IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27317

STACEY ZERFAS
Plaintiff/Appellant,

vs.

AMCO Insurance Company, a Nationwide Company,
Defendant/Appellee.

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

The Honorable Stuart L. Tiede, Presiding

BRIEF OF APPELLANT STACEY ZERFAS

Nancy J. Turbak Berry
Seamus W. Culhane
Turbak Law Office, P.C.
26 S. Broadway, Suite 100
Watertown, SD 57201
(605) 886-8361

Attorneys for Appellant

Kent R. Cutler
Kimberly R. Wassink
100 N. Phillips Avenue, 9th Floor
P.O. Box 1400
Sioux Falls, SD 57101-1400
(605) 335-4950

Attorneys for Appellee

Notice of Appeal filed January 9, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Caselaw cited:

Statutes cited:

Other authorities cited:

JURISDICTIONAL STATEMENT

Stacey Zerfas appeals from the Summary Judgment entered on December 19, 2014 by which the circuit court dismissed her claim for uninsured motorist benefits against AMCO Insurance Company. Mrs. Zerfas filed a Notice of Appeal January 9, 2015.

STATEMENT OF LEGAL ISSUES

1. **Did the hit-and-run driver whose conduct caused the death of Mrs. Zerfas' husband, David Zerfas, owe any legal duty to Mr. Zerfas?**

   The trial court found that the hit-and-run driver owed no duty to Mr. Zerfas, such that Mrs. Zerfas could not possibly be entitled to uninsured motorist benefits.

   Most relevant cases:
   Herren v. Gantvoort, 454 N.W.2d 539 (S.D. 1990)
   Janis v. Nash Finch Co., 2010 S.D. 27, 780 N.W.2d 495
   Millea v. Erickson, 2014 S.D. 34, 849 N.W.2d 272

   Most relevant statutes:
   SDCL §31-32-6
   SDCL §32-24-8

2. **Could a jury reasonably conclude that a driver using a public highway breaches his legal duties to others when the driver kills a deer on the highway and, without attempting to remove the deer carcass, trying to warn oncoming motorists, notifying authorities of the hazard, or otherwise taking any action to prevent danger to others, leaves the scene with the carcass still lying in the middle of the highway in the dark?**

   The trial court in effect ruled that a jury could not reasonably conclude that such a driver had violated any legal duty.

   Most relevant cases:
   Iverson v. NPC Intern., Inc., 2011 S.D. 40, 801 N.W.2d 275
   Johnson v. Matthew J. Batchelder Co., Inc, 2010 S.D. 23, 779 N.W.2d 690
   Janis v. Nash Finch Co., 2010 S.D. 27, 780 N.W.2d 495

STATEMENT OF THE CASE

Stacey Zerfas brought this action in Minnehaha County, Second Judicial Circuit, to recover uninsured motorist (UM) benefits following the death of her husband David in a motor vehicle collision caused by an unidentified hit-and-run driver. Mrs. Zerfas claimed that the negligence of the hit-and-run driver was a proximate cause of the crash that claimed her husband's life. Because an unidentified hit-and-run driver is deemed an "uninsured motorist" for purposes of UM coverage, Mrs. Zerfas claimed AMCO owed UM benefits under the AMCO auto policy she and her husband had purchased from AMCO.

AMCO moved for summary judgment. AMCO contended that the hit-and-run driver could not have been negligent because that driver had no legal duty to use reasonable care toward other drivers on the highway and was not otherwise under any legal duty toward Mr. Zerfas. Agreeing that the hit-and-run driver had had no legal duty to other drivers on the highway, Judge Stuart L. Tiede granted AMCO's motion.

STATEMENT OF THE FACTS

Sometime before 6:23 AM on December 2, 2011, an unidentified motorist traveling through Minnehaha County kills a deer on Interstate 29 and leaves the scene, with the deer carcass still lying in the southbound lanes of the interstate, between the Baltic and Del Rapids exits. (S.R. 276) The driver does not stop his truck or car and place any signal lights or reflective triangles to mark the hazard; he does not drag the carcass out of the lanes of travel; and he does not activate his hazard lights to warn approaching drivers and wait at the scene until the remains can be

removed. Apparently, after killing the deer, the unidentified driver just drives off. (S.R. 276)

Among the other southbound motorists on the interstate in the darkness of the early morning, one of the first is air guardsman David Zerfas, who is on his way to work in Sioux Falls from his home in Brookings. As David Zerfas comes upon the carcass in the road and tries to swerve around it, he loses control of his car, enters the median, and crashes in the northbound lanes of the interstate highway. (S.R. 276) Forty-four year old David Zerfas dies in the crash, leaving behind his wife of 21 years and their three children, ages 12, 16, and 19. (S.R.17 ¶6; S.R. 23 ¶3) The hit-and-run driver responsible for leaving the dead deer in the highway in the first place is never identified. (S.R. 278; S.R. 297, dep. 51:3-6)

David and Stacey Zerfas had bought an auto policy from AMCO. (S.R.16 ¶1; S.R. 23 ¶2) The policy provides that AMCO will pay compensatory damages an insured is legally entitled to recover from the operator of an uninsured motor vehicle because of bodily injury sustained by an insured motorist and caused by an accident. (S.R. 283) The policy provides $100,000 of uninsured motorist coverage in the event an insured is legally entitled to recover damages from an uninsured driver for injury or death caused by the uninsured driver. (S.R.17 ¶7; S.R. 23 ¶2) As required by SDCL §58-11-9,[1] the coverage applies to claims against operators of hit-and-run motor vehicles. The policy expressly defines "uninsured motor vehicle" to include a

[1] SDCL §58-11-9 requires that every auto policy issued in South Dakota includes coverage for the protection of persons insured under the policy who are "legally entitled to recover damages from owners or operators of uninsured motor vehicles and hit-and-run motor vehicles because of bodily injury...or...death, resulting therefrom."

motor vehicle that is "a hit-and-run vehicle whose operator or owner cannot be identified and which hits or causes an accident resulting in 'bodily injury' without hitting...." (S.R. 283)

Upon David's death, Stacey Zerfas makes a claim for uninsured motorist (UM) benefits under the AMCO policy to compensate her and the children for the damages they would be entitled to collect from the hit-and-run motorist as a result of David's death, if that motorist could be identified. (S.R. 17 ¶10, 12; S.R 23 ¶2)

AMCO investigates the claim for UM benefits and by March 29, 2012, its investigation has yielded the conclusion, recorded in the AMCO claim file, that David Zerfas died while trying to avoid a deer carcass that had been left in the highway by an unidentified motorist:

> "[David Zerfas] swerved to miss deer carcass in roadway and as result lost control of vehicle and crossed the center median into oncoming traffic where he was impacted by an oncoming [vehicle]. As a result of this accident [Mr. Zerfas] sustained fatal injury. The decedent's wife is presenting a UM claim alleging the unidentified vehicle striking the deer[2] is the cause of the accident." (S.R. 278)

By then, AMCO also concludes that the unidentified driver of the hit-and-run vehicle could be considered an "uninsured motorist" under the AMCO policy. Nancy Graham is the bodily injury claims manager supervising the handling of the Zerfas claim for AMCO.[3] Ms. Graham notes in the claim file, apparently in response

---

[2] AMCO misstates Mrs. Zerfas' claim here. Mrs. Zerfas' claim has never been that the unidentified driver simply *struck* the deer. Her claim is that the unidentified driver struck the deer *and then, becoming a hit-and-run driver,* created a serious hazard by leaving the deer carcass lying in the lanes of an interstate highway without exercising any care whatsoever to alleviate the hazard he had created for other users of the highway.

[3] AMCO is an "Allied" company serviced by Allied claims handlers. (S.R. 286 – Graham dep. 6:13-21). Nancy Graham, as a bodily injury claims manager for Allied,

to inquiry from a subordinate, that the unidentified hit-and-run driver who left the scene with the deer carcass lying in the highway fits within the definition of an uninsured motorist. She says that "based on policy language I believe this could be considered an 'uninsured vehicle' by definition of the policy." (S.R. 278) She notes that while some policies may require contact with the unidentified vehicle,

> "our policy reads 'uninsured vehicle' means a land motor vehicle...which is a hit and run vehicle whose owner/operator cannot be identified and which hits or causes an accident resulting in bi WITHOUT hitting your or any family member veh you are occupying or your covered auto. Based on policy language our question surrounds .... 'which hits or causes an accident.' " (emphasis in original) (S.R. 278)

Satisfied that David Zerfas died as a result of a deer carcass having been left in the highway by an unidentified hit-and-run driver,[4] and satisfied that the hit-and-run vehicle would be considered an "uninsured vehicle," AMCO concludes that the only remaining question is whether the crash was caused by the negligence of the hit-and-run driver, or by some contributory negligence on the part of David Zerfas. In her status report to the file, Ms. Graham writes:

> "What remains is if the mva was caused by the negligence of the unidentified vehicle leaving the deer in the roadway or the ins. negligence for lookout and failure to maintain control." (S.R. 278)

---

handled the Zerfas claim for AMCO. (S.R.286 – Graham dep 5:10-12; dep. 6:22-25). She also testified on behalf of AMCO as its designated 30(b)(6) representative, the person most knowledgeable about AMCO's failure to pay UM benefits to the Zerfas family. (S.R. 286-7, dep. 7:10 – 9:6).

[4] Although the company did not feel there was "conclusive" evidence that Mr. Zerfas had encountered the carcass of a deer (rather than striking a live deer and killing it), AMCO concluded for purposes of the claim that "the deer carcass was lying in the roadway when Mr. Zerfas approached it, and he either struck it or swerved to avoid it when this occurred." (S.R. 299, dep. 60:13-20).

AMCO does not find evidence that anything other than a deer carcass in the lanes of traffic caused Mr. Zerfas to leave the highway. (S.R. 296-7, dep. 48:23-49:1). AMCO finds no evidence of any negligence on Mr. Zerfas' part leading him to lose control of his vehicle. (S.R. 296, dep. 46:19 – 47:17) However, because Mr. Zerfas was not able to maintain control of his vehicle when he encountered the deer carcass, AMCO at one point claims to believe that "his contributory negligence in this particular accident would be considered more than slight and would also bar his recovery." (S.R. 294, dep. 38:6-14) Ultimately, though, AMCO's speculation about contributory negligence on the part of Mr. Zerfas *is not* the basis for AMCO denying UM benefits.

AMCO denies Stacey Zerfas' claim for UM benefits because AMCO concludes there is no way the hit-and-run driver in this case could be considered negligent. AMCO concludes that the hit-and-run driver who left the deer carcass on Interstate 29 in the early morning hours of December 2, 2011 could not *possibly* be found negligent by a jury – and indeed would never have to face a jury – because, according to AMCO, the hit-and-run driver had no obligation *to do anything.* (S.R. 299-300, dep. 60:21—62:14) AMCO concludes that as a matter of law, the driver who killed a deer and caused its carcass to be left in the traffic lanes of the highway had no obligation to remove or attempt to remove the carcass, no obligation to try to warn motorists that he was leaving a dead deer in the highway, and no obligation to notify authorities of the obstruction he was leaving. (S.R. 299-300, dep. 60:21—62:14) Based on a belief that the hit-and-run driver owed no duty of reasonable care to other motorists traveling on Interstate 29 that morning, AMCO concludes there is

no way Stacey Zerfas is legally entitled to recover damages from the hit-and-run driver, and therefore AMCO denies UM benefits to Mrs. Zerfas.

Mrs. Zerfas then sues AMCO for UM benefits. AMCO moves the trial court for summary judgment, claiming the hit-and-run driver could not possibly be found negligent by any jury because, AMCO claims, the driver that struck and killed the deer was under no legal duty to do anything about the carcass he was leaving in the road. The trial court grants AMCO's motion and dismisses Mrs. Zerfas' lawsuit, saying, "And the thing that I have struggled with in this case is that, in my judgment, I can find no duty, and I don't believe that there is a duty under these circumstances." (MOTION FOR SUMMARY JUDGMENT transcript, page 23, lines 10-13).

ARGUMENT

1. **The trial court erred in finding that the hit-and-run driver whose conduct caused David Zerfas' death was under no legal duty.**

   a. **Every driver of a vehicle using a public highway has the duty to use ordinary care at all times to avoid causing injury to others.**

   b. **Statutory duties also apply to the hit-and-run driver.**

2. **Whether the hit-and-run driver breached his legal duty is a disputed material fact to be decided by the jury.**

   a. **Mrs. Zerfas is entitled to have a jury decide the factual question of whether the hit-and-run driver breached his legal duties.**

   b. **A jury could reasonably draw the conclusion that the hit-and-run driver breached his legal duties.**

1. **The trial court erred in finding that the hit-and-run driver whose conduct caused David Zerfas' death was under no legal duty.**

Whether or not a duty exists is a question of law that is reviewed de novo. *Millea v. Erickson,* 2014 S.D. 34, ¶9, 849 N.W.2d 272, 275; *Kuel v. Horner (J.W.) Lumber Co.,* 2004 S.D. 48, ¶ 10, 678 N.W.2d 809, 812(citations omitted). On appeal, the circuit court's decision is entitled to no deference. The circuit court erred in this case, and its decision should be reversed.

a. Every driver of a vehicle using a public highway has the duty to use ordinary care at all times to avoid causing injury to others.

It is well-established in South Dakota that *every* driver of a vehicle using a public highway has the legal duty to exercise ordinary care at all times to avoid placing other users of the highway in danger. *Herren v. Gantvoort,* 454 N.W.2d 539, 542 (S.D. 1990); *Hitzel v. Clark,* 334 N.W.2d 37, 40 (S.D. 1983) (citing *Limmer v. Westergaard,* 251 N.W.2d 676 (S.D. 1977)); *Nugent v. Quam,* 152 N.W.2d 371 (S.D. 1967). The common law duty of *every* driver to use ordinary care *at all times* to avoid putting others in danger is so basic that it has long been expressed not only in case law, but in pattern jury instructions. In its current form, the pattern instruction reads:

> "The driver of a vehicle using a public highway has a duty to exercise ordinary care at all times to avoid placing . . . others in danger...." SDPJI (Civil) 20-210-10.

In *Herren,* where this Court explicitly noted that the jury instructions "correctly stated the law," the following instruction was among those approved:

> "It is the duty of *every* driver of a vehicle using a public highway to exercise ordinary care at all times to avoid placing himself or others in danger and to

exercise ordinary care at all times to avoid a collision." (emphasis added) 454 N.W.2d at 542.

There is one simple question that determines whether this common legal duty applies to the undisputed facts of this case: was the hit-and-run driver using a public highway? The answer to that question is plainly yes. There is no dispute that the hit-and-run driver with whom this case is concerned was a user of a public highway – Interstate 29. Therefore, there is no question that the driver owed a "duty...to exercise ordinary care at all times to avoid placing...others in danger...."

The same conclusion would be reached even if this duty were not already so well-established and so often stated – if, instead, the question of duty were a question of first impression. When a legal duty has not already been established and identified, the analysis of whether a duty exists depends on the foreseeability of injury. *Janis v. Nash Finch Co.*, 2010 S.D. 27, ¶ 15, 780 N.W.2d 495, 502; *Poelstra v. Basin Elec. Power Co-op,* 1996 S.D. 36 ¶16, 545 N.W.2d 823, 826-7. Here, it is foreseeable that a driver who uses a pubic highway may by his conduct create a risk of injury for others. Those most foreseeably at risk are other users of the same highway. It is elementary, therefore, that all drivers would have a duty to exercise care for the safety of other highway users. Indeed, the safe, orderly movement of traffic on public highways depends on a relationship of mutual respect among drivers defined by the duty to use ordinary care to avoid danger to others.

With respect to the hit-and-run driver here, it was foreseeable that other southbound users of Interstate 29 were among those at risk. There is no dispute that Mr. Zerfas was one of the southbound motorists on Interstate 29. Mr. Zerfas was

among those people – oncoming motorists and passengers on the interstate – who were *precisely* the people for whom injury from the deer carcass being left on the highway was most foreseeable. Furthermore, though a relationship *per se* between a defendant and plaintiff is not required before a duty is found,[5] there was a relationship between the hit-and-run driver and David Zerfas: they were fellow users of the same stretch of southbound Interstate 29 on the morning of December 2, 2011.

This Court should *not* take the radical action of withdrawing from the consistent, longstanding, and widespread legal principle that it is the duty of *every* driver of a vehicle using a public highway to exercise ordinary care at all times to avoid placing others in danger. It cannot be surprising to realize, and should not be puzzling or controversial to acknowledge, that every driver using a public highway in South Dakota has the legal duty to use ordinary care at all times to avoid placing other highway users in danger. It is hornbook law that one who chooses to undertake an affirmative action "such as driving an automobile" is subject to a legal duty of reasonable care toward others. W. Page Keeton, et al., PROSSER AND KEETON ON THE LAW OF TORTS §53, at 358 (5th ed. 1984). The broad duty applicable to one who chooses to drive an automobile is stated by PROSSER AND KEETON this way:

> "That is to say, that whenever the automobile driver should, as a reasonable person, foresee that his conduct will involve an unreasonable risk of harm to other drivers or to pedestrians, he is then under a duty to them to exercise the care of a reasonable person as to what he does or does not do." *Id.*

---

[5] This Court has indicated that a relationship between the parties is *one* way a duty may arise, but has gone on to say, "*Additionally*, a duty can be created by common-law or statute." (emphasis added) *Millea v. Erickson,* 2014 S.D. 34, ¶12, 849 N.W.2d 272, 276 (citations omitted).

There is no reason to reverse a consistent line of cases, abandon precedence and prevailing law, and nullify a well-accepted jury instruction that has likely been given for decades to virtually every civil jury empaneled in this state in any motor vehicle crash case. The chaos in courtrooms, judges' chambers, and law offices would be surpassed only by the chaos on highways if this Court announced that not all drivers using the public roadways have a duty to exercise ordinary care to avoid placing others in danger.

The principle expressed in the universal duty of drivers on public highways to use ordinary care is merely a particular application of the most basic principles of negligence law. Reversing the status quo on the matter of a driver's duty would begin unraveling the most fundamental precepts of tort law – a situation understandably attractive to automobile insurers, but one that would create impossible inconsistencies in negligence law. Not only drivers, but others who through their conduct create a risk of physical harm to others, are assigned the legal duty to exercise reasonable care. The principle, as restated in contemporary language is set forth simply:

> **"§ 7. Duty**
>
> *Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm*
>
> **"(a) An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm. ...."** A CONCISE RESTATEMENT (THIRD) OF TORTS (2013).

The concept in tort law of an actor's duty arising from the actor creating a risk for others is not new. While the RESTATEMENT (SECOND) OF TORTS does not use the

word "duty" in setting out the elements of an action for negligence,[6] the element that corresponds to the notion of duty – i.e., that the "conduct of the actor is negligent with respect to the other, or a class of persons within which he is included" [7] – is explained *by reference to risk*:

> **"Negligent Conduct; Act or Failure to Act**
>
> **Negligent conduct may be...:**
>
> **(a) An act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or...."** RESTATEMENT (SECOND) OF TORTS §284 (1965).

Implicit in §284 is the principle that an actor has a duty to avoid creating an unreasonable risk for others, since conduct that creates an unreasonable risk for others is negligent. Holding that drivers of motor vehicles on public highways, however, have *no* legal duty to exercise ordinary care to avoid placing others at risk would carve out for motorists an illogical exception to that principle of tort law.

Like every other driver who chooses to use the public highways in South Dakota, the hit-and-run driver in this case owed other highway users the duty to use ordinary care at all times to avoid putting them in danger. As discussed below,

---

[6] RESTATEMENT (SECOND) OF TORTS (1965) lays out the elements of an action for negligence as follows:

> § 281. Statement of the Elements of a Cause of Action for Negligence
> The actor is liable for an invasion of an interest of another, if:
> (a) The interest invaded is protected against unintentional invasion, and
> (b) The conduct of the actor is negligent with respect to the other, or a class of persons within which he is included, and
> (c) The actor's conduct is a legal cause of the invasion, and
> (d) The other has not so conducted himself as to disable himself from bringing an action for such invasion.

[7] See *infra* note 6, subsection (b).

whether that duty was breached is a factual question to be addressed by the jury. But the trial court overlooked the hit-and-run driver's most basic, well-established duty when it mistakenly concluded that the driver in this case had no legal duty.

b. Statutory duties also apply to the hit-and-run driver.

There are statutes with which all drivers are obliged to comply that also give rise to at least some legal duty on the part of the driver in this case. For example, SDCL §31-32-6 provides:

> "It shall be the duty of every person who so injures or obstructs any...highway as to render the same unsafe immediately to put up a danger sign...."

Not only does this statute explicitly create a duty, but it appears fairly obvious that the statute on its face is intended to promote safety. Accordingly, the statute not only provides further evidence of a legal duty on the part of the hit-and-run driver, but may well be a duty the violation of which would be evidence of negligence *per se*.

More generally, every person who drives on a public highway is obliged to do so carefully and with due caution. SDCL §32-24-8.[8] The suggestion in this case is not that the driver violated any duty of careful driving when he hit and killed the deer. However, jurors may well conclude that a driver who drives off from a scene where he has caused a deer carcass to be lying in the lanes of travel – particularly in the dark of an early winter morning – is at that point *not* driving carefully and with due caution.

---

[8] SDCL §32-24-8 provides:

> "Any person who drives any vehicle upon a highway...carelessly and without due caution, at a speed or in a manner so as to endanger any person or propery, not amount to reckless driving..., is guilty of careless driving. ..."

Mrs. Zerfas is entitled to have a jury also decide, based on a preponderance of the evidence, whether the hit-and-run driver violated these statutory duties. It is conceded that specific facts about the hit-and-run driver and why he acted as he did are necessarily impossible to provide; that is inherent in the fact that the driver is an unidentified hit-and-run driver. But that is by definition *always* the case with hit-and-run drivers. In virtually every hit-and-run case, there may be more questions than answers about who the identified driver was, exactly what he was doing, and why. So if uninsured motorist claimants were required to provide an actual profile of the hit-and-run driver, establish the specific circumstances of that particular driver, and prove the motivation that explains the driver's conduct and the lack of any excuse for it, UM claims for damages caused by hit-and-run drivers would be practically impossible. Clearly, that is not the intent of South Dakota law. *See* SDCL §58-11-9, requiring insurers to provide UM coverage for damages caused by hit-and-run drivers.

2. Whether the hit-and-run driver breached his legal duty is a disputed material fact to be decided by the jury.

Given that the hit-and-run driver had, at the very least, the legal duty to exercise ordinary care at all times to avoid placing others in danger, the next question is, what is the "ordinary care" required in this case? When a driver on a South Dakota highway hits and kills a deer and causes its carcass to be obstructing interstate traffic lanes in the dark, what *ordinary care* would then be expected of that driver to "avoid placing others in danger"? No one person alone – whether judge or social commentator – could be expected to give a proper answer to that question, much less to hold with binding legal authority that *doing nothing* is necessarily the answer. The

question of what care is ordinary care under any particular circumstances is exactly the kind of question our legal system trusts juries to answer. If the question were raised outside a legal context, it undoubtedly would benefit from a healthy discussion of varied opinions from people bringing to the discussion their own observations and insights gained from lifetimes of experiences. No less is true in the legal context. Jurors, who routinely are instructed to bring to the courtroom the perspectives gained from a variety of life experiences, are the perfect resources to determine the answer to the question of what ordinary care is legally required of the hit-and-run driver here.

a. Mrs. Zerfas is entitled to have a jury decide the factual question of whether the hit-and-run driver breached a legal duty.

It was not Mrs. Zerfas' obligation at the summary judgment stage to prove that a jury necessarily would agree that the hit-and-run driver had breached one or more legal duties. She was not required to establish with certainty that a jury would find her legally entitled to recover damages. "Legally entitled" for purposes of UM coverage doesn't mean that entitlement to damages must be proven beyond a reasonable doubt. The purpose of the UM coverage required by statute is to provide the same insurance protection to an insured party injured by an unknown motorist that would have been available to her had she been injured as a result of the negligence of a motorist covered by liability insurance. *Clark v. Regent Ins. Co.*, 270 N.W.2d 26, 29 (S.D. 1978) (citations omitted). To accomplish that purpose, UM statutory provisions are construed liberally in favor of coverage. *Id.* (citations omitted).

A plaintiff in a negligence action faced with a summary judgment motion by which the defense claims to be entitled to judgment as a matter of law is *not* required

to establish at that point that an applicable legal duty was breached. *Johnson v. Matthew J. Batchelder Co., Inc,* 2010 S.D 23, ¶14, 779 N.W.2d 690, 694. It is error for a trial court to impose the "ultimate burden of establishing a breach of duty on [the plaintiff] at the summary judgment stage." *Id.* The plaintiff's duty is simply to dispute issues of material fact for a jury to determine. *Id.* In this case, the disputed fact is the ultimate factual issue of whether the hit-and-run driver's conduct violated that driver's legal duties.

"If a duty exists, the remaining questions of breach and causation are factual questions that must be determined by the trier of fact." *Iverson v. NPC Intern., Inc.,* 2011 S.D. 40, ¶ 7, 801 N.W.2d 275, 278 (citations omitted). While the existence of a duty is a question of law to be determined by the court, "a jury generally determines whether a duty has been breached." *Janis v. Nash Finch Co.,* 2010 S.D. 27, ¶ 8, 780 N.W.2d 497, 500 (citations omitted). Questions of negligence, including the question of whether a duty was breached, "are for the jury in all but the rarest of cases so long as there is evidence to support the issues." *Id.* (citations omitted). Only when there is "but one conclusion from facts and inferences" that reasonably can be drawn does the question of whether a duty was breached become a question of law suitable for decision upon a motion for summary judgment. *Id.*

"Summary judgment is an extreme remedy, [. . .] not intended as a substitute for a trial." *Discover Bank v. Stanley,* 2008 S.D. 111, ¶ 19, 757 N.W.2d 756, 762 (quoting *Cont'l Grain Co. v. Heritage Bank,* 1996 S.D. 61, ¶ 17, 548 N.W.2d 507, 511). The moving party's burden at summary judgment stage is "the burden of *clearly* demonstrating an absence of any genuine issue of material fact and an

entitlement to judgment as a matter of law." *Johnson v. Matthew J. Batchelder Co., Inc.*, 2010 S.D. 23, ¶8, 779 N.W.2d 690, 693 (citations omitted) (emphasis added). In *Hamilton v. Sommers,* this Court reiterated the well-settled rules for its review of summary judgment:

> "We must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists..." 2014 S.D. 76, ¶17, 855 N.W.2d 855, 861 (S.D. 2014) (citations omitted).

Many facts were undisputed for purposes of the UM claim[9] or were beyond dispute. For example, there was no dispute that David Zerfas was killed in a crash; that the crash occurred in the very early hours of a December morning; that the crash occurred when Mr. Zerfas lost control of his vehicle; that Mr. Zerfas lost control of his vehicle when he came upon a deer carcass in the dark; that Mr. Zerfas lost control of his vehicle when he either swerved to avoid the deer carcass or struck the deer carcass; that the deer carcass had been left by a hit-and-run driver who had struck and killed the deer; that the deer carcass had been left in the middle of the southbound lanes of Interstate 29; that the hit-and-run driver who killed the deer and left the deer carcass in the roadway was never identified; that there was no evidence that the hit-

[9] For purposes of its summary judgment motion, AMCO did try to run away from factual admissions it already had made. For example, AMCO had long ago concluded for purposes of determining whether Mrs. Zerfas was entitled to UM benefits that a hit-and-run driver had killed a deer and left it lying in the highway; satisfied with its own investigation of that question, AMCO assumed that to be a fact and its 30(b)(6) witness so admitted under oath. However, arguing its motion for summary judgment, AMCO tried to resurrect that as an issue by raising a totally unfounded speculation about whether Mr. Zerfas had struck and killed the deer.

and-run driver had ever removed or attempted to remove the deer carcass or any part of it; that there was no evidence that the hit-and-run driver had ever warned or attempted to warn oncoming motorists by placing any warning signs, activating any emergency flashers, or positioning his vehicle so as to illuminate the carcass with his headlights; that there was no evidence that the hit-and-run driver had notified authorities; and that there was no evidence that the driver had otherwise secured or attempted to secure assistance of anyone in dealing with the hazard he had created.

b. A jury could reasonably draw the conclusion that the hit-and-run driver breached a legal duty.

Especially when the facts are viewed most favorably to Mrs. Zerfas, as they must be viewed, it is clear that a South Dakota jury *could* reasonably find under these facts that the hit-and-run driver breached his legal duty to others. Acts of omission as well as commission may constitute the failure to exercise ordinary care. *Erickson v. Lavielle,* 368 N.w.2d 624, 626-7 (S.D. 1985)(citation omitted). And who better than South Dakota jurors to decide what is "ordinary care" when a motorist kills a deer in the middle of a major highway in this state? Jurors conceivably *might* decide that doing nothing after having caused a deer carcass to be lying in the middle of the highway before dawn *is* ordinary care in South Dakota, but we doubt it. If jurors instead draw the conclusion that under the circumstances of this case, the hit-and-run driver breached his duty to others, that conclusion surely would be among those conclusions that could reasonably be drawn.

AMCO did not prove *or even try to prove* that the only reasonable conclusion a jury could draw from the facts was that the hit-and-run driver satisfied the duties

applicable to him. Apparently realizing that to prevail on the factual question of whether the duty of ordinary care had been breached, AMCO would have the impossible task of proving there is "but one conclusion from facts and inferences" that reasonably could be drawn from the facts in this case, viewing all facts and inferences most favorably to Mrs. Zerfas, AMCO did not even address that question. Rather, AMCO chose to avoid the question entirely by claiming that the issue before the court was whether there is a specific legal duty to do each one of the various things a driver might due in response to creating such a hazard on the highway.

AMCO cleverly ignored the well-established duty *every* driver has to use ordinary care to avoid placing others in danger, pretending to the trial court that the question before the court was not whether there is evidence from which a jury might find that the hit-and-run driver had breached that duty. AMCO wrongly suggested that for the trial court to find Mrs. Zerfas entitled to a jury trial, the trial court first had to find a specific legal duty for the hit-and-run driver to take each particular action – whether to move the deer, mark the hazard, notify authorities, warn oncoming motorists, etc. AMCO persuaded the trial court that the question before the court was whether, as the court considered the list of various things a driver might have done after killing a deer in the highway, there was a *legal duty* to take *any one particular* action *in every case* in response to the danger the driver had created.

By misrepresenting the issue as if the question were, for example, whether there is an absolute legal duty in every case to remove a deer carcass from the roadway, AMCO managed to avoid the real factual question, confuse the court, and elevate the hurdle Mrs. Zerfas was required to clear to avoid summary judgment.

Notably, at the hearing on AMCO's earlier, unsuccessful motion to dismiss on the pleadings, AMCO admitted that if a person had caused a deer carcass to be on the highway because he shot it with a gun instead of hitting it with a vehicle, the person would have a legal duty to not leave the carcass lying in the lane of traffic.[10] Apparently realizing that a driver would likewise have a duty to do something if a deer carcass fell out of the back of his vehicle, AMCO was quick to claim that would be a different situation than when a motorist causes a deer carcass to be in the highway by killing the deer with his vehicle.[11] As they relate to ordinary care, distinguishing the significance of whether a deer was killed by a gun or a car, or whether a deer carcass fell of the front or the back of a vehicle seems to be splitting hairs. At the least, it is the stuff of discussions most appropriate for jurors' deliberations in the jury room, not for a summary judgment ruling by a court.

One can always imagine *some* circumstance under which any *one* response to causing a deer carcass to be in the middle of the highway might not be required by jurors applying the standard of ordinary care. For example, a driver limited by size and strength or disabled by age or physical condition certainly might not be expected to attempt to move a deer carcass. Under certain specific circumstances – e.g., the middle of a blizzard – it may be that ordinary care would not require such an attempt by anyone. But the proper question for summary judgment was not whether there is a legal duty *to take any one specific action* in response to creation of the danger, such that all drivers under all circumstances would be required to take that action. Framing

[10] Transcript: Motion Hearing 3/21/13, page 27, lines 8-11 (S.R. 52).
[11] Transcript: Motion Hearing 3/21/13, page 31, line 18-page 32, line 3 (S.R. 56-57).

the question that way represented a sleight of hand by which AMCO misguided the trial court into holding Mrs. Zerfas to an inherently impossible standard. Rather, the proper factual question for purposes of summary judgment was whether a jury could reasonably find that a driver *who did nothing* under the specific circumstances of this case failed to exercise ordinary care to avoid danger to others.

Mrs. Zerfas is not obliged to prove that any specific action that the hit-and-run driver might have taken in this case is required of all drivers under all circumstances in all cases. Rather, she is entitled to have a jury decide the disputed factual question under the circumstances of *this case.* That question is, did the hit-and-run driver here exercise ordinary care to avoid danger to others, or did he not?

AMCO likely will claim that if this Court recognizes the duty of the hit-and-run driver, then the young, the old, and the disabled all will be forced to wrangle deer carcasses on the open highways, exposing them to traffic and everyone to greater danger than the risk of just leaving carcasses in the highway to threaten the lives of oncoming motorists. This argument, as it extends a straw man argument to absurdity, is inherently flawed because it ignores the concept of a reasonable person.

All motorists owe each other a duty of ordinary care under the circumstances; that standard contemplates potential individual physical limitations by considering relevant circumstances as one factor in determining reasonable care. Jurors applying their common knowledge and utilizing the common sense gained through various life experiences may well conclude that in today's world, people ordinarily will have several alternatives available if they create an obstruction in the highway, but are unable to remove it safely. Almost every vehicle on the highway now has at least one

occupant with a cell phone; nearly every vehicle is equipped not only with headlights but with flashing hazard lights; and commercial truckers are required by law to carry special warning lights or reflecting signs. Which of those (or other) responses might represent ordinary, reasonable care in any one case depends on the circumstances, but being unable to personally remove the obstruction does not mean the driver who created it is entitled *to do nothing.*

CONCLUSION

The most basic negligence law requires people to use reasonable care to avoid creating unreasonable risks for others, and provides that those who fail to do so can be held liable for resulting harm. This case involves, among other duties, the most basic duty imposed on those who choose to drive a vehicle on a public highway: the duty to use ordinary care to avoid danger to others. It is for jurors to decide whether the hit-and-run driver's conduct in this case satisfied that duty.

If the driver who left the deer carcass obstructing safe travel on Interstate 29 the morning of December 2, 2011 had been identified, it is not hard to imagine that driver being required to answer for his conduct before a jury. The jury would decide if his conduct satisfied the driver's legal duties. Mrs. Zerfas deserves no less, just because the defendant is her UM carrier instead of the unidentified driver himself.

Every week in courtrooms across South Dakota, judges read well-established law from South Dakota Civil Pattern Jury Instruction 20-20-10 as they remind jurors it is up to them to decide how a reasonable person would act in any given case:

> .... The law does not say how a reasonable person would act under facts similar to those shown by evidence. That is for you to decide.

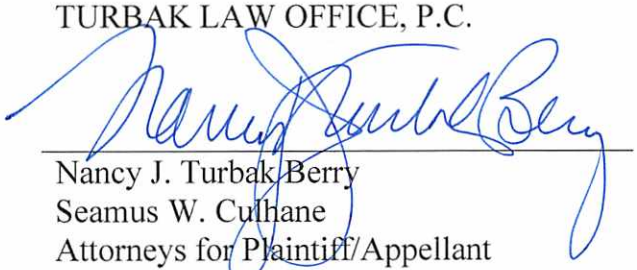
Jurors should decide how a reasonable person in South Dakota would act under the circumstances of this case. The trial court's decision to grant summary judgment was wrong. It should be reversed and the case should be remanded for trial on its merits.

REQUEST FOR ORAL ARGUMENT

Oral argument is respectfully requested.

Dated this 23rd day of March, 2015.

TURBAK LAW OFFICE, P.C.



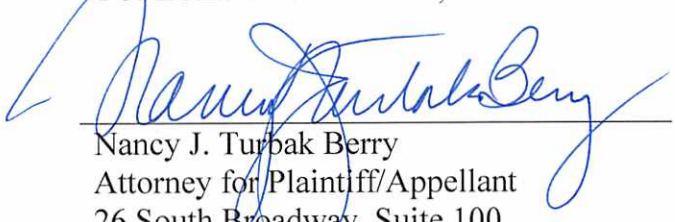
Nancy J. Turbak Berry
Seamus W. Culhane
Attorneys for Plaintiff/Appellant
26 South Broadway, Suite 100
Watertown, SD 57201

CERTIFICATE OF COMPLIANCE

I hereby certify that the above Brief of Appellant Stacey Zerfas has been produced in Microsoft Word using a 12.5 point proportionally spaced typeface for the text of the Brief and a 12 point proportionally spaced typeface for footnotes; that the Brief contains 7,048 words and twenty-three (23) pages, and that this complies with the Court's type volume limitation under SDCL 15-26A-66(b)(2).

Dated this 23rd day of March, 2015.

TURBAK LAW OFFICE, P.C.



Nancy J. Turbak Berry
Attorney for Plaintiff/Appellant
26 South Broadway, Suite 100
Watertown, SD 57201
605-886-8361
nancy@turbaklaw.com

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of April, 2015, pursuant to SDCL §15-26C-4, I electronically served Kent R. Cutler and Kimberly R. Wassink the above Brief with the amended Appendix by transmitting electronic copies to them at the following addresses:

kentc@cutlerlawfirm.com
kimw@cutlerlawfirm.com

Dated this 16th day of April, 2015.

TURBAK LAW OFFICE, P.C.

Nancy J. Turbak Berry
Attorney for Plaintiff/Appellant
26 South Broadway, Suite 100
Watertown, SD 57201
605-886-8361
nancy@turbaklaw.com

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27317

STACEY ZERFAS,

Appellant,

vs.

AMCO INSURANCE COMPANY,
A Nationwide Company,

Appellee.

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

Honorable Stuart L. Tiede, Circuit Court Judge

APPELLEE'S BRIEF

Kent R. Cutler
Kimberly R. Wassink
CUTLER LAW FIRM, LLP
100 N. Phillips Ave., 9th Floor
P.O. Box 1400
Sioux Falls, SD 57101-1400
(605) 335-4950
Attorneys for Appellee

Nancy J. Turbak Berry
Seamus W. Culhane
TURBAK LAW OFFICE, P.C.
26 S. Broadway, Suite 100
Watertown, SD 57201-3670
(605) 886-8361
Attorneys Appellant

Notice of Appeal filed January 9, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes:

South Dakota Supreme Court:

Other Courts:

Secondary Sources:

PRELIMINARY STATEMENT

The Appellant Stacey Zerfas will be referred to as "Plaintiff." Appellee AMCO Insurance Company, a Nationwide Company, will be referred to as "AMCO." Plaintiff's spouse, David Zerfas, deceased, will be referred to as "Zerfas." References to the Settled Record will be by the designation "SR" followed by the page number(s). References to the Appendix will be by the designation "App." followed by the page number(s).

JURISDICTIONAL STATEMENT

Plaintiff appeals the Order granting Summary Judgment in favor of AMCO dated December 19, 2014, entered by the Honorable Stuart Tiede, Second Judicial Circuit Court. Plaintiff filed a Notice of Appeal on January 9, 2015.

LEGAL ISSUE

WHETHER THE TRIAL COURT ERRED WHEN IT GRANTED SUMMARY JUDGMENT IN FAVOR OF AMCO.

The trial court held that under the circumstances of this case, an alleged but unsubstantiated "hit and run" driver, of whom there is no evidence of existence, who Plaintiff claimed hit and killed a deer at an unspecified time and indeterminate location, had no duty to remove its remains from the roadway. Therefore, the alleged "hit and run" driver could not be found to have negligently caused the death of Plaintiff's spouse who was killed in a collision when he swerved to avoid a live or deceased deer in the roadway. Because there is no duty, a claim of negligence against the unproved "hit and run" driver as an uninsured motorist could not be sustained, and AMCO did not breach its automobile insurance contract with Zerfas by denying a claim for uninsured motorist coverage.

In addition, because there is no evidence that a "hit and run" driver existed or killed the deer which caused Zerfas to swerve, there is likewise no evidence upon which a jury could reasonably conclude that an uninsured motorist had a duty to warn Zerfas of the deer remains or a duty to call authorities to report the remains. Accordingly, there is no evidence that an alleged "hit and run" driver breached any duty to Zerfas or caused the loss in this case.

Most Relevant Authorities:

A. Tipton v. Town of Tabor, 1997 S.D. 96, 567 N.W.2d 351, 357.

B. Zinskie v. Terraciano, 2010 Pa. D. & C.5th 353, 2010 Pa. Dist. & Cnty. Dec. LEXIS 677 (November 29, 2010).

C. Wong v. Am. Family Mut. Ins. Co., 576 N.W.2d 742, 746 (Minn. 1998).

D. Whitefield v. Therriault Corp., 745 P.2d 1126 (Mont. 1987).

STATEMENT OF THE CASE

Plaintiff commenced a breach of contract action against AMCO for its alleged failure to pay uninsured motorist benefits. Plaintiff's claim for coverage is based on allegations a "hit and run" driver killed a deer and breached a duty by failing to remove it from the roadway, failing to warn oncoming motorists, and failing to call authorities. Plaintiff claims as a result of breaching these duties, her spouse swerved to avoid the deer remains, lost control, and was killed. The Honorable Stuart Tiede, Second Judicial Circuit, found no such duties and granted summary judgment in favor of AMCO. App. 1.

STATEMENT OF THE FACTS

The Accident

This case involves a car accident which occurred at approximately 6:23 a.m. on December 2, 2011, on Interstate 29 between Brookings and Sioux Falls, South Dakota. In the collision, Zerfas, AMCO's insured, lost control of his vehicle, crossed the median, and was struck by oncoming traffic. Zerfas was fatally injured in the accident.

The primary source of the limited evidence in this case is the South Dakota Highway Patrol Accident Report (hereinafter "Report"). App. 2 (SR 276). The Report details the findings of the State Troopers who responded to the emergency call following the accident. Id. The Report references two vehicles involved in the collision, one belonging to Zerfas and a second driven by Mark Misar (hereinafter "Misar"). Id. Misar was traveling in the northbound lanes of I-29 on the morning of the collision when Zerfas, who was traveling southbound on the same roadway, crossed the median into the lanes of oncoming traffic. Id. The Report references tire marks indicating Misar locked his breaks but was unable to avoid the collision, hitting Zerfas at the driver's side door. Id. Zerfas's vehicle came to rest facing west in the east ditch, while the vehicle Misar was driving came to rest facing east. Id. When law enforcement arrived, Misar was walking and conscious, having suffered only minor injuries. Id. Tragically, paramedics pronounced Zerfas deceased at the scene. Id.

The Report section entitled "Crash Investigation or Technical Reconstruction" provides the following description of what the Troopers determined occurred on the morning of December 2, 2011:

> There were remains of a deer in the south bound lanes where tire marks show Vehicle 1 swerved left and lost control. Vehicle 1 [Zerfas's vehicle]

> left tire marks from the southbound lanes into the median where the vehicle was partially sideways. The tire marks go thru the median and marks show were (sic) the tires hit the paved median shoulder and spun the vehicle into the north bound lanes. Vehicle 2 [Misar's vehicle] was in the right north bound lane and left tire marks from locking up the brakes attempting to avoid Vehicle 1. The area of impact was in the right north bound lane by the physical evidence of fluid trails, gouges, and tire marks. After impact both vehicles went into the east ditch. Speed of Vehicle 1 is unknown and speed of Vehicle 2 was about 70 mph according to the driver Mr. Misar.

SR 276. Similarly, the "Summary" section of the Report provides in part that "Vehicle 1 was traveling south bound on I-29 when the driver attempted to swerve around the remains of a deer. The driver lost control, entered the median, and came into the north bound lanes." SR 276.

The Report does not identify any drivers or vehicles other than Zerfas and Misar. The Report does not identify skid marks or other road markings made by vehicles other than those belonging to Zerfas and Misar. There is no mention in the Report of any vehicle parts or debris from any other vehicles. The Report references the "remains of a deer" on two occasions but does not further describe the condition of the remains or their size or that the deer appeared to have been struck by an automobile. Id. The only tire marks near the deer remains are from the vehicle driven by Zerfas. Id.

The Policy

The automobile Zerfas was driving when the accident occurred was insured by AMCO. App. 52 (SR 283). Misar's insurer reported the accident to AMCO the day it occurred. App. 44 (SR 298).[1] AMCO paid Misar for the property damage to his vehicle

[1] Deposition of AMCO Rule 30(b)(6) designee Nancy Graham (hereinafter "Graham Depo.") at 53:5-23.

and the medical expenses he incurred. Id.[2] AMCO also paid for Zerfas's funeral expenses under the medical payment provision in the policy. Id.[3] Plaintiff subsequently presented AMCO with an uninsured motorist ("UM") claim, alleging that an unidentified driver struck the deer at some time before Zerfas came upon it, which caused him to swerve and lose control of his vehicle. SR 278.

The UM policy provides that AMCO "will pay compensatory damages which an 'insured' is legally entitled to recover from the owner or operator of an 'uninsured motor vehicle' because of 'bodily injury'…." App. 52 (SR 283). In addition, the policy mandates that if a claim involves a "hit and run" driver, the specifics of the accident and the alleged phantom driver's involvement must be proved as a prerequisite to coverage. Id. Specifically, the policy provides as follows:

> "Uninsured motor vehicle" means a land motor vehicle or trailer of any type:
>
> (3) Which is a hit-and-run vehicle whose operator or owner cannot be identified and which hits or causes an accident resulting in "bodily injury" without hitting:
>
> a. You or any "family member";
> b. A vehicle which you or any "family member" are "occupying"; or
> c. "Your covered auto".
>
> **If there is no physical contact with the hit-and-run vehicle the facts of the accident must be proved. We will only accept competent evidence other than the testimony of a person making claim under this or any similar coverage.**

Id. (emphasis added). Accordingly, while the AMCO policy does not condition coverage for damage by a hit and run vehicle on a "hit" as many policies require, if there is no physical contact with the alleged hit-and-run vehicle, the policy requires proof of

[2] Graham Depo. at 54:4-19.
[3] Graham Depo. at 54:25-55:15.

"the facts of the accident" by "competent evidence." Id. Conversely, if there is no "hit" and no corroboration, the policy precludes UM coverage because the definition of a "hit and run" vehicle is not met. Id. Accordingly, in this case, the Plaintiff is not "legally entitled to recover" for this loss unless "competent evidence" establishes that a "hit and run vehicle" exists and that the driver of that vehicle breached a duty which caused Zerfas's loss. If competent evidence had substantiated a hit and run driver's existence and negligence, the analysis would proceed to the question of whether Zerfas was contributorily negligent more than slight. App. 42 (SR 296).[4] Thus, whether Plaintiff is "legally entitled to recover" damages in this case under the UM policy based on allegations against a hit and run driver is a multi-step analysis which requires satisfaction of several conditions.

AMCO'S Investigation

Upon presentation of the claim, AMCO began its investigation. AMCO interviewed witnesses, reviewed the Report, photographed the vehicles, and conducted research. App. 40; 44-45 (SR 294, 298-299).[5] Two fact witnesses were identified, including Misar, the injured driver who stuck Zerfas, who is discussed in the Report, and Mrs. Greene ("Greene"), a passenger in a vehicle traveling northbound behind the Misar vehicle. App. 44 (SR 298).[6]

AMCO interviewed both known witnesses. Misar reported that the events happened very quickly, that he saw headlights sliding crossways through the median and braked in an attempt to avoid them. He was unable to do so and hit Zerfas's vehicle at

[4] Graham Depo. at 46:18-47:11.
[5] Graham Depo. at pp. 37-38; 56-60.
[6] Graham Depo. at 56:14-23.

the driver door. App. 45 (SR 299).[7] Greene likewise reported that she saw headlights coming sideways though the median and into their lane of travel. Id.[8] She and her husband stopped to render aid and called authorities to report the accident. Id.[9] While waiting for emergency personnel, Greene observed that various cars avoided the deer remains in the southbound lanes of travel without losing control of their respective vehicles. Id.[10]

AMCO never found any evidence, direct or circumstantial, of the existence of a "hit and run" or "phantom driver." App. 40; 43 (SR 294, 297).[11] No one saw the deer being hit by a vehicle or witnessed how it came to be on the roadway. App. 43 (SR 297).[12] The Report contains no reference to skid marks or roadway debris that could have come from a third vehicle if one had hit the deer at this particular spot on the roadway. App. 2 (SR 276). The Report gives no indication of how the deer died or whether there is any evidence it was struck by a vehicle. Id.

In fact, it was not ruled out that Zerfas himself killed the deer. App. 45 (SR 299).[13] There were deer remains found on Zerfas's vehicle (App. 37--SR 291)[14], and the skid marks the highway patrol identified next to the deer remains were also from the vehicle Zerfas was driving. App. 2 (SR 276).

---

[7] Graham Depo. at 57:16-21.
[8] Graham Depo. 57:24-25.
[9] Graham Depo. 58:2-9.
[10] Graham Depo. 58:5-14.
[11] Graham Depo. 37:5-10; 50:6-12; 51:3-6.
[12] Graham Depo. 50:6-12.
[13] Graham Depo. at 60:13-20.
[14] Graham Depo. 26:20-23; 28:19-24.

Plaintiff's Claim

Following its investigation, and in consideration of the facts and evidence AMCO compiled, AMCO found that there is no basis for UM coverage for the loss in this case. AMCO found no evidence that a phantom driver existed or caused deer remains to be present at the spot where Zerfas hit them. App. 40, 43 (SR 294, 297).[15] AMCO also determined that even if such a driver did exist and did hit the deer in this precise location, the driver had no duty to remove the animal from the roadway or to take other action, such as warning oncoming traffic or calling authorities. App. 46 (SR 300).[16]

Upon denial of the UM claim, Plaintiff commenced this action for breach of contract against AMCO for its alleged failure to pay UM benefits. SR 16-19. Initially, Plaintiff also sued AMCO for bad faith, but she subsequently dismissed that cause of action. SR 1; SR 16-19.

Plaintiff's Amended Complaint claims an unidentified driver "struck and killed a deer in the southbound lanes of travel" on Interstate 29 in Minnehaha County, "left the deer carcass obstructing traffic in the southbound lanes of travel of Interstate 29, failed to warn oncoming motorists, failed to notify authorities of the obstruction, and left the scene." SR 16-19. Plaintiff posits a legal duty to ensure that a wild animal struck by a vehicle is immediately removed by the driver that struck it. Id. Plaintiff further claims that the hit and run driver she alleges killed the deer had a duty to immediately notify authorities and to warn oncoming drivers of the presence of the animal in the roadway. Plaintiff claims these alleged failures, if they occurred, caused her spouse to swerve and lose control of his vehicle and she should be entitled to UM coverage as a result.

[15] Graham Depo. at 37:5-10; 50:6-12; 51:3-6.
[16] Graham Depo. at 62:5-16.

During the course of the litigation, the parties conducted discovery. Plaintiff did not engage an accident reconstructionist or any type of expert to supplement the Report's findings. No additional witnesses came forward with information. Accordingly, after completing discovery, AMCO moved for summary judgment.

The circuit court heard AMCO's motion at a hearing on December 15, 2014. Following arguments of counsel and upon considering the evidence of record, the court granted summary judgment in AMCO's favor. App. 1. The Honorable Stuart Tiede discussed the rationale for his decision and the dire ramifications of imposing the duties the urged by the Plaintiff:

> First of all, I don't think that the statute which requires everybody to exercise ordinary care fulfills the duty requirement. I think that one can fail to exercise ordinary care, but is not liable if that person owed no duty to the plaintiff. Duty is a matter of law. And that duty is established either by a statute or by common law.
>
> And the thing that I have struggled with in this case is that, in my judgment, I can find no duty, and I don't believe that there is a duty under these circumstances. A driver at night may have struck something, may not have known what he or she struck, whether it was a small animal, whether it was a larger animal, whether it was a bird. May not have even seen it. May not know whether there is a carcass, and if there is a carcass, where the carcass ended up. And it just seems to me that it is unreasonable to expect every motorist, old, young, in good health, disabled, strong or weak, to require them to stop their motor vehicle on an interstate highway or any other public highway for that matter at night and conduct a search for what may or may not be there.
>
> We don't know whether with (sic) the animal would have limped off, what could have happened and expect them to then—if they locate something after searching out on an interstate highway at night—to then find some way to remove the carcass from the roadway. It seems to me that that duty, it there's going to be such a duty, it ought to be created by the legislature. By statute. By specific statute.
>
> I think that the law is fairly clear that the duty, if at all, rests with the authorities who are in charge of the particular highway to clear those kinds of obstructions. And the duty of other motorists is to operate their vehicle

> under control to be able to maintain control in the event that they encounter a situation where there is a deer carcass in the road.
>
> A lot of deer. A lot of strikes of deer by vehicles. It's pretty common knowledge that that may be one of the hazards of operating a motor vehicle in this state and in most other states. That it's a risk that you may strike a deer or may encounter the carcass.
>
> And it seems to me that if there's any duty at all, it's imposed upon the operator of the vehicle to anticipate that and to have his or her vehicle under control. So I don't believe that there is a duty. And that's—even if I give—if I draw all reasonable inferences in favor of the nonmoving party, including the fact that it is likely that the deer was struck by some vehicle, but we don't know that for a fact, but even assuming that, I just don't see where there is a legal duty under these facts to do what the plaintiff claims the alleged phantom driver should have done under these circumstances.
>
> And in the absence of any duty, I don't think that there can be a failure to exercise ordinary care that would result in liability to the plaintiff or the decedent in this case. And, therefore, I don't think there's a valid uninsured or underinsured motorist claim here.
>
> I am going to grant the defendant's motion for summary judgment. I realize this is a harsh result for the plaintiff's family, and I've certainly given that consideration, but I just don't see a legal duty here. I think that the debate about the public interest falls in favor of not having people stopping and trying to remove deer carcasses at all hours of the day and night on a busily-traveled, high-speed highway. I think it creates more problems than it would solve. I think that's for the legislature to determine.

Transcript, Hearing on Defendant's Motion for Summary Judgment, December 15, 2014 (hereinafter "Summary Judgment Transcript") at page 23:3-26:3, App. 25-28.

The circuit court's decision is well-reasoned and an appropriate use of summary judgment to lay to rest claims that are not legally viable and should not be submitted to a jury. Plaintiff appeals the circuit court's order granting summary judgment to AMCO.

ARGUMENT

I. THE CIRCUIT COURT DID NOT ERR IN GRANTING AMCO'S MOTION FOR SUMMARY JUDGMENT.

A. STANDARD OF REVIEW.

The standard for summary judgment is well settled in South Dakota. Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." SDCL § 15-6-56(c). Reasonable inferences drawn from the facts are viewed in the light most favorable to the non-moving party. *Luther v. City of Winner*, 2004 S.D. 1, ¶ 6, 674 N.W.2d 339, 343 (quoting *Roden v. Gen. Cas. Co. of Wis.*, 2003 S.D. 130, ¶ 5, 671 N.W.2d 622, 624).

"The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists." *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 11, 816 N.W.2d 96, 101 (quoting *Saathoff v. Kuhlman*, 2009 S.D. 17, ¶ 11, 763 N.W.2d 800, 804). Therefore, "[e]ntry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Id.* (quoting *W. Consol. Coop. v. Pew*, 2011 S.D. 9, ¶ 19, 795 N.W.2d 390, 396). A sufficient showing requires that "[t]he party challenging summary judgment . . . substantiate his allegations with sufficient probative evidence that would permit a finding in his favor on more than mere speculation, conjecture, or fantasy." *Quinn v. Farmers Ins. Exch.*, 2014 S.D. 14, ¶ 20, 844 N.W.2d 619, 624-25 (quoting *Stern Oil Co. v. Brown*, 2012 S.D. 56, ¶ 8, 817 N.W.2d 395, 398; Nationwide Mut. Ins. Co. v. Barton Solvents, Inc., 2014 S.D. 70, 855 N.W.2d 145, 149. "Mere allegations are not sufficient to preclude summary judgment." Mark, Inc. v. Maguire Ins. Agency, 1994 S.D. 80, ¶ 4, 518 N.W.2d 227.

On appeal, this Court reviews a circuit court's decision to grant summary judgment "to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the trial court, affirmance of a summary judgment is proper." *Jacobson v. Leisinger*, 2008 S.D. 19, ¶ 24, 746 N.W.2d 739, 745 (quoting *Cooper v. James*, 2001 S.D. 59, ¶ 6, 627 N.W.2d 784, 787). First Dakota Nat'l Bank v. Graham, 2015 S. D. 29, ¶ 13. In fact, this Court has gone so far as to say that "[w]here a judgment is correct, it will not be reversed even though based on erroneous conclusions or wrong reasons." Wolff v. Sec. of South Dakota Game, Fish and Parks, 1996 S.D. 23, ¶ 32, 544 N.W.2d 531, 537.

The circuit court found that under the circumstances of this case, there was no duty on the part of an alleged phantom driver to remove deer remains from the roadway, to warn of the presence of deer remains in the roadway, or to report hitting a deer. As well-articulated by the court, the dangers created by a driver attempting to fulfill such duties would far outweigh any dangers which might be minimized by it.

Not only is there no evidence to establish a duty in this case, there is no evidence upon which a jury could reasonably draw an inference of negligence. A jury's role is to weigh evidence. In this case, a jury presented with these limited facts would be left to guess and speculate. Moreover, the language of the policy under which Plaintiff seeks coverage unambiguously precludes UM coverage by an alleged "hit and run vehicle" without proof of the facts of the accident by competent evidence. Evidence of the existence of the phantom driver is wholly lacking in this case, as is evidence of when and how the deer remains came to be present on the roadway. Accordingly, there are

multiple rationales upon which summary judgment is required, and this Court should affirm the circuit court's decision.

B. CLARIFICATION OF PLAINTIFF'S STATEMENTS.

1. There is no evidence of the existence of a phantom or hit and run driver and no evidence that the deer was hit by a third vehicle in this location.

In light of Plaintiff's stated factual basis for her claim, it is critical that AMCO clarify the evidence of record. Citing exclusively to the Report from the South Dakota Highway Patrol, Plaintiff states as fact that "[s]ometime before 6:23 AM on December 2, 2011, an unidentified motorist traveling through Minnehaha County kills a deer on Interstate 29 and leaves the scene, with the deer carcass still lying in the southbound lanes of the interstate, between the Baltic and Del (sic) Rapids exits." Appellant's Brief at p. 2. Throughout her Brief, Plaintiff portrays these statements as conclusively-established facts. However, the Report Plaintiff cites as its sole source does not support this conclusion in any respect. Compare App. 2. The Report makes two mere references to "remains of a deer" but proffers no explanation or inference as to how or when the remains came to be there. App. 2. It makes no reference to a John Doe, phantom, unidentified or hit and run driver, or any drivers other than Zerfas and Misar. Id. It makes no reference to the condition of the deer remains, the deer's cause of death, or how long it had been there. The Report does not reference debris, skid marks, or physical evidence of any sort which could be attributed to a driver other than Zerfas or Misar. Id. There is no evidence suggesting the deer was hit by a car precisely where it lay. In short, it is known that on the morning of December 2, 2011, Zerfas lost control of his vehicle, drove into oncoming traffic and was killed. The remains of a deer were found by the skid

marks attributable to Zerfas's car. There is no evidence of any other facts relating to this collision, particularly the means by which the deer remains came to be in this spot on the roadway or whether the deer was hit by someone other than Zerfas and, if so, where and by whom. Not only is there no direct evidence, there is no evidence upon which a reasonable inference in Plaintiff's favor can be drawn.[17] This is simply Plaintiff's theory of the case. It exists only within the allegations of her pleadings, which do not square with the evidence of record.

2. AMCO's coverage analysis is not an admission and does not create coverage.

Plaintiff's second attempt to overcome the evidentiary void in this case is to mischaracterize the deposition testimony of AMCO's 30(b)(6) witness, Nancy Graham (hereinafter "Graham"), claiming AMCO acknowledged a hit and run driver killed the deer in the precise location Zerfas encountered it. Plaintiff therefore asserts that this "admission" should have effectively ended AMCO's coverage analysis. That is clearly not the case. AMCO's coverage determination requires analysis of both the policy provisions and the underlying facts of the claim. In the process of fulfilling its duty to investigate Zerfas's claim, AMCO reviewed the policy terms and the circumstances of the accident. Coverage requires fulfillment of multiple conditions, the failure of any one of which can preclude coverage. App. 52. Zerfas's claim is not a typical "hit and run" driver claim. Many policies require physical contact for a hit and run driver to constitute an "uninsured" under a policy's definitions. It is undisputed that Zerfas had no physical

[17] The circuit court explained it reached its decision even when it inferred that the deer was struck by a vehicle. Summary Judgment Transcript at 24, App. 26. However, the court did not infer it was hit in the spot where it lay at the conclusion of the accident or that it was hit by someone other than Zerfas. There is simply no evidence to support those inferences.

contact with any vehicle other than the one driven by Misar. Accordingly, if the policy required a "hit," the claim would be denied immediately on that basis. Zerfas's AMCO policy, however, does not require physical contact. While it is undisputed that there was no physical contact between Zerfas and any vehicle other than Misar's, that fact does not in and of itself preclude coverage in this case. SR 278. Accordingly, as it investigated coverage and liability, AMCO considered that an unidentified driver that did not have physical contact with Zerfas, *if* its existence and actions were established pursuant to the policy's requirements, could hypothetically meet the definition of an "uninsured driver" and the claim would not be denied based on lack of physical contact. App. 52.

Plaintiff's counsel deposed Graham and questioned her concerning AMCO's coverage analysis. Contrary to Plaintiff's claim, Graham at no time conceded that there was a phantom driver or that a phantom driver hit and killed the deer on the roadway in question. Moreover, even if a phantom driver could constitute an "uninsured motorist," Zerfas can only receive what he is "legally entitled to recover from the owner or operator of an 'uninsured motor vehicle.'" Thus, the analysis may proceed but numerous other requirements must still be met before coverage is established.

Even if Graham had misspoken, which she did not, her statements would not waive the clear and unambiguous requirements of the insurance policy, i.e., that the facts of the accident involving a hit-and-run driver be proved by "competent evidence other than the testimony of a person making a claim" under the policy. App. 52. Determining if coverage could exist if a witness or other evidence subsequently came forward to corroborate a hit and run driver is simply performing a thorough analysis, not creating a binding admission. If there were no conceivable set of facts upon which coverage could

exist, further analysis of the claim would not be necessary, and the claim would have been denied immediately. AMCO was simply discharging its duty to thoroughly investigate any potential for coverage. It made no concession or admissions in doing so, and Plaintiff's assertion to that effect is without merit. The significance of Graham's testimony is simply that she established that AMCO did its job in investigating the case.

C. THE CIRCUIT COURT PROPERLY DETERMINED NO DUTY EXISTS UNDER THE CIRCUMSTANCES OF THIS CASE.

1. Standard for Determining Existence of Duty

Because Plaintiff's claim is rooted in the alleged negligence of a claimed phantom driver, the Plaintiff must establish that if a phantom driver exists, he or she owed Zerfas a duty, which he or she breached, and the proximate cause of which resulted in injury. Hendrix v. Schulte, 2007 S.D. 73, ¶ 7, 736 N.W.2d 845, 847 ("In order to prevail in a suit based on negligence, a plaintiff must prove duty, breach of that duty, proximate and factual causation, and actual injury.") (other citations omitted). "The existence of a duty owed by the defendant to the plaintiff, which requires the defendant to conform to a certain standard of conduct in order to protect the plaintiff against unreasonable risks, is elemental to a negligence action." Poelstra v. Basin Elec. Power Coop., 1996 S.D. 36, ¶ 7, 545 N.W.2d 823, 825 (citations omitted).

Whether a duty exists "is a question of law to be determined by the court and not the jury." Hamilton v. Sommers, 2014 S.D. 76, ¶ 22, 855 N.W.2d 855, 862 (citations omitted). "Tort liability depends upon the existence and breach of duty, and unless a specific statute creates a legal obligation, ascertaining a duty and defining its limitations…remain a function of the courts." Tipton, 1997 S.D. 96, ¶ 12; see also Hendrix, 2007 S.D. 73, ¶ 8 (judgment to defendant where duty question resolved in

defendant's favor); Erickson v. Lavielle, 368 N.W.2d 624 (S.D. 1985) (stating the general rule is that the existence of a duty is to be determined by the court). The Court's function is to determine "as a matter of law, [both] the existence and scope or range of that duty." Hamilton, 2014 S.D. 76, ¶ 22, 855 N.W.2d at 862 (*quoting* 57A Am. Jur. 2d Negligence § 78 (2014)).

"The existence of a duty ultimately depends upon choices between competing policies." Tipton, 1997 S.D. 96, ¶ 11, 567 N.W.2d at 357 (*citing* 2 S. Speiser, et al., *The American Law of Torts* § 6:11 n.45 (1985 & 1997 Supp) (other citations and internal citations omitted)). The Court of Appeals of New York engaged in an insightful discussion of the existence of duty in Hamilton v. Beretta U.S.A. Corp, 96 N.Y.2d 222, 750 N.E.2d 1055 (2001):

> The threshold question in any negligence action is: does defendant owe a legally recognized duty of care to plaintiff? Courts traditionally "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability….Thus, in determining whether a duty exists, "courts must be mindful of the precedential, and consequential, future effects of their rulings, and limit the legal consequences of wrongs to a controllable degree….Foreseeability, alone, does not define duty—it merely determines the scope of duty once it is determined to exist….The injured party must show that a defendant owed not merely a general duty to society but a specific duty to him or her, for "without a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable harm." That is required in order to avoid subjecting an actor "to limitless liability to an indeterminate class of persons conceivably injured by any negligence in that act." Moreover, any extension of the scope of duty must be tailored to reflect accurately the extent that its social benefits outweigh its costs.

Id. at 232 (citations omitted).

In the case currently before the Court, the circuit court found no duty to act in the manner Plaintiff alleged was both necessary and required. The circuit court emphasized the dangerous precedent, and precarious public policy, to impose a duty which would require a person, no matter of his or her age, physical attributes or capabilities, to place themselves on a busy roadway in an attempt to locate a wild or domestic animal he may have struck, encounter said animal, whether injured or deceased, and remove it from the roadway. See Summary Judgment Hearing Transcript at pp. 23. 25, App. 25, 27. Dealing with an injured and potentially diseased animal would be extremely dangerous in any instance, even involving a domestic animals. Furthermore, being on the roadway attempting to locate what one believes he may have hit, and then attempting to remove it from the busy roadway, causes an exponentially greater hazard than the obstruction might itself create. There is an abundance of tragic accounts in the news daily and weekly of motorists who pull to the side of the roadway to provide assistance or for other reasons and are injured or killed by other travelers. Encouraging pedestrian activity on busy highways would be exceedingly unsafe and short-sighted. In the case at hand, if a phantom driver did hit and kill the deer in the precise location where the deer laid,[18] there is no way of knowing whether that person would have been physically capable of moving a large animal or even exiting his or her vehicle.[19] Attempting to locate and remove an animal from the roadway would endanger both the person conducting the search and

[18] If the deer was hit and killed by another vehicle, there is no telling where that impact occurred. An animal does not necessarily fall dead at the exact place where it is hit. Under Plaintiff's theory of recovery, a person who hits a deer would be required to track it until it dies

[19] The absence of any evidence concerning the individual who may have struck the deer underscores the jury's inability to discern between whatever conduct occurred here and what a reasonable person would do, under circumstances which are wholly unknown. That is precisely why Plaintiff's reliance on the reasonable person standard is misplaced.

removal and the approaching drivers who would then encounter multiple obstructions. Under these circumstances, and absent a specific legislative directive, the circuit court was correct in concluding there is no legal duty as a matter of law in this case.

This issue appears to be one of first impression in South Dakota. However, a number of courts in other jurisdictions have considered this issue in similar circumstances and have determined that a motorist has no duty to remove an injured or deceased animal from the roadway. In fact, these cases are more compelling because the respective courts refuse to impose a duty on both a *known driver* who *knowingly* hit a wild animal and undisputedly caused it to lie in the roadway and a *substantiated* phantom driver, who was corroborated by physical evidence and witness testimony. In each of those cases, the court refused to impose a duty to report, warn or remove the animal from the roadway.

Particularly instructive here is the reasoning of the Common Pleas Court in Pennsylvania in its recent decision in Zinskie v. Terraciano, 2010 Pa. D. & C.5th 353, 2010 Pa. Dist. & Cnty. Dec. LEXIS 677 (November 29, 2010).[20] The driver in the Zinskie case, who was identified and undisputedly hit the deer which caused the subsequent collision, was sued for negligence by another motorist who hit the deer on the roadway and was injured as a result. Id. at 355-358. In that case, the court granted summary judgment to the Defendants, driver and passenger, holding they did not owe Plaintiffs a duty to remove a deer from the highway after hitting it or to warn oncoming traffic of it. The court reasoned as follows:

> We find no case law, nor have the Plaintiffs provided the Court with any, which states that a motorist owes a duty of care to another motorist in regard to either hitting a deer, removing an injured deer from the roadway, or alerting oncoming traffic of a dangerous condition…[The Pennsylvania

[20] A copy of the Zinskie case is attached hereto at App. 53-58.

> Commonwealth Court in Rippy v. Fogel, 529 A.2d 608, 108 Pa. Cmmw. 296 (Pa. Cmwlth. 1987)] specifically held that a deer on the highway was not a dangerous condition upon which to predicate liability. As such, we cannot impose a duty of care on Defendants. We also find it necessary to state that we know of no Court that has imposed a duty upon a motorist to remove a large, injured deer from the highway. Such risk imposes a great safety issue and we find it unreasonable to hold Defendant to such a standard.

Id. at 360.

The Zinskie Court's acknowledgement of the serious ramifications of a policy imposing such duties is compelling and squares precisely with the circuit court's rationale in this case. Requiring a driver, whether he or she be elderly, juvenile, handicapped or able-bodied, to remove an injured or deceased wild animal from an interstate highway is untenable and, in fact, extremely dangerous. The imagery of a youthful or elderly motorist wrangling with a large carcass, or a live, wounded animal mistakenly deemed deceased, underscores the implausibility of such a duty. In addition, allowing the jury to determine whether a person is sufficiently able-bodied to undertake the task, as Plaintiff argues, is fundamentally unfair because it would allow for varying results for identical conduct. A jury would be more prone to assign liability to a muscled young man while a teenage girl with a slighter frame would likely be excused for the same conduct, based solely on physical composition.

The Supreme Court of Minnesota examined this issue and reached the same conclusion in Wong v. Am. Family Mut. Ins. Co., 576 N.W.2d 742, 746 (Minn. 1998), a case with the same posture as that currently before the Court, namely, a first-party uninsured motorist claim based on the alleged negligence of a phantom driver. In the Wong case, the jury found that there had been an earlier collision between a deer and a vehicle driven by an unidentified driver and that the unidentified driver was 55%

negligent and Wong, the insured, was 45% negligent. Id. at 744. On appeal, however, the Supreme Court reversed the jury's award, holding that an unidentified driver had "no duty to other motorists to remove the deer from the highway or to call the road authorities." Id. at 745.

The Supreme Court of Montana also affirmed a trial court's grant of summary judgment in two similar cases, Whitefield v. Therriault Corp., 745 P.2d 1126 (Mont. 1987) and White v. Murdock, 877 P.2d 474 (Mont. 1994). In Whitefield, an action was brought against a highway employee by the spouse of a man killed when he struck a horse on the road. 745 P.2d at 196-197. There was evidence that the employee was seen chasing the horse, attempting to remove it from the road. Id. However, while the Court acknowledged the general duty of the highway department to maintain highways in a safe condition, it affirmed the trial court's grant of summary judgment to Defendant because the employee had no duty to remove live animals from the road. Id. at 198. In White v. Murdock, the Court affirmed summary judgment to Defendants, who were sued by a passenger who was injured when the driver of the vehicle in which she road lost control trying to avoid a moose in the roadway, which the Defendants struck. 877 P.2d at 478. The Court held that "[t]o establish material questions of fact, the party opposing summary judgment must set forth specific facts and cannot rely on speculative, fanciful, or conclusory statements." Id. at 477. The Court also noted that the Plaintiff failed to show Defendants would "have enough time to do anything to warn [the oncoming driver] of the possibility of the moose in the road," which underscores an additional deficiency in the Plaintiff's claim in this case. Id.

Several of the cases discussed above note the respective proponent's failure to cite case law in which a court imposed a duty to remove a deer carcass or to warn oncoming traffic following a collision with a deer or similar animal. Likewise, Plaintiff cites no authority to support that proposition. With respect to a duty to contact authorities, there is again no evidence that a third party hit the deer, knowingly or unknowingly, in this location. Moreover, because there is no evidence regarding the timing of the deer's demise, if it was hit by a third party, there is no way of knowing whether upon report the authorities could or would have acted quickly enough to remove it prior to Zerfas's encounter with it. Therefore, not only is there no duty, there is no causal nexus between the alleged failure to report and the injuries Zerfas sustained.

2. There are Insufficient Facts to Give Rise to a Duty in this Case.

Furthermore, there are insufficient facts to give rise to a duty in this case. The evidence of record can be succinctly stated. The only known facts are that in the vicinity of subsequently-discovered deer remains, Zerfas lost control of his vehicle, crossed the median into oncoming traffic, and was fatally injured in the ensuing collision.

Any inference or conclusion beyond these facts is based solely on conjecture, speculation, and guesswork. Even though it is presumed that Zerfas swerved to avoid the deer, he may have swerved to avoid a live deer rather than one which was deceased. As discussed above, AMCO could not rule out the possibility that *Zerfas* killed the deer, and there is circumstantial evidence, i.e. deer remains on his vehicle and the sole existence of his skid marks where the deer lay, which supports that conclusion.

There is no evidence as to when the deer was killed or how it came to lie in the roadway. There is no evidence that it was killed in the spot where it lay or whether it

may have been struck by north or south bound traffic. It could have been killed in a different location and dragged onto the roadway by another animal. It could have been hit by a vehicle on a side road, kept alive by adrenaline until it fell. There is no evidence of the condition of the deer at the time of the collision, which the accident report describes only as "deer remains," so it may have been there for an extensive time. There is no evidence in the record as to whether the entire carcass was intact or the size of the remains.

Likewise, there is no evidence of how the deer was killed. There is no evidence that it was killed as a result of being hit by a vehicle. It could have been shot by a hunter in an entirely different location. No one who witnessed the deer's death has been identified. It could have been hit by one driver who injured it, remaining mobile, and then struck again by a second driver which finished it off. There is no evidence of marks on the roadway from another vehicle or debris on the roadway from a vehicle other than those involved in this collision that might give any credence to Plaintiff's theory that it was hit by a phantom vehicle in that precise spot. Without any evidence, there is no basis upon which a jury could reasonably infer the *existence* of a hit and run or phantom driver, much less reasonably conclude any of the elements of a negligence claim. Even if the deer was struck by a third party's vehicle, there is no way of telling whether it was hit in this precise spot or on a side road or by a vehicle traveling in the other direction. Therefore, even if one infers that this deer was killed by a vehicle, there is still no evidence of when, where and by whom. Moreover, the policy language precludes the claim based on insufficient evidence *as a matter of law*. The standard set forth in the policy heightens the burden for establishing facts even beyond the criteria for summary

judgment, and it is clearly unsatisfied by the quantum of proof Plaintiff offers and that exists in this case.

While the Plaintiff makes various sweeping statements cautioning against the serious negative ramifications of not imposing duties in this case, those arguments are red herrings. Whether a duty exists here is limited to this case and not a bright-line rule for all cases. In this case, where there is no evidence that a "hit and run" or phantom driver existed or that a phantom driver struck and killed the deer at this exact spot, there is no factual basis to impose a duty. In fact, contrary to Plaintiff's assertions, the negative impact of imposing such duties is far more likely to have devastating social and economic ramifications than not imposing them. If this case is deemed submissible to a jury, then any time a driver is injured by swerving to avoid an item in the roadway that is there by unknown origin, that driver will have a submissible UM claim under a no-physical-contact hit-and-run policy. It is not possible to formulate a weaker claim than this one.

Ultimately, no common law or statutory duty requires a motorist to take the actions Plaintiff alleges. Unlike a situation in which a domesticated animal escapes from a vehicle or adjacent property, Plaintiff cannot trace the deer in this accident back to an owner or someone who had a duty to control it. There is certainly no ability to trace the deer back to the alleged but unsubstantiated unidentified motorist, and the jury would be left to rank speculation to determine what happened in the alleged collision between that vehicle and the deer and how to measure the alleged breach of a duty to act. In this circumstance, there is no basis for a legal duty to be asserted, and the circuit court fulfilled its duty as gatekeeper in granting summary judgment in favor of AMCO. This Court should affirm.

II. THE ZERFAS POLICY UNAMBIGUOUSLY PRECLUDES COVERAGE BASED ON A HIT AND RUN DRIVER WITHOUT PROOF OF THE FACTS BY COMPETENT EVIDENCE.

While the circuit court did not reach this argument, the unambiguous policy language provides an additional basis for summary judgment in AMCO's favor. The Zerfas policy provides in pertinent part as follows:

> "Uninsured motor vehicle" means a land motor vehicle or trailer of any type:
>
> (3) Which is a hit-and-run vehicle whose operator or owner cannot be identified and which hits or causes an accident resulting in "bodily injury" without hitting:
>
> a. You or any "family member";
>
> b. A vehicle which you or any "family member" are "occupying"; or
>
> c. "Your covered auto".
>
> **If there is no physical contact with the hit-and-run vehicle the facts of the accident must be proved. We will only accept competent evidence other than the testimony of a person making claim under this or any similar coverage.**

App. 52.

The policy is unambiguous. It requires corroboration of a hit-and-run vehicle when no physical contact with the alleged vehicle has occurred. Just as a failure of evidence requires summary dismissal as discussed above, summary judgment is also the required result when corroboration fails. Therefore, AMCO is also entitled to summary judgment in its favor on this basis, as failure to "prove the facts of the accident" by "competent evidence" is fatal to the Plaintiff's claim. See Gayheart v. Doe, 758 N.E.2d 1162 (4th Dist. Ohio Ct. App. 2001) (failure to corroborate phantom driver results in summary judgment for insurer); Gobin v. Allstate Ins. Co., 773 P.2d 131 (Wash. Ct. App. 1989) (affirming summary judgment in favor of insurer where insured could not provide

independent corroboration of phantom vehicle causing accident); compare Dakota, Minnesota & E.R.R. Corp. v. Acuity, 2009 S.D. 69, 771 N.W.2d 623 (insured corroborated phantom vehicle through testimony of three independent witnesses, thereby satisfying policy requirement).

III. PLAINTIFF'S ARGUMENTS ARE WITHOUT MERIT AND MUST BE REJECTED.

A. A STATUTORY DUTY TO MAKE REASONABLE USE OF THE HIGHWAY IS NOT APPLICABLE IN THIS CASE.

Plaintiff points to SDCL § 31-32-6 as creating a statutory duty to remove a deer carcass from the roadway, but that assertion is at odds with the Supreme Court of South Dakota's interpretation of that statute, which it appears was considered most recently in 1951. Norman v. Cummings, 45 N.W.2d 839 (S.D. 1951). Interestingly, the Plaintiff cites this authority in support of her position. However, in that case, the Court explains the meaning of the statute (formerly SDC 28.9909) as follows:

> Under SDC 28.9909 it is unlawful to place any obstruction upon any highway. These statutes do not abrogate the common right of the public, granted by law, to make reasonable use of highways for usual and ordinary transportation. 40 C.J.S. Highways, § 233. *If as a result of usual, ordinary and reasonable use a highway is injured, obstructed or rendered dangerous and unsafe for travel, it becomes the duty of the duly authorized public authorities to provide the remedy, but no liability attaches to the user as a result of such use, either to the public highway authorities for damages to the highway…or to other travelers on the ground of negligence.*

Id. at 840 (emphasis added).

If there was a negligent driver that hit and killed a deer in this precise location, there is no evidence that his or her use of the highway was not "usual, ordinary and reasonable." Even if the driver caused the highway to be obstructed by the deer carcass, the case law interpreting this statute instructs that it is the duty of the public authorities to

address it, not that of the driver. This case also effectively illustrates the distinction between a driver who knowingly and voluntarily transmits a danger, such as by hauling and spilling bentonite as occurred in Norman, and one who is using the highway for ordinary travel and comes upon a free-roaming animal the driver cannot avoid. It stands to reason that a duty to remedy would exist for the former but not the latter.

B. A GENERAL DUTY OF CARE DOES NOT MAKE THIS A SUBMISSIBLE CASE.

"Tort liability depends upon the existence and breach of duty, and unless a specific statute creates a legal obligation, ascertaining a duty and defining its limitations…remain a function of the courts. A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, **to conform to a particular standard of conduct** toward another." Tipton, 1997 S.D. 96, ¶ 12, 567 N.W.3d 351, 356 (emphasis added).

Because the circumstances of this case are unknown and the existence of a hit and run driver unestablished, there is no known third party upon whom to impose a duty. This fact underscores the fundamental problem with this case: there is no known conduct for a jury to measure against the reasonable person standard. Comparing what an unknown and potentially nonexistent person may have done in this case to a reasonable person under the same or similar circumstances is not possible, because there is no evidence upon which a jury could base the comparison. There is no evidence from which a jury could legally conclude that any actions taken in this case were unreasonable. There is no evidence a third party existed, much less what he or she did or did not do. Under these circumstances, this is not a submissible case. See Whitechurch v. McBride, 818 P.2d 622, 623 (Wash. Ct. App. 1991) (trial court acted properly in taking case from

jury where "the jury had no way of discerning what a reasonable person's conduct would have been, or of comparing that conduct with the defendant's…and could not find that the accident would not have occurred but for the defendant's excessive speed.").

The South Dakota Pattern Jury Instruction Plaintiff cites in her Brief further demonstrates this fatal flaw in Plaintiff's case. Instruction 20-20-10 provides that negligence "is the doing of something which a reasonable person would not do, or the failure to do something which a reasonable person would do, under facts similar to those shown by the evidence." See South Dakota Civil Pattern Jury Instruction 20-20-10 (emphasis added); Plaintiff's Brief at p. 5. Plaintiff has no evidence to guide the jury in this analysis. The quantum of proof Plaintiff claims she has here is tantamount to a *res ipsa loquitur* case where negligence is presumed. However, Plaintiff does not meet the legal requirements for such an evidentiary presumption. Id.[21] Again, "speculation and conjecture cannot fill the role of a reasonable inference for the purpose of making a submissible case." Riley v. Riley, 847 S.W.2d 86, 88 (Mo. Ct. App. 1992). Speculation is the basis for this entire action.

[21] The requirements for *res ipsa loquitur* are that the instrumentality that caused the injury must have been under the full management and control of the defendant or his servants; that the accident was such that according to common knowledge and experience does not happen if those having management or control had not been negligent; and that plaintiff's injury must have resulted from the accident. Malloy v. Commonwealth Highland Theatres, 375 N.W.2d 631, 634 (S.D. 1985).

C. A DRIVER'S DUTY TO OPERATE A VEHICLE WITH REASONABLE CARE IS INAPPLICABLE IN THIS CASE.

Furthermore, Plaintiff's reliance on a driver's duty of reasonable care is wholly misplaced because Zerfas's injury does not flow from the negligent operation of a motor vehicle. Plaintiff argues at length that the circuit court's ruling diverges from the well-established principle that "it is the duty of every driver of a vehicle using a public highway to exercise ordinary care at all times to avoid placing others in danger." See Appellant's Brief at p. 10 ("The chaos in courtroom, judges' chambers, and law offices would be surpassed only by the chaos on highways if this Court announced that not all drivers using the public roadway have a duty to exercise ordinary care to avoid placing others in danger.").

Neither AMCO nor the circuit court takes issue with the legal principle that a driver owes a duty of reasonable care in the operation of his or her vehicle. The circuit court did not reject this concept or rule contrary to it. The basis for Zerfas's injuries as alleged are not a result of the negligent operation of a motor vehicle. Clearly, the acts complained of are separate and distinct from driving. Even if one presumes a hit and run vehicle hit the deer, and again presuming the deer fell in the very spot it was hit, there is simply nothing negligent about that conduct. Hitting a wild animal on a public highway is not a negligent act. In fact, encouraging drivers to attempt to avoid hitting a deer for fear of having to locate and wrangle with it would impose another perilous policy, one wholly contrary to that publicly espoused in our state, that is, to discourage drivers from

overcorrecting when encountering roadway hazards.[22] Accordingly, any duty upon that individual, and necessarily any corresponding breach thereof, must arise subsequent to striking the deer. Those duties, if they exist, are not related to the operation of a motor vehicle. Plaintiff's pleadings allege the individual had a duty to leave his or her vehicle and remove the dead or injured animal; to leave his or her vehicle and warn oncoming traffic, and to telephone or contact authorities to report striking an animal. It is those alleged failures Plaintiff claims caused Zerfas's injuries. Therefore, the duty to reasonably operate a vehicle is inapposite in this case. This is not a case where an unidentified vehicle injured Zerfas because he or she was following too closely, traveling too slowly, speeding, sideswiping, or driving erratically. Plaintiff's position blurs the lines and confuses the issue. However, the circuit court was able to distinguish Plaintiff's reliance on a driver's duty of care and ferreted out the pertinent standard to make the proper analysis in this case. This Court should affirm.

D. RESTATEMENT (THIRD) OF TORTS SUPPORTS AMCO'S CASE.

Finally, citing to the Restatement (Third) of Torts (hereinafter "Restatement Third"), the Plaintiff attempts to rely on the concept that "[a]n actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm." Restatement Third § 7(a). However, even if the concept is valid, it has no application in this case because there is no evidence that an actor existed or created a risk of physical harm, or assuming *arguendo* this did occur, there is no evidence that said actor had knowledge of creating such a risk. Again, hitting a wild animal on a roadway is not a

[22] While inaptly titled, the South Dakota Department of Public Safety's "Don't Jerk and Drive" campaign demonstrates the public policy designed to address and warn driver of the dangers of overcorrecting.

negligent act. As the circuit court explained, a person who hits an animal may be completely unaware of what he or she hit, whether it is dead or injured, stationary or mobile, rabid or innocuous, or where it ultimately ends up. This argument again presupposes many conclusions of which there is no evidence in this case.

Furthermore, the Restatement Third itself qualifies the duty with public policy considerations. Section 7(b) provides that the general duty of reasonable care does not apply "when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases." Restatement Third § 7(b) at 90. That is precisely the rationale Judge Tiede articulated in finding no duty in this case.

This concept also relates to Plaintiff's claim that it is "splitting hairs" to distinguish cases where a driver is transporting property which falls off his vehicle, knowingly creating a roadway obstruction that may be hazardous. Those cases are distinguishable because the driver in those cases had an independent duty to refrain from the conduct that created the hazard. For example, an individual hauling something on his vehicle would reasonably have a duty to ensure it was properly secured and would not fall off. This is a stronger case for existence of a duty because the individual's own negligence created the hazard. That is much different than this case, where the allegation is that a driver hits a free-roaming wild animal by no fault of his own. A driver has no duty to avoid hitting an animal that crosses his path in the roadway. It is not negligent to do so. If a driver does hit a deer, it does not mean that he was making an unreasonable use of the highway or that he was not operating his vehicle reasonably.

CONCLUSION

This is not a case where the jury, if presented with the evidence of record, should be allowed to make inferences to "fill in the blanks" of what occurred. Inferences must be reasonable and based on evidence, not on supposition and not on emotion. If this case had been given to the jury, the jury would have to author the scenario with respect to how the remains of a deer came to be on the roadway on December 2, 2011, from start to finish. That would render the outcome based solely on "conjecture, fantasy, and guesswork" which is impermissible under South Dakota law.

Public policy is the keystone for imposing a duty. As set forth above, the public policy weighs heavily against imposition of a duty to remove animal remains from a roadway, even in a case where those facts are established. The hazard created would be far greater than any minimization of harm.

Finally, the unambiguous language of the policy is determinative in this case and mandates summary judgment in favor of AMCO. Accordingly, for the foregoing reasons, AMCO respectfully requests this Court to affirm the Circuit Court's Order granting summary judgment in its favor.

Dated this 1st day of June, 2015.

CUTLER LAW FIRM, LLP
Attorneys at Law

/s/ Kimberly R. Wassink
Kent R. Cutler
Kimberly R. Wassink
100 N. Phillips Ave., 9th Floor
P.O. Box 1400
Sioux Falls, South Dakota 57101-1400
Telephone 605-335-4950; Facsimile 605-335-4966
Attorneys for Appellee AMCO Insurance Company

REQUEST FOR ORAL ARGUMENT

Appellee AMCO Insurance Company respectfully requests oral argument before the Court.

/s/ Kimberly R. Wassink
Kimberly R. Wassink

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Appellee's Brief does not exceed the word limit set forth in SDCL 15-26A-66, said Brief contains 9,753 words.

/s/ Kimberly R. Wassink
Kimberly R. Wassink

CERTIFICATE OF SERVICE

The undersigned attorney for the Appellee does hereby certify that on this ____ day of June, 2015, the original and two (2) copies of the Appellee's Brief were sent to Shirley Jameson-Fergel, Supreme Court Clerk, 500 East Capitol Avenue, Pierre, South Dakota 57501, via Federal Express overnight delivery; an electronic filing of Appellee's Brief was sent to the Supreme Court Clerk via email attachment to scclerkbriefs@ujs.state.sd.us; and an electronic copy and one copy of Appellee's Brief were served electronically and by U.S. Mail, postage prepaid, upon Appellant's counsel at the following address:

Ms. Nancy J. Turbak Berry
Mr. Seamus W. Culhane
Turbak Law Office, PC
25 S. Broadway, Suite 100
Watertown, SD 57201-3670
nancy@turbaklaw.com
seamus@turbaklaw.com

/s/ Kimberly R. Wassink
Kimberly R. Wassink

INDEX TO APPELLEE'S APPENDIX

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27317

STACEY ZERFAS
Plaintiff/Appellant,

vs.

AMCO Insurance Company, a Nationwide Company,
Defendant/Appellee.

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

The Honorable Stuart L. Tiede, Presiding

REPLY BRIEF OF APPELLANT STACEY ZERFAS

Nancy J. Turbak Berry
Seamus W. Culhane
Turbak Law Office, P.C.
26 S. Broadway, Suite 100
Watertown, SD 57201
(605) 886-8361

Attorneys for Appellant

Kent R. Cutler
Kimberly R. Wassink
100 N. Phillips Avenue, 9th Floor
P.O. Box 1400
Sioux Falls, SD 57101-1400
(605) 335-4950

Attorneys for Appellee

Notice of Appeal filed January 9, 2015

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

AMCO now concedes that *all* drivers on public highways owe a legal duty to other highway users, contrary to its earlier argument to the trial court and to that court's ruling. Though not surrendering the issue of duty entirely, AMCO focuses its arguments now on factual matters. AMCO's arguments about the alleged insufficiency of the facts in this case reflect, for the most part, limitations inherent in every phantom driver situation.

Essentially, what AMCO's arguments boil down to is a bristling at the public policy in South Dakota that requires insurers to provide uninsured motorist (UM) coverage to insureds in phantom driver cases. Because those drivers are never known, the particular details of their actions and information about why they acted as they did and whether there may have been some excuse for their conduct *always* remain a mystery. Yet the Legislature and this Court have made it clear that UM coverage does apply to such situations, imperfect as the proof always may be of the alleged fault attributed to those unknown drivers.

The trial court erred in granting AMCO's motion for summary judgment based on the opinion that the phantom driver here owed no legal duty to other users of Interstate 29. Trying to find some other basis for the ruling, AMCO falsely claims there is "no evidence" of what happened, and makes a desperate, inexplicable argument that AMCO's own conclusions about what happened should be ignored. AMCO is wrong, and the trial court was wrong. Summary judgment should be reversed for the following reasons.

ARGUMENT

1. The trial court erred in finding that a driver who causes a deer carcass to be in a public highway owes other highway users no duty whatsoever.

    a. Every driver on a public highway has a duty to use ordinary care at all times to avoid causing injury to others.

    b. Specific statutory duties also apply.

    c. This is not a "case of first impression" involving questions of unique, narrowly-defined duties.

2. There is no alternative basis on which to affirm the trial court.

    a. Rules relevant to factual issues for purposes of summary judgment.

    b. There are facts sufficient to allow jurors to conclude an unknown motorist struck the deer and left its carcass on the highway.

    c. AMCO has not proven a lack of "competent evidence other than the testimony of [Mrs. Zerfas] to prove "the facts of the accident."

1. The trial court erred in finding that a driver who causes a deer carcass to be in a public highway owes other highway users no duty whatsoever.

a. Every driver on a public highway has a duty to use ordinary care at all times to avoid causing injury to others.

Unable to deny the duty of every driver on a public highway to exercise ordinary care to avoid risk to others, AMCO first tries to sidestep that duty by complaining "there is no known third party upon whom to impose a duty."[1] That is true. As in *every* case involving an unidentified – "phantom" – driver, the third party alleged to be at fault is unknown. It is too late, however, for AMCO to argue that the

[1] Appellee's Brief, page 27.

unknown identity of an at-fault driver bars the possibility of finding fault on the part of that driver for purposes of UM benefits. That argument is precluded by SDCL §58-11-9:

> "No policy insuring against loss resulting from liability imposed by law for bodily injury or death suffered by any person arising out of the ownership, maintenance, or use of a motor vehicle may be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state…unless coverage is provided…for the protection of persons insured thereunder who are legally entitled to recover damages from owners or operators of uninsured motor vehicles *and hit-and-run motor vehicles*…." [emphasis added]

The most reasonable way to interpret the phrase "operators of…hit-and-run motor vehicles" is to conclude that it includes operators whose identities are unknown; if their identities were known, they might be found to be *insured* drivers. Requiring *un*insured coverage to be provided when the at-fault driver was operating a "hit-and-run" vehicle implies a presumption that the driver was never identified. AMCO is free to argue to legislators that the statute should be changed so insurers don't have to provide coverage when "there is no known third party upon whom to impose a duty." But the Legislature having adopted a statute directly contrary to that argument, AMCO is *not* free to argue now that its insured's claim is defective because she cannot identify the at-fault driver whose fault she alleges caused her husband's death.

Any doubt was eliminated long ago about whether mandatory UM coverage is intended to apply when the "hit-and-run" driver is never identified. *Clark v Regent Ins. Co.*, dealt with the " 'phantom vehicle' problem." 270 N.W.2d 26, 29 (1978). In *Clark*, this Court concluded that the term "hit-and-run" as used in our statute was

intended to refer to unidentified motorists who failed to stop and identify themselves. *Id.* at 31. Insurers in that case had tried to limit their statutory obligation by adding policy provisions restricting benefits to cases where an insured could prove the "phantom vehicle" had made physical contact with the insured's vehicle. *Id.* at 27. The position advocated by insurers complained of suspicion and doubt about whether an allegedly vanishing motorist "had in fact been involved in the accident." *Id.* at 28. This Court rejected the argument, *Id.* at 30, noting that "the provisions of the uninsured motorist statutes are construed liberally in favor of coverage." *Id.* at 29.

AMCO also tries to sidestep the motorist's legal duty by falsely claiming "there is no known conduct" to be considered, claiming there is no evidence whatsoever of what the phantom driver "did or did not do."[2] That is <u>not</u> true. Who the phantom driver was and why that driver did nothing *are* unknowns, but those things are *always* unknown in phantom driver cases. While no witness came forward to report observing the phantom driver firsthand, there is considerable circumstantial evidence that after hitting the deer, the driver *did nothing.* No motorist was stopped near the carcass with emergency flashers activated. No flare or reflective triangle had been placed on the scene. No one in the vicinity claimed to have been trying to warn oncoming motorists, remove the obstruction, or notify authorities. Neither the Highway Patrol investigation nor AMCO's investigation revealed a shred of evidence that the phantom motorist had done *anything*. So the conduct the jury would be

[2] Appellee's Brief, page 27.

asked to evaluate is the conduct of leaving the scene of a deadly traffic obstruction *without doing anything*.

Finally, AMCO attempts to avoid this legal duty by subtly inserting AMCO's own arbitrary restriction on that duty. AMCO claims the alleged conduct can't be a violation of every driver's duty because "the acts complained of are separate and distinct *from driving*." [emphasis added] [3] According to South Dakota law, once a driver chooses to use a public highway, that person has the duty "to exercise ordinary care *at all times*…." [emphasis added] *Herren v. Gantvoort,* 454 N.W.2d 539, 542.[4] The duty has *never* been stated as if it is the duty "to exercise ordinary care *while in the act of driving*…." Still, AMCO claims that a vehicle driver who chooses to use a public highway has only the duty to exercise ordinary care in the specific act of *driving*. Even if that were the law, AMCO's argument fails because one of its insured's complaints is that the unidentified motorist *drove off* from the obstruction without exercising any ordinary care to protect other highway users. By trying to artificially restrict the legal duty of drivers on public highways, AMCO tries to shift discussion away from the actual claim here and insist that its insured must prove a claim she never made – that the phantom driver was negligent to *hit* the deer.

b. Specific statutory duties also apply.

AMCO falsely claims that Mrs. Zerfas cited SDCL§31-32-6 "as creating a statutory duty to remove a deer carcass from the roadway…."[5] Neither SDCL§31-

[3] Appellee's Brief, page 29-30.

[4] See also Appellant's Brief, page 8.

[5] Appellee's Brief, p. 26.

32-6 nor Mrs. Zerfas states that one who obstructs the highway has a statutory duty to remove the obstruction. The statute says every person who "obstructs any…highway as to render the same unsafe" must immediately *warn others*. Mrs. Zerfas' argument is simply that besides the duty every motorist on a public highway has to use ordinary care to avoid risk to others, there also is a statutory duty to warn others when the highway is obstructed in a way making the highway unsafe. It is true that SDCL§31-32-6 doesn't create a statutory duty to remove a deer carcass; AMCO wins that point and prevails over the straw man it erected.

AMCO's next response to SDCL§31-32-6 is to misrepresent the only Supreme Court opinion examining that statute's language, *Norman v. Cummings,* 45 N.W.2d 839 (S.D. 1951). AMCO correctly points out that obstructions or hazards arising from *ordinary and reasonable* use of a highway don't give rise to liability for highway users.[6] For example, potholes resulting from the ordinary wear of reasonable highway use yield a responsibility for public authorities to remedy the resulting hazard; no private liability attaches to users of the highway. However, if AMCO had not cut short the language quoted from *Norman*, the *very next words* would be:

> "However, it is the duty of every traveler to avoid any unusual or unreasonable use of the highway and by such use obstruct the highway or make it dangerous for travel, and damages resulting from failure to perform that duty may be recovered by any person who sustains injuries therefrom." 45 N.W.2d at 841

Norman does not preclude personal liability based on violation of the duty under SDCL§31-32-6 to refrain from obstructing the highway through unreasonable or

[6] See Appellee's Brief, page 26.

unusual use. The question is whether jurors might conclude that leaving a carcass in the driving lane of an interstate before dawn without doing anything is unusual or unreasonable use.

The *Norman* opinion does not suggest jurors here would be barred from finding liability under SDCL §31-32-6. The Court in *Norman* found the hazard in that case didn't cause plaintiff's damages, but the Court was willing to *assume* the defendant's use of the highway so as to leave bentonite on the roadway *was* "unusual and unreasonable." *Id.* at 841. It is not a stretch to say that if driving away with bentonite residue on the highway can be unreasonable, driving off and leaving a deer carcass in the highway also might be considered unreasonable.

AMCO repeatedly tries to characterize its insured's complaint as criticizing the phantom driver for striking a deer, though that is *not* the behavior alleged as the basis of liability. The behavior jurors should be allowed to evaluate was not hitting a "free-roaming animal the driver cannot avoid," but the behavior that follows – when the animal is not free-roaming, but lying dead on the highway. AMCO attempts a distinction between one who leaves a carcass obstructing travel and a defendant who creates a hazard by spilt bentonite, just as AMCO tries to distinguish between a motorist leaving a deer carcass in the highway after striking it and one who leaves a carcass in the highway after it falls off his truck. (S.R. 56-57) If the distinction makes a difference, it is not a difference in *duty*, for the statutory duty is the same in all instances: to not obstruct the highway or endanger others by unusual or unreasonable conduct. Any difference is the difference *for jurors to consider* in deciding whether the facts in each case amount to *breach* of that duty.

c. This is not a "case of first impression" involving questions of unique, narrowly-defined duties.

AMCO also tries to disguise factual jury questions as legal questions of unique duties. AMCO wrongly suggests that before its insured's claim may proceed, the insured must prove a number of specific legal duties for the unidentified driver – to activate flashers, to mark the hazard, to notify authorities, to move the deer, etc. That tactic worked with the trial court and AMCO has found two reported instances where it worked in other jurisdictions, but this Court should not be fooled. This is not a case of first impression. It is a case involving the same basic principles of ordinary and reasonable care that are the bedrock of negligence law.

The defense tactic of insisting on narrowly defined legal duties that match omitted conduct in a particular case is clever. First, it elevates the hurdles plaintiffs must clear before proceeding with their claims; instead of allowing jurors to decide whether conduct in a particular case violated a duty of reasonable care, the tactic requires plaintiffs to prove before trial that the conduct missing in any one case would be legally required *in every case.* Second, the tactic defines the supposed duty so narrowly that it limits the likelihood of reported case law discussing the narrowly defined duty. Defendants then can say, "See! There are no cases stating that the duty to [fill in the blank with particular conduct jurors might find the defendant should have displayed] exists!"

AMCO offers as "instructive" the Pennsylvania trial court decision, *Zinskie v. Terraciano,*[7] but fails to note whether, like South Dakota, Pennsylvania imposes on

[7] Appellee's Brief, page 19-20.

every driver using a public highway the legal duty to use reasonable care to avoid risk to others, or prohibits unreasonable conduct leaving public highways obstructed. The decision of the trial court here is reviewed *de novo*,[8] so a Pennsylvania trial court is owed no deference. What *is* notable about *Zinskie*, though, is the conduct of even the defendants in that case; defendants there claimed that after killing the deer, they pulled off the road, shone their headlights, and activated flashers.[9] 20 Pa. D. & C.5th 353 (2010), 357-8. (Appellee's Appdx, page 56). On the issue of legal duty, though, the *Zinskie* opinion is weak. The analysis starts with an intermediate appellate decision holding that the Commonwealth could not be liable for a *live* deer walking on the highway, then finds it "unreasonable to hold a private citizen to a standard to which the Commonwealth itself is not even held," and finally leaps from that opinion to the conclusion that private defendants could not be liable for failing to remove a carcass or warn oncoming traffic. *Id.* at 360 (Appellee's Appdx, page 57).

Likewise, the Minnesota case of *Wong v. American Family*, 576 N.W.2d 742 (1998) is not compelling. The issue in *Wong* related specifically to a Minnesota littering statute. The sole claim Wong made was that liability arose from violation of a Minnesota statute prohibiting litter on a highway. *Id.* at 745. While the holding in *Wong* is favorable to the defense, the *entire reasoning* of the case focuses on the littering statute, with no indication of whether Minnesota law elsewhere imposes on drivers the duty to use reasonable care to avoid risk to others, or whether Minnesota

[8] Appellant's Brief, page 8.

[9] Plaintiffs, injured in a collision after their vehicle had struck the carcass and left the lane of travel, apparently disputed that defendants had activated their flashers.

law creates a specific statutory duty prohibiting unreasonable conduct that leaves highways obstructed. The *Wong* court makes a brief, broader statement in conclusion that "under the facts of this case, the unidentified driver had no duty to other motorists to remove the deer from the highway or to call the road authorities." *Id.* at 746. That statement may be mere dicta, and in any case is unsupported by analysis or reasoning. *Id.*

Contrary to AMCO's suggestion, the Montana cases *do not* hold that legal duty is lacking under circumstances similar to those here. In *White v. Murdock,* defendant Lynds struck a moose on the highway, the carcass of which was then struck by an oncoming motorist whose passengers were injured in the resulting rollover. 877 P.2d 474 (Mont. 1994). Nowhere did the court say there was an absence of any legal duty on the part of Mr. Lynds; rather, the case was decided on the facts, with the discussion if anything suggesting there *is* an applicable legal duty:

> As to a duty to remove the moose from the highway after he hit it, Lynds' uncontradicted testimony demonstrated that he simply did not have enough time to do anything to warn Murdock of the possibility of a moose in the road. The [Murdock's] Bronco had already rolled by the time Lynds got his family out of the motor home. …We conclude that the District Court did not err in ruling that [Murdock's passengers] have failed to establish material issues of fact concerning whether Lynds breached a duty." *Id.* at 477.

The other Montana case AMCO cites has neither similar facts nor anything to do with the issue at hand; the question was whether Montana highway maintenance employees have a duty to remove live animals from roadways. *Whitfield v Therriault Corp.,* 745 P.2d 1126, 1127 (1987).

2. There is no alternative basis on which to affirm the trial court.

AMCO argues that even if the trial court erred in finding no duty, summary judgment is warranted by the facts. AMCO's two factual arguments focus on the reality that some facts are not known with certainty in phantom driver situations. First, AMCO argues there are insufficient facts from which jurors could conclude that an unknown motorist caused the deer carcass to be in the highway.[10] Second, AMCO argues there is insufficient "competent evidence" to prove "facts of the accident" so as to satisfy AMCO's policy language.[11]

a. Rules relevant to factual issues for purposes of summary judgment.

It was AMCO's burden to clearly demonstrate an absence of *any* genuine issue of material fact, together with its resulting entitlement to judgment.[12] AMCO is entitled to summary judgment only if it proves "but one conclusion" can reasonably be drawn from the facts and required inferences.[13] Mrs. Zerfas is entitled to have *all* available evidence viewed most favorably to her.[14] She is entitled to have *all* reasonable doubts resolved in her favor.[15]

Mrs. Zerfas has no greater duty to prove her claim now than she would have at trial. Contrary to AMCO's repeated suggestion, her claim is *not* subject to summary judgment unless she proves an unidentified motorist left the carcass in Interstate 29

[10] Appellee's Brief, page 13-14.

[11] Appellee's Brief, page 25-26.

[12] See Appellant's Brief, page 16-17.

[13] Id.

[14] Id.

[15] Id.

with such certainty as to "rule out" all other possibilities.[16] At this stage, Mrs. Zerfas is not even required to satisfy the ultimate burden of establishing her claim.[17] Even at trial, that "ultimate burden" would be only to prove the claim by greater convincing force of the evidence.

b. There are facts sufficient to allow jurors to conclude an unknown motorist struck the deer and left its carcass on the highway.

Appellant's Brief identified the material fact in dispute as the ultimate factual question of whether the phantom driver's conduct violated his legal duties.[18] Whether a duty was breached is a factual question for the jury,[19] and clearly, that factual question is hotly disputed. However, AMCO identifies a second factual dispute – whether a phantom driver had struck and killed the deer, or whether – as AMCO now speculates – Mr. Zerfas struck and killed the deer. Jurors considering this second question would be instructed to apply a "greater convincing force" standard and would have the right to consider the common knowledge they possess, together with their ordinary experiences and observations in daily life. SDPJI (Civil) 1-30-20. Using that standard of proof and their own common knowledge, experiences, and observations, it surely would not be *un*reasonable for jurors to conclude – just as AMCO itself did years ago – that the deer carcass Mr. Zerfas encountered in the

[16] AMCO repeatedly complains that explanations other than the deer carcass having been left by an unidentified motorist were not "ruled out." See, e.g., Appellee's Brief, pages 7, 22.

[17] See Appellant's Brief, page 15-16.

[18] See Appellant's Brief, page 16.

[19] Id.

middle of Interstate 29 was sufficient circumstantial evidence[20] that a preceding motorist struck and killed the deer.

The results of AMCO's investigation shortly after Mr. Zerfas' death, which AMCO now tries to disown, are not the product of some casual inquiry AMCO had the choice to make or not. Once AMCO's insured made a claim for her husband's death, AMCO had the duty to conduct a good faith investigation. *Eldridge v. Northwest G.F. Mutual Ins. Co.,* 221 N.W.2d 16 (1974); see *Bertelsen v. Allstate Ins. Co.*, 2011 S.D.13, ¶20, 796 N.W.2d 685. Entitled to have her insurer conduct a factual investigation in good faith, Mrs. Zerfas surely was entitled to rely on the results. It is unconscionable for AMCO now to criticize *Mrs. Zerfas* for not conducting a more thorough investigation or presenting more details.

AMCO's claim file reveals that following the investigation AMCO was required to make, AMCO itself concluded that a hit-and-run driver had killed a deer and left its carcass in the highway. (S.R.278, Appellant's Brief Appendix, page 9). Nothing in AMCO's claim file expresses doubt that the deer had been struck by an unidentified motorist, or suggests even a theory that Mr. Zerfas killed the deer. See, for example, claims manager Nancy Graham's memo to the AMCO claim file:

What Graham's memo says[21]	**What Graham's memo does <u>not</u> say**
"Ins. swerved to miss deer *carcass* in roadway…"	"Ins. swerved to miss *deer* in roadway."

[20] Jurors also would be instructed that the law makes no distinction between direct and circumstantial evidence. SDPJI (Civil) 1-60-20.

[21] Emphases are added.

What Graham's memo says (cont'd)	What Graham's memo does <u>not</u> say (cont'd)
"The decedent's wife [alleges] *the unidentified vehicle* striking the deer is the cause of the accident."	"The decedent's wife [alleges] *that an unidentified vehicle* striking the deer is the cause of the accident."
"… this could be considered an 'uninsured vehicle' by definition ….	"*If an unidentified vehicle struck the deer*, this could be considered an 'uninsured vehicle by definition…."
"What remains is if the mva was caused by the negligence of *the* unidentified vehicle leaving the deer in the roadway…"	"What remains is if the mva was caused by the negligence of *an* unidentified vehicle leaving the deer in the roadway…."

AMCO offers the novel argument that statements in AMCO's claim file contrary to AMCO's position here are not admissions because they relate to a "coverage analysis."[22] Not surprisingly, AMCO cites no authority for that remarkable claim. Particularly since this *is* a coverage case, AMCO cannot credibly claim that AMCO's statements made in the course of its coverage analysis would be anything *other than* admissions.

Prior to litigation, AMCO concluded that Mr. Zerfas died as a result of a deer carcass being left in the highway by a phantom driver. Of course those conclusions were not based on absolute certainty, but nothing in the law requires facts supporting UM claims to be proven with absolute certainty. At the time, AMCO was satisfied with its investigation of whether a phantom motorist had caused the deer carcass to be in the highway; AMCO assumed that to be the case, and AMCO's designated 30(b)(6) witness, Nancy Graham, admitted that under oath. Ms. Graham's testimony

[22] Appellee's Brief, page 14-16.

was that AMCO concluded for purposes of the claim that "the deer carcass was lying in the roadway when Mr. Zerfas approached it, and he either struck it or swerved to avoid it when this occurred." (S.R. 299, dep. 60:13-20).

AMCO tries to disown its prior conclusions by raising unfounded speculation about Mr. Zerfas' driving. The contention that *Mr. Zerfas* struck and killed the deer not only is contrary to AMCO's own conclusion, but is inconsistent with the Highway Patrol investigation, which found Mr. Zerfas lost control when he "attempted to swerve around the *remains* of a deer." (S.R. 276, Appellant's Appendix, page A-008).[23] With regard to contributory negligence, Mr. Zerfas is presumed to have exercised due care for his safety, *Dehnert v. Garrett Feed Co.,* 169 N.W.2d 719, 721 (S.D. 1969), and AMCO has identified no evidence to rebut that presumption.

There is sufficient evidence from which jurors could conclude, *just as AMCO did three years ago,* that an unknown driver struck and killed the deer, leaving its carcass in the highway. AMCO's satisfaction with that conclusion for purposes of its own coverage determination – and the fact that AMCO denied coverage based not on a lack of evidence about the accident, but on a mistaken belief that the phantom driver had no legal duty to other highway users – is itself evidence a jury is entitled to consider. AMCO presumably is free at trial to try to excuse its earlier admissions by attempting to impeach its own conclusions, but AMCO is not entitled to have those

[23] The only evidence AMCO points to now to argue that Mr. Zerfas may have struck a live deer is a reference to "deer remains" possibly found on Mr. Zerfas' vehicle,[23] which is consistent with AMCO's earlier conclusion that Mr. Zerfas lost control of his vehicle when he *either* struck the deer carcass *or* swerved to miss it.

admissions ignored now for purposes of determining whether there is a material factual dispute precluding summary judgment.

c. AMCO has not proven a lack of "competent evidence other than the testimony of [Mrs. Zerfas] to prove "the facts of the accident."

AMCO repeatedly implies that AMCO is especially generous with its insureds in not requiring physical contact before UM coverage is available in cases of phantom drivers,[24] and therefore is entitled to impose this additional condition on coverage. AMCO says, for example, that "if the policy required a 'hit,' the claim would be denied immediately."[25] If AMCO's policy required a "hit," the policy would be illegal. *Clark v Regent Ins. Co.*, 270 N.W.2d 26, 29 (1978). Insurers' efforts to restrict mandatory UM coverage by conditioning coverage on physical contact is against public policy. *Id.*

It appears this Court has never been asked to consider specifically whether similar efforts to restrict UM coverage in phantom vehicle cases by requiring "competent evidence" other than the testimony of the insured to prove "the facts of the accident" is a more valid condition. Even assuming so, AMCO has not met its summary judgment burden to prove by undisputed facts that the condition is *not* met. AMCO makes no argument, much less provides undisputed material facts proving, that "competent evidence" as required by the policy language requires evidence other than evidence from the Highway Patrol investigation and recorded results and conclusions from AMCO's own investigation. Furthermore, *all* evidence is evidence

[24] See, e.g., Appellee's Brief, pages 5-6, 14-15.
[25] Appellee's Brief, p. 15.

"other than the testimony of Mrs. Zerfas." Mrs. Zerfas has never testified; *no* information comes from her.

Neither the policy nor Appellee's Brief defines what is meant by proving "facts of the accident."[26] Rather, AMCO simply repeats over and over its disingenuous claim that there is "no evidence" about what happened the morning Mr. Zerfas died. Undisputedly, there was a dead deer lying in the middle of Interstate 29, with no reason to suspect it was dropped there by some airborne carrier and little reason to suspect it fell over of a heart attack. The Highway Patrol concluded the deer carcass had been lying in the highway and Mr. Zerfas lost control of his vehicle when he struck it or swerved to miss it, and AMCO's claim manager concluded Mr. Zerfas died after swerving to miss the carcass of a deer that AMCO concluded had been killed by an unidentified motorist.

In virtually every instance involving an unidentified hit-and-run driver, there may be more questions than answers about who the unidentified driver was, exactly what he was doing, and why. But if UM claimants were required to provide such details, UM claims arising from hit-and-run drivers would, as a practical matter, be impossible. That may be attractive to insurers, but clearly is not the intent of South Dakota law. SDCL §58-11-9.

CONCLUSION

When the facts are viewed most favorably to Mrs. Zerfas and all reasonable doubts are resolved in her favor, it is clear jurors reasonably could find that the deer carcass her husband encountered on the morning of his death had been left there by a

[26] Of course, ambiguity about what that means must be interpreted in favor of coverage.

phantom driver who struck the deer and drove off, *and* that the phantom driver breached his legal duty to others by leaving the carcass in the highway without doing anything to avoid the danger to others. If that driver had been identified, it is hard to imagine him not being required to answer for his conduct before a jury. Mrs. Zerfas deserves no less because the defendant happens to be her UM carrier, instead of the unidentified driver himself.

Mrs. Zerfas is entitled to have a jury consider her claim without first having to prove with certainty that a jury necessarily will find her entitled to recover damages. The trial court's decision to grant summary judgment was wrong and should be reversed. There are major issues of disputed material facts, and jurors should decide those issues. A jury may not agree that a hit-and-run driver who kills a deer on Interstate 29 breaches one or more legal duties if he drives off under the circumstances here without doing anything to address the resulting danger to others on the highway; jurors might even conclude that, despite the physical evidence and the conclusions AMCO made following its investigation, it was not an unidentified driver who caused the deer carcass to be in the roadway. But those possibilities do not entitle AMCO to summary judgment. The case should be remanded for trial.

Dated June 16, 2015.

TURBAK LAW OFFICE, P.C.

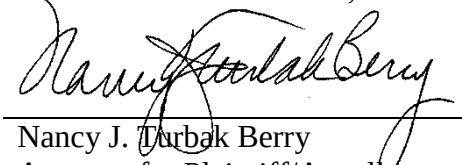
Nancy J. Turbak Berry
Seamus W. Culhane
Attorneys for Plaintiff/Appellant
26 South Broadway, Suite 100
Watertown, SD 57201

CERTIFICATE OF COMPLIANCE

I hereby certify that the above reply Brief of Appellant Stacey Zerfas has been produced in Microsoft Word using a 12.5 point proportionally spaced typeface for the text of the Brief and a 12 point proportionally spaced typeface for footnotes; that the Brief contains 4,989 words, and that this complies with the Court's type volume limitation under SDCL 15-26A-66(b)(2).

Dated June 16, 2015.

TURBAK LAW OFFICE, P.C.



Nancy J. Turbak Berry
Attorney for Plaintiff/Appellant
26 South Broadway, Suite 100
Watertown, SD 57201
605-886-8361
nancy@turbaklaw.com

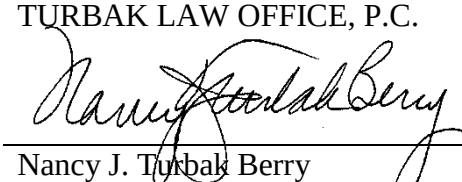
CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of June, 2015, pursuant to SDCL §15-26C-4, I electronically served Kent R. Cutler and Kimberly R. Wassink the above Brief by transmitting electronic copies to them at the following addresses:

kentc@cutlerlawfirm.com
kimw@cutlerlawfirm.com

Dated June 16, 2015.

TURBAK LAW OFFICE, P.C.



Nancy J. Turbak Berry
Attorney for Plaintiff/Appellant
26 South Broadway, Suite 100
Watertown, SD 57201
605-886-8361
nancy@turbaklaw.com