

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30776

JUSTIN HAMER and KIM HAMER,

Plaintiffs and Appellants,

vs.

PAUL DUFFY and CORNERSTONE POURED FOUNDATIONS, INC.,

Defendants and Appellees.

Appeal from the Circuit Court
Second Judicial Circuit
Lincoln County, South Dakota
The Honorable John R. Pekas Presiding

APPELLANTS' BRIEF

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PRELIMINARY STATEMENT

In accordance with SDCL § 15-26A-64, references to the certified record will be designated by the letters “CR” followed by the page number(s) designated in the Index prepared by the Lincoln County Clerk of Courts. References to the hearing transcripts contained in the court file will be designated by the letters “CR” followed by the pertinent page number(s). References to the Trial Transcript will be designated by the letter “TT” followed by the name designated on the title page of each volume followed by pertinent page number(s). References to the materials contained in the attached Appendix will be designated by the letters “App.” followed by the pertinent page number(s).

Pursuant to SDCL § 15-26A-63, references to Plaintiffs and Appellants Justin Hamer and Kim Hamer will be made to “Plaintiffs” if plural or “Plaintiff Kim Hamer,” “Plaintiff Justin Hamer” or “Mr. Hamer” if singular. References to Defendants and Appellees Paul Duffy and Cornerstone Poured Foundations, Inc., will be made to “Defendants” if plural or “Defendant Cornerstone,” “Defendant Duffy” or “Mr. Duffy” if singular.

JURISDICTIONAL STATEMENT

Pursuant to SDCL §§ 15-26A-3(1) and 15-26A-4(1) and 15-26A-7, Plaintiffs hereby appeal to the Supreme Court of South Dakota from the Judgment entered in the above-captioned matter on July 1, 2024 and assign as error the “Order Granting Defendants’ Motion to Exclude Testimony of Plaintiffs’ Expert Witnesses, Adam Grill and Michael DiTallo, Pursuant to SDCL § 19-19-702”

entered on December 13, 2021, an “Order Denying Plaintiffs’ Motion for Reconsideration of Order Excluding Trial Testimony of Plaintiffs’ Expert Witnesses, Adam Grill and Michael DiTallo” entered on November 1, 2022, an “Order Denying Plaintiffs’ Motion to Amend Complaint” entered on January 6, 2023, as well the refusal by the Court to include in its instructions to the jury, Plaintiffs’ Requested Instructions numbers 28, 35 and 48. A Notice of Appeal was filed on July 30, 2024. Jurisdiction is provided by SDCL §§ 15-26A-3(1) and 15-26A-7.

STATEMENT OF THE ISSUES

Issue I: Whether the trial court erred by excluding the expert testimony of Adam Grill and / or Michael DiTallo?

The Trial Court granted Defendants’ motion to exclude the testimony of Adam Grill and Michael DiTallo and denied Plaintiffs’ motion for reconsideration.

- *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993).
- *Burley v. Kytac Innovative Sports Equip., Inc.*, 2007 SD 82, 737 N.W.2d 397.
- *State v. Lemler*, 2009 SD 86, 774 N.W.2d 272.
- SDCL § 19-19-702

Issue II: Whether the trial court erred by refusing to allow Plaintiffs to amend their complaint to allege negligence by Defendant Cornerstone, and violations of the Federal Motor Carrier Safety Regulations?

The trial court denied Plaintiffs’ motion to amend their complaint.

- *Levene v. Staples Oil Co. Inc.*, 685 F.Supp.3d 791 (D.S.D. 2023).

- *Davies v. GPHC, LLC*, 2022 SD 55, 980 N.W.2d 251.
- *Lovell v. Oahe Elec. Coop*, 382 N.W.2d 396, (S.D. 1986).
- SDCL § 49-28A-3.

Issue III. Whether the trial court erred by refusing to instruct the jury regarding a violation of 49 C.F.R. § 392.3 of the Federal Motor Carrier Safety Regulations?

The trial court refused to give Plaintiffs' requested instruction number 35.

- *Levene v. Staples Oil Co. Inc.*, 685 F.Supp.3d 791 (D.S.D. 2023).
- *Jensen v. Menard, Inc.*, 2018 SD 11, 907 N.W.2 816.
- 49 C.F. R. § 392.3.

STATEMENT OF THE CASE AND FACTS

Statement of the Case

This case was commenced in South Dakota Circuit Court, Second Judicial Circuit, within and for Lincoln County, by the service of a summons and complaint dated March 13, 2020. (CR pp 3 - 8). The case was assigned to the Honorable John R. Pekas, Circuit Court Judge.

The lawsuit arises from a motor vehicle crash between a commercial truck and a pickup truck in Lincoln County, South Dakota, on April 8, 2019. (CR p 6). Plaintiff Justin Hamer was the driver of the pickup and alleged personal injuries caused by the crash. (CR pp 5-6). Justin's wife, Plaintiff Kim Hamer, asserted a claim for loss of consortium. (CR p 7).

In essence, the complaint alleges that Defendant Duffy, the driver of flatbed truck owned by Mr. Duffy's employer, Defendant Cornerstone, was negligent in

the operation of the commercial vehicle by failing to yield the right-of-way while making a left-hand turn at an intersection. (CR p 6). In their answer, Defendants denied any negligence, asserted the affirmative defense of contributory negligence on the part of Plaintiff Justin Hamer and counterclaimed for property damage to the commercial vehicle. (CR pp 9-10).

On April 30, 2021, the trial court entered a Stipulation for Scheduling Order and Order. (CR pp 24 -27). On the day of the deadline, May 17, 2021, Plaintiffs served their expert disclosures. (CR pp 63 – 106, 140 - 169). These disclosures included a twenty-nine-page report issued by Adam Grill, as well as his resume and professional background. (CR pp 66 – 95, 140-149; App. pp 16-45, 57 - 66). Plaintiffs' disclosures also contained a ten-page report issued by Michael DiTallo of Dynamic Safety, L.L.C., as well as Mr. DiTallo's Curriculum Vitae. (CR pp 96 – 106, 150 – 169; App. pp 46 – 56, 67 - 86). Both reports contained various findings, opinions and conclusions relating to the events and circumstances which caused or contributed to causing the crash. (CR pp 66 – 95, 96 – 106; App. pp 16 – 45, 46 – 56).

In response, Defendants' counsel declined to retain any experts who specialized in the fields of commercial driving safety and/or accident reconstruction.¹ Instead, three days after Defendants filed their expert witness

¹ The sole expert identified by Defendants was a medical witness, Dr. Brad Elkins, MD. (CR p 28).

disclosure, Defendants filed a motion for an order precluding both Mr. Grill and Mr. DiTallo from testifying at trial. (CR pp 43 – 44).

A hearing was scheduled for December 13, 2021, at 9:30 a.m. in Sioux Falls, SD. (CR 107). During the hearing, Defendants' counsel acknowledged that the pending motion could be fairly characterized as a "Daubert" motion brought pursuant to SDCL § 19-19-702. (CR 188 – 189). Nevertheless, Defendants' counsel did not argue or claim that Mr. Grill and Mr. DiTallo lacked the necessary knowledge, skill, experience, training or education to qualify as an experts pursuant to SDCL § 19-19-702. (CR pp 187 – 191). Instead, Defendants' counsel argued that the liability issues presented in the case were so simple and uncomplicated that the expert opinions expressed by Mr. Grill and Mr. DiTallo would not help the jury understand the evidence or determine facts in issue and should be disallowed. (CR p 188 - 191).

Although the trial court agreed that the crash occurred at a "confusing" and "complex" intersection, the court concluded that "the jury will be able to, to figure that out," and granted Defendants' motion from the bench. (CR pp 197-198). A written order disallowing the trial testimony of Mr. Grill and Mr. DiTallo was entered the same day. (CR pp 1-2 – 183; App. pp 87 - 88).

On January 6, 2022, the trial court set the case for a three-day jury trial commencing on July 20, 2022. (CR p 184). During a pre-trial conference conducted on June 16, 2022, the trial was postponed until December 6, 2022, by

agreement of counsel, because of shared concerns that the case would take more than three days to try. (CR pp 249 – 250).

On August 23, 2022, Plaintiffs filed “Plaintiffs’ Motion for Reconsideration of Order Excluding Trial Testimony of Plaintiffs’ Experts Adam Grill and Michael DiTallo.” (CR pp 273 – 274). A hearing was scheduled for November 1, 2022. (CR pp 275 – 276).

After hearing the arguments of counsel, the trial court ruled from the bench that “there still isn’t a need to have the expert witness. This is something that I believe that this is something that the lay, ah, person can go ahead and make the correct decision, so I’m going to have to deny your motion to reconsider at this time[.]” (CR p 1097). An order denying the motion was entered the same day. (CR p 291).

On November 22, 2022, Plaintiffs filed a motion to amend the complaint, with a proposed complaint attached. (CR pp 299 – 311). The proposed amended complaint realleged counts one and two set forth in the original complaint, and added count three, which included several allegations of negligence by Defendant Duffy and/or Defendant Cornerstone, based in part upon alleged violations of Federal Motor Carrier Safety Regulations. (CR pp 5-7, 304 – 311).

A hearing was scheduled for December 20, 2022. By this time, the jury trial originally rescheduled for December 6, 2022 had been postponed once again until August 1, 2023. (CR pp 560, 1076). During the hearing, Plaintiffs’ counsel

argued that the Defendants would have ample time to respond to the new claims and conduct any necessary discovery before trial. (CR pp 1063 - 1067).

In response, Defendants' counsel argued that the discovery deadline had expired and that alleged violations of Federal Motor Carrier Safety Regulations do not give rise to a "private right of action". (CR pp 1068 – 1072).

The court recognized that the new trial date was nine months away and acknowledged that the issue before the court was whether the Defendants would be prejudiced by the proposed amendments. (CR p 1076). Aside from pointing out that pleadings were exchanged and the original discovery deadline had passed, however, the trial court did not specifically explain how the Defendants would be prejudiced by the proposed amendment. (CR pp 1076 – 1081). Instead, the court essentially ruled that the alleged violations of the Federal Motor Carrier Safety Regulations were not enforceable as a "private cause of action". (CR 1076 – 1081). An order denying Plaintiffs' motion to the amend the complaint was entered on January 6, 2023. (CR p 556; App. p 90).

The trial was continued once again from August 1, 2023 to October 31, 2023, because of conflicts regarding expert witnesses. (CR p 560). On October 2, 2023, Plaintiffs' counsel filed a notice of hearing regarding an offer of proof relating to the expert opinions of Adam Grill and Michael DiTallo. (CR pp 586 – 587).

The offer of proof hearing was conducted on October 11, 2023. (CR p 1104). Mr. DiTallo and Mr. Grill both testified. (CR pp 1104 – 1111, 1113 – 1123).

Mr. DiTallo is an expert specializing in crash reconstruction and analysis. (CR p 1105). He reiterated and summarized some of the findings, opinions and conclusions set forth in his expert report, which was marked as Exhibit 1001. (CR p 1107). He also identified his Curriculum Vitae, which was marked as Exhibit 1002. These exhibits were received by the Court as part of Plaintiffs' offer of proof. (CR pp 1148 – 1158, 1201 – 1220).

Mr. Grill is an expert specializing in Commercial Vehicle Safety Expert and Commercial Vehicle Transportation. (CR p 1113). He summarized his work history and highlighted some of his expert opinions, findings and conclusions. (CR pp 1113, 1116 – 1118). He also identified his professional resume, which was marked as Exhibit 1003. These four exhibits were also received by the Court as part of Plaintiffs' offer of proof. (CR pp 1221 – 1230, 1231 – 1260).

Because of the death of a family member of one of the parties, the jury trial originally scheduled for October 31, 2023 had to be postponed once again. (CR p 623).

On May 20, 2024, a four-day jury trial was convened at the Lincoln County Courthouse in Canton, SD. (TT Jury Selection p 1). Plaintiffs rested their case on day two. (TT Day 2 p 140). Defendants declined to make any motions at that time. (TT Day 2 p 143).

The Defendants rested their case on day three. (TT Day 3 p 71). Plaintiffs' motion for a directed verdict on the issue of Defendant Duffy's negligence was denied. (TT Day 3 pp 72-74).

After the jury was excused, the court and counsel engaged in an on-the-record discussion about the court's proposed jury instructions. (TT Day 3 pp 76 – 124). Plaintiffs' counsel objected to the court's failure to include Plaintiffs' Requested Jury Instruction number 35 and specifically requested that the court include section 49 U.S.C. 392.3 in the court's instructions. Over Plaintiffs' objections, the court denied Plaintiff's request and refused to include Plaintiff's Requested Instruction 35 in its charge to the jury. (TT Day 3 pp 117-118).

On day four of the trial, the Court read the instructions to the jury and counsel for both sides gave closing arguments. (TT Day 4 p 7, 8 – 49). After deliberating, the jury returned its special verdict. (CR p 717; TT Day 4 pp 59-60; App. pp 1 – 3). The Jury found that Defendant Duffy was negligent and that such negligence was a legal cause of Plaintiff's injuries or damages and that Plaintiff Justin Hamer was contributorily negligence, more than slight, in causing the collision. (CR pp 717 – 719; TT Day 4 pp 59-60; App. pp 1-3).

A judgment was entered on July 1, 2024. (CR pp 1004 – 1005; App. p 4). A notice of Appeal was filed on July 30, 2024. (CR pp 1021 – 1022; App. p 6-7)

Statement of the Facts

On April 8, 2010, at approximately 9:05 a.m., Plaintiff Justin Hamer was driving a 2003 Chevrolet Avalanche west on Lincoln County highway 271, in the

vicinity of the I-29 interchange. (TT Day 2 p 100; CR pp 56, 59, 62, 961, 964, 967; App. pp 9, 12, 15). Mr. Hamer had just dropped off his child at school and was intending to proceed west on highway 271. (TT Day 2 p 100; CR pp 62, 967; App. p 15).

At about the same time, Defendant Duffy was driving a 2014 Western Star Modell 4700 eastbound on the same highway, approaching the I-29 interchange from the opposite direction. (TT Day 1 p 51; CR pp 5762, 962, 967; App. p 15). This truck is a flatbed or straight truck and is one of three commercial vehicles owned and operated by Defendant Cornerstone. (TT Day 1 p 63, Day 2 p 132, Day 3, p 63; CR pp 775, 776).

The truck was equipped with a front axle, two rear axles and one lift axle, consisting of an extra set of wheels that can be raised or lowered as needed. (CR pp 775, 776). The vehicle had a gross motor vehicle rating of 33,000 pounds. (TT Day 2 p 132). Because the truck was a commercial vehicle, Mr. Duffy was required to have a Commercial Driver's License to operate the vehicle and to abide by the Federal Motor Carrier Safety Regulations. (TT Day 1 pp 40, 41, Day 2 p 132).

Mr. Duffy was intending to turn left and proceed north on Interstate 29. (CR pp 62, 967). When Mr. Duffy and Mr. Hamer reached the intersection, the traffic lights were blinking red for both drivers. (TT Day 2 p 100; CR pp 62, 967; App. p 15). Apparently, the traffic signals were not functioning properly. (CR pp 62, 967; App. p 15).

The intersection itself is rather complicated. (CR pp 62, 967; App. p 15). There are two lanes going east, two lanes going west, two lanes exiting the interstate, and two lanes entering the interstate, all governed by the same set of traffic control signals. (TT Day 1 p 47; CR p 957).

Both drivers stopped at the stop bars on the roadway and then started forward. (TT Day1 p 49, Day 2 p 100; CR 62, 967; App p 15). Mr. Duffy had to travel under two interstate overpasses before turning left onto the north-bound I-29 on-ramp. (TT Day 1 p 40; CR pp 62, 957, 967). Mr. Hamer only had to drive straight and continue traveling west. (TT Day 2 p 100; CR pp 62, 967, App p 15).

Defendant Duffy did not see Mr. Hammer's vehicle when Mr. Duffy first stopped. (TT Day 1 p 48). (*Id.*) Defendant did not see Mr. Hamer's yellow pickup when Dr. Duffy crossed under the first interstate bridge. (TT Day 1 p 49).

It was a clear, bright and sunny day. (TT Day 1 p 51). The sun was not in Mr. Duffy's eyes. The weather was not a factor in causing the crash. (*Id.*)

As Mr. Duffy's truck and Mr. Hamer's pickup approached each other from opposite directions, Mr. Duffy made a sudden left-hand turn and crashed into the driver's side of Mr. Hamer's vehicle. (TT Day pp 1 49 – 50, Day 2 p 100; CR pp 62, 772, 773, 967; App. p 15).

The color of Mr. Hamer's pickup was school bus yellow. (CR p 774). Mr. Duffy testified that he "caught a glimpse" of the yellow truck when he turned left. (TT Day 1 pp 48, 49). Mr. Duffy knew that in order to enter the north-bound on-

ramp, he had to cross two lanes of traffic approaching from the east. (TT Day 1 p 49).

Based upon the “glimpse,” Mr. Duffy could not tell how fast Mr. Hamer was traveling. (TT Day 1 p 50). Furthermore, Mr. Duffy could not explain or describe what, if anything, Mr. Hamer did wrong. (*Id.*)

Mr. Duffy testified that he “had the right of way,” or at least “thought” he had the right of way. (*Id.*) He further testified that if had seen Mr. Hamer coming, he would have let him go by. (TT Day 1 p 51).

The force of the impact broke out some windows and caused the back right tire and rim to break off of Mr. Hamer’s pickup. (TT Day 2 pp 100, 131-132; CR p 772). Mr. Hamer’s head also struck and damaged a bulkhead in his pickup. (TT Day 2 p 100; CR p 602).

The night before the crash, Defendant Duffy was out delivering newspapers. (TT Day 1 p 57). In addition to his regular work schedule working for Defendant Cornerstone, which is ten hours a day, five days a week, Mr. Duffy also operated a paper route seven nights a week. (TT Day 1 pp 55 -56).

Mr. Duffy’s routine during the work week was to go to bed at 8:30 p.m., wake up at 11:30 p.m., deliver his papers and then return home at 2:30 a.m. (TT Day 1 pp 57 – 58). Then Mr. Duffy would go back to bed and get up at 6:00 a.m. and report to work at Defendant Cornerstone by 7:00 a.m. (TT Day 1 pp 56, 59).

On average, Mr. Duffy would get three hours of sleep before delivering papers and then another three and a half hours of sleep before reporting to his

regular job. (TT Day 1 pp 57 – 60). This amounts to a total of thirteen hours of work per day and a total of six and a half hours of sleep per night, split into two sessions. (TT Day 1 pp 58 – 60).

After the crash, Plaintiff Justin Hamer was taken to the emergency room by his father-in law. (TT Day 2 p 125). Plaintiff Kim Hamer met Mr. Hamer at the hospital. (TT Day 1 p 5). Mr. Hamer complained of headaches, dizziness and nausea and reported during the crash, he hit his head on the center column of the truck. (TT Day 2 p 7; CR p 602).

Despite continuing medical treatment, Mr. Hamer continued to experience symptoms which included persistent headaches, blurred vision, sensitivity to light, issues with depth perception, the inability to read, difficulty viewing computer screens, problems driving and issues with peripheral vision. (TT Day 1 pp 8, 9, 16, 17, Day 2 pp 18, 86, 88; CR p 602).

It is undisputed that Mr. Hamer is a Veteran of the United States Army and served in Iraq. (TT Day 1 p 83, Day 2 pp 10, 85, 90). While there, he was exposed to artillery during combat and suffered concussive injuries that resulted in Post Traumatic Concussion Syndrome. (TT Day 1 p 83, Day 2 pp 10 85). This condition manifested in symptoms of depression, anxiety and suicidal thoughts, causing the need for both inpatient and outpatient treatment. (TT Day 1 p 90, Day 2 pp 11 – 13, 90).

Nevertheless, Mr. Hamer did not experience the type of headaches and vision problems like those he experienced after the crash on April 8, 2019. (TT

Day 2 pp 41, 45, 86, 88, 89; CR p 602). Dr. Minton, a specialist in neuro-ophthalmology, testified that Mr. Hamer sustained trauma to the left side of his head which resulted in visual difficulties. (CR p 602). These difficulties included problems with bright lights, driving, peripheral vision, depth perception and twitching. (CR p 602).

As a result of his evaluation, Dr. Minton diagnosed two conditions which manifested after the crash. The first is blepharospasm, a condition that happens when the eye muscles cause spasms or twitches of the eyelids. (CR p 604).

The second condition is convergence insufficiency, which is a common problem in traumatic brain injuries. (CR p 603). This condition occurs when the two eyes struggle to work together when attempting to focus close up. (CR p 603). This can cause symptoms including aching of the eyes, frontal headaches and the inability to read or do computer work for a long time. (CR p 603).

Because of his symptoms, Dr. Minton expressed concern that Mr. Hamer would have difficulties going back to his former job in sales. (CR p 604). Dr. Minton understood that Mr. Hamer covered a large territory and would experience difficulties doing a lot of driving because of his sensitivity to light and other vision problems. (CR p 605).

Dr. Swenson is a neuropsychologist. (TT Day 1 p 71). He testified that Mr. Hamer sustained a traumatic injury to the frontal lobe of his brain as a result of the crash on April 4, 2019, which manifested with vision problems including headaches, left eye pain, difficulty concentrating and focusing, photosensitivity

and blurry vision. (TT Day 1 pp 83, 84, 91). He also testified that Mr. Hamer exacerbated his pre-existing PTSD symptoms and faces a greater risk of stress-related disease and illness. (TT Day 1 pp 91 98).

According to Dr. Swenson, the April 8, 2019 crash has caused a traumatic and detrimental impact on Mr. Hamer's personal life, business life, vocational life and marriage. (CR pp 91, 93). Unfortunately, Mr. Hamer's condition is permanent in nature and his symptoms are not expected to improve. (TT Day 1 pp 91, 93).

Thomas Audet is a certified vocational rehabilitation consultant. (TT Day 2 p 61). Mr. Audet reviewed Mr. Hamer's medical records, spoke with him by telephone during COVID-19 and later met with him in person. (TT Day 2 pp 63-64).

Mr. Audet then performed a transferable skills analysis to determine what kind of jobs Mr. Hamer would have been qualified for prior to the crash. (TT Day 2 p 64). Next, Mr. Audet compiled a list of vision problems and other symptoms that Mr. Hamer was experiencing as a result of the traumatic brain injury caused by the 2019 collision. (*Id.*). These difficulties included problems with fluorescent lights, the need to wear dark glasses inside, the need to keep his house dark, the need to take frequent breaks, the inability to view computer screens, difficulties with direct sunlight, the inability to work outside for extended periods, problems associated with driving and inability to maintain a work schedule. (*Id.*).

At the end of his analysis, Mr. Audet reached the conclusion that Mr. Hamer was not employable because he was not capable of maintaining and holding steady employment because of his vision issues and associated problems and limitations. (TT Day 2 p 65). Before the crash, Mr. Hamer earned between \$55,00 and \$70,000 per year. (TT Day 2 p 69). Mr. Audet testified that the \$70,000 figure is consistent with information available from the South Dakota Department of labor regarding the median income for non-technical sales representatives in South Dakota. (TT Day 2 p 70).

Mr. Audet observed that since the collision through the time of trial, Mr. Hamer has missed five years of employment and has lost five years of pay. (TT Day 2 p 70). Mr. Audet further testified that in his opinion, Mr. Hamer will remain unemployed and will lose additional revenues through the time of retirement at age sixty-seven. (TT Day 2 p 70).

ARGUMENT

Issue I: The trial court abused its discretion by excluding the expert testimony of Adam Grill and/or Michael DiTallo.

From the outset, it should be noted that the timeliness of Plaintiffs' expert disclosures is not at issue. (CR pp 63 – 65). In addition, the Defendants have not claimed, and the trial court did not rule, that Mr. Grill and Mr. DiTallo should be disqualified from testifying because of (1) lack of skill, experience, training or education in their respective fields, (2) insufficient facts or data forming the basis

for the opinions, or (3) the application of unreliable principles and methods of analysis.

Instead, Defendants' counsel argued that the issues presented in this case were so simple that none of the findings, opinions and conclusions expressed in Mr. Grill's and Mr. DiTallo's reports would assist the jury with understanding the evidence or determining any fact in dispute. (CR pp 187 – 191, 1089, 1094). Under the record presented, this contention is inaccurate, unsupportable and disingenuous, and the trial court's preemptive ruling, precluding Mr. Gill and Mr. DiTallo from testifying altogether, resulted in the exclusion of relevant and informative testimony, to the prejudice of the Plaintiffs, without any legitimate justification. Despite a motion for consideration and an offer of proof, the trial court failed and refused to acknowledge and correct this injustice, leaving Plaintiffs with no recourse except this appeal.

The admissibility of expert testimony in South Dakota is governed by SDCL § 19-19-702. "This statute is patterned after Rule 702 of the Federal Rules of Evidence." *State v. Shell*, 301 N.W.2d 669, 672(S.D. 1981). This statute provides:

A witness who has qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) The testimony is based on sufficient facts or data;
- (c) The testimony is the product of reliable principles and methods; and

- (d) The expert has reliably applied the principles and methods to the facts of the case.

Under this statute, “[a] trial court is responsible for deciding whether an expert’s knowledge will ‘assist the trier of fact to understand the evidence or to determining a fact in issue.’” *Klutman v. Sioux Falls Storm*, 2009 SD 55, ¶ 21, 769 N.W.2d 440, 449 (quoting SDCL § 19-15-2, now transferred to § 19-19-702). This responsibility “includes determining ‘whether a particular expert has sufficient specialized knowledge to assist jurors in deciding the specific issues in the case.’” *Klutman*, 2009 SD 55, ¶ 21, 769 N.W.2d at 449 (quoting *Wheeling Pittsburgh Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 715 (8th Cir. 2001)).

The burden of demonstrating that the testimony is competent, relevant and reliable rests with the proponent of the testimony. *Burley v. Kytect Innovative Sports Equip. Inc.*, 2007 SD 82, ¶ 13, 737 N.W.2d at 397, 403. Nevertheless, the rules of evidence are liberally construed with the “general approach of relaxing the traditional barriers to ‘opinion’ testimony.” *Burley*, 2007 SD 82, ¶ 24, 737 N.W.2d at 405 (quoting *Daubert*, 509 U.S. at 588). Furthermore, “[a] party who offers expert testimony is not required to prove to a judge in a *Daubert* hearing that the expert’s opinion is correct; all that must be shown is that expert’s testimony rests upon ‘good grounds, based on what is known.’” *State v. Lemler*, 2009 SD 86, ¶ 34, 774 N.W.2d p 272, 284-85; *Burley*, 2007 SD 82, ¶ 24, 737

N.W.2d at 406 (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 597, 590 (1993)).

“Any other deficiencies in an expert’s opinion or qualifications can be tested through the adversary process at trial.” *Burley*, 2007 SD 82, ¶ 24, 737 N.W.2d at 406. “[A] trial court does not abuse its discretion in admitting the scientific evidence and then letting the factfinder resolve the factual dispute.” *Lemler*, 2009 SD 86, ¶ 35, 774 N.W.2d at 285. “Vigorous cross-examination, presentation of contrary evidence and careful instruction on the burden of proof” are the traditional means of challenging expert opinions. *State v. Guthrie*, 2001 SD 61, ¶ 38, 627 N.W.2d 401, 417 (quoting *Daubert*, 509 U.S. at 596).

Once a *Daubert* challenge is made, “the trial judge must simply determine ‘that an expert’s testimony both rests on a reliable foundation and is relevant to the task at hand.’” *First W. Bank Wall*, 2001 SD 16, ¶ 8, 621 N.W.2d at 615 (quoting *Estate of Dokken*, 2000 SD 9, ¶ 40, 604 N.W.2d 487, 498)). “Relevance embraces ‘evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.’” *Burley*, 2007 SD 82, ¶ 13, 737 N.W.2d at 403 (quoting *State v. Guthrie*, 2001 SD 61, ¶ 32, 627 N.W.2d 401, 415) (quoting SDCL § 19-12-1, which has been transferred to SDCL § 19-19-401).

“Rule 702 reflects an attempt to liberalize the rules governing the admission of expert testimony.” *Burley*, 2007 SD 82, ¶ 24 n.1, 737 N.W.2d at 406 (quoting *Weisgram v. Marley Co.*, 169 F.3d 514, 523 (8th Cir. 1999)). “The rule

clearly is one of admissibility rather than exclusion.” *Burley*, 2007 SD 82, ¶ 24 n.1, 737 N.W.2d at 406 (quoting *Arcoren v. United States*, 929 F.2d 1235, 1239); see *Lauzon v. Senco Prod., Inc.*, 270 F.3d 681, 686 (8th Cir. 2001) *Jenson v. Eveleth Taconite Co.*, 20 F.3d 1298, 1297 (8th Cir. 1997).

To be admissible, all that is required is that the proposed expert testimony is: (1) relevant, and; (2) based upon a reliable foundation. *Burley*, 2007 SD 82, ¶ 25, 737 N.W.2d at 406; see *Daubert*, 509 U.S. at 597). “The determining factor in admitting expert testimony is if it would assist the jury in understanding matters that normally would not lie within a layman’s breadth of knowledge.” *State v. Edelman*, 1999 SD 52, ¶ 29, 593 N.W.2d 419, 424 (quoting *Bland v. Davison Co.*, 1997 SD 92, ¶ 30, 566 N.W.2d 452, 461).

“[A] trial court does not abuse its discretion in admitting the scientific evidence and then letting the factfinder resolve the factual dispute.” *State v. Lemler*, 2009 SD 86, ¶ 35, 774 N.W.2d 272, 285. “A trial court should exclude an expert opinion only if it is so fundamentally unsupported that it cannot help the fact finder.” *Hurst v. United States*, 882 F.2d 306, 311 (8th Cir. 1989); see *Loudermill v. Dow Chem. Co.*, 8763 F.2d 566, 570 (8th Cir. 1988).

Turning to the expert testimony in question, Adam Grill is an expert in commercial truck safety and resides in Billings, MT. (CR pp 140, 1221; App. p 57). He has held a commercial driver’s license for approximately twenty years. (*Id.*).

Mr. Grill has multiple commercial endorsements and certifications and has worked as a commercial truck driver in all fifty states except Hawaii. (CR pp 141, 1222; App. p 58). Affidavit of Scott G. Hoy dated December 6, 2021, Exhibit 4 p 2). Also, he has worked as a warehouse manager, safety supervisor, forklift operator, dock supervisor, truck driver, truck driving instructor, Federal Motor Carrier Safety Administration consultant. (CR pp 142 – 143, 1223 - 12224; App, pp 59 – 60). In addition, he has extensive experience in truck accident investigation, vehicle dynamics and accident reconstruction, has participated in special projects, research and instructional assignments, has given numerous speeches and professional presentations, holds many professional licenses and certifications, belongs to several professional trucking organizations and has given expert testimony in both state and federal courts. (CR pp 140 - 149, 1221 – 1230; App. pp 57 – 66).

In his report, Mr. Grill explained some of the rules, regulations, standards, customs and practices applicable to the commercial trucking industry. (CR pp 71 – 78, 1236 – 1243; App. pp 21 – 28). He observed that the performance standards for commercial vehicles are different then non-commercial vehicles because “their design characteristics, control instruments and mechanical systems require special knowledge, skills and driving behaviors in order to drive them safely, legally and efficiently”. (CR pp 74, 1230; App. p 24). This is because commercial vehicles are bigger and heavier, more difficult to maneuver, more complex to drive, take longer to accelerate and stop and require special licenses, certifications,

knowledge and training to safely operate. (CR pp 74-75, 1239 – 1240; App. pp 24-25).

Because of these differences, the drivers of commercial vehicles “are required to know and obey a much broader and more stringent series of state and federal regulations than those who operate non-commercial vehicles”. (CR pp 75, 1240; App. p 25). These regulations include the Federal Motor Carrier Safety Regulations, which apply to commercial motor vehicles that transport property or passengers in interstate commerce. (CR pp 76, 1241; App. p 26). In order to demonstrate the knowledge and skills necessary to operate these vehicles, the operators must obtain a commercial driver’s license to perform their work in a safe and legal manner. (*Id.*). The subjects addressed during this commercial licensing process include “managing speed and space, keeping a property lookout and accident avoidance and mitigation – to name a few”. (CR pp 76, 1241; App. p 26).

The Federal Motor Carrier Safety Regulations apply to both the operators of commercial vehicles and their employers. (CR pp 75, 1240; App. p 25). In his report, Mr. Grill rendered the opinion that based under the applicable federal standards, Defendant Cornerstone’s driver training and safety management system was inadequate, substandard and deficient. (CR pp 79 – 81, 1244 – 1246; App. pp 29 - 31). Under the applicable regulations, the employers of commercial truck drivers have the continuing and non-delegable duties to instruct their drivers about

the maintenance, operation, or driving of commercial vehicles. (CR pp 75 – 78, 1240 – 1243; App. pp 25 – 28).

In its answers to interrogatories, Defendant Cornerstone admitted that “there is no formal training that [Defendant] Cornerstone provides drivers”. (CR pp 80, 1245; App. p 30). Mr. Grill further observed that a successful safety program, had it been implemented by Defendant Cornerstone, would have effectively prevented the collision from occurring. (CR pp 79 – 81; 1244, 1246; App. pp 29 – 31).

Regarding Defendant Duffy’s conduct, Mr. Grill rendered the opinion that Mr. Duffy, after obtaining his commercial driver’s license, failed to possess and exercise that degree of training, knowledge and skills required to operate a Commercial Vehicle, given its size, weight and handling characteristics, particularly before changing speed and direction. (CR pp 81 – 82, 1246 – 1247; App. pp 31-32). Specifically, Mr. Duffy failed to maintain a proper visual search, failed to properly manage his speed and space, failed to recognize the hazards in front of him and have a contingency plan in case of an emergency and failed to recognize and execute defensive driving measures to avoid a preventable crash. (CR pp 81-82, 93, 1246 – 1247, 1258; App. pp 31 – 32, 43). During the offer of proof hearing, Mr. Grill also testified that drivers need at least eight hours of consecutive off-duty rest in order to operate a commercial vehicle in compliance with federal regulations. (CR pp 1117 – 1118).

Michael DiTallo is an expert in traffic accident investigation and reconstruction and resides in Lake Zurich, Illinois. (CR pp 150, 1201; App. p 67). He is employed by Dynamic Safety L.L.C., an independent consulting company that provides services to industry, government entities, the insurance industry, the legal field and the private sector. (*Id.*). He is also an adjunct faculty member for Northwestern University Center of Public Safety in Evanston, Illinois. (*Id.*).

He holds several certifications, registrations and licenses and is a member of multiple professional associations. (CR pp 161 – 162, 1212 – 1213; App. pp 78 – 79). Over the last twenty years, he has made over fifty presentations on various subjects relating to accident investigation and reconstruction. (CR pp 161 – 166, 1212 – 1217; App. pp 78 – 83). He has also authored over a dozen publications. (CR pp 167 – 168, 1218 – 1219; App. pp 84 – 85).

Mr. DiTallo reviewed the accident investigation materials and issued a report, listing the items analyzed and describing the collision site, the weather and lighting conditions, the vehicles involved, as well as the sequence of events leading up to the collision. (CR pp 97 – 99, 1149 – 1151; App. pp 47 – 49). He noted that Defendant Duffy had to travel farther to reach the point of the collision. (CR pp 99, 1151; App. p 49). Based upon the damage to the vehicles as depicted in the photographs, he observed that the damage to Defendant Duffy's truck was in the front left corner, and Plaintiff Jason Hamer's vehicle was struck on the driver's side of the vehicle, just in front of the rear wheel, which is consistent with an angled impact. (*Id.*).

Mr. DiTallo also calculated the normal acceleration of both vehicles and estimated that it would have taken Plaintiff Justin Hamer between 7.0 and 7.5 seconds to reach the area of impact from his “stop bar” on the roadway, and between 10 and 10.5 seconds for Defendant Duffy to reach the area of impact from his “stop bar” on the roadway. (CR pp 99 – 101, 1151 – 1153; App. pp 49 – 50). In addition, utilizing a computer software program, he analyzed the average perception / response time of both drivers faced with their respective paths of travel. (CR pp 100, 1152; App. p 50).

Based upon his review, analysis and calculations, Mr. DiTallo formed and expressed several opinions and conclusions relating to the accident. (*Id.*). First, Mr. DiTallo concluded that Defendant Duffy had between 4.4 and 4.9 seconds to recognize and respond to the danger caused by Plaintiff Justin Hamer’s approaching vehicle. (CR pp 101, 1153; App. p 51). Second, based upon his attempt to make a left-hand turn despite the existence of oncoming traffic in the immediate vicinity, Defendant Duffy was “situationally inattentive” to his surroundings. (CR pp 102, 1154; App. p 52). Third, as a consequence of his failure to allow the intersection to clear before initiating the left-hand turn, Defendant Duffy failed to yield the right of way to Plaintiff Justin Hamer’s approaching vehicle and caused the collision.² (*Id.*).

² It should be noted that the “ultimate issue” rule in South Dakota was abolished in 1993, when SDCL § 19-15-4 was amended to adopt Federal Rule of Evidence 704 verbatim. *State v. Raymond*, 540 N.W.2d 407, 410 (S.D. 1995); *Zens v. Harrison*, 538, 794, 795 (S.D. 1995). SDCL § 19-15-4 was transferred to SDCL § 19-19-704 in 2016 and states that “[a]n opinion is not objectionable just because it embraces an ultimate issue”.

Mr. DiTallo's report does not mention or refer to any provision of the Federal Motor Carrier Safety Regulations. (CR pp 96 – 106, 1148 – 1158; App. pp 46 – 56). Mr. DiTallo did not mention or cite any federal regulation during the hearing on Plaintiffs' offer of proof. (CR pp 1105 – 1110). As he indicated during the hearing, Mr. DiTallo is a "crash reconstructionist". (CR p 1109).

This crash involves a complicated intersection with a set of traffic signals governing eight different lanes of travel. (CR pp 62, 967, App. p 15; (TT Day 1 p 47; CR p 957). The traffic signals were malfunctioning. (CR pp 62, 967; App. p 15).

Defendant Duffy's vehicle was a large flatbed truck which required a commercial driver license to operate. (TT Day 1 pp 40, 41, Day 2 p 132). With all due respect, the acceleration rates, perception times, reaction times, stopping distances and handling characteristics of commercial vehicles are matters generally considered beyond the common knowledge of average jurors. In addition, the knowledge, training and skills required to obtain a Commercial Driver License, as well as the federal safety regulations that apply to commercial vehicles, are also matters generally considered outside the ordinary experience and understanding of average citizens.

In South Dakota, "expert testimony is required in negligence cases when the defendant is held to a standard of care that is outside the common knowledge and experience of ordinary persons." *Levene v. Staples Oil Co, Inc.*, 685 F.Supp.3d 791, 804 (D.S.D. 2023) (quoting *Hanson v. Big Stone Therapies, Inc.*,

2018 SD 60, ¶ 30, 916 N.W.2d 151, 159 and 65A C.J.S. Negligence § 930 (2018)). Otherwise, “laypersons would have to indulge in speculation and conjecture” to determine whether the defendants were negligent. *Hanson*, 2018 SD 60, ¶ 26, 916 N.W.2d at 158.

In this case, the defendants, who are held to commercial driver standards, asked the court to disallow evidence regarding the standard of care provided by a specialist in accident reconstruction and an expert in the field of commercial trucking. By ruling that neither expert would be allowed to testify about any matters contained in their reports, the court deprived the jury of the knowledge and instruction available from a specialist in accident reconstruction as well as pertinent information relating to the knowledge, training and skills necessary to obtain a commercial driver’s license, operate a commercial vehicle and comply with federal safety regulations.

With all due respect, this wholesale exclusion of relevant evidence was arbitrary, unreasonable, unfair and prejudicial.

“The trial court is to act as a gatekeeper, not as a wall[.]” *Kuper v. Lincoln-Union Elec. Co.*, 1996 SD 145, ¶ 29, 557 N.W.2d at 758. The rules of evidence are interpreted liberally with the “general approach of relaxing the traditional barriers to ‘opinion’ testimony.” *Burley v. Kytac Innovative Sports Equip., Inc.*, 2007 SD 82, ¶ 24, 737 N.W.2d 397, 405 (quoting *State v. Guthrie*, 2001 SD 61, ¶ 36, 627 N.W.2d 401, 416).

A litigant has a right to present its case in any manner it sees fit “so long as it stays within evidentiary rules”. *State v. Abdo*, 2018 SD 34, ¶ 27, 911 N.W.2d 738, 745; *State v. Herrmann*, 2004 SD 53, ¶ 12, 679 N.W.2d 503, 507. A party has the right to offer generalized expert testimony about “matters that normally would not lie within a layman’s breadth of knowledge”. *State v. Edelman*, 1999 SD 52, ¶ 29, 593 N.W.2d 419, 424; (quoting *Bland v. Davison Co.*, 1997 SD 92, ¶ 30, 566 N.W.2d 452, 461). Because the proposed testimony of Mr. Grill and/or Mr. DiTallo is relevant and based upon a reliable foundation, the trial court abused its discretion and the judgment should be vacated and the case reversed and remanded for further proceedings.

Issue II. The trial court erred by refusing to allow Plaintiffs to amend their complaint to allege negligence by Defendant Cornerstone and violations of the Federal Motor Carrier Safety Regulations.

SDCL § 15-6-15(a) provides:

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has neither been placed upon the trial calendar, nor an order made setting a date for trial, he may so amend it at any time within twenty days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

Under the terms of this statute, “[a] trial court may permit the amendment of pleadings before, during, and after trial without the adverse party’s consent.”

Burhenn v. Dennis Supply Co., 685 N.W.2d 778, 783 (S.D. 2004)(quoting *Dakota Cheese, Inc. v. Ford*, 1999 SD 147, ¶ 24, 603 NW2d 73, 78); see *Prairie Lakes Health Care System, Inc. v. Wookey*, 1998 SD 99, ¶ 28, 583 N.W.2d 405, 417; *Isakson v. Parris*, 526 N.W.2d 733, 735 (S.D. 1995); *Tesch v. Tesch*, 399 N.W.2d 880, 882 (S.D. 1987). “The general rule is that a motion to amend is freely granted and a circuit court should do so unless it will somehow prejudice the adverse party.” *Burlington Northern Railroad Co. v. Green*, 2001 S.D. 48, ¶ 33, 624 N.W.2d 826, 833(S.D. 2001)(Amundson, J. concurring); see *Kjerstad v. Ravellette Publications, Inc.*, 517 NW2d 419, 423 (SD 1994).

Motions to amend pleadings are reviewed for clear abuse of discretion. *Robinson-Podoll v. Harmelink, Fox & Ravensborg Law Office*, 2020 SD 5, ¶ 11, 939 N.W.2d 38. An abuse of discretion occurs when discretion is exercised to an end or purpose not justified by, and clearly against, reason and evidence. *Ries v. JM Custom Homes, LLC*, 2022 SD 52, ¶ 11, 980 N.W.2d 217, 221.

“The most important consideration in determining whether a party should be allowed to amend a pleading is whether the nonmoving party will be prejudiced by the amendment.” *Robinson-Podoll*, 2020 SD 5, ¶ 14, 939 N.W.2d at 38; see *Hein v. Zoss*, 2016 SD 73, ¶24, 887 N.W.2d 62-69-70; *Burhenn*, 685 N.W.2d at 783; *Dakota Cheese, Inc.*, 603 NW2d at 78. “Prejudice is often shown when a party is surprised and unprepared to meet the contents of the proposed amendment.” *Robinson-Podoll*, 2020 SD 5, ¶ 14, 939 N.W.2d at 38; see *Tesch*, 399 N.W.2d at 882; *Isakson*, 526 N.W.2d at 736.

“The inquiry should center on whether the nonmoving party has a fair opportunity to litigate the new issue and to offer additional evidence if the case will be tried on a different point.” *Prairie Lakes Health Care Sys. Inc.*, 1998 SD 99, ¶ 29, 583 N.W.2d at 417; see *Americana Healthcare Center v. Randall*, 513 N.W.2d 566, 571 (S.D. 1994). A Plaintiff typically will not be precluded from amending a complaint or adding a claim “simply because that amendment may increase defendant’s potential liability.” *Prairie Lakes Health Care Sys. Inc.*, 1998 SD 99, ¶ 29, 583 N.W.2d at 417 (quoting 6 *Wright & A. Miller, Federal Practice and Procedure* § 1487 (1990)).

“[C]ourts have allowed amendments when it was established that doing so would not unduly increase discovery or delay the trial, and when the opponent could not claim surprise, but effectively should have recognized that the new matter included in the amendment would be at issue.” *Isakson*, 526 N.W.2d at 737 (quoting 6 *Wright & Arthur R. Miller, Federal Practice and Procedure*, § 1487 (1990)). Typically, a plaintiff will “not be precluded from amending a . . . complaint in order to state a claim on which relief can be granted or from adding a claim to an otherwise proper complaint *simply* because the amendment may increase defendant’s potential liability.” *Prairie Lakes health Care System, Inc.*, 1998 SD 99, ¶ 29, 583 N.W.2d at 417 (quoting 6 *Wright & Arthur R. Miller, Federal Practice and Procedure*, § 1487 (1990)).

No unfair prejudice can be claimed unless the non-moving party can demonstrate that it will be deprived of a fair opportunity to litigate the issue or

precluded from offering additional evidence bearing on the new issues. *Isakson*, 526 N.W.2d at 736; see *Prairie Lakes Health Care System, Inc.*, 1998 SD 99, ¶ 29, 583 N.W.2d at 417. Thus, unless it affirmatively appears from the record that the non-moving party will unfairly suffer a specific prejudice caused by the proposed amendments, a trial court should allow the amendments in the interests of justice. *Isakson*, 526 N.W.2d at 736-37; *Kjerstad*, 517 N.W.2d at 423; SDCL § 15-6-15(a).

SDCL § 15-6-15(c) provides in part that “[w]henver the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading.” See *Klutman v. Sioux Falls Storm*, 2009 SD 55, ¶ 15, 769 N.W.2d 440 at 447. In order to relate back, the amended pleading must be “based upon the same series of transactions or occurrences alleged in the original pleading”. *Waterman v. Morningside Manor*, 2013 SD 78, ¶ 19, 839 N.W. 2d 567, 572.

The original complaint alleged a claim for personal injury and loss of consortium arising out of a motor vehicle crash which occurred in Lincoln County on April 8, 2019 based upon negligence. (CR pp 5 - 8). The proposed Amended Complaint reasserted counts one and two and added count three, consisting of new allegations of negligence by the defendants, some of which are based upon alleged violations of the Federal Motor Carrier Safety Regulations. (CR pp 306 – 310).

Both complaints are based upon a common core of operative facts relating to the same accident involving the same parties. No legal theory aside from negligence has been alleged in the Amended Complaint.³ Accordingly, Plaintiffs' Amended Complaint should relate back to the date of the original complaint. *Waterman*, 2013 SD 78, ¶ 19, 839 N.W.2d at 572; *Klutman*, 2009 SD 55, ¶ 15, 769 N.W.2d at 447.

As previously stated, the trial court did not specifically articulate how Defendants were prejudiced by Plaintiffs' motion to amend during the hearing on December 20, 2022. (CR pp 1075 – 1080). By the time that the hearing was conducted, the trial date had been postponed for another nine months. (CR pp 560, 1076). The Defendants had ample time to conduct any additional discovery and prepare an adequate defense to the new allegations. *See Robinson-Podoll*, 2020 SD 5, ¶ 16, 939 N.W.2d at 38 – 39. There was no showing that Defendants were "surprised and unprepared to meet the contents of the proposed amendment". *Ries*, 2022 SD 52, 12, 980 N.W.2d at 221.

Instead, the trial court denied Plaintiffs' motion to amend because, in the view of the court, some of the proposed amendment was futile, because alleged violations of the Federal Motor Carrier Safety Regulations were not enforceable as

³ Even if it had, "[a]n amended pleading can relate back to the original pleading even when "there is a change in the precise legal description of the rights sought to be enforce, or a change in the legal theory upon which the action is brought." *Waterman*, 2013 SD 78, ¶ 19, 839 N.W.2d at 572 (quoting *Fabbiano v. Demings*, 91 So. 3d 893, 895 (Fla. Dist. C. App. 2012)).

a private cause of action. (CR pp 1079 – 80). With all due respect, because the trial court’s analysis on this issue was erroneous, the court’s denial of Plaintiffs’ motion to amend was an abuse of discretion, as it was not justified by, and clearly against, reason and evidence. *See Reis*, 2022 SD 52, ¶ 11, 980 N.W.2d at 221.

The Federal Motor Carrier Safety Regulations are designed to protect the public safety by regulating the operation of commercial motor vehicles. See 49 C.F.R. § 383.1(a). Section 383.1 provides in part “[t]he purpose of this part is to help reduce or prevent truck and bus accidents, fatalities and injuries by requiring drivers to have a single commercial motor vehicle license and by disqualifying drivers who operate commercial vehicles in an unsafe manner.” 49 C.F.R. § 383.1.

South Dakota has adopted parts 390 to 397, inclusive, of the Federal Motor Carrier Safety Regulations. In 2019, SDCL § 49-28A-3 provided:

The state hereby adopts Title 49 of the Code of Federal Regulations, subtitle B, chapter I, subchapter A, part 107 (subparts F and G only) and subchapter C, parts 171 to 180, inclusive, as amended through January 1, 2017, and Title 49 of the Code of Federal Regulations, subtitle B, chapter III, subchapter B, part 387 and parts 390 to 397, inclusive, as amended through January 1, 2017, with the following modifications:

- (1) All references to interstate operations shall also include intrastate operations except that drivers and motor carriers operating intrastate vehicles and combinations of vehicles with two axles or less or with a gross vehicle weight rating of not more than twenty-six thousand pounds which are not used to transport hazardous materials requiring placarding under part 177, or designed to transport more than fifteen passengers, including the driver, are not subject to parts 390-397;

- (2) For the purposes of part 391.11(b)(1), a driver shall be at least twenty-one years old if engaged in interstate commerce, or transporting hazardous material of a type or quantity requiring placarding under part 177, or operating a vehicle designed to transport more than fifteen passengers, including the driver. All other drivers shall be at least eighteen years of age;
- (3) Unless required by an employer to be medically certified under Title 49 of the Code of Federal Regulations, intrastate drivers are exempt from the physical requirements of part 391.41.

Any violation of part 387 and parts 390 to 396, inclusive, of the motor carrier safety requirements governing the qualifications of drivers, driving of motor vehicles, parts and accessories necessary for safe operation, notification and reporting of accidents, assistance with investigations and special studies, hours of service of drivers, inspection, repair, and maintenance is a Class 2 misdemeanor. Any violation of the hazardous materials regulations pertaining to registration of cargo tank motor vehicles, registration of persons who offer or transport hazardous materials, general information, regulations and definitions, hazardous materials tables, hazardous materials communication regulations, and test and inspection marking requirements found in parts 107 (subparts F and G only), 171, 172, and 178 to 180, inclusive, is a Class 2 misdemeanor. Any violation of the hazardous materials regulations pertaining to packaging, prohibited shipments, loading and unloading, segregation and separation, retesting and inspection of cargo tanks, and other carriage by regulations found in parts 173 to 180, inclusive, or violation of the driving and parking rules in part 397, is a Class 1 misdemeanor.

2018 S.D. Sess.L. ch. 264; *See Levene*, 685 F.Supp.3d 808.

SDCL § 49-28A-3 specifically states that "[a]ny violation of ... parts 390 to 396, inclusive... is a Class 2 misdemeanor." Also, any vehicle with more than two axles and a single vehicle with a gross vehicle weight rating of more than 26,000 pounds must have a commercial driver's license and must conform with all references to interstate operations, which includes the truck Mr. Duffy's was

driving at the time of the crash. (SDCL § 49-28A-3(1); (CR pp 775, 776; TT Day 2 p 132). Furthermore, the South Dakota legislature adopted 49 C.F.R. § 392.2, which provides that “[e]very commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. However, if a regulation of the Federal Motor Carrier Safety Administration imposes a higher standard of care than that law, ordinance or regulation, the Federal Motor Carrier Safety Administration regulation must be complied with.” See SDCL § 49-28A-3.

“Under South Dakota law, ‘where a particular statutory or regulatory standard is enacted to protect persons in the plaintiff’s position or to prevent the type of accident that occurred, and the plaintiff can establish this relationship to the statute, unexplained violation of that standard renders the defendant negligent as a matter of law.’” *Levene*, 685 F. Supp. at 802 (quoting *Davies v. GPHC, LLC*, 2022 SD 55, ¶ 43, 980 N.W.2d 251, 263 and *Lovell v. Oahe Elec. Coop.*, 382 N.W.2d 396, 397-98 (S.D. 1986)); see also *Weeks v. Prostrullo Sons, Inc.*, 169 N.W.2d 727, 728 – 729 (S.D. 1997). “The reason for this rule is that the [regulation] becomes the standard of care or conduct to which the reasonably prudent person is held.” *Alley v. Siepman*, 214 N.W.2d 7.9 (S.D. 1974). Because the court observed that the regulations adopted were framed by the Legislature as “motor carrier *safety* requirements,” and because state law only requires that the plaintiffs qualify as a member of the class of persons which the safety regulation was designed to protect, then an unexplained violation of said regulation serves as

a basis for negligence, leaving the issues of comparative negligence, proximate cause and damages to the jury. *Levene*, 685 F.Supp.3d at 807 - 809; see *Stensland v. Harding County*, 2015 SD 91, ¶ 97, 872 N.W.2d 92, 97.

Plaintiffs have never claimed that a violation of the Federal Motor Carrier Safety Regulations creates a “private cause of action” separate and apart from the tort of negligence existing under state law. See *Hejnal v. U.S. Xpress, Inc.*, 2018 WL 534376, at *7 (E.D. Mo. Jan. 24, 2018) (“Contrary to defendant’s assertion, [the] complaint does not state a claim for relief under the FMCSR. Plaintiff does not allege a violation of a federal regulation as a cause of action in its own right. Rather, Plaintiffs’ complaint merely alleges possible violations of federal regulations as an element of state law causes of action.”); *Ballinger v. Gustafson*, 2022 WL 16758558, at *3 (D. Neb. Oct. 19, 2022) (finding that “Plaintiff’s Complaint [referencing provisions of the FMCSR] merely alleges violations of federal regulations as an element of state law causes of action” and further noting that “[v]iolations of the FMCSR can be considered together with other evidence of negligence at trial for personal injury claims arising out of a motor vehicle accident.”). Instead, Plaintiffs contend that the South Dakota Legislature, by adopting 49 C.F.R. §§ parts 390 to 397 in SDCL § 49-28A-3, which incorporated federal safety regulations, which set the minimum industry standard of care for commercial truck drivers, has modified the standard of care for the operators of commercial vehicles and their employers, and that the violation of said regulations, without excuse, if it pertains to individuals who are part of the class of

persons the regulations were designed to protect, constitutes negligence per se. *See Levene*, 685, F.supp3d at 808 – 812; *Davies v. GPHC, LLC*, 2022 SD 55, ¶ 43, 980 N.W.2d at 263; *Lovell*, 382 N.W.2d at 397-98. The trial court’s failure and refusal to reach this conclusion, and the court’s resulting denial of Plaintiffs’ motion to amend their complaint, was unjustified and clearly against, reason and evidence. Accordingly, the judgment appealed from should be vacated and the case reversed and remanded for further proceedings.

Issue III: The trial court erred by refusing to instruct the jury regarding a violation of 49 C.F.R. § 392.3 of the Federal Motor Carrier Safety Regulations.

Plaintiffs filed their requested jury instructions on November 22, 2022. (CR pp 356 – 475). At that time, Plaintiffs’ motion to amend the complaint had not been decided.

Plaintiffs proposed instruction number thirty-five contained references to ten sections or subsections of the Federal Motor Carrier Safety Regulations. (CR pp 392 – 393, 451 – 453). The trial court’s denial of Plaintiffs’ motion to amend the complaint limited the relevancy of some of these regulations at trial.

Nevertheless, under the record presented, Plaintiffs respectfully submit that the trial court should have included 49 C.F.R. § 392.3 in its instructions.

Plaintiff’s requested instruction number thirty-five stated in part:

Code of Federal Regulations 49 C.F.R. § 392.3 provides:

No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired,

or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

(CR pp 392 - 393, 451 – 453; App. p 91-92).

During the settlement of instructions, Plaintiffs' counsel specifically requested that the court include 49 C.F.R. section 392.3 in the court's instructions to the jury. (TT Day 3 p 116). Over Plaintiffs' objections, this instruction was refused by the Court but preserved in the record. (TT Day 3 p 117).

In the original complaint, Plaintiffs alleged that Defendant Duffy was negligent by failing to "stay vigilant, awake and alert". (CR p 6). At the time of the crash, Defendant Duffy had a paper route at night, was working thirteen hours per day during the week, and was averaging approximately 6.5 hours of sleep per night, with three hours between 8:30 p.m. and 11:30 p.m., and three and a half hours between 2:30 a.m. and 6:00 a.m. (TT Day 1 pp 56 – 59).

The South Dakota Commercial Driver License Manual was admitted into evidence. (TT Day 1 p 42; CR pp 778 – 949). It states in part:

Fatigue and Lack of Alertness. Fatigue is physical or mental tiredness that can be caused by physical or mental strain, repetitive task, illness or lack of sleep. Just like alcohol and drugs, it impairs your vision and judgment

Fatigue causes errors related to speed and distance, increases your risk of being in a crash, causes you to not see and react to hazards as quickly; and affects your ability to make critical decisions. When you are fatigued, you could fall asleep behind the wheel and crash, injuring or killing yourself or others.

The manual also states that adults need eight to nine hours of sleep to maintain alertness and reveals that being sleep-deprived or fatigued (six hours of sleep or less) triples your risk of having a crash. (CR pp 836, 837).

In a pre-trial order, approximately two months before the trial, the court stated that “[t]he court recognizes the South Dakota Federal Court’s ruling in *Levene v. Staples Oil Co.*, 2023 WL 4944038, as stating the Federal Motor Carrier Safety Regulations establishes the Defendants standard of care.” (CR p 654). When settling instructions, however, the trial court reached the opposite conclusion. (TT Day 2 pp 116 – 117).

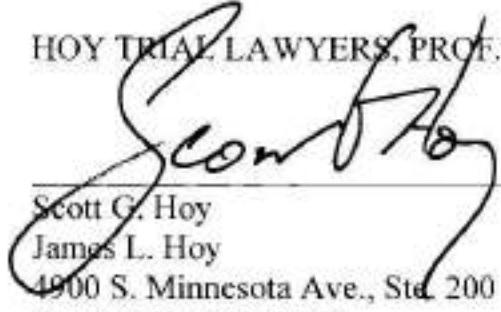
The proposed instruction regarding 49 C.F.R. § 392.3 is a correct statement of the law. The regulation is a safety statute adopted by the South Dakota Legislature in SDCL § 49-28A-3 and imposes a higher standard for the operators of commercial vehicles. The proposed instruction is adequately supported by the evidence. As additional evidence of negligence to be weighed in the balance, the subject of this instructions bears directly on the issue of comparative fault. Because the “failure to give a requested instruction that correctly sets forth the law constitutes not only error, but prejudicial error,” the judgment should be vacated and the case reversed and remanded for further proceedings. *Jensen v. Menard, Inc.*, 2018 SD 11, ¶ 13, 907 N.W.2d 816, 820; see *Young v. Oury*, 2013 SD 7, ¶ 31, 827 N.W.2d 561, 469; *Overfield Am. Underwriters Life Ins. Co.*, 2000 SD 98, ¶ 11, 614 N.W.2d 814, 816; *Van Zee v. Sioux Valley Hosp.*, 315 N.W.2d 489, 492 (S.D. 1982); *Wolf v. Graber*, 303 N.W.2d 364, 366 (S.D. 1981).

CONCLUSION

Wherefore, Plaintiffs respectfully request that this Court vacate the judgment and reverse and remand the case for further proceedings.

Dated at Sioux Falls, South Dakota, this 4th day of February, 2025.

HOY TRIAL LAWYERS, P.C.F. L.L.C.



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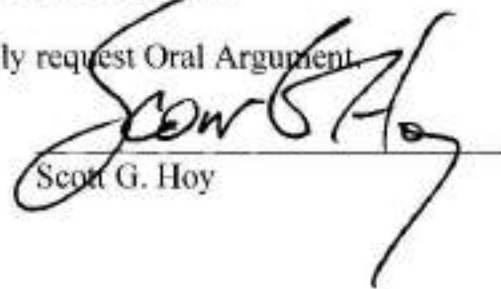
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Attorneys for Plaintiffs and Appellants

Request for Oral Argument

Appellants respectfully request Oral Argument.



Scott G. Hoy

Certificate of Compliance

Pursuant to SDCL § 15-26A-66(b)(4) the undersigned certifies that to the best of his knowledge, this brief complies with the type volume limitation in SDCL § 15-26A-66(b)(2). This brief was prepared using Microsoft 365 Office Word, New Times Roman font size 13. According to the word processing system, this brief contains 9,887 words and 48,961 characters, exclusive of the table of contents, table of cases and authorities, preliminary statement, jurisdictional statement, statement of legal issues, certificates of counsel and appendix.



Scott G. Hoy

Certificate of Service

The undersigned certifies that on February 4, 2025, he electronically served a true and correct copies of the foregoing "Plaintiffs' and Appellants' Brief" by and through the Odyssey File and System, upon Mark A. Arndt, Evans, Haigh & Arndt, LLP, PO Box 2790, Sioux Falls, SD 57101, counsel for Defendants and Appellees, and upon the Clerk the South Dakota Supreme Court, 500 E. Capitol, Pierre, SD 57501-5070, for filing; the undersigned further certifies that on February 4, 2025, he mailed the original "Plaintiffs and Appellants' Brief," postage prepaid, to the Clerk of the South Dakota Supreme Court, 500 E. Capitol, Pierre, SD 57501-5070.



Scott G. Hoy

APPENDIX TO PLAINTIFFS' AND APPELLANTS' BRIEF

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STATE OF SOUTH DAKOTA)
:SS
COUNTY OF LINCOLN)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

JUSTIN HAMER AND KIM HAMER,
Plaintiffs,

vs.

**PAUL DUFFY and CORNERSTONE
POURED FOUNDATIONS, INC.,**
Defendants.

CIV. 20-243

SPECIAL VERDICT

We, the jury, duly impaneled in the above-entitled action hereby find as follows:

1. Do you find that Defendant Paul Duffy was negligent and such negligence was a legal cause of Plaintiffs' injuries or damages?

Yes ☒

No ☐

If your answer to Question 1 is no, you may skip the remaining questions and sign and date the Verdict Form. If your answer to Question 1 is yes, please proceed to question 2.

2. Do you find that Plaintiff Justin Hamer was contributorily negligent more than slight in causing the collision?

Yes ☒

No ☐

If your answer to Question 2 is yes, you may skip the remaining questions and sign and date the Verdict Form. If your answer to Question 2 is, no AND your answer to Question 1 was yes, please proceed to Questions 3 and 4.

3. Was Plaintiff Justin Hamer contributorily negligent slight or less than slight in comparison with the negligence of Defendant Paul Duffy?

Yes ☐

No ☐

If your answer to Question 3 is yes, continue to Question 4, but the Plaintiffs' damages must be reduced in proportion to the amount of Plaintiff Justin Hamer's slight or less than slight contributory negligence in accordance with the Court's instructions.

If your answer to Question 3 was no, please proceed to Question 4 and do not reduce any damages that you find that the Plaintiffs are entitled to recover.

4. What amount of damages, if any, did plaintiffs incur as a legal result of defendant Paul Duffy's negligent driving? Fill in the sum you have decided is appropriate.

Past earnings lost, if any:

\$ _____

Loss of future earning capacity, reduced to present value if any:

\$ _____

The disability, pain and suffering, mental anguish and loss of capacity of the enjoyment of life experienced by Plaintiff Justin Hamer in the past and reasonably certain to be experienced in the future, if any:

\$ _____

The reasonable value of Plaintiff Kim Hamer's past loss of consortium for the personal injuries that was legally caused by defendant Paul Duffy's negligence, if any:

\$ _____

Future loss of consortium reduced to present value, if any:

\$ _____

The case is completed. Please have the jury foreman sign the Special Verdict Form and notify the bailiff.

Dated this 23rd day of May, 2024.


Foreperson

STATE OF SOUTH DAKOTA)
 : SS
COUNTY OF LINCOLN)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

JUSTIN HAMER and KIM HAMER, Plaintiffs, vs. PAUL DUFFY and CORNERSTONE POURED FOUNDATIONS, INC., Defendants.	41CIV20-000243 JUDGMENT
--	---------------------------------------

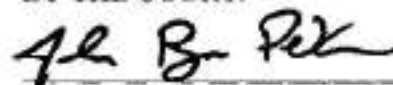
The above-captioned action having been tried to a Jury on May 20-23, 2024, the Honorable John Pekas, presiding, and the Jury having entered a verdict for the Defense:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that a Judgment is entered for the Defendants, with no damages awarded to the Plaintiffs.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that as the prevailing party, Defendants may make an Application for Taxation of Costs per the applicable South Dakota statute, which if granted, such amount may be hereinafter inserted below on this Judgment by the Lincoln County Clerk of Courts.

7/1/2024 9:05:38 AM

BY THE COURT:



Honorable John Pekas
Circuit Court Judge

Attest:
Baker, Teresa
Clerk/Deputy



0004

COSTS

Amount of costs awarded to Defendants as the prevailing party: \$ **875.71** ,

Attest:
Baker, Teresa
Clerk/Deputy



STATE OF SOUTH DAKOTA)
) SS
COUNTY OF LINCOLN)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

JUSTIN HAMER and KIM HAMER, Plaintiffs, vs. PAUL DUFFY and CORNERSTONE POURED FOUNDATIONS, INC., Defendants.	41CIV20-000243 <u>NOTICE OF APPEAL</u>
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TO MARK A ARNDT, AND PAUL DUFFY AND CORNERSTONE POURED FOUNDATIONS, INC.:

PLEASE TAKE NOTICE that Pursuant to SDCL §§ 15-26A-3(1), 15-26A-3(2), 15-26A-4(1) and 15-26A-7, Plaintiffs Justin Hamer and Kim Hamer hereby appeal to the Supreme Court of South Dakota from the Judgment entered in the above-captioned matter on July 1, 2024 and assign as error the "Order Granting Defendants' Motion to Exclude Testimony of Plaintiffs' Expert Witnesses, Adam Grill and Michael DiTallo, Pursuant to SDCL 19-19-702" entered on December 13, 2021, an "Order Denying Plaintiffs' Motion for Reconsideration of Order Excluding Trial Testimony of Plaintiffs' Expert Witnesses, Adam Grill and Michael DiTallo" entered on November 1, 2022, an "Order Denying Plaintiffs' Motion to Amend Complaint" entered on January 6, 2023, as well the refusal by the Court to include in its instructions to the jury, Plaintiffs' Requested Instructions numbers 28, 35 and 48.

Dated at Sioux Falls, South Dakota, this 30th day of July, 2024.

HOY TRIAL LAWYERS, PROF. L.L.C.



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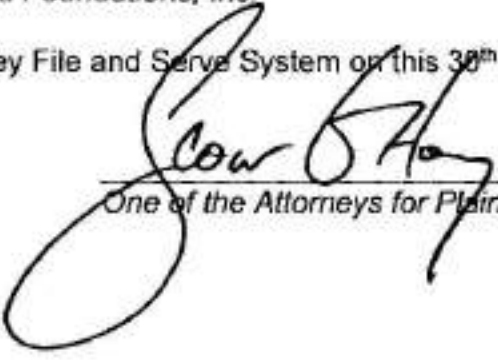
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Email: danny@truckwreckjustice.com
ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing "Notice of Appeal" was electronically filed and served through the Odyssey File and Serve system upon the following:

Mark A. Arndt
Evans, Haigh & Hinton, LLP
PO Box 2790
Sioux Falls SD 57101
*Attorneys for Defendants Paul Duffy and Cornerstone
Poured Foundations, Inc.*

by and through the Odyssey File and Serve System on this 30th day of July, 2024.



One of the Attorneys for Plaintiffs

**STATE OF SOUTH DAKOTA INVESTIGATOR'S MOTOR
VEHICLE TRAFFIC ACCIDENT REPORT**

Mail to: Office of Accident Records, 118 W. Capitol
Ave., Pierre, SD 57501

Form DPS - AR1 12/12/2014

TraCS TraCS Sequence:
ID: **DMALONE-44A14 1904107181**

Agency Use Report Type
19-02134 19-02134

☐ Is this only a Wild Animal Hit
Report?

Agency Name
**LINCOLN COUNTY
SHERIFF**

Date of Accident
04/08/2019

Time of Accident
09:05 Hrs.

Reporting Officer Last Name
MALONE

Reporting Officer First
Name
DEREK

Reporting Officer
Middle Name

Reporting Officer

44A14

L O C A T I O N	Location Description ON I 29 N AT ITS INTERSECTION WITH I 29 N8					
	Latitude 43.461049			Longitude -96.797355		
	County 42	County Name 42 - LINCOLN		City or Rural 0000 - Rural	Roadway Surface Condition 01 - Dry	
	On Road, Street, or Highway I 29 N			Roadway Surface Type 01 - Concrete		
	At Intersection with I 29 N8			Roadway Align/Grade 01 - Straight and level		
	Distance 0.36	Units Miles/Tenths	Direction of North	MRM (milepost) 73.0	Relation to Junction 04 - Five-point, or more	
	Distance	Units	Direction and	Distance	Units	Direction of
	Junction or Intersecting Street			Name of Junction, Road, Street, or Highway		

0009



U N I T 001	Unit Type 01 - Motor vehicle in transport with driver				Hit and Run 02 - No	
	Driver's Name - Last DUFFY		First PAUL	Middle KELLY		
	Address 1115 W 6TH ST			Address (Line 2) SIOUX FALLS		
	City SD	State SD	Zip 57104	Date of Birth 12/08/1966	Sex 1 - Male	
				Non - Motorist Location 96 - Not Applicable		
	Phone 6054135925	DL State SD	DL Class 1	Non - Motorist Action 96 - Not Applicable		
	DL Status 01 - Normal within restrictions			Non - Motorist Contributing Circumstances		
	Driver Contributing Circumstances (Up to Two) 99 - Unknown			(Up to Two) 96 - Not Applicable		
	Vision Contributing Circumstance 00 - None			Drug Use 00 - None used	Drug Test 02 - Test not given	
				Alcohol Use 00 - None used	Alcohol Test 91 - Test not given	
	Injury Status 05 - No injury			Ejection 00 - Not ejected		
	Safety Equipment 03 - Lap belt and shoulder harness used			Citation Charge? 02 - No		
	Seating Position 01 - Operator			Citation #1		
	Air Bag Deployed 00 - Not deployed			Citation #2		
	Transported To			Citation #3		
	Source of Transport 00 - Not Transported			Citation #4		
	Is Driver the Owner No					
	Owner's Name - Last POURED FOUNDATION		First CORNERSTONE	Middle INC		
	Address 6004 EQUARTZITE DR			Address (Line 2)		
	City SIOUX FALLS		State SD	Zip 57110	Red Tag A566532	
	Year 2014	Make Other (Click 'Other' button to enter an unlisted vehicle)	Model WSTR 4700SB	VIN 5KKHAXDV4EPFW7990		
	License Plate # 10793V		State SD	Year 2020	Estimated Travel Speed 15	Speed - How Estimated? 01 - Officer Estimate
	Speed Limit 35	Total Occupants 1		Damage Extent 03 - Disabling Damage		Vehicle Towed 01 - Yes
	Damage Amount (Vehicle and Contents) 1001			Insurance Co. Name 13021 - UNITED FIRE & CASUALTY COMPANY		
	Insurance Policy # 60512410			Effective Date 01/23/2019	Expiration Date 01/23/2020	
Emergency Vehicle Use?			Vehicle Configuration 17 - Single-unit truck (2-axle, 6 tires) GVWR 10,001 lbs or more			
Trailer Type 00 - No trailer/attachment			Cargo Body Type			

0010

Direction of Travel Before Crash 01 - Northbound		Trailer LP # Attached to Power Unit		State	Year
Initial Point of Impact 12 - Position 12	Most Damaged Area 12 - Position 12		Trailer 2 License Plate #	State	Year
Underride/Override 00 - No underride or override			Trailer 3 License Plate #	State	Year
Traffic Control Device Type 02 - Flashing traffic control signal			Vehicle Contributing Circumstance 00 - None		
Vehicle Maneuver 06 - Turning left			Road Contributing Circumstance 00 - None		
First Event 25 - Motor vehicle in transport			Second Event		
Third Event			Fourth Event		
Most Harmful Event for this Vehicle 25 - Motor vehicle in transport					
<input type="checkbox"/> Does the accident involve one or more of the following: <ul style="list-style-type: none"> a truck having a GCWR of 10,001 or more pounds; OR a vehicle displaying a hazardous material placard; OR a vehicle designed to transport 9 or more people, including driver 			<input type="checkbox"/> Did the accident result in one or more of the following: <ul style="list-style-type: none"> a fatality; OR an injury requiring transportation for immediate medical attention; OR a vehicle was disabled requiring a towaway from the scene 		
Accident Involved Vehicle - Purpose			Carrier Name		
Street Address			Street Address (Line 2)		
City	State	Zip	US DOT # 98	GVWR	GCWR
Hazardous Material Released?	Hazardous Material Content Code	Hazardous Material Class Code		Hazardous Materials Description	

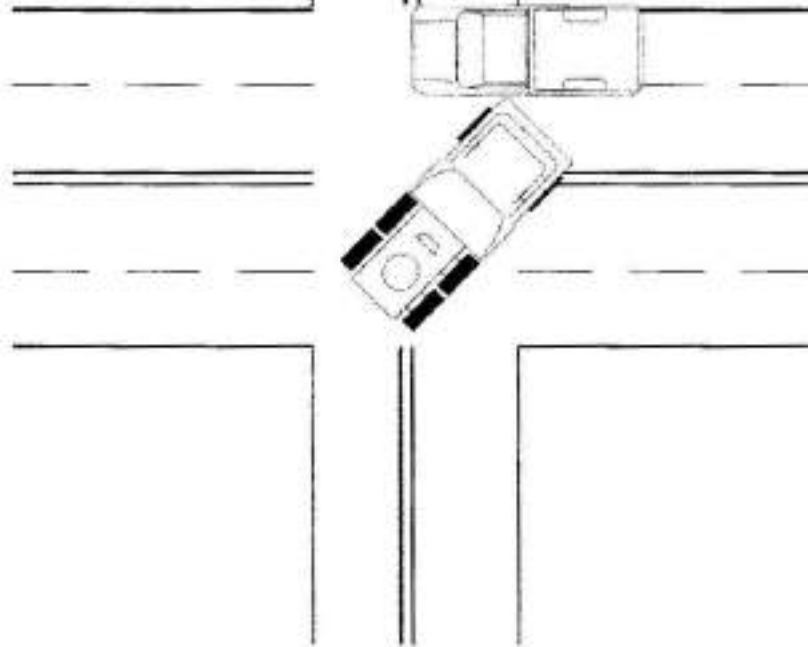
Underride/Override 00 - No underride or override		Trailer 3 License Plate #		State	Year
Traffic Control Device Type 02 - Flashing traffic control signal			Vehicle Contributing Circumstance 00 - None		
Vehicle Maneuver 01 - Straight ahead			Road Contributing Circumstance 00 - None		
First Event 25 - Motor vehicle in transport			Second Event		
Third Event			Fourth Event		
Most Harmful Event for this Vehicle 25 - Motor vehicle in transport					
<input type="checkbox"/> Does the accident involve one or more of the following: <ul style="list-style-type: none"> a truck having a GCWR of 10,001 or more pounds; OR a vehicle displaying a hazardous material placard; OR a vehicle designed to transport 9 or more people, including driver 			<input type="checkbox"/> Did the accident result in one or more of the following: <ul style="list-style-type: none"> a fatality; OR an injury requiring transportation for immediate medical attention; OR a vehicle was disabled requiring a towaway from the scene 		
Accident Involved Vehicle - Purpose			Carrier Name		
Street Address			Street Address (Line 2)		
City	State	Zip	US DOT # 98	GVWR	GCWR
Hazardous Material Released?	Hazardous Material Content Code	Hazardous Material Class Code	Hazardous Materials Description		

Work Zone Related? 02 - No	First Harmful Event? 25 - Motor vehicle in transport
Workers Present?	Location of First Harmful Event 01 - On roadway
Work Zone 96 - Not Applicable	Trafficway Description 03 - Two-way, divided, unprotected (painted >4 feet) median
Work Zone Location 96 - Not Applicable	Manner of Collision 03 - Angle
Manner of Collision 03 - Angle	Light Condition 01 - Daylight
School Bus Related? 00 - No	Weather Conditions (up to two) 01 - Clear

D O	Damaged Object (Property Other Than Vehicles)		Estimate of Damage
A B	Owner's Full Name - Last		Middle Name
M J	Address		Address (Line 2)
A E	City	State	Zip
G C			
E T			
D			

I P	Unit #	Last Name	First Name	Middle Name
N E	Address		Address (Line 2)	
J R	City	State	Zip	Date of Birth
U S	Injury Status		Ejection	
R O	Seating Position		Safety Equipment	
E N	Air Bag Deployed		Source of Transport	
D	Transported to		EMS Trip #	

D
I
A
G
R
A
M



NARRATIVE

ON 4/8/19 I RESPONDED TO 271 UNDER THE I-29 OVERPASS FOR A REPORT OF A NON INJURY ACCIDENT. WHEN I ARRIVED ON SCENE I OBSERVED THAT THE LIGHTS WERE ALL FLASHING RED DUE TO AN ISSUES WITH THE LIGHTS. IT SHOULD BE NOTED THAT THIS IS A VERY COMPLICATED INTERSECTION THAT SUPPORTS EAST WEST BOUND TRAFFIC, EACH DIRECTION HAVING SEVERAL LANES TO SUPPORT THROUGH TRAFFIC AND ENTRY AND EXIT OF INTERSTATE TRAFFIC. THE ACCIDENT WAS A SEMI VS A TRUCK AND THE ACCIDENT WAS BLOCKING THE LANE OF TRAVEL. I SPOKE TO ONE OF THE DRIVERS INVOLVED PAUL DUFFY. PAUL ADVISED HE WAS EAST BOUND ON 271 AND JUST STOPPED AT ONE OF THE TURNING LANES AT THE LIGHT TO HEAD NORTH ONTO THE INTERSTATE. HE ADVISED THE LIGHTS WERE ALL FLASHING RED AND HE HAD THE RIGHT AWAY. HE BEGAN TO MAKE HIS TURN ONTO THE INTERSTATE WHEN A YELLOW TRUCK DROVE IN FRONT OF HIM AND HE STRUCK THE VEHICLE. PAUL INSISTED THAT HE DEFINITELY HAD THE RIGHT OF WAY GIVEN THE SITUATION. I THEN SPOKE TO THE OTHER DRIVER JUSTIN HAMMER. JUSTIN ADVISED HE WAS WEST BOUND ON 271ST AND HAD JUST APPROACHED THE FLASHING LIGHT AND STOPPED. JUSTIN ADVISED HE WAS TRYING TO CONTINUE WEST BOUND. HE OBSERVED A WHITE TRUCK MAKE A LEFT HAND TURN TO GO NORTHBOUND ONTO THE INTERSTATE. HE ADVISED THE SEMI WAS BEHIND THE TRUCK AND GIVEN THE WHITE TRUCK WENT HE WOULD HAVE HAD THE RIGHT AWAY NEXT. JUSTIN ADVISED HE STARTED TO GO AND SAW THAT THE SEMI WAS COMING TOWARD HIM HE THOUGHT THE SEMI WOULD STOP BUT INSTEAD IN RAN INTO HIS VEHICLE AND FORCED HIM UP ONTO THE SIDE WALK. I TOOK PICTURES OF THE SCENE AND PROVIDED BOTH PARTIES WITH A RED TAG AND CASE NUMBER. I QUESTIONED PAUL ABOUT THE WHITE TRUCK THAT WOULD HAVE BEEN IN FRONT OF HIM AND HE DENIED THAT THERE WAS ANY VEHICLE IN FRONT OF HIM. THERE WERE NOT WITNESS THAT STAYED ON SCENE. I EXPLAINED TO BOTH PARTIES THAT I WOULD MAKE A REPORT OF THE INCIDENT AND THEY COULD EXPLAIN TO THEIR INSURANCE WHAT HAPPENED.

W I T N E S S	Last Name		First Name		Middle Name	
	Address					
	Address (Line 2)					
	City		State	Zip	Phone #	

Date Notified 04/08/2019	Time Notified 09:05 Hrs.	Date Arrived 04/08/2019	Time Arrived 09:22 Hrs.
Agency Type 02 - Sheriff department	Investigation Made at Scene? 01 - Yes	Photos Taken? Y	Date Approved 04/15/2019
Approval Officer	Last Name BARTSCHER	First Name AARON	Middle Name

IN THE STATE OF SOUTH DAKOTA, COUNTY OF LINCOLN
CIRCUIT COURT, SECOND JUDICIAL COURT
NO. 41 CIV

JUSTIN HAMER AND KIM HAMER,
Plaintiffs,
vs.
PAUL DUFFY AND CORNERSTONE POURED FOUNDATIONS, INC.,
Defendants.

A Report by Adam Grill
December 17, 2020

Adam Grill
1236 Cordova St
Billings, MT 59101
(406) 248-2766

Service Document

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I. INTRODUCTION

I, Adam Grill, have been contacted by the Hoy Trial Lawyers, Prof, LLC to review information and offer opinions regarding the case matter of Hamer vs. Paul Duffy & Cornerstone Poured Foundations, Inc. as a result of a crash that occurred at approximately 09:05 AM on April 8th, 2019 at the intersection of I-29 North and Highway 271, in Lincoln County, South Dakota.

At approximately that time and location, Mr. Justin Hamer was traveling westbound on Highway 271 at the intersection with I-29. At approximately that same time and location, Mr. Paul Duffy was traveling eastbound on Highway 271 operating his CMV in the left turn lane. Mr. Duffy proceeded through the intersection to turn left and collided with Mr. Hamer's vehicle in the driver's side rear passenger door of his vehicle.

A. Background¹

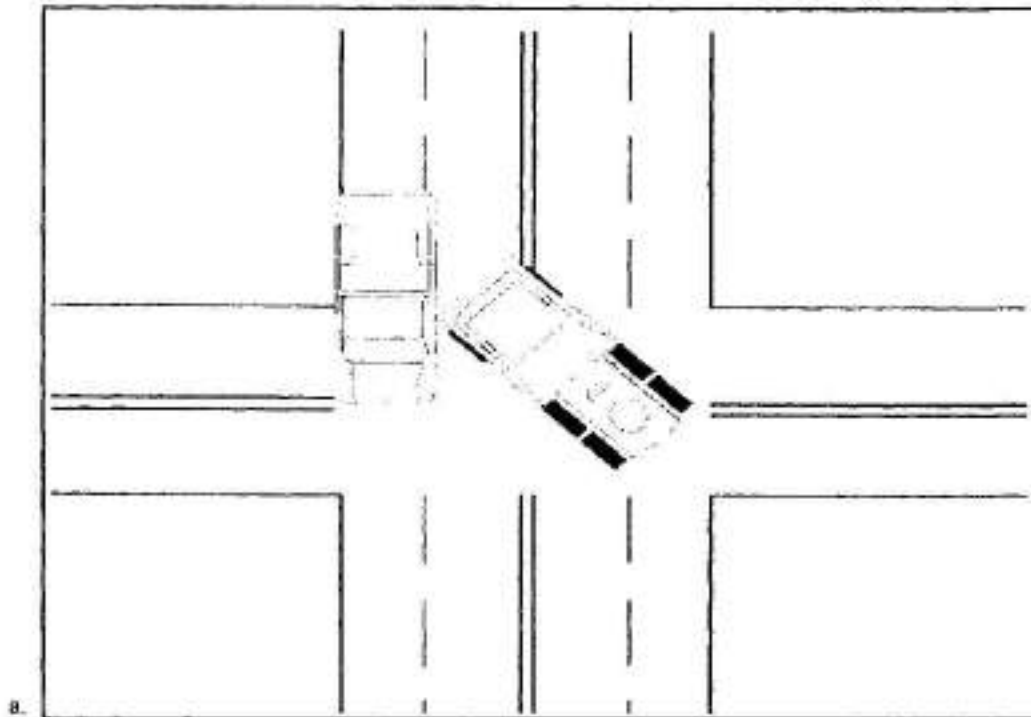
1. Location

The event took place in the westbound lanes of the Highway 271 East, at the intersection with I 29 in Lincoln County, South Dakota.

2. Vehicle Status

- a. Unit 1: 2014 red Western Star 4700SB, operated by Cornerstone Poured Foundation, Inc. and their driver, Paul Duffy.
- b. Unit 2: 2003 yellow Chevy Avalanche operated by Justin Hamer.

¹ Information taken from the South Dakota Investigator's Motor Vehicle Traffic Accident Report #19 - 02134.

3. Police Diagram4. Police Synopsis

"On 4/8/19 I responded to 271 under the I-29 overpass for a report of a non-injury accident. When I arrived on scene I observed that the lights were all flashing red due to an issues with the lights. It should be noted that this is a very complicated intersection that supports east west bound traffic, each direction having several lanes to support through traffic and entry and exit of interstate traffic. The accident was a semi vs a truck and the accident was blocking the lane of travel. I spoke to one of the drivers Paul Duffy. Paul advised he was east bound on 271 and just stopped at one of the turning lanes at the light to head north onto the interstate. He advised the lights were all flashing red and he had the right of way. He began to make his turn onto the interstate when a yellow truck drove in front of him and he struck the vehicle. Paul insisted that he definitely had the right of way given the situation. I then spoke to the other driver Justin Hammer. Justin advised he was west bound on 271" and had just approached the flashing light and stopped. Justin advised he was trying to continue west bound. He observed a white truck make a left hand turn to go northbound onto the interstate. He advised the semi was behind the truck and given the white truck went he would have had the right of way next. Justin advised he started to go and saw that the semi was coming towards him he thought the semi would stop but instead ran into his vehicle and forced him up onto the sidewalk. I

took pictures of the scene and provided both parties with a red tag and case number. I questioned Paul about the white truck that would have been in front of him and he denied that there was any vehicle in front of him. There were not witness that stayed on scene. I explained to both parties that I would make a report of the incident and they could explain to their insurance what happened."

B. Scope

The purposes of this report are to present opinions in four overarching areas:

- General trucking industry customs, practices, and standards;
- The operating performance of the commercial motor vehicle operators in this case;
- The motor carrier management practices of the motor carriers involved in this case; and,
- Determinations of accident preventability from a commercial trucking industry standpoint.

1. Definitions for the purpose of this report:

- a. ACCIDENT AREA, means the same as crash area and refers to the westbound lanes of the Highway 271 East, at the intersection with I-29 in Lincoln County, South Dakota.
- b. CDL, refers to a commercial driver license;
- c. CDL Manual, refers to the American Association of Motor Vehicle Administrators (AAMVA) Model Commercial Drivers' License Manual, and includes the CDL manuals from all states, including South Dakota;
- d. CMV, unless specified otherwise, refers to a commercial motor vehicle, as defined by the FMCSA and specifically includes the type of commercial motor vehicle that was involved in this collision;
- e. CMV OPERATOR, refers to the driver of a commercial motor vehicle like Defendant Duffy;
- f. CORNERSTONE, refers to Cornerstone Poured Foundation, Inc., USDOT # 1658907, the defendant motor carrier in this case;

- g. DRIVER, unless specifically described otherwise, refers to a CMV operator;
 - h. FHWA, refers to Federal Highway Administration, from which Congress separated FMCSA in 1999;
 - i. FMCSA, refers to the U.S. Department of Transportation's Federal Motor Carrier Safety Administration;
 - j. FMCSR, means Federal Motor Carrier Safety Regulations.²
2. This report presents specific information pertaining to:
- a. Regulations and standard practices of professional drivers and motor carriers.
 - b. The duty of professional drivers to operate their vehicles in a safe and prudent manner, including (but not limited) by:
 - i. Making safe and reasonable decisions without impeding the reasonable flow of traffic or endangering other road users;
 - ii. Managing speed and space;
 - iii. Recognizing and responding to hazards;
 - iv. Operating a CMV in a defensive manner with consideration for the rights and safety of others;
 - v. Proper accident avoidance and mitigation.
 - c. The CMV operating performance of Defendant Duffy just before and at the time of the collision.
 - d. The motor carrier safety management practices of Cornerstone.
 - e. Standards for determining the preventability of accidents.

² The FMCSRs appear in Title 49 C.F.R., Chapter III, Subpart B.

3. Schedule of Appendices:

- a. Appendix A – CV of Adam Grill.
- b. Appendix B – Examination of material and information by Adam Grill in connection with the formation of opinions stated in this report.³

C. Opinions based on experience, training, education and background

Raised in a family environment that centered on truck driving and truck driver training, I have worked around large commercial vehicles and studied the intricacies of commercial vehicle transportation among the best in the industry. I received my certification as a commercial vehicle operator in 2005. I hold a CDL with endorsements for hazardous materials, tankers, double trailers, triple trailers, passenger buses, and school buses. I am a certified director of safety (CDS). I am certified for forklift operation, operation of longer combination vehicles (LCVs), crane hoist and rigging, aerial manlift, telehandler, and heavy equipment including payloaders and motor graders. I am a certified pilot car operator and flagger through Gulf Coast Community College in Panama City, Florida.

For eight years I served in the US Army and US Army National Guard where I was called upon to teach truck and heavy vehicle operation and driver safety, among other duties. I am currently an active truck driver, and an associate of Atlantic Pacific Resource Group. I have formal truck driver training and education from Sage Technical Services, MTS Freight, the United States Army, the Montana Army National Guard, The National Safety Council, the Smith System Driver Improvement Institute, and others.

My family experience and lifestyle have always centered on the instruction and operation of heavy equipment and tractor-trailers. I currently serve as a trucking consultant and manage the fleet for Lew Grill Specialized Services. I have also assisted in over a dozen special studies and trucking projects covering safety procedures as well as time and motion studies including visibility from CMV drivers' point-of-view, starting/stopping, turning, and various other aspects of safe and efficient trucking operation. I have worked in various capacities as a teacher, including classroom instructor, off-road driving range instructor, and on-road skills instructor.

³ This material includes information and publications from readily available sources including the internet, The American Trucking Association, The South Dakota CDL Manual, and the Federal Motor Carrier Safety Regulations.

Hester & Duffy, et. al
Adam Grill / December 17, 2020

I have over 15 years of combined experience as a truck driver, forklift operator, heavy equipment operator, industrial machinery operator, truck-driving instructor, dock supervisor, truck-driving consultant, and accident investigator. I am a member of the Transportation Research Board of the National Academies, Owner-Operator Independent Drivers Association, Truckload Carrier's Association, Montana Contractor's Association, National Private Truck Council, Montana Motor Carrier's Association, and the American Trucking Association. I have participated in educational training at the American Trucking Associations Technology and Maintenance Council. I worked on a project for the Federal Motor Carrier Safety Administration relating to the testing protocol for Electronic Logging Devices (ELDs) as required under the proposed rulemaking.

My current focuses include training and supervision of truck drivers, training instructors, and warehousing staff, fleet management for Lew Grill Specialized Services and The Legacy International Corporation, freight hauling and truck/trailer transportation, truck and driver dispatching, special projects for various fleet, industry, and government entities, and the development of educational programs for commercial drivers, equipment operators, and industry professionals, as well as supervisor for the motor carrier and broker relationships involving Atlantic Pacific Resource Group and The Legacy International Corporation with outside brokers, shippers, motor carriers, and others.

I have experience in truck accident investigation, vehicle dynamics, and accident reconstruction from the Legacy Corporation. I have testified in litigation matters where I have qualified as an expert concerning safe operation of commercial motor vehicles and the standard of care of commercial vehicle operators and motor carriers. I have operated a commercial motor vehicle for the furtherance of interstate commerce in AL, AZ, AR, CA, CO, CT, DC, DE, FL, GA, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WI, WY.

II. TRUCKING INDUSTRY RULES, REGULATIONS, STANDARDS, CUSTOMS, AND PRACTICES.

A. Standard customs and practices in the trucking industry.

The totality of trucking industry customs and practices is based upon the combined experiences of "stake holders" who are industry experts in their particular occupation, that share a common interest for highway safety. These are the type of resources relied upon within the industry which I, and similarly qualified experts, would use from day to day for purposes of safety and training. Included are truck drivers, owner-operators, motor carriers, risk managers, trade organizations, government, insurance companies, manufacturers, industry suppliers, and training providers and their instructors, to mention a few. All play an important role in the development of operating standards, training materials and their delivery to sensitize and educate CMV operators. This educational material includes, but is not limited to, publications and material produced by motor carrier industry sources, for example, the:

- American Trucking Associations (ATA);
- National Safety Council (NSC);
- The Smith System for Safe Driving;
- American Transportation Research Institute (ATRI) publications;
- State Trucking Associations;
- North American Transportation Research Institute (NATMI);
- Notice of Proposed Rulemaking for FMCSR's;
- American National Standards Institute (ANSI);
- Truckload Carrier Association (TCA);
- USDOT; and,
- Many others.

B. The standard of care of truck drivers.

The standard of care for truck drivers is the same as for every road user, in the respect that the truck must be operated in a manner that avoids crashing into things, or having others collide with it. In my opinion, the performance standards to accomplish this standard of care are much different for truck drivers than operators of smaller vehicles.

Their distinctive position as CMV operators is due to the very nature of their work, the additional training and licensing required, and the special characteristics of their vehicles, as described subsequently in this report. CMV's are the largest vehicles on the highway. Their size and weight disparity compared to non-commercial vehicles creates a greater risk to the occupants of non-commercial vehicles when they are involved together in the same mishap.

C. The need for CMV regulations and standards.

While all road users are subject to government regulations and driving standards, drivers and commercial motor carriers who operate large CMVs have more stringent requirements concerning their requirements for safe operation of their vehicles. When it comes to highway safety, these more stringent requirements apply because of the very nature of their work, and the special characteristics of their vehicles. These characteristics require additional care in driver selection, training, management and supervision to assure safe operations are achieved and maintained. The need is often set forth in a notice of proposed rulemaking by the various governmental agencies involved in regulating the industry.

D. CMV's require a higher degree of safe driving performances.

All CMVs are more complicated and less stable than non-CMV's, making them more difficult to operate. In comparison to non-commercial vehicles, their design characteristics, control instruments, and mechanical systems require special knowledge, skills, and driving behaviors in order to drive them safely, legally, and efficiently. A partial list of differences includes that large trucks:

1. Are bigger and heavier than other vehicles;
2. Are more difficult to maneuver;
3. Are more complex to drive;
4. Must be inspected more frequently;
5. Take longer to accelerate and to stop;
6. Have complex vehicle systems and more individual components;
7. Entail special knowledge and skills to operate and maintain;

8. Require a special driver's license, certification, and qualification;
9. Have more and different regulations to obey;
10. Require more alertness and caution, and greater driver performance duties in order to achieve the same standard of care as other road users;
11. Have different energy absorbing systems that are often mismatched with smaller vehicles; and,
12. Have significant mass/weight differences.

Motor carriers and drivers who operate CMVs are required to know and obey a much broader and more stringent series of state and federal regulations than those who operate non-commercial vehicles. CMV operators operate enormously more hours and more miles than non-CMV drivers do. It is common for CMV drivers to spend ten times the amount of time behind-the-wheel than other drivers. Therefore, they and their equipment must be prepared to safely handle a much greater number of hazards and stressful situations.

E. Federal Motor Carrier Safety Regulations (FMCSR).

The FMCSR's are applicable to all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce. Motor carriers, including officers, agents, representatives, employees, and drivers, or those who are responsible for hiring, assigning, training, supervising, maintaining, dispatching, or driving trucks, have a statutory duty to be instructed in, and comply with Federal Motor Carrier Safety Regulations.⁴ Moreover, the federal regulations require that all drivers of commercial motor vehicles shall have knowledge and skills necessary to operate a commercial motor vehicle safely.⁵

F. USDOT/FHWA Minimum Performance Standards for Truck Drivers.

The Truck Driver Model Curriculum, as it is known in the industry, is a broad set of standardized minimum core curriculum guidelines and training materials. In the 1980's, the U.S. Department of Transportation's, Federal Highway Administration (FHWA) determined that a need existed to propose minimum training standards for tractor-trailer drivers. To provide technical guidance, the FHWA developed a model curriculum that could be used for training them. The curriculum incorporated the

⁴ FMCSR § 392.1.

⁵ FMCSR § 383.3. See also §§ 383.110, 383.111, and Appendix to Subpart G – sample guidelines for required knowledge and skills.

FMCSR and addressed the critical aspects of truck driver performance standards. It identifies the specific knowledge, skills, and attitudes necessary for truck drivers to perform their work in a safe, legal, and efficient manner.⁶

G. Commercial Driver's License Standards.

Established under the Commercial Motor Vehicle Safety Act of 1986 (CMVSA), the CDL requirements are intended to improve highway safety by requiring commercial vehicle drivers to pass a series of knowledge and skills tests that are directly related to the special handling characteristics for the type of vehicles they drive. To that end, the CMVSA directed the FHWA⁷ to develop national minimum licensing standards, which all CMV drivers must meet in order to obtain a CDL. The existing USDOT/FHWA Model Curriculum was used to develop the CDL written and driving skills tests that were implemented as licensing standards in 1992 and remain as the commercial drivers' licensing standards in use today.

1. *"All drivers of commercial motor vehicles shall have knowledge and skills necessary to operate a commercial motor vehicle safely"⁸ as contained in the FMCSRs. To that end all states publish CDL manuals for commercial driver license applicants in their states. These requirements "apply to every person who operates a commercial motor vehicle (CMV) in interstate, foreign, or intrastate commerce, to all employers of such persons, and to all States."⁹*
2. It is for this reason that the CDL manual in every state, including South Dakota, is substantively uniform to those published by all other states, and it contains the general knowledge, and describes the required knowledge and skills for truck drivers.
3. The CDL Manual contains the information that truck drivers should know and consider when operating a CMV, including the requirements concerning managing speed and space, keeping a proper lookout, and accident avoidance and mitigation – to name a few.

⁶ Model Curriculum: Minimum Standards for Training Tractor-Trailer Drivers, USDOT/FHWA, 1985, GPO Stock No. 050-001-06293-1.

⁷ Congress created FMCSA as separate from FHWA in 1999 to assume these responsibilities.

⁸ FMCSR § 383.3 Applicability, and §§ 383.110, 383.111, and Appendix to Subpart G— sample guidelines for required knowledge and skills.

⁹ Id. at § 383.3.

H. Defensive Driving Standards.

As identified previously in this report, all commercial motor vehicles require a higher performance standard in order to safely operate. Many defensive driver programs have become widely accepted and well-known educational resources for motor carriers to train, educate, and evaluate commercial drivers. It is paramount that motor carriers take advantage of these defensive driving standards. Some of the defensive driving program sources include the National Safety Council (NSC), The Smith System Driver Improvement Institute of America, and J.J. Keller to name a few.

I. Strategy of Safe Driving.

The strategy of safe driving is achieved through the development and improvement of five mental driving skills: searching, identifying, predicting, deciding, and executing.¹⁰

- a. Searching the driving environment.
- b. Identifying the hazardous driving condition or situation.
- c. Predicting the probable sequence of the hazard.
- d. Deciding on what maneuver is required to avoid the hazard.
- e. Executing the required maneuver.

J. Gatekeepers to highway safety.

- I. Motor carriers, like Cornerstone, who allow drivers to operate commercial trucks have specific requirements, including:
 - a. Driver qualifications;
 - b. Vehicle inspection and maintenance procedures and records;
 - c. Driver compliance with controlled substances and alcohol testing;
 - d. Driver compliance with driver hours of service, including company and driver's ability to plan trips to conform with speed limits and regulations;
 - e. The company's compliance with federal, state, county, and local regulations.

¹⁰ This driver perception process is commonly abbreviated as SIPDE and is a recognized defensive driving process similar to the Smith System 5 Keys and the information promulgated throughout the state CDL manuals.

2. Motor carriers and their drivers who operate CMV's are required to know and obey a much broader and more stringent series of rules and regulations. The increased exposure of risk and danger to the environment and general public increases their responsibilities and performance duties to maintain that same standard of care proportionate to the risks involved.
3. Because of the complex variables associated with their driving environment, their equipment, and the amount of time spent on the highway, recklessness or carelessness of a CMV operator is likely to translate to a catastrophic event. Therefore, it is critical that CMV operators like Defendant Duffy have advanced knowledge and skill, safe driving attitudes, are physically and medically fit, are alert to safely do their work proportionate to the greater degree of risk they are exposed to, and can fulfill the higher degree of safety performance required of them. These higher performance standards are essential to highway safety and can only be derived from proper driver selection, supervision, regulatory obedience, driver monitoring, driver training, and experience.
4. The roles of persons who hire, manage, supervise, train and retain drivers, as well as the role of those responsible for assigning loads for CMV drivers to transport, are paramount to highway safety. Moments before a crash is not the time to learn required knowledge, skills, and attitudes, nor is it the time to discover that a driver may not be physically or medically fit, or lacks experience or training to operate a CMV safely. The important role of motor carrier management, and strict compliance to motor carrier rules, regulations, customs, and practices related to the safe operation of a CMV, cannot be overstated.

III. OPINIONS REGARDING THE MOTOR CARRIER MANAGEMENT PRACTICES OF CORNERSTONE.

A. Cornerstone had a regulatory duty to ensure that their drivers, like Defendant Duffy, met their obligations under the Federal Motor Carrier Safety Regulations.

1. FMCSR §390.3 – General applicability.
 - a. *“(e) Knowledge of and compliance with the regulations. (1) Every employer shall be knowledgeable of and comply with all regulations contained in this subchapter that are applicable to that motor carrier's operations. (2) Every driver and employee involved in motor carrier operations shall be instructed regarding, and shall comply with, all applicable regulations contained in this subchapter.”*

2. FMCSR §390.11 – Motor carrier to require observance of driver regulations.

- a. *"Whenever in part 325 of subchapter A or in this subchapter a duty is prescribed for a driver or a prohibition is imposed upon the driver, it shall be the duty of the motor carrier to require observance of such duty or prohibition. If the motor carrier is a driver, the driver shall likewise be bound."*

3. Motor Carriers are "liable for the actions of their employees even though the carrier contends that it did not require or permit the violations to occur ... Liability under the FMCSRs does not depend upon actual knowledge of the violations ... Neither intent to commit, nor actual knowledge of a violation is a necessary element of that liability." Motor carriers "permit" violations of the regulations by their employees "... if they fail to have in place management systems that effectively prevent such violations."¹¹

B. Given the nature and preventability of Defendant Duffy's collision, it is evident that Cornerstone did not have successful safety management systems in place that would effectively prevent such a collision from occurring, as was their duty.

- 1. *"Safety must be considered as an essential element in the operation of every motor fleet, regardless of size, type, or function. ... Motor fleets that do not have effective safety or loss prevention programs place themselves in positions of financial jeopardy, regulatory crisis, and social irresponsibility."*¹²
- 2. Supervisors, managers, and persons within a company that are responsible for protecting the company's assets and investments, including profit, play a key role in the function of highway safety.
 - a. *"Safety programs should be considered on another basis – as a social necessity of a motor fleet. In addition to showing concern for the well-being of its employees, the socially conscious motor fleet industry recognizes that it has moral and social responsibilities toward the public with whom it engages on a regular basis."*¹³

¹¹ FMCSR Interpretations to §395.3, Questions/Guidance 7 & 8.

¹² North American Transportation Management Institute. "Safety, A Management Function." Motor Fleet Safety Supervision: Principles and Practices, Eighth Edition, Denver, CO, NATMI, 2019, p. 1. (NATMI is a professional development organization for transportation industry professionals. NATMI offers professional training courses throughout North America for truck, bus and transit fleet professionals in the areas of fleet safety, fleet maintenance management, transportation security, and accident investigation.)

¹³ North American Transportation Management Institute. "Safety, A Management Function." Motor Fleet Safety Supervision: Principles and Practices, Eighth Edition, Denver, CO, NATMI, 2019, p. 1.

3. According to the ATRI Studies on Predicting Truck Crash Involvement:

- a. *"Each of the carriers emphasized during the interview process that proactive safety measures, such as initial and "sustainment" training, are the lynchpins to ensuring that negative safety incidents do not occur in the first place. The value of these safety programs, however, must be complemented by remedial safety training programs that mitigate a problem driver behavior after a negative safety incident has occurred."*¹⁴
- b. *"All of the safety directors emphasized the need to keep safety "constantly in front of the drivers." To do that, all of the carriers had a continuous "sustainment" training program. These programs blended standard safety training activities with company company-specific strategies (that were derived from company safety data such as crash and conviction types). These sustainment programs always included reward programs that recognized and positively reinforced "safe driving"."*¹⁵
 - (1) **OPINION:** In order to have a successful sustainment training program, a motor carrier must take a three-phase approach to the training: 1) Educate drivers on a subject; 2) Show drivers what the company's expectations are through practical hands-on experiences; and, 3) Assess or test drivers to ensure that they meet, and believe in, the qualifications and standards you've set forth.
 - (2) **OPINION:** It is evident that, in this case, this 3-tiered approach was missing or broke down such that any training that Defendant Duffy would have received was ineffective and/or absent at the time of his crash. For example:
 - (i) Cornerstone's Answers to Plaintiffs' Interrogatories, number 25: *"Describe all training that Cornerstone Poured Foundations, Inc. provides or requires for its drivers. ANSWER: Drivers must have their CDL. If they do not already have it when they are hired, myself or another driver will help them to obtain it and will ride with them, but there is no formal training that Cornerstone provides drivers."*
- c. *"The carriers interviewed routinely performed employee performance reviews at regularly scheduled intervals, almost always more frequently than the federally required annual driver motor vehicle record (MVR) review. Several of the carriers reported using these reports to look*

¹⁴ Predicting Truck Crash Involvement, 2011 Update, page 24.¹⁵ *Id.*, page 25.

*for potential trends or patterns of behavior in order to effectively monitor and, if necessary, take corrective measures to improve the driver's safety performance."*¹⁶

- d. *"Similarly, the Crash Predictor serves as a resource for motor carriers, providing critical guidance on targeted risk-reduction training for incoming drivers, as well as targeted remedial training opportunities for veteran drivers."*¹⁷
- 4. Additionally, Cornerstone had a regulatory duty to instruct their drivers in the regulations relevant to their commercial vehicle operation:
- 5. FMCSR §392.2 – Applicable operating rules.
 - a. *"Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. However, if a regulation of the Federal Motor Carrier Safety Administration imposes a higher standard of care than that law, ordinance or regulation, the Federal Motor Carrier Safety Administration regulation must be complied with."*
 - b. FMCSR 392.1 – Scope of rules in this part.
 - (1) *"(a) Every motor carrier, its officers, agents, representatives, and employees responsible for the management, maintenance, operation, or driving of commercial motor vehicles, or the hiring, supervising, training, assigning, or dispatching of drivers, shall be instructed in and comply with the rules in this part."*

IV. OPINIONS REGARDING THE CMV OPERATING PERFORMANCE OF DEFENDANT DUFFY.

A. Defendant Duffy knew, or should have known, all of the information in the CDL Manual that is expected of any well-trained, prudent, safe, defensive CMV operator. Including:

- 1. FMCSR § 383.111 – Required Knowledge.
 - a. *"(a) All CMV operators must have knowledge of the following 20 general areas: (1) Safe operations regulations. Driver-related elements of the regulations contained in parts 391, 392, 393, 395, 396 and 397 of this subchapter, such as: ... (ii) Procedures for safe vehicle operations; ... (7) Visual search. The importance of proper visual search, and proper visual*

¹⁶ Id.

¹⁷ Id., 2018 Update, page 40

search methods, including: (i) Seeing ahead and to the sides; ... (9) Speed management. The importance of understanding the effects of speed, including: (i) Speed and stopping distance; ... (iv) Speed and visibility; and (v) Speed and traffic flow. (10) Space management. The procedures and techniques for controlling the space around the vehicle, including: (i) The importance of space management; (ii) Space cushions, e.g., controlling space ahead/to the rear; ... (13) Hazard perceptions. The basic information on hazard perception and clues for recognition of hazards, including: (i) Road characteristics; and (ii) Road user activities. ..."

(1) **OPINION:** This required knowledge, which Defendant Duffy knew or should have known, means that Defendant Duffy has different and unique performance objectives when operating a CMV, including greater anticipation than operators of non-CMV's to avoid becoming involved in a collision.

(2) **OPINION:** This required knowledge is also outlined and explained in the CDL Manual. Further, the information in the CDL Manual is substantively similar to the safety concepts taught in the Smith System's 5 Keys to Safe Driving as well as other industry resources as cited throughout this report.

2. FMCSR § 383.113 – Required Skills.

- a. *"(c) Safe on-road driving skills. All applicants for a CDL must possess and demonstrate the following safe on-road driving skills for their vehicle class: (1) Ability to use proper visual search methods; ... (3) Ability to adjust speed to the configuration and condition of the roadway, weather and visibility conditions, traffic conditions, and motor vehicle, cargo and driver conditions; ... (8) Ability to observe the road and the behavior of other motor vehicles, particularly before changing speed and direction."*

(1) **OPINION:** These required skills were required of Defendant Duffy at the time of his crash. Additionally, just like the knowledge requirements, these skills objectives are promulgated in greater detail in the CDL Manual and other industry sources cited in this report; and necessary for the safe operation of a CMV. Had Defendant Duffy been given a CDL skills test at the time of this collision, he would have failed to meet the standards necessary to receive his CDL, and therefore it is evident to me that at the time of this collision he failed to even meet the basic minimum expectations of a CMV operator as it relates to the circumstances of this collision.

B. Defendant Duffy had a duty to apply industry defensive driving concepts like The Smith System.

1. The Smith System is a well-known defensive driving program and is a standard in industries that operate vehicles for the furtherance of a business. The smith system includes the following five critical keys:
 - a. Aim High In Steering.
 - (1) Look far ahead into the area you're approaching;
 - (2) Extend your forward visibility according to your speed, using at least a 15 second eye lead time.
 - b. Get The Big Picture.
 - (1) Maintain a 360-degree circle of constant awareness;
 - (2) Position yourself so that you can see all around you;
 - (3) Prioritize what areas around you will require more attention;
 - (4) Getting the big picture allows you to anticipate the actions of others, and helps you allow for relevant traffic variables.
 - c. Keep Your Eyes Moving.
 - (1) Keep your eyes moving in order to continuously get the big picture;
 - (2) Scanning skills become much more important when there is traffic, pedestrians, potential hazards, or difficult maneuvers.
 - d. Leave Yourself An Out.
 - (1) Leave space around your vehicle for increased visibility and a way out of trouble;
 - (2) Constantly evaluate your traffic position;
 - (3) A space cushion gives you an escape route and reduces your vulnerability to the actions of other drivers.
 - e. Make Sure They See You.
 - (1) Get eye contact;
 - (2) Communicate early so that if others don't heed than you have time to give yourself an out.

2. According to The Smith System, following these five keys accomplishes three objectives:
 - a. Creates space for the vehicle – Allows the driver to be less vulnerable to driving errors from others or from one's self.
 - b. Gains Visibility for the driver – Allows the driver to gather crucial traffic information in order to make safe, reasonable, and prudent driving decisions.
 - c. Provides time to make decisions – Allows the driver to think, react, and retain space around the vehicle.

C. Defendant Duffy had a duty to keep a proper lookout in order to perceive hazards in front of him.¹⁸

1. CDL Manual, Section 2.4 – Seeing.¹⁹
 - a. *"To be a safe driver you need to know what's going on all around your vehicle. Not looking properly is a major cause of accidents."*
2. CDL Manual, Section 2.4.1 – Seeing Ahead.²⁰
 - a. *"All drivers look ahead; but many don't look far enough ahead. Importance of Looking Far Enough Ahead. Because stopping or changing lanes can take a lot of distance, knowing what the traffic is doing on all sides of you is very important. You need to look well ahead to make sure you have room to make these moves safely. How far Ahead to Look. Most good drivers look at least 12 to 15 seconds ahead. That means looking ahead the distance you will travel in 12 to 15 seconds. At lower speeds, that's about one block. At highway speeds it's about a quarter of a mile. If you're not looking that far ahead, you may have to stop too quickly or make quick lane changes. Looking 12 to 15 seconds ahead doesn't mean not paying attention to things that are closer. Good drivers shift their attention back and forth, near and far. ... Look for Traffic. Look for vehicles coming onto the highway, into your lane, or turning. Watch for brake lights from slowing vehicles. By seeing these things far enough ahead, you can change your speed, or change lanes if necessary to avoid a problem. If a traffic light has been green for a*

¹⁸ Sources listed below are based on the regulatory concept found in FMCSR §383.111 – Required Knowledge. "(7) Visual Search. The importance of proper visual search, and proper visual search methods ..."

¹⁹ See also: J. J. Keller. "Visual Search." *Entry-Level Driver Training: Obtaining A CDL*, Neenah, Wisconsin, J. J. Keller & Associates, 2019, p. 126. See also: Adams, Alice, and PTDL. "Visual Search." *Tractor-Trailer Truck Driver Training*, Fourth Edition, Clifton Park, NY, Delmar Cengage Learning, 2013, pp. 334–339. See also: Mike Byrnes and Associates. "Safe Driving." *Bumper to Bumper: The Complete Guide to Tractor-Trailer Operations*, Fifth Edition, Corpus Christi, Texas, Mike Byrnes & Associates, 2013, pp. 244–245.

²⁰ *Id.*

long time it will probably change before you get there. Start slowing down and be ready to stop."

- (1) **OPINION:** These safety rules are echoed in the Smith System's defensive driving concepts of aiming high in steering, getting the big picture, and keeping your eyes moving.

D. Defendant Duffy had a duty to adhere to industry safe driving standards and practices as it relates to speed and space management.²¹

1. CDL Manual, Section 2.7 – Managing Space.²²

- a. *"To be a safe driver, you need space all around your vehicle. When things go wrong, space gives you time to think and to take action."*
- b. *"To have space available when something goes wrong, you need to manage space. While this is true for all drivers, it is very important for large vehicles. They take up more space and they require more space for stopping and turning."*

2. CDL Manual, Section 2.6 – Controlling Speed.²³

- a. *"Driving too fast is a major cause of fatal crashes. You must adjust your speed depending on driving conditions. These include traction, curves, visibility, traffic and hills."*

²¹ Sources listed below are based on the regulatory concept found in FMCSR §383.111 – Required Knowledge. "(9) Speed Management. The importance of understanding the effects of speed ... (10) Space Management. The procedures and techniques for controlling the space around the vehicle..."

²² See also: J. J. Keller, "Space Management," *Entry-Level Driver Training: Obtaining A CDL*, Neenah, Wisconsin, J. J. Keller & Associates, 2019, p. 162. See also: Adams, Alice, and PTDI, "Space Management," *Tractor-Trailer Truck Driver Training*, Fourth Edition, Clifton Park, NY, Delmar Cengage Learning, 2013, pp. 352–355. See also: Mike Byrnes and Associates, "Safe Driving," *Bumper to Bumper: The Complete Guide to Tractor-Trailer Operations*, Fifth Edition, Corpus Christi, Texas, Mike Byrnes & Associates, 2013, pp. 251–252.

²³ See also: J. J. Keller, "Speed Management," *Entry-Level Driver Training: Obtaining A CDL*, Neenah, Wisconsin, J. J. Keller & Associates, 2019, pp. 151–158. See also: Adams, Alice, and PTDI, "Speed Management," *Tractor-Trailer Truck Driver Training*, Fourth Edition, Clifton Park, NY, Delmar Cengage Learning, 2013, pp. 367–370, 377. See also: Mike Byrnes and Associates, "Safe Driving," *Bumper to Bumper: The Complete Guide to Tractor-Trailer Operations*, Fifth Edition, Corpus Christi, Texas, Mike Byrnes & Associates, 2013, pp. 248–250.

E. Defendant Duffy had a duty to properly recognize, prepare for, and respond to the hazards around him.²⁴

1. South Dakota Vehicle Driver Manual – Rules of the Road
 - a. Page 1: Traffic Control Devices – Traffic Signals – *"A flashing RED traffic light means the same as a stop sign. You must come to a full stop and then may proceed when it is safe to do so."*
2. South Dakota Legislature Legislative Research Council.
 - a. 32-28 – Traffic Control Devices.
 - (1) 32-28-06 – Flashing red or yellow signal: *"If an illuminated flashing red or yellow signal is used in a traffic sign or signal, vehicular traffic shall obey such signal as provided by §§ 32-28-7 and 32-28-8."*
 - (2) 32-28-08.2 – Procedures when traffic lights malfunctioning: *"If a traffic control signal is out of operation or is not functioning properly, the vehicle traffic facing a: (1) Green signal may proceed with caution. (2) Yellow signal may proceed with caution. And (3) Red or completely unlighted signal stop shall stop in the same manner as if the vehicle is at a stop sign."*
 - (3) 32-29-2.1 – Action required at stop sign – Place of stopping: ... *"After having stopped, the driver shall yield the right – of – way to any vehicle which has entered or is approaching the intersection from another highway and may not proceed into the intersection until certain that such intersecting roadway is free from oncoming traffic which may affect safe passage."*
3. CDL Manual, Section 2.8.1 – Importance of Seeing Hazards²⁵
 - a. *"What is a Hazard? A hazard is any road condition or other road user (driver, bicyclist, pedestrian) that is a possible danger."*
 - b. *"Seeing Hazards Lets You Be Prepared. You will have more time to act if you see hazards before they become emergencies."*

²⁴ Sources listed below are based on the regulatory concept found in FMCSR §383.111 – Required Knowledge. *"(13) Hazard perceptions. The basic information on hazard perception and clues for recognition of hazards..."*

²⁵ See also: J. J. Keller. "Hazard Perception." *Entry-Level Driver Training: Obtaining A CDL*, Neenah, Wisconsin, J. J. Keller & Associates, 2019, p. 202. See also: Adams, Alice, and PTDF. "Hazard Awareness." *Tractor-Trailer Truck Driver Training*, Fourth Edition, Clifton Park, NY, Delmar Cengage Learning, 2013, pp. 444-459.

4. CDL Manual, Section 2.8.3 – Drivers Who Are Hazards²⁶

- a. *"Conflicts. You are in conflict when you have to change speed and/or direction to avoid hitting someone. Conflicts occur at intersection where vehicles meet, at merges (such as turnpike on ramps) and where there are needed lane changes (such as the end of a lane, forcing a move to another lane of traffic). Other situations include slow moving or stalled traffic in a traffic lane, and accident scenes. Watch for other drivers who are in conflict because they are a hazard to you. When they react to this conflict, they may do something that will put them in conflict with you."*

5. CDL Manual, Section 2.8.4 – Always Have a Plan.²⁷

- a. *"You should always be looking for hazards. Continue to learn to see hazards on the road. However, don't forget why you are looking for hazards – they may turn into emergencies. You look for hazards in order to have time to plan a way out of any emergency. When you see a hazard, think about the emergencies that could develop and figure out what you would do. Always be prepared to take action based on your plans. In this way, you will be a prepared, defensive driver who will improve your own safety as well as the safety of all road users."*

V. OPINIONS REGARDING PREVENTABILITY AND CAUSE OF THIS ACCIDENT ON THE PART OF CORNERSTONE AND THEIR DRIVER DEFENDANT DUFFY.

A. Defendant Duffy caused his own preventable collision.

1. American Trucking Associations' Guidelines for Determining Preventability of Accidents

- a. *"The concept of preventability is based on the premise that a professional driver is expected to meet a higher standard of performance than the average motorist. It is self-evident that the professional driver should be able to observe and assess the behavior of pedestrians and other drivers and recognize those actions which may create hazardous conditions and take every reasonable measure to avoid involvement in an accident."²⁸*

²⁶ Id.²⁷ Id.²⁸ ATA Preventability Guide, page 11.

2. The ATA's Guidelines also mention that an accident is generally preventable if:²⁹
 - a. Driver was inattentive or failed to accurately observe existing conditions;
 - b. Driver's speed was not consistent with existing road, weather and traffic conditions;
 - c. Driver's speed precluded stopping within available clear distances;
 - d. Driver misjudged available clearances (above, below, or on the sides) resulting in the striking of a fixed object;
 - e. Driver was not entirely in the proper lane of travel;
 - f. Driver failed to control vehicle;
 - g. Driver failed to yield right-of-way to avoid an accident;
 - h. Driver failed to communicate their presence or intended actions through appropriate means; or,
 - i. Driver was in violation of company operating rules or specific instructions, the regulations of any federal or state regulatory agency, or any applicable traffic laws or ordinances (including traffic control devices) which contributed to an accident.
3. Accidents at intersections are preventable if:³⁰
 - a. Driver failed to control speed to stop within available sight distance;
 - b. Driver failed to check cross-traffic and wait for it to clear before entering intersection;
 - c. Driver pulled from side street in the face of oncoming traffic;
 - d. Driver collided with person, vehicle or object while making right or left turn;
 - e. Driver collided with vehicle making turn in front of their vehicle;

²⁹ *Id.*, at page 14.

³⁰ *Id.*

- f. Driver was illegally blocking the intersection; or
 - g. While making a turn, driver failed to properly block inside lane.
4. The National Safety Council defines a preventable accident as:
- a. *"A preventable collision is one in which the driver failed to do everything that reasonably could have been done to avoid it."*³¹
5. The National Safety Council also notes that:
- a. *"Collisions at Intersections. A professional driver has the responsibility to approach, enter, and cross intersections prepared to avoid collisions that might occur because of the actions of other drivers. ... Complex traffic movement, blind intersections, failure of the other driver to conform to law or traffic control devices do not automatically discharge a collision as non-preventable. In fact, most collisions at intersections are preventable even though the professional driver has not violated traffic regulations. The professional's failure to take precautionary measures prior to entering the intersection is a factor in making a preventable decision. Even though the actions of the other driver indicated possible collision involvement, the decision based on such entrapment should be preventable."*³²
 - b. *"Collisions While Turning. Turning movements – like passing maneuvers – require exacting care on the part of the driver. The driver making the turn is responsible for preventing squeeze plays at both left and right turns. The driver may be responsible regardless of whether the collision involved other vehicles, scooters, bicycles, or pedestrians. ... Failure to take all appropriate defensive action indicates preventability."*³³
6. FMCSR § 385.3 – Definitions
- a. *"Preventable accident on the part of a motor carrier means an accident (1) that involved a commercial motor vehicle, and (2) that could have been averted but for an act, or failure to act, by the motor carrier or the driver."*

³¹ National Safety Council's Guide to Determine Motor Vehicle Collision Preventability, page 2.

³² Id., page 13.

³³ Id., pages 14-15.

7. FMCSR, Appendix A to Part 385

- a. *"Preventability will be determined according to the following standard: 'If a driver, who exercises normal judgment and foresight, could have foreseen the possibility of the accident that in fact occurred, and avoided it by taking steps within his/her control which would not have risked causing another kind of mishap, the accident was preventable'"*.

8. According to The Smith System, there are 10 common causes of collisions:

- a. Inattention – When a driver mentally tunes out their traffic world;
- b. Too much attention to too little – Staring too long at one item while overlooking others;
- c. Not enough time – Not taking the necessary steps in order to have enough time to make good decisions;
- d. Not enough space – Driving in a "pack" or "cluster" and not leaving enough space for unexpected problems;
- e. Not allowing for the mistakes of other drivers – Driving with a lack of awareness, preventing one's self from anticipating and adjusting to changing traffic;
- f. Not enough training – Lacking any supplemental or advanced driver training;
- g. Failure to adjust to conditions – Driving without adapting to evolving circumstances;
- h. Attitude – Driving while overly emotional, or without the proper safe-driving mindset;
- i. Driver impairment – Driving under influences such as fatigue, drugs/alcohol, illness, etc.;
- j. Vehicle failure – Vehicle failure causes only a small percentage of collisions, but can be prevented/reduced through good vehicle PMCS.

- (1) **OPINION:** If one or more of these Smith System 10 common causes can be attributed to the commercial driver, then by virtue of the ATA, FMCSA, NSC, or other customary definition, the collision would have to be considered preventable on the part of the motor carrier and driver. Here, Defendant Duffy violated numerous duties which resulted in the collision. This collision was preventable on the part of Defendant Duffy and Cornerstone.

VI. SUMMARY.

Safe driving performance is based on planning. CMV operators must make effective observation of potentially hazardous situations, have a keen sense of anticipation for what may happen in a given situation, and above all, make appropriate safety risk decisions. The goal is to avoid being taken by surprise, and predict what will happen before it does, and then taking appropriate action to avoid the anticipated hazard.

Defendant Duffy had a duty to operate his CMV in a manner consistent with industry customs and practices, and the standards of care expected of well-trained, safe, prudent, and experienced CMV operators. In my opinion, Defendant Duffy failed to operate his CMV defensively

"If we do not practice defensive driving, then accidents will occur."³⁴

"The defensive driver tries to recognize potentially hazardous situations sufficiently in advance to allow time to safely maneuver past them. The defensive driver assumes that other drivers may make mistakes and is on guard in the event an error is made. The defensive driver searches ahead of what is immediately in front, to have advance warning of approaching hazards."³⁵

Defendant Duffy failed to see what was there to be seen. The safe, prudent thing to do would be to make sure his path is clear prior to driving into it, make sure other road users can see him, communicate his intentions, and avoid running into other road users. The standard of care for CMV drivers is to obey regulations and not compromise safety by taking chances. In my opinion, if Defendant Duffy had operated his truck in accordance with regulations and safe industry practices, as was his duty, this crash would not have happened.

Within the U.S. Department of Transportation, the Federal Motor Carrier Safety Administration establishes motor carrier and driver laws for the safe operation of commercial motor vehicles on the nation's highways and publishes them in the Federal Motor Carrier Safety Regulations. The FMCSRs are specifically "applicable to all employers, employees, and commercial motor vehicles, which transport property or passengers in interstate commerce". There are specific sections of the FMCSRs which dictate to motor carriers and drivers their obligations and responsibilities with respect to the safe operation of their commercial motor vehicles.

³⁴ Adams, Alice, and PTDL. *Tractor-Trailer Truck Driver Training*. Fourth Edition, Clifton Park, NY, Delmar Cengage Learning, 2013.

³⁵ United States. Department of Transportation. Federal Highway Administration. Office of Motor Carriers. *Commercial Vehicle Preventable Accident Manual*. Third Edition, Triodyne, Inc., 1997.

I believe that ensuring safety and compliance needs to be a company-wide effort including drivers, managers, safety personnel, and the executive branch, together with owners of the company. While drivers are responsible for the way they operate their truck, ensuring compliance for the operation of the truck falls squarely on motor carrier management. The motor carrier's duty in this regard is non-delegable, and the obligation cannot be passed on solely to the driver or anyone else. For whenever, *"a duty is prescribed for a driver or a prohibition is imposed upon the driver, it shall be the duty of the motor carrier to require observance of such duty or prohibition."*³⁶

Cornerstone is responsible for developing a safety control system that detects careless or reckless driving performance and trains drivers on safe, defensive, and proper CMV operation. While the function of a safety control system in motor carrier fleets is everyone's job within a company, it starts with the support and commitment of owners, directors, and top management, and includes the role of mid-level supervisors and drivers. *"The particular processes which can create a safe fleet organization then include, but are not limited to: personnel selection, effective training, proper supervision, accident investigation, and compliance with applicable regulations."*³⁷

*"Compliance with all applicable regulations is the responsibility of the fleet organization. The fleet supervisor should work to achieve a sound compliance program. The company ultimately is responsible for both its own actions as well as the actions of its employees. Noncompliance costs money and creates problems. Neither of these is acceptable to a well-run motor fleet operation."*³⁸

³⁶ FMCSR § 390.11.

³⁷ *Motor Fleet Safety Supervision: Principles and Practices*, North American Transportation Management Institute (NATMI), p. 2 of §1.

³⁸ North American Transportation Management Institute. "Regulatory Compliance." *Motor Fleet Safety Supervision: Principles and Practices*, Eighth Edition, Denver, CO, NATMI, 2019, p. 193.

VII. CONCLUSIONS.

From the information provided to me, and the opinions reached in this report, I conclude the following:

1. Defendant Duffy was required to have the necessary knowledge, skills, and safe driving attitude to prevent crashing into others.
2. Defendant Duffy failed to adhere to industry regulations and standards in at least the following ways:
 - a. Failed to maintain a proper visual search;
 - b. Failed to properly manage his speed and space;
 - c. Failed to recognize the hazards in front of him and have a plan for them;
 - d. Failed to recognize and execute defensive driving measures to avoid a preventable collision.
3. Cornerstone's safety management systems were either missing or simply failed to ensure that CMV operators like Defendant Duffy would not collide with other road users when they have the time and opportunity to prevent doing so.
4. Cornerstone is responsible for the actions of Defendant Duffy as it relates to the safe operation of a CMV.
5. According to industry standards, this collision was preventable on the part of Cornerstone and their driver Defendant Duffy.

These are the opinions I have as of this date, and I reserve the right to supplement my opinions as new or additional information becomes available to me. These opinions are not intended to be considered legal conclusions. Rather, these opinions, and the methods for reaching them, are consistent with the methods and process by which a truck safety professional such as myself would ordinarily use in conducting an accident investigation and crash preventability determination during the normal scope of business as a motor carrier. These opinions are based on the facts and materials provided to me in this case as identified in Appendix B to this report, as well as the totality of my experience, education, and training; and specifically includes reliance on various peer reviewed sources as referenced in footnotes throughout this report, in conjunction with industry customs and standards as practiced in the trucking industry.

I, ADAM GRILL, CERTIFY THAT THESE ARE MY OPINIONS ON THIS 17th
DAY OF DECEMBER 2020 REGARDING THE CASE OF HAMER VS DUFFY
AND CORNERSTONE POURED FOUNDATIONS, INC.


ADAM GRILL

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REVIEW OF MATERIALS AND INFORMATION BY ADAM GRILL

Regarding: Justin Hamer vs Paul Duffy

1. Lincoln County Sheriff Dashcam
2. PHOTOS 20190408_092503-20190408_092620
3. POLICE-911 Calls 04-08-2019_09.05.02.5_-_Position_1_Phone_-_4_(Voice)
4. 04-08-2019_09.05.14.7_-_Position_2_Phone_(Voice)
5. Accident Report
6. Case 19-02134 Sheriff Narrative
7. Video shot by Attorney Scott Hoy IMG_2130-IMG_2131
8. Capture
9. MED EXH - Hamer_Justin 03-23-2020
10. Investigator accident report
11. Accident Report
12. Case 19-02134 Sheriff Narrative
13. Complaint and Demand for Trial by Jury
14. Summons - Cornerstone
15. Summons - Duffy
16. C - Paul Duffy - Recorded Statement
17. Cornerstone Ans Resp to Pls' Int RFPD (1st Set)
18. D - Justin Hamer - Recorded Statement
19. Duffy Ans Resp to Pls' Int RFPD (1st Set)



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January 22, 2021

Hamer v. Duffy

Preliminary Crash Investigation and Reconstruction Report

Introduction

I was requested by Scott Hoy of Hoy Trial Lawyers, to investigate a two-vehicle collision involving a red 2014 Western Star 4700SB driven by Mr. Paul Duffy and a yellow 2003 Chevrolet Avalanche driven by Mr. Justin Hamer. This collision occurred in the intersection of I-29 and 271st Street, near the City of Tea, Lincoln County, South Dakota on April 8th, 2019 at approximately 9:05 AM. There were no passengers or known witnesses in this collision.

Background

I was provided the following information to assist in my analysis:

1. Correspondence

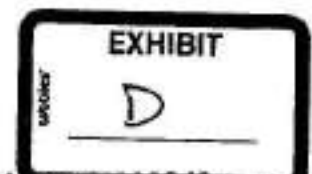
Client Supplied Materials 03-27-2020

2. Dashcam video from Lincoln County Sheriff
3. Seven (7) digital photographs taken by Lincoln County Sheriff
4. 9-1-1 calls
5. Lincoln County Sheriff Reports
6. Video taken by Attorney Scott Hoy
7. One (1) Google Earth Pro snapshot of involved intersection
8. Synopsis of medical treatment of Mr. Justin Hamer

Client Supplied Materials 10-07-2020

9. Transcribed recorded statement of Paul Duffy taken on 04-12-2019.
10. Transcribed recorded statement of Justin Hamer taken on 04-12-2019.
11. Cornerstone Answers to Plaintiff's Interrogatories and Responses to Requests for Production
12. Paul Duffy's Answers to Plaintiff's Interrogatories and Responses to Requests for Production

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Client Supplied Materials 12-18-2020

13. Report completed by Adam Grill on December 17, 2020

Client Supplied Material 01-13-2021

14. Deposition of Ms. Kim Hamer taken on 11-13-2020 (No Exhibits tendered)

15. Deposition of Mr. Justin Hamer taken on 11-13-2020 (No Exhibits tendered)

Description of Collision Site

This collision occurred in the intersection of I-29 and 271st Street, near the City of Tea, Lincoln County, South Dakota on April 8th, 2019 at approximately 9:05 AM. In the area of this collision, 271st Street is an east-west four-lane roadway, with two through lanes in each direction constructed of concrete. Each direction has two left turn lanes to enter onto I-29 which is an overpass to 271st Street. The intersection is controlled by traffic signals which on the day of the collision were not functioning properly and were flashing red. The posted speed limit is 40 miles per hour.

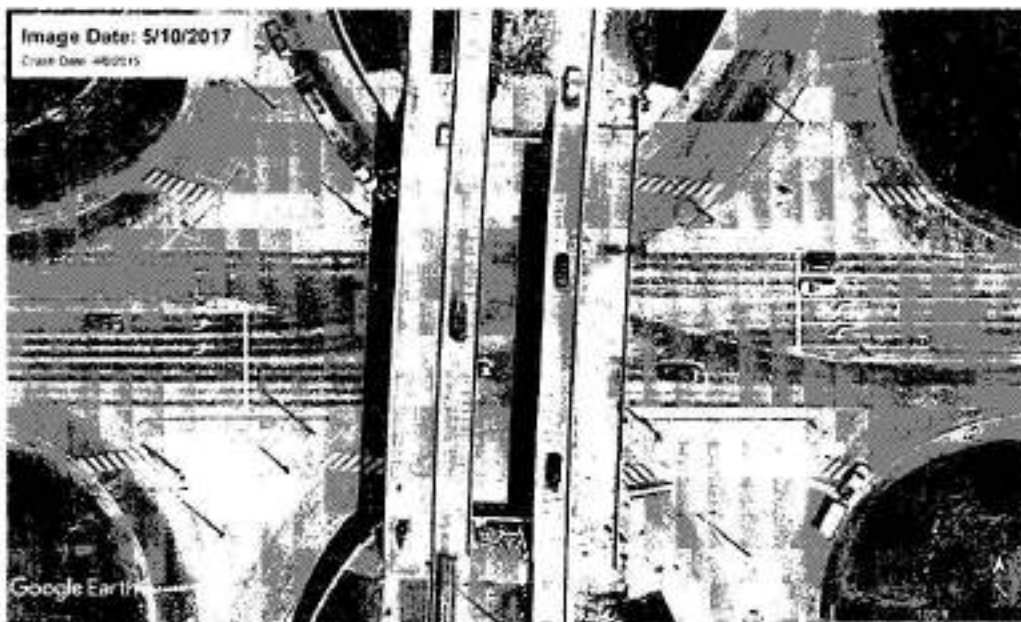


Exhibit 1: Google Earth aerial of the overall scene.

Description of Weather and Lighting

The police report and/or photographs indicated the weather was clear and the roadway was dry at the time of this collision. The time of this collision was during daylight.

Description of Subject Vehicles

Vehicle # 1

Vehicle # 1 is a red 2014 Western Star 4700SB, VIN # 5KKHAXDV4EPFW7990, driven by Mr. Paul Duffy. There were no passengers in the vehicle. This vehicle was not drivable post collision.

Vehicle # 2

Vehicle # 2 is a yellow 2003 Chevrolet Avalanche, VIN # 3GNEK13TX3G310370 driven by Mr. Justin Hamer. There were no passengers in the vehicle. This vehicle was not drivable post collision.

Description of the Collision

Reportedly (from the police report) this collision occurred as follows:

"On 4/8/19 I responded to 271 under the I-29 overpass for a report of a non injury accident. When I arrived on scene I observed that the lights were all flashing red due to an issues with the lights. It should be noted that this a very complicated intersection that supports east west bound traffic, each direction having several lanes to support through traffic and entry and exit of interstate traffic. The accident was a semi vs a truck and the accident was blocking the lane of travel. I spoke to one of the drivers involved Paul Duffy. Paul advised he was east bound on 271 and just stopped at one of the turning lanes at the light to head north onto the interstate. He advised the lights were all flashing red and he had the right away. He began to make his turn onto the interstate when a yellow truck drove in front of him and he struck the vehicle. Paul insisted that he definitely had the right of way given the situation. I then spoke to the other driver Justin Hammer. Justin advised he was west bound on 271st and had just approached the flashing light and stopped. Justin advised he was trying to continue westbound. He observed a white truck make a left hand turn to go northbound onto the interstate. He advised the semi was behind the truck and given the white truck went he would have had the right away next. Justin advised he started to go and saw that the semi was coming toward him. He thought the semi would stop but instead it ran into his vehicle and forced him up onto the side walk. I took pictures of the scene and provided both parties with a red tag and case number. I questioned Paul about the white truck that would have been in front of him and he denied that there was any vehicle in front of him. There were not witness that stayed on scene. I explained to both parties that I would make a report of the incident and they could explain to their insurance what happened."

Work Performed

The following work was performed by myself and/or my staff to assist in the analysis of this collision:

- Materials received were reviewed.
- Police materials were reviewed.
- Correspondence was written.
- Personal conversation with Justin Hamer on 01-18-2021.
- Vehicle specifications were obtained.
- Internet aerials were obtained.
- The site was inspected, scanned with a Faro 3D scanner, and photographed on 12-15-2020.
- Scale scene diagrams were created.
- A damage analysis, vehicle dynamics, sightline, impact configurations, and trajectory analysis was considered/conducted.
- Preliminary time/distance analysis was performed.

I reviewed the Lincoln County Sheriff's photographs and observed the Chevrolet was struck on the driver side near the C-Pillar. The damage to the truck was located at the driver front corner. The damage is consistent with an angled impact and the Chevrolet would have rotated counterclockwise after the impact. I was unable to locate any physical evidence on the roadway that was visible in the photographs to identify the exact area of impact.

The drivers in this collision both provided recorded statements to an insurance company. Mr. Hamer has been deposed however Mr. Duffy has not been deposed. The available statements and testimony had several discrepancies including the lanes of travel of the vehicles, whether there was another vehicle that turned before the straight truck, and whether any evasive maneuver was performed.

Using the scan data obtained from the site inspection a diagram of the scene was created. I was not able to inspect either vehicle in this case so similar vehicles were used to depict those involved in this case in the diagrams. Several diagrams were created to represent the statements of the drivers and the approximate distances to reach impact based on their statements.

Both drivers stated they had proceeded into the intersection after coming to a complete stop. In every case, it can be seen the straight truck driven by Mr. Duffy had further to travel to reach the area of impact. Mr. Duffy's truck is not capable of accelerating as quickly as the Chevrolet. Had the Chevrolet accelerated at a normal rate of 4.8 ft/sec/sec over a range of distance between 120 – 135 feet, it would have taken between 7.0 and 7.5 seconds for the Chevrolet to

reach the area of impact from the stop bar accelerating from a stop. Even at a more rapid acceleration for the straight truck (3.22 ft/sec/sec) it would have taken between 10.0 and 10.5 seconds for the truck to have reached the area of impact due to its greater distance and slower acceleration rate.

In my personal conversation with Mr. Hamer, he indicated he thought the truck had been in the through lane and did not realize it was in a left turn lane. Based on the topography of the intersection, it is likely the truck had moved straight forward for some distance before it needed to turn left through the intersection. This is due to the long travel distance from the stop bar to the entrance onto the interstate. Based on the amount of time it would take the Chevrolet to reach the area of impact, the approaching yellow Chevrolet was visible and able to be perceived as it approached. Mr. Hamer stated he accelerated normally to traverse the intersection. Mr. Hamer stated he attempted to avoid the turning truck by steering right indicating he had completed his perception/response and initiated an evasive tactic.

I utilized a software program, I.DRR®, to analyze the average perception/response time (PRT) of drivers faced with a similar path intrusion as this case. The average PRT was 2.6 seconds for a turning driver with an overall average PRT of 2.3 seconds for all drivers. The 85th percentile was 3.3 seconds. The average for a non-turning driver was only slightly less, 2.2 seconds, and for a driver faced with a vehicle turning across their path it was 2.5 seconds. The 85th percentile was 3.0 seconds. Exhibits 2 – 3 are screenshots of the analysis results.

TURN ACROSS PATH/HEAD-ON (Exhibit 2)		E Paul - PCSB, LLC	
A	5. Hazard & Appro Response Distance (ft) [DEFAULT]		
EX	4. Roadside Fidelity (ft) [DEFAULT]		
D	1. Driving	Offset @ start of Intrs	40.0
E	<input checked="" type="checkbox"/> Calculate Eccentricity	Dist to Intruder	174.0
Ln		Eccentricity	12.9 deg
M	0. Other not stopped	1. Response to one object	
Tr	0. EV Not Turning	2. More info (ie. Intersection, curve, flagger)	
Tr	3. PRT Intruder (Merg. of 500 ms)	<input type="checkbox"/> Check if hovering brake	
$\text{Braking Adj} = (4.33 \times T) + (305 + 224L + 7150 - 496T) - 164M + 261Tn + 356(D - 1) + 7$ $250 + (4.33 \times 7) + 305(2.9) + 224(1) + 716(1) - 496(2) - 164(0) + 261(0) + 350 \times (0 - 1) + 7$			
AVERAGE PRT		85th percentile response	
2.2 sec		3.0 sec	
Equation		1.6 sec	
Turn Across Path		Min Avg	Max Avg
2.5 Sec		2.2 Sec	2.7 Sec

Exhibit 2: I.DRR analysis of PRT for the subject vehicle not turning

TURN ACROSS PATH/HEAD ON (Prapp.d) [v]		E Paul - 4 CSO LLC	
A	3. Impact & Auto Response (Function) [v] DEFAULT [v]		
EX	4. Road/Fidelity Sim [v] [v] DEFAULT [v]		
D	1. Driving [v]	Offset @ start of Inbs	400
E	<input checked="" type="checkbox"/> Calculate Eccentricity	Dist to Intruder	174.0
Li		Eccentricity	12.9 deg [v] 1.0 [v]
M	5. Other unit stopped [v]	1. Response to one object [v]	
Ta	1. Str Turning [v]	2. Two (more) intersection curve trigger [v]	
Tr	3. PRT Induces Delay of 500 ms [v]	<input type="checkbox"/> Check if hovering brake	
$\text{Braking Adj} = (413 \times T_1) + 30E + 224L_1 + 716D - 496T_2 - 164M + 261T_3 + 350(D - 1) = 7$ $250 = (413 \times 3) + 30 \times 12.9 + 224 \times 1 + 716 \times 1 - 496 \times 2 - 164 \times 0 + 261 \times 1 + 350 \times (1 - 1) = 7$			
85th percentile response			
AVERAGE PRT		2.3 sec	3.3 sec
Equation		2.1 sec	
		Min Avg	Max Avg
L or R turn driver		2.6 Sec	

Exhibit 3: I.DRR analysis of PRT for the subject vehicle turning

As stated earlier, using a normal acceleration rate for the Chevrolet, it would have taken between 7.0 – 7.5 seconds to reach the area of impact. Using the average PRT for a turning vehicle of 2.6 seconds, this would have left 4.4 – 4.9 seconds for Mr. Duffy to respond to the Chevrolet. Mr. Duffy in his recorded statement to United Fire Group insurance stated he had seen the Chevrolet stop at the stop bar¹, therefore he was aware of its presence.

As discussed earlier, the Chevrolet was impacted on the driver side near the C-Pillar which is located just ahead of the rear tire. Based on data in AutoStats, it is approximately 6 feet from the rear bumper to the base of the rear window which is located at the area of impact. Based on my calculations, the Chevrolet would have been traveling around 23-24 miles per hour having accelerated at a normal rate. This equates to around 35 ft/sec. The Chevrolet would have needed less than 0.2 seconds to travel the 6 feet to clear the front end of the truck.

¹ Duffy United Fire Group statement, p. 5

Opinions and Conclusions

The following opinions and conclusions are based upon my analysis including my calculations, my review and analysis of the information provided, my review and analysis of the information obtained by my staff, my education, my training and my experience. These opinions are to a reasonable degree of accident reconstruction and scientific certainty. My current Curriculum Vitae, which outlines my training, education, certifications and experience, my fee schedule and my testimony listing are included as "Attachment 5" to this report. Any of my work product may be used as demonstrative exhibits in trial. My opinions may be supplemented if new or additional information should become available.

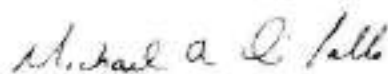
1. Based on my analysis, Mr. Paul Duffy was situationally inattentive to the approaching Chevrolet.
2. Based on my analysis, using an average Perception/Response time, Mr. Paul Duffy had between 4.4 -4.9 seconds to respond to the approaching Chevrolet and avoid this collision.
3. Based on my analysis, Mr. Duffy failed to yield to an approaching vehicle while in an intersection making a left turn.
4. Based on my analysis, Mr. Duffy violated South Dakota statute 32-26-19, Left-turning Vehicles – Right-of-way of Oncoming Vehicle.

Discussion

It should be noted that as of the date of this report, I have not inspected either vehicle.

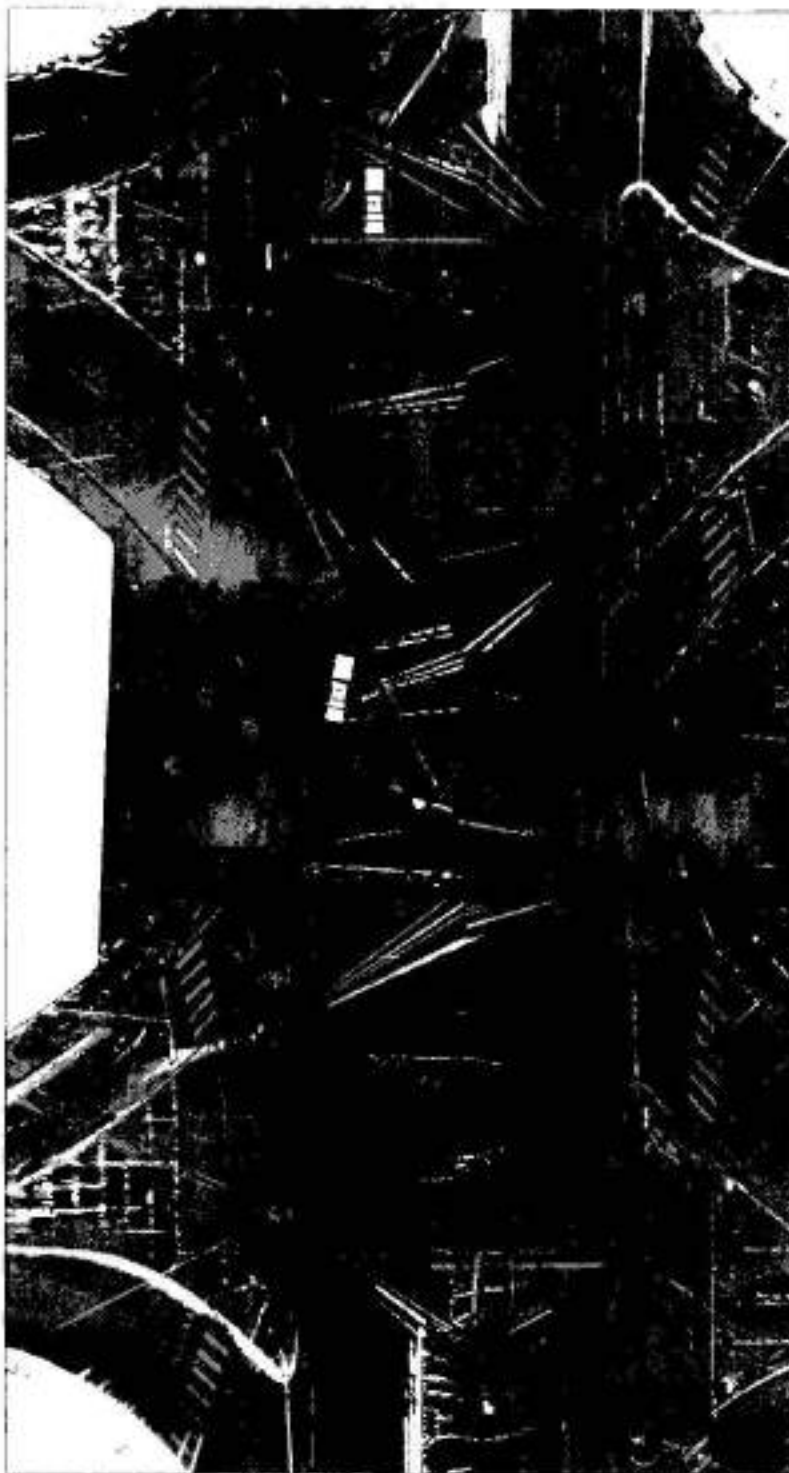
My opinions may be supplemented and/or changed if additional work is requested, approved, performed and/or if additional information becomes available.

Best Regards,



Michael A. DiTallo

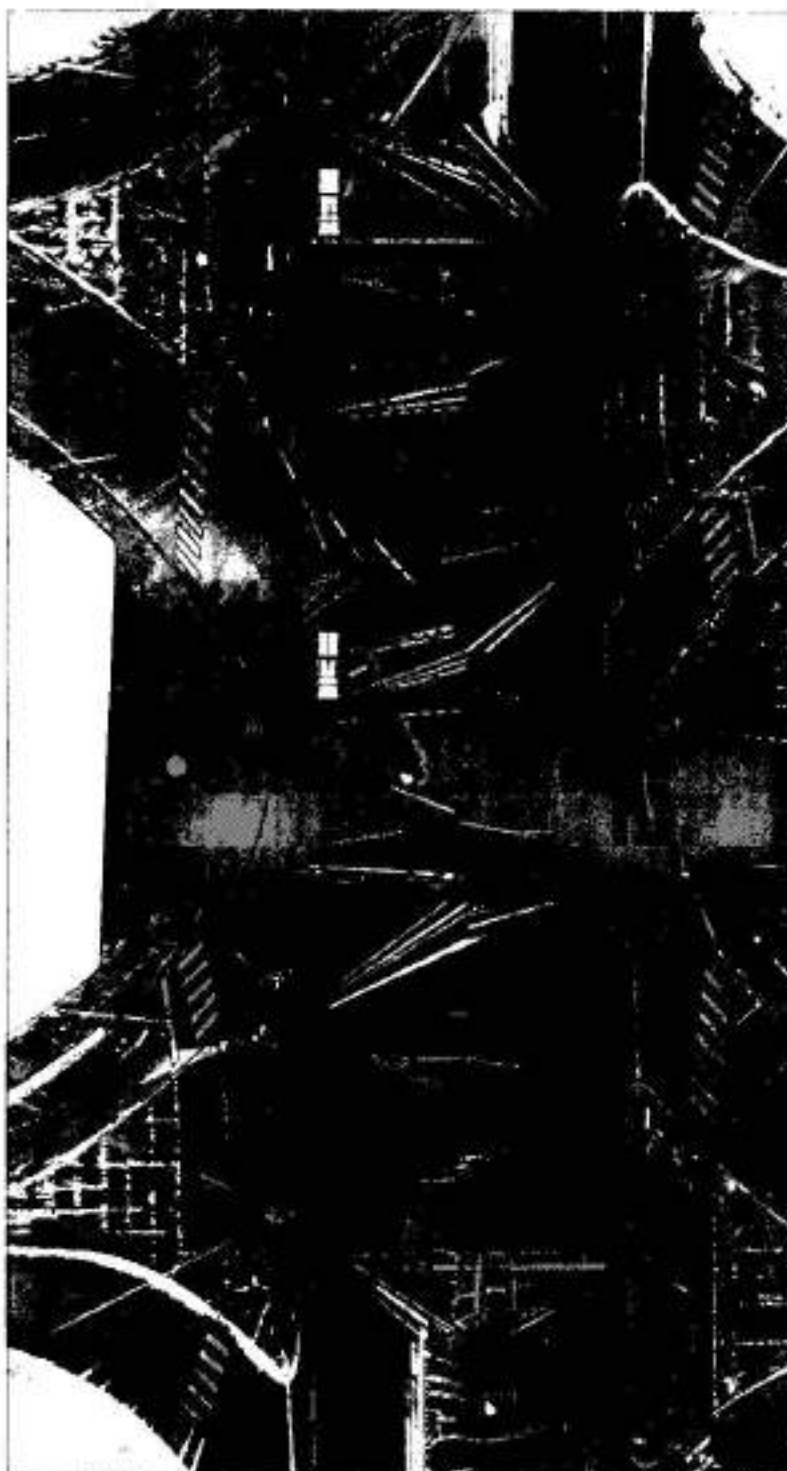
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Attachment 1: Scene Diagram showing estimated travel distance based on statement of Mr. Hamer.



Attachment 2: Scene Diagram showing estimated travel distance based on statement of Mr. Hamer and final rest positions.



Attachment 3: Scene Diagram showing estimated travel distance based on statement of Mr. Duffy.



Attachment 4: Scene Diagram showing estimated travel distance based on statement of Mr. Duffy and final rest positions.

ADAM GRILL

Atlantic Pacific Resource Group
1236 Cordova Street
Billings, MT 59101
406.248.2766 | Adam@LewGrill.com

PROFESSIONAL BACKGROUND

Raised in a family environment that centered on truck driving and truck driver training, I have worked around large commercial vehicles and studied the intricacies of commercial vehicle transportation among the best in the industry. I received my certification as a commercial vehicle operator in 2005. I hold a CDL with endorsements for hazardous materials, tankers, double trailers, triple trailers, passenger buses, and school buses. I am certified for forklift operation, operation of longer combination vehicles (LCVs), crane hoist and rigging, aerial manlift, telehandler, and heavy equipment including payloaders and motor graders. I am a certified pilot car operator and flagger through Gulf Coast Community College in Panama City, Florida.

For eight years I served in the US Army and US Army National Guard where I was called upon to teach truck and heavy vehicle operation and driver safety, among other duties. I am currently an active truck driver, and an associate of Atlantic Pacific Resource Group. I have formal truck driver training and education from Sage Technical Services, MTS Freight, the United States Army, the Montana Army National Guard, and the Smith System Driver Improvement Institute.

My family experience and lifestyle have always centered on the instruction and operation of heavy equipment and tractor-trailers. I currently serve as a trucking consultant and manage the fleet for Lew Grill Specialized Services. I have also assisted in over a dozen special studies and trucking projects covering safety procedures as well as time and motion studies including visibility from CMV drivers' point-of-view, starting/stopping, turning, and various other aspects of safe and efficient trucking operation. I have worked in various capacities at Sage, including classroom instructor, off-road driving range instructor, and on-road skills instructor.



0057

I have over 14 years of combined experience as a truck driver, forklift operator, heavy equipment operator, industrial machinery operator, truck-driving instructor, dock supervisor, truck-driving consultant, and accident investigator. I am a current member of the Transportation Research Board of the National Academies, Owner-Operator Independent Drivers Association, Truckload Carrier's Association, Montana Contractor's Association, Montana Motor Carrier's Association, and the American Trucking Association. I have participated in educational training at the American Trucking Associations Technology and Maintenance Council. I am currently working on a project for the Federal Motor Carrier Safety Administration relating to the testing protocol for Electronic Logging Devices (ELDs) as required under the proposed rulemaking.

My current focuses include training and supervision of truck drivers, training instructors, and warehousing staff, fleet management for Lew Grill Specialized Services and The Legacy International Corporation, freight hauling and truck/trailer transportation, truck and driver dispatching, special projects for various fleet, industry, and government entities, and the development of educational programs for commercial drivers, equipment operators, and industry professionals, as well as supervisor for the motor carrier and broker relationships involving Atlantic Pacific Resource Group and The Legacy International Corporation with outside brokers, shippers, motor carriers, and others.

I have experience in truck accident investigation, vehicle dynamics, and accident reconstruction from the Legacy Corporation. I have testified in litigation matters where I have qualified as an expert concerning safe operation of commercial motor vehicles and the standard of care of commercial vehicle operators and motor carriers. I have operated a commercial vehicle in AL, AZ, AR, CA, CO, CT, DC, DE, FL, GA, ID, IL, IN, IA, KS, KY, LA, ME, MD, MA, MI, MN, MS, MO, MT, NE, NV, NH, NJ, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, SD, TN, TX, UT, VT, VA, WA, WV, WI, WY.

WORK EXPERIENCE

The Legacy Corporation International, Billings, MT

Warehouse Manager, Safety Supervisor, Training Supervisor, FMCSA Consulting 2014-Current

Create and maintain policies and programs for warehousing, industrial safety programs, CMV driver training school, CMV driver training curriculum development, CMV instructor hiring and management, and special projects for fleet, industry, and government.

Atlantic Pacific Resource Group, Inc./Lew Grill Specialized Services, Billings, MT

Truck Driver, Forklift Operator, Dock Supervisor, Consultant 2003-Current

Setup and management of broker operations and freight operations. Accident analysis and trucking litigation consulting, truck driving assignments, transportation studies, special projects, truck and trailer management, training program development and facilitation, various DOT projects for the Federal Motor Carrier Safety Administration. Assistance in various truck-driving investigations, time and motion studies, turning studies, visibility studies, and human factors tests.

MTS Freight, Billings, MT

Truck Driver, Forklift Operator, Dock Supervisor 2010-2016

Local and regional LTL operations using 4 to 8-axle tractor/trailer combinations including doubles/triples, straight trucks, and lift gate operations. Forklift and dock work including loading/unloading of trailers, freight staging, and warehousing. Dock operations management including truck driver dispatching, manifesting, warehousing oversight, customer relations, and forklift operator management.

Briggs Distributing

Truck Driver 2008-2009

Local and regional truck driving and lift gate operations, customer relations including bill of lading management and cash/check/credit receivables.

Sage Technical Services, Billings, MT

Truck Driver, Truck Driving Instructor 2008-2013

Classroom, lab, range, and public road truck driving instruction on various tractor/trailer combinations.

US Army National Guard, Montana

Chemical Specialist, Truck Driver/Heavy Vehicle Operator

2007-2014

Various military duties including specialized hazardous materials and chemical training, equipment hauling, military/civilian driver relations, driver safety, truck-driving operation, close quarters backing/maneuvering.

GEO Distributing, Billings, MT

Truck Driver

2006

Local and regional truck driving operations. Customer relations including bill of lading management and cash/check/credit receivables.

SPECIAL PROJECTS, RESEARCH, TRUCK DRIVING, AND INSTRUCTIONAL ASSIGNMENTS

Legacy International, Assessment of Safety Technologies in Trucking.

2016-Current

ELD's, tire pressure monitoring (TPMS) and tire pressure balancing systems, fuel efficiency monitoring, remote truck and driver video monitoring, satellite-based tracking, mobile communications/telematics/dispatching, real-time performance alerts, lane departure warning, forward collision warning, pedestrian and bicycle path intrusion warning, GPS mapping, CMV-to-CMV communications.

Special Project – Vehicle Control Test

2019

Testing in conjunction with a CMV crash to demonstrate the capabilities and limitations of a combination commercial vehicle in navigating various hill grades safely without applying brakes.

Mirror Adjustment and Blind Spot Study

2018

Testing to determine the visibility limitations of various mirror sets, including the identification of blind spots through properly adjusted convex mirrors, west coast mirrors, and fender mirrors.

Backing Test

2018

Testing to determine safe and efficient backing speeds, as well as space limitations to perform 90-degree back maneuvers.

Stopping Distance Test**2018**

Stopping tests of various empty and fully loaded tractor-trailer combinations within measured distances at various speeds for the purposes of assessing efficacy of braking components, including ABS.

Special Project – Vehicle Control and Driver Perception**2018**

Testing in conjunction with a CMV crash to demonstrate the timing and limitations of a combination commercial vehicle as it relates to 90-degree backing into a driveway. Evaluated the time and space requirements necessary to safely and reasonably complete such maneuvers.

USDOT Project**2014 - 2017**

Assisting on USDOT project relating to ELD required testing protocol and procedures to meet the federal rule for Electronic Log Device testing. Providing subject matter expertise on the user experience of working with ELD's, assisting with the information gathered for FMCSA, and providing trucks and driver services for use as a real-time test.

Stopping Distance Study**2017**

Stopping tests of various empty and fully loaded tractor-trailer combinations within measured distances at various speeds for the purposes of assessing efficacy of braking components, including ABS.

Time and Motion Study**2016**

Time and distance testing for left and right lane change maneuvers with a tractor and 53-foot semi-trailer.

Time and Motion Study**2015**

Time testing for various left-turn, right-turn, and lane change maneuvers with a 48-foot and 28-foot set of doubles.

Visibility Study**2014**

Study testing various forward and lateral visibility factors from the driver seat of a tractor.

Truck Driving Investigation**2013**

Investigation measuring U-turn distances and space requirements for a 5-axle tractor/53-foot trailer combination.

Truck Driving Investigation	2013
Driving to and from Houston, Texas for the purpose of recreating possible driving routes in conjunction with an accident investigation.	
Truck Driving Investigation	2011
Nighttime visibility study on I-40 west of Kingman, Arizona.	
Truck Driving Investigation	2010
Drove a 5-axle tractor/53-foot trailer combination to, from, and during an investigation of right-turn visibility factors. Filmed truck drivers, mirrors, and streets for the purposes of measuring and studying right-turn visibility.	
Velocity Investigation	2008
Investigation of velocity ranges of commercial vehicles as a function of gear selection at low engine speed versus top governed speed.	
Time and Motion Study	2008
Study and reconstruction of CMV movements using low gears from a stopped position.	
Stopping Distance Investigation	2007
Stopping tests of a fully loaded tractor-trailer within measured distances at various speeds.	
Time and Motion Study	2005
Right-turn study of 5-axle tractor-trailer.	
Visibility Study	2005
Visibility measurement study regarding mirror use of tractor-trailer.	
Time and Speed Study	2004
Study of various complex truck transmissions in all gears.	
Time and Motion Study	2004
Right-turn study testing the recognition and feel of tractor-trailer off tracking.	

Visibility Study	2003
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Visibility study of truck/tractor right side port window.

Load Study	2002
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Study on various loading techniques and load shifting patterns.

Visibility Study	2001
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Study testing driver visibility at acute angle intersections and special scenarios such as railroad crossings and freight/yard entrances and exits.

SPEAKING ENGAGEMENTS AND PRESENTATIONS

Speech and Presentation, Colorado Trial Lawyers Association	2019
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Speaker and presenter on recognizing distinct issues in truck accidents, as well as understanding key components that define a motor carrier and CMV.

Speech and Presentation, Workhorse Seminar, co-panelist and speaker	2019
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Speaker and presenter on broker liability, truck crash parties and their relationships, understanding motor carrier documents and their importance to truck crashes, and key issues in truck accidents. Florida Justice Association, Orlando, Florida.

Speech and Presentation on Broker Liability, co-speaker	2018
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Presentation on broker liability and understanding the broker/carrier process from procurement to payment. 360 Advocacy Group, Las Vegas, Nevada.

Speech and Presentation on Broker Liability, co-speaker	2018
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Presentation on broker liability and understanding the broker/carrier process from procurement to payment. Primerus Defense Institute, Las Vegas, Nevada.

Speech and Presentation on Accident Preventability and Fault Analysis	2017
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Whitewood Transportation Annual Convention, "Accident Preventability, Fault & Negligence", Billings, Montana. Presented on fault analysis and techniques for recognizing and determining preventability.

Speech and Presentation on Accident Scene Breakdown	2016
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Speech on accident scene breakdown, standard procedures, hazards, and effective practices conducted for insurance agencies, motor carriers, and drivers.

LICENSING, CERTIFICATIONS, CONTINUING EDUCATION

Commercial Driver License with endorsements for hazardous materials, tankers, double trailers, triple trailers, passenger buses, and school buses.	2005-Current
North American Transportation Management Institute's (NATMI) training program for Certified Safety Supervisor	2020
NATMI training program for Certified Director of Safety	2020
National Safety Council's Defensive Driving Safety Training for Professional Truck and Van Drivers.	2020
Licensed Trusted Agent – Transportation Security Administration	2019
Certified First Observer – Transportation Security Administration: Certificates for highway worker, truck rental, general trucking, over-the-road bus, school bus, and general parking.	2019
Trimble ELD and Fleet Manager Workshop and training course, Minnetonka, Minnesota.	2019
Skid Pad Training and Defensive Driving Assessment, Acton, Montana.	2017
Telehandler Certification Course, Billings, Montana.	2017
Aerial Man Lift Certification Course, Billings, Montana.	2017
Forklift Certification Course, Billings, Montana.	2017
Crane Hoist and Rigging Certification Course.	2016
Transportation Worker Identification Credential (TWIC): Security clearance certification by the U.S. Department of Homeland Security for unescorted access to secure areas of facilities and vessels regulated under the Maritime Transportation Security Act (MTSA).	2016
Truck and Bus Safety Subcommittee Meeting, Transportation Research Board of the National Academies (TRB), Washington D.C.	2016
Technology and Maintenance Council research and forum education.	2015
Pilot/Escort Driver & Flagging Certification for Oversize and Super Loads of extreme weight & dimension, Gulf Coast College, Panama City, Florida.	2015
Truck and Bus Safety Subcommittee Meeting, Transportation Research Board of the National Academies (TRB), Washington D.C.	2015
Distracted Driving certificate of training, Smith System Driver Improvement Institute.	2014

Truck Forward Motion certificate of training, Smith System Driver Improvement Institute.	2014
USDOT/Federal Motor Carrier Safety Administration safety audit on Atlantic Pacific Resource Group d/b/a Lew Grill Specialized Services.	2014
Forklift safety certification and training, MTS Freight.	2015
Heavy equipment operation certification and training.	2011
LCV training, MTS Freight.	2010
LCV Certification, Sage Technical Services.	2009
Certified Driving Instructor, Sage Technical Services.	2008
US Army Heavy Vehicle Operator's License.	2007
Tractor-Trailer Driver TTD 150 certificate of training, Sage Technical Services.	2005
Certificate of Attainment, PTDL.	2005
Safety Management Council certificate of driver/dispatch relations, Sage Technical Services.	2005

MEMBERSHIPS

- Transportation Research Board of the National Academies (affiliate member);
- Truckload Carrier's Association;
- Montana Contractor's Association;
- National Safety Council
- Owner-Operators Independent Driver Association;
- American Trucking Association;
- Montana Motor Carriers Association

EXPERT WITNESS TESTIMONY BY TRIAL OR DEPOSITION

<u>DATE</u>	<u>CAPTION</u>	<u>STATE</u>	<u>CASE NO.</u>
09/16/2015	Paulette Hanson vs Perry Keyes, et al.	WI	14-CV-208
12/10/2015	Angela Thomas vs Ricardo Hernandez, et al.	TX	CV 14-09-626
03/08/2016	Heacock vs Frito Lay, et al.	WA	14-2-27412-2-SEA
09/04/2016	Trejo vs Raja Trucking	TX	DC-15-04842
12/29/2016	Weston vs Sony Music	IL	2014 L 3672
01/19/2017	Snider vs ASF Intermodal, et al.	LA	2:14cv2132
05/31/2017	Malovanyi vs North American Pipe Corp.	WI	3:15-cv-00548
07/27/2017	Alston vs. E & D Trucking, et al.	IL	14 L 0973
08/22/2017	Asbate vs. Bossier Parish School Board, et al.	LA	146 , 133 - E
10/09/2017	Rogers vs Meeds and A-1 Chipseal	CO	2016CV34585
01/10/2018	Cantu vs WA Trucking, et al.	TX	2016-83353

08/02/2018	Amick vs California Fleet-Car, et al.	CA	CIVDS1703652
09/18/2018	Murray vs A&B Hardwood Flooring, et al.	IL	16 L 7570
10/10/2018	Turner, et al. vs Bowling Trucking, et al.	KY	16-CI00226
10/29/2018	Perez vs K&B	IL	1:17-cv-02610
11/19/2018	Hamilton vs Western Disposal	UT	170906735
04/09/2019	Murray vs A&B Hardwood Flooring, et al.	IL	16 L 7570
05/16/2019	Burciaga vs Hightower	NV	A-16-734774-C
06/27/2019	Powers vs Central Transport	OK	CJ-2017-03532



Dynamic Safety L.L.C.

Curriculum Vitae of Michael A. DiTallo

Employment History

- 09/03 to Present **Dynamic Safety, LLC** (formerly Dynamic Safety, Inc.), Consultant
Lake Zurich, Illinois
An independent consulting company offering services to industry, government, law enforcement, insurance companies, the legal field and the private sector. Services offered include accident reconstruction and vehicle systems analysis. Responsible for accident investigation, accident reconstruction, 2D and 3D computer accident reconstruction and simulation, vehicle inspections, crash testing, standards research, video and photographic analysis, technical reports, trial exhibit preparation, technical assistance and consulting.
- 12/00 to Present **Northwestern University Center for Public Safety** (formerly
1994 to 1996 Northwestern University Traffic Institute), Adjunct Faculty Member
Evanston, Illinois
Responsible for developing and presenting educational program in traffic accident investigation and reconstruction.

Classes taught include:

- Bosch CDR Technician Level 1
- Bosch CDR Technician Level 2
- Accident Investigation 1
- Accident Investigation 2
- Math & Physics for Traffic Crash Reconstruction
- Vehicle Dynamics
- Traffic Crash Reconstruction 1 (TCR 1)
- Traffic Crash Reconstruction 2 (TCR 2)
- Traffic Crash Reconstruction 3 (TCR 3)
- Traffic Crash Reconstruction Refresher



Employment History, continued

- Motorcycle Crash Reconstruction
- Heavy Vehicle Accident Reconstruction
- Hit & Run/Pedestrian Reconstruction
- Lamp Examination
- Total Stations Mapping/Surveying
- Preserving and Analyzing Information From Heavy Vehicle EDRs
- Traffic Crash Reconstruction for Engineers
- Specialized Accident Reconstruction (Ford and General Motors)
- Computerized Traffic Accident Reconstruction 1
- Introduction to EDCRASH (COMPTAR 1)
- Computerized Traffic Accident Reconstruction 3
- Introduction to EDSMAC (COMPTAR 3)
- Computerized Traffic Accident Reconstruction 4 (COMPTAR 4)
- Microcomputer Assisted Traffic Accident Reconstruction (MATAR)
- Traffic Management (*for the School of Police Staff and Command*)

10/17 to Present	Collision Safety Institute , Instructor <i>League City, Texas</i> Classes taught include: <ul style="list-style-type: none">• Advanced Pedestrian Crash Reconstruction
01/04 to 10/07	The Village of South Barrington Police Department , Part time Police Officer, Traffic Accident Reconstructionist <i>South Barrington, Illinois</i>
04/03 to 05/04	Island Lake Police Department , Part time Police Officer, Traffic Accident Reconstructionist <i>Island Lake, Illinois</i>
06/02 to 09/03	DiTallo & Associates , Principal Traffic Accident Reconstruction Consultant <i>Long Grove, Illinois</i>
12/00 to 06/02	Fricke Cooper Engineering, LLC , Principal Traffic Accident Reconstruction Consultant <i>Lake Zurich, Illinois</i>

Employment History, continued

- 11/96 to 12/00 **Northwestern University Traffic Institute**, Associate Director,
Accident Investigation Division
Evanston, Illinois
Consultant to law enforcement agencies, attorneys and other in the
area of traffic accident investigation and reconstruction.
Responsible for researching and writing technical publications.
Responsible for supervision and training of adjunct staff in the area
of traffic accident investigation and reconstruction. Responsible for
technical support for an independent study course called Algebra: A
refresher course for traffic accident investigation.
- 1996 to 12/00 **DiTallo & Associates**, Principal Traffic Accident Reconstruction
Consultant
Long Grove, Illinois
- 02/95 to 09/96 **Rampart Investigation**, Accident Reconstructionist Consultant
Campbell, California
- 11/90 to 11/96 **The City of Sunnyvale Department of Public Safety**,
Public Safety Officer
Sunnyvale, California
Traffic Officer, Major Accident Investigator, Field Training Officer,
Background Investigator, Department Instructor, Desk Officer
Also taught classes including:
- Accident Investigation
 - Accident Reconstruction
 - First Aid
 - CPR
 - Field Training
- 5/88 to 11/90 **The City of Newark Police Department**, Police Officer
Newark, CA
Traffic Officer, Major Accident Investigator, Department Instructor
Classes taught include:
- Accident Investigation
 - Accident Reconstruction
 - First Aid
 - CPR

Employment History, continued

1983 to 1988 **The City of Santa Clara Police Department**, Reserve Police Officer, Police Senior Cadet, Police Cadet
Santa Clara, CA

Continuing Education

"Traffic Crash Reconstruction Conference", IATAI, Springfield, Illinois, October 9-11, 2019

"Motorcycle Crash Reconstruction Seminar", IATAI, Springfield, Illinois, October 7-8, 2019

"2019 EDR Summit", Collision Safety Institute, Houston, Texas, March 4-6, 2019.

"Crash Data Retrieval Train the Trainer Course", Collision Safety Institute, Houston, Texas, March 3, 2019.

"2018 EDR Summit", Collision Safety Institute, Houston, Texas, March 5-7, 2018.

"Crash Data Retrieval Train the Trainer Course", Collision Safety Institute, Houston, Texas, March 4, 2018.

"2018 SATAI Winter Conference". Southwestern Association of Technical Accident Investigators, Inc., Glendale, Arizona, January 25-27, 2018.

"2017 ARC-CSI Crash Conference", Las Vegas, Nevada, September 2017.

"2017 CLM Midwest Conference", Chicago, Illinois, June 15-16, 2017.

"2017 EDR Summit", Collision Safety Institute, Houston, Texas, March 6-8, 2017.

"Crash Data Retrieval Train the Trainer Course", Collision Safety Institute, Houston, Texas, March 5, 2017.

"I.DRR User Forum 2017", Nashville, Tennessee, February 2017.

"2016 ARC-CSI Crash Conference", Las Vegas, Nevada, May 2016.

"Bosch CDR Tool Product Summit", Santa Barbara, California, March 7-9, 2016.

"Crash Data Retrieval Train the Trainer Course", Collision Safety Institute, Houston, Texas, January 24, 2016.

Continuing Education, continued

"2016 Crash Data Retrieval User's Summit", Collision Safety Institute, Houston, Texas, January 2016.

"FARO Laser Scanner Training and User Certification", FARO Technologies, Lake Mary, Florida, March 2015.

"FARO Focus 3D Scanner Certification Program", FARO Technologies, Lake Mary, Florida, March 2015.

"Crash Data Retrieval Train the Trainer Course", Collision Safety Institute, Houston, Texas, January 25, 2015.

"Acceleration and Vericom Familiarization", Vericom Computers, Inc., Lake Zurich, Illinois, November 2014.

"Laser Scanner LS", FARO, Los Angeles, California, October 2014.

"Video V-Box Training", Racelogic USA, Farmington Hills, Michigan, July 2014.

"2014 ARC-CSI Crash Conference", Las Vegas, Nevada June, 2014.

"Crash Data Retrieval Train the Trainer Course", Collision Safety Institute, Houston, Texas, January 26, 2014.

"Midwest Association of Technical Accident Investigators Annual Meeting and Training Seminar", Midwest Association of Technical Accident Investigators, Wisconsin Dells, Wisconsin, June 10-12, 2013.

"2013 Crash Data Retrieval User's Summit", Collision Safety Institute, Houston, Texas, January 2013.

"CA2RS 2012 Fall Conference", California Association of Accident Reconstruction Specialists, South Lake Tahoe, California, November 1-3, 2012.

"Bosch CDR Tool Product Summit", Plymouth, Michigan, October 23-25, 2012.

"26th Annual Traffic Crash Reconstruction Conference", Illinois Association of Technical Accident Investigators, East Peoria, Illinois, September 20, 2012.

"2012 ARC-CSI Crash Conference", Las Vegas, Nevada, June 5, 2012.

"Crash Data Retrieval Data Analyst" Northwestern University Center for Public Safety, Evanston, Illinois, May 2012.

Continuing Education, continued

"NSPII 2011 Advanced Insurance Fraud Seminar", Bloomingdale, Illinois, November 2011.

"Bosch CDR Tool Product Summit", Plymouth, Michigan, November 2011.

"Tractor-Trailer Driving Training", Sage Corporation, Billings, Montana, September 2011.

"2011 ARC-CSI Crash Conference", Las Vegas, Nevada, May 2011.

"Bendix Brake Training School", Bendix Spicer Foundation Brake LLC, Huntington, Indiana, April 2011.

"Advanced Crash Reconstruction Utilizing Human Factors Research", Northwestern University Center for Public Safety, Evanston, Illinois, March 2011.

"Crash Data Retrieval Trainer/Mentor Training", Collision Safety Institute, Houston, Texas, January 2011.

"2011 Crash Data Retrieval User's Summit", Collision Safety Institute, Houston, Texas, January 2011.

"Motorcycle Electronics and ERI Systems", Harley Davidson University, Milwaukee, Wisconsin, December 2010.

"Accessing and Interpreting Heavy Vehicle Event Data Recorders", SAE International, Cerritos, California, December 2010.

"Crash Reconstruction Utilizing Human Factors Research", Crash Safety Solutions, University of Massachusetts, Amherst, Massachusetts, October 2010.

"2008 Crash Data Retrieval User's Conference", Houston, Texas, January, 2008.

"Highway Vehicle Event Data Recorder Symposium", SAE International, Washington, D.C., September, 2007.

"MapScenes Upgrade to 2006 and Advanced Techniques Class", CSI Mapping Inc., Hoffman Estates, Illinois, December, 2006.

"Operator Computer Based In-Service Training Program for the Alco-Sensor FST", South Barrington Police Department, South Barrington, Illinois, November 10, 2006.

Continuing Education, continued

"Crash Data Retrieval (CDR) Data Analyst Certification Course", Collision Safety Institute, Overland Park, Kansas, July 2006

"Crash Data Retrieval (CDR) Technician Course", Collision Safety Institute, Overland Park, Kansas, July 11, 2006

"Insite 6 Familiarization", Cummins Virtual College, Hodgkins, Illinois, January 4, 2006

"Caterpillar Electronic Technician (ET) Training for Electronic Control Modules", Patten Power Systems Training Center, Elmhurst, Illinois, September 14, 2005

"DDEC Reports/Data Extraction", Detroit Diesel Training Center, Detroit, Michigan, August 2005

"Fats III Simulation Training", North East Multi-Regional Training, Inc., October 22, 2004.

"40 Hour Law for Police Course", Illinois Law Enforcement Training and Standards Board Executive Institute, October 2003

"Photomodeler Pro 5 Collision Investigation", Eos Systems Inc., July 2003

"2003 MapScenes Systems Technical Training for Instructors", MicroSurvey, June 20, 2003

"4 Hour Mandatory Firearms Training", North East Multi-Regional Training, Inc., May 2003

"Illinois Wireless Information Network Training", Illinois State Police, May 2003

"3D NURBS Modeling" Rhino, 2002

"Braking Performance of Heavy Commercial Vehicles", SAE, September 2001

"Crash Data Retrieval Systems", Vetronix Corporation, June 2001

HVE Forum (EDC), 2001

HVE Forum (EDC), 2000

"PhotoModeler Pro Basic Training Workshop", DeChant Consulting Services, September 1999

Continuing Education, continued

"Vehicle Lamp Examination Workshop", Midwestern Association of Forensic Scientists, June 1999

HVE Forum (EDC), 1999

Society of Automotive Engineers (SAE) Congress, 1999

"Commercial Vehicle Accident Investigation", J.J. Keller & Associates, March 1998

"Operation and Maintenance of Heavy Duty Vehicle Air Components and Brake Systems", Bendix, November 1997

"Blow Out School", Michelin Vehicle Dynamics, September 12, 1997

"Heavy Truck Roll-Over '97", Forensic Accident Reconstructionists of Oregon, July 1997

"EDC Simulations" Engineering Dynamics Corporation, January 1997

Society of Automotive Engineers (SAE) Congress, 1997

"Concept of Day/Night Visibility", Institute of Vehicular Safety, December 1996

"Computer Aided Accident Reconstruction / How to be a Successful Expert Witness / Restraint Systems / Perception of Headlamps: Pedestrians Point of View", Southwestern Association of Technical Accident Investigators, December 1996

"Pedestrian/Bicyclist Accident Reconstruction", Texas A & M University, April 1996

"Low Speed Impact Dynamics / Human Factors / PC Crash Presentation", Southwestern Association of Technical Accident Investigators, March 1996

"Moulage: The Art of Injury Simulation", Image Perspectives School of Moulage, March 1996

"Nikon Total Stationing", Northwestern University Traffic Institute, August 1995

"Computerized Traffic Accident Reconstruction Introduction to EDSMAC", Northwestern University Traffic Institute, March 1995

"Microcomputer-Assisted Traffic Accident Reconstruction-EDCRASH", Northwestern University Traffic Institute, March 1995

Continuing Education, continued

"Computerized Traffic Accident Reconstruction Introduction to EDCRASH", Northwestern University Traffic Institute, March 1995

"Computerized Traffic Accident Reconstruction Introduction to EDCAD", Northwestern University Traffic Institute, March 1995

"Heavy Vehicle Crash Reconstruction", Northwestern University Traffic Institute, February 1995

"Commercial Enforcement Training", California Highway Patrol, August 1994

"Traffic Accident Reconstruction II", Northwestern University Traffic Institute, March 1994

"Traffic Accident Reconstruction I", Northwestern University Traffic Institute, January 1994

"Vehicle Dynamics", Northwestern University Traffic Institute, December 1993

"Behavior Analysis Interview & Interrogation Techniques", Behavior Analysis Training Institute, August 1993

"Field Training Officer Seminar", San Jose Police Department, January 1993

"Background Investigation", Evergreen Valley College, January 1993

"Fireground Truck Work Strategy & Tactics", Waterbury Fire Department, July 1992

"Drug Alcohol Recognition Training", Evergreen Valley College, May 1992

"Sunnyvale Basic Fire Academy", City of Sunnyvale Department of Public Safety, March 1991

"Association Leadership Seminar", Peace Officer Research Association of California, July 1990

"Traffic Accident Reconstruction", Sacramento City College, June 1990

"Advanced Traffic Accident Investigation", Los Medanos College, May 1990

"Hazardous Materials for First Responders", Los Medanos College, March 1990

"Intermediate Traffic Accident Investigation", Los Medanos College, January 1990

Continuing Education, continued

"Radar Operator", Sacramento City College, January 1990

"Monadnock PR-24 Defensive Police Baton", Monadnock Lifetime Products, September 1989

"Street Survival '89 The Tactical Edge Seminar", Calibre Press, Inc., August 1989

"Street Survival '89 The Win Seminar", Calibre Press, Inc., August 1989

"Telecommunications Training – Practitioner", State of California Department of Justice Training Center, May 1989

"Driver Training", Los Medanos College, November 1988

"Automatic Pistol Transition Training", Newark Police Department, October 1988

"Chemical Agents", Evergreen Valley College, September 1988

"Traffic Accident Investigation", Evergreen Valley College, September 1988

"Basic Police Academy", Evergreen Valley College, September 1988

"ABC Laws", State of California Department of Alcoholic Beverage Control, June 1988

"Narcotic Enforcement & Influence", Gavilan College, December 1986

"C.J.T.C. Defensive Driving", San Jose City College, September 1986

"Reserve Level I", San Jose City College, February 1986

"Officer Safety and Survival", Advanced Officer Training Systems, October 1985

"ABC Laws", State of California Department of Alcoholic Beverage Control, September 1985

"Tear Gas Training for Citizens", Santa Clara Police Department, December 1984

"Reserve Level II", San Jose City College, June 1985

"Reserve Officer Training Level III", San Jose City College, October 1984

Certifications and Registrations

Certified FARO Laser Scanner Trainer, FARO, March 2015

Certified FARO Focus 3D Laser Scanner Operator, FARO, March 2015

Certified CDR System Operator, Collision Safety Institute, Evanston, Illinois, May 2012

Bosch CDR Trainer/Mentor, Collision Safety Institute, January 2011

Law Enforcement Agencies Data System Less Than Full Access Computer Based Training Course, Illinois State Police, August 6, 2006

Certified Child Safety Seat Technician. Certification # T618613, Certification Date April 2006

Certified Crash Reconstructionist Specialist, Certification # PTB03351, State of Illinois, March 8, 2004

ACTAR Accredited Traffic Accident Reconstructionist, Registration # 1405, May 30, 2004

Law Enforcement Agencies Data System Less Than Full Access Recertification Computer Based Training Course, Illinois State Police, April 9, 2004

Registered Flagger (Illinois), American Traffic Safety Services Association, February 11, 2004

Illinois Law Enforcement Training and Standards Board, Police Training and Standards Waiver, January 2004

Hazardous Materials *First Responder Operational, Certificate # OR44438, The Governor's Office of Emergency Services California Specialized Training Institute, January 13, 1993

Intermediate Certificate, Commission on Peace Officers Standards and Training, July 14, 1992

Fire Fighter 1 Certification, Certification # 023677, California State Fire Marshal, June 9, 1992

Apparatus Driver/Pump Operator Certificate, Sunnyvale Department of Public Safety, March 8, 1991

Certified First Aid & CPR Instructor, Police Officers Standards and Training, April 1990

Certifications and Registrations, continued

Basic Certificate, Commission on Peace Officers Standards and Training,
November 7, 1989

CMI Intoxilyzer, Santa Clara County District Attorney Laboratory of Criminalistics
Intoxilyzer 4011 & 5000, Certification # SA1807, California Highway Patrol,
December 1986

Instructor Basic Life Support, American Red Cross

Instructor Community CPR, American Red Cross

Standard First Aid, American Red Cross

Basic Life Support, American Red Cross

Licenses

- Illinois Class D & Class M
- Montana Class A Commercial Driver License (CDL) with Motorcycle, Tanker, Double/Triple, and Airbrake Endorsements (through April 2012)
- California Class B & M (through 1996)

Professional Associations

Society of Automotive Engineers (SAE)
Technical Paper Reviewer

American Society for Testing and Materials (ASTM)
Technical Paper Reviewer

National Association of Professional Reconstruction Specialists

Southwestern Association of Technical Accident Investigators (SATAI)

Illinois Association of Technical Accident Investigators (IATAI)

Society of Accident Reconstructionists

Professional Associations, continued

Forensic Accident Reconstructionists of Oregon (FARO)

California Association of Accident Reconstruction Specialists (CA2RS)

National Society of Professional Insurance Investigators (NSPII)

Midwest Association of Technical Accident Investigators (MATAI)

Presentations

Guest Speaker at the 2019 IATAI Motorcycle Crash Reconstruction Seminar, *Rotational Momentum Analysis for Motorcycle Crash Reconstruction*, October 2019, Springfield, Illinois

Guest Speaker at The LEGACY International Corporation, *Field Exercises in Dynamic Testing, Nighttime Recognition Testing, Foundation Brake Systems, DOT Levels of Inspection, Out of Service Criteria, ECM & Other EDRs*, July 2019, Billings, Montana

Guest Speaker at The LEGACY International Corporation, *Field Exercises in Dynamic Testing, Nighttime Recognition Testing, Foundation Brake Systems, DOT Levels of Inspection, Out of Service Criteria, ECM & Other EDRs*, May 2019, Billings, Montana

Guest Speaker at 2019 EDR Summit, *A Generational Review of Collision Mitigation Systems in Heavy Vehicles*, March 2019, Houston, Texas

Guest Speaker at Florida Justice Association John Romano's Workhorse Seminar, *The Anatomy of a Trucking Case: Foundational Basics on How to Handle, Litigate and Try Trucking Cases*, Spoke on Initial Crash Investigation Processes from a Crash Reconstructionists Perspective and EDR, February 19 – 22, 2019, Orlando, Florida

Guest Speaker at Illinois Association of Technical Accident Investigators (IATAI) 32nd Annual Traffic Crash Reconstruction Conference, *Motorcycle Crash Studies and Reconstruction Principles*, September 28, 2018, Springfield, Illinois

Guest Speaker at CTS Expert Seminar 2018, *Recent Testing, Instrumentation and Objectives for Motorcycle to Vehicle, Motorcycle to Barrier and Vehicle to Pedestrian Testing*, September 2018, Munster, Germany.

Guest Speaker at The LEGACY International Corporation, *Field Exercises in Dynamic Testing, Nighttime Recognition Testing, Foundation Brake Systems, DOT Levels of Inspection, Out of Service Criteria, ECM & Other EDRs*, August 2018, Billings, Montana

Presentations, continued

Guest Speaker at 2018 Midwest Association of Technical Accident Investigators Conference, *Motorcycle Reconstruction Techniques*, June 18, 2018, Des Moines, Iowa

Guest Speaker at 2017 EDR Summit, *Subaru EDR Evidence: Software Traits and Real-World Examples*, March 2018, Houston, Texas

Guest Speaker at Southwestern Association of Technical Accident Investigators, Inc. 2018 Winter Conference, *Pedestrian Collision Reconstruction*, January 26, 2018, Glendale, Arizona

Guest Speaker at ARC CSI Crash Conference, *Pedestrian Crash Reconstruction Methodologies*, September 2017, Las Vegas, Nevada

Guest Speaker at The LEGACY International Corporation, *Field Exercises in Dynamic Testing, Foundation Brake Systems, DOT Levels of Inspection, Out of Service Criteria, ECM & Other EDRs*, September 2017, Billings, Montana

Guest Speaker at the DuPage County Accident Reconstruction Team (DuCART) Quarterly Training, *Heavy Vehicle Crash Reconstruction*, June 15, 2016, Carol Stream, Illinois

Guest Speaker at the 11th Annual New England Fraud Expo, *An Overview of Heavy Truck Event Data Recorders in Crash Investigation and Reconstruction Today and in the Future*, June 7 & 8, 2016, Foxborough, Massachusetts

Guest Speaker at MAPFRE USA, *The Process of Crash Investigation and Reconstruction*, June, 3, 2016, Webster, Massachusetts

Guest Speaker at the 2016 ARC-CSI Crash Conference, *Team Leader Motorcycle Crash Test Team*, May 2016, Las Vegas, Nevada

Guest Speaker at the 2016 ARC-CSI Crash Conference, *Motorcycle Crash Reconstruction Tied to Crash Testing*, May 2016, Las Vegas, Nevada

Guest Speaker at The Bar Association of Metropolitan St. Louis, *Black Boxes and Vehicles: What You Need to Know*, March 30, 2016, St. Louis, Missouri

Guest Speaker at 2016 SATAI Spring Conference, *FARO 3D Laser Scanning and its Uses in Crash Reconstruction (including a case study)*, March 2016, Las Vegas, Nevada

Guest Speaker at 2016 SATAI Spring Conference, *Update on HVEDR – Paccar and Hino Engines*, March 2016, Las Vegas, Nevada

Presentations, continued

Guest Speaker at 2016 SATAI Spring Conference, *Review of Conservation of Energy, Speed from Damage, Delta-V, and Force Balance*, March 2016, Las Vegas, Nevada

Guest Speaker at 2016 CDR User's Summit, *Case Study: Data from a Car-to-Motorcycle Crash Test Highlighting Complementary Reconstruction Techniques and Applications*, January 2016, Houston, Texas

Guest Speaker at 2016 CDR User's Summit, *Application of Crash Data from Non-Supported Ford Vehicles*, January 2016, Houston, Texas

Guest speaker at Lake County Major Crash Assistance Team training, June 10, 2015, Lake Zurich Police Department, Lake Zurich, Illinois

Assisted the planning, organization, training, instrumentation and running of a series of crash tests for Lake County Major Crash Assistance Team (MCAT). Also was able to be a crash test driver, experiencing that of a driver in a crash. September 4-5, 2014, Grayslake, Illinois

Guest Speaker at 2014 ARC_CSI Crash Conference, *HVEDR: New Engines, New Software, New Coverage*, June 3, 2014, Las Vegas, Nevada

Guest Speaker at 2013 Midwest Association of Technical Accident Investigators, *Heavy Truck Crash Reconstruction*, June 12, 2013, Wisconsin Dells, Wisconsin

Guest Speaker at 2013 Midwest Association of Technical Accident Investigators, *Advanced Energy Analysis (Force Balance)*, June 11, 2013, Wisconsin Dells, Wisconsin

Guest Speaker at 2013 ARC-CSI Crash Conference, *Conservation of Energy*, May 14, 2013, Las Vegas, Nevada

Guest Speaker at 2013 CDR User's Summit, *An Examination of Data from "Cleared" Airbag Control Modules*, January 23, 2012, Houston, Texas

Guest Speaker at 2012 Bosch CDR Tool Product Summit, October 23-25, 2012, Plymouth, Michigan

Guest Speaker at Illinois Association of Technical Accident Investigators 26th Annual Traffic Crash Reconstruction Conference, *Advanced Energy in Crash Reconstruction*, September 20, 2012, East Peoria, Illinois

Guest Speaker at American Association for Justice 2012 Annual Convention, *3 D Laser Scanning – A Primer*, July 29, 2012, Chicago, Illinois

Presentations, continued

Guest Speaker at American Association for Justice 2012 Annual Convention, *Vehicle EDR Technology and Data Application*, July 29, 2012, Chicago, Illinois

Guest Speaker at 2012 ARC-CSI Crash Conference, *Closing Velocity Analysis*, June 5, 2012, Las Vegas, Nevada

Guest Speaker at NSPII Nashville Chapter, *Vehicle EDR Technology and Data Application*, December 6, 2011, Nashville, Tennessee

Guest Speaker at IASIU, *Vehicle "Black Box" Technology for Insurance Investigators*, November 18, 2011, Downers Grove, Illinois

Guest Speaker at NSPII 2011 Advanced Insurance Fraud Seminar, *Vehicle EDR Technology and Data Application*, November 14-15, 2011, Bloomingdale, Illinois

Guest Speaker at 2011 Bosch CDR Tool Product Summit, November 7-8, 2011, Plymouth, Michigan

Vehicle Event Data Recorder (EDR) Technology and Data Application-Using "Black Box" data in your investigations, Dynamic Safety LLC, October 12, 2011, Rosemont, Illinois

Vehicle Event Data Recorder (EDR) Technology and Data Application-Using "Black Box" data in your investigations, Dynamic Safety LLC, August 11, 2011, Rosemont, Illinois

Guest Speaker at Commercial Auto Symposium, *Vehicle Event Data Recorder (EDR) Technology and Data Application*, July 14-15, 2011, HelpPoint Claims Services by Farmers, Scottsdale, Arizona

Guest Speaker at Commercial Auto Symposium, *Reconstruction – Simulation with Case Examples*, July 14-15, 2011, HelpPoint Claims Services by Farmers, Scottsdale, Arizona

Vehicle Event Data Recorder (EDR) Technology and Data Application-Using "Black Box" data in your investigations, Dynamic Safety LLC, June 17, 2011, Rosemont, Illinois

Guest Speaker at 2011 ARC-CSI Crash Conference, *The Relationships of Momentum, PDOF and Delta-V*, May 25, 2011, Las Vegas, Nevada

New York Statewide Accident Reconstruction Society (NYSTARS) Accident Reconstruction Refresher, March 14-15, 2011, New York State Police Academy, Albany, New York

Presentations, continued

Guest speaker at Lake County Major Crash Assistance Team training, February 26, 2010, Lake Zurich Police Department, Lake Zurich, Illinois

Guest Speaker at the Interstate Trucking Litigation Group Fall 2008 Seminar, *Accident Reconstruction, Heavy Vehicle Downloads*, October 3, 2008, Chicago, Illinois

Guest speaker at Safeco Insurance, *The Process of Accident Investigation and Reconstruction*, June 27, 2007, Hoffman Estates, Illinois

Guest speaker at Continental Western Group, *At Scene Photography and Measurements*, May 23, 2007, Des Moines, Iowa

Guest speaker at The Greater Des Moines Claims Managers Council Annual Fall Seminar, October 2006, Des Moines, Iowa

Momentum and Energy Refresher, Indiana Association of Certified Accident Investigators, September 20, 2006.

Guest speaker at Lake County Major Crash Assistance Team training, June 27, 2006, Buffalo Grove Police Department, Buffalo Grove, Illinois

Guest speaker at 40th Annual Illinois Traffic Court Conference, June 2, 2005, Bradley University, Peoria, Illinois

Guest speaker at Quad Cities Claims Association 2004 Spring Seminar, April 22, 2004, Davenport, Iowa

Guest speaker at 2004 Continental Western Group Panel Counsel Meeting, March 31, 2004, St. Louis, Missouri

Guest speaker at The Greater Des Moines Claims Managers Council Annual Fall Seminar, September 2003, Des Moines, Iowa

Guest speaker at 2001 TIDA (Trucking Industry Defense Association) Ninth Annual Industry Seminar, October 10, 2001, Atlanta, Georgia

DUI Presentation, Northwestern University Traffic Institute, 1999

DUI Presentation, Northwestern University Traffic Institute, 1998

Crash Test Team Member/Organizer

Planned, organized and managed the running of motorcycle and car-to-car crash testing at the Illinois Association of Technical Accident Investigators Motorcycle Crash Testing Seminar and Main Conference, October 7-11, 2019, Springfield, Illinois.

Assisted in school bus crash tests at the 2019 Midwest Association of Technical Accident Investigators Conference, June 3-5, 2019, Cedar Rapids, Iowa.

Crash Team Member for Motorcycle and Pedestrian Crash Testing at the CTS Expert Seminar 2018, September 2018, Munster, Germany.

Assisted in the planning, organization and running of motorcycle crash tests at the 2018 Midwest Association of Technical Accident Investigators Conference, June 18-20, 2018, Des Moines, Iowa.

Led the planning, organization, training, instrumentation and running of a series of forward projection pedestrian crash tests at the Illinois Association of Technical Accident Investigators Pedestrian Crash Testing, June 1-2, 2018, Lockport, Illinois.

Participated in Southwestern Association of Technical Accident Investigator's 2018 Winter Conference as a crash team member performing low speed and pedestrian crash tests, January 25-27, 2018, Glendale, Arizona.

Planned, organized and managed 2 bicycle crash tests and 2 pedestrian crash tests with Collision Safety Institute, October 16-20, 2017, Montreal, Canada.

Planned, organized and managed 17 car-pedestrian crash tests at the 2017 ARC-CSI Crash Conference, September 18-21, 2017, Las Vegas, Nevada.

Planned, organized and managed 27 motorcycle crash tests at the 2016 ARC-CSI Crash Conference, May 23-26, 2016, Las Vegas, Nevada.

Assisted the planning, organization, training, instrumentation and running of a series of crash tests for Lake County Major Crash Assistance Team (MCAT). Also was able to be a crash test driver, experiencing that of a driver in a crash. September 4-5, 2014, Grayslake, Illinois.

Publications

"The Continued Evolution of Event Data Recorders in Crash Reconstruction", The Key – The Quarterly Journal of the Northwestern Center for Public Safety, May 2018

Publications, continued

"Evaluation of the Mide Slam Stick as a Low-Cost Accelerometer and Data Acquisition System for Vehicle Skid Testing", Collision Magazine, August 2017

"3D Laser Scanners in Crash Testing", Collision Magazine, August 2017

"Motorcycle Center of Gravity Data- Methodology and Reference 2016 ARC-CSI Motorcycle Crash Team Pre-Crash Testing", Collision Magazine, August 2017

"3 Different Methodologies for Determining the Drag Factor for Motorcycles Sliding on Their Sides", Collision Magazine, August 2017

"Evaluation of the MIDE Slam Stick X as a Low-Cost Accelerometer and Data Acquisition System for Vehicle Crash Testing", Collision Magazine, February 2017

"Motorcycle Crash Testing: Advanced Boot Camp was Born", Collision Magazine, February 2017

"A Team Approach to Crash Investigation", Collision Magazine, December 2015

"Vehicle Undercarriage Scanning For Use In Crash Reconstruction", FARO Case Study, FARO Technologies, Inc., May 2015

Traffic Collision Investigation, 2014, Northwestern University Center for Public Safety

Co-Authored chapter with Brian J. Queiser and Calvin P. McClain, Jr. "Tire Examination After Motor Vehicle Collisions"

Traffic Crash Reconstruction 2nd Edition, 2010, Northwestern University Center for Public Safety Co-Authored chapter "Use of Event Data Recorders in Commercial Vehicle Crash Reconstruction"

Traffic Crash Reconstruction 2nd Edition, 2010, Northwestern University Center for Public Safety Co-Authored chapter "Use of Event Data Recorders in Light Duty Vehicle Crash Reconstruction"

Traffic Collision Investigation, 2001, Northwestern University Center for Public Safety Co-Authored chapter with Calvin P. McClain, Jr. "Tire Examination after Motor Vehicle Collisions"

Awards and Commendations

"Honorable Service", South Barrington Police Department, March 2005

"Excellent Police Duty", South Barrington Police Department, June 2004

"Certificate of Educational Achievement", South Barrington Police Department,
June 2004

(10/2019)

STATE OF SOUTH DAKOTA)
: SS
COUNTY OF LINCOLN)

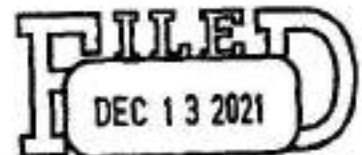
IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

JUSTIN HAMER and KIM HAMER, Plaintiffs, vs. PAUL DUFFY and CORNERSTONE POURED FOUNDATIONS, INC., Defendants.	41CIV20-000243 ORDER GRANTING DEFENDANTS' MOTION TO EXCLUDE TESTIMONY OF PLAINTIFFS' EXPERT WITNESSES, ADAM GRILL AND MICHAEL DITALLO, PURSUANT TO SDCL 19-19-702
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On December 13, 2021, the Court conducted a hearing regarding Defendants Paul Duffy and Cornerstone Poured Foundations, Inc.'s Motion to Exclude the Testimony of Plaintiffs' Expert Witnesses, Adam Grill and Michael DiTallo, Pursuant to SDCL 19-19-702. The hearing was conducted at the Minnehaha County Courthouse for the convenience of the Court and the parties. Plaintiffs were represented by their counsel, Scott Hoy. Defendants were represented by their counsel, Mark Arndt.

The Court, after considering the evidence and arguments of counsel, including the Briefs of both parties, hereby GRANTS Defendants' Motion.

Pursuant to SDCL 19-19-702, and exercising the Court's gate-keeping function regarding any parties' purported expert testimony, the Court hereby finds, based upon the facts of the auto accident that is the subject of this litigation, that Plaintiffs have not met their burden of proof that the purported testimony of Plaintiffs' experts Adam Grill and Michael DiTallo would provide any technical, scientific or specialized knowledge that would assist the trier of fact in determining which party was liable/at fault for causing the auto accident.



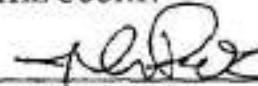
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Lincoln County, S.D.
Clerk Circuit Court

Therefore, this Court ORDERS that the purported testimony of Plaintiffs' experts, Adam Grill and Michael DiTallo will be excluded at Trial.

Dated this 13 day of December, 2021.

BY THE COURT:



Honorable John Pekas
Circuit Court Judge

ATTEST:

BRITTAN ANDERSON
Clerk of Courts

By 
Deputy Clerk

(SEAL)



STATE OF SOUTH DAKOTA)
: SS
COUNTY OF LINCOLN)

IN CIRCUIT COURT
SECOND JUDICIAL CIRCUIT

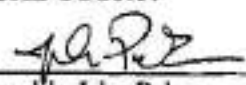
JUSTIN HAMER and KIM HAMER, Plaintiffs, vs. PAUL DUFFY and CORNERSTONE POURED FOUNDATIONS, INC., Defendants.	41 CIV20-000243 ORDER DENYING PLAINTIFFS' MOTION FOR RECONSIDERATION OF ORDER EXCLUDING TRIAL TESTIMONY OF PLAINTIFFS' EXPERT WITNESSES, ADAM GRILL AND MICHAEL DITALLO
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On November 1, 2022, this Court conducted a hearing regarding Plaintiffs' Motion for Reconsideration of the Court's prior Order excluding the trial testimony of Plaintiffs' expert witnesses, Adam Grill and Michael DiTallo, pursuant to SDCL 19-19-702. The hearing was conducted at the Minnehaha County Courthouse for the convenience of the Court and the parties. Plaintiffs were represented by their counsel, Scott Hoy and James Hoy. Defendants were represented by their counsel, Mark Arndt.

The Court, after considering the arguments of counsel, including the Briefs of both parties, hereby denies Plaintiffs' Motion. The Court's December 13, 2021 Order Granting Defendants' Motion to Exclude Testimony of Plaintiffs' Expert Witnesses Adam Grill and Michael DiTallo, Pursuant to SDCL 19-19-702 remains as the Order of the Court.

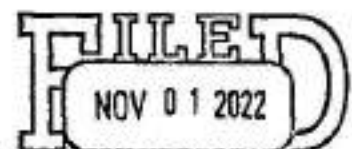
Dated this 1 day of November, 2022.

BY THE COURT:


Honorable John Pekas
Circuit Court Judge

BRITTAN ANDERSON
ATTEST:
Clerk of Courts

By 
Deputy Clerk
(SEAL)



0089 Lincoln County, S.D.
Clerk Circuit Court

PLAINTIFFS' REQUESTED JURY INSTRUCTION NO. 35

The Federal Motor Carrier Safety Regulations also impose duties and responsibilities on motor carriers and commercial vehicle drivers.

Code of Federal Regulations 49 C.F.R. § 391.11(a) provides:

A person shall not drive a commercial motor vehicle unless he/she is qualified to drive a commercial motor vehicle. A motor carrier shall not require or permit a person to drive a commercial motor vehicle unless that person is qualified to drive a commercial motor vehicle.

Code of Federal Regulations 49 C.F.R. § 391.11(b)(3) provides:

A person is qualified to drive a commercial motor vehicle if he can, by reason of experience, training, or both, safely operate the type of commercial motor vehicle he drives.

Code of Federal Regulations 49 C.F.R. § 391.23(a)(1) provides:

A motor carrier, for each driver it employs, shall make an inquiry, within 30 days of the date the driver's employment begins, to each State where the driver held or holds a motor vehicle operator's license or permit during the preceding 3 years to obtain that driver's motor vehicle record.

Code of Federal Regulations 49 C.F.R. § 391.25(a) provides:

Each motor carrier shall, at least once every 12 months, make an inquiry to obtain the motor vehicle record of each driver it employs, covering at least the preceding 12 months, to the appropriate agency of every State in which the driver held a commercial motor vehicle operator's license or permit during the time period.

Code of Federal Regulations 49 C.F.R. § 391.27(a) provides:

Each motor carrier shall, at least once every 12 months, require each driver it employs to prepare and furnish it with a list of all violations of motor vehicle traffic laws and ordinances (other than violations involving only parking) of which the driver has been convicted...during the preceding 12 months.

Code of Federal Regulations 49 C.F.R. § 391.25(b) provides:

Each motor carrier shall, at least once every 12 months, review the motor vehicle record of each driver it employs to determine whether that driver meets minimum requirements for safe driving or is disqualified to drive a commercial motor vehicle....

Code of Federal Regulations 49 C.F.R. § 391.25(b)(2) provides:

The motor carrier must consider the driver's accident record and any evidence that the driver has violated laws governing the operation of motor vehicles, and must give great weight to violations, such as speeding, reckless driving, and operating while under the influence of alcohol or drugs, that indicate that the driver has exhibited a disregard for the safety of the public.

Code of Federal Regulations 49 C.F.R. § 392.1 provides:

Every motor carrier, its officers, agents, representatives, and employees responsible for the management, maintenance, operation, or driving of commercial motor vehicles, or the hiring, supervising, training, assigning or dispatching of drivers, shall be instructed in and comply with the rules of [Part 392 – Driving of Commercial Motor Vehicles].

Code of Federal Regulations 49 C.F.R. § 392.2 provides:

Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. However, if a regulation of the Federal Motor Carrier Safety Administration imposes a higher standard of care than that law, ordinance or regulation, the Federal Motor Carrier Safety Administration regulation must be complied with.

Code of Federal Regulations 49 C.F.R. § 392.3 provides:

No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver's ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, as to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.

These federal regulations set the standard of care of a reasonable motor carrier and commercial vehicle driver. If you find that one or both of the defendants violated the regulations, such violation is negligence.

Source: SDPJI 20-200-10; 49 C.F.R. §§ 391.11(a); 391.11(b)(3); 391.23(a)(1); 391.25(a); 391.27(a); 391.25(b); 391.25(b)(2); 392.1; 392.2; 49 C.F.R. § 392.3

CHAPTER 264 (HB 1014)

The application of the intrastate exemption for certain commercial motor vehicles revised.

ENTITLED, An Act to revise certain provisions regarding the application of the intrastate exemption for certain commercial vehicles from the federal motor carrier regulations.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That § 49-28A-3 be amended to read:

49-28A-3. The state hereby adopts Title 49 of the Code of Federal Regulations, subtitle B, chapter I, subchapter A, part 107 (subparts F and G only) and subchapter C, parts 171 to 180, inclusive, as amended through January 1, 2017, and Title 49 of the Code of Federal Regulations, subtitle B, chapter III, subchapter B, part 387 and parts 390 to 397, inclusive, as amended through January 1, 2017, with the following modifications:

- (1) All references to interstate operations shall also include intrastate operations except that drivers and motor carriers operating intrastate vehicles and combinations of vehicles with three ~~two~~ axles or less or with a gross vehicle weight rating of not more than twenty-six thousand pounds which are not used to transport hazardous materials requiring placarding under part 177, or designed to transport more than fifteen passengers, including the driver, are not subject to parts 390-397;
- (2) For the purposes of part 391.11(b)(1), a driver shall be at least twenty-one years old if engaged in interstate commerce, or transporting hazardous material of a type or quantity requiring placarding under part 177, or operating a vehicle designed to transport more than fifteen passengers, including the driver. All other drivers shall be at least eighteen years of age;
- (3) Unless required by an employer to be medically certified under Title 49 of the Code of Federal Regulations, intrastate drivers are exempt from the physical requirements of part 391.41.

Any violation of part 387 and parts 390 to 396, inclusive, the motor carrier safety requirements governing the qualifications of drivers, driving of motor vehicles, parts and accessories necessary for safe operation, notification and reporting of accidents, assistance with investigations and special studies, hours of service of drivers, inspection, repair, and maintenance is a Class 2 misdemeanor. Any violation of the hazardous materials regulations pertaining to registration of cargo tank motor vehicles, registration of persons who offer or transport hazardous materials, general information, regulations and definitions, hazardous materials tables, hazardous materials communication regulations, and test and inspection marking requirements found in parts 107 (subparts F and G only), 171, 172, and 178 to 180, inclusive, is a Class 2 misdemeanor. Any violation of the hazardous materials regulations pertaining to packaging, prohibited shipments, loading and unloading, segregation and separation, retesting and inspection of cargo tanks, and other carriage by regulations found in parts 173 to 180, inclusive, or violation of the driving and parking rules in part 397, is a Class 1 misdemeanor.

Signed February 14, 2018

**IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA**

No. 30776

JUSTIN HAMER and KIM HAMER,

Plaintiffs/Appellants,

vs.

PAUL DUFFY and CORNERSTONE POURED FOUNDATIONS, INC.,

Defendants/Appellees.

Appeal from the Circuit Court
Second Judicial Circuit
Lincoln County, South Dakota

The Honorable John R. Pekas, Presiding Judge

**BRIEF OF APPELLEES PAUL DUFFY AND
CORNERSTONE POURED FOUNDATIONS, INC.**

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JURISDICTIONAL STATEMENT

The circuit court entered a Judgment on July 1, 2024, following a jury trial and verdict dated May 23, 2024, which determined that Plaintiff Justin Hamer's contributory negligence was more than slight, and awarded the Plaintiffs ("the Hamers") no damages. A Notice of Entry of Judgment was entered on July 1, 2024. The Hamers filed a Notice of Appeal on July 30, 2024. This Court has jurisdiction over this appeal pursuant to SDCL 15-26A-3(1).

STATEMENT OF THE ISSUES

I. Whether the Circuit Court Abused its Discretion by Granting Defendants' Motion to Exclude Plaintiffs' Expert Witnesses, Adam Grill and Michael DiTallo.

The circuit court did not abuse its discretion by granting Defendants' Motion to Exclude Plaintiffs' Expert Witnesses, Adam Grill ("Grill") and Michael DiTallo ("DiTallo"). Given the facts of the car accident that is the subject of this litigation, the Hamers failed to meet their burden of proof that Grill and DiTallo's purported expert testimonies would have been relevant under SDCL 19-19-702(a), i.e., would have provided any technical, scientific, or specialized knowledge that would have assisted the jury in determining which party was liable, or at fault, for causing the subject auto accident, and therefore, the Hamers' purported experts were properly excluded by the circuit court per SDCL 19-19-702.

- SDCL 19-19-702
- *Burley v. Kytac Innovative Sports Equip., Inc.*, 2007 S.D. 82, 737 N.W.2d 397
- *Hanson v. Big Stone Therapies, Inc.*, 2018 S.D. 60, 916 N.W.2d 151
- *Morin v. Chicago & Nw. Ry. Sys.*, 209 N.W.2d 895 (S.D. 1973)

II. Whether the Circuit Court Abused its Discretion by Denying Plaintiffs' Motion to Amend Complaint.

The circuit court did not abuse its discretion by denying Plaintiffs' Motion to Amend Complaint. The Hamers' Motion to Amend Complaint was filed on November 22, 2022, which was a full year after the November 15, 2021, discovery deadline provided in the Court's Scheduling Order, after the June 16, 2022, Pre-Trial Conference held by the Court, after two prior jury trial dates had been set and continued, and fourteen (14) days prior to the then-scheduled jury trial on December 6, 2022.

- SDCL 15-6-15(a)
- *Ries v. JM Custom Homes, LLC*, 2022 S.D. 52, 980 N.W.2d 217
- *Fodness v. City of Sioux Falls*, 2020 S.D. 43, 947 N.W.2d 619
- *Highmark Fed. Credit Union v. Hunter*, 2012 S.D. 37, 814 N.W.2d 413

III. Whether the Circuit Court Abused its Discretion by Declining to Give Plaintiffs' Requested Jury Instruction Regarding the Federal Motor Carrier Safety Regulations.

The circuit court did not abuse its discretion by denying Plaintiffs' requested jury instruction regarding the Federal Motor Carrier Safety Regulations ("FMCSR"). The Hamers' original Complaint, which remained in place during trial, did not allege FMCSR violations. The circuit court properly instructed the jury regarding South Dakota law related to the traffic control devices that were applicable at the time of the accident. Further, the FMCSR does not create a private cause of action for personal injury claims.

- *Highmark Fed. Credit Union v. Hunter*, 2012 S.D. 37, 814 N.W.2d 413
- *Frye-Byington v. Rapid City Med. Ctr., LLP*, 2021 S.D. 3, 954 N.W.2d 314
- *Young v. Oury*, 2013 S.D. 7, 827 N.W.2d 561

STATEMENT OF THE CASE

Plaintiff Justin Hamer ("Hamer") alleged personal injuries as the result of a pickup truck (driven by Hamer) and semi-truck (driven by Defendant Paul Duffy) ("Duffy") accident. Plaintiff Kim Hamer, the wife of Hamer, made a claim for loss of consortium. (Collectively, the Plaintiffs will be referred to as "the Hamers".) (Collectively, the Defendants will be referred to as "Cornerstone".)

The accident occurred at the Interstate 29 underpass near the Tea, South Dakota exit. Hamer and Duffy both arrived at the underpass near the same time. The intersection was temporarily controlled by flashing red lights. Hamer and Duffy both claim to have arrived at the flashing red light prior to the other, and therefore, dispute which driver had the right-of-way. Both vehicles proceeded and collided near the middle of the intersection, but slightly closer to Hamer's side of the intersection. Law enforcement investigated, but was unable to determine which party had the right-of-way. After hearing the testimony of Hamer, Duffy, and law enforcement, the jury determined that both drivers were negligent, but that Hamer's contributory negligence was greater than slight, and therefore, awarded no damages to the Hamers.

STATEMENT OF FACTS

This accident occurred on April 8, 2019, on Highway 271 under the Interstate 29 overpass near Tea, South Dakota. (Accident Report, R. 961-967.)¹ Plaintiff Justin Hamer ("Hamer"), who was driving a pickup truck, and Defendant Paul Duffy ("Duffy"), who was driving a "Cornerstone Poured Foundations" semi-truck, collided near the middle of the intersection, but slightly closer to Hamer's side of the intersection. *Id.* At

¹ Citations to "R. [page]" refer to the applicable page number in the Certified Record.

the time of the accident, the lights at the intersection were all flashing red. *Id.* Hamer and Duffy dispute who had the right-of-way at the intersection. *Id.* Law enforcement was not able to determine which party had the right-of-way, as law enforcement could not determine which vehicle arrived at the intersection first. *Id.* Neither party was issued a traffic citation. *Id.*

At trial, Duffy, an experienced semi-truck driver and Commercial Driver's License holder, testified:

Q: Do you believe that you had the right of way at the intersection prior to the crash?

A: Yes, I believe I had the right of way. If I thought I did not have the right away, I would not have proceeded through the intersection.

Q: I know it was five years ago. Do you recall what all of the other vehicles were doing at the intersection at the time of the accident?

A: I don't recall.

(Trial Transcript ("TT"), Day 1, pp. 68-69, R. 1334-1335.)

After speaking with both Hamer and Duffy at the scene, Lincoln County Deputy Sheriff Derek Malone ("Deputy Malone") was unable to conclude which vehicle arrived at the intersection first. (Accident Report, R. 961-967.) On the third day of the trial, Deputy Malone's trial deposition was played for the jury. (TT Day 3, p. 56, R 1617.) That trial deposition testimony included the following:

Q: (by defense counsel Arndt) All right. Tell the jury what you recall as far as what steps you took to investigate this accident.

A: (by Deputy Derek Malone) Yes. I would have responded from the location I was. I would have drove there in my Lincoln County Sheriff's Office vehicle. Upon arriving at the scene -- do you want me to tell you what happened or how I would have responded?

Q: Yeah. Both, if you can, at the same time. And if I need to ask you for clarification, I'll do that.

A: Absolutely. To the best of my knowledge, when I arrived on scene, one of the first things we want to do is make sure that there are no serious injuries involved. In this particular incident, this intersection has a stoplight at it that's normally just working as normal. However, when I arrived on scene, I noticed that these lights were malfunctioning, so the intersection was -- the lights were blinking red, so it wasn't typical of that intersection. I saw the vehicles pushed up onto the sidewalk. I talked to both parties. The first party I spoke with, I believe, was Paul Duffy and I explained -- had him explain to me what happened. Mr. Duffy told me that he was traveling, it would have been eastbound on 271, and he stopped at the light, which was now blinking red because it was malfunctioning. He was attempting to go north onto I-29, the interstate, which would have been a left-hand turn for him.

He indicated to me that he had the right-of-way at that point. And when he went to make his turn, another vehicle came out in front of him and he collided with that vehicle in the intersection.

He told me that he would have had the right-of-way and that there was no doubt in his mind that he had the right-of-way. I talked to the other party involved. I believe it was Justin Hamer. I would have to refer just to make sure.

Q: Sure.

A: Maybe you can correct me if I'm wrong, but I do believe it's, yes, Justin Hamer. Justin Hamer told me that he was traveling westbound on 271 and came to that intersection and that his plan was to continue westbound through that intersection. He told me that when he was stopped at the light, there was a vehicle that had just turned on -- left onto the interstate and, therefore, because the vehicle had just turned, he would have had the right-of-way. And so when he thought that he had the right-of-way he continued to proceed westbound through the intersection where he saw a semi that he thought was going to stop but instead collided with him.

I questioned Mr. Duffy about the vehicle that would have turned in front of him. Mr. Duffy denied there being any vehicle at the intersection and stated again that he would have had the right-of-way.

In this particular incident, there was no outside witnesses that were involved that stayed on-scene, and I wasn't there at the time, so I had no

way to determine who, if anybody, at that point had violated the right-of-way.

(Trial Deposition Transcript of Derek Malone, pp. 13-15, Appx. 14-16.)

As argued by the defense during trial, given that the impact location was slightly closer to the side of the intersection from where Hamer (driving a pickup) had driven, circumstantially, it was likely that Duffy had arrived at the intersection first, and therefore, had the right-of-way.

The jury concluded that both drivers were negligent, but that Hamer was contributorily negligent more than slight, and therefore, did not award any damages to the Hamers. (Special Verdict Form, R. 717-719.)

AUTHORITY & ARGUMENT

I. The Circuit Court did not Abuse its Discretion by Granting Defendants' Motion to Exclude Plaintiffs' Expert Witnesses, Adam Grill and Michael DiTallo.

The circuit court did not abuse its discretion by granting Defendants' Motion to Exclude Plaintiffs' Expert Witnesses, Adam Grill and Michael DiTallo.

The standard of review regarding the admissibility of expert testimony is abuse of discretion. "A circuit court has broad discretion regarding the admission of expert testimony. Therefore, we review the circuit court's decision to exclude expert testimony for an abuse of discretion." *State v. Jackson*, 2020 S.D. 53, ¶ 42, 949 N.W.2d 395, 408 (internal citations omitted). "An abuse of discretion refers to a discretion exercised to an end or purpose not justified by, and clearly against, reason and evidence." *O'Day v. Nanton*, 2017 S.D. 90, ¶ 17, 905 N.W.2d 568, 572 (quoting *Kaiser v. Univ. Physicians Clinic*, 2006 S.D. 95, ¶ 29, 724 N.W.2d 186, 194).

The circuit court's December 13, 2021, "Order Granting Defendants' Motion to Exclude Testimony of Plaintiffs' Expert Witnesses, Adam Grill and Michael DiTallo, Pursuant to SDCL 19-19-702" properly held that:

Pursuant to SDCL 19-19-702, and exercising the Court's gate-keeping function regarding any parties' purported expert testimony, the Court hereby finds, *based upon the facts of the auto accident that is the subject of this litigation*, that Plaintiffs have not met their burden of proof that the purported testimony of Plaintiffs' experts Adam Grill and Michael DiTallo would provide any technical, scientific or specialized knowledge *that would assist the trier of fact in determining which party was liable/at fault for causing the auto accident.*

R. 182-183 (emphasis added).

The authority relied upon by the circuit court, SDCL 19-19-702, provides:

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) The expert's scientific, technical, or other specialized knowledge *will help the trier of fact* to understand the evidence or to determine a fact in issue;
- (b) The testimony is based on sufficient facts or data;
- (c) The testimony is the product of reliable principles and methods; and
- (d) The expert has reliably applied the principles and methods to the facts of the case.

SDCL 19-19-702 (emphasis added).

A. **The Hamers Had the Burden to Prove, by a Preponderance of Evidence, that their Proffered Expert Testimony of Grill and DiTallo would have Assisted the Jury.**

The Hamers had the burden to prove, by a preponderance of evidence, that their two proposed expert witnesses, Adam Grill ("trucking expert"), and Michael DiTallo (accident reconstruction expert), would meet the requirements of SDCL 19-19-702(a), including that Grill and DiTallo would "help the trier of fact to understand the evidence or determine a fact in issue[.]" *Id.*

“The burden of demonstrating that the testimony is competent, relevant, and reliable rests with the proponent of the testimony.” *Burley v. Kytect Innovative Sports Equip., Inc.*, 2007 S.D. 82, ¶ 13, 737 N.W.2d 397, 402-403 (citing SDCL 19-9-7 (Rule 104(a)), transferred to SDCL 19-19-104). “The proponent of the expert testimony must prove its admissibility by a preponderance of the evidence.” *Id.* ¶ 13 (citing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 n. 10 (1993)).

“A trial court is responsible for deciding whether an expert’s knowledge will ‘assist the trier of fact to understand the evidence or to determine a fact in issue,’ under Rule 702.” *Burley*, 2007 S.D. 82, ¶ 16. “Rule 702 requires that the expert’s knowledge ‘help’ the trier of fact to understand the evidence or determine a fact in issue.” FED. R. EVID. 702 advisory committee note (2023). The trial court must assess whether an expert witness’s proposed testimony will be helpful to the jury. *Daubert*, 509 U.S. at 591 (explaining that a second condition of Rule 702 is that the proposed expert testimony be helpful to the jury, which is an inquiry that “goes primarily to relevance”).

While opposing Cornerstone’s Motion to Exclude Plaintiffs’ expert witnesses, and again, during this appeal, the Hamers argue that SDCL 19-19-702 is a “rule of inclusion.” However, the South Dakota Supreme Court has confirmed that the circuit court must exercise its gatekeeping role regarding proposed expert testimony. “In *Daubert*, the Supreme Court mandated that judges, when faced with a proffer of expert scientific testimony, conduct a ‘gatekeeping’ preliminary evaluation to determine whether the proffered testimony is allowable.” *State v. Moeller*, 2000 S.D. 122, ¶ 82, 616 N.W.2d 424, 448 (citing *Daubert*, 509 U.S. at 597).

B. The Hamers Failed to Meet their Burden of Proof that their Proffered Expert Testimony Would Assist the Jury.

The Hamers designated Adam Grill as a “trucking expert” witness. (Plaintiffs’ Disclosure of Expert Witnesses, R. 63.) Grill’s report was attached to Plaintiffs’ Disclosure. (R. 66-94.) Grill’s report conceded that, “[t]he standard of care for truck drivers is the same as for every road user, in the respect that the truck must be operated in a manner that avoids crashing into things, or having others collide with it.” (R. 73.) Despite this concession, Grill’s report went on to offer opinions that Duffy “failed to adhere to industry regulations and standards” because he allegedly:

- a. Failed to maintain a proper visual search;
- b. Failed to properly manage his speed and space;
- c. Failed to recognize the hazards in front of him and have a plan for them;
- d. Failed to recognize and execute defensive driving measures to avoid a preventable collision.

(R 93.) These “standards” cited by Grill apply to every motor vehicle. Assessing whether a driver violated these “standards” did not require knowledge beyond a lay juror. Grill’s purported standards are nothing more than a thinly-veiled attempt by the Hamers to cloak their theory of fault in “expertise”.

The Hamers also disclosed Michael DiTallo, an accident reconstructionist. (Plaintiffs’ Disclosure of Expert Witnesses, R. 63.) DiTallo’s report was also attached to Plaintiffs’ Disclosure. (R. 96-106.) On page 7 of his report, DiTallo summarized his opinions as follows:

1. Based on my analysis, Mr. Paul Duffy was situationally inattentive to the approaching Chevrolet.
2. Based on my analysis, using an average Perception/Response time, Mr. Paul Duffy had between 4.4–4.9 seconds to respond to the approaching Chevrolet and avoid this collision.

3. Based on my analysis, Mr. Duffy failed to yield to an approaching vehicle while in an intersection making a left turn.
4. Based on my analysis, Mr. Duffy violated South Dakota statute 32-26-19, Left-turning Vehicles – Right-of-way of Oncoming Vehicle.

(R 102.) Again, none of DiTallo's proposed "expert" opinions addressed topics beyond the knowledge of a lay juror.

Per SDCL 19-19-702(a), the Hamers were required to demonstrate that their proposed expert testimony would be helpful, in that it must "...help the trier of fact to understand the evidence or determine a fact in issue..." *Id.* Given the facts of the accident, the circuit court did not abuse its discretion by concluding that the jury did not need "expert" testimony regarding which vehicle arrived at the intersection first. Making such a determination was within the jury's lay knowledge. The purported testimony of Grill and DiTallo was not needed in order for the jury determine fault.

"Generally, expert testimony is required in negligence cases when the defendant is held to a standard of care that is outside the common knowledge and experience of ordinary persons." *Hanson v. Big Stone Therapies, Inc.*, 2018 S.D. 60, ¶ 30, 916 N.W.2d 151, 159 (citing 65A C.J.S. Negligence § 930 (Updated March 2018)). "Whether an expert's testimony is admissible depends upon whether the testimony would assist the trier of fact in understanding the evidence or determining a fact in issue. It is for the trial court to make the initial decision on whether the testimony will assist the trier of fact." *Schaffer v. Edward D. Jones & Co.*, 1996 S.D. 94, ¶ 8, 552 N.W.2d 801, 805. "Expert testimony is needed to establish the standard of care of a professional unless the area is within the common knowledge and comprehension of the ordinary laymen. Unless the issues are unusually complex, expert testimony is not required." *Mid-W. Elec., Inc. v.*

DeWild Grant Reckert & Assocs. Co., 500 N.W.2d 250, 255 (S.D. 1993). “We have consistently stated that if the subject of the expert opinion is one of common knowledge, and the facts are available to the jury and equally understandable by them, the opinion of the expert should be rejected.” *Morin v. Chicago & Nw. Ry. Sys.*, 209 N.W.2d 895, 897 (S.D. 1973).

The drivers of the two vehicles—Hamer and Duffy—were the only known witnesses to this accident. Both testified at trial, and the jury was able to assess their respective testimony and credibility. Multiple photographs depicting the physical evidence of the accident were introduced at trial. (R. 765-777.) Further, Lincoln County Deputy Sheriff Malone investigated the accident. Deputy Malone’s Accident Report was admitted as an exhibit at trial. (R. 961-967.) Deputy Malone’s trial deposition was played for the jury at trial. (Appx. 1-54). Deputy Malone testified that his investigation included his observation of the accident scene and speaking to both drivers. The jury had sufficient evidence to determine right-of-way, which was not a technical or scientific issue. The Hamers’ attempt to cloak a questionable liability auto accident with expert testimony was properly rejected by the circuit court via the gatekeeping function required by SDCL 19-19-702(a).

We agree with DCI. There is no rule that requires expert testimony. Expert testimony is admissible where it “will help the trier of fact to understand the evidence or to determine a fact in issue[.]” SDCL 19-19-702. But “[t]o be helpful, of course, expert opinion must offer more than something jurors can infer for themselves. *State v. Guthrie*, 2001 S.D. 61, ¶ 32, 627 N.W.2d 401, 415.

Black v. Div. of Crim. Investigation, 2016 S.D. 82, ¶ 23, 887 N.W.2d 731, 737.

While analyzing *Daubert*, other jurisdictions have confirmed that not all auto accident cases require expert testimony.

However, not every motor vehicle accident requires expert testimony to understand how it took place and who was at fault. This case does not involve complex accident reconstruction analysis in order to understand whose negligence caused the accident, and the jury had ample evidence from which to determine fault. This case involved a low-speed collision between two vehicles. Several fact witnesses testified regarding the circumstances that caused the accident, and the physical evidence in the form of skid marks and damage to the vehicles was not outside a layperson's common sense or understanding. This was not a case with an unknown origin or circumstances.

Pilgrim's Pride Corp. v. Smock, 134 S.W.3d 880, 894 (Tex. App. 2004); *see also Utz v. Running & Rolling Trucking, Inc.*, 32 So. 3d 450, 463-65 (Miss. 2010) (affirming trial court's exclusion of plaintiff's proposed expert opinion that the taillights of a truck were obscured by dirt because "[t]his issue, dirt on the taillights, was not of a nature that required an expert opinion, as the jury had enough knowledge to discern whether the photographs depicted dirt on the taillights"); *Watkins v. Schmitt*, 665 N.E.2d 1379, 1385-86 (Ill. 1996) (affirming exclusion of accident reconstructionist's proposed testimony regarding speed of vehicle because estimating the speed of a car was within a lay person's knowledge and eyewitnesses testified as to estimates of vehicle's speed); *Drope v. Owens*, 765 S.W.2d 8, 11 (Ark. 1989) (holding trial court did not err in excluding expert testimony regarding speed of motorcycle before collision with car because the speed of the motorcycle was not beyond the comprehension or understanding of jurors so expert testimony was not necessary to assist them); *Kimble v. Earle M. Jorgenson Co.*, 830 N.E. 2d 814, 826 (Ill. Ct. App. 2005) (affirming trial court's exclusion of proposed testimony of accident reconstruction expert because his proposed testimony was not "beyond the ken of the average juror" and thus would not have assisted jury).

The liability dispute in this case boiled down to the simple question of right-of-way at an intersection controlled by a flashing red light. Neither of the Hamers' proposed

experts witnessed this accident, and neither proposed expert had any greater insight than the drivers or law enforcement as to which vehicle arrived at the stop light first. The jury heard both drivers' testimonies, heard the testimony of the investigating law enforcement officer, observed the physical evidence of the accident via photographs, weighed the credibility of all of the evidence, were properly instructed on South Dakota traffic statutes governing a flashing red light intersection, and determined that Hamer's driving was contributorily negligent more than slight. The circuit court correctly determined that the issue regarding which party had the right-of-way was fully within the common knowledge of the jury and did not require expert testimony. "[B]ased upon the facts of the auto accident that is the subject of this litigation, Plaintiffs have not met their burden of proof that the purported testimony of Plaintiffs' experts Adam Grill and Michael DiTallo would provide any technical, scientific or specialized knowledge that would assist the trier of fact in determining which party was liable/at fault for causing the auto accident." ("Order Granting Defendant's Motion to Exclude Testimony of Plaintiffs' Expert Witnesses, Adam Grill and Michael DiTallo, Pursuant to SDCL 19-19-702", R. 182.)

Although the facts of any auto accident case are bound to be different, this Court very recently addressed the issue of the necessity of expert testimony in a car accident case involving a contributory negligence defense, and concluded, at least in that case, that expert testimony was not required.

But even if Weiland's expert opinion argument were before us, we have never held that expert testimony is categorically required to prove causation for contributory negligence based on excessive speed, and we decline to do so here. We appreciate the difficulty in determining the precise point where the laws of physics intersect with "the common experience and capability of a lay person[.]" *Matter of Drainage Permit 11-81*, 2019 S.D. 3, ¶ 42,

922 N.W.2d 263, 275, and we acknowledge that the question presented here is a close one. But given the particular evidence adduced at trial, we conclude that the causation issue relating to the contributory negligence claim was within the common experience and capability of a lay person, and there was sufficient evidence to support the jury's verdict finding contributory negligence.

Weiland v. Bumann, 2025 S.D. 9, ¶ 51, --- N.W.3d ---.

The Hamers did not meet their burden of proof, by a preponderance of evidence, to admit the testimonies of their two proposed expert witnesses. The circuit court properly exercised its gatekeeping function under SDCL 19-19-702(a).

II. The Circuit Court did not Abuse its Discretion by Denying Plaintiffs' Motion to Amend Complaint.

The standard of review on this issue is also abuse of discretion. "We review the circuit court's decision to grant or deny a motion to amend pleadings using the abuse of discretion standard of review. An abuse of discretion occurs when discretion is exercised to an end or purpose not justified by, and clearly against, reason and evidence." *Ries v. JM Custom Homes, LLC*, 2022 S.D. 52, ¶ 11, 980 N.W.2d 217, 221.

The circuit court did not abuse its discretion by denying the Hamers' Motion to Amend Complaint. SDCL 15-6-15(a) governs amendments to pleadings.

A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has neither been placed upon the trial calendar, nor an order made setting a date for trial, he may so amend it at any time within twenty days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ten days after service of the amended pleading, whichever period is longer, unless the court otherwise orders.

Id.

A. **The Hamers' Motion to Amend Complaint Sought Substantive Late Amendments.**

The Hamers' Motion to Amend Complaint was filed on November 22, 2022, a full year after the November 15, 2021, discovery deadline had expired per the Court's Scheduling Order (Stipulation for Scheduling Order and Order, R. 25), after a June 16, 2022, Pre-Trial Conference had been held by the Court (Order Following Pre-Trial Conference and Re-Set of Jury Trial, R. 249-250), after two prior jury trial dates had been set and continued, and fourteen (14) days prior to the then-scheduled jury trial of December 6, 2022. (R. 249.)

The Hamers' original Complaint, dated March 13, 2020, alleged negligence and contained 10 paragraphs. (R. 5-8.) Soon after the Hamers retained new pro hac vice counsel, Danny Ellis of the "Truck Wreck Justice" Firm (November 17, 2022, Verified Motion of Resident Attorney to Admit Danny R. Ellis, Pro Hac Vice, R. 292), the Hamers moved to Amend their Complaint (November 22, 2022, Motion to Amend Complaint, R. 299). The proposed Amended Complaint contained 36 paragraphs—26 of which were new. (R. 304-311.) While the first two causes of action (negligent driving and *respondeat superior*) remained the same, the Hamers' proposed Amended Complaint sought to add a new "Count Three" cause of action, which alleged violations of 11 different sections/sub-sections of the Federal Motor Carrier Safety Regulations (FMCSR, discussed further *infra*). The new "Count Three" cited at least four new theories of direct negligence against Cornerstone:

1. Negligent supervision of Defendant Duffy (§ 25);
2. Negligent retention of Defendant Duffy (§ 26);
3. Negligent entrustment of a motor vehicle to Defendant Duffy (§ 27); and

4. Negligent training of Defendant Duffy (§ 28).

At the hearing regarding the Hamers' Motion to Amend Complaint, the circuit court stated, "[w]ell, in looking at the request for the ... amendment, the facts remain that this was made, ah, right before we were going to have the jury trial[.]" (December 20, 2022, hearing transcript, R. 1075-1076.) The circuit court further noted that it was "clear that there was a trial date established a long time before the amendment was ever presented to the court," which implicated SDCL 15-6-15(a), and mandated that the circuit court evaluate "whether or not there [was] any prejudice ... to the defendant[s]." R. 1076.

B. Allowing the Hamers to Amend their Complaint would have Unfairly Prejudiced Cornerstone.

When the Hamers filed their Motion to Amend Complaint, after two years of litigating the Hamers' original Complaint, Cornerstone was prepared for trial. Had the circuit court allowed the Hamers to amend their Complaint, Cornerstone would have been forced to conduct additional 11th hour discovery, and prepare entirely new defenses, which would have been prejudicial to Cornerstone. The circuit court agreed, "...discovery has been complete[d]. We've had ... dispositive motions completed, and even motions in limine have been decided." (R. 1079.) The circuit court concluded, "...we have discovery completed, and we're ready for trial, and so I just want to necessitate that we don't need to reopen discovery and conduct more depositions and interrogatories. We're ready to go." (R. 1080.)

"The primary purpose of our pretrial procedure is to simplify and narrow issues for trial." *Johnson v. Hanna*, 101 N.W.2d 830, 833 (S.D. 1960). It is one thing to permit a party to amend their Complaint prior to, or during discovery. It is something entirely different to allow the addition of extensive new legal theories, after discovery has been

completed, and after a Pre-Trial Conference, including the circuit court's ruling on motions in limine. At some point prior to kick-off, the goalposts need to be set.

Prejudice to the non-moving party may include surprise. "The most important consideration in determining whether a party should be allowed to amend a pleading is whether the nonmoving party will be prejudiced by the amendment. *Prejudice is often shown when a party is surprised and unprepared to meet the contents of the proposed amendment.*" *Ries*, 2022 S.D. 52, ¶ 12 (emphasis added).

Since the Hamers' original Complaint in March of 2020 and through all of discovery and pre-trial motions, the issues for the trier of fact were: (1) which party's driving (if either) was negligent; and (2) damages (if any). The liability assessment was based entirely on the Hamers' common law negligence claim, and the parties' testimonies and evidence concerning their respective versions of the accident. After pre-trial motions had been heard, and after a jury trial date had been set, the Hamers' Amended Complaint proposed entirely new theories based upon previously unalleged violations of federal law—the FMCSR. The circuit court correctly determined that the Hamers' Amended Complaint was untimely, and that Cornerstone would be prejudiced by the proposed amendments.

C. The Hamers' Motion to Amend Complaint was Futile.

"Motions for leave to amend should be granted freely when justice so requires. However, the circuit court may deny leave to amend when there are compelling reasons such as futility of the amendment." *Fodness v. City of Sioux Falls*, 2020 S.D. 43, ¶ 30, 947 N.W.2d 619, 629. The FMCSRs do not create a private cause of action for personal injury auto accident claims. As the circuit court properly concluded, beyond being untimely, the Hamers' proposed Amended Complaint was futile.

The FMCSR/49 C.F.R. §§ 309-399 cited in the Hamers' proposed Amended Complaint derives its authority from 49 U.S.C. § 14704. The Hamers argue that the FMCSR established a standard of care for Cornerstone's truck driver. This Court has previously addressed this issue.

"Whether federal statutes establish a standard of care, i.e. duty, in state-based claims is a matter of state law." *Highmark Fed. Credit Union v. Hunter*, 2012 S.D. 37, ¶ 11, 814 N.W.2d 413, 416 (citing *Hofbauer v. Nw. Nat'l Bank of Rochester*, 700 F.2d 1197, 1201 (8th Cir. 1983); see also *Mid-America Nat'l Bank of Chicago v. First Sav. & Loan Ass'n of South Holland*, 515 N.E.2d 176, 179 (Ill. App. Ct. 1987) ("The question of whether or not a Federal statute establishes the appropriate standard of conduct for a state common law cause of action is a matter of state law.")).

Via *Highmark*, this Court went on to specifically hold that a federal statute that does not provide for a private cause of action, also does not create a standard of care in a South Dakota negligence action.

The next reason that the NFIA does not establish a duty in a negligence case is that the NFIA does not create a private right of action. A private right of action essentially indicates the right of an individual to bring an action to enforce particular regulations or statutes. See *Alexander v. Sandoval*, 532 U.S. 275, 285-86 (2001). "[P]rivate rights of action to enforce federal law must be created by Congress." *Id.* Accordingly, statutory intent to create a private remedy is determinative. *Id.* Federal courts have consistently determined that the NFIA does not create a private right of action for borrowers. *Wright v. Allstate Ins. Co.*, 500 F.3d 390, 398 (5th Cir. 2007) (concluding that the NFIA did not expressly or implicitly authorize a private federal common law cause of action for fraud or negligent misrepresentation); *Hofbauer*, 700 F.2d at 1201; *Mid-America Nat'l Bank of Chicago v. First Sav. And Loan Ass'n of South Holland*, 737 F.2d 638, 640 (7th Cir. 1984); *Arvai v. First Sav. & Loan Ass'n*, 698 F.2d 683, 684 (4th Cir. 1983). If the NFIA does not create a private right of action, then it follows that an individual cannot use the NFIA to establish a duty in an individual civil claim.

Id. ¶ 16.

Although conceding that the FMCSR does not create a private cause of action², the Hamers claim that the FMCSR creates a standard of care that should have been admitted at trial. As noted above, *Highmark* specifically rejects that theory. “The separation-of-powers doctrine and principles of federalism militate against the adoption of the federal statute as the standard of care in a state negligence action *when no private cause of action, either explicit or implicit, exists in the federal statute.*” *Id.* ¶ 17 (quoting *R.B.J. Apartments, Inc. v. Gate City Sav. & Loan Ass’n*, 315 N.W.2d 284, 290 (N.D. 1982)) (emphasis added).

The FMCSR creates certain private causes related to commercial trucking, but do not create a private cause of action for *personal injuries* incurred in traffic accidents involving commercial trucks.

Congress did intend to create certain private rights of action in § 14704(a)(2), *but not a right of action for personal injury.*” Instead, Judge VanBebber reasoned that § 14704(a)(2) creates a private cause of action for damages in commercial disputes *but not for personal injury actions.*

Furthermore, the Court notes that *numerous other courts* have also concluded that § 14704(a)(2) *does not create a private cause of action for personal injury actions.* The most recent decision comes from the United States District Court for the District of New Mexico. In *Leon v. FedEx Ground Package Sys., Inc.*, Judge Browning noted numerous decisions (including Judge VanBebber’s decision) in which courts have found that “there is no federal private right of action allowing personal injury or wrongful death plaintiffs to hold defendants liable for violations of the FMCSR.” He thus concluded that “[t]he Court agrees with the *majority of other courts* that 49 U.S.C. § 14704(a)(2) *does not create a private right of action for personal injury and wrongful death plaintiffs.*” Accordingly,

² The Hamers admit that the FMCSR does not create a private cause of action for a personal injury auto accident plaintiff. See Hearing Transcript, December 20, 2022, (“I want to make sure that our position is clear with the court. We’re not saying that it’s a private cause of action.” (R. 1080.))

Judge Browning found that the plaintiff could not bring suit for alleged violations of the FMCSR.

In this case, the Court finds the above cases persuasive. *Plaintiffs do not direct the Court to any persuasive authority holding that § 14704(a)(2) allows a personal injury plaintiff to maintain a private cause of action for violation of the MCA or FMCSR.* Thus, Plaintiff cannot bring a private cause of action under the MCA or FMCSR.

Drake v. Old Dominion Freight Line, Inc., Case No. 15-1307-EFM/KGG, 2016 WL

1328941, at *3-4 (D. Kan. Apr. 5, 2016) (emphasis added).

In 2016, a New Mexico Federal District Court cited a list of Courts that considered this issue and reached the same conclusion.

See Harris v. FedEx Nat. LTL, Inc., 760 F.3d 780, 784 n.2 (8th Cir.2014) (stating in dicta that “[w]e doubt there is a federal private right of action for a violation of the FMCSR”); *Crosby v. Landstar*, No. CIV. 04-1535-SLR, 2005 WL 1459484, at *2 (D. Del. June 21, 2005) (Robinson, J.) (“Plaintiff’s claims for personal injury and property damage are more like negligence claims. Section 14704 does not give this court jurisdiction over negligence claims, which are traditionally within the purview of state jurisdiction.”); *Jones v. D’Souza*, No. CIV.A. 7:06CV00547, 2007 WL 2688332, at *7 (W.D.Va. Sept. 11, 2007) (Conrad, J.); *Kavulak v. Laimis Juodzevicius, A.V. Inc.*, 994 F.Supp.2d 337, 343-44 (W.D.N.Y. 2014) (Skretny, J.) (“[T]his statute also does not create a private right of action to recover for personal injuries sustained by a motorist struck by a tractor-trailer driver.”); *Courtney v. Ivanov*, 41 F.Supp.3d 453, 457 (W.D. Pa. 2014) (Gibson, J.); *Slagowski v. Cent. Washington Asphalt, Inc.*, No. 2:11-CV-00142-APG, 2014 WL 4887807, at *7 (D.Nev. Sept. 30, 2014) (Gordon, J.) (“Virtually all courts that have examined this issue have concluded there is no private right of action for personal injuries arising from a violation of the MCA or its safety regulations.”); *Lipscomb v. Zurich Am. Ins. Co.*, No. CIV.A. 11-2555, 2012 WL 1902595, at *2 (E.D.La. May 25, 2012) (Milazzo, J.). Some state courts have followed suit. *See Craft v. Graebel-Oklahoma Movers, Inc.*, 2007 O.K. 79, ¶ 25, 178 P.3d 170, 177 (“[T]he legislative history establishes that Congress was interested only in enabling private entities to assume the Interstate Commerce Commission’s role to enforce the commercial aspects of the Motor Carrier Act.”); *Tierney v. Arrowhead Concrete Works, Inc.*, 791 N.W.2d 540, 547 (Minn. Ct. App. 2010) (“[I]t is appropriate to look beyond the seemingly plain wording of subsection (a)(2) to the legislative history, to determine the scope of that subsection.”).

The Court agrees with the majority of other courts that 49 U.S.C. § 14704(a)(2) does not create a private right of action for personal injury and wrongful death plaintiffs. ...

Leon v. FedEx Ground Package Sys., Inc., No. CV 13-1005 JB/SCY, 2016 WL 836980, at *12-13 (D.N.M. Feb. 16, 2016).

Because the FMCSR does not create a private cause of action for personal injury claims, the FMCSR also does not establish a standard of care for a South Dakota negligence cause of action. The Hamers' proposed Amended Complaint was properly denied because it was untimely, and also because it was futile.

III. The Circuit Court did not Abuse its Discretion by Declining to give the Hamers' Requested Jury Instruction regarding the Federal Motor Carrier Safety Regulations.

The standard of review of a circuit court's instruction to the jury is abuse of discretion. "A trial court has discretion in the wording and arrangement of its jury instructions, and therefore, we generally review a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard." *Frye-Byington v. Rapid City Med. Ctr., LLP*, 2021 S.D. 3, ¶ 22, 954 N.W.2d 314, 319 (quoting *Johnson v. United Parcel Serv., Inc.*, 2020 S.D. 39, ¶ 28, 946 N.W.2d 1, 9). The party charging that an instruction was denied erroneously must show not only that the denial of the requested instruction was erroneous, but also that the erroneous denial was prejudicial. *Wangness v. Builders Cashway, Inc.*, 2010 S.D. 14, ¶ 10, 779 N.W.2d 136, 140 (internal citations omitted).

"When an issue is supported by the evidence and an instruction correctly setting forth the law is requested, the court should so instruct the jury." *Young v. Oury*, 2013 S.D. 7, ¶ 31, 827 N.W.2d 561, 569 (citing *Kuper v. Lincoln-Union Elec. Co.*, 1996 S.D.

145, ¶ 32, 557 N.W.2d 748, 758) (internal citations omitted). “But a court is not required to instruct the jury on issues lacking evidentiary support.” *Id.*

The Hamers’ requested jury instruction number 35 asked the circuit court to instruct the jury on the FMCSR. The requested instruction stated, “The Federal Motor Carrier Safety Regulations also impose duties and responsibilities on motor carriers and commercial vehicle drivers”. The requested jury instruction went on to reference ten (10) sections of the FMCSR, which would have instructed the jury about Cornerstone’s alleged duties under the FMCSR. (R. 451-453.) The requested jury instruction ended with, “These federal regulations set the standard of care of a reasonable motor carrier and commercial vehicle driver. If you find that one or both of the defendants violated the regulations, such violation is negligence.” (R. 453.) Per *Highmark*, this requested instruction is an incorrect statement of the law governing a South Dakota accident involving a commercial semi-truck.

For the same reasons as cited above, the circuit court properly denied the Hamers’ requested jury instruction number 35. The FMCSR does not create a private cause of action for personal injury claims, and therefore, does not create a standard of care for a jury to decide a South Dakota negligence cause of action. *Highmark*, 2012 S.D. 37, ¶ 16.

CONCLUSION

The Circuit Court’s decision to grant Defendants’ Motion to Exclude Plaintiffs’ Expert Witnesses, Adam Grill and Michael DiTallo, was not an abuse of discretion. The Hamers failed to meet their burden of proof that their proposed expert witness testimony would help the trier of fact to understand the evidence or determine a fact in issue. The circuit court properly applied SDCL 19-19-702(a).

The circuit court's decision to deny the Hamers' Motion to Amend Complaint was also not an abuse of discretion. The Hamers' Motion to Amend Complaint was untimely, and unfairly prejudicial to Cornerstone. The Hamers' proposed Amended Complaint was also futile, as the FMCSR does not create a private cause of action for personal injuries arising out of a commercial trucking accident, and therefore, does not establish a legal duty for a South Dakota negligence cause of action. For the same reasons, the circuit court properly denied the Hamers' requested jury instruction regarding the FMCSR.

WHEREFORE, Defendants Paul Duffy and Cornerstone Poured Foundations, Inc., respectfully requests that this Court affirm the Judgment of the circuit court.

Dated at Sioux Falls, South Dakota, this 20th day of March, 2025.

EVANS, HAIGH & ARNDT, L.L.P.

/s/ Mark J. Arndt

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Brief of Appellees Paul Duffy and Cornerstone Poured Foundations, Inc. complies with the type volume limitations set forth in SDCL 15-26A-66(b)(2). Based on the information provided by Microsoft Word 2016, this Brief contains 6,555 words, excluding the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of the Issues, any addendum materials, and any Certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2016.

Dated at Sioux Falls, South Dakota, this 20th day of March, 2025.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20th day of March, 2025, a true and correct copy of the foregoing “Brief of Appellees Paul Duffy and Cornerstone Poured Foundations, Inc.” was filed and served using the Court’s Odyssey File and Serve system which upon information and belief will send e-mail notification of such filing to:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

No. 30776

JUSTIN HAMER and KIM HAMER,

Plaintiffs/Appellants,

vs.

PAUL DUFFY and CORNERSTONE POURED FOUNDATIONS, INC.,

Defendants/Appellees.

Appeal from the Circuit Court
Second Judicial Circuit
Lincoln County, South Dakota

The Honorable John R. Pekas, Presiding Judge

APPELLEES' APPENDIX

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Notice of Appeal filed July 30, 2024

APPENDIX TABLE OF CONTENTS

<u>DOCUMENT</u>	<u>APPENDIX PAGE(S)</u>
Trial Deposition Transcript of Derek Malone	Appx. 1-54

In The Matter Of:
Justin Hamer and Kim Hamer v.
Paul Duffy and Cornerstone Poured Foundations, Inc.

Derek Malone
October 2, 2023

Pat Beck, Court Reporter

Original File 100223Malone.txt
Min-U-Script® with Word Index

1 STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
 2)
 2 COUNTY OF LINCOLN) SECOND JUDICIAL CIRCUIT

3 * * * * *

4 JUSTIN HAMER and 41CIV20-000243
 5 KIM HAMER,

6 Plaintiffs,

7 vs.

8 PAUL DUFFY and CORNERSTONE
 9 POURED FOUNDATIONS, INC.,

10 Defendants.

11 Evans, Haigh & Arndt
 12 Sioux Falls, South Dakota
 13 October 2, 2023
 14 2:58 p.m.

15 * * * * *

16 V I D E O T A P E D

17 D E P O S I T I O N O F

18 DEREK MALONE

19 * * * * *

20 APPEARANCES:

21 Mr. Scott G. Hoy
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25 for the Plaintiffs;

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ALSO PRESENT: Mr. Jeff Lambert, Promotional Video

INDEX OF EXAMINATION

by Mr. Arndt: P. 5, 43
by Mr. Hoy: P. 31

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NUMBER	DESCRIPTION	MARKED
A	Accident Report	P. 3
1	Diagram	P. 34
2	Diagram	P. 34
3	Statute	P. 38

S T I P U L A T I O N

It is stipulated and agreed, by and between the above-named parties through their attorneys of record, whose appearances have been hereinabove noted, that the videotaped deposition of DEREK MALONE may be taken at this time and place, that is, at the offices of Evans, Haigh & Arndt, Sioux Falls, South Dakota, on the 2nd day of October, 2023, commencing at the hour of 2:58 p.m.; said deposition taken before Pat L. Beck, Registered Merit Reporter and Notary Public within and for the States of South Dakota and Minnesota; said deposition taken for the purpose of discovery or for use at trial or for each of said purposes; and said deposition is taken in accordance with the applicable Rules of Civil Procedure as if taken pursuant to written notice. Objections, except as to the form of the question, are reserved until the time of trial. Insofar as counsel are concerned, the reading and the signing of the transcript by the witness is waived.

* * * * *

(Deposition Exhibit A marked for
identification.)

* * * * *

Pat L. Beck, Court Reporter
605.351.8200 stenopat@sio.midco.net

1 THE VIDEOGRAPHER: We are now on the record.
2 The deposition of Derek Malone is being taken on
3 October 2nd, 2023, commencing at approximately
4 14:58. This deposition is being conducted at the
5 offices of Evans, Haigh & Arndt, LLP, 225 East
6 11th Street, Sioux Falls, South Dakota. The
7 deposition is taken in the matter of Justin Hamer
8 and Kim Hamer, Plaintiffs, versus Paul Duffy and
9 Cornerstone Poured Foundations, Incorporated,
10 Defendants, venued in the State of South Dakota,
11 County of Lincoln, in Circuit Court, Second Judicial
12 Circuit. Case No. 41CIV20-000243.

13 Starting with the noticing party, would all
14 counsel please state your appearances and whom you
15 represent.

16 MR. ARNDT: Mark Arndt on behalf of Defendants
17 Cornerstone Poured Foundation and Paul Duffy.

18 MR. HOY: And Scott Hoy on behalf of Justin and
19 Kim Hamer.

20 THE VIDEOGRAPHER: Our court reporter is
21 Pat Beck. Would you please swear the witness.

22 * * * * *

23 DEREK MALONE,
24 called as a witness, being first duly sworn, deposed
25 and said as follows:

1 EXAMINATION BY MR. ARNDT:

2 Q Okay. Good afternoon, sir. Could you please
3 state your name.

4 A Derek Malone.

5 Q And can I call you -- I would normally call you
6 Deputy Malone, but I know you're not -- no longer
7 working for the sheriff's office; is that right?

8 A That is correct.

9 Q So can I call you Derek? Is that okay?

10 A Absolutely.

11 Q All right. Derek, how old are you?

12 A I'm 34 years old.

13 Q Derek, you understand the purpose of while
14 you're -- why you're here today is to provide some
15 testimony related to a motor vehicle accident that
16 would have occurred in Lincoln County on April 8th
17 of 2019?

18 A Yes.

19 Q And at that time, April of 2019, what was your
20 occupation?

21 A I was a deputy sheriff for Lincoln County
22 Sheriff's Office.

23 Q How long had you been working for the sheriff's
24 office?

25 A I'd been working there since roughly, I

1 believe, August of 2015.

2 Q And can you give the jury just a little bit
3 more information about your law enforcement
4 experience. Maybe start at the beginning of your
5 law enforcement career and take us to present day.

6 A Absolutely. When I joined the sheriff's
7 office, I was uncertified, which means that I had to
8 attend the South Dakota Law Enforcement Program --
9 Certification Program, I believe it was 13 weeks,
10 for certification out in Pierre, South Dakota.

11 After graduating that, I would have -- I would
12 have gone through my OJT program, which is the
13 on-the-job training program with the sheriff's
14 office where initially you ride around with a senior
15 deputy in various steps where they start off kind of
16 leading and then you slowly transition to where
17 you're taking over. And then by the end, you do
18 kind of like a week of, like, a certification week.
19 If you pass everything, then they can allow you to
20 be on your own. And at that point I would have
21 worked on my own as a deputy.

22 Q So when was it that you actually became
23 certified as a law enforcement officer in
24 South Dakota?

25 A The exact date I don't know off the top of my

1 head, but, again, it would have been that 13 weeks.
2 It was not too long after I started. I believe it
3 would have been -- it would have been in 2015.

4 Q Okay. Sometime in the year 2015?

5 A Yes.

6 Q And at that time you were working for the
7 Lincoln County Sheriff's Office as a deputy?

8 A That is correct.

9 Q And then you continued in that capacity for a
10 number of years?

11 A Yes. I continued in that capacity until
12 February of 2020.

13 Q And what occupation did you take in February of
14 2020?

15 A In February of 2020 I transitioned to federal
16 law enforcement. I accepted a job with the
17 Department of Homeland Security with an agency
18 called Federal Protective Services.

19 Q And my understanding is now you're going to
20 have another career change; is that right?

21 A Yes.

22 Q What are you going to do now?

23 A I recently accepted a position with the
24 Department of Justice with ATF and I'll be a
25 criminal investigator with them.

1 Q Alcohol, Tobacco & Firearms?

2 A That is correct.

3 Q And that leads to why we're taking your video
4 deposition today. You're not going to be in this
5 area at the time of our jury trial, which is
6 October 31st through November 3rd; is that right?

7 A That is correct.

8 Q And where do you plan to be at that point?

9 A As a part of my new job, I have to go to law
10 enforcement training in Georgia, FLETC, Federal Law
11 Enforcement Training Center. That's a six- to
12 seven-month program that I'll be starting here
13 October 15th and not expected to be back until
14 roughly April 25th.

15 Q Okay. Well, we appreciate you accommodating
16 our schedule to get this done today. Before I leave
17 your background information, Derek, can you tell us
18 a little bit about your education? Do you have a
19 high school degree?

20 A I do.

21 Q Where did you graduate high school?

22 A I graduated high school in Muskegon, Michigan,
23 at a school called Orchard View High School.

24 Q And then did you attend college after that?

25 A I have attended colleges. I've done a couple

1 of online colleges. Most recently at American
2 Military University. I do not currently have a
3 degree.

4 Q Okay. So we'll switch gears to -- a bit -- to
5 the accident itself. Again, the date of the
6 accident, I think, according to the report that we
7 received from the Lincoln County Sheriff's Office
8 was April 8th of 2019. And I'm going to, I guess,
9 start by showing you what's been previously marked
10 as Exhibit A. Tell me if you recognize that
11 document, Derek. And if you need to take a minute
12 to flip through it, please do.

13 A Absolutely. I do recognize this as being an
14 accident report. Yes, a South Dakota Accident
15 Report.

16 Q And can you tell by looking at that document if
17 you would have been the officer that would have
18 completed that report?

19 A I am, yes.

20 Q And where do you see that?

21 A On the very first page on the top it has
22 D. Malone and 44 Adam 14, which was my badge number
23 at the time.

24 Q Okay. Great. And I think for reference --
25 maybe I should have done this before we started, but

1 I'm going to do it now anyway. For reference, I'm
2 going to maybe have you mark the exhibit with page
3 numbers, if you don't mind. I don't think there are
4 page numbers on the exhibit itself.

5 A Absolutely.

6 Q Would you mind going through and just marking
7 each page?

8 A (Witness complies with request.) Seven pages.

9 Q Okay.

10 A That's what I'm showing.

11 Q A total of seven pages?

12 A Absolutely.

13 Q Okay. And is this format something that you
14 would typically use in the course of your duties as
15 a deputy sheriff in Lincoln County?

16 A Yes, it was.

17 Q And is the -- is the format itself somewhat
18 standard for law enforcement or how does this -- how
19 did this format come about, do you know?

20 A I'm not sure how it came about, but I do know
21 that this was a -- this is the printed copy of what
22 would come out when we use the electronic system. I
23 believe the name of that was Track System. We would
24 do it online and this was the end result, what the
25 form would look like.

1 Q Okay. So would this format be a typical format
2 for you to complete when you investigated an
3 accident?

4 A Yes, it would.

5 Q All right. So I'd like to go through just a
6 few items on each page, and maybe we'll just try to
7 go through it in order page by page.

8 First of all, I do see in the top right-hand
9 corner the ID says D. Malone. That's your name;
10 correct?

11 A Yes, it is.

12 Q And then the date of the accident is April 8th
13 of 2019. Do you see that?

14 A I do.

15 Q How about the time of the accident? Does the
16 first page indicate that?

17 A 0905 hours.

18 Q And that would be 9 a.m.?

19 A Yes, it would.

20 Q And then does the first page reference where
21 the accident took place?

22 A Yes, it does.

23 Q And I know there are some maybe technical terms
24 that are used there. Can you, maybe in lay terms,
25 describe where the accident took place?

1 A Yes. It would be under the -- under the I-29
2 bridge at the intersection, which would be kind of
3 called the T intersection of 271 under the I-29
4 bridge.

5 Q Okay. And I think that east/west road also is
6 occasionally referenced as Highway 106? Is it
7 County Highway 106?

8 A I do believe, yes.

9 Q Okay. But anyway, you've referred to it as --
10 that street that runs east and west -- as 271?

11 A Yes.

12 Q Okay. And the north -- north/south roadway is
13 I-29?

14 A That is correct.

15 Q All right. And the accident, per your
16 investigation, occurred underneath that overpass of
17 I-29 and 271?

18 A That is correct.

19 Q Okay. Maybe -- just backing up a little bit.
20 I don't know if you have -- I know this was a while
21 ago. I don't know if you have a specific
22 recollection. How was it that you would have
23 responded to this accident scene? Why would you
24 have gone out there to investigate this?

25 A I would have received a call from the dispatch

1 basically dispatching me out there by somebody
2 either calling the non-emergency or 9-1-1.

3 Q And then maybe tell the jury what you would
4 typically do to investigate -- let's start it this
5 way: Do you recall specifically -- do you have a
6 recollection of this accident or investigating this
7 accident?

8 A I do.

9 Q All right. Tell the jury what you recall as
10 far as what steps you took to investigate this
11 accident.

12 A Yes. I would have responded from the location
13 I was. I would have drove there in my Lincoln
14 County Sheriff's Office vehicle. Upon arriving at
15 the scene -- do you want me to tell you what
16 happened or how I would have responded?

17 Q Yeah. Both, if you can, at the same time. And
18 if I need to ask you for clarification, I'll do
19 that.

20 A Absolutely. To the best of my knowledge, when
21 I arrived on scene, one of the first things we want
22 to do is make sure that there are no serious
23 injuries involved. In this particular incident,
24 this intersection has a stoplight at it that's
25 normally just working as normal. However, when I

1 arrived on scene, I noticed that these lights were
2 malfunctioning, so the intersection was -- the
3 lights were blinking red, so it wasn't typical of
4 that intersection. I saw the vehicles pushed up
5 onto the sidewalk. I talked to both parties. The
6 first party I spoke with, I believe, was Paul Duffy
7 and I explained -- had him explain to me what
8 happened. Mr. Duffy told me that he was traveling,
9 it would have been eastbound on 271, and he stopped
10 at the light, which was now blinking red because it
11 was malfunctioning. He was attempting to go north
12 onto I-29, the interstate, which would have been a
13 left-hand turn for him.

14 He indicated to me that he had the right-of-way
15 at that point. And when he went to make his turn,
16 another vehicle came out in front of him and he
17 collided with that vehicle in the intersection.

18 He told me that he would have had the
19 right-of-way and that there was no doubt in his mind
20 that he had the right-of-way. I talked to the other
21 party involved. I believe it was Justin Hamer. I
22 would have to refer just to make sure.

23 Q Sure.

24 A Maybe you can correct me if I'm wrong, but I do
25 believe it's, yes, Justin Hamer. Justin Hamer told

1 me that he was traveling westbound on 271 and came
2 to that intersection and that his plan was to
3 continue westbound through that intersection. He
4 told me that when he was stopped at the light, there
5 was a vehicle that had just turned on -- left onto
6 the interstate and, therefore, because the vehicle
7 had just turned, he would have had the right-of-way.
8 And so when he thought that he had the right-of-way
9 he continued to proceed westbound through the
10 intersection where he saw a semi that he thought was
11 going to stop but instead collided with him.

12 I questioned Mr. Duffy about the vehicle that
13 would have turned in front of him. Mr. Duffy denied
14 there being any vehicle at the intersection and
15 stated again that he would have had the
16 right-of-way.

17 In this particular incident, there was no
18 outside witnesses that were involved that stayed
19 on-scene, and I wasn't there at the time, so I had
20 no way to determine who, if anybody, at that point
21 had violated the right-of-way.

22 Q Okay. And as a little bit of a summary of
23 those conversations, you first obtained the
24 right-of-way explanation from Mr. Duffy who was
25 driving the semitruck?

1 A Yes.

2 Q And he denied -- well, he stated that he
3 believed he had the right-of-way?

4 A That is correct.

5 Q And then you spoke to Mr. Hamer about the
6 right-of-way and he indicated he believed he had the
7 right-of-way?

8 A Yes.

9 Q And then you rechecked with Mr. Duffy, and
10 Mr. Duffy, again, indicated that he believed he had
11 the right-of-way?

12 A That is correct.

13 Q And when you rechecked with Mr. Duffy, did you
14 also address that issue of whether there was a
15 vehicle that had been at the same intersection ahead
16 of him making the similar maneuver to what Mr. Duffy
17 was attempting to do?

18 A I did. He denied that there was a vehicle in
19 front of him.

20 Q Okay. And because there were no -- well, you
21 indicated there were no witnesses; is that right?

22 A No witnesses that stayed behind that I could --

23 Q Okay.

24 A -- talk to.

25 Q Okay. Based upon all of that, did you come to

1 any conclusion as to whether or not one party was at
2 fault for causing the accident?

3 MR. HOY: Objection. Relevance.

4 Q (By Mr. Arndt) You can answer.

5 A Based off that, I determined that I could not
6 accurately determine which party was at fault.

7 Q Okay. As far as the location of the vehicles
8 physically in relation to the intersection itself,
9 where were the vehicles located?

10 A So --

11 MR. HOY: Are you talking about the Duffy
12 vehicle and the Hamer vehicle?

13 Q (By Mr. Arndt) I'll try to clarify, if that
14 wasn't clear. As far as the vehicles as they were
15 resting in the intersection, when you arrive, where
16 were they located?

17 A So if recalling correctly, under the -- under
18 the bridge there is like a sidewalk portion that
19 would be under the bridge for if people are still
20 walking. They were pushed up onto the sidewalk
21 portion that would have been closer to the
22 north-hand side of the intersection under the
23 bridge.

24 Q Okay. If someone were to refer to the location
25 of where the collision occurred as being in the

1 middle of the intersection near the bridge or
2 underneath the bridge, would that be accurate?

3 A I believe that would be accurate, yes.

4 Q Okay. Okay. Now maybe to clean up some
5 details, Deputy Malone, I do want to flip through a
6 few pages of your report. Let's go to the second
7 page, if you don't mind. The second page of the
8 report is information related to the vehicle that
9 Mr. Duffy was driving; is that correct?

10 A Yes.

11 Q And Mr. Duffy was the person who was driving
12 the semitruck; is that right?

13 A That is correct.

14 Q And as it relates to -- just kind of moving
15 down that page a bit. On the left-hand side, about
16 a third of the way down the page, there's a
17 reference in the report to driver contributing
18 circumstances. And then did you fill out
19 information for that category?

20 MR. HOY: Objection. Relevance.

21 Q (By Mr. Arndt) You can answer.

22 A I selected the option that would -- of putting
23 99, which was unknown.

24 Q All right. And did you issue any citations to
25 Mr. Duffy for his driving related to this accident?

1 A I did not.

2 MR. HOY: Same objection.

3 Q (By Mr. Arndt) Okay. So no citation to
4 Mr. Duffy?

5 MR. HOY: Same objection.

6 THE WITNESS: That's correct. No citation.

7 Q (By Mr. Arndt) And then how about injury
8 status, moving further down that page? Do you see
9 that category?

10 A I do.

11 Q And what does that indicate?

12 A Indicated that there was no injuries at the
13 time.

14 Q So no injury to Mr. Duffy?

15 A That is correct.

16 Q Moving further down the page, about two-thirds
17 of the way down the page, kind of on the right side
18 there's an estimated travel speed. Do you see that?

19 A Yes, I do.

20 Q And what did you indicate for the estimated
21 travel speed for Mr. Duffy's vehicle?

22 A I estimated it at 15 miles per hour.

23 Q And then the category right next to that says
24 what?

25 A "How estimated."

1 Q And what did you indicate?

2 A I indicated it was an officer estimate.

3 Q All right. So that means it's not that
4 somebody told you, you just estimated based upon
5 what you saw of the speed of Mr. Duffy's vehicle?

6 A Yes. Based on what I saw and based on how the
7 accident occurred.

8 Q Yeah. And to that degree, I suppose that would
9 include that the vehicles would have been stopped
10 before proceeding into the intersection; is that
11 right?

12 A That is correct.

13 Q So there would only have been so much time to
14 accelerate and get to 15 miles an hour from where
15 they were stopped to where the accident actually
16 occurred?

17 A That is correct.

18 Q And then to the next page, please, page 3,
19 there's a reference about -- again, a third of the
20 way down the page -- to traffic control device. Do
21 you see that?

22 A On page 3? Yes, I do.

23 Q And what does that say?

24 A Flashing traffic control signal.

25 Q And that's what you had previously described as

1 the flashing red lights?

2 A Yes.

3 Q Typically there would have been traffic lights
4 at this intersection that would have been directing
5 the traffic and who had the right-of-way; is that
6 right?

7 A That is correct.

8 Q But those lights weren't working, so the
9 default for the lights was flashing red?

10 A That is correct.

11 Q All right. Let's move on to page 4, please.
12 And this page 4 is the information related to
13 Justin Hamer's vehicle; is that right?

14 A Yes.

15 Q Also known as Unit 2 on your report?

16 A Yes.

17 Q And I forgot to ask you when asking about
18 Mr. Duffy's vehicle, that's referred to in your
19 report as Unit 1?

20 A That is correct.

21 Q So back to page 4, Unit 2, Justin Hamer's
22 vehicle. What did you list for driver contributing
23 circumstances underneath that category?

24 A I listed "unknown" as well.

25 Q Same -- same as you had listed for Mr. Duffy?

1 A That is correct.

2 Q And then how about for the injury status? Do
3 you see that?

4 A I do.

5 Q What does that say?

6 A It says "possible injury."

7 Q Do you know how you came to that conclusion?
8 Why "possible injury"?

9 A I don't recall if he -- at this point if he
10 specifically mentioned to me something that would
11 have made me put that or if I saw a visible injury.
12 Unfortunately, I just don't recall that at this
13 time.

14 Q All right. You don't have a recollection of
15 seeing a visible injury?

16 A I don't have a recollection of it, no.

17 Q And then that same question as I asked you for
18 Mr. Duffy, was there a citation issued to Mr. Hamer?

19 A There was not.

20 Q And then how about the estimated travel speed
21 for Mr. Hamer's vehicle?

22 A Fifteen miles an hour is what I put for
23 estimated.

24 Q So the same estimated speed for both vehicles
25 based upon what you observed?

1 A Yes.

2 Q And then let's go to page 5. Again, the
3 traffic control device type, what did you list
4 there?

5 A "Flashing traffic control signal."

6 Q So both parties had the same flashing red
7 lights?

8 A Yes.

9 Q And then what is page 6 of your report?

10 A Page 6 of the report is a drawing based on
11 what the -- how the accident looked or how the
12 accident occurred.

13 Q Okay. And for the jury's reference, assuming
14 they see this, can you tell us which vehicle is
15 which based upon your diagram?

16 A Absolutely. So there is a compass on the top
17 right corner that indicates north that's on top. So
18 looking at that, the north vehicle you see on there
19 is Mr. Hamer's vehicle as he's trying to go
20 westbound on 271. And the semi-looking vehicle on
21 the south is Mr. Duffy's vehicle as he was
22 attempting to turn northbound.

23 Q Okay. It might be obvious from the diagram,
24 but just in case it's not --

25 A Absolutely.

1 Q -- I'm going to ask you to take this pen and
2 maybe note the number of the vehicle as it
3 correlates to your report.

4 A Absolutely.

5 Q Okay. And I guess I'm assuming you noted,
6 yeah, vehicle 1 is the vehicle you referred to as
7 the semitruck that's at a bit of a diagonal in the
8 intersection?

9 A Yes.

10 Q And for the jury's reference, if Mr. Duffy's
11 explanation to you as to where he was trying to
12 proceed is accurate, does the line -- the direction
13 of the vehicle make sense to you?

14 A It does.

15 Q So where would he have been trying to go? I
16 don't know if you can just maybe use the diagram or
17 describe for the jury the direction he would have
18 been trying to travel.

19 A Absolutely. He would have been making, from
20 his position, a left-hand turn, so he would have
21 driven a little bit forward and started to make his
22 turn, and the way the on-ramp is, it kind of loops,
23 so he would have made a left-hand turn and kind of
24 continued more -- I guess he would have turned left
25 onto the on-ramp, so he would have been at an angle

1 at the point where they collided.

2 Q Okay. And similarly, vehicle 2 would be
3 Mr. Hamer's vehicle?

4 A Yes.

5 Q And that vehicle, per Mr. Hamer's statement to
6 you, is consistent with the direction he would have
7 been traveling?

8 A It is.

9 Q And that's just basically from east to west on
10 Highway 271?

11 A That is correct.

12 Q And based upon the physical evidence at the
13 accident scene, would it be the front driver's side
14 of Mr. Duffy's vehicle that would have struck the
15 front driver's side of Mr. Hamer's vehicle?

16 A That is correct.

17 Q Okay. Let's move to page 7 of the report for
18 me, please, and there's a reference at the top of
19 this report that says "Narrative." Do you see that?

20 A I do.

21 Q And is this something typically that you would
22 use in an accident report to, I guess, further
23 provide some details as to your investigation of how
24 the accident happened?

25 A Yes, it is.

1 Q All right. In the first sentence of the
2 narrative, do you see a reference to "non-injury
3 accident"?

4 A Yes, I do.

5 Q And why did you include that in the narrative
6 of your report?

7 A Those are the types of calls, when they come
8 out, they are dispatched usually to us -- they'll
9 come out as either an injury accident or a
10 non-injury accident, so the way it was dispatched
11 out to me, it was dispatched as a non-injury
12 accident.

13 Q Do you know, does that categor- -- or
14 categorization of the injury, that label of
15 "non-injury," does that refer to whether or not an
16 ambulance or an EMT would be called to the scene or
17 does that have any bearing, do you know?

18 A The initial results are just based on how our
19 dispatch is coded, which is usually just based on
20 the information they received from the 9-1-1 caller
21 or non-emergency caller.

22 Q All right. And moving through the narrative of
23 your report, the next line references those flashing
24 red lights that you've already described; is that
25 right?

1 A Yes.

2 Q And then what does the next sentence of your
3 narrative indicate? It starts with "It."

4 A "It should be noted that this is a very
5 complicated intersection that supports
6 east/westbound traffic, each direction having
7 several lanes to support through traffic and entry
8 and exit of interstate traffic."

9 Q All right. And I guess without trying to make
10 you a traffic engineer, why did you indicate that it
11 was a complicated intersection?

12 A Yes. Just it was -- it was more complicated
13 than your typical T intersection. It's not made to
14 be supported just on a -- normally on a four-way
15 intersection, it's supposed to be with lights, so
16 there's multiple lanes of traffic for east- and
17 westbound traffic, and there's multiple turn lanes
18 to go onto the interstate. And then there's traffic
19 trying to come off the interstate, so at any one
20 time there can be several cars from multiple
21 directions trying to get through the intersection.

22 Q Okay. I'm guessing most of our jurors are
23 going to understand that intersection since they're
24 Lincoln County residents and are probably familiar
25 with that. But maybe for further reference, is

1 there another intersection in the Sioux Falls area
2 that's similar to that intersection that you're
3 aware of? I'm thinking of the 12th Street area of
4 I-29?

5 A Yes. Yes, absolutely. That is.

6 Q Those two bridges and underpasses are similar?

7 A They are similar, yes.

8 Q All right. And your report goes on to
9 reference your interaction with the two drivers,
10 Mr. Duffy and Mr. Hamer; is that right?

11 A Yes, it does.

12 Q And those describe those -- I guess, the
13 previous conversation that you described to us that
14 Mr. Duffy indicated he had the right-of-way.
15 Mr. Hamer also indicated that he had the
16 right-of-way. And then Mr. Duffy again indicated to
17 you that, no, he thought he had the right-of-way?

18 A That's correct.

19 Q And, again, there's a reference later on in
20 your report that there was not any other, I guess,
21 independent witness at the scene that could help you
22 clarify which of those two actually had the
23 right-of-way?

24 A That is correct.

25 Q And then you concluded, based upon all of that,

1 that you didn't have enough information to determine
2 fault or cite anybody for a driving mistake; is that
3 right?

4 A That is correct.

5 Q All right.

6 MR. HOY: By the way -- I'm sorry. Objection
7 to that last question and answer as based on
8 relevance.

9 Q (By Mr. Arndt) Okay. Officer Malone, does the
10 Exhibit 1 fairly and accurately depict and summarize
11 your investigation of this April 8th, 2019, accident
12 between Mr. Hamer and Mr. Duffy?

13 A Yes, it does.

14 Q And does that document -- that document is
15 something that you would typically use in the
16 course of your business as a deputy sheriff in
17 Lincoln County?

18 A Yes, it is.

19 Q I'm going to move into maybe some other items
20 that might not be specifically mentioned in your
21 report. And I recognize, again, it's been four
22 years since the accident happened, so if you don't
23 have a recollection, you just need to let us know
24 that.

25 Do you have a memory of, when you spoke to

1 Mr. Hamer at the scene, whether or not he indicated
2 to you that he had lost consciousness?

3 A I do not have any memory of that.

4 Q And do you have a recollection of Mr. Hamer
5 acting in a way that led you to believe that he was
6 confused or had some type of head trauma?

7 A I do not recall any of that.

8 Q Do you believe that's something that you
9 typically would recall from an accident scene when
10 investigating an accident scene?

11 A If it was an injury accident, typically that's
12 something that I would have noted in my report, if
13 there was that type of injury, it would have been
14 noted. It's hard to say this long ago -- this long
15 if I would remember. I can't -- I guess I can't
16 answer that.

17 Q Sure. I understand. We need to rely upon your
18 report, I suppose.

19 A Absolutely.

20 Q Okay. As it relates to the fault of either
21 vehicle for their driving at the scene, as you
22 investigated the accident, did you make any kind of
23 a determination about whether or not the semitruck
24 had committed any type of Federal Motor Carrier
25 violation that would have contributed to the fault

1 of who caused this accident?

2 A No. For that aspect of it, I didn't consider
3 any of that. I didn't feel that that played any
4 portion of it.

5 Q And why not? Why did that -- why did a Federal
6 Motor Carrier regulation or any type of a trucking
7 violation not contribute to your determination of
8 who was at fault?

9 A What I was looking at mainly in that type was
10 kind of the right-of-way issue, who had the
11 right-of-way. So in my opinion, whether it was a
12 commercial vehicle or a private vehicle, the
13 right-of-way question would have still been the
14 same.

15 MR. ARNDT: Okay. I am going to offer
16 Exhibit A at this point.

17 MR. HOY: No objection.

18 MR. ARNDT: And, Deputy Malone, that's all the
19 questions I have for you at this point. Mr. Hoy may
20 have some questions for you.

21 MR. HOY: I do.

22 EXAMINATION BY MR. HOY:

23 Q Deputy, thank you. I appreciate your time.

24 Let me just ask a couple of things. Are you trained
25 in accident reconstruction?

1 A We do -- we go over our accident block in the
2 -- as part of the academy. I have not been to,
3 like, an accident reconstructionist. No, there's
4 further schools that do that, and I have not been to
5 any of those.

6 Q And there are certain officers that can be
7 called in to do those when you deem it necessary; is
8 that right?

9 A There can be, yes.

10 Q Okay. Did you do any kind of a -- any kind of
11 testing to determine the reaction time of Mr. Duffy
12 in making this turn?

13 A No.

14 Q Did you do any kind of a check of his equipment
15 or brakes or anything like that?

16 A I did not.

17 Q Did you make any measurements at the scene?

18 A I did not make any measurements.

19 Q Was there somebody coming to take measurements
20 after you finished with your investigation or was
21 that it?

22 A There was nobody coming to take measurements at
23 that point.

24 Q Okay. Now, the vehicle Mr. Hamer was driving
25 was an Avalanche. Do you recall that it was yellow?

1 A Personally, I do not recall that it was yellow.
2 I did see in my report that I noted it was yellow.

3 Q Okay. So a yellow truck would be easier to see
4 than some other colors?

5 MR. ARNDT: Well, I'll object as it calls for
6 speculation.

7 THE WITNESS: I believe that intersection is
8 quite open, so I believe any vehicle would be able
9 to be seen in that intersection.

10 Q (By Mr. Hoy) Okay. Including Mr. Hamer's?

11 A Yes.

12 Q All right. Now, so are -- do you have a CDL,
13 sir?

14 A I do not.

15 Q Are you aware of the regul- -- of the contents
16 of the CDL manual, the commercial driver's license
17 manual?

18 A I am not.

19 Q So even if you wanted to apply it, would you
20 have been able to make reference to it in your
21 report?

22 A I would not have, no.

23 MR. HOY: Okay. Now, I want to -- at this
24 point let's mark this first one Exhibit 1 and then
25 the second one Exhibit 2. She needs to put the

1 marker on it first, sir.

2 THE WITNESS: Absolutely.

3 (Deposition Exhibit Nos. 1 and 2 marked for
4 identification.)

5 Q (By Mr. Hoy) All right. Do you see both of
6 those exhibits in front of you?

7 A I do.

8 Q And the first one says "Google Earth" on it at
9 the bottom right corner?

10 A Yes.

11 Q Does that appear to be a picture of this -- of
12 this intersection where this crash occurred?

13 A I do believe the area has changed a little bit
14 since this, but I do believe this is that
15 intersection.

16 Q Okay. Now, then, showing you -- showing you
17 what is Exhibit 2, Officer, is that a rendition of
18 what the lanes look like under the interstate
19 overpass?

20 A Yes.

21 Q Okay. So there's -- for Mr. Hamer, in the
22 direction he was traveling, there were two lanes
23 that were going west?

24 A That is correct.

25 Q And, therefore, there would have been two lanes

1 going east if someone was going that way; is that
2 correct?

3 A That is also correct.

4 Q And then there's two turn lanes, both east and
5 west, for people trying to enter the interstate; is
6 that correct?

7 A That is correct.

8 Q Would you agree with me that the lights showing
9 that there was red flashing either stop -- whether
10 it had a turn light on it or not -- are most visible
11 at the area where the white stripes are on either of
12 these two exhibits? Is that fair?

13 A Yes. That you can see them from those
14 positions. I think that's fair, yes.

15 Q All right. And you would agree with me that
16 where Mr. Hamer had stopped before he went ahead,
17 this would be many car lengths before he came even
18 under the bridge. Is that fair to say?

19 A Yes.

20 Q So in order for someone to, quote, dart out,
21 that would have had to have been some extreme
22 acceleration. Do you agree?

23 MR. ARNDT: I'll object. It calls for
24 speculation.

25 THE WITNESS: I'm not sure if "dart out" -- I

1 guess I'm not sure if he would have to have darted
2 out, but...

3 Q (By Mr. Hoy) Well, okay. Let me ask it to you
4 this way and then you'll maybe understand my point.

5 If it's just a four-way stop where somebody's
6 making a left turn and the guy coming the other way
7 decided he was going to go, I mean, he could enter
8 the intersection and not be seen by the other
9 driver; is that correct?

10 A Yes. I understand. Yes, there is a larger
11 difference in this intersection than there would be
12 at kind of a traditional four-way intersection, yes.

13 Q And it would be -- it would -- if you're
14 driving a yellow truck and moving ahead, from your
15 perspective, if you were about to make a left turn,
16 you should be able to see that vehicle. I'm asking
17 you that in your experience.

18 MR. ARNDT: Well, I'll object. I think the
19 question is vague and it calls for speculation as to
20 what the other driver would have seen.

21 THE WITNESS: If I'm making a left-hand turn or
22 I'm going straight or if I'm driving my vehicle, I
23 always try to be cautious, yes, of other drivers.

24 Q (By Mr. Hoy) And in your experience with just a
25 standard driver's license, would you yield to

1 somebody coming across the lane you're about to
2 cross before you cross it?

3 MR. ARNDT: Object to the form of the question
4 and the reference to what type of driver's license
5 the person would have had, so I'll add relevancy.

6 THE WITNESS: Talking about me personally, if
7 I'm driving, whether I feel somebody has a
8 right-of-way or not, I try to practice defensive
9 driving, so I try to anticipate other people's
10 actions, so if I had to yield my right-of-way to
11 avoid a collision, I would.

12 Q (By Mr. Hoy) Okay. If you -- I need you to say
13 that again for me. If you had to yield the
14 right-of-way, what did you say, sir?

15 A I said me, personally, if I had to yield my
16 right-of-way to avoid a collision, I would.

17 Q Doesn't the law require that anybody making a
18 left turn makes sure that the lane is clear before
19 you cross it?

20 MR. ARNDT: I'll object to the extent that it
21 calls for a legal conclusion.

22 THE WITNESS: So from my understanding, how I
23 would interpret that is that would apply just to a
24 vehicle where there's no right-of-way sign. The
25 vehicle's just coming straight. I'm going to make a

1 left-hand turn. That vehicle coming straight
2 shouldn't have to yield to me or stop or slow down.
3 However, if that person already has some kind of
4 device telling them to yield, then they need to
5 follow that.

6 Q (By Mr. Hoy) Okay. All right. Now, in cases
7 where you have given citations, you normally give
8 statutes?

9 A Yes.

10 Q And I'm talking about during the period when
11 you were a deputy sheriff.

12 A Yes.

13 Q Is that right?

14 A Yes.

15 MR. HOY: All right. So with your answer,
16 then, I'm going to mark that as Exhibit 3.

17 (Deposition Exhibit No. 3 marked for
18 identification.)

19 Q (By Mr. Hoy) I see you're reading it. Tell me
20 when you're done, sir.

21 A Oh, yes. Okay. I've read this.

22 Q All right. Now, looking at SDCL 32-28-08.2,
23 you would agree with me that this was a red light as
24 opposed to a caution light?

25 A Yes. It was blinking red is what it was, yes.

1 Q And then applying that to Section 2, it says
2 that a "Red...signal stop shall stop in the same
3 manner as if the vehicle is at a stop sign";
4 correct?

5 A What was that part that you were reading just
6 now?

7 Q I'm reading, then, Number 3 --

8 A Number 3.

9 Q -- that says that the red -- "And the red or
10 completely unlighted signal stop shall stop in the
11 same manner as if the vehicle is at a stop sign."

12 A Yes, I do see that.

13 Q All right. So what the law says is that
14 somebody making a left turn has to act as if they're
15 at a stop sign if there's a flashing red?

16 A Yes.

17 MR. ARNDT: I'm going to object to the form of
18 the question. And it's vague.

19 Q (By Mr. Hoy) Is there anything about that
20 question you misunderstood, sir?

21 A No.

22 Q Okay. Now, then, to go on, under
23 SDCL 32-29-2.1, it says, "After having stopped, a
24 driver shall yield the right-of-way to any vehicle
25 which has entered or is approaching the intersection

1 from another highway and may not proceed into the
2 intersection until certain that such intersection
3 roadway is free from oncoming traffic which may
4 affect safe passage." Did I read that correctly?

5 A Yes.

6 Q Do you remember that as being the statute on
7 making a left turn in South Dakota?

8 MR. ARNDT: Well, I'm going to object to the
9 form. There's no reference in here to a left-hand
10 turn.

11 THE WITNESS: This was something that is --
12 reading this is refreshing my memory on the statute.

13 Q (By Mr. Hoy) Okay. Do you -- just to be clear,
14 then, "After having stopped, the driver shall yield
15 the right-of-way to any vehicle which has entered or
16 is approaching the intersection from another highway
17 and may not proceed into the intersection until
18 certain that such intersection roadway is free from
19 oncoming traffic which may affect safe passage," and
20 that you are -- that refreshes your memory of what
21 the statute is?

22 A Yes.

23 Q Now, going back, then, to Exhibit 2, would you
24 agree with me, then, that the -- will you agree with
25 me, then, that any truck making a left turn, before

1 they make that turn onto the underpass, has the
2 obligation to make sure that there is no one in any
3 of what would be, in this case, the westbound lanes
4 before they cross, applying that statute, do you
5 agree?

6 MR. ARNDT: Object to the form of the question
7 in that it calls for a legal conclusion.

8 THE WITNESS: So just in my opinion at this --
9 at this intersection and given the situation, you
10 should make sure that it's clear before you're
11 turning. But in this case, the other driver also
12 has an obligation to stop at that stop sign as well.
13 So as much as the driver has to yield to make sure
14 the left lane is clear, as they're turning left, the
15 other driver has to also make sure that they're
16 abiding by what would have been a blinking stop
17 sign -- or a blinking light at that point as well.

18 Q (By Mr. Hoy) Did you have any information that
19 my client hadn't stopped?

20 A No.

21 Q Okay. So if my client had stopped, then the
22 answer you just gave would be correct, it would
23 apply to this situation?

24 A Yes. I guess I'm just not sure if he stops --
25 if he doesn't have the right-of-way, but he stops,

1 if he can go. If it's not his turn to go, if he can
2 do that. I wouldn't think he would be able to go
3 even if he stops and somebody's there before him.
4 I'm not saying that somebody was, because I wasn't
5 able to determine if they were, but...

6 Q Okay. Do you recall that the wheels on the --
7 the wheel wells themselves -- were fully taken off
8 the truck or ripped from the truck in this crash?

9 A I do not recall that myself. I do know that
10 the vehicles were both, I think, pushed up onto the
11 side, so that definitely was impacting the way they
12 pushed them up, but I can't specifically recall how
13 the vehicles looked.

14 Q Okay. You would agree with me that the
15 statutes we just looked at are safety statutes for
16 the good of the public?

17 A Yes.

18 Q You would agree with me that the contents of
19 the commercial driver's license manual are for the
20 safety of the public?

21 MR. ARNDT: I'm going to object to that
22 question and the preceding in that it calls for
23 legal conclusions and object to relevance.

24 THE WITNESS: I would say that I'm not sure
25 what's in the commercial ones, but I would say that

1 they are probably written to, yes, make sure that
2 the public is safe.

3 Q (By Mr. Hoy) All right. And, then, do you know
4 anything about the Federal Motor Carriers?

5 A I have not.

6 Q And you've never reviewed those?

7 A Correct.

8 Q So you wouldn't even have been able to consider
9 them; is that correct?

10 A That's correct.

11 Q Do you think a truck driver should still be
12 following the commercial driver's license manual and
13 the federal regs if they're to be bound by them?

14 MR. ARNDT: Objection. Calls for a legal
15 conclusion.

16 THE WITNESS: Yes. If there is regulations or
17 things that they have to abide by to have their CDL
18 or certifications, they should abide by those.

19 MR. HOY: Okay. Let me just take a quick
20 moment. Thank you, Officer. I have nothing
21 further.

22 EXAMINATION BY MR. ARNDT:

23 Q Deputy Malone, I've got just a few follow-up
24 questions.

25 A Yes.

1 Q If, pursuant to your investigation of this
2 accident, you would have observed some type of a
3 defect on the truck that Mr. Duffy was driving to
4 indicate that that truck or that defect would have
5 caused or contributed to the accident, would you
6 have further investigated that?

7 A Yes.

8 Q You did not observe that in this case, though?

9 A That is correct.

10 Q As it relates to the obligations of both
11 vehicles at this intersection, based upon the facts
12 of your -- your investigation, do you believe that
13 both vehicles had the identical obligation to yield
14 the right-of-way to one another?

15 A Yes. I couldn't determine who, if any, had got
16 there, so I just know that both vehicles needed to
17 stop at that flashing red light and then make sure
18 it was their turn to go before they left.

19 Q Okay. So which vehicle had the right-of-way,
20 in your view, would have been determined by which
21 vehicle arrived at their stopping point first?

22 A That's correct.

23 Q And you were not able to conclude that in this
24 case?

25 A I was not.

1 MR. ARNDT: Okay. I think that's all I have.

2 MR. HOY: I have nothing further. Appreciate
3 your time.

4 THE WITNESS: Thank you.

5 THE VIDEOGRAPHER: Ready to go off the record?

6 MR. ARNDT: Yes.

7 THE VIDEOGRAPHER: The time is 15:48. This
8 concludes this video deposition. We're off the
9 record.

10 (Witness excused.)

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1 STATE OF SOUTH DAKOTA)

2 :SS CERTIFICATE

3 COUNTY OF LINCOLN)

4 I, Pat L. Beck, Registered Merit Reporter
5 and Notary Public within and for the State of South
6 Dakota:

7 DO HEREBY CERTIFY that the witness was
8 first duly sworn by me to testify to the truth, the
9 whole truth, and nothing but the truth relative to
10 the matter under consideration, and that the
11 foregoing pages 1-45, inclusive, are a true and
12 correct transcript of my stenotype notes made during
13 the time of the taking of the deposition of this
14 witness.

15 I FURTHER CERTIFY that I am not an
16 attorney for, nor related to the parties to this
17 action, and that I am in no way interested in the
18 outcome of this action.

19 In testimony whereof, I have hereto set my
20 hand and official seal this 7th day of October,
21 2023.

22 _____
23 Pat L. Beck, Notary Public

24 Expiration Date: June 11, 2028

25 Iowa CSR: No. 1185

Pat L. Beck, Court Reporter
605.351.8200 stenopat@sio.midco.net

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 30776

JUSTIN HAMER and KIM HAMER,

Plaintiffs and Appellants,

vs.

PAUL DUFFY and CORNERSTONE POURED FOUNDATIONS, INC.,

Defendants and Appellees.

Appeal from the Circuit Court
Second Judicial Circuit
Lincoln County, South Dakota
The Honorable John R. Pekas Presiding

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ARGUMENT

Issue I: The trial court erred by excluding the expert testimony of Adam Grill and / or Michael DiTallo

Plaintiffs respectfully submit that the circuit court abused its discretion by excluding specialist expert knowledge and testimony critical to credibility, fault analysis, and an accurate understanding of the rules governing motor carriers and Commercial Driver License (CDL) drivers. The crux of Appellees' argument on appeal is, in substance, that the evidence was good enough:

"The drivers of the two vehicles—Hamer and Duffy—were the only known witnesses to this accident. Both testified at trial, and the jury was able to assess their respective testimony and credibility. Multiple photographs depicting the physical evidence of the accident scene were introduced at trial (R. 765-777). Further, Lincoln County Deputy Sheriff Malone investigated the accident. Deputy Malone's Accident Report was admitted as an exhibit at trial. (R. 961-967). Deputy Malone's trial deposition was played for the jury at trial. (Appx. 1-54). Deputy Malone testified that his investigation included his observation of the accident scene and speaking to both drivers. The jury had sufficient evidence to determine right-of-way, which was not a technical or scientific issue."

See Appellee Brief at 11 (emphasis added).

Plaintiffs contest the characterization that the jury's only task was to determine right-of-way (i.e., who arrived at an intersection first). Each expert proffered relevant testimony in their field of expertise outside the common knowledge and experience of a jury that addressed technical issues central to liability, including the performance and compliance standards required to safely operate a commercial motor vehicle; application of 49 C.F.R. § 392.3 ("Ill or Fatigued Operator") to the trial testimony of the defendants due to Defendant

Duffy's ongoing split-shift work; and the reconstruction of sight lines and perception/reaction times at a confusing and complex intersection, exacerbated by a malfunctioning traffic control device, depriving the jury of critical information necessary to evaluate credibility and engage in a proper fault analysis.

The superficial investigation conducted by Deputy Malone—consisting of conflicting party interviews and photographs—was not an acceptable substitute for the exacting measurements, analyses, and crash reconstruction performed by Michael DiTallo (“Mr. DiTallo”), which is plainly evident from a comparison of the two reports. (CR pp. 66-93, 1231 – 1258, 96 – 104, 1148 – 1156; App. 16-45; 46-56).

In his deposition,¹ Deputy Malone highlighted the directly conflicting accounts of Mr. Hamer and Defendant Duffy. [Def. Appx. at 15-17]. He further added, “...there was no outside witnesses that were involved that stayed on-scene, and I wasn’t there at the time, so I had no way to determine who, if anybody, at that point had violated the right-of-way”. [Def. Appx. at 16]. Regarding the complexity of the intersection, Deputy Malone testified, “...at any one time there can be several cars from multiple directions trying to get through the intersection”. [Def. Appx. at 28] (emphasis added). He additionally testified, “...there is a large[] difference in this intersection then there would be at kind of a traditional

¹ Aside from inclusion in the Appendix to Defendants’ Brief, a copy of the transcript of Mr. Malone’s deposition does not otherwise appear in the record. Mr. Malone testified via video deposition. A DVD of the video recording appears in the record as Exhibit “X”.

four-way intersection....” [Def. Appx. at 37] (emphasis added). Deputy Malone was not trained in accident reconstruction. [Def. Appx. at 32-33]. He made no measurements of the scene. [Def. Appx. at 33]. He performed no testing to determine the reaction time for Defendant Duffy. [Def. Appx. at 33]. He did not possess a CDL and was not familiar with the contents of the CDL manual. [Def. Appx. at 34]. Similarly, he was not familiar with the Federal Motor Carrier Safety Regulations (FMCSR) and did not consider the regulations in his response to the crash. [Def. Appx. at 44]. Most importantly, Malone testified that a truck driver should abide by the regulations. [Def. Appx. at 44].

For Defendants to argue otherwise, or suggest that the evidence was minimally “sufficient” for the jury to do its job, is disingenuous, as the pretrial ruling infringed on Plaintiffs’ right to prepare and zealously present the strongest case possible within the rules of evidence. *See, e.g., State v. Abdo*, 2018 S.D. 34, ¶ 27, 911 N.W.2d 738, 745 (“[A party] has the right to present its case in any manner it sees fit so long as it stays within evidentiary rules[.]”). *Id.*

Mr. DiTallo included the following aerial image of the intersection in his report along with several detailed scene diagrams he created based on 3D scans of the same:

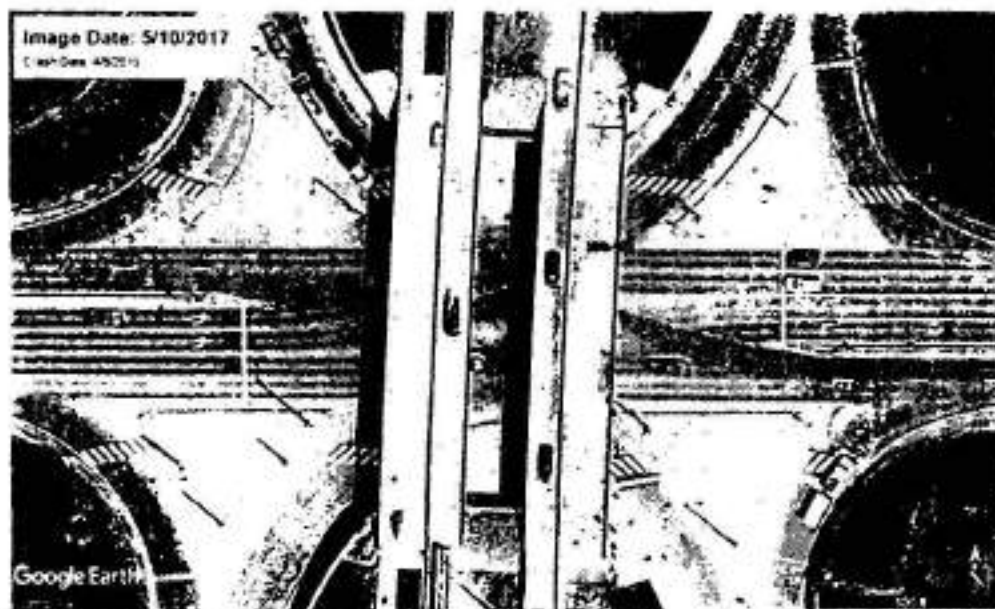


Exhibit 1: Google Earth aerial of the overall scene.

[CR pp. 47, 97, 1149; App. at 47].

While there may be garden variety auto crashes that do not require expert testimony, as argued by Defendants, this is respectfully not one of them. The details—the size and handling characteristics of the CMV, whether Defendant Duffy was fatigued and/or Defendants were non-compliant with the applicable federal safety regulations, acceleration rates, elevated CMV sight lines, respective distances traveled, and reaction/perception times—all mattered and more than likely affected the outcome of this trial. As determined by Mr. DiTallo, this crash was avoidable if Defendant Duffy delayed his turn by a mere .02 seconds, which is the blink of an eye when he possessed between 4.4 and 4.9 seconds to observe and react to Mr. Hamer’s yellow Chevrolet. [(CR pp. 51, 101, 1153; App. at 51]. Incredibly, despite his thorough investigation, precise measurements, and scientific/mathematical findings, Defendants argued that “...none of [Mr.]

DiTallo's proposed 'expert' opinions addressed topics beyond the knowledge of a lay juror". *See* Appellee Brief at 10.

As to Plaintiffs' truck safety expert, Defendants further argued that "[Mr.] Grill's report conceded that, '[t]he standard of care for truck drivers is the same as for every road user, in the respect that the truck must be operated in a manner that avoids crashing into things, or having others collide with it,'" but neglected to highlight the next sentence which read, "...the performance standards to accomplish this standard of care are much different for truck drivers than operators of smaller vehicles." [CR pp. 23, 73, 1238; App. at 23]. This argument is an extension of Defendant Cornerstone's erroneous trial testimony that, "[t]hey're the same as automobile rules...except for inspecting the truck," adding "I'm just telling you it's the same rules". (TT Day 3 at 69).

Defendant Cornerstone was aware of Defendant Duffy's split-shift schedule that involved thirteen (13) hour workdays with, at best, six and one-half (6 ½) hours of non-consecutive sleep, but testified "[s]ome people need sleep and some don't," adding, "[t]he rules say drive safe". (TT Day 1 at 59-60 [Duffy]; TT Day 3 at 64; 70 [Cornerstone]). The circuit court's pre-trial rulings deprived Plaintiffs of an ability to counter this false and self-serving testimony including, but not limited to, Mr. Grill educating the jury that the Federal Motor Carrier Safety Regulations require a truck driver to achieve "ten consecutive hours" of "restorative rest". (CR p. 1118).

It is axiomatic that the conduct of a truck driver should be assessed by reference to the conduct of a reasonable person with the special competence required of truck drivers, not by reference to the conduct of a reasonable, ordinary driver. *Dakter v. Cavallino*, 363 Wis.2d 738, 866 N.W.2d 656, 670-72 (2015) (holding that instruction that professional driver of semi-truck driver would exercise under the same or similar circumstances, having due regard for the state of learning, education, experience, and knowledge possessed by semi-truck drivers holding commercial driver's licenses did not impermissibly imply that jury should hold driver to heightened standard of care); *see also Malburg v. Grate*, 2014 WL 4473786, at *4-5 (E.D. Mich. Sept. 9, 2014) (“[Defendant’s] knowledge of the FMCSRs, and his alleged failure to apply that knowledge in the circumstances of this case, will, of course, be relevant to the jury’s determination on the ultimate issue of [his] negligence.”); *Abrams v. FedEx Ground Package System, Inc.*, 585 F.Supp.3d 1131, 1152 (S.D. Ill. 2022) (“Plaintiff may present the relevant FMCSRs through [their expert] as this will assist the jury in understanding the standard of care in the trucking industry, an area with which they may not be familiar.”).

Absent Mr. Grill’s testimony, the jury was left with the false impression that the FMCSR is the “same as automobile rules”. It was also deprived of critical information that would help it resolve conflicting testimony, evaluate credibility, and properly apportion fault. Plaintiffs respectfully submit that the jury would not have determined Mr. Hamer to be contributorily negligent, more than slight, if it

learned that Defendant Duffy had up to 4.4 to 4.9 seconds of perception/reaction time to observe Mr. Hamer's yellow Chevrolet and avoid the crash by a fraction of a second. (CR pp. 100-101, 1152-1153; App. at 50-51). The omitted explanation, supported by Defendant Duffy's trial testimony, is that he was chronically fatigued in violation of the FMCSRs and minimum industry standards. TT Day 1 at 56-60; (CR pp. 1117 – 1118).

Defendants further submit that "...other jurisdictions have confirmed that not all auto accident cases require expert testimony". (See Appellee Brief at 11). Aside from the cases holding no precedential value, each is distinguishable. Not a single case analyzed and excluded the testimony of a trucking expert or addressed fatigued driving. In *Pilgrim's Pride Corp. v. Smoak*, the Court of Appeals of Texas determined a jury was presented with sufficient evidence to render a verdict for the plaintiff notwithstanding the fact that the trial court erroneously permitted a police officer to offer a causation opinion. *See Pilgrim's Pride Corp. v. Smoak*, 134 S.W.3d 880, 892 (Tex. App. 2004) ("[The officer] was not an accident reconstruction expert who had the experience and knowledge to observe the scene and add some scientific, technical, or specialized knowledge to the evidence which would assist the trier of fact to understand the evidence and testimony in the case."). It was in the context of affirming the verdict absent expert testimony that the excerpt highlighted by Defendants was written. *Id.* at 894. Indeed, the very next sentence in the opinion strengthens Plaintiffs' argument in this case: "[t]he parties were permitted to introduce qualified accident reconstruction experts

to assist the jury in determining the cause of the accident, **but they were not required to do so.**” *Id.* (emphasis added). In other words, while “expert testimony was not required to establish negligence,” the parties were free to present it. *Id.*; see also *Weiland v. Bumann*, 2025 S.D. 9, ¶¶ 50-51, 18 N.W.3d 148, 160 (“[W]e have never held that expert testimony is categorically required to prove causation for contributory negligence based on excessive speed....”). *Id.*

Two of the other cases involved no testimony that the jury could not itself infer from the trial evidence. *Utz v. Running & Rolling Trucking, Inc.*, 32 So.3d 450, 463 (Miss. 2010) (“[T]he trial court prohibited any expert opinions that the taillights of the R&R truck had dirt on them or were dirty at the time of the accident [because the status was depicted in photographs]...[but] did not preclude [plaintiff] from asking her experts, in a hypothetical situation, about the effects of dirt on taillight visibility, stating that the expert ‘can talk about if, in fact, there was dirt on the taillight, what effect it would have on the visibility of the trailer.’”); see also *Kimble v. Earle M. Jorgenson Co.*, 830 N.E.2d 814, 824 (Ill.Ct.App. 2005).

Additionally, in *Watkins v. Schmitt*, unlike here, three eyewitnesses agreed that a cement truck was traveling at a reasonable speed at the time of an accident. *Watkins v. Schmitt*, 665 N.E.2d 1379, 1383-84 (Ill. 1996). Based on post-crash analysis of skid marks, a police officer provided deposition testimony that the truck was going significantly faster than the witness estimates. *Id.* at 1384. The

opinion made clear that the eyewitness testimony of the neutral witnesses was a significant factor in excluding the testimony:

“In this case, three eyewitnesses who had a reasonable opportunity to observe the accident, and sufficient driving experience, gave their speed estimates all within a 20- to 35-mile-per-hour range. Even without defendant Schmitt’s testimony, **there are two disinterested eyewitnesses who had a fair opportunity to observe Schmitt’s speed....** The speed estimates from these three eyewitnesses, along with the evidence of skid marks, clearly formed a sufficient basis upon which a jury could make its own conclusions.”

Id. at 1386 (emphasis added).

The final case is from a jurisdiction that favors exclusion. “While the general rule not favoring reconstruction of accidents by expert testimony [in Arkansas] has been liberalized somewhat since enactment of the Uniform Rules of Evidence..., [Arkansas courts] have continued to follow it.” *Drope v. Owens*, 765 S.W.2d 8, 10 (Ark. 1989). This factor alone distinguishes this case; however, like the facts in *Watkins*, there were four eyewitnesses and the trial court was of the opinion that “...it would be impossible for an expert to come up with a reasonable conclusion as to speed under the circumstances.” *Id.* at 9.

The Supreme Court of Arkansas subsequently distinguished *Drope* with a factual pattern more akin to the conflicting testimony at issue here, writing:

“Unlike the rather straightforward situation in *Drope v. Owens*, where only the speed of a motorcycle was at issue, here a number of factors came into play, **as well as directly contradictory testimony from the persons involved in the collision** and one eyewitness. Dr. Williams, without question, assisted the jury in analyzing the physical evidence.”

Banks v. Jackson, 848 S.W.2d 408, 412 (Ark. 1993) (emphasis added); *see also McElroy v. Benefield*, 771 S.W.2d 274, 275-76 (Ark. 1989) (affirming the trial court's decision to admit an expert's testimony where the reconstructionist evaluated skid marks, observed the displacement of and damage done to vehicles, and measured distances in order to arrive at speed estimates.). Respectfully, the trial court abused its discretion, the judgment should be vacated and the case reversed and remanded for further proceedings.

Issue II. The trial court erred by refusing to allow Plaintiffs to amend their complaint to allege negligence by Defendant Cornerstone and violations of the Federal Motor Carrier Safety Regulations

Plaintiffs respectfully submit that South Dakota adopted the FMCR pursuant to SDCL § 29-28A-3 and recognizes that violations of Federal Motor Carrier Safety Regulations can constitute negligence per se and evidence of common law negligence. Relying on *Highmark Federal Credit Union v. Hunter*, Appellees further erroneously contend that amending the complaint to allege violations of the FMCSR was futile because “[t]he FMCSRs do not create a private cause of action....” (See Appellee Brief at 17). This argument misstates the law and misconstrues the role of the FMCSR under South Dakota law. First, unlike the National Flood Insurance Act of 1968 (“NFIA”) at issue in *Highmark*, South Dakota adopted, and expressly incorporated, the FMCSR into South Dakota

state law.² SDCL § 49-28A-3; *see also* *Kukla v. Hulm*, 310 F.3d 1046, 1049 (8th Cir. 2002) (“South Dakota has adopted federal regulations regarding motor carriers.”); *Levene v. Staples Oil Co., Inc.*, 685 F.Supp.3d 791, 808 (D. S.D. 2023) (same).

Further, this Court observed that Congress enacted the NFIA “to protect lenders and the federal treasury[.]” not to create private causes of action for borrowers against lenders. *Highmark Federal Credit Union v. Hunter*, 2012 S.D. 37, ¶15, 814 N.W.2d 413, 417. By contrast, one of the stated purposes of the Federal Motor Carrier Act of 1984 is to “promote the safe operation of commercial motor vehicles [to protect the public].” 49 U.S.C. § 31131(a)(1); *see also* 49 U.S.C. § 31131(b)(1) (“[I]t is in the public interest to enhance commercial motor vehicle safety and thereby reduce highway fatalities, injuries, and property damage....”); *A.D. Transp. Express, Inc. v. United States*, 290 F.3d 761, 767 (6th Cir. 2002) (observing that the purpose of the Motor Carrier Safety Improvement Act of 1999 is to “promot[e] safer operation of commercial motor vehicles”).

Rejecting an argument that a federal safety regulation that requires tractor-trailer drivers to exercise “extreme caution” in hazardous weather conditions does

² Indeed, the statute further provides “[a]ny violation of part 387 and parts 390 to 396, inclusive, the motor carrier safety requirements governing the qualification of drivers, driving of motor vehicles, parts and accessories necessary for safe operation, notification and reporting of accidents, assistance with investigations and special studies, hours of service of drivers, inspection, repair, and maintenance **is a Class 2 misdemeanor.**” *Id.* (emphasis added).

not promote public safety, U.S. District Court Judge Karen E. Schreier wrote the following:

“Defendants next argue that 49 C.F.R. § 392.14 cannot form the basis of a negligence per se argument against either Staples Oil or Shelhaas because the South Dakota legislature did not enact SDCL § 49-28A-3, which in turn adopts 49 C.F.R. § 392.14, to promote public safety as is required by the South Dakota Supreme Court. Under South Dakota law, ‘where a particular statutory or regulatory standard is enacted to protect persons in the plaintiff’s position or to prevent the type of accident that occurred, and the plaintiff can establish this relationship to the statute, unexplained violation of that standard renders the defendant negligent as a matter of law. *Davies v. GPHC, LLC*, 980 N.W.2d 251, 263 (S.D. 2022 (quoting *Lovell v. Oahe Elec. Coop.*, 382 N.W.2d 396, 397-98 (S.D. 1986)).

Here, the South Dakota State legislature ‘adopt[ed]...Title 49 of the Code of Federal Regulations, subtitle B, chapter III, subchapter B...parts 390 to 397, inclusive[,]’ with certain amendments that do not apply here. See SDCL § 49-28A-3. Section 49-28A-3 further states that “[a]ny violation of...parts 390 to 396, inclusive...is a Class 2 misdemeanor.’ *Id.* This statute explicitly frames these regulations as “motor carrier *safety* requirements.’ *Id.* (emphasis added). The Eighth Circuit has also recognized that 49 C.F.R. § 392.14 ‘[was] designed to protect against the possibility that as conditions become hazardous the truck driver will be more prone to lose control of his vehicle and cause an accident.’ *Labbee v. Roadway Express, Inc.*, 469 F.2d 169, 171-72 (8th Cir. 1972). And viewing the evidence in the light most favorable to the plaintiffs, a jury could find that Shelhaas failed to exercise extreme caution in the hazardous weather conditions, as 49 C.F.R. § 392.14 requires. Because the South Dakota legislature has explicitly stated that it adopted 49 C.F.R. § 392.14 out of concern for safety and because the federal regulation itself was designed to promote safety in the context of truck drivers operating a vehicle in hazardous conditions, the court rejects defendants’ argument that 49 C.F.R. § 392.14 cannot provide the basis of negligence per se liability.”

Levene, 685 F.Supp.3d at 808-09.

The Federal Motor Carrier Safety Regulations establish a uniform national standard for all motor carriers, truck drivers, and tractor-trailers, and provide, in relevant part:

“Every commercial motor vehicle must be operated in accordance with the laws, ordinances, and regulations of the jurisdiction in which it is being operated. **However, if a FMCSA regulation imposes a higher standard of care than that law, ordinance or regulation, the regulation must be complied with.**”

See 49 C.F.R. § 392.2 (emphasis added).

One such federal safety regulation implicated by the evidence in this case—found in Part 392 of the FMCSRs, which was adopted by the South Dakota Legislature, is the regulation prohibiting fatigued driving, which reads in relevant part:

“No driver shall operate a commercial motor vehicle, and a motor carrier shall not require or permit a driver to operate a commercial motor vehicle, while the driver’s ability or alertness is so impaired, or so likely to become impaired, through fatigue, illness, or any other cause, so to make it unsafe for him/her to begin or continue to operate the commercial motor vehicle.”

49 C.F.R. § 392.3.

“The reasons which persuaded [this Court] to hold that the violation of a safety statute or ordinance is negligence as a matter of law apply with equal validity to safety rules and regulations....” *Blakey v. Boos*, 83 S.D. 1, 7, 153 N.W.2d 305, 308 (S.D. 1967) (regulations adopted by the Board of Charities and Corrections); see also *Thompson v. Summers*, 567 N.W.2d 387, 394 (S.D. 1997) (“Whether [defendant] violated one or more of these statutes and [federal] regulations [relating to hot air balloon piloting and landing safety], and if so, whether the violation was the proximate cause of [plaintiff’s] injuries constitutes a question for the factfinder.”); *Hertz Motel v. Ross Signs*, 2005 S.D. 72, ¶¶ 9-12, 698 N.W.2d 532, 535 (S.D. 2005) (observing that “South Dakota has adopted the

[National Electrical Code]” and finding that the trial court did not err in determining that a violation of a NEC safety rule could serve as the basis for negligence *per se*); *Martino v. Park Jefferson Racing Ass’n*, 315 N.W.2d 309, 313 (S.D. 1982) (“These safety regulations [requiring that race track be maintained in good condition including adequate railing closures] fix a standard by which the fact of negligence may be determined.”).

“If [49 C.F.R. § 393.3 was] not designed with safety in mind, then why [was it] enacted – for what purpose?” *Jones v. Hirschbach Motor Lines*, 588 F.Supp.3d 953, 958 (D. S.D. 2022) (Characterizing an argument that state statutes mandating SMV emblem, taillights, and stop lights are not safety statutes as “sophistic and def[ying] both logic and common sense”). Taking the defense argument to its logical conclusion, if violation of the adopted and criminalized FMCSRs cannot lawfully form the basis of negligence *per se* and/or negligence in South Dakota, then neither can the Rules of the Road which, unlike the FMCSRs, do not expressly provide that they exist for the benefit of the motoring public. The circuit court’s failure to recognize this distinction was reversible error that deprived Plaintiffs an opportunity to allege negligence *per se* and generate evidence of negligence.

As was made clear throughout these proceedings, Plaintiffs did not allege, nor do they claim a right to recover, pursuant to 49 U.S.C. § 14704. Rather, the allegations alleged negligence *per se* and direct negligence theories squarely rooted in South Dakota law, which recognizes claims of negligent hiring, training,

supervision, retention, and entrustment. *Kirlin v. Halverson*, 2008 S.D. 107, ¶ 30, 758 N.W.2d 436, 448; *see also Estate of Trobaugh ex rel. Trobaugh v. Farmers Ins. Exchange*, 2001 S.D. 37, ¶ 30, 623 N.W.2d 497, 504.

Courts routinely reject this meritless argument. In *Ballinger v. Gustafson*, for example, a federal judge in the Eighth Circuit observed that “Plaintiff’s Complaint [did] not attempt to state a claim for relief under the FMCSR and [did] not allege a violation of any federal regulations as a cause of action in its own right[;] [i]nstead, Plaintiff’s Complaint merely allege[d] violations of federal regulations as an element of state law causes of action.”³ *Ballinger*, 2022 WL 16758558, at *3 (D. Neb. Oct. 19, 2022); *see also Lidstrom v. Scotlynn*

³ Federal courts also routinely conclude that references to the FMCSR as part of state law negligence claims do not convert the matter into a federal question for jurisdictional purposes. *See, e.g., Hayle v. J.B. Hunt Transportation, Inc.*, 2024 WL 4501713, at *2 (W.D. Wash. Oct. 16, 2024) (“It is also clear that the [negligence] claim arises under state law because, as plaintiff has argued, there is no private cause of action arising out of the FMCSR.”); *Lopez v. Univ. of the Sw.*, 2024 WL 68531, at *3 (D. N.M. Jan. 5, 2024) (“The federal regulations referenced in Plaintiffs’ Amended Complaint have been expressly adopted by New Mexico into its own motor carrier safety regulations and thus Plaintiffs’ right to relief does not depend on federal law.”); *Reichert v. Mendez*, 2023 WL 1814293, at *1-3 (D. Ariz. Feb. 8, 2023) (finding no section 1331 subject-matter jurisdiction over state-law negligence claim based on allegation that defendant driver’s negligence was attributable to defendant employer under FMCSR); *Dumas v. Albaier*, 2020 WL 5943019, at *2-3 (S.D. Ohio Oct. 7, 2020) (finding no section 1331 subject-matter jurisdiction over state-law negligence claim based on allegations that defendant violated duties imposed by the FMCSR); *Dippel v. Best Drive, LLC*, 2020 WL 813971, at *132 (S.D. Ill. Feb. 19, 2020) (same); *Moody v. Great West Cas. Co.*, 2017 WL 77417, at *1, *3-4 (S.D. Ga. Jan. 9, 2017) (finding no section 1331 subject-matter jurisdiction over state-law negligence claim based on allegation that one defendant’s negligence was attributable to another defendant under the FMCSR); *Fochtman v. Rhino Energy*, 2013 WL 5701468, at *1-3 (E.D. Ky. Oct. 17, 2013) (finding no section 1331 subject-matter jurisdiction over state-law negligence claim based on allegation that defendants violated duties imposed by the FMCSR); *Coffman v. Dutch Farms, Inc.*, 2017 WL 1217238, at *1-4 (N.D. Ind. Feb. 24, 2017) (same).

Commodities Inc., 2024 WL 2886570, at *5 (E.D. Wash. June 6, 2024) (“[T]he Court does not construe Plaintiffs’ reference to federal regulations as the invocation of a federal ‘regulatory negligence’ cause of action; instead, the reference is a factual assertion of a duty owed and breached.”); *Nelson v. Werner Enterprises, Inc.*, 692 F.Supp.3d 821, 827 (E.D. Tenn. Sept. 15, 2023) (“The fact that the FMCSR does not contain a private cause of action does not preclude Plaintiff from using the FMCSR to establish a standard of care. Moreover, this Court has already concluded that at least one section of the FMCSR provided a standard of care that satisfied the requirements for negligence per se.”); *Widdows v. Dwaine Wilcox and Trucks, Inc.*, 2020 WL 13133419, at *4 (M.D. Fla. Nov. 19, 2020) (“As [the plaintiff] observes, he brings only Florida common law claims, and his allegations that [the motor carrier] breached duties of care including by violating those regulations does not transform the allegations included in the Florida common law claims into federal private causes of action under federal law.”); *Hejnal v. U.S. Xpress, Inc.*, 2018 WL 534376, at *7 (E.D. Mo. Jan. 24, 2018). (“Contrary to defendant’s assertion, [the] complaint does not attempt to state a claim for relief under the FMCSR. Plaintiff does not allege a violation of a federal regulation as a cause of action in its own right. Rather, Plaintiff’s complaint merely alleges possible violations of federal regulations as an element of state law causes of action.”); *Chavez-Matchie v. Jack Cooper Transport Co.*, 2017 WL 2378334, at *4 (D. Kan. June 1, 2017) (“Plaintiff’s common law negligence claims are predicated on alleged violations of the FMCSRs.”);

Courtney v. Ivanov, 2015 WL 3866674, at *3 (W.D. Pa. June 23, 2015) (“[T]he remaining paragraphs in dispute...are not an attempt by Plaintiff to assert a private cause of action under 49 U.S.C. § 14704(a)(2), as Count X did in the original complaint. Instead, those paragraphs allege violations of the FMCSR to serve as a factual basis for asserting a claim of common law negligence and negligent entrustment.”). Because alleged violations of the FMCSR which have codified into state law allege viable claims, the trial court erred by refusing to allow Plaintiffs to amend their complaint.

Issue III: The trial court erred by refusing to instruct the jury regarding a violation of 48 C.F.R. § 392.3 of the Federal Motor Carrier Safety Regulations

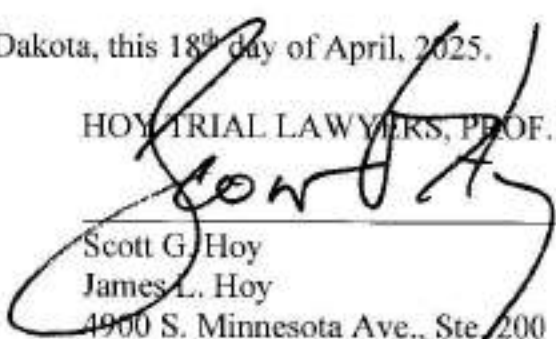
Plaintiffs rely on the arguments and authorities previously submitted in their initial brief dated and served February 4, 2025, as well as this brief.

CONCLUSION

Wherefore, Plaintiffs respectfully request that this Court vacate the judgment and reverse and remand the case for further proceedings.

Dated at Sioux Falls, South Dakota, this 18th day of April, 2025.

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Request for Oral Argument

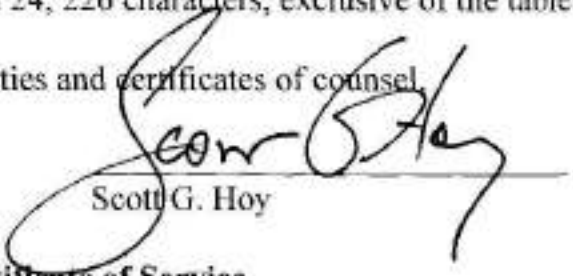
Appellants respectfully request Oral Argument.



Scott G. Hoy

Certificate of Compliance

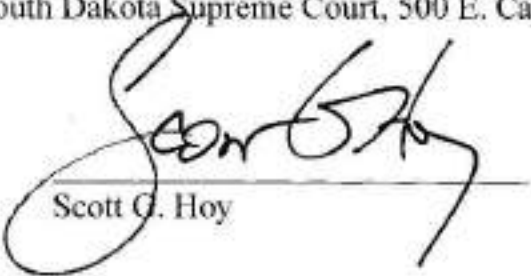
Pursuant to SDCL § 15-26A-66(b)(4) the undersigned certifies that to the best of his knowledge, this brief complies with the type volume limitation in SDCL § 15-26A-66(b)(2). This brief was prepared using Microsoft 365 Office Word, New Times Roman font size 13. According to the word processing system, this brief contains 4,537 words and 24, 226 characters, exclusive of the table of contents, table of cases and authorities and certificates of counsel.



Scott G. Hoy

Certificate of Service

The undersigned certifies that on April 18, 2025, he electronically served a true and correct copies of the foregoing "Plaintiffs' and Appellants' Reply Brief" by and through the Odyssey File and System, upon Mark A. Arndt, Evans, Haigh & Arndt, LLP, PO Box 2790, Sioux Falls, SD 57101, counsel for Defendants and Appellees, and upon the Clerk the South Dakota Supreme Court, 500 E. Capitol, Pierre, SD 57501-5070, for filing; the undersigned further certifies that on February 3, 2025, he mailed the original "Plaintiffs' and Appellants' Brief," postage prepaid, to the Clerk of the South Dakota Supreme Court, 500 E. Capitol, Pierre, SD 57501-5070.



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