Summary Judgment

A hearing was held on February 22, 2016, before the Court, Hon. John Ryan Pekas, Circuit Judge presiding upon the cross Motions for Summary Judgment filed by the City of Sioux Falls, Lorie Hogstand, and Tracy Turbak (the "City") and the Argus Leader Media (the "Argus Leader"). The City is represented by James E. Moore and the Argus Leader is represented by Jon E. Arneson. After fully reviewing the parties' arguments, reading all of their written submissions and the relevant authorities, and carefully considering the issues presented, the court grants the City's Motion for Summary Judgment and denies the Argus Leader's Motion for Summary Judgment:

FACTUAL BACKGROUND

In 2014, questions were raised by the City that regarded the aesthetic appearance of the exterior metal siding on the west side of the new-constructed Denny Sanford Premier Center ("Premier Center"). The City negotiated final amounts due and its dissatisfaction with the work with the general contractor and four subcontractors, all of whom were represented by counsel, to resolve the dispute. After mediation, the parties reach a confidential settlement agreement.

After one of the subcontractors disputed the terms of the agreement, the City retained outside counsel, who ultimately prepared a lawsuit to enforce the terms of the settlement. After further negotiation, the parties entered into a second settlement, the Confidential Settlement Agreement (the "Settlement"), which was signed in September, 2015. The City announced that they had reached a global settlement of the dispute with the Premier Center contractors on September 18, 2015.

The Settlement, in paragraph 6.6, provides that each party to the agreement warrants that except for disclosure of the global settlement amount of $1,000,000.00, all other details shall remain confidential and shall not be disclosed to any person.

On October 9, 2015, Joe Sneve ("Sneve"), a reporter for the Argus Leader, sent an email to the City's Attorney, David Pfeifle ("Pfeifle"), requesting a copy of the Settlement. On October 21, 2015, Pfeifle sent a letter to Sneve denying his request for a copy of the Settlement, citing the confidentiality language and SDCL § 1-27-1.5(20) as grounds for the denial. On October 31, 2015, Jon Arneson sent a letter to Pfeifle requesting that the City reconsider its denial of Sneve's request for a copy of the Settlement. Pfeifle responded to Jon Arneson on November 19, 2015, declining to reconsider the denial of Sneve's request for a copy of the Settlement. The Argus Leader then filed a complaint on December 1, 2015, asking this court to order the City to provide the Argus Leader with a copy of the Settlement and requesting this court to award the Argus Leader costs disbursements and a civil penalty under SDCL § 1-27-40.2 in the amount of $50 per day for each day that delivery of these records was unreasonably delayed through the fault of the City.

AUTHORITES AND ANALYSIS

1.) SDCL § 1-27-1.5(20) excludes the Settlement from public inspection and copying

The statutes of South Dakota recognize the need for open public records. ". . . Sunlight is said to be the best of disinfectants. . . " Buckley v. Valeo, 424 U.S. 1, 67 (1976). Public records are to be open to inspection and copying by the public:

> Except as otherwise expressly provided by statute, all citizens of this state, and all other persons interested in the examination of the public records, as defined in § 1-27-1.1, are hereby fully empowered and authorized to examine such public record, and make memoranda and abstracts therefrom during the hours the respective offices are open for the ordinary transaction of business and, unless federal copyright law otherwise provides, obtain copies of public records in accordance with this chapter.
>
> Each government entity or elected or appointed government official shall, during normal business hours, make available to the public for inspection and copying in the manner set forth in this chapter all public records held by that entity or official.

SDCL § 1-27-1. However, SDCL § 1-27-1.5 provides for 27 exceptions. Mercer v. S.D. Attorney Gen. Office, 2015 S.D. 31, ¶ 17, 864 N.W.2d 299, 303. Under SDCL 1-27-1.5, certain "records are not subject to §§ 1-27-1, 1-27-1.1, and 1-27-1.3[.]" Mercer v. S.D. Attorney Gen. Office, 2015 S.D. 31, ¶ 19, 864 N.W.2d 299, 304. Specifically:

> The following records are not subject to §§ 1-27-1, 1-27-1.1, and 1-27-1.3:
>
> . . .
>
> (20) Any document declared closed or confidential by court order, contract, or stipulation of the parties to any civil or criminal action or proceeding;

Records, such as contracts, are exempted from disclosure. Specifically, ". . . Records which, if disclosed, would impair present . . . contract awards . . . are exempt from disclosure. SDCL § 1-27-1.3. The Argus Leader argues that the Settlement entered into by the City with the several sub-contractors is not a 'contract' for the purposes of SDCL § 1-27-1.5(20). This argument hinges on the idea that the noun 'contract' is modified by the phrase 'of the parties to any civil or criminal action or proceeding,' and since the contract at issue in this case was not one declared

confidential to a civil action, then the contract would not be excepted from public disclosure laws via SDCL § 1-27-1. The City, on the other hand, argues that the word contract is an antecedent that stands alone and, therefore, by having a provision in the Settlement declaring itself as confidential that the Settlement is indeed excepted from public disclosure laws. Thus, this court must engage in statutory interpretation in order to answer the question of whether or not the noun 'contract' is modified by the phrase 'of the parties to any civil or criminal action or proceeding.'

The Supreme Court of South Dakota has adopted "the rule known as the 'Doctrine of the Last Antecedent' which states: '[i]t is the general rule of statutory as well as grammatical construction that a modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose which requires a different interpretation.'" Rogers v. Allied Mut. Ins. Co., 520 N.W.2d 614, 617 (S.D. 1994)(citing Kaberna v. School Bd. of Lead–Deadwood Sch. Dist. 40–1, 438 N.W.2d 542, 543 (S.D.1989); Lewis v. Annie Creek Mining Co., 74 S.D. 26, 33, 48 N.W.2d 815, 819 (1951)). "Under the last-antecedent doctrine, where no contrary intention appears, relative and qualifying words, phrases, and clauses are to be applied to the immediately preceding words or phrase." 82 C.J.S. Statutes § 443 (citations omitted). "Such words, phrases, and clauses are not to be construed as extending to or modifying others that are more remote nor are they ordinarily to be construed as extending to following words." Id. "The last antecedent is the 'last word, phrase, or clause that can be made an antecedent without impairing the meaning of the sentence." 2A Sutherland Statutory Construction § 47:33 (7th ed.).

However, this doctrine is not absolute and "can be overcome by other indicia of the meaning of the statute." 82 C.J.S. Statutes § 443(citing U.S. v. Hayes, 129 S. Ct. 1079, 172 L. Ed. 2d 816 (2009)). This doctrine is only to apply where "there are uncertainties or ambiguities, when other rules of construction fail, and when the intent of the legislature is unclear." Id.

(citations omitted). The doctrine is merely an aid that yields to more persuasive contextual evidence of legislative intent and common sense. Id. "Accordingly, the doctrine will not be adhered to where extension to a more remote antecedent is clearly require by a consideration of the entire act...[w]here several words are followed by a clause that is as much applicable to the first and other words as to the last, the clause should be read as applicable to all." Id. (citations omitted). Furthermore, the use of seriatim comma is not dispositive of legislative intent to limit the qualifying phrase to the last antecedent. "[M]any leading grammarians, while sometimes noting that commas at the end of series can avoid ambiguity, concede that use of such commas is discretionary." United States v. Bass, 404 U.S. 336, 340, 92 S. Ct. 515, 518, 30 L. Ed. 2d 488 (1971). While the 'absence of offsetting commas around a statutory phrase suggests that a phrase modifies only the language immediately adjoining...the omission of a comma does not necessarily foreclose applying the modifier to all of the preceding words." 82 C.J.S. Statutes § 430.

In this situation, the court finds that the only interpretation of this statute that makes logical sense is that the modifier "of the parties to any civil or criminal action or proceeding" only modifies the last antecedent "stipulation." "The purpose of statutory construction is to interpret the true intention of the law, which is to be construed primarily from the plain meaning of the statute." In re Estate of Howe, 2004 S.D. 118, ¶ 41, 689 N.W.2d 22, 32 (citations omitted). "The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said...we must give legislation its plain meaning...[w]e cannot amend to produce or avoid a particular results." Id. (citations omitted).

This court simply has to look at the effect of applying the modifier "of the parties to any civil or criminal action or proceeding" to each of the antecedents. By doing so, the statute would be read as saying "[a]ny document declared close or confidential by court order...of the parties

to any civil or criminal action or proceeding". This is clearly an absurd sentence that would result from the Argus Leader's interpretation. If the modifier is going to be applied to all antecedents, then that application should make sense. In the case at hand though, having the modifier applicable to "court order" is illogical. There is no such thing as a "court order of the parties" and clearly the legislature did not intend the modifier to apply in this regard.

Thus, the Doctrine of the Last Antecedent should be applied in interpreting this statute. There seems to be no legislative intent to apply the qualifying phrase to all antecedents. While the Argus Leader is able to find multiple instances where the Doctrine of the Last Antecedent was not used by the Legislature in statutes through South Dakota's code, those instances are not determinative of the matter before this court. The statutes listed by the Argus Leader in their brief used a qualifying phrase to describe all antecedents in a way that was intuitive and made logical sense. Here, the opposite is true as doing so would accomplish an outlandish result.

This court does acknowledge liberal construction of public access to public records law. Specifically:

> The provisions of §§ 1-27-1 to 1-27-1.15, inclusive, and 1-27-4 shall be liberally construed whenever any state, county, or political subdivision fiscal records, audit, warrant, voucher, invoice, purchase order, requisition, payroll, check, receipt, or other record of receipt, cash, or expenditure involving public funds is involved in order that the citizens of this state shall have the full right to know of and have full access to information on the public finances of the government and the public bodies and entities created to serve them. Use of funds as needed for criminal investigatory/confidential informant purposes is not subject to this section, but any budgetary information summarizing total sums used for such purposes is public. Records which, if disclosed, would impair present or pending contract awards or collective bargaining negotiations are exempt from disclosure.

SDCL § 1-27-1.3. And furthermore, "[e]xceptions in statutes generally should be strictly, but reasonably construed; they extend only so far as their language fairly warrants, and all doubts should be resolved in favor of the general provision rather than the exception." Simpson v. Tobin, 367 N.W.2d 757, 764 (S.D. 1985)(citing State v. Peters, 334 N.W.2d 217 (S.D.1983)).

"In dealing with statutory exceptions, this court construes the language strictly resolving doubt in favor of the general provision." 1st Am. Sys., Inc. v. Rezatto, 311 N.W.2d 51, 55 (S.D. 1981)(citing Lien v. Rowe, 77 S.D. 422, 426, 92 N.W.2d 922, 924 (1958)).

Despite this, the most reasonable construction of the statute at issue is to apply the Doctrine of the Last Antecedent and allow for the word "contract" to stand alone. While the public disclosure laws are to be interpreted liberally and general provisions are favored where there are doubts about the applicability of an exception, this court should not engage in an interpretation that clearly results in absurdity. In this case, that means the court should restrict the modifier to the last antecedent, "stipulation" and not apply it to "contract". Therefore, the City's contract, which was declared confidential, is not subject to inspection by the public as it is a document excepted from SDCL § 1-27-1.

The Argus Leader cites to a decision letter that was written by the Honorable Judge Jon Erickson out of the Third Judicial Circuit in support of their above argument. However, in that letter Judge Erickson rests his holding on that fact that:

> SDCL 13-18-43 requires the District to keep open to reasonable inspection by the public all contracts relating to school business. There are no exceptions. Therefore, SDCL 1-27-1.5(20) does not apply to School Boards and School Districts Officers.

While a decision by a trial court in a different circuit would only be persuasive authority, this court is not convinced that Judge Erickson's decision fully addressed the issue that is currently at stake here. Judge Erickson was able to rest his decision on the basis of SDCL 13-8-43, which was a more specific provision requiring contracts related to school business to be open for public inspection. This does not address whether or not the term 'contract' is modified by the phrase 'of the parties to any civil or criminal action or proceeding.' Therefore, this court finds that Judge

Erickson's decision in Beadle County Civil File 13-126 has no bearing on this court's interpretation of SDCL §1-27-1.5(20).

Lastly, this court finds that interpreting the word 'contract' as a stand-alone antecedent does not undercut the legislative purposes of SDCL § 1-27-1. First, no claim has been made by the Argus Leader that the City is acting in bad faith in regards to keeping the contract confidential.1 Secondly, under the Argus Leader's interpretation of SDCL § 1-27-1.5(20), the only thing the City would have to do to make a contract confidential would be to file or serve a civil lawsuit. Thus, the only difference between this court's interpretation and the Argus Leader's interpretation of SDCL § 1-27-1.5(20) is the cost of service of process or a filing fee. This court's interpretation does not significantly broaden a "systematic scheme of secrecy" any more than what the South Dakota Legislature had already intended. This court's interpretation simply comports with what is consistent with the plain language of the statute and the statute's rationale.

2.) No Superseding Municipality Laws Compel Disclosure of the City's Settlement Agreement

Finally, the Argus Leader argues that SDCL § 1-27-33 is dispositive of this case regardless of this court's interpretation of SDCL § 1-27-1.5. SDCL § 1-27-33 provides that:

> The provisions of this chapter do not supersede more specific provisions regarding public access or confidentiality elsewhere in state or federal law.

The Argus Leader then goes on to list certain provisions of SDCL § 9, including SDCL § 9-14-17, which states in part:

> The municipal finance officer shall keep an office at a place directed by the governing body. The finance officer shall keep the corporate seal, all papers and

1 In fact, the City has disclosed arguably the most important term, that is, the global settlement amount of $1,000,000.00.

> records of the municipality, and a record of the proceedings of the governing body, whose meetings the finance officer shall attend.

SDCL § 9-14-21, which states:

> The municipal finance officer shall examine all reports, books, papers, vouchers, and accounts of the treasurer; audit and adjust all claims and demands against the municipality before they are allowed by the governing body; and keep a record of the finance officer's acts and doings. The finance officer shall keep a book in which the finance officer shall enter all contracts. *The book shall include an index to the contracts and shall be open to the inspection of all parties interested.*

And, lastly, SDCL § 9-18-2, which reads:

> Every municipal officer shall keep a record of the official acts and proceedings of his office, and such record shall be open to public inspection during business hours under reasonable restrictions.

Thus, the Argus Leader argues that these municipality-related statutes already impose an obligation on the City to keep its records, including the contract at issue in this case, open. The crux of the Argus Leader's argument then rests on the notion that a conflict exists between SDCL § 1-27-1.5(20) and SDCL § 9-18-2 and that SDCL § 9-18-2 should prevail as it is the more specific provision. This court disagrees.

As this court interprets it, SDCL 1-27-1.5(20) excludes contracts entered into by the City and declared confidential from the open records requirement. This court also interprets SDCL § 9-18-2 as not requiring municipal contracts to be open to public inspection. SDCL §9-18-2 only goes so far as to state that the "record of the official acts and proceedings of his office...shall be open to public inspection" without further defining what is encompassed within "official acts and proceedings." Moreover, SDCL § 9-14-21 sets out its own standard of inspection for contracts entered into by the municipality, which contradicts the Argus Leader's interpretation of SDCL § 9-18-2. SDCL § 9-14-21 allows the inspection of contracts for "all parties interested," which is distinct from being open to inspection by the public. Were SDCL § 9-18-2 to encompass contracts entered into by the City, then the language in SDCL § 9-14-21, which allows the book

of contracts to be open to inspection only by interested parties, would be mere surplusage. This court does acknowledge that "[w]hen the question of which of two enactments the legislature intended to apply to a particular situation, terms of a statute relating to a particular subject will prevail over the general terms of another statute." Benson v. State, 2006 SD 8, ¶ 71, 710 N.W.2d at 158 (quoting Martinmaas, 2000 SD 85, ¶ 49, 612 N.W.2d at 611) (other citations omitted). This is further elaborated by SDCL § 1-27-33, which indeed states that the provisions of SDCL § 1-27 will not supersede more specific provisions regarding public access found elsewhere in South Dakota's code.

Yet, "where statutes appear to conflict, it is our responsibility to give reasonable construction to both, and if possible, to give effect to all provisions under consideration, construing them together to make them harmonious and workable." Wiersma v. Maple Leaf Farms, 1996 SD 16, ¶ 4, 543 N.W.2d 787, 789. The South Dakota Legislature decided to exclude contracts entered into by the City and declared confidential from being subject to public inspection. SDCL § 1-27-1.5(20). The legislature's objective in SDCL §1-27-1.5(20) comports with this court's interpretation that SDCL §9-18-2 does not require that all municipal contracts be open to public inspection, but only open to inspection by interested parties via SDCL § 9-14-21. This interpretation satisfies this court's duty to give a reasonable construction to all provisions and to construe such provisions in a workable and practical manner.

CONCLUSION

The Argus Leader's Motion for Summary Judgment is DENIED and the City's Motion for Summary Judgment is GRANTED. The Settlement is a document declared confidential by contract and is not open to public inspection according to SDCL § 1-27-1.5(20).

Therefore, let an Order be entered accordingly.

ORDER

Based on the Findings of Fact and Conclusions of Law, the Court hereby,

ORDERS, ADJUDGES AND DECREES as follows:

1. The Plaintiff's motion for summary judgment is DENIED.

2. The Defendant's motion for summary judgment is GRANTED.

3. Counsel for the Defendant's will prepare a Judgment accordingly.

Dated on May 20, 2016.

John Ryan Pekas
Circuit Court Judge

Attest: Angelia M. Gries, Clerk of Courts
By: Lammi Penning
Deputy

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