

TUESDAY, OCTOBER 6, 2009
9:00 A.M.

NO. 1

#24921, #24930 (N.O.R.),

#25062

TANNER WANGSNESS,
Plaintiff and Appellant,

vs.

BUILDER'S CASHWAY, INC.,
Defendant and Appellee.

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(FOR APPELLANT)

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(FOR APPELLEE)

The Honorable Jon R. Erickson
Third Judicial Circuit
Hand County

(CIV 06-09)

20-20-10

LEGAL ISSUES

I. TRIAL COURT ERRED IN INSTRUCTING THE JURY ON ASSUMPTION OF THE RISK AS THE FACTS DO NOT SUPPORT SUCH AN INSTRUCTION. SDCL 15-6-8(c) Baddou v. Hall, 756 NW2nd 554, 2008 SD 90, Kostel v. Schwartz, 756 NW2nd 363, 2008 SD 85, Carpenter v. Rapids City Red Dogs, LLC, 751 NW2nd 292, 2008 SD 40, Tiede v. Cortrust Bank, NA., 748 NW2nd 748, 2008 SD 31, Smith v. Smith, 278 NW2d 155 (SD 1979) Peterson v. Safeway Steel Scaffolds Co., 400 NW2d 909 (SD 1987), Tim Duda v. Phatty McGees, Inc., doing d/b/a Hooky Jacks v. Willie Guerrero, Ray v. Downes, 1998 SD 40, ¶11, 576 NW2d 896, 898 (quoting Mack v. Kranz Farms, Inc., 1996 SD 63, ¶9, 548 NW2d 812, 814 (citation omitted), Id. ¶15 (quoting Westover v. East River Elec. Power Coop., Inc., 488 NW2d 892, 901 (SD 1992)).

II. TRIAL COURT ERRED IN FAILING TO ADMIT TESTIMONY OF TREATING DOCTOR THAT INJURY PROBABLY CAUSED LOSS OF MEMORY. OBJECTION OF FAILURE TO DISCLOSE PRIOR TO DEPOSITION.

This objection was made on "TT PAGE 869" which is a Clerk of Courts note on Cashway's objection to Dr. Joel Huber's testimony which was sustained. (See Ex 7 p. 869 attached 2nd paragraph p 2) Federal Rules of Civil Procedure 2007 Deposition and Discovery Subdivision (b)(4)-Trial Preparation, Kurtz v. Squires, 757 NW2d 407, 2008 SD 101, Clark v. Clark, 753 NW2d 423, 2008 SD 59, Fin-Ag, Inc. v. Cimpl's, Inc., 754 NW2nd 1, 2008 SD 47.

III. THE COURT ERRED IN FAILING TO ALLOW EVIDENCE THAT CASHWAY HAD KNOWLEDGE OF A SHIELD PLACED ON THE ROTATING SHAFT IN THE YEAR 2000 OVER 2 YEARS BEFORE TANNER'S INJURY ON AUGUST 4, 2003 AND AN ERROR OF THE COURT GIVING NEW INSTRUCTION #29 ADVISING THE JURY COULD ONLY CONSIDER THE PRODUCT DEFECTIVE AS OF THE DATE OF SALE. "TT V.2 p213

L13-14 and TT V.2 p212 L14-17, p213 L23-p214 L3" Navistar v. Navistar International Transportation Corp., 46 Fed 3rd 844 at 850 (8th Circuit 1995)

IV. TRIAL JUDGE FAILED TO APPLY THE COLLATERAL SOURCE RULE. Degen v. Bayman, 90 SD 400, 241 NW2d 703 (1976), Papke v. Harbert, ¶79 2007 SD 87, 738 NW 2d 510

By Notice of Review filed in Appeal # 24921, Appellee raises the following issues:

- I. Whether the Circuit Court erred in denying Appellee Builders Cashway, Inc.'s Motion for Summary Judgment pursuant to SDCL 15-6-56(d).

SDCL 20-9-9

Engberg v. Ford Motor Co., 87 S.D. 195, 204, 205 N.W.2d 104

Peterson v. Safeway Steel Scaffolds Co., 400 N.W.2d 909, 915 (S.D. 1987).

Robinson v. Brandtjen & Kluge, Inc., 500 F.3d 691, 694-97 (8th Cir. 2007)

Brech v. J.C. Penney Co., 532 F. Supp. 916 (D.S.D. 1982)

Anderson v. M.W. Kellogg Co., 766 P.2d 637 (Colo. 1988).

- II. Whether the Circuit Court erred in denying Appellee Builders Cashway, Inc.'s Motion in Limine to Exclude Expert Testimony of Dr. Daniel Humberg and Jim Suhr.

State v. Lee, 599 N.W.2d 630, 633 (S.D. 1999)

Zens v. Harrison, 538 N.W.2d 794, 795 (S.D. 1995)