IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 27851

Douglas W. Howard,	)
	)
Appellee,	)
v.	)
	)
Patrick C. Bennett, Personal Representative	)
Of the Estate if Raymond Earl Bennett,	)
Deceased,	)
	)
Appellant.	)

Appeal from the Circuit Court
Seventh Judicial Circuit
Pennington, South Dakota
The Honorable Heidi Linngren
Circuit Court Judge

APPELLANT'S BRIEF

Heather Lammers Bogard
704 St. Joseph Street
P.O. Box 290
Rapid City, SD 57709
(605) 342-2410
Attorneys for Appellant
Patrick C. Bennett, Personal
Representative of the Estate
Of Raymond Earl Bennett,
Deceased

David A. Bradsky
Bradsky, Bradsky & Bradsky
927 Main Street
Rapid City, SD 57701
(605) 342-8970
Attorneys for Appellee
Douglas W. Howard

ORDER GRANTING INTERMEDIATE
APPEAL ENTERED JUNE 6, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

STATUTES:

OTHER AUTHORITIES:

JURISDICTIONAL STATEMENT

On April 28, 2016, the trial court denied the motion for summary judgment made by Appellant; notice of entry of its order was given on May 5, 2016. Appellant thereafter made a Petition for Permission to Appeal Under SDCL 15-26A-3(6) on May 6, 2016. This Court entered its Order Granting Petition for Allowance of Appeal from Intermediate Order on June 6, 2016.

STATEMENT OF THE LEGAL ISSUE

Whether Bennett owed Howard a legal duty to protect Howard from harm more than an hour after the Highway Patrol had taken control of Bennett's accident scene and there were no other accidents prior to Howard's arrival?

The trial court held in the affirmative.

Most Relevant Cases:

Zerfas v. AMCO Ins. Co., 2015 SD 99, 873 N.W.2d 65.

Braun v. New Hope Tp., 2002 SD 67, 646 N.W.2d 737.

Olson v. Equitable Life Assurance Co., 2004 SD 71, 681 N.W.2d 471.

Jackson v. Howell's Motor Freight, Inc., 485 S.E.2d 895 (N.C.App. 1997).

Most Relevant Statutes:

SDCL 31-4-14.2.

SDCL 31-4-14.3.

SDCL 32-2-7.

SDCL 22-11-6.

STATEMENT OF THE CASE AND THE FACTS

Appellee Howard [hereinafter Howard] commenced an action on May 22, 2015 in the Seventh Judicial Circuit Court, Pennington County, South Dakota, the Honorable Heidi L. Linngren, presiding, against Appellant Bennett, as the personal representative of the Estate of Raymond Bennett [hereinafter Bennett]. Bennett made a motion for summary judgment under the doctrine of intervening/superseding cause, which motion was denied by the trial court. This Court thereafter granted Bennett's petition for an intermediate appeal under SDCL 15-26A-3(6).

There appears to be no significant dispute as to any fact regarding this case. On August 5, 2012, at approximately 3:00 p.m., Raymond Bennett, after turning off South Dakota Highway 385 in Pennington County, proceeded eastbound on South Dakota Highway 44 towards Rapid City, for approximately .4 mile on his motorcycle. At this point he failed to negotiate a corner on Highway 44. Bennett and his motorcycle left the highway and Bennett was killed.[1] The portion of Highway 44 between the turn from Highway 385 involves several curves,[2] and Howard's Complaint in this action described the curve immediately prior to the scene of Bennett's accident as a "blind corner."[3]

---

[1] Bennett Accident Report at tenth through twelfth pages. The Bennett Accident Report was filed in the trial court as Exhibit 1 to the Affidavit of Heather Lammers Bogard in Support of the Amended Motion for Summary Judgment dated March 8, 2016. See also Defendant's Statement of Material Facts Not in Dispute for Purposes of Amended Motion for Summary Judgment at Paragraphs 1 and 2 and Plaintiff's Response thereto.

[2] Rybak deposition at 27-28. The Rybak deposition was filed in the trial court as Exhibit 2 to the Affidavit of Heather Lammers Bogard in Support of the Amended Motion for Summary Judgment.

[3] Complaint, Paragraph 4.

There is no dispute that Bennett's accident and death was the result of his own negligence.[4]

The first South Dakota Highway Patrolman to arrive at the Accident scene was Trooper Dan Bender, who got there at 3:23 p.m.[5] During the next eight minutes, another four Highway Patrolmen, Trooper Heinrich, Trooper Adam, Trooper Downing and Trooper Kinney arrived.[6] These were, in the words of Trooper Rybak, who arrived at the scene at 4:00 p.m., "responsible for ensuring that everything [was] taken care of safely and appropriately and [to] get traffic open."[7] By the time Rybak arrived, Bennett's body had been removed, but a tow truck was still preparing to remove Bennett's motorcycle, and several of the Patrolmen, who were conducting accident investigation activities, remained on the scene with their vehicles.[8] Traffic was then flowing both directions past the accident scene,[9] and the record contained no indication that any accident occurred near the Bennett scene prior to 4:39 p.m. Rybak testified that Trooper Heinrich's Highway Patrol vehicle was parked in such a way as to alert traffic approaching from the direction of Rapid City that law enforcement was present and to slow down,[10] but that there were too many curves between the accident scene and Highway 385 to establish warnings for drivers approaching from that direction given the risk to Highway

---

[4] Bennett Accident Report at twelfth through thirteenth pages.
[5] Id. at fourth page; Defendant's Statement of Material Facts, Paragraph 3 and Plaintiff's Response thereto.
[6] Bennett Accident Report at fifth page.
[7] Rybak deposition at 8, 20-21, Defendant's Statement of Material Fact, Paragraph 3 and Plaintiff's Response thereto.
[8] Rybak deposition at 13, 15, 19-20, 33, 35; Defendant's Statement of Material Facts, Paragraphs 4-7 and Plaintiff's Responses thereto.
[9] Rybak deposition at 25, 29; Defendant's Statement of Material Facts, Paragraph 8 and Plaintiff's Response thereto.
[10] Rybak deposition at 18, 28-29.

Patrolmen from "the amount of traffic that was on that roadway going in both directions during the Rally."[11]

Rybak testified that at 4:39 p.m., while he was operating mapping equipment at the accident scene, he heard extreme braking. He then saw Howard on his motorcycle approaching from the direction of the Highway 385 intersection and heading towards the east. In Rybak's view, Howard was attempting to avoid running into the back of another vehicle, but in the process flipped his motorcycle over.[12]

The version Howard gave of his accident at his deposition is similar. According to Howard, he turned off Highway 385 onto Highway 44 heading east and encountered the Bennett accident scene as he came around a corner.[13] Howard testified there was "no Highway Patrol. There was nothing there" at this corner.[14] Howard testified that, immediately as he rounded this blind corner, he encountered a motorhome pulling a large trailer stopped on Highway 44 in front of him. Because a car was coming towards him in the other lane, Howard testified that he was obliged to hit his brakes very hard, and that this caused him to fall to the ground and lose consciousness.[15]

Howard testified that the Highway Patrol "should have been back . . . on [the] corner" that Howard rounded before encountering the accident scene, and that the

---

[11] Id. At 27-28.
[12] Rybak deposition at 22-25; Defendant's Statement of Material Facts, Paragraph 9 and Plaintiff's Response thereto.
[13] Howard deposition at 15-16. The Howard deposition was filed in the trial court as Exhibit 3 to the Affidavit of Heather Lammers Bogard in Support of Amended Motion for Summary Judgment. See also Defendant's Statement of Material Fact, Paragraphs 10-11, and Plaintiff's Response thereto.
[14] Howard deposition at 18; Defendant's Statement of Material Facts, Paragraph 12 and Plaintiff's Response thereto.
[15] Howard deposition at 18, 21-22, 24-25; Defendant's Statement of Material Facts, Paragraphs 12-14 and Plaintiff's Response thereto.

Highway Patrol should "absolutely" have been there to secure the accident scene an hour and half after Bennett's accident. Howard asserted that, while he continued to blame Bennett for the situation, he felt the Highway Patrol had "a hand in it."[16] Indeed, Howard testified:

> Q And would you agree that if there had been a Highway Patrol vehicle such as the one placed on Exhibit 3 labeled "Heinrich," you would have slowed down earlier?
>
> A Even more so, yes. I know the speed limit is 50 there, and I know I was going way slower than that.
>
> Q And of course, then, if you would have been able to slow down, you wouldn't have had to hit your brakes as hard when you saw the motorhome?
>
> A Exactly.
>
> Q Would you agree that since Mr. Bennett was dead, he didn't have any control over how the scene was controlled by the Highway Patrol?
>
> A That's right. Yep.
>
> Q And it wasn't his responsibility to make sure the scene was controlled?
>
> A Right.

(Emphasis supplied.)[17]

In fact, two years before he sued Bennett, Howard sued Highway Patrol Trooper Bender and, as John Does, all the other Highway Patrolmen at the accident scene. This 2013 complaint in the Seventh Judicial Circuit Court,[18] alleged that:

---

[16] Howard deposition at 23, 29-30; Defendant's Statement of Material Facts, Paragraphs 15-18 and Plaintiff's Response thereto.

[17] Howard deposition at 30; Defendant's Statement of Material Facts, Paragraphs 19-20 and Plaintiff's Response thereto.

> Dan M. Bender was in charge of the scene; that at all times material hereto, the Defendant Dan M. Bender, was acting in the course of and in the scope of his employment with the South Dakota Highway Patrol; that the Defendant, Dan M. Bender in his individual capacity, and/or those unknown officers at the scene, were negligent in failing to properly secure the site of the fatal accident upon which the Plaintiff came, in particular in failing to warn oncoming traffic that there was an accident, in failing to warn that the road was partially blocked as the tow truck was loading the deceased's motorcycle and in spite of warnings given by the tow truck driver to the Defendant Dan Bender that someone should be up the road warning on-coming traffic of the situation as the curve obscured the vision of oncoming traffic and as it was a dangerous situation; that the Defendant Dan Bender and/or those unknown officers at the scene refused to take steps to warn oncoming traffic of the dangerous situation despite the requests and warnings from the tow truck driver; that Defendant Dan M. Bender and/or those unknown officers at the scene were also negligent in ignoring the sites [sic] and sounds of other previous vehicles "screeching" their tires / brakes and trying to slow down after also being surprised upon rounding the curve; that Defendants, Dan M. Bender and/or those unknown officers at the scene were otherwise negligent.
>
> That as a direct and proximate result of the negligence of the Defendants and each of then as described herein, Plaintiff has suffered serious injuries to his person and mind.

Howard v. Bender Amended Complaint at Paragraphs 3-5 (emphasis supplied).

Trooper Bender made a motion to dismiss based on, among other things, the issue of duty, and in resisting the motion, Howard expanded on his allegations and now explicitly took the position that Trooper Bender owed Howard a legal duty to secure the Bennett accident scene and to warn Howard of the danger:

---

[18] The Amended Complaint in Howard v. Bender was filed in the trial court as Exhibit 4 to the Affidavit of Heather Lammers Bogard in Support of Amended Motion for Summary Judgment.

> Howard had just turned onto Highway 44 from Highway 385, and had just rounded the blind curve which is located on Highway 44 about 3/10 of a mile east of the intersection of Highways 385 and 44 when he suddenly encountered a tow truck partially blocking the highway.
>
> Bender, as an employee of the South Dakota Highway Patrol / Department of Public Safety, was investigating the accident which had occurred just east of the blind curve, and was charged with the duty of properly securing the accident scene, and warning motorists such as Howard that there was an accident, and that a tow truck was partially blocking the highway.
>
> Bender had ignored requests and warnings from the tow truck operator that someone should be up the road warning on-coming motorists of the situation, especially because the blind curve obscured the vision of oncoming traffic. Bender had ignored sights and sounds of other vehicles "screeching" their tires from applying their brakes after rounding the blind cure and seeing the blockage of the highway. Despite the warnings from the two [sic] truck driver and the obvious fact that the motorists were surprised to encounter the partially blocked highway, Bender refused to take any steps to warn oncoming traffic of the dangerous situation created by his failure to properly secure the accident scene.
>
> The fact that Bender ignored requests and warnings from the tow truck operator and refused to post any warnings up the road, and ignored that fact that other motorists were having to take emergency braking measurers because of the partial highway blockage, reasonably supports an inference that Bender **knowingly** ignored a danger which **he himself had created** through his supervision of the removal of the accident vehicle from the scene.

Howard v. Bender, Plaintiff's Brief in Opposition to Motion to Dismiss at 2-3 (emphasis supplied and in the original).[19]

[19] The Plaintiff's Brief in Howard v. Bender was filed in the trial court as Exhibit 5 to the Affidavit of Heather Lammers Bogard in Support of Amended Motion for Summary Judgment.

The Seventh Judicial Circuit Court accepted Howard's assertions and denied the motion to dismiss,[20] although Howard seems to have subsequently dismissed the action against Trooper Bender and the other Highway Patrol officers.

ARGUMENT

Bennett Owed Howard no Legal Duty to Protect Howard from Harm More than an Hour After the Highway Patrol Took Control of Bennett's Accident Scene With No Other Accidents in the Interim.

Scope of Review: Because the issue presented by this appeal "questions the existence of a duty (created by relationship or through foreseeability), the issue is a question of law that is fully reviewable by this Court," Braun v. New Hope Tp., 2002 SD 57, ¶ 9, 646 N.W.2d 737, 740 and is heard de novo. Zerfas v. AMCO Ins. Co., 2015 SD 99, ¶ 8, 873 N.W.2d 65, 69.

This Court has recently made it very clear that the mere fact that a driver on a highway has been involved in an accident that created some degree of a hazard for subsequent drivers does not necessarily impose a duty on the first driver to take steps to protect those subsequent drivers. Zerfas v. AMCO Ins. Co., supra, considered the situation created when "a driver, other than [the plaintiff], hit [a] deer . . . [and] the presence of the deer carcass in [the plaintiff's] lane of travel caused him to swerve, lose control of his vehicle, and be struck by oncoming traffic," Id., 2015 S.D. 99, ¶ 9, 873

[20] The Order Denying Motion to Dismiss was filed in the trial court as Exhibit 6 to the Affidavit of Heather Lammers Bogard in Support of Amended Motion for Summary Judgment.

N.W.2d at 69, resulting in the plaintiff's death. Id., 2015 SD 99, ¶ 1, 873 N.W.2d at 67.

This Court recited the familiar rule that:

> "foreseeability in defining the boundaries of a duty is always a question of law" and is examined at the time the act or omission occurred . . .. To determine whether a duty exists, we examine "the facts as they appeared at the time, and not by a judgment from actual consequences which were not then to be apprehended by a prudent and competent man."

Id. 2015 SD 99, ¶ 14, 873 N.W.2d at 70.[21]

This Court then proceeded to find that killing a deer in a collision and then leaving its carcass in the riving lane of an interstate highway did not create a foreseeable risk of injury to subsequent drivers. This Court held that it

> cannot be disputed that there is some degree of danger from the presence of a deer carcass on a driving lane of an interstate. Yet, this does not perforce mean that it was foreseeable that a [subsequent] driver would not be able to avoid striking the carcass . . . every user of a highway has "a duty to exercise reasonable care under the circumstances . . . to maintain control of the vehicle so as to be able to stop or otherwise . . . avoid an accident within that person's range of vision . . .." Here, there is evidence that other drivers using the southbound lane on Interstate avoided the deer carcass.
>
> To accept [plaintiff's] view that a duty exists under the facts of this case would in essence impose strict liability upon all drivers post-impact . . . and make them ensurers of the safety of all following travelers. Yet when examining foreseeability of harm, we have said that "[no] one is required to guard against or take measures to avert that which a reasonable person under the circumstance would not anticipate as likely to happen."

[21] The trial court appears to have erroneously believed that this was a fact issue, although its identification of the facts it believed to be in dispute is hazy at best (Motion Hearing Transcript at 9). In any event, these facts were not included in the trial court's written order, and this Court's review is limited to the written order and not any extraneous remarks. Connelly v. Sherwood, 268 N.W. 140, 142 (S.D. 1978).

Id. 2105 SD 99, ¶¶ 15-16, 873 N.W. 2d at 70-71 (emphasis supplied).

Here, of course, the record is clear that, in the hour and one-half between Bennett's fatal crash at approximately 3:00 p.m. on August 5, 2012, and Howard's accident at 4:39 p.m., there were no other accidents at this location. This is despite the fact that the traffic past the scene was so heavy that the Highway Patrol considered it unsafe to position Troopers at any corners to warn oncoming drivers of the accident scene and to do no more than to park a Highway Patrol vehicle where it could be seen by drivers approaching from one direction only. (Rybak deposition at 27-29.) Yet, as in Zerfas, "other drivers using [the highway] avoided the [hazards at the accident scene]," indicating that the mere fact that Bennett had experienced an accident did "not perforce mean that it was foreseeable that [a subsequent] driver would not be able to avoid" another accident at that location. Zerfas, 2015 S.D. 99, ¶ 15, 873 N.W.2d at 70-71. There can, accordingly, be little doubt that even without other intervening factors, any imposition of a duty upon Bennett to protect Howard is dubious at best. Here, where there is the very significant intervening circumstance that the Highway Patrol had taken control of the accident scene more than an hour prior to Howard's accident, there can be no doubt that Bennett no longer owed Howard any duty by the time Howard arrived upon this scene.

> As this Court held in Braun v. New Hope Tp., supra, the intervening/superseding cause analysis questions the extent of the obligation, or duty, of the original actor who was negligent . . .. Although the question is often expressed in terms of "cause" or "proximate cause," those terms avoid the real issue. The appropriate question "is one of negligence and the extent of the obligation: whether the [original actor's] responsibility extends to such interventions, which are foreign to the risk the [original

> actor] has created. It is best stated as a problem of the scope of the legal obligation to protect the plaintiff against such an intervening cause."

2002 S.D. 67, ¶ 12, 646 N.W.2d at 740 (emphasis supplied). The issue of whether an intervening/superseding cause has occurred is thus a "question of law that is fully reviewable by this Court." Id., 2002 S.D. 67, ¶ 9, 646 N.W.2d at 740. In general terms, a superseding cause is found to exist where the "act or operation of an intervening force prevents the original actor's antecedent negligence from becoming a legal cause in bringing about the harm to another." Id., 2002 S.D. 67, ¶ 13, 646 N.W.2d at 741.

When the question involves the acts of third parties, as is the situation here, "[m]ore specific rules" apply, and this Court has adopted those set forth in Restatement (Second) of Torts § 452(2). Braun held, citing that section, that

> "Where *because of lapse of time or otherwise*, the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause." *Id*. at § 452(2)(emphasis added). In such cases the duty, and therefore the entire responsibility, shifts to the third person and the original actor is relieved of liability. *Id*. at § 452(2) com.d.

Braun, supra, 2002 S.D. 67, ¶ 15, 646 N.W.2d at 741 (emphasis in original). This issue is to be addressed in terms of foreseeability. It is only when "intervening negligence [is] foreseeable [that] the original actor remains liable because '[f]orseeable intervening forces are within the scope of the original risk.'" Id., 2002 S.D. 67, ¶ 16, 646 N.W.2d at 741.

In Braun, as here, the intervening/superseding acts were also those of government actors. After a Township road had been blocked by a washout, the Township posted a warning of the blockage with a "road closed" sign. Two defendants, T-Lakota and

Rozell, were responsible for knocking down the warning sign, but before they could replace it, the Township reinstalled the sign, but in a much less conspicuous position. The plaintiff subsequently drove into the washout without noticing the sign and was significantly injured. Id., 2002 S.D. 67, ¶¶ 2-6, 646 N.W.2d at 739. This Court posed the question as "whether it was reasonably foreseeable to T-Lakota and Rozell that Township, after having affirmatively acted to reinstall the sign, would do so in a negligent manner." Id. 2002 S.D. 67, ¶ 16, 646 N.W.2d at 741.

In deciding foreseeability in the context of this governmental third party's conduct, the court identified two "significant" factors. The first was whether the third party "had an independent statutory duty . . . to protect the public." Id., 2002 S.D. 67, ¶ 17, 646 N.W.2d at 741. In Braun, such a duty was found in statutes requiring townships to maintain highways damaged by floods, and to post conspicuous warning signs to give the public notice of hazards. Id. In this case, Howard himself took the position in the Howard v. Bender action that the Highway Patrolmen at the Bennett accident scene were "charged with the duty of properly securing the accident scene, and warning motorists such as Howard that there was an accident." Plaintiff's Brief in Opposition to Motion to Dismiss at 2. As such, Howard can scarcely now deny that the Highway Patrol had such a duty.

This Court has long made it clear that a "party to an action may not make a voluntary decision concerning a trial tactic and then when they find themselves in an undesirable position as a result of that legal posture, attempt to proceed in a subsequent inconsistent manner. Judicial estoppel bars such gamesmanship." Gregory v. Solem, 449 N.W.2d 827, 832 (S.D. 1989). Or as this Court more recently put it, ""[s]ometimes

called the 'prior success rule,' the doctrine applies to parties who have unequivocally and successfully asserted a position in a prior proceeding; thus, they are estopped form asserting an inconsistent position in a subsequent proceeding." Bailey v. Duling, 2013 S.D. 15, ¶ 33, 827 N.W.2d 351, 362-63. There is no dispute that Howard took his position regarding the Highway Patrol's duty in opposition to Trooper Bender's motion to dismiss on the duty issue. See Plaintiff's Brief in Opposition to Motion to Dismiss at 3-6. There is also no dispute that Howard's assertions were successful: the trial court in Howard v. Bender denied Bender's motion to dismiss on January 13, 2014. Howard is now accordingly judicially estopped to dispute that the Highway Patrol has a "duty of properly securing the accident scene, and warning motorists such as Howard that there was an accident." See, e.g., Sprague v. Simon, 760 N.E.2d 833, 837 (Ohio App. 2001) (party estopped by prior argument on duty issue). Indeed, it should be noted that many jurisdictions recognize that law enforcement officers have a common law duty to warn highway users of impending dangers. See, e.g., Ritter v. State, 344 N.Y.S.2d 257, 269 (N.Y.Ct. 1972); Monceaux v. Jennings Rice Drier, Inc., 590 So.2d 672, 675 (La.App. 1991); Anthony v. C.D. Amende Co., 639 P.2d 231, 233-34 (Wash.App.1982).

It is, moreover, clear that the Highway Patrol was also subject to a statutory duty to warn "motorists such as Howard" of any hazards related to the Bennett accident scene. By statute, patrol officers are required to "assist in the enforcement of all laws . . . governing motor vehicles . . . over and upon the highways of this state." SDCL 32-2-7. One of these laws is SDCL 31-4-14.2:

> Notice to the public that a state trunk highway is closed or its use is restricted shall be given in one or more of the following forms:

(1) Erection of suitable barriers upon the highway to restrict or prohibit travel;
(2) Post warning and notice of the condition of the highway for travel;
(3) Post signs for direction of traffic upon the highway relative to use or nonuse of the highway;
(4) Place warning devices on the highway;
(5) Place flagmen to warn, detour, or direct traffic on the highway.

(Emphasis supplied.)

The existence of such a legal duty on the part of the intervening third person is of course central to the fundamental consideration stated by comment f. of Restatement (Second) of Torts § 452: when "full responsibility for control of the situation and prevention of the threatened harm has passed to [a] third person, his failure to act is then a superseding cause, which will relieve the original actor of liability." (Emphasis supplied.) Howard himself agrees that Bender and the other Highway Patrolmen were "in charge of the scene" at the time of Howard's accident, Amended Complaint, Howard v. Bender, Paragraph 4, and conceded at his deposition that Bennett had no "control over how the scene was controlled by the Highway Patrol" and that it wasn't Bennett's "responsibility to make sure the scene was controlled." Howard Deposition at 30. A party "cannot claim a version of the facts more favorable to himself than his own testimony." Trammell v. Prairie States Ins. Co., 473 N.W.2d 460, 463 (S.D. 1991). In any event, Howard only recognized what the law already makes clear: if a highway is "rendered dangerous and unsafe for travel, it becomes the duty of the duly authorized public authorities to provide the remedy." Norman v. Cummings, 45 N.W.2d 839, 841 (S.D. 1951) (emphasis supplied). The "Legislature intended that the whole duty with respect to public safety on any particular highway should rest" on the governmental

entity responsible for that highway, Robinson v. Minnehaha County, 277 N.W. 324, 327 (S.D. 1938), a duty which, as to state trunk Highway 44, SDCL 31-4-164, is plainly vested in the State of South Dakota. SDCL 31-4-2. Once the Highway Patrol has acted to fulfill its responsibility to control an accident scene and to remedy any dangers arising out of an accident, no private party may override the decision of those officers.

Indeed, any attempt by a private party to provide his own "safety measures" at an accident scene once the Highway Patrol has acted would likely result in criminal charges under SDCL 22-11-6 for obstruction of a law enforcement officer. See, e.g., Rivera v. Foley, 2015 WL 1296258 *8 (D.Conn.2015)(party's entry into "scene of a major motor vehicle accident and ongoing police investigation provides arguable reasonable suspicion that [the party] was interfering with police activity"); People v. Kolb, 183 N.Y.S.2d 840, 842-43 (NY.Cty.Ct. 1958)(disorderly conduct conviction proper where defendant told tow truck called by police to leave so defendant could "handle" the accident; defendant's conduct constituted "obstruction of the plan adopted by the police officer to clear the scene of the accident"). Moreover, an attempt to vary the type of warnings given by the Highway Patrol under SDCL 31-4-14.2 could be considered a violation of SDCL 31-4-14.3, which makes it a criminal offense to "fail to observe" warnings under SDCL 31-1-14.2. The Highway Patrol is, of course, authorized to arrest violators of "any of the laws or police regulations of this state, governing operation of motor vehicles." SDCL 32-2-8.

As McCleaf v. State, 945 P.2d 1298 (Ariz.App.1997), put it, applying Restatement (Second) of Torts § 452(2), "[w]hen a responsible actor assumes control of a situation from another . . . the rule is that the negligence of the initial actor will not be found to be a proximate cause of harms that befall after the authoritative and effectual

decision as to the same matter has been made by another person empowered to make it." 945 P.2d at 1303 (emphasis supplied). Here, the Highway Patrol unquestionably had the power to make "authoritative and effectual" decisions as to the regulation of traffic past the Bennett accident scene. Once the Highway Patrol in fact "assumed control" of this scene and made its decisions regarding traffic warnings no private party could lawfully do anything to override those "authoritative" decisions. As a result, whatever harm that occurred to Howard was caused by the decision made by the Highway Patrol not to post warnings between the Highway 385 intersection and the accident scene on Highway 44, and Bennett's negligence ceased to be a proximate cause of any harm that subsequently occurred.

Moreover, the fact that the Highway Patrol affirmatively acted to carry out their unquestioned legal "duty of properly securing the accident scene, and warning motorists such as Howard that there was an accident," to use Howard's own words, leads directly to the second "significant" factor established by this Court's analytical framework in Braun:

> It is also significant that this accident happened after Township affirmatively acted under these statutes to remedy the danger. Because Township reinstalled the sign before the accident, T-Lakota's and Rozell's acts or omissions were no longer creating the condition or danger which ultimately harmed Braun.

2002 S.D. 67, ¶ 18, 646 N.W.2d at 745-46 (emphasis supplied). It has, of course, long been the rule in South Dakota that where an initial actor did nothing more than "furnish a condition by which the injury by the subsequent independent act of a third person occurred," Bruening v. Miller, 230 N.W.2d 754, 759 (S.D. 1930), that initial actor is not liable for the subsequent injury.

Here, Howard's accident indisputably occurred at 4:39 p.m., an hour after at least five Highway Patrol officers arrived to take charge of the Bennett accident scene. Bennett's situation is accordingly no different than that of Gibbs in Jackson v. Howell's Motor Freight, Inc., 485 S.E.2d 895 (N.C. App. 1997). In Jackson, Gibbs, the "original actor," negligently ran his vehicle into a utility pole and caused it to fall into the street. City police arrived and began directing traffic through the accident scene until a truck caught on a wire still attached to the downed pole and dragged the pole against the plaintiff. Finding that the original actor Gibbs was not liable for this subsequent accident, the court held:

> police officers and other officials had taken control of the accident scene. These officials . . . made decisions regarding the flow of traffic and assumed the responsibility for directing traffic through the accident scene. Therefore . . . we find that "[t]he facts do not constitute a continuous succession of events, so linked together as to make a natural whole" and any subsequent act of negligence by . . . the City . . . was "an intervening act which was not itself a consequence of [defendant Gibbs'] original negligence, nor under the control of [defendant Gibbs], nor foreseeable by him in the exercise of reasonable prevision" . . . . Accordingly, we affirm the trial court's decision to grant summary judgment in Gibbs' favor.

485 S.E.2d at 482-83 (emphasis supplied). Here, too, Howard's accident happened well "after [the Highway Patrol] affirmatively acted . . . to "remedy the danger," Braun, supra, 2002 S.D.67, ¶ 18, 646 N.W.2d at 745, and had "taken control of the accident scene." Jackson, supra, 485 S.E.2d at 482. Thus, Bennett's "acts or omissions were no longer creating the condition or danger which ultimately harmed" Howard, Braun, supra, and merely "furnished the condition through which by subsequent independent events the injury resulted." Christensen v. Krueger, 278 N.W. 171, 173 (S.D. 1938).

This accordingly brings this case to the ultimate issue that must be resolved under the Braun analysis: "[i]n light of [the Highway Patrol's independent duties], the affirmative acts of [the Highway Patrol], and the passage of time, was it reasonably foreseeable that [the Highway Patrol] would [take control of the accident scene] in a manner that was allegedly inadequate to [protect other users of] the highway?" 2002 S.D. 57, ¶ 18, 646 N.W.2d at 742 (emphasis supplied). In answering that inquiry in Braun, this Court directly addressed

> the superseding responsibility of third parties . . . who become aware of a danger and deal with it before the original actor's negligence has caused harm. Prosser notes that in those situations, an original actor is sometimes "free to assume that when a third party becomes aware of the danger, and is in a position to deal with it, the third person will act reasonably. It is only where misconduct was to be anticipated, and taking the risk of it was unreasonable, that liability will be imposed for consequences to which such intervening acts contributed."

Id., 2002 S.D. 67, ¶ 19, 646 N.W.2d at 742 (emphasis supplied). In determining whether it could be foreseen that such a third party would fail to properly "deal with" the danger, the court must consider "the character and position of the third person who is to take the responsibility [and] his knowledge of the danger and the likelihood that he will or will not exercise proper care." Restatement (Second) of Torts § 452, comment f (emphasis supplied). Given the almost inherent trust that society places in law enforcement officers like members of the South Dakota Highway Patrol, it can scarcely be said that they are individuals who would be "likely" to "not exercise proper care."

In Kent v. Commonwealth, 771 N.E.2d 770 (Mass. 2002), for example, a victim shot by a criminal named MacNeil sought to sue the state parole board that had turned over custody of MacNeil to the United States Immigration and Naturalization Service

[INS] for deportation; the INS then subsequently released MacNeil, who subsequently shot the plaintiff. The court held:

> The transfer of MacNeil to the Federal law enforcement agency charged with the responsibility for, and exclusive jurisdiction over the deportation of aliens shifted the duty to prevent harm from MacNeil's presence in Massachusetts from Commonwealth to the INS. By assuming control of MacNeil under its warrant, the INS assumed the risks created by his release to that warrant. Because the duty to prevent harm, and the risk created by MacNeil's release, were transferred to a law enforcement agency that could lawfully be relied on to perform the responsibilities it had assumed safely, the element of proximate cause, which might otherwise have linked MacNeil's release on parole with his harmful conduct in Leominster, was extinguished. Subsequent action by the INS releasing MacNeil in Massachusetts became a superseding cause of the harm he inflicted, relieving the Commonwealth of liability as a matter of law. Restatement (Second) of Torts § 452(2) (1965) ("where . . . the duty to prevent harm to another threatened by the actor's negligent conduct is found to have shifted from the actor to a third person, the failure of the third person to prevent such harm is a superseding cause"). See 1 D.B. Dobb, Torts § 194, at 484 (2001)(if actor B "assumes control of the risk [created by A] and can reasonably be expected to provide adequate safety . . . responsibility may be shifted to B, thus relieving A of liability as a matter of law").
>
> The Commonwealth had no authority to challenge or control the unanticipated determination by the INS in 1995 that MacNeil was a United States citizen no longer subject to deportation. It was this INS decision hat released MacNeil to the streets of Massachusetts in 1995, and, in this respect, was the efficient cause of his presence in Leonminster on September 15. As such, the INS action constituted a superseding cause of the harm that followed.

771 N.E.2d at 777-78 (emphasis supplied). Here, of course, Bennett had "no authority" to challenge Highway Patrol decisions regarding the accident scene. Even more to the point, these Highway Patrolmen were unquestionably individuals who "could lawfully be

relied on to perform the responsibilities [they] had assumed safely" with regard to that control of the Bennett accident scene. Indeed, "it is presumed that public officers [will do] their duty." State ex rel. Gosch v. Lemier, 84 N.W.2d 418, 419 (S.D. 1957). It can certainly be no coincidence that in another ruling by this Court that a third person's acts constituted a superseding act, that third person was also a law enforcement official:

> Assuming Equitable was negligent in failing to cancel the sale before it began, its negligence, left unchecked, might have resulted in harm to Olsons. However, Equitable's negligence was *not* left unchecked. Equitable told Sheriff Jung to cancel the sale. No damages would have resulted if Sheriff Jung had complied with Equitable's instructions to cancel the sale . . . .
>
> Instead, Sheriff Jung chose to proceed with the sale and reinstituted the potential of harm. A reasonable person would have expected the sheriff to follow the directions and orders provided by Equitable. Sheriff Jung's conduct altered the relationship between the parties. Sheriff Jung's conduct superseded any negligence by Equitable. The circuit court correctly granted summary judgment in favor of Equitable.

Olson v. Equitable Life Assur. Co., 2004 S.D. 71, ¶¶ 19, 22 682 N.W.2d 471, 476 (emphasis in original and supplied).

It is undisputed that the Highway Patrol did nothing to post warnings for drivers, like Howard, who were approaching the accident scene from Highway 385. Although some warning was provided to drivers approaching from the other direction by strategically parking a Highway Patrol vehicle so that oncoming travelers could see it, the Highway Patrol judged it was "too dangerous" to expose its personnel to the heavy traffic coming from the Highway 385 intersection. Rybak deposition at 18, 27-29. It is, moreover, this lack of even the warning provided by a carefully positioned Highway Patrol vehicle that Howard blames for his inability to slow down without losing control

of his motorcycle. Howard deposition at 30.[22] Further, Howard even accused the Highway Patrol of much greater misconduct in his pleadings in Howard v. Bender, going so far as to insist that Highway Patrolman Bender

> [I]gnored requests and warnings from the tow truck operator that someone should be up the road warning on-coming motorists of the situation, especially because the blind curve obscured the vision of oncoming traffic. Bender had ignored sights and sounds of other vehicles "screeching" their tires from applying their brakes after rounding the blind curve and seeing the blockage of the highway. Despite the warnings from the two [sic] truck driver and the obvious fact that motorists were surprised to encounter the partially blocked highway, Bender refused to take any steps to warn oncoming traffic of the dangerous situation created by his failure to properly secure the accident scene.
>
> The fact that Bender ignored requests and warnings from the tow truck operator and refused to post any warnings up the road, and ignored that fact that other motorists were having to take emergency measures because of the partial highway blockage, reasonably supports the inference that Bender **knowingly** ignored a danger which **he himself had created** through his supervision of the removal of the accident vehicle from the scene.

Plaintiff's Brief in Opposition to Motion to Dismiss, Howard v. Bender at 2-3 (emphasis supplied and in original). Once again, Howard is judicially estopped from taking a different position now, merely because he finds that the earlier and prevailing position that he took in Howard v. Bender may presently be inconvenient, given his current

[22] At hearing, Howard's position seems to have been that the motion should have been denied because the thrust of Trooper Rybak's testimony was that the Highway Patrol did nothing wrong. Motions Hearing Transcript at 8. Howard, however, has himself shown that the Highway Patrol had a legal duty to warn him; and has testified that the Highway Patrol did not warn him and it was because of this lack of warning that Howard wrecked his motorcycle. Howard is legally bound by his legal position on duty and his own sworn testimony as to the circumstances of the accident, and cannot save himself by now adopting Rybak's testimony.

preference for suing Bennett instead. Gregory v. Solem, supra; Bailey v. Duling, supra. It is clear that, even when the issue is one involving an ordinary citizen, a defendant can have no reason to foresee that another party would knowingly ignore direct warnings of a danger. See, e.g., Bogle v. Duke Power Co., 219 S.E.2d 308, 311 (N.C. App. 1975); Pridgett v. Jackson Iron & Metal Co., 253 So.2d 837, 844 (Miss. 1971); Besser v. Hansen, 415 S.E.2d 138, 144 (Va. 1992). It is impossible to see how anyone could foresee that a Highway Patrolman would, in Howard's own words, knowingly ignore the dangers created by an accident scene and wholly violate his statutory and common law duties to protect oncoming drivers like Howard.

There can, accordingly, be only one result upon all these undisputed facts and under the settled law that governs this issue. "[N]o injury occurred between the time of [Bennett's] negligence and the time [the Highway Patrol took control of the accident scene] . . . . At this point, [Bennett would have no] reason to foresee that [the Highway Patrol would] perform . . . their duty in an allegedly negligent manner . . . the lapse of time, the independent statutory [and common law] duty of [the Highway Patrol to warn oncoming drivers of the hazards of the accident scene], and the affirmative performance of that duty in an allegedly negligent manner were superseding causes that relieved [Bennett] of liability for [his] alleged negligence. Under these circumstances, liability for the breach of duty to [Howard] shifted to the [Highway Patrol]. Summary judgment [in favor of Bennett should have been] granted." Braun, supra, 2002 S.D. 57, ¶ 24, 646 N.W.2d at 743 (emphasis supplied). Bennett therefore asks this Court to reverse the trial court's order denying Bennett's motion for summary judgment.

CONCLUSION

Bennett urges this Court to reverse the order denying Bennett's motion for summary judgment and to remand this case with directions that Bennett's motion be granted.

Bennett requests opportunity for oral argument.

Dated this 6th day of September, 2016.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

/s/Heather Lammers Bogard
Heather Lammers Bogard
Attorneys for Appellant
P.O. Box 290
Rapid City, SD 57709
(605) 343-2410

CERTIFICATE OF SERVICE

The undersigned hereby certifies that pursuant to SDCL § 15-26C-3 she served an electronic copy, and two hard copies of the above and foregoing **APPELLANT'S BRIEF** on the following individual, by depositing the same this date in the United States mail, postage prepaid, at Rapid City, South Dakota, addressed as follows:

David A. Bradsky
Bradsky, Bradsky & Bradsky
927 Main Street
Rapid City, SD 57701
Attorneys for Appellee
Email address: dbradsky@aol.com

Dated this 6th day of September, 2016.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

/s/Heather Lammers Bogard
Heather Lammers Bogard
Attorneys for Appellant

P.O. Box 290
Rapid City, SD 57709
(605) 343-2410

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellant, certifies pursuant to SDCL § 25-26A-66 that the brief contains 6,831 words and 41,457 characters, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Appendix and Certificates of Counsel and the name and the version of the word processing software used to prepare the brief is Microsoft Word 2010 using Times New Roman font 12 and left justification.

Dated this day 6th of September, 2016.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

/s/Heather Lammers Bogard
Heather Lammers Bogard
Attorneys for Appellant
P.O. Box 290
Rapid City, SD 57709
(605) 343-2410

CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that pursuant to SDCL § 15-26C-3 he served an electronic copy in Word format and an original and two hard copies of the above and foregoing **APPELLANT'S BRIEF** on the Clerk of the Supreme Court by depositing the same this date in the United States mail, postage prepaid, at Rapid City, South Dakota, addressed as follows:

Clerk of the Supreme Court
State Capitol Building
500 East Capitol Avenue
Pierre, SD 57501-5070

Email address: scclerkbriefs@ujs.state.sd.us

Dated this 6th day of September, 2016.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

/s/Heather Lammers Bogard
Heather Lammers Bogard
Attorneys for Appellant
P.O. Box 290
Rapid City, SD 57709

APPENDIX

APPENDIX

STATE OF SOUTH DAKOTA) COUNTY OF PENNINGTON	)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
DOUGLAS W. HOWARD, Plaintiff, vs. PATRICK C. BENNETT, Personal Representative of the Estate of Deceased, Defendant.	)	51CIV15-000686 ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant' Motion For Summary Judgment having come on regularly before this Court on April 25, 2016, and the Court having considered the arguments of counsel, considered the briefs and the affidavits on file, and otherwise being fully advised in the premises, and the Court finding genuine issues of material fact exist for a jury to decide; now, therefore, it is hereby

ORDERED, ADJUDGED and DECREED that Defendants' Motion For Summary Judgment is hereby denied and this matter shall proceed to trial; and it is further

ORDERED, ADJUDGED and DECREED that a status hearing will be held June 6, 2016 at 9 A.M.

A-1

Filed: 5/5/2016 4:21:05 PM CST Pennington County, South Dakota 51CIV15-000686

CIV 15-686

DATED at Rapid City, Pennington County, State of South Dakota, this 28th day of April, 2016.

BY THE COURT:

Heidi L. Linngren,
Circuit Court Judge

ATTEST:

/S/Renae Truman, Clerk of Courts

By: Linda LeBeau
Deputy Clerk

Pennington County, SD
FILED
IN CIRCUIT COURT
APR 29 2016
Ranae Truman, Clerk of Courts
By LL Deputy

STATE OF SOUTH DAKOTA) SS COUNTY OF PENNINGTON	)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
DOUGLAS W. HOWARD, Plaintiff, vs. PATRICK C. BENNETT, Personal Representative of the Estate of RAYMOND EARL BENNETT, Deceased. Defendant.	)	51CIV15-000686 **DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE FOR PURPOSES OF AMENDED MOTION FOR SUMMARY JUDGMENT**

Comes now Defendant and, pursuant to SDCL 15-6-56(c), and for purposes of Defendant's motion for summary judgment only, makes this statement of material facts as to which there is no genuine issue to be tried:

1. Raymond Bennett, whose estate is the Defendant herein, was killed in a motorcycle accident at approximately 3:00 p.m. on August 5, 2012 when, due to high speed and his intoxication, he failed to negotiate a corner while traveling East on Highway 44 in the direction of Rapid City, South Dakota, left the highway and entered the ditch and struck a delineator post near a driveway. Highway Patrol Accident Report; Rybak deposition at 30-31.[1]

2. In the accident, both Bennett and his motorcycle landed off the highway. Rybak depo. at 7.

3. Following the Bennett accident, members of the South Dakota Highway Patrol began to arrive at the scene at 3:23 p.m. and took responsibility to ensure that "everything is taken care of

[1] The Highway Patrol Accident Report of the Bennett accident is Exhibit 1 to Affidavit of Heather Lammers Bogard in Support of Amended Motion for Summary Judgment; the Rybak deposition is Exhibit 2 to the Affidavit.

A-3

safely and appropriately and [to] get traffic open." Rybak depo. at 20; Accident Report.

4. Through the course of the hour and a half following Bennett's accident, Bennett's body was removed. Rybak depo. at 13, 19, 33.

5. Highway Patrol Sergeant Robert Rybak, an accident reconstructionist, arrived at 4:00 p.m. to do forensic mapping and parked in the driveway. Rybak depo. at 6, 15, 19.

6. At the time Rybak arrived, Highway Patrol Heinrich was still at the scene with his vehicle; Highway Patrol Sergeant Kinney was still at the scene, with his vehicle also parked at the driveway; and a tow truck was also present to remove Bennett's motorcycle. Rybak depo. at 15, 35.

7. Sergeant Kinney was assisting Rybak with his mapping equipment while Trooper Heinrich continued his investigation as accident reconstructionist. Rybak depo. at 6, 20.

8. Traffic was flowing both directions past the accident scene. Rybak depo. 25, 29; Howard depo. at 22.[2]

9. At 4:39 p.m., while Rybak was running his mapping equipment, Rybak heard the sound of extreme braking and saw Douglas Howard on a motorcycle coming from the West and traveling East. Rybak observed that Howard was attempting to avoid running into the back of another vehicle, and then Howard's motorcycle flipped over. Rybak depo. at 22-25.

10. Howard testified that he turned off Highway 385 onto Highway 44 in the direction of Rapid City. Howard depo. at 15.

11. Howard testified that he encountered the Bennett accident scene at the very first curve on Highway 44 headed west, which Howard describes as a "blind corner." Howard depo. at 15; Complaint, Paragraph 4.

[2] The Howard deposition is Exhibit 3 to the Affidavit.

12. Howard testified there was no presence by the Highway Patrol in the area of Highway 44 before the "blind corner." Howard depo. at 18.

13. Howard testified that as he rounded the "blind corner," he encountered a large motorhome pulling a large trailer, stopped in Highway 44 in front of him in his lane of travel, and a vehicle approaching in the opposite lane of travel. Howard depo. at 21-22.

14. Howard testified that he hit his brakes very hard causing him to hit the ground and lose consciousness. Howard depo. at 24-25.

15. Howard testified that in the hour and a half following Bennett's death, the Highway Patrol should have secured the accident scene. Howard depo. at 29-30.

16. Howard testified that the Highway Patrol had no presence where they should have been, and should have been back near the "blind corner." Howard depo. at 23.

17. Howard testified that he reasonably expected the Highway Patrol to secure an accident scene. Howard depo. at 29.

18. Although Howard thinks that Bennett was at fault for Howard's accident, Howard also thinks that the Highway Patrol had a hand in it. Howard depo. at 29.

19. Howard agrees that Bennett, being dead, had no control over how the accident scene was controlled by the Highway Patrol, and that it was not Bennett's responsibility to make sure the scene was controlled. Howard depo. at 30.

20. Howard testified that if the Highway Patrol had stationed one of their vehicles closer to the "blind corner," Howard would have slowed down sooner and not had to hit his brakes so hard to avoid the vehicle stopped in the highway. Howard depo. at 30.

21. Following the accident, Howard brought an action entitled Howard v. Bender, et al., Civil No. 13-1000, Seventh Judicial Circuit Court, in which Howard alleged that members of the

Highway Patrol, including Dan Bender, were negligent in their control of the accident scene and failed to provide warnings to motorists such as Howard of the danger presented by the accident scene, and that such negligence was the proximate cause of Howard's injuries. Amended Complaint in Howard v. Bender, et al., at Paragraphs 3-5.[3]

22. The defense in Howard v. Bender, et al. made a motion to dismiss, which Howard resisted by taking the position that Highway Patrolman Bender had a duty to secure the accident scene and to provide warning of the existence of the accident, and that Bender ignored warnings and requests that he post warnings of the danger created by the accident scene; and that Bender had "knowingly ignored" that danger. Plaintiff's Brief in Opposition to Motion to Dismiss in Howard v. Bender.[4]

23. The trial court in Howard v. Bender denied the motion to dismiss.[5]

Dated this 8th day of March, 2016.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

By: */s/ Heather Lammers Bogard*

Heather Lammers Bogard
PO Box 290
Rapid City, SD 57709
(605) 343-2410
hbogard@costelloporter.com
Attorneys for Defendant

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of March, 2016, a true and correct copy of the

[3] The Howard v. Bender Amended Complaint is Exhibit 4 to the Affidavit of Heather Lammers Bogard.
[4] The Plaintiff's Brief in Howard v. Bender is attached as Exhibit 5 to the Affidavit.
[5] The Order Denying Motion to Dismiss in Howard v. Bender is attached as Exhibit 6 to the Affidavit.

Filed: 3/8/2016 11:16:21 AM CST Pennington County, South Dakota 51CIV15-000686

foregoing **DEFENDANT'S STATEMENT OF MATERIAL FACTS NOT IN DISPUTE FOR PURPOSES OF AMENDED MOTION FOR SUMMARY JUDGMENT** was served upon the following counsel of record, by serving placing the same in the service indicated as follows:

David A. Bradsky Bradsky, Bradsky, & Bradsky, P.C. 927 Main Street Rapid City, SD 57701 (605) 342-8970 dbradsky@aol.com *Attorneys for Plaintiff*	[ ] [ ] [ ] [ ] [x]	U.S. Mail Hand Delivery Electronic E-mail Process Server Odyssey File & Serve

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER LLP

By: */s/ Heather Lammers Bogard*
Heather Lammers Bogard
PO Box 290
Rapid City, SD 57709
(605) 343-2410
hbogard@costelloporter.com
Attorneys for Defendant

Filed: 3/8/2016 11:16:21 AM CST Pennington County, South Dakota 51CIV15-000686

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)	
COUNTY OF PENNINGTON	)	SEVENTH JUDICIAL CIRCUIT
DOUGLAS W. HOWARD,	)	51CIV15-000686
	)	
Plaintiff,	)	PLAINTIFF'S RESPONSE
	)	TO DEFENDANT'S
vs.	)	STATEMENT OF
	)	MATERIAL FACTS
PATRICK C. BENNETT, Personal Representative of the Estate of Deceased,	)	ON DEFENDANT'S
	)	AMENDED MOTION
	)	FOR SUMMARY
	)	JUDGMENT
Defendant.	)	

Plaintiff herewith submits, pursuant to SDCL 15-6-56(c), the following Response to Defendant's Statement of Material Facts.

1. Not disputed.

2. Not disputed, subject to the additional fact that Bender's accident necessarily required the arrival of law enforcement, ambulance, and towing, personnel, and their vehicles, for purposes of investigating the scene and beginning the process of removal of accident debris and remains. See Statements 5 through 7.

3. Not disputed. See Statements 5 through 7.

4. Not disputed, subject to the additional fact that law enforcement and towing personnel remained on the scene. See Statements 5 through 7.

5. Not disputed.

6. Not disputed.

7. Not disputed.

8. Not disputed.

9. Not disputed that Rybak so testified in his deposition, but such testimony is not necessarily conclusive.

10. Not disputed.

11. Not disputed.

12. Not disputed.

13. Not disputed.

14. Not disputed.

15. Not disputed.

16. Not disputed that Plaintiff so testified as to his opinion.

17. Not disputed that Plaintiff so testified as to his opinion.

18. Not disputed.

19. Not disputed, subject to the additional fact that Bennett's negligence and accident set in motion a series of inevitable and naturally occurring events regarding efforts to secure the scene and remove accident debris and remains.

20. Not disputed that Plaintiff so testified as to his opinion, subject to the additional fact that Plaintiff testified that both Bennett and the Highway Patrol were at fault. See Statement 18.

21. Not disputed that Plaintiff brought such action. Disputed that the action alleged that the Highway Patrol's, and Dan Bender's, acts or omissions were "the proximate cause" of Plaintiff's injuries. The Amended Complaint actually stated in Paragraph 5 thereof that his injuries were "a direct and proximate result" of such acts and omissions. (Boldface added).

22. Disputed and Objected to as not material. Because Plaintiff's resistance to the Motion to Dismiss in Howard v. Bender, et al. were in opposition to a Motion to Dismiss for

failure to state a claim upon which relief could be granted, and an argument that the public duty rule barred the action, any statements or arguments made in such resistance have nothing to do with the issue of causation raised by Defendant's Amended Motion for Summary Judgment.

23. Not disputed, but objected to as not material.

Dated this 19 day of April, 2016.

BRADSKY, BRADSKY & BRADSKY, P.C.

BY: _____

David A. Bradsky
927 Main Street
Rapid City, SD 57701
605-342-8970
dbradsky@aol.com
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of April, 2016, a true and correct copy of the foregoing document was served upon the following counsel of record, by serving placing the same in the service indicated as follows:

Heather Lammers Bogard
Costello, Porter Law Firm
P.O. Box 290
Rapid City, SD 57709
(605) 343-2410
hbogard@costelloporter.com
Attorneys for Defendant

[ ] U.S. Mail
[ ] Hand Delivery
[x] Electronic E-mail
[ ] Process Server
[x] Odyssey File & Serve

BRADSKY, BRADSKY & BRADSKY, PC

By: _____

David A. Bradsky
927 Main St.
Rapid City, SD 57701
(605) 342-8970
dbradsky@aol.com
Attorneys for Plaintiff

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO.27851

Douglas W. Howard,	)
	)
Appellee,	)
v.	)
	)
Patrick C. Bennett, Personal Representative	)
Of the Estate if Raymond Earl Bennett,	)
Deceased,	)
	)
Appellant.	)

Appeal from the Circuit Court
Seventh Judicial Circuit
Pennington, South Dakota
The Honorable Heidi Linngren
Circuit Court Judge

APPELLEE'S BRIEF

Heather Lammers Bogard
704 St. Joseph Street
P.O. Box 290
Rapid City, SD 57709
(605) 342-2410
Attorneys for Appellant
Patrick C. Bennett, Personal Representative of the Estate Of Raymond Earl Bennett, Deceased

David A. Bradsky
Bradsky, Bradsky & Bradsky
927 Main Street
Rapid City, SD 57701
(605) 342-8970
Attorneys for Appellee
Douglas W. Howard

ORDER GRANTING INTERMEDIATE
APPEAL ENTERED JUNE 6, 2016

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

As was done in Appellant's Brief, the parties will be referred to herein by their surnames. Appellant Patrick C. Bennett, Personal Representative of the Estate if Raymond Earl Bennett will be referred to as Bennett. Appellee Douglas W. Howard will be referred to as Howard.

JURISDICTIONAL STATEMENT

Howard agree that this Court has jurisdiction over this appeal pursuant to its Order Granting Petition for Allowance of Appeal from Intermediate Order on June 6, 2016.

STATEMENT OF THE LEGAL ISSUE

Whether the trial court was correct in recognizing that this case presents an issue of proximate cause involving more than one tortfeasor, and therefore in denying summary judgment so that the issue of relative degrees of fault could be resolved by the jury.

The trial court denied Bennett's Motion for Summary Judgment.

Most Relevant Cases:

Zerfas v. AMCO Ins. Co., 2015 SD 99, 873 N.W.2d 65.

Braun v. New Hope Tp., 2002 SD 67, 646 N.W.2d 737.

Rumbolz v. Wipf, 42 S.D. 327, 145 N.W.2d 520 (1966).

Baumann v. Zhukov, 802 F.3d 950 (8th Cir. 2015).

STATEMENT OF THE CASE AND THE FACTS

Succinctly stated, the facts relevant to Howard's injuries are as follows; unlike the unknown driver who struck and killed a deer in the case of Zerfas v. AMCO Ins. Co., 2015 SD 99, 873 N.W.2d 65, Bennett was admittedly negligent when he crashed his

motorcycle. That crash necessitated an on-the-scene accident investigation by the South Dakota Highway Patrol. Bennett's negligence created a situation which a trier of fact could easily find resulted in, and in any event certainly contributed to, Howard's accident and injuries a little over an hour later.

Similarly, with respect to Howard's previously commenced action against Trooper Bender, the facts can also be stated quite succinctly: Howard sued Bender, alleging negligence in the manner in which Bender attempted to control traffic at the scene of Bennett's accident. Howard alleged that Bender's negligence was "a" (not "the") proximate cause of Howard's injuries. (Appellant's Appendix p. A-9). Trooper Bender moved to dismiss Howard's Complaint for failure to state a claim upon which relief could be granted, arguing that the "public duty rule[1]" barred Howard's action. (Id. pp. A-9, A-10). The Circuit Court which presided over the case of Howard v. Bender denied Bender's Motion to Dismiss. There was no consideration as to the issue of proximate cause, because the issue was not presented by the Motion to Dismiss. Therefore, the Circuit Court made no ruling on the issue of causation.

STANDARD OF REVIEW

Because this is appeal from a ruling denying a Motion for Summary Judgment, it is appropriate to approach Bennett's appeal within the context the applicable standard for summary judgment. As this Court stated in the case of Johnson v. Matthew J. Batchelder Co., 2010 S.D. 23, 779 N.W.2d 690:

[1] Generally speaking, the "public duty rule" in this context holds that law enforcement owes a duty to the public at large but not to an individual or smaller class of individuals. Walther v. KPKA Meadowlands Limited Partnership, 1998 SD 78, ¶ 17, 581 N.W.2d 527 at 531.

> Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." SDCL 15-6-56(c). "[T]he moving party has the burden of clearly demonstrating an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law." Luther v. City of Winner, 2004 SD 1, ¶ 6, 674 N.W.2d 339, 343. "[W]e view all evidence and favorable inferences from that evidence in a light most favorable to the nonmoving party." Stone v. Von Eye Farms, 2007 SD 115, ¶ 6, 741 N.W.2d 767, 769. 2010 S.D. 23, ¶ 8, 779 N.W.2d 690, 693.

Additionally, in the case of Keystone Plaza Condominiums Association v. Eastep, 2004 S.D. 28, 676 N.W.2d 842, this Court stated:

> "[S]ummary judgment is not a substitute for trial; a belief that the non-moving party will not prevail at trial is not an appropriate basis for granting the motion on issues not shown to be a sham, frivolous or unsubstantiated; summary judgment is an extreme remedy and should be awarded only when the truth is clear[;] and reasonable doubts touching upon the existence of a genuine issue of material fact should be resolved against the movant." St. Onge Livestock Co., Ltd. V. Curtis, 2002 SD 102, ¶ 25, 650 N.W.2d 537, 544 (quoting Tibke v. McDougall, 479 N.W.2d 898, 904 (S.D.1992)) (bracketed material in original text). Keystone Plaza Condominiums Association v. Eastep, 2004 S.D. 28, ¶ 15, 676 N.W.2d 842, 847.

In ruling on Bennett's Motion for Summary Judgment, the Circuit Court properly found that issues of fact remain to be resolved. As this Court has reiterated on several occasions:

> Questions of proximate cause are for the jury in 'all but the rarest of cases.' " Fritz [v. Howard Township], 1997 SD 122, ¶ 17, 570 N.W.2d [240] at 244 (quoting Bauman v. Auch, 539 N.W.2d 320, 325 (S.D.1995)). Hertz Motel v. Ross Signs, 2005 S.D. 72, ¶ 22, 698 N.W.2d 532, 538.

ARGUMENT

Judicial Estoppel Has No Application to This Case.

Bennett's initial Brief to this Court argues at pages 11-12 that Howard should be judicially estopped from arguing that Bennett's negligence was a proximate cause of his injuries because of a previous action against Trooper Bender. The principle of judicial estoppel has no application to this case for two reasons.

First, Howard has never argued that Trooper Bender's negligence, if any, was the sole proximate cause of his injuries. The Complaint against Trooper Bender alleged that he was negligent and that such negligence was "a" proximate cause. (Appellant's Appendix A-9). This Court has clearly and consistently recognized the obvious fact that some injuries are caused by negligence of more than one tortfeasor acting independently. In the case of Rumbolz v. Wipf, 82 S.D. 327, 145 N.W.2d 520 (1966), this Court stated:

> When an injury occurs through the concurrent negligence of two persons, and would not have occurred in the absence of either, the negligence of both is the proximate cause of the accident and both are answerable. 82 S.D. 327, 331, 145 N.W.2d 520, 522.

Of course, Bennett is free to attempt to persuade the jury in this case that Trooper Bender was negligent in the manner in which he managed the scene of the accident. But that is a far cry from arguing that, as a matter of law, Howard is not entitled to have the issue of causation tried by a jury.

In any event, as noted, Howard has never argued that Bender alone caused his injuries. As Bennett's Brief acknowledges at page 12, judicial estoppel means that a party who has *successfully asserted* an inconsistent position in previous litigation must be held to such inconsistent position in subsequent proceedings. Bailey v. Duling, 2013 S.D. 15, 827 N.W.2d 351. Under axiomatic principles of tort law as recognized in Rumbolz,

supra, there is nothing inconsistent with Howard's allegation that Bennett was negligent and that such negligence was *a* proximate cause of his injuries, and his allegation that Bender was negligent and likewise was a proximate cause of his injuries.

The issue before the Circuit Court in Howard v. Bender was whether the public duty rule was a bar to the action. The Circuit Court ruled, in the context of a Motion to Dismiss for Failure to State a Claim, that the public duty rule was not such a bar. Therefore, given the actual issue before the Court, and the fact that Howard did not argue that Bender's acts or omissions were *the* sole proximate cause of his injuries, Howard has not successfully asserted a position inconsistent with the claims made in this action against Bennett, and judicial estoppel does not apply.

Finally, the following observation of this Court in the case of Tunender v. Minnaert, 1997 S.D. 62, 563 N.W.2d 849 applies to defeat Bennett's argument:

> The language of a party or the attorney should be construed in view of the purpose for which it is used and in connection with the surrounding circumstances and statements. 1997 S.D. 62, ¶23, 563 N.W.2d 849, 853.

Any statements made by Howard's counsel in defending against a Motion to Dismiss in Howard v. Bender which was based on the public duty rule have nothing to do with this case, and Bennett's judicial estoppel argument must be rejected.

ARGUMENT

The Circuit Court Properly Denied Summary Judgment

The Circuit Court's denial of Bennett's Motion for Summary Judgment is a completely appropriate recognition of the fact that the issue raise by Bennett is one of

causation. The issue must be tried by a jury, and Bennett is free to argue to the jury that Trooper Bender bears most if not all of the responsibility for Howard's injuries.

Bennett places significant reliance upon two cases: Braun v. New Hope Township, 2002 S.D. 57, 646 N.W.2d 737; and, Zerfas v. AMCO Insurance Co., 2015 S.D. 99, 873 N.W.2d 65. Each case is easily distinguishable. Braun is distinguishable on its facts, which are markedly different from those in this case. Zerfas is a case which has nothing to do with causation, and therefore nothing to do with Bennett's argument of superseding cause.

In Braun, a sign warning of a washout had been placed in the middle of a township road. Two men knocked the sign down when they were moving a farm implement. They propped the sign up against a pile of rocks in the middle of the road. At some point thereafter, the township replaced the sign, but placed it on the side of the road instead of the middle. Three weeks later, plaintiff Braun drove into the washout when he didn't notice the sign which had been properly installed by the township.

This Court held that:

> . . . the lapse of time, the independent duty of Township to erect guards and maintain an appropriate sign, and the affirmative performance of that duty in an allegedly negligent manner were superseding causes that relieved T-Lakota and Rozell of liability for their alleged negligence. 2002 S.D. 67, ¶24, 646 N.W.2d 737, 743.

The primary factor relied upon by this Court in finding a superseding cause as a matter of law was lapse of time. Three full weeks had gone by between the time when the township placed the sign and the time of the incident. Here there was a period of less than two

hours between the act (Bennett's negligence) which set the circumstances in motion which led to Howard's injuries.

Additionally, the condition in Braun which was created by the men moving the farm implement when they knocked over the sign had become totally irrelevant during the three week period which elapsed before Braun drove by the properly placed sign without noticing it. Here, the condition which was the natural progression of events from the negligence of Bennett was fully operative at the time of Plaintiff's injuries.

Finally, the fact is that the township defendant in Braun was not negligent. The township had properly placed the sign warning of the washout in the first place. There was no evidence that the township had notice that men moving a farm implement had knocked it down and improperly tried to put it back. Here there is no dispute that Bennett was negligent, and that his negligence created a dangerous situation. Instead, Bennett argues that because of lapse of time his negligence was no longer relevant. The lapse of time is too short to relieve him of responsibility for his negligence, which was the operative event.

There is no question that Howard's injuries would not have occurred if Bennett had not been negligent. In this context it is well to revisit the following language from Rumbolz, *supra,* quoted earlier in this Brief:

> When an injury occurs through the concurrent negligence of two persons, *and would not have occurred in the absence of either*, the negligence of both is the proximate cause of the accident and both are answerable. 82 S.D. 327, 331, 145 N.W.2d 520, 522. (Emphasis added).

Bennett admits he was negligent. He argues that the natural and logical effect of his negligence was superseded by the alleged negligence of Trooper Bender. His

admission of negligence makes the Zerfas case inapposite to his argument. There was no indication that the unknown driver in Zerfas had been negligent in any way. The absence of any indication of negligence was a significant factor in this Court's refusal to impose a duty of care on that unknown driver. This Court stated:

> To accept [plaintiff] Stacey's view that a duty exists under all the facts in this case would in essence impose strict liability upon all drivers post-impact with wild animals and make them ensurers of the safety of all following travelers. 2015 S.D. 99, ¶16, 873 N.W.2d 65, 70-71.

Inasmuch as Bennett's negligence is undisputed, this case carries no risk of strict liability upon non-negligent drivers.

Bennett also relies on the case of Jackson v. Howell's Motor Freight, Inc., 485 S.E.2d 895 (N.C.Ct. App. 1997), a case which involved active negligence on the part of law enforcement officers which substantially exceeded mere passive negligence at an accident scene. In Jackson, a fire truck was called to the scene of an accident wherein a driver had run into and sheared off a utility pole. The pole fell into the street but left a wire suspended over the street. The driver of a fire truck called to the scene was actually directed by a law enforcement officer to drive under the suspended wire. The driver did so, and the truck caught the wire and dragged the pole. A fireman riding on the truck was injured when the pole struck the fireman. While such active negligence may superseded the original negligence of the driver who sheared the pole, it substantially exceeds the alleged omissions in Trooper Bender's management of the scene created by Bennett. The substantial difference points to an issue of fact in this case which must be submitted to a jury.

This case cannot be resolved as a matter of law. A much better approach would be that taken by the Eighth Circuit Court of Appeals in the case of Baumann v. Zhukov, 802 F.3d 950 (8th Cir. 2015). Baumann is particularly instructive as to the multi-factor analysis required. The court in Baumann listed the factors as follows:

> But numerous courts in other jurisdictions, faced with similar facts, have concluded that the proximate cause inquiry *is fact specific*. In cases involving successive car accidents, proximate cause has been resolved as a matter of law based on the following considerations: (a) lapse of time; (b) whether the force initiated by the original wrongdoer continued in active operation up to the injury[;] (c) whether the act of the intervenor can be considered *extraordinary*[;] and (d) whether the intervening act was a *normal response* to the situation created by the [first] wrongdoer. Baumann v. Zhukov, 802 F.3d 950, 955 (8th Cir. 2015) (emphasis added).

In this case, the lapse of time is quite brief. The force, or circumstances, initiated by Bennett's negligence as the original wrongdoer were still in active operation up to Howard's injury. The act of Trooper Bender in investigating and managing the scene is hardly extraordinary, because such things are done in the normal and ordinary course of events following an accident. Finally, Bender's acts were a normal response to the situation created by the negligence of Bennett as the first tortfeasor.

Nothing extraordinary occurred at the accident scene which would eliminate Bennett's negligence as one of the cause without which Howard's injuries would not have occurred.

CONCLUSION

Howard respectfully requests that this Court affirm the order denying Bennett's motion for summary judgment and remand this case for further proceedings on its merits.

Dated this 7th day of November, 2016.

BRADSKY, BRADSKY & BRADSKY

/s/ David A. Bradsky
David A. Bradsky
Attorneys for Appellee
927 Main Street
Rapid City, SD 57701
dbradsky@aol.com

CERTIFICATE OF SERVICE

The undersigned hereby certifies that pursuant to SDCL § 15-26C-3 he served an electronic copy, and two hard copies of the above and foregoing **APPELLEE'S BRIEF** on the following individual, via hand-delivery, at Rapid City, South Dakota, addressed as follows:

Heather Lammers Bogard
Costello, Porter, Hill, Heisterkamp, Bushnell & Carpenter, LLP
P.O. Box 290
Rapid City, SD 57709
Attorneys for Appellant
Email address: hbogard@costelloporter.com

Dated this 7th day of November, 2016.

BRADSKY, BRADSKY & BRADSKY

/s/ David A. Bradsky
David A. Bradsky
Attorneys for Appellee
927 Main Street
Rapid City, SD 57701
dbradsky@aol.com

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellee, certifies pursuant to SDCL § 15-26A-66 that the brief contains 2,592 words and 12,896 characters, exclusive of the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, Appendix and Certificates of Counsel and the name and the version of the word processing software used to prepare the brief is Microsoft Word 2010 using Times New Roman font 12 and left justification.

Dated this day 7th of November, 2016.

BRADSKY, BRADSKY & BRADSKY

/s/ David A. Bradsky
David A. Bradsky
Attorneys for Appellee
927 Main Street
Rapid City, SD 57701
dbradsky@aol.com

CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that pursuant to SDCL § 15-26C-3 he served an electronic copy in Word format and an original and two hard copies of the above and foregoing **APPELLEE'S BRIEF** on the Clerk of the Supreme Court by depositing the same this date in the United States mail, postage prepaid, at Rapid City, South Dakota, addressed as follows:

Clerk of the Supreme Court
State Capitol Building
500 East Capitol Avenue
Pierre, SD 57501-5070
Email address: scclerkbriefs@ujs.state.sd.us

Dated this 7th day of November, 2016.

BRADSKY, BRADSKY & BRADSKY

/s/ David A. Bradsky
David A. Bradsky
Attorneys for Appellee
927 Main Street
Rapid City, SD 57701
dbradsky@aol.com

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 27851

Douglas W. Howard,	)
	)
Appellee,	)
v.	)
	)
Patrick C. Bennett, Personal Representative	)
Of the Estate if Raymond Earl Bennett,	)
Deceased,	)
	)
Appellant.	)

Appeal from the Circuit Court
Seventh Judicial Circuit
Pennington, South Dakota
The Honorable Heidi Linngren
Circuit Court Judge

APPELLANT'S REPLY BRIEF

Heather Lammers Bogard
704 St. Joseph Street
P.O. Box 290
Rapid City, SD 57709
(605) 342-2410
Attorneys for Appellant
Patrick C. Bennett, Personal
Representative of the Estate
Of Raymond Earl Bennett,
Deceased

David A. Bradsky
Bradsky, Bradsky & Bradsky
927 Main Street
Rapid City, SD 57701
(605) 342-8970
Attorneys for Appellee
Douglas W. Howard

ORDER GRANTING INTERMEDIATE
APPEAL ENTERED JUNE 6, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

Page

Page

STATUTES:

OTHER AUTHORITIES:

ARGUMENT

Bennett Owed Howard no Legal Duty to Protect Howard from Harm More than an Hour After the Highway Patrol Took Control of Bennett's Accident Scene With No Other Accidents in the Interim.

Throughout Howard's statement of the issue, statement of the facts, standard of review, and arguments, Howard's brief suffers from one consistent mistake: an inability to perceive that the issue before this Court under the intervening superseding cause analysis involves a question of duty, not proximate cause. As this Court directly held in Braun v. New Hope Tp., 2002 SD 67, ¶12, 646 NW2d 737, 740:

> The intervening/superseding cause analysis questions the extent of the obligation, or duty, of the original actor who was negligent…Although the question is often expressed in terms of "cause" or "proximate cause," those terms avoid the real issue. The appropriate question "is one of negligence and the extent of the obligation: whether the [original actor's] responsibility extends to such interventions, which are foreign to the risk the [original actor] has created. It is best stated as a problem of the scope of the legal obligation to protect the plaintiff against such an intervening cause."

(Emphasis supplied.) Braun, in adopting the reasoning of Restatement (Second) of Torts §452, thus made it very clear that under the intervening superseding cause analysis, the issue is whether

> the duty, and therefore the entire responsibility, shifts to the third person and the original actor is relieved of liability… In order to determine whether an actor's liability is shifted to a third person, one must look to see if the intervening cause was foreseeable.

2002 SD 67, ¶¶ 15-16, 646 NW2d at 741 (emphasis supplied).

It is true that "the concepts of foreseeability of harm as it relates to the element of causation and foreseeability of harm relevant to the element of duty…are often

confused," Zerfas v. AMCO Ins. Co., 2015 SD 99, ¶13, 873 NW2d 65, 70. Howard's failure to grasp this obstruction, however, is fatal to his basic argument that this issue must be tried to a jury. Braun, in its discussion of this point, held that "foreseeability in defining the boundaries of a duty is always a question of law." 2002 SD 67, ¶9, 646 NW2d at 740. This is, of course, an unquestioned principle of South Dakota law. See, e.g., Zerfas, supra, 2015 SD 99, ¶14, 873 NW2d at 70; Johnson v. Hayman & Associates, Inc., 2015 SD 63, ¶13, 867 NW2d 698, 762; Smith ex rel. Ross v. Lagow Const. & Developing Co., 2002 SD 37, ¶18, 642 NW2d 187, 192.

This point disposes of most, if not all, of Howard's arguments, not the least of which is his vague suggestion that this Court should follow Baumann v. Zhukov, 802 F.3d 950 (8th Cir. 2015), instead of the analysis it adopted in Braun. One critical problem with such an approach is that Baumann applied Nebraska law, and in particular the case of A.W. v. Lancaster Cty. Sch. Dist. 0001, 784 NW2d 907 (Neb. 2010). See Baumann, 802 F.3d at 955-56. Although Howard seems unaware of it, Nebraska law in this respect cannot be reconciled with South Dakota law, for A.W., supra, in abrogating numerous prior Nebraska cases, held that "foreseeability is not a factor to be considered by courts when making determinations of duty." 784 NW2d at 918. Baumann, accordingly, has no force in South Dakota, since this "Court establishes its own precedent and is not bound by divergent law established in other jurisdictions," Fisher v. Sears, Roebuck & Co., 214 NW2d 85, 89 (SD 1974).

Howard is thus also wrong when he asserts that the standard of review here is that used for summary judgments in cases involving factual disputes. When the question is one of duty, that is an issue that is reviewed de novo, Zerfas, supra, 2015 SD 99, ¶8, 873

NW2d at 69, including cases involving duty under the intervening, superseding cause analysis. Braun, supra, 2002 SD 67, ¶9, 646 NW2d at 740.

Further, Howard is wrong when he claims that he is not estopped by previous positions upon which he has already prevailed in another case related to this accident. In 2013, two years before Howard thought to sue Bennett, Howard brought an action entitled Howard v. Bender against Trooper Bender and the other Highway Patrol troopers who investigated Bennett's accident, making the factual allegation that he "had just turned onto Highway 44 from Highway 385, and had just rounded the blind curve which is located on Highway 44…when he suddenly encountered" the accident scene, lost control of his motorcycle, and was injured. See Howard v. Bender, Plaintiff's Brief in Opposition to Motion to Dismiss at 2, which was filed below as Exhibit 5 to the Affidavit of Heather Lammers Bogard in Support of Amended Motion for Summary Judgment; relevant portions are attached herein as Appendix 1. These allegations are, of course, largely identical to Howard's 2015 Complaint against Bennett, which allege that "shortly after [Bennett's] accident [Howard], without any notice of the impending accident scene, encountered the scene and the dangerous condition created by [Bennett] as he rounded the blind corner on his motorcycle; that because of the dangerous scene, [Howard] lost control of his motorcycle and crashed." Howard v. Bennett Complaint, Paragraph 4.

The only difference between these two actions is who Howard attempted to hold directly responsible for the failure to warn him of the hazard, although he clearly still asserts that the Highway Patrol is partially to blame. Howard Deposition at 23, 29-30. It may be true that when Trooper Bender moved to dismiss Howard v. Bender, he raised no issue of causation, as Howard argues. Appellee's Brief at 2. But Howard admits that

Bender raised issues related to whether he owed any duty to Howard, Appellee's Brief at 2, and Howard does not deny, nor could he, that Howard forcefully argued that Trooper Bender was "charged with the duty of properly securing the accident scene, and warning motorists such as Howard that there was an accident." Howard v. Bender, Plaintiff's Brief in Opposition to Motion to Dismiss at 2. Howard further admits that the court presiding over Howard v. Bender denied the motion to dismiss. Appellee's Brief at 2. In other words, Howard's position prevailed in his earlier litigation. As this Court held in Bailey v. Duling, 2013 SD 15, ¶33, 827 NW2d 351, 363, "parties who have unequivocally and successfully asserted a position in a prior proceeding… are estopped from asserting an inconsistent position in a subsequent proceeding." The enforcement of this rule is plainly critical in the administration of justice, and clearly extends to conflicting arguments regarding duty. See, e.g., Sprague v. Simon, 760 NE2d 833, 837 (Ohio App. 2001). As one of the cases this Court cited with approval in Bailey, Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982), observed, the "essential function of judicial estoppel is to prevent intentional inconsistency; the object of the rule is to protect the judiciary, as an institution, from the perversion of judicial machinery…Judicial estoppel addresses the incongruity of allowing a party to [successfully] assert a position in one tribunal and the opposite in another tribunal. If the second tribunal adopted the party's inconsistent position, then at least one court has probably been misled." (Emphasis supplied.)

In any event, it is difficult to understand why Howard now offers any argument about whether he is estopped on this issue since he does not dispute that the Highway Patrol Troopers in fact had these duties. Howard does not question Bennett's showing

that Bender and the other troopers, acting on behalf of the state of South Dakota, had statutory duties under SDCL §§31-4-14.2, 31-4-14.3 and 32-2-8 to post and enforce warnings of the hazards created by the Bennett accident scene, nor does Howard dispute Bennett's authorities detailing the common law rule that the discovery of impending dangers to highway users imposes a duty on state policy to take precautionary measures to avert further accidents. See, e.g., Ritter v. State, 344 N.Y.S.2d 257, 269 (N.Y.Ct. 1972); Monceaux v. Jennings Rice Drier, Inc., 590 So.2d 672, 675 (La. App. 1991); Anthony v. C.D. Amende Co., 639 P.2d 231, 233-34 (Wash. App. 1982). Howard argues against none of this. It is settled that arguments "'not briefed and supported by authority [are] considered abandoned,'" Centrol, Inc. v. Morrow, 489 NW2d 890, 893-94 (S.D. 1992), and statements by one party "will be taken as true unless questioned in a brief filed by [the opposing party.]" Alma Group, LLC v. Weiss, 2000 SD 108, ¶26 n. 4, 616 NW2d 96, 101 n.4. See also, e.g., Ridgeway v. Wal-Mart Stores, Inc., 2014 WL 2600326*9 (N.D.Cal. 2014) ("Plaintiffs do not respond to Wal-Mart's argument…and thus concede by silence.")[1]

Clearly, Howard accepts these legal propositions because he must. There can be no denying the fundamental rule that, whatever private parties may have done in creating a highway obstruction, "the responsibility of controlling traffic [past that obstruction] rests solely with [the public entity responsible for the highway]," Schmeling v. Ott, 388 NW2d 195, 199 (Iowa App. 1986) (emphasis supplied). The "Legislature intended that the whole duty with respect to public safety on any particular highway should rest" on the

[1] It should be noted, however, that even where a third party may not owe anyone a duty, the third party's "acts could still…break the chain of causation." Clark v. Milano, 152 F.R.D. 66, 72 (S.D. W. Va. 1993).

public entity that has charge of that highway, Robinson v. Minnehaha County, 277 NW 324, 327 (SD 1938), so that if a highway is "rendered dangerous and unsafe for travel, it becomes the duty of the duly authorized public authorities to provide the remedy." Norman v. Cummings, 45 NW2d 839, 841 (SD 1951). And when a State, working through agents like Highway Patrol troopers, has acted to enforce its duties in this regard, the central consideration stated by comment f. of Restatement (Second) of Torts §452 comes into play:

> when "full responsibility for control of the situation and prevention of the threatened harm has passed to [a] third person, his failure to act is then a superseding cause, which will relieve the original actor of liability."

(Emphasis supplied.)

Indeed, Howard himself has admitted as much in his own testimony. Howard conceded at his deposition that Bennett had no "control over how the scene was controlled by the Highway Patrol" and that it wasn't Bennett's "responsibility to make sure the scene was controlled." Howard Deposition at 30. A party "cannot claim a version of the facts more favorable to himself than his own testimony." Trammell v. Prairie States Ins. Co., 473 NW2d 460, 463 (SD 1991). These admissions bring him squarely under the rule stated in McCleaf v. State, 945 P.2d 1298 (Ariz. App. 1997), also involving an intervening, superseding act by a public official under the approach utilized by Restatement (Second) of Torts §452(2): "[w]hen a responsible actor assumes control of a situation from another…the rule is that the negligence of the initial actor will not be found to be a proximate cause of harms that befall after the authoritative and effectual decision as to the same matter has been made by another person empowered to make it." 945 P.2d at 303 (emphasis supplied). Here, the State, acting through the Highway Patrol,

unquestionably had the power to and in fact made "authoritative and effectual" decisions as to the regulation of traffic past the Bennett accident scene. Once the State, acting through the Highway Patrol, "assumed control" of this scene and made its decisions regarding traffic warnings, no private party could lawfully do anything to override those "authoritative" decisions. As a result, whatever harm that occurred to Howard was caused by the decision made by the State, acting through the Highway Patrol, not to post warnings between the Highway 385 intersection and the accident scene on Highway 44 and Bennett's negligence ceased to be approximate cause of any harm that subsequently befell Howard.

In other words, as in Braun, after the Highway Patrol "affirmatively acted" to control the accident scene and "to remedy the danger…before [Howard's] accident, [Bennett's] acts or omissions were no longer creating the condition or danger which ultimately harmed [Howard]," Braun, supra, 2002 SD 67, ¶18, 646 NW2d at 741-42, and instead Bennett's actions merely "furnished the condition which by subsequent independent events [Howard's] injury resulted." Christensen v. Krueger, 278 NW 171, 173 (SD 1938). Howard argues that Braun is not controlling because in Braun, several weeks elapsed between the Township's allegedly negligent reinstallation of the road sign and the accident in the road. Yet this Court in no way created some kind of bright line rule that a set number of hours or days must elapse between events for an intervening act by a third person to become a superseding cause; such an artificial standard could never be accurately measured and would be utterly unworkable. Rather, the critical factor about "time" in Braun was not how much of it had passed, but whether the third person

had enough time to take control of the dangerous situation and to act authoritatively to remedy it before another accident occurred. As Braun put it,

> no injury occurred between the time of T-Lakota's and Rozell's alleged negligence and the time Township reinstalled the sign. When Rozell returned to fix the sign, he found that Township had already undertaken its statutory duties and had reinstalled it. At this point, neither Rozell nor T-Lakota had any reason to foresee that Township had performed their duty in an allegedly negligent manner.

Braun, 2002 SD 67, ¶24, 646 NW2d at 743 (emphasis supplied). Here, too, the Highway Patrol clearly had enough time to assert its authority over this stretch of highway and to make its decisions, which no private party had the power to change, regarding how traffic would be conducted past the accident scene and what warnings that traffic would receive. It makes no difference how much time that process required; all that is important is that the process was complete before Howard came into the area and had his accident.

There is likewise no merit to Howard's attempts to distinguish the situation here from the remarkably similar facts in Jackson v. Howell's Motor Freight, Inc., 485 S.E.2d 895 (N.C. 1997). In that case, the negligent original actor Gibbs caused an accident with a utility pole that produced a hazardous situation in a street. The court held that when the police took control of the scene, their negligence in directing traffic relieved Gibbs of liability for a subsequent accident:

> police officers and other officials had taken control of the accident scene. These officials…made decisions regarding the flow of traffic and assumed the responsibility for directing traffic through the accident scene. Therefore…we find that "[t]he facts do not constitute a continuous succession of events, so linked together as to make a natural whole" and any subsequent act of negligence by… the City…was "an intervening act which was not itself a consequence of [defendant Gibbs'] original negligence, nor

> under the control of [defendant Gibbs], nor foreseeable by him in the exercise of reasonable prevision"…
> Accordingly, we affirm the trial court's decision to grant summary judgment in Gibbs' favor.

485 S.E.2d at 900 (emphasis supplied).

Howard offers a strained suggestion that the policemen in Jackson were "actively" negligent compared to what Howard calls the Highway Patrolmen's "passive" negligence here. Yet the point about "active" and "passive" negligence in Jackson related only to an indemnity claim, 485 S.E.2d at 897, and had nothing to do with the court's discussion of intervening acts. In any event, all the policeman in Jackson did was to "wave" cars past the accident. Id. This is, of course, little different than merely standing along the highway and allowing traffic to move by, which is essentially what Howard now seems to say happened at Bennett's accident. But when Howard now asserts that the traffic "waving" in Jackson "substantially exceeds the alleged omissions in Trooper Bender's management of the scene," Appellee's Brief at 8, Howard allows himself to once again forget what he claimed in Howard v. Bender, when he argued that Bender "created the dangerous situation which caused Howard's injuries," Plaintiff's Brief in Opposition to Motion to Dismiss at 3 (emphasis supplied), based on Howard's factual allegations that Bender

> ignored requests and warnings from the tow truck operator that someone should be up on the road warning oncoming motorists of the situation, especially because the blind curve obscured the vision of oncoming traffic. Bender had ignored sights and sounds of other vehicles "screeching" their tires from applying their brakes after rounding the blind curve and seeing the blockage of the highway. Despite the warnings from the two [sic] truck driver and the obvious fact that motorists were surprised to encounter the partially blocked highway, Bender refused to take any steps

> to warn oncoming traffic of the dangerous situation created by his failure to properly secure the accident scene.
>
> The fact that Bender ignored requests and warnings from the tow truck operator and refused to post any warnings up the road, and ignored that fact that other motorists were having to take emergency measures because of the partial highway blockage, reasonably supports the inference that Bender **knowingly** ignored the danger which **he himself had created** through his supervision of the removal of the accident vehicle from the scene.

Id. at 2-3 (emphasis supplied and in original). Thus, if Howard's own words are to be believed, there can be no doubt that the negligence of the Highway Patrol troopers here was vastly more aggravated than that of the police in Jackson, supra, if that was a point that even made any difference to this analysis.

Indeed, Howard seems persistently confused as to virtually everything related to Braun and the intervening, superseding cause analysis. He also asserts that Braun is distinguishable because, he says, the Township was "not negligent," apparently referring to its initial placement of the sign. This is a meaningless distinction. What Howard overlooks is that the allegations in Braun were that the defendants who knocked down that properly placed sign were initially negligent and that the Township was subsequently negligent when it allegedly reinstalled the sign in a negligent fashion. Braun, supra, 2002 SD 67, ¶¶3-7, 646 NW2d at 739. That, of course, provides the framework for any case in which this intervening, superseding cause analysis is applied: an initial act of negligence by the defendant followed by intervening acts of a third party prior to a subsequent accident. That is precisely the pattern at issue here, and Howard's desperate attempts to say otherwise are without merit.

Similarly, it is difficult to perceive exactly how it is that Howard seeks to distinguish Zerfas. As Howard admits, Zerfas has nothing to do with causation, Appellee's Brief at 6, but its discussion of duty, and its clear holding, that the mere fact that a driver on a highway has been involved in an accident that created some degree of a hazard for subsequent drivers does not necessarily impose a duty on the first driver to take steps to protect those subsequent drivers, Zerfas, 2015 SD 99, ¶16, 873 NW2d at 71, is very much applicable to the issues here. Howard believes that the fact no finding of negligence was made as to the unknown driver in Zerfas is somehow significant, but this mistakes the point of the intervening, superseding cause analysis, which includes no comparison between the conduct of the initial actor and those of the intervening third party. As Sandberg v. Blue Earth County, 615 NW2d 61, 64 (Minn. 2000) put it, citing the Restatement:

> because the duty, and hence the entire responsibility for the situation, has been shifted to a third person, *the original actor is relieved of liability for the result which follows from the operation of his own negligence*. The shifted responsibility means in effect that the duty, or obligation, of the original actor in the matter has terminated, and has been replaced by that of the third person.
>
> Restatement (Second) of Torts §452, commt. d (1965) (emphasis added). Because the original actor is relieved of his duty in these extraordinary circumstances, he can have no fault to be compared.

(Emphasis in original and supplied.)

As Braun made clear, the ultimate question in this analysis is whether

> the intervening cause was foreseeable…The risk created by the original actor may include the intervention of the foreseeable negligence of others…If such intervening negligence was foreseeable, the original actor remains liable because "[f]oreseeable intervening forces are within

> the scope of the original risk…"…Therefore, we must decide whether it was reasonably foreseeable to [Bennett] that [the Highway Patrol], after having affirmatively acted to [control the accident scene], would do so in a negligent manner.

Braun, supra, 2002 SD 67, ¶16, 646 NW2d at 741. Once again, Howard does not dispute the fact that Bennett would have had no reason to foresee that the Highway Patrol would act negligently in this regard. By contrast, Howard even goes so far as to state that Trooper "Bender's acts were a normal response to the situation created by … Bennett." Appellee's Brief at 9. Plainly, Howard thus agrees the responsibility for the accident scene had been taken over by "a law enforcement agency that could lawfully be relied on to perform the responsibilities it had assumed safely." Kent v. Commonwealth, 771 N.E.2d 770, 777 (Mass. 2002). This conclusively terminates any liability Bennett may have had for subsequent accidents on Highway 44 that afternoon, for as this Court explained in Braun, an original actor is

> free to assume that when a third party becomes aware of the danger, and is in a position to deal with it, the third person will act reasonably. It is only where misconduct was to be anticipated, and taking the risk of it was unreasonable, that liability will be imposed for consequences to which such intervening acts contributed.

Braun, supra, 2002 SD 67, ¶19, 64 NW2d at 742 (emphasis supplied). Howard has failed to even argue that Bennett should have anticipated that the State, acting through the Highway Patrol, would do nothing to post warnings for drivers, like Howard, approaching the accident scene from Highway 385, and that although some warning would be provided to drivers approaching from the other direction by strategically parking a Highway Patrol vehicle so that oncoming travelers could see it, the State, acting through the Highway Patrol, would judge it to be "too dangerous" to expose its personnel

to the heavy traffic coming from the Highway 385 intersection. It is, of course, this lack of even the warning provided by a carefully positioned Highway Patrol vehicle that Howard blames for his inability to slow down without losing control. Howard Deposition at 30. And, of course, this is without taking into account Howard's allegations that the Highway Patrol "created this hazard" when they knowingly ignored the danger that they had themselves created and refused despite warnings to take any precautions. Plaintiff's Brief in Opposition to Motion to Dismiss, Howard v. Bender at 2-3.[2] This Court held in Braun that

> If a third person "fully discovers the danger, and then proceeds, in deliberate disregard of it…to inflict upon the danger which the third person has discovered" the responsibility is shifted to the third party.

Braun, 2002 SD 67, ¶19, 646 NW2d at 742. There can be no doubt that this is what happened here: Bennett "could not have foreseen that [the Highway Patrol], having [taken control of the accident scene], would have done so in a manner which allegedly did not meet [the Patrol's] duty." Id.

Bennett was accordingly entitled to summary judgment in his favor on Howard's claim, and the trial court erred when it denied Bennett's motion.

---

[2] Bennett does not venture an opinion as to the accuracy of Howard's very serious allegations in this regard, although Bennett assumes that Howard's counsel had evidentiary support for those contentions, as required by SDCL 15-6-11(b)(3). In any event, the truth of these allegations is not directly pertinent to the intervening, superseding analysis; this Court, in finding the Township's acts to constitute a superseding cause in Braun, carefully noted, at least five times, that it was only assessing the Township's alleged negligence. Braun, supra, 2002 SD 67, ¶¶ 7, 18, 19, 24, 646 NW2d at 739, 742, 743. Moreover, it is also clear that the third party need not actually be held liable for his acts for those acts to be found a superseding cause. See, e.g., McCleaf, supra, 945 P.2d at 1302-1303 (judge's failure to jail drunk driver was superseding cause of probation officer's negligent failure to arrest driver even though the judge "cannot be held liable because he is immune").

CONCLUSION

For all the reasons stated, Bennett urges this Court to reverse the order below, and to remand this action with directions to the trial court to grant Bennett's motion for summary judgment.

Dated this 18th day of November, 2016.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

/s/Heather Lammers Bogard
Heather Lammers Bogard
Attorneys for Appellant
P.O. Box 290
Rapid City, SD 57709
(605) 343-2410

CERTIFICATE OF SERVICE

The undersigned hereby certifies that pursuant to SDCL § 15-26C-3 she served an electronic copy, and two hard copies of the above and foregoing **APPELLANT'S REPLY BRIEF** on the following individual, by depositing the same this date in the United States mail, postage prepaid, at Rapid City, South Dakota, addressed as follows:

David A. Bradsky
Bradsky, Bradsky & Bradsky
927 Main Street
Rapid City, SD 57701
Attorneys for Appellee
Email address: dbradsky@aol.com

Dated this 18th day of November, 2016.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

/s/Heather Lammers Bogard
Heather Lammers Bogard
Attorneys for Appellant
P.O. Box 290
Rapid City, SD 57709
(605) 343-2410

CERTIFICATE OF COMPLIANCE

The undersigned, counsel for Appellant, certifies pursuant to SDCL § 25-26A-66 that the brief contains 4,156 words and 21,329 characters, exclusive of the Table of Contents, Table of Authorities, and Certificates of Counsel and the name and the version of the word processing software used to prepare the brief is Microsoft Word 2010 using Times New Roman font 12 and left justification.

Dated this 18th day of November, 2016.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

/s/Heather Lammers Bogard
Heather Lammers Bogard
Attorneys for Appellant
P.O. Box 290
Rapid City, SD 57709
(605) 343-2410

CERTIFICATE OF PROOF OF FILING

The undersigned hereby certifies that pursuant to SDCL § 15-26C-3 he served an electronic copy in Word format and an original and two hard copies of the above and foregoing **APPELLANT'S REPLY BRIEF** on the Clerk of the Supreme Court by depositing the same this date in the United States mail, postage prepaid, at Rapid City, South Dakota, addressed as follows:

Clerk of the Supreme Court
State Capitol Building
500 East Capitol Avenue
Pierre, SD 57501-5070
Email address: scclerkbriefs@ujs.state.sd.us

Dated this 18th day of November, 2016.

COSTELLO, PORTER, HILL, HEISTERKAMP, BUSHNELL & CARPENTER, LLP

/s/Heather Lammers Bogard
Heather Lammers Bogard
Attorneys for Appellant
P.O. Box 290
Rapid City, SD 57709

APPENDIX

STATE OF SOUTH DAKOTA)SS COUNTY OF PENNINGTON	)	IN CIRCUIT COURT SEVENTH JUDICIAL CIRCUIT
DOUGLAS W. HOWARD, Plaintiff, vs. DAN M. BENDER, SOUTH DAKOT HIGHWAY PATROL/ DEPARTMENT OF PUBLIC SAFETY, Defendants.	)	Civ. No. 13-1000 PLAINTIFF'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

Defendants seek outright dismissal of this action prior to any discovery or investigation.

In this context, the following standard applies:

> A motion to dismiss under SDCL 15-6-12(b) tests the legal sufficiency of the pleading, not the facts which support it. For purposes of the pleading, the court must **treat as true all facts properly pled in the complaint and resolve all doubts in favor of the pleader.** 'Our standard of review of a trial court's grant or denial of a motion to dismiss is the same as our review of a motion for summary judgment-is the pleader entitled to judgment as a matter of law?' Thus, all reasonable inferences of fact must be drawn in favor of the non-moving party and we give no deference to the trial court's conclusions of law. Vitek v. Bon Homme County Board of Commissioners, 2002 SD 100, ¶ 7, 650 N.W.2d 513, 516 (internal citations omitted). "**The motion is viewed with disfavor and is rarely granted.**" Thompson v. Summers, 1997 SD 103, ¶ 5, 567 N.W.2d 387, 390. "Pleadings should not be dismissed merely because the court entertains doubts as to whether the pleader will prevail in the action." *Id.* ¶ 7. The rules of procedure **favor the resolution of cases upon the merits by trial or summary judgment** rather than on failed or inartful accusations. Id. The court **accepts the pleader's description of what happened along with any conclusions reasonably drawn therefrom.** *Id.* ¶ 5. "A complaint should not be dismissed for failure to state a claim unless it appears **beyond doubt** that the plaintiff can prove **no set of facts in support of his claim which would entitle him to relief.**" *Id.* Guthmiller v. Deloitte & Touche, LLP, 2005 S.D. 77, ¶4, 699 N.W.2d 493, 496. (Boldface added).

Applying the above standard , the following facts and inferences reasonably drawn therefore must be taken as true in determining whether it is "beyond doubt that [Howard] can prove no set of facts . . . which would entitle him to relief."

EXHIBIT
tabbies
5

A–1

STATEMENT OF FACTS

On or about August 5, 2012, Plaintiff Douglas W. Howard ("Howard") was seriously injured when, while riding his motorcycle on Highway 44 West of Rapid City, he suddenly came upon the scene of a motorcycle accident which was being investigated by Defendant Dan M. Bender ("Bender"), a Trooper with the South Dakota Highway Patrol.

Howard had just turned onto Highway 44 from Highway 385, and had just rounded the blind curve which is located on Highway 44 about 3/10 of a mile east of the intersection of Highways 385 and 44 when he suddenly encountered a tow truck partially blocking the highway.

Bender, as an employee of the South Dakota Highway Patrol/Department of Public Safety, was investigating the accident which had occurred just east of the blind curve, and was charged with the duty of properly securing the accident scene, and warning motorists such as Howard that there was an accident, and that a tow truck was partially blocking the highway.

Bender had ignored requests and warnings from the tow truck operator that someone should be up the road warning on-coming motorists of the situation, especially because the blind curve obscured the vision of oncoming traffic. Bender had ignored sights and sounds of other vehicles "screeching" their tires from applying their brakes after rounding the blind curve and seeing the blockage of the highway. Despite the warnings from the two truck driver and the obvious fact that motorists were surprised to encounter the partially blocked highway, Bender refused to take any steps to warn oncoming traffic of the dangerous situation created by his failure to properly secure the accident scene.

The fact that Bender ignored requests and warnings from the tow truck operator and refused to post any warnings up the road, and ignored that fact that other motorists were having to take emergency braking measures because of the partial highway blockage, reasonably

supports an inference that Bender **knowingly**[1] ignored a danger which **he himself had created** through his supervision of the removal of the accident vehicle from the scene.

ARGUMENT: THE FORMULATION OF THE "PUBLIC DUTY" DOCTRINE IN *GLEASON v. PETERS AND TIPTON v. TOWN OF TABOR* DOES NOT FIT THIS CASE.

This is a case of first impression in South Dakota. Bender's Brief correctly notes, however, that South Dakota has applied the public duty doctrine to cases of law enforcement and public safety, most recently in the cases of Gleason v. Peters, 1997 SD 102, 658 N.W.2d 351 and Tipton v. Town of Tabor, 1997 SD 96, 567 N.W.2d 482. While the public duty doctrine as set forth in those cases remains viable in South Dakota, it is not directly applicable to this situation.

Both Gleason and Tipton involved the allegedly negligent failure of law enforcement to protect the general public from the criminal acts of third persons. Tipton involved a resident who kept vicious dogs, and the alleged failure of the town police to take steps to remove or impound the dogs. Gleason involved the alleged failure of county law enforcement to break up a teen-age keg party, which was allegedly negligent because of the failure to recognize that young persons might become intoxicated and belligerent and harm other persons.

This case, however, does not involve the failure to control or prevent the unlawful or tortious conduct of **third persons**. Instead, it involves the direct acts and omissions of Bender himself. Bender created the dangerous situation which caused Howard's injuries. Under Bender's supervision and control, and deliberate refusal to heed warnings, a tow truck was placed on the highway immediately after a blind corner, and no attempt to warn motorists approaching the blind corner of the obstruction ahead. This is a far different situation from the

[1] It is true that the Amended Complaint uses the term "negligence." However, under the standard set forth in Guthmiller v. Deloitte & Touche, LLP (quoted *supra* p. 1), the particular words of the pleading are not controlling, particularly as to legal characterizations or conclusions. Instead, it is the description of what happened, together with any reasonable inferences or conclusions drawn from that conclusion, that controls.

previous applications of the public duty rule in South Dakota, which were limited to the failure to prevent or control the conduct of third persons.

The South Dakota Supreme Court has not hesitated to limit the reach of the public duty doctrine in cases where it was obviously inappropriate. In the case of E.P. v. Riley, 1999 SD 163, 604 N.W.2d 7, the Court ruled that the public duty doctrine extends only to issues involving law enforcement or public safety. 1999 S.D. 163, ¶22, 604 N.W.2d 7, 13-14. Obviously, this case does involve law enforcement. However, the unique facts of this case point directly to a an additional limitation on the reach of the public duty doctrine to exclude cases where law enforcement personnel themselves, as opposed to third parties, are the ones who created the danger.

The policy reasons which underlie the public duty doctrine support this additional limitation. The public duty doctrine states:

> Essentially, the rule declares government owes a duty of protection to the public, not to particular persons or classes. Sound reasons support this doctrine. Furnishing public safety always involves allocating limited resources. Law enforcement entails more than simply reacting to violations; it encompasses the art of keeping the peace. Deploying finite resources to achieve these goals is a legislative and executive policy function. To allow individuals to influence through private litigation how resources must be disposed would render government administration chaotic and enfeebled. Unrestricted liability might discourage communities from acting at all or encourage action merely to avoid suit, without regard to the common good. The rule promotes accountability for offenders, rather than police who through mistake fail to thwart offenses. Otherwise, lawbreaker culpability becomes increasingly irrelevant with liability focused not on the true malefactors, but on local governments. E.P. v. Riley, 1999 S.D. 163, ¶19, 604 N.W.2d 7, 13 (quoting Tipton v. Town of Tabor, 1997 SD 96, ¶10, 567 N.W.2d at 356.

Clearly, this is not a case involving the broad application of finite resources to keep the peace, and it is not a case which undermines the policy of accountability to third party offenders "rather than police who through mistake fail to thwart offenses." This involves the deliberate refusal to

take steps to safely secure an accident scene, which refusal endangered motorists who on August 5, 2012 were traveling on Highway 44 west just after its intersection with Highway 385.

Those motorists included Howard. Those motorists traveling in that place on that day, who were endangered by Bender's acts and omissions, are far different from the broad class of the general public. Those motorists are a specifically defined and circumscribed class of persons who required protection from mismanagement of an accident scene.

Once this Court recognizes the compelling distinction between this case and previous applications of the public duty doctrine in South Dakota, it becomes clear that not every one of the four elements of the exception to the public duty doctrine can be workably applied to this case. However, to the extent that those elements are applicable, their application supports the continuation of Howard's claim to disposition on its merits.

The first element is the state actor's **Actual knowledge of dangerous condition.** Taking the allegations in the Amended Complaint, together with all inferences and conclusions reasonably drawn from those allegations, it is clear for purposes of a Motion to Dismiss that Bender knew of the dangerous condition created by his refusal to take time to set up warning devices or personnel in response to the warnings of the tow truck driver. The conditions on the ground, involving a blind curve right after an intersection and right before the accident scene also contributed to his actual knowledge of dangerous conditions.

The second element is the injured party's **reasonable reliance** on specific actions or representations to forego other means of protecting himself. In the absence of warnings, Howard, along with all other motorists Highway 44 at that place at that time, reasonably expected that the highway would be clear and unobstructed by a tow truck. Bender's failure to set up warnings was a specific action which fully supported that expectation.

The third element "permits recovery for negligent **failure to enforce its laws** (boldface added) only when there is language in a statute or ordinance which shows an intent to protect a particular and circumscribed class of persons." Tipton II, 1997 SD 96, ¶35. Howard acknowledges that there is not such a statute in this case. However, this element is really not workable in a public duty doctrine analysis as applied to this case because, as argued above, this is not a case about failure to protect the general public because of "negligent failure to enforce laws." Instead, this case presents the phenomena of a dangerous situation created, not by mere failure to apprehend a suspect or prevent an unlawful act, but by the specific actual acts and omissions of Bender on August 5, 2012 at the specific location of the accident.

The fourth element, **failure to avoid increasing risk of harm,** is, like elements one and two, clearly met in this case. Bender's acts and omissions actually created the risk of harm, and therefore certainly failed to avoid increasing the risk of harm.

The statement at page 8 of Bender's Motion/Brief that, "at best, the Amended Complaint alleges that Trooper Bender failed to diminish the dangerous situation created by the fatal accident" is simply wrong. Bender created a dangerous situation by refusing to warn approaching motorists of the existence of a tow truck blocking the highway. Paragraph 4 of the Amended Complaint specifically alleges that Bender ignored requests to warn of the danger created by the tow truck's presence on the highway. This goes far beyond "fail[ing] to diminish the dangerous situation created by the fatal accident."

ARGUMENT: IMMUNITY UNDER SDCL §20-9-4.1 REQUIRES A FACTUAL DETERMINATION OF "GOOD FAITH" WHICH CANNOT BE MADE ON A MOTION TO DISMISS.