IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 27288

RYAN STENSLAND,

Plaintiff and Appellant,

vs.

HARDING COUNTY,
a governmental subdivision
of the State of South Dakota,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
HARDING COUNTY, SOUTH DAKOTA

THE HONORABLE JEROME A. ECKRICH

APPELLANT'S BRIEF

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Jurisdictional Statement

A jury trial was held on September 10 and 11, 2014 in this matter, and a verdict in favor of Harding County was returned on September 11, 2014. The Honorable Jerome Eckrich signed the Judgment on September 26, 2014, and the Judgment was filed on September 29, 2014. Notice of Entry of Judgment was served on September 29, 2014.

Ryan Stensland's Renewed Motion for Judgment as a Matter of Law, or in the alternative, Motion for New Trial was served on October 7, 2014. An Order pursuant to SDCL 15-6-50(b) and 15-6-59(b) was signed on October 20, 2014 and filed on October 22, 2014 extending the time for entering an order on Stensland's motions until such time as the Trial Court entered an order granting or denying the pending motions.

A hearing was held on October 30, 2014, at which time the Trial Court orally denied Stensland's motions. An Order denying Stensland's motions was signed on November 7, 2014. Notice of Entry of Order and Judgment was served on counsel for Stensland on November 20, 2014.

Notice of Appeal was filed by Stensland on December 12, 2014.

Statement of Legal Issues

1. Whether Ryan Stensland was Entitled to Judgment as a Matter of Law on Harding County's Liability to Him and the County's Affirmative Defenses of Contributory Negligence and Assumption of the Risk.

The Trial Court denied Plaintiff's Motion for Judgment as a Matter of Law at the close of evidence and denied the Plaintiff's Renewed Motion for Judgment as a Matter of Law filed subsequent to entry of the verdict.

Fritz v. Howard Township, 1997 SD 122, 570 N.W.2d 240

Nugent v. Quam, 82 S.D 583, 152 N.W.2d 371 (1967)

Duda v. Phatty McGees, Inc., 2008 SD 115, 758 N.W.2d 754

Cooper v. Rang, 2011 S.D. 6, 794 N.W.2d 757.

SDCL 31-32-10

SDCL 31-28-6

2. Whether Certain Jury Instructions Given by the Trial Court Were Given in Error and/or Mislead, Were Conflicting, or Confused the Jury, Which Prejudiced Ryan Stensland.

The Trial Court overruled all of Plaintiff's objections at trial regarding the jury instruction submitted to the jury.

Tovsland v. Reub, 2004 S.D. 9, 686 N.W.2d 392

Bertelson v. Allstate Insurance Co. (Bertelson II), 2011 S.D. 13, 796 N.W.2d 685

Wallahan v. Black Hills Elec. Co-op., Inc., 523 N.W.2d 417 (S.D. 1994)

Summary of the Case

On a dark night on May 16, 2009, a washout that had existed for more than 30 days on Harding County Road 734 and that was admittedly a danger to the traveling public and not properly guarded or signed by Harding County, was encountered by Ryan Stensland.

In spite of the overwhelming evidence that the County was negligent for failing to properly follow the law and despite any evidence of improper speed or other wrongful conduct on Ryan's part, the jury was allowed to consider whether Ryan was contributorily negligent and assumed the risk of encountering the dangerous washout, which had existed for more than 30 days. Not surprisingly, the Harding County jury found for Harding County.

Ryan Stensland respectfully requests the Supreme Court reverse and remand to the Circuit Court for a trial on damages only.

Introduction

In this appeal, the Appellant, Ryan Stensland, will be referred to by his first name, "Ryan." The Appellee, Harding County, will be the referred to as "Harding County" or "County," as may be appropriate.

The trial transcript consists of two portions. The trial transcript for September 10, 2014, will be referred to as "TT1" followed by the page number, i.e. "TT1 pg. 5." The trial transcript for September 11, 2014 will be referred to as "TT2" followed by the page number, i.e. "TT2 pg. 5." The Appellant's Appendix will be referred to as "Appx." followed by the page number, i.e. "Appx. pg. 5."

The Facts of the Case

A. The Dangerous Washout[1]

Kevin Robinson [Robinson] lives in Ralph, South Dakota on County Road 734 [CR 734]. TT1 pg. 28. Prior to Easter Sunday 2009 [April 12, 2009] there had been snow and rain in the Ralph, South Dakota area. East of the Robinson place is Little Joe Creek.

On Easter Sunday 2009, the Robinson family was on their way to Prairie City to see family. While traveling east down CR 734, Robinson saw that water had run over the road in various places prior to a culvert in the road. He drove across the culvert and saw a little hole in the road. Curious, he stopped and investigated the hole. He stomped on the ground and about one-half the road fell in. Robinson realized he and his family were fortunate, as there was only about 12 – 18 inches of gravel bridging the road above the

[1] To assist the Court for geographical reference, Trial Exhibit 11 has been annotated by Ryan's counsel. Appx. Pg. 001.

culvert. After he stomped on the road, he could see the culvert completely exposed. As a result, Robinson instructed his wife to call Brad Bowers [Harding County Highway Superintendent] to advise him there was a problem in the area. TT1 pgs. 30-31.

Naturally, Robinson took a different route home on Easter Sunday. When he returned home, he saw no road signs on the road or anywhere else. TT1 pg. 33. Subsequently, he did see a "saw horse" looking thing with a Road Closed sign on it, near his driveway. TT1 pg. 33.

The "saw horse" had a sandbag on it. Its legs were twisted and it would spin and tip over when the wind caught it. He believes that is why there was a sandbag placed on it. TT1 pg. 35. The "saw horse" Robinson saw was as depicted in Exhibits 13 and Exhibit 16, page 7. TT1 pgs. 36-37; Appx. pgs. 015, 022.

Inquiring regarding any attempts to repair, Robinson was asked if he had seen any heavy equipment, dump trucks, or anything that would indicate preparation for repair to the washout between April 12, 2009 and May 16, 2009. Robinson responded that he did not see any. TT1 pg. 38.

B. The County's Failure to Follow the Law

a. Rocky Sarsland – County Highway Worker

Rocky Sarsland [Sarsland] has been employed with the Harding County Highway Department since 2007. TT1 pg. 75. Sarsland was trained to follow the Manual on Uniform Traffic Control Devices [MUTCD] when the County is faced with a dangerous condition in a county roadway. TT1 pg. 76-77. Sarsland became knowledgeable about the CR 734 washout from Brad Bowers. Bowers told Sarsland to put up road closed signs and barricades. TT1 pg. 79.

Harding CR 734 was washed out. It was dangerous. It was dangerous to the traveling public. It was dangerous to anyone who would possibly travel on CR 734. TT1 pg. 79.

When Sarsland was trying to put the signs together for the CR 734 washout, he did not go to the MUTCD to determine what signs were required by law. TT1 pg. 80. He does agree that the MUTCD requires if there is a dangerous condition on the county road, that a sign be put up in a conspicuous place that says "Road Closed Ahead." Exhibit 10; Appx. pg. 003. Then, there should be another sign between that sign and the danger that says "Road Closed." *Id*. These signs should be in the area to give notice to the traveling public that – the road is closed; there is a danger ahead; don't go down this road. TT1 pg. 80. Sarsland did put a sign east of the washout for travelers [heading to the west from the east] coming off of Highway 79. TT1 pg. 80; Exhibit 16, page 8; Appx. pg. 023. The sign was not compliant with the MUTCD. TT1 pg. 81.

For the traveling public on CR 734 traveling from the west to the east, there should have been a Type 3 barricade[2] with reflective yellow and white tape as required by the MUTCD on a stand weighted down by sandbags with a "Road Closed" sign on it. TT1 pg. 82. There was no such thing. There also was no "Road Closed Ahead" sign. There was no signage as required by law to warn the traveling public that there was a dangerous condition ahead on CR 734. TT1 pg. 83.

[2] A Type 3 Barricade is depicted in Exhibit 10; Appx. pg. 009. A "Road Closed" sign is depicted in Exhibit 10; Appx. pg. 003 and Exhibit 10A; Appx. 013. The "Road Closed" sign is to be installed at or near the center of the roadway on or above a Type 3 Barricade. Exhibit 10; Appx. 004.

Instead of proper Type 3 barricades required by the MUTCD near the washout, Sarsland put "saw horse" Type 1 barricades[3] and cones near the washout. But they did not have yellow or white reflective tape. TT1 pg.84.

The sign put up by Sarsland for east bound traffic on CR 734, with a "Road Closed" sign on it, was a Type 1 barricade and not a Type 3 barricade. TT1 pgs. 85-86; Exhibit 13; Appx. 015 and Exhibit 19; Appx. 030. One sand bag was placed on the saw horse to anchor it. TT1 pg. 89.

A Type 3 barricade is not a solid four foot by five foot type barricade. It has slats, with spacing between slats. TT1 pg. 89. Sand bags are placed on Type 3 barricades so they do not blow over. TT1 pg. 90. Sarsland agreed that because of his training and because the MUTCD manual addresses proper signage for a dangerous road condition, if a Type 3 barricade would have been place and properly weighted down with sandbags, there would not have been an issue with it blowing over. TT1 pg. 93.

It is windy in Harding County country. With that knowledge, Sarsland agreed that the County needs to take all precaution with signage in order to protect the traveling public from a dangerous situation. TT1 pg. 93.

b. Brad Bowers – County Highway Superintendent

Brad Bowers [Bowers] has worked for Harding County since 1997 and has been the County Highway Superintendent since 2004. TT1 pg. 95. As Highway Superintendent, it is his responsibility to ensure that Harding County complies with laws pertaining to conditions of roads and signage, if signage needs to be put up. TT1 pgs. 95-96. Also, in such capacity, if he learns that a highway or culvert is damaged by flood

[3] A Type 1 Barricade is depicted in Exhibit 10; Appx. pg. 009.

or otherwise to the extent it endangers the public, he on behalf of the County must take action. TT1 pg. 96. The County's action must be proper signage and repair within a reasonable amount of time. TT1 pg. 96.

Bowers agrees that for purposes of proper signage, Harding County relies on the MUTCD in order to comply with the law. TT1 pg. 96. The MUTCD requires proper signage and proper undertaking to warn the traveling public of a danger ahead. TT1 pg. 96. The County must also, within a reasonable time, take such action to repair the danger to minimize the danger to the traveling public. TT1 pg. 96-97.

The washout on CR 734 was a dangerous situation, as admitted by Bowers. TT1 pg. 97. The signage put out by the County did not comply with law, which requires following the MUTCD. TT1 pg. 97.

The saw horse type barricade with a Road Closed sign on it, found on the road, is depicted in Exhibit 13. Appx. 015. TT1 pg. 98. Bowers has no evidence that the sign was up from 9 a.m. to 9 p.m. Saturday. TT1 pg. 99. The purpose of signage is to communicate road conditions. TT1 pg. 99. If signs are not up, the conditions of the road cannot be communicated. TT1 pg. 99.

In the April 12, 2009 time frame, there were five road washouts in Harding County. TT1 pg. 100. The CR 734 washed out from road edge to road edge. About ten feet was washed out east to west and it was about five to six feet deep. TT1 pg. 100. The CR 734 washout was in the top two of the most dangerous and second most dangerous one in the County in April 2009. TT1 pg. 101. The County made a choice not to repair the CR 734 washout and instead put signage out. The signage did not comply with the law. TT1 pg. 103.

C. The County's Failure to Protect the Traveling Public Causes an Accident

Ryan Stensland [Ryan] was born February 14, 1969. TT2 pg. 16. He is a rancher and farmer. TT2 pg. 17. His family ranch is 33 miles northeast of Buffalo, South Dakota. TT2 pg. 17. The ranch is 12 miles straight west of Ralph, South Dakota. TT2 pg. 22.

On the date of the accident, Ryan was going to take his step daughter, Viktoria Marquardt, to meet his sister, Leslie, so Viktoria could go to a branding. TT2 pgs. 21-22. Ryan's sister lives near Bison, South Dakota, and the plan was for he and Leslie to meet about halfway between the ranch and Bison, South Dakota, perhaps near Prairie City, SD. TT2 pg. 22. Ryan's intended route to meet Leslie would be for him to head east on CR 734 to Highway 79, then take Highway 79 south to Highway 20, and then to Prairie City. TT2 pg. 23.

Prior to leaving, Ryan's father mentioned that there would possibly be some signs for a detour. TT2 pg. 23. If faced with detour signs, Ryan would have then turned right at Ralph and headed south, then head back east to meet up with his sister. TT2 pg. 23.

Ryan and Viktoria leave the ranch about 8:00 – 8:30 p.m. It is dark and Ryan had his headlights on. TT2 pg. 23. Traveling at a speed of 45 mph or less, Ryan is on CR 734 heading east. When he gets to Ralph, South Dakota, he slows down to look for detour signs. If he sees a detour sign, he intends to turn south at Ralph, South Dakota. TT2 pg. 23. Seeing no detour signs, Ryan continues east on CR 734. His high beam headlights are on. TT2 pg. 24.

As Ryan approaches Carlson Road, he sees no detour sign. He does not see a sign that says "Road Closed Ahead." He sees nothing. He sees nothing that would indicate there is danger ahead of him. TT2 pg. 25.

As Ryan approaches Kevin Robinson's driveway, there is nothing that he sees that indicates there may be a problem ahead of him. TT2 pg. 25. If there is a warning or a sign that would have communicated a detour or road closed, Ryan would not have continued driving down CR 734. TT2 pg. 28. Ryan would never have traveled down a road with a washout with his 15 year stepdaughter, or by himself, if he had known a washout existed ahead of him. TT2 pg. 69.

As Ryan is driving, the condition of the road is good in the high elevation area of CR 734. As he begins to get lower on the road, in elevation, the condition of the road abruptly changes. TT2 pg. 25. Ryan slows down. TT2 pg. 25-26. All of a sudden the road is wash board like. He drives his car to the left side of the road -- but the wash board condition of the road continues. There is no indication to Ryan that danger lurks ahead of him. TT2 pg. 26.

Ryan continues driving and then all of a sudden - there was a ditch in front of him [the washout in the road] and there was impact. TT2 pg. 27. The airbags in the car go off. Ryan is in shock. Viktoria is scared and talking about a fire. TT2 pg. 28.

D. County's Attempt to Prove Contributory Negligence and/or Assumption of the Risk.

a. Speed and Wash Board Road

The morning after Ryan's accident, Harding County Deputy Sheriff Wyatt Sabo [Deputy Sabo] investigated Ryan's accident. TT1 pg. 59. Deputy Sabo initially approached the accident scene on CR 734 from the east – off Hwy. 79. TT1 pg. 60.

Later on, Deputy Sabo took a route that placed him on the west side of the accident scene. TT1 pg. 62. When Deputy Sabo approached the accident scene from the west, heading in an easterly direction on CR 734, he saw a sign that was down[4] on the road. TT1 pg. 63.

In performing his investigation, Deputy Sabo determined that the condition of CR 734 was wash board like and no water was running over the road. TT1 pg. 63. The speed limit on CR 734 is 45 mph. Deputy Sabo determined that Ryan could not have been going very fast due to the wash board condition of the road. TT1 pg. 63-64. The condition of the road was such that it would have prevented someone from going over 45 mph. TT 1 pg. 64. Since the County was involved, Deputy Sabo also had South Dakota Highway Patrol Trooper Fox [Trooper Fox] assist with the speed issue. Deputy Sabo was provided no information that Trooper Fox had concluded anything different than Deputy Sabo had concerning Ryan's speed. TT1 pg. 64.

Faced with the County Deputy Sheriff's finding that Ryan was not speeding, the County called Viktoria Marquardt to testify. TT2 pg. 93. Viktoria did not remember the night of the accident very well. She vaguely remembers the accident itself. TT2 pg. 94. She really did not remember anything about the road conditions leading up to the accident. TT2 pg. 95.

Counsel for the County then began to illicit conclusions from Viktoria about the speed of Ryan's vehicle and about how Ryan was driving. TT2 pg. 95-96. Upon cross examination, we learn that Viktoria understood the speed limit to be 35 miles per hour and that she thought Ryan was going 45 miles per hour, and that is why she felt he was

[4] This sign is depicted in Exhibit 13; Appx. 015.

speeding. TT2 pg. 96. On further cross examination, Viktoria admitted that although the road was bumpy, Ryan had control of his car. TT2 pg. 97. Ryan was not weaving all over the place or anything like that. TT2 pg. 97. The road was washboardy, and being 15 years old, she was a little scared because she had not been on a washboardy road before. TT2 pg. 97.

The County's own Highway Superintendent contradicted the County's theory that Ryan was speeding. The following took place on cross examination by Ryan's counsel:

> ***Counsel for Ryan:*** Now, through the questioning it sounds like Ryan is being blamed for this accident, driving on a washboardy road and should have thought this in his head, "Hallelujah, there's a washout, I better stop." Is that what you're thinking?
>
> ***Mr. Bowers:*** I think he had an indication that there would still be a washout.
>
> ***Counsel for Ryan:*** Okay. So if you're driving down the road and you're not someone who's a highway individual and its washboardy, he's supposed to know there's a washout?
>
> ***Mr. Bowers:*** He might not know there's a washout, but the road is rough enough to – I mean, ***he had to be going really slow.*** [Emphasis supplied].

TT2 pg. 89.

b. The Delineator Post

Stuck in the middle of the washout apparently was a delineator post.

Deputy Sabo testified that one normally sees a delineator post in the ditch along the end of culverts or a cattle gate in Harding County. TT1 pg. 73. When a light shines on a delineator post, that normally tells one where the end of the culvert is. TT1 pg. 73. Deputy Sabo has never seen a delineator post in the middle of the road before this incident. TT1 pg. 73-74. There is nothing on the delineator post that warns of a 20 to 30 foot wide washout, 8 to 10 foot deep, five to six feet deep in to the bottom of the washout. TT1 pg. 74.

As Ryan was traveling down CR 734, his headlights shined on the delineator post. Ryan is familiar with delineator posts being on auto gates and on culverts. TT2 pg. 26. Ryan has never seen a delineator post in the middle of a road. TT2 pg. 27. When Ryan saw the delineator post, he never gave it a thought because the road would be on the side of it and he was concerned about the washboard. TT2 pg. 27

E. The County's Opening and Closing – It's Ryan's Fault

Counsel for the County in opening statement explained to the jury:

* * * *

> I want to start by saying it's not about the signs. It's not about the signs. ***The County has an obligation under the Manual on Uniform Traffic Control Devices [MUTCD] to put up signs that are specific***. I mean it tells you exactly what they are supposed to look like, how high they are, which way the little stripes have to point. It's that specific. And the signs that were put out there were not like that. Okay. ***So the County isn't trying to explain to you that these signs complied with MUTCD, they didn't. That's a given.*** [Emphasis supplied].
>
> ***What this case is about is whether Mr. Stensland, himself caused this accident.*** If he had fair warning that that washout was there regardless of the signs and he, nevertheless, took the risk and drove his car into the washout. [Emphasis supplied].

TT1 pgs. 16-17.

The County's theme of the accident being Ryan's fault, continued in the County's closing argument:

> * * * *
>
> In my opening statement, if you recall, . . ., I started by saying this isn't about the signs. This isn't about the signs. The Judge's rule [sic] decides the signs didn't comply with the law. We aren't pretending that they did. . . .
>
> ***What we didn't hear Mr. Morris talk about is what the instructions are calling contributory negligence or assumption of the risk . . . .*** [Emphasis supplied].

TT2 pg. 123.

> * * * *
>
> ***The County's defense in this case is that Mr. Stensland didn't act reasonably to protect himself. Let me repeat that. The County's defense is that Mr. Stensland didn't take steps to protect himself.*** [Emphasis supplied].
>
> * * * *

TT2 pg. 124.

Argument

A. Ryan Was Entitled to Judgment as a Matter of Law at the Close of the Case.

a. Standard of Review

This Court reviews a trial court's consideration of a motion for judgment as a matter of law and renewed motion for judgment as a matter of law under the following standard:

> A motion for [judgment as a matter of law] under SDCL 15-6-50(a) questions the legal sufficiency of the evidence to sustain a verdict against the moving party. Upon such a motion, the trial court must determine whether there is any substantial evidence to sustain the action. The evidence must be accepted which is most favorable to the nonmoving party and the trial court must indulge all legitimate inferences therefrom in his favor. If sufficient evidence exists so that reasonable minds could differ, a [judgment as a matter of law] is not appropriate. The trial court's decisions and rulings on such motions are presumed correct and this Court will not seek reasons to reverse.

Martinmaas v. Engelmann, 2000 S.D. 85, ¶20, 612 N.W.2d 600, 606.

Further, the Court applies the abuse of discretion standard when reviewing the trial court's ruling." *Martinmaas* at ¶20.

b. The Motions

At the close of the case, counsel for Ryan moved for judgment as a matter of law on the County's liability. Counsel also moved for judgment as a matter of law on the affirmative defenses asserted by the County – contributory negligence and assumption of the risk. TT2 pg. 99-101.

The Trial Court ruled that that the County was negligent per se and such establishes negligence – but doesn't establish causation. The Trial Court stated, ". . . . And that's a jury question, that remains to be decided, whether or not the County's negligence and failure to comply with the MUTCD was the cause of the accident. So that's a jury question that remains." TT2 pg. 104-105. With respect to the affirmative defenses, the motions were denied. TT2 pgs. 105-107.

Subsequently, Ryan's counsel filed a Renewed Motion for Judgment as a Matter of Law or New Trial. The motion has heard by the Trial Court on October 30, 2014. At

that hearing, the Trial Court denied the motion and subsequently entered an Order on November 7, 2014. Appx. 039-040.

c. The Trial Court Abused its Discretion in Denying the Judgment as a Matter of Law.

i. The Trial Court Should Have Ruled the County was Negligent as a Matter of Law.

A judgment as a matter of law is appropriate when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue[.]" SDCL 15-6-50(a). Although questions of negligence, contributory negligence and assumption of the risk are for the jury so long as there is evidence to support the issues, when reasonable men can draw but one conclusion from facts and inferences, they become a matter of law. *Stone v. Von Eye Farms*, 2007 SD 115, ¶ 6, 741 N.W.2d 767, 770.

A cause of action for negligence requires four elements: 1) a duty; 2) a breach of that duty; 3) [legal] cause; and 4) damages. *Leslie v. City of Bonesteel*, 303 N.W.2d 117, 119 (SD 1981); *Johnson v. Jongeling*, 328 N.W.2d 275 (SD 1983). Judgment as a matter of law is appropriate where the evidence is so clearly one-sided that reasonable minds could reach no other conclusion other than that the negligence of the defendant was the proximate cause of the accident. *Klarenbeek v. Campbell*, 299 N.W.2d 580, 581 (SD 1980). "For [legal] cause to exist, 'the harm suffered must be found to be a foreseeable consequence of the act complained of …. The negligent act must be a substantial factor in bringing about the harm.' " *Thompson v. Summers*, 1997 SD 103, ¶18, 567 N.W.2d 387, 394 (citation and quotation omitted).

Harding County is expressly required to maintain county roads pursuant to 31-12-26, which states:

> Each board of county commissioners and county superintendent of highways in organized counties, shall construct, repair, and maintain all secondary roads within the counties not included in any municipality, or organized civil township, or county road district organized pursuant to chapter 31-12A.

SDCL 31-32-10 imposes a statutory duty upon the County to act promptly to prevent accidents and injuries by erecting a guard either over a defect or across the road as follows:

> ***If any highway, culvert***, or bridge ***is damaged by flood,*** fire ***or other cause, to the extent that it endangers the safety of public travel, the governing body responsible for the maintenance of such highway, culvert, or bridge, shall*** within forty-eight hours of receiving notice of such danger, ***erect guards over such defect or across such highway of sufficient height, width, and strength to guard the public from accident or injury and shall repair the damage or provide an alternative means of crossing within a reasonable time after receiving notice of the danger.*** The governing body shall erect a similar guard across any abandoned public highway, culvert, or bridge. Any officer who violates any of the provisions of this section commits a petty offense. [Emphasis supplied]

SDCL 31-32-10. *See also, Kiel v. DeSmet Township*, 90 S.D. 492, 242 N.W.2d 153, 155 (1976):

> Obviously, the main obligation of a county under this statute [SDCL 31-32-10] is to repair all defects in a county highway which endanger the safety of public travel. Incidentally, the statute also imposes a secondary duty upon the county to erect temporary guards over defects, where needed, until repairs are made.

SDCL 31-28-6 requires the placement of a warning sign for the benefit of approaching traffic:

> The public board or officer whose duty it is to repair or maintain any public highway shall erect and maintain at points in conformity with standard uniform traffic control practices on each side of any sharp turn, blind crossing, or other point of danger on such highway, except railway crossings marked as required in § 31-28-7, a substantial and conspicuous warning sign. The sign shall be on the right-hand side of the highway approaching such point of danger. Failure to comply with the provisions of this section is a Class 1 misdemeanor.

South Dakota has adopted the Manual on Uniform Traffic Control Devices[5] (MUTCD). The MUTCD is a national publication promulgated by the Federal Highway Administration and is the national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel. *Fritz v. Howard Township*, 1997 SD 122, ¶ 16, 570 N.W.2d 240, 243. The MUTCD provisions are applicable to Harding County's statutory duty pursuant to SDCL 31-28-6 with respect to "uniform traffic control practices."

This Court held that compliance with the MUTCD was required under facts almost identical to those in the instant case in *Fritz v. Howard Township*, 1997 SD 122, 570 N.W.2d 240. In *Fritz*, a motorist sustained injuries after driving into an unmarked, unguarded and washed-out township road. The Township had placed homemade "Road Closed" signs in the middle of the road at both ends of the road, but the sign on one end was knocked down.

The Court noted that the Township had a duty under 31-28-6 to provide a warning sign for the benefit of approaching traffic, and stated specifically that "the reference in SDCL 31-28-6 to 'uniform traffic control practices' dictates that the sign conform to the

[5] Prior to Trial, the Trial Court issued a Memorandum Decision and Order on the applicability of the MUTCD. Appx. 033-038 and 031-032.

Manual on Uniform Traffic Control Devices (MUTCD)." *Fritz*, 1997 SD 122 at ¶ 16, 570 N.W.2d at 243.

Harding County's Highway Superintendent, Brad Bowers, admitted the washout happened on April 12, 2009 and Ryan's accident happened about 35 days later. He also admitted that the CR 734 washout was the second worst washout in the County. TT2 pg. 87. Bowers admitted the County should have signed the washout to protect the traveling public and do everything in his power so no one gets injured or hurt, and admitted that he did not do that. TT2 pg. 87. He admitted that because he works for the County, that means the County did not do it. TT2 pg. 88.

Bowers admitted that he knew as Highway Superintendent, the obligation is to erect guards over defects and across highways of sufficient height, width, and strength to guard the public from injury. TT2 pg. 88. He admitted that "saw horse" type barricade was placed on each side of the washout. And he admitted he put up no Type 3 barricades to give notice and to communicate to the public that there was a road closed. TT2 pg. 88.

An unexcused violation of a statute enacted to promote safety constitutes negligence per se. *Thompson v. Summers*, 1997 SD 103, ¶ 16, 567 N.W.2d 387, 393 (citations omitted). To determine whether there is negligence per se, a jury can consider whether the statute was violated, and if so, whether there is a legal excuse for the violation. *Albers v. Ottenbacher*, 79 S.D. 637, 116 N.W.2d 529, 531. In this case, it was undisputed that the statutes were violated. There was no evidence of legal excuse offered. Therefore, causation was not an issue.

In *Harmon v. Washburn*, 2008 SD 42, 751 N.W.2d 297, this Court addressed granting a motion for judgment as a matter of law where it was undisputed that the defendant violated a statute and was negligent per se. In *Harmon*, the plaintiff, Harmon, was legally passing the defendant, Washburn, who turned directly into Harmon's path with little or no warning. Washburn, by her own admission, violated the statutory safety mandate, which constituted negligence per se. The Court reversed the jury's verdict for entry of judgment in favor of Harmon. The Court held that it was error for the trial court not to grant a judgment as a matter of law on the issue of the defendant's negligence. *Id.* at ¶ 14.

Discussing the *Harmon* decision in *Baddou v. Hall,* 2008 SD 90, 756 N.W.2d 554, the Court noted that "[o]nly in exceptional cases may the verdict be directed in favor of the party having the burden of proof" but that "[a]dmissions of statutory violations meeting the 'exceptional' standard justify taking such cases from the jury." *Baddou*, 2008 SD 90 at ¶ 25, 756 N.W.2d at 561. "Where the defendant admits a violation of a safety statute, negligence per se is established and the issue of liability should not be submitted to the jury." *Id.* at ¶ 27.

Mr. Bowers admitted that all of the applicable statutory requirements were violated by the County. The County had no excuse. The County failed miserably in protecting the traveling public from a dangerous condition on CR 734. The issue of causation should not have been submitted to the jury.

d. The Trial Court Should Have Granted Judgment as a Matter of Law on the County's Affirmative Defenses of Contributory Negligence and Assumption of the Risk.

i. Contributory Negligence

The issue of contributory negligence should not have been submitted to the jury. Under South Dakota law, a plaintiff may not recover if his negligence is more than slight in comparison with the negligence of the defendant. SDCL 20-9-2. The question of contributory negligence is a two-part inquiry. *Nugent v. Quam*, 82 S.D. 583, 152 N.W.2d 371 (1967).

The first step of the *Nugent* analysis is a determination of whether the plaintiff and the defendant were negligent. If both parties are found negligent, the second step of the process requires that the negligence of the plaintiff be compared to the negligence of the defendant. If it is determined that a plaintiff has committed negligence more than slight, the plaintiff cannot recover. In making such a determination, there is a direct comparison between the conduct of the plaintiff and the defendant rather than the reasonable person standard used to determine whether both parties are negligent. *Treib v. Kern*, 513 N.W.2d 908, 911-912 (SD 1994).

In this case, it is undisputed that the County was negligent and liable to Ryan. So, we first need to look at Ryan's conduct that the County alleges constitutes negligence:

- Ryan Stensland continued to drive on the road despite its washboard condition.
- Ryan Stensland's father indicated to Ryan that it may be necessary for him to take a detour and look for detour signs, yet Ryan chose to travel on CR 734.
- Ryan Stensland was speeding or overdriving the road conditions.

- Ryan Stensland failed to realize that a delineator post in the road indicated a washout.

Negligence requires four elements: 1) a duty; 2) a breach of that duty; 3) [legal] cause; and 4) damages. *Leslie v. City of Bonesteel*, 303 N.W.2d 117, 119 (SD 1981). The County cannot point to a duty of Ryan, a breach of that duty, and proximate or legal cause. The undisputed evidence at trial was that there were no standing signs to warn Ryan that a portion of CR 734 was closed on May 16, 2009. The fact that Ryan continued to drive on the road, despite its washboard condition, does not constitute negligence. The County faults Ryan for driving on the road, even though the very reason he continued to drive on the road is because of the County's failure to provide the statutorily required signage to communicate that the road was closed. It defies logic to argue that because of the washboard conditions, Ryan should have known that there was a washout ahead and that the road was actually closed. Driving on a road with washboard conditions does not constitute negligence on Ryan's part.

Ryan testified that his father had indicated it may be necessary for him to take a detour because of the condition of the road and to look for detour signs. As such, Ryan kept a lookout for any signs indicating that he should detour. Seeing no such signs, Ryan continued to travel on CR 734. Again, Ryan cannot be negligent for failure to see a "Road Closed" sign that wasn't standing. Nor can he be negligent for Harding County's failure to have proper barriers at or near the washout. As Mr. Bower's agreed, "saw horse" type barriers, not statutorily required Type 3 barricades, were placed at or near the washout.

The undisputed testimony by Deputy Sabo was that speed was not a factor in causing this accident. In addition, the County attempted to elicit testimony from Viktoria Marquardt that Ryan was speeding. However, on cross examination, Viktoria testified that if the speed limit was 45 miles per hour, which Deputy Sabo testified it was, Ryan was not exceeding the speed limit. Most glaringly, Mr. Bowers himself testified that Ryan could not have been going very fast.

A delineator post was placed in the washout by an unknown individual. The County argues that Ryan should have realized the delineator post indicated the road was closed due to a washout. Brad Bowers testified that a delineator post is used to mark culverts on the sides of a road. A delineator post is not placed in the middle of a road. Ryan testified that he observed the delineator post in the distance as he traveled, but did not realize until it was too late to stop that the post was actually in a washout. Again, it is incredible to think that the County should be excused for its failure to follow the law regarding signage of a dangerous condition by saying that because someone (not the County) stuck a post in the middle of the road that Ryan should have known the road was closed due to a washout.

Brad Bowers testified that the purpose of road signage is to communicate information to the traveling public. He acknowledged that a sign that is down does not communicate anything. A delineator post does not communicate that a road is closed. The law requires compliance with the MUTCD for a reason. That reason is that it has been determined and codified into law that the MUTCD standards are what is necessary to communicate information to the traveling public in order for them to respond in an appropriate manner.

In *Harmon v. Washburn*, 2008 SD 42, 751 N.W.2d 297, the plaintiff also sought a judgment as a matter of law that the plaintiff was not contributorily negligent. The plaintiff was passing a caravan of vehicles in a lawful manner, when the defendant made a left-hand turn without a proper signal. The defendant argued that the plaintiff was contributorily negligent because she did not anticipate that due to the caravan and horseback riders nearby, that the defendant would make a left hand turn without a proper signal. This Court held that the plaintiff had the right to assume the defendant would follow the rules of the road, and there was no legally sufficient evidentiary basis for a reasonable jury to find the plaintiff contributorily negligent. This Court held that the trial court erred by not granting judgment as a matter of law on this issue. *Id.*, at ¶ 21, 751 N.W.2d at 302.

Ryan Stensland had a right to assume the road was open for travel, in the absence of the required road closed signage which communicated to him that the road was closed. Ryan had the right to assume the County would have erected proper legal barriers at or near the washout. There was no legally sufficient evidentiary basis for the Court to give a contributory negligence instruction or even for a reasonable jury to find Plaintiff contributorily negligent. "This case is so clearly onesided that reasonable minds could reach no conclusion other than that" Harding County was negligent and there was no evidence of negligence on Ryan's part. *See*, *Cooper v. Rang*, 2011 S.D. 6, ¶10, 794 N.W.2d 757.

In this case, the Trial Court instructed the jury that the County breached its duties under SDCL 31-28-6 and SDCL 31-32-10, and that a breach of such duties is negligence.

However, rather than granting judgment as a matter of law as to the County's liability, the Trial Court left the issue of causation for the jury.

Under the instructions given in this case, the jury was required to determine whether there was proximate [legal] cause. This was error. It was undisputed that Ryan established the elements of duty, breach of duty, legal cause and damages. Reasonable minds cannot differ as to whether the harm suffered by Ryan, *i.e.* driving into the washout, was a foreseeable consequence of the County's failure to comply with SDCL 31-28-6 and SDCL 31-32-10. The County's failure to comply with the requirements regarding signage and proper barriers was clearly a substantial factor in bringing about the harm suffered by Ryan. Mr. Bowers testified that the County did not erect sufficient guards to protect the public from injury. Reasonable minds could reach no other conclusion, but that Ryan drove into the washout as a result of the washout not being properly guarded and signed as required by the statutes. All of the elements of the County's negligence were established, and the issue of causation should not have been submitted to the jury.

This case is similar to *Cooper v. Rang*, 2011 S.D. 6, 794 N.W.2d 757. In *Cooper*, there was no evidence that anything other than Rang caused the accident; there was no unavoidable accident instruction given; nor was the jury instructed that Rang's negligence could be excused; and Rang offered no non-negligent explanation for the accident. *Cooper*, 2011 S. D. 6, ¶10.

In this case, there was no evidence that anything other than Harding County's negligence caused the accident; there was no unavoidable accident instruction given; the

jury was not instructed that Harding County's negligence could be excused; and Harding County offered no non-negligent explanation for the accident. "This case is so clearly onesided that reasonable minds could reach no conclusion other than that" Harding County was negligent. *Cooper v. Rang*, 2011 S.D. 6, ¶10, 794 N.W.2d 757. As such, Ryan was entitled to judgment as a matter of law as to the County's liability.

e. Assumption of the Risk

Similarly, the issue of assumption of the risk should not have been submitted to the jury. A person assumes the risk of injury when the person: (1) had actual or constructive knowledge of the risk; (2) appreciated its character; and (3) voluntarily accepted the risk, with the time, knowledge, and experience to make an intelligent choice. *Duda v. Phatty McGees, Inc.*, 2008 SD 115, ¶ 13, 758 N.W.2d 754, 758. Failure to establish any one of the three elements negates the defense. *Stone v. Von Eye Farms*, 2007 SD 115, ¶ 19, 741 N.W.2d 767, 772.

A person is deemed to have appreciated the risk if it is the type of risk that no adult of average intelligence can deny. *Duda v. Phatty McGees, Inc.*, 2008 SD 115, ¶ 13, 758 N.W.2d 754, 758. "'Knowledge of the risk is the watchword of assumption of the risk.'" Id. (quoting Prosser on Torts § 68 (5thed 1984). "Indeed assumption of the risk imports a knowing and voluntary self exposure to a known danger. Plaintiffs cannot assume risks of activities or conditions of which they are ignorant." *Duda*, 2008 SD 115, ¶ 12, 758 N.W.2d at 758. "The standard to be applied is a subjective one, of what the particular plaintiff in fact sees, knows, understands and appreciates. In this it differs from the objective standard which is applied to contributory negligence." Id. (quoting Restatement (Second) of Torts § 496D, cmt c (1965)).

The only risk assumed by Ryan Stensland was the risk of driving on a gravel road with washboard conditions. He did not lose control of his car due to washboard conditions, get injured, and sue Harding County for his injuries. He was injured because the second worst washout in the County existed without proper warning signs and proper barriers erected to protect Ryan and the traveling public.

Had Ryan seen a standing "Road Closed" sign and Type 3 barriers and then proceeded to travel on CR 734, he would have assumed a known risk. However, where the evidence is undisputed that the sign was down and there were no Type 3 barriers, Ryan cannot be said to have voluntarily exposed himself to a known danger. He cannot assume the risk of a condition – the washed out road – where he was ignorant of that condition.

B. Certain Jury Instructions Were Given in Error Which Prejudiced Ryan.

a. Standard of Review

The Court's standard of review concerning jury instructions is well settled. Jury instructions are construed as a whole to learn if they provide a full and correct statement of the law. *Behrens v. Wedmore*, 2005 S.D. 79, ¶37, 698 N.W.2d 555, 570. The party alleging error on appeal must show error affirmatively by the record, and not only must the error be demonstrated, but it must also be shown to be prejudicial error. *Tovsland v. Reub*, 2004 S.D. 93, ¶15, 686 N.W.2d 392, 398. Erroneous instructions are prejudicial when in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party. *Bertelsen v. Allstate Insurance Co. (Bertelsen II)*, 2011 S.D. 13, ¶ 26, 796 N.W.2d 685, 695.

The trial court need only instruct the jury on issues supported by competent evidence in the record. *Sundt Corp. v. South Dakota Dep't of Transp.*, 1997 S.D. 91, ¶19, 566 N.W.2d 476, 480. If the instructions given "mislead, conflict, or confuse the jury, it constitutes reversible error." *Wallahan v. Black Hills Elec. Co-op., Inc.*, 523 N.W.2d 417, 422 (S.D. 1994).

Ryan's counsel and the County's counsel made their record regarding Ryan's motion for judgment as a matter of law. TT2 pgs. 98-107. Ryan's counsel objected to the Court's Instruction #18 which lists the issues for the jury to decide. Counsel asserted that the issue of "legal cause" was not an issue and objected to the issues of contributory negligence and assumption of the risk. TT2 pg. 109. Ryan's counsel also objected to the Court's Instructions 19, 20, 22, 23, 24, 25, and 26. TT2 pgs. 110-111.

b. Insufficient Evidence to Give Contributory Negligence and Assumption of the Risk Instructions

i. Contributory Negligence – Instructions #19 and #20[6]

It is axiomatic that the burden was on the County to present sufficient evidence that Ryan was contributorily negligent. The County attempted to do so by alleging Ryan was speeding; that the wash board condition of the road was such that Ryan should have been put on notice that a dangerous washout lurked ahead of him; and that the delineator post someone stuck in the washout should have given him notice that a dangerous washout lurked ahead of him.

The speed limit on CR 734 was 45 miles per hour. It was clear that Ryan's speed was not a factor in the accident. The Harding County Deputy testified so. The Harding

[6] Instructions #19 and #20 are contained in the Appendix, Appx. 047 and 048, respectively.

County Highway Superintendent testified Ryan could not be going very fast due to the condition of the road. Undaunted, the County then attempted to present evidence that Ryan was speeding by offering conclusory statements from his stepdaughter, Viktoria. Through cross examination, her conclusory statements were exposed by erroneous assumptions she made and that fact that as a young girl, she had never experienced wash board roads in the past.

The County then attempted to present evidence that the wash board condition of the road somehow gave Ryan notice that a dangerous washout lurked ahead. This was disingenuous. What notice exists factually and in the law that wash board roads means there is a dangerous washout ahead? None.

Lastly, the County continued its disingenuous position that a delineator post stuck in the middle of the washout should have communicated a danger to Ryan that a washout was ahead. To the contrary, no such communication exists. The undisputed testimony is that a delineator post is usually located at the end or a culvert or a cattle gate. The delineator post created confusion not communication of a danger. In fact, as the photo of the delineator post shows, Ryan's car is left of the delineator post, meaning he was staying to the left side of the road when confronted with confusing information.

Contributory negligence is a "breach of duty" which the law imposes upon persons to protect themselves from injury. *Starnes v. Stofferahn*, 160 N.W.2d 421, 426 (S.D. 1968). In order for the court to give the contributory negligence instruction, there had to be some evidence that Ryan breached a duty? What duty did he breach? None.

Giving an instruction on contributory negligence on the facts of this case was prejudicial to Ryan. The jury was apparently focused on contributory negligent in light of the jury's question on the issue. Appx. 055. Where the evidence supporting the verdict is so weak and the lack of evidence pointing to other causes other than the County's negligence, the error is prejudicial. See, *Stevens v. Wood Sawmill*, 426 N.W.2d 13, 17 (S.D. 1988). The instruction unduly and improperly emphasized the County's position. *Del Vecchio v. Lund*, 293 N.W.2d 474, 476 (S.D. 1980).

ii. Assumption of the Risk – Instruction #21[7]

As with contributory negligence, it is axiomatic that the County had to present sufficient evidence that Ryan assumed the risk of encountering the dangerous washout. The County attempted to do so by showing that Ryan lived in the area and that his father had advised him to look out for detour signs because of the washout on CR 734.

A person assumes the risk of injury when the person: (1) had actual or constructive knowledge of the risk; (2) appreciated its character; and (3) voluntarily accepted the risk, with the time, knowledge, and experience to make an intelligent choice. *Duda v. Phatty McGees, Inc.*, 2008 SD 115, ¶ 13, 758 N.W.2d 754, 758. Failure to establish any one of the three elements negates the defense. *Stone v. Von Eye Farms*, 2007 SD 115, ¶ 19, 741 N.W.2d 767, 772. None of the elements were established by the County.

The irony of the County's assumption of the risk defense is that there were no signs as required by law communicating to Ryan that the road was closed. There were no

[7] Instruction #21 is located in the Appendix, Appx. 049.

legally required barricades protecting Ryan from the dangers of the washout. It is undisputed that Ryan was looking for detour signs or other communication that the washout continued to exist. There were none.

Where the evidence supporting the verdict is so weak and the lack of evidence pointing to other causes other than the County's negligence, the error is prejudicial. *See*, *Stevens v. Wood Sawmill*, 426 N.W.2d 13, 17 (S.D. 1988). The instruction unduly and improperly emphasized the County's position. *Del Vecchio v. Lund*, 293 N.W.2d 474, 476 (S.D. 1980).

c. Certain of the Trial Court's Instructions Mislead, Conflict or Confuse the Jury

i. Instruction #18

In jury instruction #17[8], the Trial Court advised the jury that the County breached its duties under two statutes and that a breach of such duties is "deemed negligence." The Court then gave instructions #17A and #17B to advise the jury which statutes were breached by the County. The conflict arises in instruction #18, wherein the Court put the burden upon Ryan of proving "Whether the County's negligence was a legal cause of the accident."

A cause of action for negligence requires four elements: 1) a duty; 2) a breach of that duty; 3) [legal] cause; and 4) damages. *Leslie v. City of Bonesteel*, 303 N.W.2d 117, 119 (SD 1981). The Trial Court's ruling that the County was "negligent" meant that all of the elements had been proven by Ryan, including "legal cause." "Legal cause" should

[8] Instruction #17(Appx. 043), #17A (Appx. 044), #17B (Appx. 045), and #18(Appx. 046) are located in the Appendix. In addition, #19 through #25 (Appx. 047 – 053) are located in the Appendix.

not have been an issue for liability of the County. The Court compounded that problem by using "legal cause" in the remaining instructions objected to by Ryan's counsel.

The instructions given were misleading, conflicting, and confused the jury. A such, there exists reversible error. *Wallahan v. Black Hills Elec. Co-op., Inc.*, 523 N.W.2d 417, 422 (S.D. 1994).

Conclusion

For more than 30 days, Harding County allowed a dangerous condition to exist on CR 734, a condition all agree was dangerous to the traveling public – including Ryan Stensland. Harding County admittedly did not follow the law by repairing the dangerous condition within a reasonable time; did not follow the law by failing to erect proper barriers at or near the dangerous condition; and did not follow the law by providing proper signs to warn of the dangerous condition. Instead, Harding County blamed Ryan for the accident. A travesty results if the verdict for Harding County is upheld.

Wherefore, Ryan Stensland respectfully requests the Supreme Court reverse and remand to the Circuit Court with directions to enter judgment on liability for Ryan Stensland and conduct a new trial on the issue of damages only.

Dated this 23rd day of February, 2015.

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ORAL ARGUMENT IS RESPECTFULLY REQUESTED

Certificate of Service

I, Robert L. Morris, hereby certify that on the 23rd day of February, 2015, I caused one (1) copy of the foregoing **APPELLANT'S BRIEF** to be served upon:

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Certificate of Filing

I, Robert L. Morris, attorney for Appellant, certify that I mailed one (1) original plus two (2) copies of **APPELLANT'S BRIEF** to the Clerk of Court, South Dakota Supreme Court, 500 East Capitol, Pierre, South Dakota 57501-5070, on February 23, 2015.

I also certify that I sent one (1) copy of **APPELLANT'S BRIEF** in Word format with Appendix in PDF format to the Clerk of Court, South Dakota Supreme Court via electronic mail (e-mail) to the following e-mail address: scclerkbriefs@ujs.state.sd.us, on February 23, 2015.

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Certificate of Compliance

In compliance with SDCL 15-26A-66(4), I hereby certify that the font size used in Appellee's Brief is Times New Roman 12. The total word count for Appellant's Brief is 8,407.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27288

RYAN STENSLAND,

Plaintiff/Appellant,

vs.

HARDING COUNTY, a governmental subdivision of the State of South Dakota,

Defendant/Appellee.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
HARDING COUNTY, SOUTH DAKOTA

The Honorable Jerome A. Eckrich
Circuit Court Judge
Notice of Appeal Filed December 12, 2014

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JURISDICTIONAL STATEMENT

A. Stenland's Appeal

County incorporates by reference Stensland's jurisdictional statement found in Appellant's Brief at p. 1.

B. Notice of Review

Notice of Appeal was filed by Stensland on December 12, 2014. County filed its Notice of Review with the Supreme Court on December 17, 2014, within the time limit set by S.D.C.L. § 15-26A-22. Therefore this Court has jurisdiction to consider the Notice of Review.

LEGAL ISSUES PRESENTED FOR REVIEW

Issue One: Did the Trial Court Err When it Denied Stensland's Motion for a Judgment as a Matter of Law on the Issue of Causation?

Issue Two: Did the Trial Court Err When it Denied Stensland's Motion for a Judgment as a Matter of Law on the Issue of Contributory Negligence?

Issue Three: Did the Trial Court Err in Denying Judgment as a Matter of Law with Respect to the County's Defense of Assumption of the Risk?

Issue Four: Did the Court Properly Instruct the Jury on Issues of Causation, Contributory Negligence and Assumption of the Risk?

Issue Five: Does the Manual on Uniform Traffic Control Devices Dictate the Legal Requirements for Warning Signs on Roads that are not Built using Federal Aid?

STATEMENT OF THE CASE

Stensland sued Harding County seeking compensation for bodily injury suffered as a result of an automobile accident. His injury occurred when Stensland drove his

automobile into a washed out portion of a County road. Stensland claimed the County was negligent because it had not adequately warned motorists of the road's condition.

The trial court ruled that the County was negligent per se because the warning signs placed near the washout did not meet statutorily-mandated requirements of the Manual on Uniform Traffic Control Devices. County argued that the lack of MUTCD-compliant signs was not the legal cause of the accident, that Stensland was contributorily negligent to a degree greater than slight, and that Stensland assumed the risk of injury.

The case was tried to a jury on September 10-11, 2014 in South Dakota Circuit Court, Fourth Judicial Circuit, Buffalo, Harding County, South Dakota. The Honorable Judge Jerome Eckrich presided.

At the close of the evidence and prior to closing argument, Stensland moved for judgment as a matter of law on the issues of the County's liability, contributory negligence and assumption of the risk. The trial court granted Stensland's motion on the issue of County's ***negligence***. However, it submitted the issues of causation, damages, contributory negligence and assumption of the risk to the jury.

Following deliberations, the jury returned a ***general verdict*** in favor of Harding County. Stensland's post-verdict renewed motions for judgment as a matter of law, or in the alternative, Motion for a New Trial, were denied.

Stensland appeals from the Circuit Court's denials of his post-verdict motions.

The County filed Notice of Review asking the South Dakota Supreme Court to review the Circuit Court's pretrial ruling on the issue of whether the County was statutorily required to place warning signs near the washout that complied with the MUTCD. The County argued it was not obligated to do so because the highway where

the washout occurred was not built using federal aid. S.D.C.L. § 31-28-11. The Circuit Court ruled that, regardless of whether the highway was built using federal aid, the MUTCD applied.

STANDARD OF REVIEW

A. General Verdict Rule

The jury in this case issued a general verdict in favor of Harding County. Clerk's Index 244, Appx. 85. One cannot discern from the verdict form whether the jury found that the County's negligence was not a legal cause for the accident, whether the jury found that Stensland's contributory negligence was greater than slight, or whether the jury found Stensland assumed the risk of injury.

The General Verdict Rule states that when a jury returns a general verdict encompassing two or more issues, and the verdict is supported by at least one issue, the case will not be reversed. *Martinmaas v. Englemann*, 2000 S.D. 85, ¶ 72, 612 N.W.2d 600, 615 (Konenkamp, J., concurring in result), citing *Allen v. McLain*, 75 S.D. 520, 69 N.W.2d 390 (1955). See also *Baddou v. Hall*, 2008 S.D. 90, ¶ 36, 756 N.W.2d 544, 562; *Thomas v. Sully County*, 2001 S.D. 73, ¶¶ 8-9, 629 N.W.2d 590, 592-93; *Eberle v. Siouxland Packing Co., Inc.,* 266 N.W.2d 256, 258 (S.D. 1978).

When a jury returns a general verdict and the case could have been decided on two or more theories, one of which was proper, the court will assume the decision was based on the proper theory. *Thomas*, 2001 S.D. 73, ¶ 7. Only if there is an affirmative showing by the appealing party that the jury's verdict was based on an improper theory rather than a proper theory will that assumption be abandoned. *Id.*, quoting *Limmer v. Westergaard*, 251 N.W.2d 676, 679 (S.D. 1977).

If *any* legal theory submitted to the jury supports its general verdict, the Appellant fails to show any prejudice caused by any erroneous instruction. *Thomas*, 2001 S.D. 73, ¶ 12; see also, *Allen*, 69 N.W.2d at 395 (where there is a general verdict and the court cannot discern which of several counts the verdict was premised on, the court cannot tell whether the trial court's error was prejudicial). Without a special verdict form, the court has no way of knowing whether the jury ever reached a particular question. *Knudson v. Hess,* 1996 S.D. 137, ¶ 16, 556 N.W.2d 73, 77-78.

B. Denial of Judgment as a Matter of Law

An appeal from a trial court's denial of a motion for judgment as a matter of law is reviewed under an abuse of discretion standard. *Baddou*, 2008 S.D. 90, ¶ 11; *Christenson v. Bergeson*, 2004 S.D. 113, ¶ 10, 688 N.W.2d 421, 425.

The reviewing court must review the record and determine whether there is any substantial evidence to allow reasonable minds to differ. *Treib v. Kern*, 513 N.W.2d 908, 911 (S.D. 1994); *Westover v. East River Elec. Power Coop.*, 488 N.W.2d 892, 896 (S.D. 1992), citing *Haggar v. Olfert*, 387 N.W.2d 45 (S.D. 1986). The reviewing court examines the evidence in a light most favorable to the nonmoving party and the court gives that party the benefit of all reasonable inferences drawn from the evidence. *Baddou*, 2008 S.D. 90, ¶ 11, *Dartt* v. *Berghorst,* 484 N.W.2d 891, 895 (S.D. 1992).

If there is any substantial evidence to sustain the cause of action or defense, it must be submitted to the trier of fact. *Baddou*, 2008 S.D. 90, ¶ 11. Judgment as a matter of law may only occur when the evidence is so one-sided that reasonable minds can reach no other conclusion. *Id.* The moving party (Stensland) is entitled to evidentiary consideration ***only*** where his evidence is uncontradicted and tends to amplify, clarify, or

explain the evidence in support of the verdict of the jury for the prevailing party. *Treib*, 513 N.W.2d at 911, quoting *Westover*, 488 N.W.2d at 896.

If there is sufficient evidence to allow reasonable minds to differ, the denial of the motion for judgment as a matter of law is correct and appropriate. *Dartt,* 484 N.W.2d at 895. Only in exceptional cases may the verdict be directed in favor of the party having the burden of proof. *Baddou,* 2008 S.D. 90, ¶ 25, *Christenson*, 2004 S.D. 113, ¶ 24.

Issues of negligence, contributory negligence, and proximate cause are ordinarily questions of fact and it must be a clear case before a trial judge is justified in taking thse issues from the jury. *Baddou,* 2008 S.D. 90, ¶ 30, quoting *Steffen v. Schwan's Sales Enters.*, 2006 S.D. 41, ¶ 26, 713 N.W.2d 614, 622 (Zinter, J., concurring in part and dissenting in part).

C. Denial of Motion for New Trial

Denial of motions for a new trial are reviewed under the abuse of discretion standard. *Baddou,* 2008 S.D. 90, ¶ 12. Whether a new trial should be granted is left to the sound judicial discretion of the trial court, and the South Dakota Supreme Court will not disturb the trial court's decision absent a clear showing of an abuse of discretion. *Dartt,* 484 N.W.2d at 894.

An abuse of discretion occurs only if no judicial mind, in view of the law and circumstances of the particular case, could reasonably have reached such a conclusion. *Baddou*, 2008 S.D. 90, ¶ 12, *Dartt*, 484 N.W.2d at 894.

The party alleging error on appeal must show error affirmatively by the record. Not only must error be demonstrated, but it also must be shown to be prejudicial error. *Baddou*, 2008 S.D. 90, ¶ 12.

The reviewing court examines the evidence in the record in the light most favorably toward the verdict. *Id.* at ¶ 33. The prevailing party benefits from all reasonable inferences. *Baddou*, 2008 S.D. 90, ¶ 32. If there is competent evidence to support the verdict, it must be upheld. *Id.* at ¶ 13. See also, S.D.C.L. § 15-6-50(a).

D. Alleged Error in Jury Instructions

A trial court's decision to grant or deny a particular instruction is reviewed under the abuse of discretion standard. *Steffen*, 2006 S.D. 41, ¶ 26. The South Dakota Supreme Court reviews the jury instructions by construing them together. The instructions are not erroneous if, when so construed, they provide a full and correct statement of the law applicable to the case. *Knudson,* 1996 S.D. 137, ¶ 6.

> "In considering whether there is evidentiary support for an instruction, a reviewing court must give the evidence the most favorable construction it will reasonably bear. If there is some evidence bearing on the issue, a reviewing court will not disturb the trial court's giving of an instruction."

Treib, 513 N.W.2d at 912, quoting *Howard v. Sanborn*, 483 N.W.2d 796, 797 (S.D. 1992).

The South Dakota Supreme Court employs a two-prong analytical framework when an alleged error in jury instructions is raised on appeal. First, the court reviews the instructions to see whether they fail to provide a full and correct statement of the law. *Thomas,* 2001 S.D. 73, ¶ 4. For example, the court reviews the instructions to determine whether they conflict, mislead, or cause confusion to the jury. *Id.*

Second, the appellant has the burden to show not only that the instruction given was error, but also that such error was prejudicial. *Knudson,* 1996 S.D. 137, ¶¶ 6, 15, *Thomas,* 2001 S.D. 73, ¶ 4. An instruction is prejudicial if the jury probably would have returned a different verdict if the faulty instruction had not been given. *Thomas,* 2001 S.D. 73, ¶ 4, *Limmer,* 251 N.W.2d at 679.

Whether any one instruction is prejudicial must be determined by a consideration of all of the instructions in their entirety. *Allen,* 69 N.W.2d at 392.

As in the general verdict rule, when the court cannot discern which of several counts the verdict was premised on, it cannot tell whether the court's error in instructing the jury was prejudicial. *Allen*, 69 N.W.2d at 395.

Factors to be considered by the court in determining the likelihood that an error was probably harmless or probably prejudicial include:

1. The force of the evidence to sustain the verdict;

2. The assumption that the jury was intelligent; and

3. Where the verdict is sustainable on more than one theory, that the verdict was based on the theory unaffected by error where nothing else in the case suggests the contrary.

Allen, 69 N.W.2d at 394. See also *Baddou*, 2008 S.D. 90, ¶¶ 15, 36 (reviewing court presumes that juries understand and abide by instructions). If it cannot be fairly inferred that the jury was misled by an erroneous instruction to the prejudice of the complaining party, the error of giving the instruction is overlooked. *Allen*, 69 N.W.2d at 395.

STATEMENT OF FACTS

An extensive recitation of the facts in evidence is presented below to illustrate why it was appropriate for the trial court to submit the issues of causation, contributory negligence and assumption of the risk to the jury.

Stensland's Familiarity with the Highway

Ryan Stensland was born in 1969. He lived on a ranch in Harding County for all his life other than a couple of years he spent at college. T2 pp. 15-17.

In fact, the ranch where Ryan Stensland spent most of his life - - 38 years of his life prior to the accident - - was located just 12 miles straight west on the very same highway where the accident occurred. *Id.*at 49. For that reason, it was not surprising that Mr. Stensland admitted at trial that he was familiar with Hwy. 734 prior to the night of the accident. *Id.* at 49-50.

Spring 2009 Water Erosion of County Roads

Harding County was inundated with snow and rain in the first few months of 2009. Runoff from melting snow and a very large quantity of rainfall wreaked havoc with roads throughout the county. T1 pp. 47-48, 100-101, T2 pp. 73-74, 83-84.

Kevin Robinson is a Harding County rancher. Mr. Robinson's ranch is located on Hwy. 734 approximately two miles east of Hwy. 79. T1 pp. 28-29. See also, Appellant's Appx. 001. The driveway for Robinson's ranch is approximately 1.5 miles west of the washout where the accident occurred. T1 28-29, T2 73-74.

Washboarded Road Approaching Washout

Highway 734 extends east and west. Alongside Hwy. 734 between Mr. Robinson's driveway and Hwy. 79, there is some low terrain located along a little creek.

T2 pp. 59-60, Exs. D and K. The low terrain drains from the north to the south through a culvert underneath Hwy. 734. T1 pp. 30-31, Ex. H. Prior to April 12, 2009, water had accumulated in that low area on the north side of Hwy. 734. The water was so deep that it spilled over Hwy. 734 in at least two areas causing the road surface to become severely eroded extremely washboarded. T1 pp. 30-31, 63-64, 67-68, 72, T2 pp. 25-26, 57-61, 73 and Ex. D.

Mr. Stensland estimated the distance from where the washboard road surface began on the west to the east where the washout was located to be about 300 yards (900 feet). T2 p. 62. Mr. Bowers, the Harding County Highway Superintendent estimated that same distance was approximately 1.5 miles. T2 p. 74.

Because the applicable standards of review in this case require the reviewing court to closely review the evidence in the record, and because facts concerning the washboard condition of the road may have played a pivotal role in the jury's verdict, a list of testimony and exhibits related to the road conditions Mr. Stensland encountered prior to driving into the washout are set forth below.

1. Mr. Stensland testified that the road surface on Hwy. 734 had been "good", but that it changed "***abruptly***" as he descended the hill from Robinson's driveway heading east. T2 pp. 25-26.

2. Mr. Stensland testified that the washboarded area of the road included potholes approximately the circumference of toilet bowls but not as deep. T2 p. 26.

3. The washboard condition of the road did not stop from the point where Mr. Stensland encountered it until he drove into the washout. T2 p. 26.

4. The washboard conditions began where the road leveled off after descending down a hill heading eastward from the Robinson driveway and extended for 1.5 miles. T2 pp. 25-26, 73-74. Stensland estimated the distance to be 900 feet. T2 pp. 61-62.

5. The washboard condition of the road was sufficiently severe that it caused Mr. Stensland to reduce his speed. T2 pp. 26-27.

6. The washboard condition of the road was so severe that Mr. Stensland moved to the left-hand side of the road (i.e., the westbound lane) because the road condition was somewhat better on that side. T2 pp. 26, 57.

7. Stensland testified that he had never driven on anything like the washboard condition of the road. T2 p. 57.

8. Stensland testified the washboard condition of the road was so severe that he was unable to keep his eyes focused on the road ahead of him because he needed to pay so much attention to the road immediately in front of him. T2 p. 57.

9. Stensland testified that he believed Hwy. 734 had been repaired "up until [the] point" he encountered the washboarded conditions. T2 p. 58.

10. Harding County Deputy Sheriff Sabo testified that the washboard condition of the road was so severe that it would have prevented a motorist from exceeding the 45 mile per hour posted speed limit, and that it was likely that Mr. Stensland could not have been going very fast because of the washboard road. T1 pp. 63-64.

11. Stensland testified he was unable to stop his vehicle after he entered the washboarded road and before he drove into the washout, a distance of at least 900 feet. T2 pp. 57-62.

Discovery of Washout

Mr. Robinson encountered these washboard conditions when he and his family traveled to an Easter celebration April 12, 2009. Mr. Robinson slowed down as he traveled those washboarded portions of the road. T1 p. 30.

When he approached the area where the culvert was located he noted a small hole in the roadway surface. He stopped his vehicle, got out and went over to investigate. When he stomped on the road surface near the hole approximately half of the road fell in. T1 pp. 30-31.

Mr. Robinson asked his wife to contact the Harding County Highway Department. T1 p. 31.

County's Response

Harding County Superintendent Bowers testified that the County went to the washout site and placed warning signs the very same day it was notified that the washout existed. T1 pp. 80-86, T2 pp. 85-86, Exs. E, G, H, J. Specifically, the County placed the following warning signs in the identified locations:

A. *For Eastbound Travelers (Like Mr. Stensland)*

1. Barricade and Sign by Robinson Driveway

A barricade mounted on elevated braces with painted diagonal black and orange stripes, and with a reflector mounted on the middle of the barricade, was placed in the middle of the road just east of Mr. Robinson's driveway (about 1.5 miles west of the

washout). A high-intensity prismatic "**ROAD CLOSED**" sign was mounted on the barricade. Orange cones were placed on each side of the barricade. A 50-lb sandbag was placed on top of the barricade to hold it secure.

2. Barricade Immediately West of the Washout

In the event an eastbound motorist missed the Road Closed sign mounted on a barricade placed in the middle of the road next to Mr. Robinson's driveway, the County placed another barricade farther east in the middle of the road near the washout itself. That barricade also had the orange and black diagonal stripes and the reflector on it. Like the other barricade, it was raised on vertical braces and secured in place with a sandbag. Orange cones were also placed on each side of that barricade. It was placed approximately twenty to thirty feet, or perhaps further, from the western edge of the washout. T2 pp. 78-83, Exs. G, H, J.

B. *Signs for Westbound Traffic*

1. Barricade and Sign by Intersection with Hwy. 79

For traffic turning from Highway 79 westbound on Hwy. 734, the County placed an elevated barricade with a high-intensity prismatic "**ROAD CLOSED**" sign. That barricade was placed in the middle of Hwy. 734 just west of Hwy. 79, and secured in place with sandbags. Orange cones were placed on each side of the barricade between the barricade and the ditches. Ex. 16 photograph 015.

2. Barricade Sign Immediately East of the Washout

In case motorists failed to obey or chose to ignore the Road Closed sign placed at the intersection of Hwy. 734 and Hwy. 79, the County also placed a barricade near the east side of the washout approximately twenty to thirty feet from the eastern edge of the

washout itself. T2 p. 79, Exs. G and H. The barricade was the same type of barricade placed on the west side having the orange and black diagonal stripes with a reflector, mounted on elevated braces, held in place with a sandbag with orange cones on each side. T2 pp. 79-81, Ex. H.

Changes After Sign Placement

After the County placed the warning signs two mysterious events took place which have never been explained. First, the barricade which held the Road Closed sign that was originally placed by Mr. Robinson's driveway somehow got moved westward to where Hwy. 734 intersects with Carlson Road. See Appellant's Appx. 001. It is unknown who moved the warning sign. T1 pp. 34-36, 86-87, T2 pp. 70-71, 75-78, Exs. C and E.

The second mystery involved what was referred to at trial as a delineator post. A delineator post is a fence post with a large yellowish-orange reflector mounted at the top of the post. Exs. G and I. The reflectors mounted on the delineator posts are highly reflective and can be seen for "quite a distance." T1 p. 71.

At some time after the washout developed but before the night of the accident, someone removed a delineator post from the south ditch beside the culvert at the washout and drove it into the middle of the surface of Hwy. 734 immediately west of the washout. Exs. G, H, I and K.

Regardless of who placed the delineator post in the middle of Hwy. 734 there is no dispute that it was in place and visible on the evening of the accident. Deputy Sabo testified that the reflectors on delineator posts are highly reflective and can be seen for quite a distance. T1 p. 71. He testified that due to the long flat stretch of road from

where the washboard began to the lip of the washout where the delineator post was placed, the reflector would be visible to one driving eastward toward the washout. T1 pp. 71-72.

More importantly, Stensland himself testified that he saw the reflector on the delineator post on the evening of the accident long before entering the washout. T2 pp. 47-48. He testified that he first saw the reflector when he came down the hill from Mr. Robinson's driveway and that it would have been visible all the way up to the washout. T2 p. 48.

The photographs shown to the jury show that Stensland drove right over the delineator post. Exs. F, G, H, I, K.

Frequent Sign Inspections

After the signs were put in place, and right up to the evening before the night of the accident, the signs were regularly inspected to ensure they were in place and functional.

Mr. Rocky Sarsland is a blade operator (road grader) assigned to maintain roads in northern Harding County, including Hwy. 734 east of Ralph. T1 pp. 78-79. The jury heard Mr. Sarsland testify that every evening after his blading work was completed he would check the warning signs on Hwy. 734. T1 p. 88. In fact, at the end of work on Friday, May 15, 2009, the night before Stensland's accident, Mr. Sarsland inspected the warning signs. At that time he saw that the road closed sign and barricade which had been moved to the intersection of Carlson Road and Hwy. 734 were in place. T1 p. 88.

Although Mr. Robinson claimed that, from time to time, the warning sign by his driveway would blow over, he also testified that he never called the County to

report that the sign was blowing over. T1 p. 47. Highway Superintendent Bowers testified that at no time after the County placed the warning signs until the date of the accident did anyone report that the signs were blowing over. T2 p. 86.

The effectiveness of the warning signs placed by the County is borne out by the fact that during the 35 day period from the date the signs were placed until the date of Mr. Stensland's accident, there were no other accidents of any kind involving that washout on Hwy. 734. T2 p. 86.

May 16, 2009

On Saturday, May 16, 2009, Stensland's step-daughter was to rendezvous with Stensland's sister so that his step-daughter could assist with branding livestock. T2 pp. 21-22. The planned rendezvous point was somewhere close to Prairie City, South Dakota. T2 p. 22.

Stensland intended to travel from his ranch east on Hwy. 734 to Hwy. 79, then south to Hwy. 20, then continue east on Hwy. 20 toward Prairie City. T2 p. 23.

Before departing with his step-daughter, Stensland discussed his proposed route with his father. T2 pp. 23, 50-51, 56-57. ***His father warned Stensland that the road had washed out and that he may have to take a detour***. T2 pp. 23, 50-51.

At trial, Mr. Stensland denied that his father told him that he may need to take a detour because there was a washout on Hwy. 734. T2 p. 50. However, when he was impeached using his prior deposition testimony, Stensland admitted that he had testified

in his deposition that his father had told him there was a washout on Hwy. 734 the very afternoon before the accident. T2 pp. 50-52.[1] See also Appx.24.

Stensland testified at trial that he knew where the road had washed out. T2 pp. 57-58. He knew the washout was between Robinson's driveway and Hwy. 79. *Id.*

As Stensland and his step-daughter drove eastward on Hwy. 734 he looked for a detour sign at the intersection with Ralph Rd. T2 pp. 56-57. See Appellant's Appx. 001. He had the option of turning south at that intersection and following an alternate route to Hwy. 79. T2 pp. 56-57. However, he did not take that alternate route even though his father had told him he might need to. *Id.*

Similarly, as Stensland continued eastward he considered turning northward on the Carlson Rd. as a potential detour. T2 p. 57. He did not take that detour even though his father had warned him that he may need to. *Id.*

Stensland testified that he did not see the "Road Closed" sign that had been moved to the intersection of Hwy. 734 and Carlson Road when he drove through that intersection. T2 pp. 66-67. Stensland himself testified that the sign and the barricade were probably in the middle of the intersection as he drove past that location. T2 pp. 66-67. He testified that he saw the sign and the barricade in the middle of the intersection as shown in Ex. E later that evening after the accident. He has no reason to believe the sign was moved to that location after he drove past there to the washout. T2 pp. 65-68.

Stensland continued driving eastbound. T2 p. 57. After passing the Robinson driveway and descending a small hill he encountered the extremely washboarded road

[1] The jurors were instructed that they were the sole judges of all facts and the credibility of witnesses. Jury Instruction No. 10. They were also instructed that if they believed any witness knowingly testified falsely, they were authorized to reject all of that witness's testimony. Jury Instruction No. 12.

surface. T2 pp. 57-62, Exs. D and K. He testified that he had never driven on anything like that. T2 p. 57. The road condition was so severe he couldn't keep his eyes on the road ahead of him. *Id.* The road had potholes the size of toilet bowls. T2 p. 26. The road was so severe he had to move to the left-hand (westbound) lane. *Id.*

In addition to encountering the severe washboardy condition of the road, Mr. Stensland spotted the delineator post which had been driven into the middle of Hwy. 734 immediately west of the washout. T2 pp. 26-27, T2 pp. 47-48 and Exs. F, G, H, I, K. He testified that he first saw the delineator post at the bottom of the hill beneath Robinson's driveway. T2 p. 48. He testified the reflector on the delineator post would have been visible from that point all the way to the washout, a distance he estimated at 900 feet. T2 pp. 47-48 and 57-62.

Stensland testified that up until the point where he encountered the washboard conditions he believed the road had been repaired. T2 p. 58. However, at the point he encountered the washboard conditions he no longer believed that to be the case. *Id.* Nevertheless, he continued to drive eastbound. *Id.*

Stensland testified that after encountering the washboard he was simply unable to stop his vehicle prior to driving into the washout despite the fact he was driving less than the posted speed limit and had at least 900 feet to do so. T2 pp. 58-62 and T2 pp. 26-27.

His stepdaughter passenger testified she was concerned about his driving because she thought he was going too fast and the road was "bumpy." T2 pp. 95-97.

As stated earlier, Harding County placed barricades on both the east and west sides of the washout itself. T2 pp. 78-82. Highway Superintendent Bowers testified that the barricade on the west side of the washout would have been placed approximately 25

feet from the washout. T2 p. 80. After the accident, that barricade was found in the washout lying on the culvert. T2 pp. 78-79 and Ex. J.

Mr. Bowers testified that if the barricade on the west side of the washout had been blown over by the wind, it would not have been blown 25 feet into the washout; rather, it would likely have simply laid over and remained on the road surface as was illustrated on the east side in Ex. H[2]. T2 pp. 82-83. Thus, the jury heard evidence from which it could infer that the barricade had been on the road surface and had been pushed into the washout by Stensland's vehicle.

Mr. Robinson assisted Stensland following the accident. T1 pp. 38-46. As Robinson was transporting Stensland to meet Stensland's father, they came across the Road Closed sign mounted on the barricade in the middle of the intersection with Hwy. 734 and Carlson Road. T2 pp. 66-67 and Ex. E. Robinson had to swerve to avoid hitting it. T2 pp. 65-66.

Curiously despite suffering a broken leg, Stensland did not seek medical attention that evening. T2 p. 62. Nor did Stensland call law enforcement that evening despite extensive damage to his vehicle. T1 p. 72. Nor did Stenslands or Robinsons contact the Harding County Highway Department to report any dangerous condition on Hwy. 734. T2 pp. 71-72.

[2] The trial transcript refers to Ex. F. However, the testimony concerning the exhibit states that exhibit the witness was viewing was taken from the east looking west. Ex. F is taken from the west looking east (Stensland was traveling eastbound). The exhibit taken from the east looking west which shows a barricade apparently blown over by wind is Ex. H.

Stensland's credibility was questionable at various times throughout his testimony. The following are a few examples[3]:

1. At trial Stensland denied that his father had warned him there may be a washout on Hwy. 734. He was impeached with his deposition testimony where he stated his father told him that very afternoon there was a washout on Ralph Rd. T2 pp. 50-51.

2. He testified the washboardey condition of the road gave him no indication there was danger ahead. T2 p. 26. However, he later testified that upon encountering the washboard condition he no longer believed the road had been repaired. T2 p. 58.

3. Stensland testified that he believed the delineator post was in the south ditch rather than in the middle of the road. T2 pp. 26-27, 47-48. However, he also testified that he was driving in the left hand lane (westbound lane). T2 p. 47. Accepting Stensland's testimony, he would have had to be driving in the south (right hand) ditch to drive over the delineator post.

4. Stensland testified that he did not have time to slow down or stop before driving into the washout. T2 pp. 59-62. He claimed he was unable to stop despite the fact that he no longer believed the road was repaired after encountering the washboard conditions 900 feet before the washout. T2 pp. 58-62.

5. Stensland testified he had not injured his left knee prior to the accident. His medical record showed that he told his doctor he had hyperextended his left knee the day before the accident. Ex. M. Furthermore, a photo shows Stensland on crutches the

[3] Credibility is for the jury to decide. *Hall v. Baddou*, 2008 S.D. 90, ¶ 29, 756 N.W.2d 554, 561-562. Instruction No. 10 allowed the jurors to consider this testimony and impeachment when gauging Mr. Stensland's credibility.

morning after the accident before he had received medical attention. Ex. K, T2 pp. 46-47.[4]

ARGUMENT

Issue One: Did the Trial Court Err When it Denied Stensland's Motion for a Judgment as a Matter of Law on the Issue of Causation?

The first argument raised in Stensland's brief argues that the trial court erred because "the trial court should have ruled the County was negligent as a matter of law." Appellant's Brief p. 16.

Stensland's argument is puzzling because the trial court ***did*** grant judgment as a matter of law in Stensland's favor on the issue of the County's negligence. In response to Stensland's motion for JAML at the close of the evidence the Court stated:

> Okay. Well, the Court has already resolved the negligence per se issue. You folks asked me to do it pretrial and I did, and I entered an order and I indicated that I'd give a negligence per se instruction.
>
> * * *
>
> [S]o negligence per se has been established. It's been admitted they didn't have the right signs. The Court has ruled the MUTCD applies in a negligence per se instruction as a matter of law. That has been no secret.

T2 103:23-104:10.

Consistent with the Court's pretrial rulings (Appellant's Appendix pp. 31-38) and the discussion quoted above, the Court instructed the jury that the County breached its duties under S.D.C.L. §§ 31-28-6 and 31-32-10 "and that a breach of such duties is

[4] The jury was instructed that if it believed any witness testified falsely, it could reject that witness's testimony. Jury Instr. 12.

deemed negligence." Jury Instruction No. 17. Therefore, Stensland's argument that the trial court erred by not finding the County negligent as a matter of law is unfounded.

Perhaps the confusion can be explained by the conflation of the concepts of, and the interchangeable use of the terms "negligence" and "liability" in Stensland's argument.

Stensland argues that the unexcused violation of a statute enacted to promote safety constitutes negligence per se. Appellant's Brief p. 19, citing *Thompson v. Summers*, 1997 S.D. 103, ¶16, 567 N.W.2d 387, 393. He goes on to state that there was no dispute the County failed to comply with South Dakota's highway maintenance/warning sign statutes. Appellant's Brief p. 19. It then continues: "There was no evidence of legal excuse offered. ***Therefore, causation was not an issue."*** *Id.* See also *Id.* at p. 31. ("The trial court's ruling that the County was negligent meant that all of the elements had been proven by Ryan, including "legal cause.")

It is the last line of that argument that demonstrates its fundamental legal flaw.

The distinction between *negligence* and *liability* was discussed by the South Dakota Supreme Court in *Schmidt v. Royer*, 1998 S.D. 5, ¶¶ 27-28, 574 N.W.2d 618, 626. That case involved the alleged violation of a safety statute requiring trucks operating on South Dakota highways to have a certain percentage of braking force based on their vehicle weight. In that case, the plaintiff wanted the court to instruct the jury that violation of the statute constituted "negligence." *Id.* at ¶ 27. The South Dakota Supreme Court affirmed the denial of the instruction on grounds that it did not go far enough.

> Violation of a statute "alone is not sufficient to render them ***liable*** to the plaintiff. Before they may be held to

> respond in damages it must further appear that their violation of the duty placed on them by this rule was [a] ***proximate cause*** of plaintiff's injury. The burden of establishing this is on the plaintiff."

Id. at ¶ 28 (emphasis added), quoting *Thompson,* 1997 S.D. 103, ¶ 18. Accord, *Bridge v. Karl's, Inc.*, 538 N.W.2d 521, 524 (S.D. 1995) (Court distinguished negligence from liability).

The South Dakota Pattern Jury Instructions also provide that proof of negligence by way of a statutory violation standing alone is not sufficient to result in *liability*. SDPJI 20-200-00 through 20-200-40. Those instructions consistently advise that instructions on legal cause are still necessary even when negligence per se exists.[5]

The distinction is also contained in SDPJI 1-50-20. That instruction guides juries through the analytical process of reaching a verdict in a case where comparative negligence is involved. If the jury finds the defendant *negligent*, the next question the jury must ask is whether the negligence was a legal cause of injury to the plaintiff. *Id.* Only after the jury finds both negligence and causation can the jury award damages (i.e., impose *liability* on the defendant).

Consistent with his pretrial rulings, Judge Eckrich found the County negligent per se due to the County's failure to place warning signs consistent with the MUTCD. However, Judge Eckrich also recognized the distinction between negligence and liability. He insisted that the jury be instructed on the issue of causation.

> Now, negligence - - let me back up a little bit to negligence per se. Negligence per se just establishes negligence. It doesn't establish causation. And that is a jury question that remains to be decided, whether or not

[5] The instructions refer to an exception discussed in the case of *Strain v. Christians*, 483 N.W.2d 783 (S.D. 1992). That exception has no application in this case.

> the County's negligence and failure to comply with the MUTCD was the cause of the accident. So that is a jury question that remains.

T2 104:20-105:1.

Stensland argues that the issue of causation should not have been submitted to the jury because the evidence was so clearly one-sided that reasonable minds could reach no other conclusion but that the County's negligence was the proximate cause of the accident. Appellant's Brief p. 16. "If there is any substantial evidence to sustain a cause of action or defense it must be submitted to the finder of fact." *Christenson v. Bergeson*, 2004 S.D. 113, ¶ 24, 688 N.W.2d 421, 428, S.D.C.L. § 15-6-50(a).

In this case, there was substantial evidence from which the jury could infer that the legal cause of the accident had nothing to do with the lack of MUTCD-compliant signs. That evidence included the following:

1. Stensland lived for approximately 38 years only 12 miles west of where the washout occurred and was familiar with Hwy. 734.

2. The washout where the accident had occurred had been in existence for approximately 35 days prior to the date of the accident.

3. Stensland's father warned him the very afternoon of the accident that there could be a washout on Hwy. 734 and that Stensland may have to take a detour.

4. Stensland knew the location of the washout and actually considered possible detour routes as he drove toward the washout location.

5. Whether standing or lying down, Stensland must have driven around the road closed sign mounted on a barricade in the middle of the intersection of Hwy. 734 and Carlson Road.

6. Stensland encountered washboard roads worse than any he had ever encountered before and at that point actually subjectively concluded Hwy. 734 had not been repaired. T2 p. 58.

7. Stensland continued to drive on the washboarded road surface despite the fact it was so severe he had to travel in the oncoming traffic lane.

8. Stensland claimed that he was unable to slow or stop his vehicle after encountering the washboarded road surface but prior to entering the washout despite the fact he claims he was traveling less than the posted speed limit and he had a distance of 900 feet to 1.5 miles to do so.

9. Stensland saw the reflector on the delineator post placed in the middle of the road over 900 feet before the washout, but nevertheless drove over the delineator post and into the washout.

10. There was evidence from which the jury could infer Stensland's vehicle struck the barricade next to the washout and pushed it into the chasm. T2 pp. 80-82, Exs. J, S.

The South Dakota Supreme Court has often stated that the mere fact that an accident happened does not create an inference that it was caused by someone's negligence. *Steffen v. Schwan's Sales Enters.*, 2006 S.D. 41, ¶ 9, 713 N.W.2d 614, 617, quoting *Carpenter v. City of Belle Fourche*, 2000 S.D. 55, ¶ 14, 609 N.W.2d 751, 759.

The jury was instructed on the issue of causation. Jury Instructions 23, 24 and 25. Those instructions are South Dakota Pattern Jury Instructions and are a correct statement of the law in South Dakota regarding legal causation.

Applying the standard of review applicable to the denial of a judgment as a matter of law, there is substantial evidence to sustain the defense that the County's failure to place MUTCD-compliant signs was not the legal cause for Stensland's injury.

Due to the fact the jury rendered a general verdict in this case, it is impossible to discern whether the jury's verdict was due to a finding that the lack of MUTCD-compliant signs was not a legal cause of Stensland's injury. Since Stensland cannot prove on appeal that the jury based its verdict on an improper legal theory, Stensland cannot prove any prejudice and the jury's verdict must be affirmed.

Issue Two: Did the Trial Court Err When it Denied Stensland's Motion for a Judgment as a Matter of Law on the Issue of Contributory Negligence?

The issue of contributory negligence is ordinarily a question of fact. It must be a clear case before a trial judge is justified in taking this issue from the jury. *Baddou*, 2008 S.D. 90, ¶ 30, *Steffen*, 2006 S.D. 41, ¶ 26 (Zinter, J., concurring in part and dissenting in part). If there is any substantial evidence to sustain the contributory negligence defense, it must be submitted to the trier of fact. *Baddou* at ¶ 11. Judgment as a matter of law may only occur when the evidence is so one-sided that reasonable minds can reach no other conclusion. *Id.*[6]

Stensland argues there is no evidence that Stensland was negligent. Appellant's Brief pp. 21-26. The first rationale offered for that conclusion is the claim that there was no legal duty which Stensland owed to anyone. *Id.* at 22. That rationale is clearly false.

The jury was instructed that a person operating a motor vehicle on a public highway has a duty to exercise reasonable care to maintain control of the vehicle so as to

[6] The jury's verdict in the County's favor was unanimous. T2 pp. 140-141.

be able to stop the vehicle or otherwise avoid an accident within that person's radius of danger. Jury Instruction No. 26. That is a South Dakota Pattern Jury Instruction (20-210-30) which has been favorably quoted by the South Dakota Supreme Court. *Cooper v. Rang*, 2011 S.D. 6, ¶ 6, 794 N.W.2d 757, 758. See also *Treib*, 513 N.W.2d at 913 (a motorist may not be blithely oblivious to the obvious).

Stensland cites the *Cooper* decision as legal authority for the argument that the jury should not have been instructed on contributory negligence in this case because, as in *Cooper*, there is "no evidence that anything other than Harding County's negligence caused the accident[.]" Appellant's Brief p. 25.

In *Cooper*, the Plaintiff's vehicle was stopped at a stop sign at the bottom of an icy hill. The Defendant drove her vehicle down that same hill. She noticed the Plaintiff's vehicle about 50 feet ahead but failed to apply her brakes until she was very close to the Plaintiff's vehicle. She was unable to stop on the icy surface and struck the Plaintiff's vehicle. *Id.* at ¶ 2.

The case was tried to a jury. At the close of the evidence the plaintiff moved for a judgment as a matter of law on the issue of the defendant's negligence on grounds the defendant admitted the accident was her fault. *Id.* at ¶ 3. The motion was denied.

The jury returned a verdict for the defendant. The plaintiff appealed on grounds the trial court abused its discretion when it failed to grant judgment as a matter of law on the issue of negligence. *Id.* at ¶ 4.

The South Dakota Supreme Court found that the undisputed evidence in the record revealed there was no evidentiary basis for the jury's verdict. *Id.* at ¶¶ 6, 10.

There was no evidence that anything other than the defendant's negligence caused the accident.

It is important to note that the defendant in *Cooper* did not allege contributory negligence. *Id.* at ¶ 6.

Unlike *Cooper*, the County alleged contributory negligence in this case. Also unlike *Cooper*, the County submitted substantial evidence supporting its contributory negligence defense.

This case is more analogous to *Treib v. Kern*, 513 N.W.2d 908 (S.D. 1994). In that case, Kern backed his car out of his driveway and hit Treib's automobile which was passing Kern's driveway on the street. Following a jury trial, the trial court granted Treib's motion for a directed verdict on the issue of *negligence* finding that Kern was negligent as a matter of law. However, the trial court denied Treib's motion for directed verdict on the issue of Treib's contributory negligence. The jury returned a verdict for Kern. *Id.* at 910.

Treib appealed arguing the trial court erred denying a directed verdict on the issue of contributory negligence. The South Dakota Supreme Court affirmed the trial court finding that there was evidence that could have supported the jury's verdict on the basis of contributory negligence. For example, Treib was driving his vehicle under the influence of medication which could cause fatigue and drowsiness. Treib had seen Kern's pickup was running and knew that Kern had a propensity for backing up his pickup without looking. Treib had taken no precautions to avoid the accident such as honking his horn or swerving. *Id*. at 912.

Similarly, in this case, despite the fact that the Court held County negligent as a matter of law, there was evidence to support instructing the jury on contributory negligence.

A non-exclusive list of contributory negligence evidence was submitted to the trial court in response to Stensland's motion for a judgment as a matter of law at the close of the evidence. T2 pp. 101-103. Building on the County's enumeration of evidence of contributory negligence, the trial court articulated approximately 17 different facts from which a jury could infer contributory negligence. T2 pp. 105-107.

The issue of contributory negligence is ordinarily a question of fact for the jury. There was substantial evidence in the record from which the jury could infer Stensland was contributorily negligent. The trial court correctly instructed the jury on contributory negligence. And the jury's verdict can be explained by a finding that Stensland was contributorily negligent to a degree greater than slight.

In addition, because the general verdict does not indicate whether the jury's verdict was based on contributory negligence rather than some other legal theory, Stensland cannot show he was prejudiced by submitting the issue to a jury.

Therefore, the trial court's denial of JAML in favor of Stensland on the issue of contributory negligence must be affirmed.

Issue Three: Did the Trial Court Err in Denying Judgment as a Matter of Law with Respect to the County's Defense of Assumption of the Risk?

As with causation and contributory negligence, the question of whether a plaintiff assumed the risk of injury is ordinarily a jury question. *Lovell,* 382 N.W.2d at 399, *Mack v. Kranz Farms, Inc.*, 1996 S.D. 63 ¶ 8, 548 N.W.2d 812, 814 (S.D. 1996).

The jury instructions on assumption of the risk correctly cited South Dakota law. Jury Instructions 21 and 22, SDPJI 20-40-10, 20-40-20.

As with contributory negligence, there was evidence introduced at trial from which the jury could infer Stensland assumed the risk of injury. The trial court articulated approximately 17 examples of evidence when it denied Stensland's motion for JAML at the close of the evidence. T2 pp. 105-107.

Stensland clearly had actual knowledge of the existence of the specific risk involved. He lived on Hwy. 734; he was familiar with the road; his ranch was merely 12 miles west of where the washout was located; the washout had been in existence approximately five weeks before the accident occurred; and perhaps most importantly, his father had warned him that very day that there was a washout on the road and he may need to take a detour. He testified that he deduced the road was not repaired when he hit the washboard conditions. T2 p. 58.

Second, there can be no debate as to whether Stensland could appreciate the character of the risk posed by a washout in the road. It is common knowledge that driving a car into a washout may result in significant property damage and possibly significant personal injury as well. *Duda v. Phatty McGee's, Inc.,* 2008 S.D. 115, ¶ 13, 758 N.W.2d 754, 758 (if the risk is one no adult of average intelligence can deny, the plaintiff is deemed to have appreciated it). The jury was instructed that it had the right to consider the common knowledge possessed by all of them together with their ordinary experiences and observations in daily life. Jury Instruction No. 11.

Furthermore, the evidence in the record would support a jury's conclusion that Stensland voluntarily accepted the risk. He had time to consider the risk (he drove 12

miles after being warned of the washout), knowledge (a specific warning from his father) and experience (he was familiar with the road) sufficient to make an intelligent choice.

Stensland made his choice. He chose to proceed eastward on Hwy. 734 despite the fact he had been warned of a washout and encountered road conditions that convinced him the road had not been repaired. He testified that he proceeded with such speed that he was unable to slow or stop his automobile prior to driving into the washout. He drove around a road closed sign, may have drove into a barricade next to the washout, and drove over a delineator post bearing a highly reflective yellowish orange reflector.

If there is any substantial evidence to sustain the assumption of the risk defense, it must be submitted to the trier of fact. *Baddou*, 2008 S.D. 90 ¶ 11. Judgment as a matter of law may only occur when the evidence is so one-sided that reasonable minds can reach no other conclusion. *Id.* If there is sufficient evidence to allow reasonable minds to differ, the denial of the motion for JAML is correct and appropriate. *Dartt*, 484 N.W.2d 891, 895.

The evidence in the record mandated submission of the issue to the jury. The jury was properly instructed on the law. Therefore, denial of JAML was appropriate and must be affirmed.

Moreover, because of the general verdict issued by the jury, it is impossible to discern whether the jury based its verdict on a finding that Stensland assumed the risk, or some other legal basis (e.g., a finding the County's negligence did not cause the accident or a finding that Stensland was contributorily negligent greater than slight). Therefore,

Stensland cannot prove that he was prejudiced by any purported error relating to the submission of assumption of the risk to the jury. Therefore, the denial of JAML on this issue must be affirmed.

Issue Four: Did the Court Properly Instruct the Jury on Issues of Causation, Contributory Negligence and Assumption of the Risk?

Stensland argues on appeal that the Court erred by instructing the jury on issues of causation, contributory negligence and assumption of the risk. Appellant's Brief pp. 27-32.[7] However, those instructions were given by the Court because the Court denied Stensland's motions for judgment as a matter of law on those issues. T2 at pp. 109-112 (Court relies on its rulings on the JAML motions).

The very same arguments regarding why denial of JAML on those issues was appropriate apply with equal force to the issue of why it was appropriate to instruct the jury on those issues. Therefore, those arguments set forth earlier in this brief are incorporated herein by this reference.

Issue Five: Notice of Review: Whether South Dakota Law Requires Compliance with the MUTCD on Roads which are not Built Using Federal Aid?

County objected to the Court's Instruction 17 where the Court instructed the jury that the County was negligent as a matter of law. T2 pp. 108-109

[7] Stensland uses the adjective "disingenuous" to describe the County's arguments concerning contributory negligence and assumption of the risk. Appellant's Brief p. 29. The use of that descriptor is quite hypocritical in light of the fact that Stensland makes grandiose statements such as there is "no evidence to support", or "the evidence is so one-sided", and "reasonable minds could not differ" in the face of overwhelming evidence in the record to the contrary. It is especially hypocritical in light of the fact that the judge could recite 17 pieces of evidence from memory and the evidence led a 12-member jury to vote unanimously in the County's favor.

Count II of Stensland's Complaint alleged that Harding County was negligent per se because it failed to place warning signs near the washout that complied with the MUTCD. Clerk's Index at pp. 3-4. Before trial the County requested a ruling on the County's legal duty. Specifically, the County asked the trial court for a ruling as to whether the MUTCD applied when Hwy. 734 was not constructed using federal aid. See S.D.C.L. § 31-28-11 (uniform national signing standards apply on roads constructed with federal aid).

The matter was briefed and was argued at the pretrial conference. Appendix pp. 1-13.

The trial court issued a Memorandum Decision which concluded that the MUTCD did apply and issued an order consistent with that decision. Clerk's Index pp. 84-91. Appellant's Appx. Pp. 31-38.

Given the Court's ruling, and given the evidence concerning the nature of the signs placed by the County in this case, the County was forced to concede before the jury that its signs did not comply with the MUTCD. It was deprived of the opportunity to argue that, although the signs did not comply with the MUTCD, they still met the statutory requirements found in S.D.C.L. § 31-28-6 and 31-32-10.

County respectfully requests the Court to review the trial court's ruling on this issue. Specifically, County requests the Court to determine whether the MUTCD only applies to roads not constructed using federal aid as stated in S.D.C.L. § 31-28-11.

The basis for Plaintiff's belief that the type of signs and their placement must comply with the MUTCD is the language in S.D.C.L. § 31-28-6 which directs that signs must be placed "at points in conformity with standard uniform traffic control

practices[.]" The South Dakota Supreme Court has interpreted that language to refer to the MUTCD. *Fritz v. Howard Township*, 1997 S.D. 122, ¶ 16, and n.5. See also, *Hansen v. South Dakota Dep't of Transportation*, 1998 S.D. 109, ¶ 31, 584 N.W.2d 881, 888. However, a South Dakota statute dictates that the MUTCD requirements only apply to roads built with *federal* aid. S.D.C.L. § 31-28-11.

> On any street or road ***constructed with federal aid***, the location, form, character of informational regulatory warning signs, curb and pavement, or other markings and traffic signals, shall conform to uniform national signing standards.

S.D.C.L. § 31-28-11 (emphasis added).

At the pretrial conference in this case Stensland's legal counsel stipulated that Hwy. 734 had not been built using federal aid. Appx. pp. 11 and 13.

The court in *Fritz* noted that the record in that case did not indicate whether the road at issue had been constructed with federal aid. *Fritz*, 570 N.W.2d at 243, n. 5. The court was not troubled that omission, however, because the township conceded that the MUTCD applied. *Id.* Therefore, *Fritz* does not provide legal authority for the proposition that the MUTCD applies to *all* South Dakota roads and not just those constructed using federal aid.

In *Truman v. Griese*, 2009 S.D. 8, 762 N.W.2d 75, the South Dakota Supreme Court recognized that the MUTCD referred to S.D.C.L. § 31-28-6 does not dictate the type of characteristics (size, shape, color) a highway warning sign must have. Rather, S.D.C.L. § 31-28-6 merely dictates where warning signs must be *placed*. *Id.* at ¶ 24 and n. 8.

Because both S.D.C.L. §§ 31-28-6 and 31-28-11 deal with the subject matter of highway warning signs, and are located in the same chapter of the code, they must read *in pari materia*. *Onnen v. Sioux Falls Indep. Sch. Dist.*, 2011 S.D. 45, ¶ 16, 801 N.W.2d 752, 756-757. The object of that rule is to ascertain and carry into effect the legislature's intent. *Id.* at 757. It must be assumed that the legislature, when enacting a provision, has in mind other statutes relating to the same subject matter. *Id.*

In this case, the legislature has provided that the MUTCD applies only to roads constructed using federal aid. S.D.C.L. § 31-28-11. Furthermore, the MUTCD only provides direction as to where signs must be placed; it does not dictate the characteristics such signs must bear. *Truman*, 2009 S.D. 8 ¶ 24.

The trial court erred when it ruled that the MUTCD applied to the washout on Hwy. 734 because Hwy. 734 was not built using federal aid. The trial court erred by instructing the jury that the County was negligent because it did not place signs with characteristics dictated by the MUTCD. Therefore, if this case is remanded for a new trial, the trial should encompass the issue of whether the County was negligent by not placing signs with characteristics and in the locations dictated by S.D.C.L. §§ 31-28-6 and 31-32-10.

CONCLUSION

There was substantial evidence introduced at trial to support the jury's defense verdict on three separate grounds: lack of legal causation; contributory negligence greater than slight; and assumption of the risk. Therefore, those issues were necessarily submitted for the jury's consideration.

The jury was properly instructed on those three separate issues.

Because the jury rendered a general verdict, it cannot be determined which of the three legal theories led the jury to conclude the County was not liable. Therefore, Stensland cannot demonstrate he was prejudiced due to the Court's denial of his motions for judgment as a matter of law or due to any allegedly erroneous jury instruction. For these reasons, the trial court's rulings must be affirmed.

Alternatively, if it is determined the trial court erred and that this matter must be remanded for retrial, County respectfully requests the Court to reverse the trial court's ruling on the issue of whether the MUTCD applies to the washout conditions that existed on Hwy. 734 due to the fact the highway was not constructed with federal aid. The Court should instruct the trial court to frame the County's legal duty solely within the statutory requirements set forth in S.D.C.L. §§ 31-32-10 and 31-28-6.

WAIVER OF ORAL ARGUMENT

To resolve the legal issue raised in this appeal the Court need only review the record and apply well-established review standards to determine whether the trial court abused its discretion when it denied Stensland's post-trial motions. It is doubtful that oral argument would assist the Court in reaching that conclusion; however, if the Court believes oral argument would assist it in deciding this matter the City would certainly participate in oral argument.

Respectfully submitted on this _____ day of April, 2015.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify this Appellee's Brief complies with the type volume limitation provided for in South Dakota Codified Laws. This Appellee's Brief, including footnotes, contains 9,766 words. I have relied upon the word count of our word processing system as used to prepare this Appellee's Brief. The original Appellee's Brief and all copies are in compliance with this rule.

GUNDERSON, PALMER, NELSON
& ASHMORE, LLP

By:_____

CERTIFICATE OF SERVICE

I certify that on this _____day of April, 2015, I e-mailed a true and correct copy of the foregoing Appellee's Brief to the following at their last-known e-mail addresses:

Robert L. Morris
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I further certify that on this _____ day of April, 2015, I e-mailed the foregoing Appellee's Brief in Word Format with Appendix in PDF format and sent two copies of it by United States mail, first-class postage prepaid, to:

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL # 27288

RYAN STENSLAND,

Plaintiff and Appellant,

vs.

HARDING COUNTY,
a governmental subdivision
of the State of South Dakota,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
HARDING COUNTY, SOUTH DAKOTA

THE HONORABLE JEROME A. ECKRICH

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Notice of Appeal Filed December 12, 2014

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Reply Brief Argument and Authority

A. There is No Confusion - Causation Was Not an Issue

1. The Statutes.

SDCL 31-32-10 imposes a statutory duty upon the County to act promptly to prevent accidents and injuries by erecting a guard either over a defect or across the road as follows:

> ***If any highway, culvert***, or bridge ***is damaged by flood,*** fire ***or other cause, to the extent that it endangers the safety of public travel, the governing body responsible for the maintenance of such highway, culvert, or bridge, shall*** within forty-eight hours of receiving notice of such danger, ***erect guards over such defect or across such highway of sufficient height, width, and strength to guard the public from accident or injury and shall repair the damage or provide an alternative means of crossing within a reasonable time after receiving notice of the danger.*** The governing body shall erect a similar guard across any abandoned public highway, culvert, or bridge. Any officer who violates any of the provisions of this section commits a petty offense. [Emphasis supplied]

SDCL 31-32-10. *See also, Kiel v. DeSmet Township*, 90 S.D. 492, 242 N.W.2d 153, 154 (1976).

The main obligation of a county under SDCL 31-32-10 ***is to repair all defects in a county highway which endanger the safety of public travel.*** Incidentally, the statute also imposes a ***secondary duty upon the county to erect temporary guards over defects***, where needed, until repairs are made. *Kiel v. DeSmet Township*, 90 S.D. 492, 242 N.W.2d 153, 155 (1976) [emphasis added]. Additionally, when defects in a county highway exist, SDCL 31-28-6 requires the placement of a warning sign for the benefit of approaching traffic:

> ***The public board or officer whose duty it is to repair or maintain any public highway shall erect and maintain at points in conformity with standard uniform traffic control practices on*** each side of any sharp turn, blind crossing, ***or other point of danger on such highway***, except railway crossings marked as required in § 31-28-7, **a substantial and**

> **conspicuous warning sign**. The sign shall be on the right-hand side of the highway approaching such point of danger. Failure to comply with the provisions of this section is a Class 1 misdemeanor. [Emphasis supplied].

2. The County's Admissions of Negligence Were Such That it Admitted it Was Negligent and Legal or Proximate Cause Was Not an Issue.

Through out the trial and in the County's responsive brief the County has admitted (1) the statute establishes the County's duty; (2) the defect in the county highway which endangered the safety of public travel was not repaired at the time of Ryan's accident, which was more than 30 days after the County received notice of highway defect; and (3) the County did not erect barriers or provide proper signage as required by the Manual on Uniform Traffic Control Devices (MUTCD) as required by South Dakota law. In spite of these admissions, the County convinced the Circuit Court to instruct the jury that Ryan had the burden of proving "Whether the County's negligence was ***the legal cause of the accident***." Appx. pg. 046. [Emphasis supplied].

Perhaps the confusion is in semantics or the terminology used to describe legal theories. Negligence requires four elements: 1) a duty; 2) a breach of that duty; 3) [legal] cause; and 4) damages. *Leslie v. City of Bonesteel*, 303 N.W.2d 117, 119 (S.D. 1981). Ryan submits in most cases when counsel and the Courts use the term "negligence," it is describing a "breach of duty" and the question remains whether that "breach of duty" was the "legal cause" of the accident. Such is not the case here. In this case, the County had a duty. The County breached that duty. The breach of that duty was the legal cause of the accident and Ryan suffered injury and damages. The County was "negligent." This scenario is consistent with this Court's expressions on the issue of legal cause a/k/a proximate cause.

Proximate cause, a/k/a legal cause, is defined by this Court as "An immediate cause which, in natural or probable sequence, produces the injury complained of. This excludes the idea of legal liability based upon mere speculative possibilities or circumstances and conditions remotely connected to the events leading up to an injury." *Mulder v. Tague*, 186 N.W.2d 884, 887 (S.D. 1971). See also, *Musch v. H-D Co-op, Inc.*, 487 N.W.2d 623 (S.D. 1992). For proximate cause, a/k/a legal cause, to exist, "the harm suffered must be found to be a foreseeable consequence of the act complained of . . . ." *Musch v. H-D Co-op, Inc.*, 487 N.W.2d 623, 626 (S.D. 1992), citing, *Leslie v. City of Bonesteel*, 303 N.W.2d 117, 119 (S.D. 1981).

The County admitted at trial and admits in its brief, that the existence of the washout on CR 734 endangered the safety of the traveling public. The County admits it did not comply with its (1) primary duty to repair defects on CR 734; (2) did not comply with its secondary duty to erect temporary guards over the defects on CR 734; and (3) did not erect, in compliance with the MUTCD, a substantial and conspicuous warning sign at the point of danger of CR 734 – the washout. In fact, the County admits it never complied with the MUTCD in even one instance regarding the defect in CR 734. As a result, Ryan drove into the washout on a dark evening. The accident and the harm suffered by Ryan was a foreseeable consequence. Reasonable minds cannot and could not differ – the County's gross failure to follow the law was the legal cause of the accident and the legal cause of Ryan's injuries. As a result, by the Court denying Ryan's motion for judgment as a matter of law on the County's liability and forcing Ryan to prove, as an issue in the case – the County's negligence was the legal cause of the accident – Ryan was prejudiced.

B. The Jury Should Not Have Been Instructed on Contributory Negligence.

To overcome a reversal of this issue, the County argues this case is analogous to *Treib v. Kern*, 513 N.W2d 908 (S.D. 1994) where in a 3-2 decision, this Court upheld the consideration of contributory negligence by the jury. So let's look at the *Treib* facts[1]:

- It was the morning of August 6, 1990[2].
- The Plaintiff noticed a billow of smoke coming from the exhaust of the Defendant's pickup.
- The Plaintiff testified he was aware of the Defendant's tendency to back out of his driveway without looking. Despite this knowledge, the Plaintiff took no evasive action to avoid the accident.
- The Plaintiff told the police officer that as he passed the Defendant's driveway he thought, "Whew, I made it."
- The Plaintiff admitted he was taking two different anti-seizure medications at the time of the accident. The medication could cause fatigue and drowsiness to the

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[1] In footnote 3 the Court stated:

Treib's testimony that he thought he had "made it," he saw exhaust coming from Kern's vehicle, and his knowledge of Kern's propensity to back without looking is evidence Treib knew of Kern's potential for negligence. This knowledge required him to exercise ordinary care.

Justice Wuest explained this in the unanimous decision of *Frey v. Kouf*, 484 N.W.2d 864, 869 (S.D.1992).

> '[T]he duty to exercise ordinary care to avoid the consequences of another's negligence does not arise until the negligence is apparent or the circumstances are such that an ordinarily prudent person would apprehend its existence.' 65A C.J.S. *Negligence* § 119, at 49 (1966).

Whether Treib exercised ordinary care is definitely a jury question. If he did not, the jury must determine whether his failure to exercise ordinary care is contributory negligence more than slight.

[2] So it must have been daylight out.

> point that it would be dangerous to operate an automobile. The Plaintiff knew these possible side effects.

Treib v. Kern, 513 N.W2d 908, 910 (S.D. 1994).

The facts in *Treib* are not even close to being similar or analogous to the facts in this case[3].

Ryan would submit if there is an analogous case, it is *Johnson v. Armfield*, 2003 S.D. 134, 672 N.W.2d 478. Armfield made bare assertions regarding the speed of Johnson. There was no competent evidence of speed. Further, Armfield failed to present any competent evidence that Johnson's speed, even if she was speeding, was the proximate cause of her injury in order to bar recovery. *Johnson v. Armfield*, 2003 S.D. 134, ¶¶ 12-13. Similarly, in this case, bare assertions without competent evidence was argued and there was no competent evidence that Ryan's alleged negligence was the proximate cause of his injury.

As in *Johnson*, the alleged contributory negligence of Ryan was at the heart of the County's defense[4]. The improper jury instruction on contributory negligence clearly prejudiced Ryan and therefore, the Circuit Court abused its discretion. *Johnson v. Armfield*, 2003 S.D. 134, ¶15.

[3] Counsel for Ryan will not rehash the facts in this case in this reply. Instead Ryan will rely on the facts and argument contained in his initial brief.

[4]Actually there were two defenses at the heart of the County's defense – contributory negligence and assumption of the risk. See, Appellant's Brief, pg. 14.

C. The Jury Should Not Have Been Instructed on Assumption of the Risk[5].

A defendant asserting assumption of the risk must establish three elements: 1) that the plaintiff had actual or constructive knowledge of the risk; 2) that the plaintiff appreciated the character of the risk; and 3) that the plaintiff voluntarily accepted the risk, given the time knowledge, and experience to make an intelligent choice. *Goepfert v. Filler*, 1997 S.D. 56, ¶ 6, 563 N.W.2d 140, 142. The failure to establish any one of the three elements negates the defense. *Id*. (citing *Westover v. East River Elec. Power Co-op., Inc.*, 488 N.W.2d 892, 901 (S.D.1992)).

The County failed to establish any one of the three elements. Ryan's alleged assumption of the risk for the accident and his injuries was also at the heart of the County's defense. The improper jury instruction on assumption of the risk, in and of itself, clearly prejudiced Ryan and therefore, the Circuit Court abused its discretion. *Johnson v. Armfield*, 2003 S.D. 134, ¶15.

D. The County's Notice of Review on SDCL 31-28-11 is a Red Herring.

1. The Statutes.

SDCL 31-32-10 imposes a statutory duty upon the County to act promptly to prevent accidents and injuries by erecting a guard either over a defect or across the road as follows:

> If any highway, culvert, or bridge is damaged by flood, fire or other cause, to the extent that it endangers the safety of public travel, the governing body responsible for the maintenance of such highway, culvert, or bridge, shall within forty-eight hours of receiving notice of such danger, erect guards over such defect or across such highway of sufficient height, width, and strength to guard the public from accident or injury and shall repair

[5] At the risk of being "grandiose," Ryan is going to mainly rely upon his argument in Appellant's Brief on this issue.

> the damage or provide an alternative means of crossing within a reasonable time after receiving notice of the danger. The governing body shall erect a similar guard across any abandoned public highway, culvert, or bridge. Any officer who violates any of the provisions of this section commits a petty offense.

SDCL 31-28-6 requires the placement of a warning sign for the benefit of approaching traffic when defects in a county highway exist:

> The public board or officer whose duty it is to repair or maintain any public highway shall erect and maintain at points in conformity with standard uniform traffic control practices on each side of any sharp turn, blind crossing, or other point of danger on such highway, except railway crossings marked as required in § 31-28-7, a substantial and conspicuous warning sign. The sign shall be on the right-hand side of the highway approaching such point of danger. Failure to comply with the provisions of this section is a Class 1 misdemeanor.

SDCL 31-28-11 provides:

> On any street or road constructed with federal aid, the location, form, character of informational regulatory warning signs, curb and pavement or other markings and traffic signals, shall conform to uniform national signing standards.

2. The Rules of Construction.

The law of statutory interpretation is well settled. This Court has previously stated:

> Questions of law such as statutory interpretation are reviewed by the Court de novo . . . . The purpose of statutory construction is to discover the true intention of the law which is to be ascertained primarily from the language expressed in the statute. The intent of a statute is determined from what the [L]egislature said, rather than what the courts think it should have said, and the court must confine itself to the language used. Words and phrases in a statute must be given their plain meaning and effect. When the language in a statute is clear, certain and unambiguous, there is no reason for construction, and the Court's only function is to declare the meaning of the statute as clearly expressed. Since statutes must be construed according to their intent, the intent must be determined from the statute as a whole, as well as enactments relating to the same subject. But, in

> construing statutes together it is presumed that the [L]egislature did not intend an absurd or unreasonable result.

In re Estate of Ricard, 2014 S.D. 54, ¶ 8, 851 N.W.2d 753, 755–56 (quoting *In re Estate of Hamilton,* 2012 S.D. 34, ¶ 7, 814 N.W.2d 141, 143).

3. The County Conceded the MUTCD Applies.

Almost 12 years before Ryan's accident, the Court had an opportunity to address the use of homemade signs used by the Howard Township in conjunction with a washed out road and the Township's liability under the very same statutes at issue here. *Fritz v. Howard Township,* 1997 S.D. 122, 570 N.W.2d, 240 (1997). Fritz claimed, and the Township conceded, that reference in SDCL 31-28-6 to "uniform traffic control practices" dictates that the sign conform to the Manual on Uniform Traffic Control Devices (MUTCD). *Fritz,* 1997 S.D. 122, ¶16. In citing to SDCL 31-28-11, the Court noted, "The record does not disclose whether this road was 'constructed with federal aid.' Regardless, the provision in SDCL 31–28–6 pertaining to "uniform traffic control practices" indicates the MUTCD. As noted, this point is conceded by Township." *Fritz,* 1997 S.D. 122, ¶16, fn. 5. In this case, the County has also conceded that the MUTCD applies.

In the opening statement, the County's attorney told the jury that ". . . . The County has an obligation under the [MUTCD] to put up signs that are specific. . . . So the County isn't trying to explain to you that these signs complied with the MUTCD, they didn't. That's a given." TT 1 pg. 16.[6] Later on in his opening statement, the County's attorney further told the jury that, "The MUTCD is the law. We're not arguing about that. The signs that were in place did not comply with the MUTCD. . . ." TT 1, pg. 26.

[6] "TT 1" refers to the trial transcript for September 10, 2014.

Rocky Sarsland, a County Highway employee since 2007, when shown Exhibit 10 [excerpts of the MUTCD], agreed the MUTCD Manual was the manual he was trained to follow when faced with a dangerous condition in a roadway. TT 1, pg. 77. Brad Bowers, the County Highway Superintendent since 2004, testified that for purposes of proper signage, the Harding County Highway Department relies on the MUTCD in order to comply with the law. He agreed the MUTCD requires proper signage and proper undertaking to warn the public of a danger ahead. TT 1, pg. 96. Mr. Bowers further agreed that the washout was a dangerous situation and the signage used did not comply with what the law requires – the MUTCD. TT 1, page 97.

The admissions of the County's attorney, County Highway Department employee, and County Highway Superintendent were judicial admissions that the MUTCD applied to the County and its obligations concerning the dangerous condition on CR 734. A judicial admission is binding on the party who makes it and an admission of fact by an attorney is also binding on that party. *Stemper v. Stemper*, 415 N.W.2d 159, 160 (S.D.1987).

As result, just like in *Fritz v. Howard Township*, 1997 S.D. 122, 570 N.W.2d (1997), the issue of whether federal aid was or was not used to construct CR 734 is a moot issue. Harding County conceded that the MUTCD applied to the County and its obligations concerning the dangerous condition on CR 734.

4. Construction of CR 734 With Federal Aid is Not a Condition Precedent to Determining the County's Liability to Ryan.

SDCL 31-28-11 provides:

> On any street or road constructed with federal aid, the location, form, character of informational regulatory warning signs, curb and pavement or

other markings and traffic signals, shall conform to uniform national signing standards.

The County appears to argue that it cannot be subject to liability if CR 734 was not constructed with federal aid. The plain meaning of the statute indicates that "if constructed with federal aid" then informational regulatory warning signs etc. shall conform to uniform national signing standards. These clearly would apply to curve signs, speed limit signs etc. The plain meaning of the statute cannot be read to require conformance with uniform national signing standards "only if constructed with federal aid." Such a reading would lead to an absurdity in light of the other statutes which express the obligations of a county when faced with a dangerous condition which endangers the safety of the public.

It is also clear that the statutory intent of SDCL 31-28-11 has nothing to do with a County's obligations pursuant to SDCL 31-32-10 or SDCL 31-28-6. The main obligation of a county under SDCL 31-32-10 ***is to repair all defects in a county highway which endanger the safety of public travel.*** The statute also imposes a ***secondary duty upon the county to erect temporary guards over defects***, where needed, until repairs are made. *Kiel v. DeSmet Township*, 90 S.D. 492, 242 N.W.2d 153, 155 (1976). SDCL 31-28-6 mandates placement of warning signs in conformity with "standard uniform control practices" at certain places "or other point of danger." *Fritz v. Howard Township*, 1997 S.D. 122,¶ 13, 570 N.W.2d 240, 243 (1997). "Uniform traffic control practices" refers to the MUTCD. *Fritz,* 1997 S.D. 122,¶ 16. Nothing in SDCL 31-28-11 indicates that the other statutes are affected by it, regardless of its interpretation, or ultimate meaning.

Conclusion

Wherefore, Ryan respectfully requests this case be reversed, and remanded to Circuit Court for a trial on the issue of his damages only.

Respectfully submitted this 28th day of May, 2015.

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ORAL ARGUMENT IS RESPECTFULLY REQUESTED

Certificate of Service

I, Robert L. Morris, hereby certify that on the 28th day of May, 2015, I caused one (1) copy of the foregoing **APPELLANT'S REPLY BRIEF** to be served upon:

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/s/ Robert L. Morris
Robert L. Morris

Certificate of Filing

I, Robert L. Morris, attorney for Appellant, certify that I mailed one (1) original plus two (2) copies of **APPELLANT'S REPLY BRIEF** to the Clerk of Court, South Dakota Supreme Court, 500 East Capitol, Pierre, South Dakota 57501-5070, on May 28, 2015.

I also certify that I sent one (1) copy of **APPELLANT'S REPLY BRIEF** in Word format to the Clerk of Court, South Dakota Supreme Court via electronic mail (e-mail) to the following e-mail address: scclerkbriefs@ujs.state.sd.us, on May 28, 2015.

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Certificate of Compliance

In compliance with SDCL 15-26A-66(4), I hereby certify that the font size used in Appellant's Reply Brief is Times New Roman 12. The total word count for Appellant's Reply Brief is 3,133.

Dated this 28th day of May, 2015.

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