IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Nos. 29114, 29138

LISA A. TAMMEN,

Plaintiff and Appellant,

and

RANDALL R. JURGENS,

Plaintiff and Appellee,

vs.

GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally,

Defendants and Appellees.

* * * * * * * * * * * * * * *

LISA A. TAMMEN,

Plaintiff and Appellee,

and

RANDALL R. JURGENS,

Plaintiff and Appellant,

vs.

GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally,

Defendants and Appellees.

Appeal from the Circuit Court
Sixth Judicial Circuit
Hughes County, South Dakota

The Honorable Thomas L. Trimble, Circuit Court Judge, Retired

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BRIEF OF APPELLANT LISA A. TAMMEN

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Notice of Appeal of Plaintiff and Appellant Lisa A. Tammen filed September 3, 2019

Notice of Appeal of Plaintiff and Appellant Randall R. Jurgens filed September 23, 2019

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PRELIMINARY STATEMENT

Citations to the Certified Record are "R." followed by the applicable page number(s) in the Clerk's Index. Appellants Lisa A. Tammen and Randall R. Jurgens are collectively referred to as "Plaintiffs," and will be referred to separately as "Plaintiff Tammen" and "Plaintiff Jurgens." Appellees will collectively be referred to as "Defendants," and will be referred to separately as "City of Pierre" and "PVFD." Defendant Gerrit A. Tronvold will be referred to as "Tronvold." References to Plaintiff Tammen's Appendix are "Tammen App." followed by the applicable page number(s).

JURISDICTIONAL STATEMENT

Plaintiff Tammen appeals from the Order Granting City of Pierre's Motion for Summary Judgment and Granting Pierre Volunteer Fire Department's Motion for Summary Judgment, dated August 8, 2019. Tammen App.5-15. An Amended Judgment was entered on August 26, 2019, granting summary judgment and directing entry of final judgment pursuant to SDCL § 15-6-54(b) on the claims brought by Plaintiffs against Defendants. Tammen App.1-4. Notice of Entry of Amended Judgment was filed on August 27, 2019. R.1020-25. Plaintiff Tammen timely filed a Notice of Appeal on September 3, 2019. R.1026-28.

REQUEST FOR ORAL ARGUMENT

Plaintiff Tammen respectfully requests oral argument.

STATEMENT OF THE ISSUES

I. Whether the Pierre Volunteer Fire Department's transportation requirements for its employees create an exception to the "going and coming" rule, thus placing its employee Tronvold within the scope of his employment at the time of the collision.

The circuit court erroneously held as a matter of law that Tronvold was not acting within the scope of his employment at the time of the collision.

- *South Dakota Public Entity Pool for Liability v. Winger*, 1997 SD 77, 566 N.W.2d 125
- *Gruhlke v. Sioux Empire Federal Credit Union, Inc.*, 2008 SD 89, 756 N.W.2d 399
- *Carter v. Reynolds*, 815 A.2d 460 (N.J. 2003)
- *Terveen v. South Dakota Dept. of Transp.*, 2015 SD 10, 861 N.W.2d 775

II. Whether the City of Pierre's Governmental Liability Policy excluding liability for "Fire Department, Fire Fighting activities or Fire Department vehicles" is applicable in this case.

The circuit court erroneously held that the City of Pierre's governmental immunity was not waived because the Governmental Liability Policy Endorsement excludes coverage for "Fire Department, Fire Fighting activities or Fire Department Vehicles."

- SDCL § 21-32A-2

- SDCL § 21-32A-1

- *Cromwell v. Rapid City Police Dept.*, 2001 SD 100, 632 N.W.2d 20

III. Whether the Pierre Volunteer Fire Department's Governmental Liability Endorsement is void as against public policy.

The circuit court erroneously held that the PVFD's Governmental Liability Endorsement is not void as contrary to public policy, even though the endorsement provides the PVFD with comprehensive coverage for damages to an insured's property while denying liability coverage to persons injured by an insured.

- SDCL § 21-32A-1

- *Cromwell v. Rapid City Police Department*, 2001 SD 100, 632 N.W.2d 20

- *Kremer v. American Family Mutual Insurance Company*, 501 N.W.2d 765 (S.D. 1993)

- *A. Unruh Chiropractic Clinic v. DeSmet Insurance Company of South Dakota*, 2010 SD 36, 782 N.W.2d 367

- *National Farmers Union Property and Casualty Company v. Bang*, 516 N.W.2d 313 (S.D. 1994)

STATEMENT OF FACTS

At 6:06 p.m. on August 1, 2016, Tronvold was traveling in his 2002 Chevy pickup southwest on Grey Goose Road from his home at 135 Dove

Road, which is approximately ten miles north of Pierre, South Dakota. Tammen App.116-22; R.874. Tronvold was driving to the Pierre Fire Station located at 215 West Dakota Avenue in Pierre to attend a mandatory fire department training session. R.881-82; R.595. At the same time, Plaintiffs were traveling westbound on South Dakota Highway 1804. Tammen App.116-22. Plaintiff Jurgens was driving a motorcycle on which Plaintiff Tammen was the passenger. Tammen App.116-22. Tronvold proceeded through a stop sign and made a left turn from Grey Goose Road onto Highway 1804 directly in front of Plaintiffs' motorcycle. Tammen App.116-22. Due to his grossly negligent and reckless conduct, Plaintiffs could not avoid colliding with Tronvold's pickup truck. Tammen App.116-22. As a result of the accident, Plaintiffs suffered serious injuries and were airlifted to Avera McKennan Hospital in Sioux Falls. Tammen App.116-22. Plaintiffs were each treated for life-threatening injuries and spent nearly a month in the hospital recovering from those injuries. R.85. Ultimately, each Plaintiff lost their left leg and has had to endure the pain and suffering that accompanies their permanent injuries. R.85. Tronvold was cited for failure to yield pursuant to SDCL § 32-29-2.1 and for a seatbelt violation. Tammen App.117. He pled guilty to those citations.

Tronvold was a volunteer firefighter for PVFD. R.861. PVFD is a corporation that is funded and regulated by the City of Pierre. R.598; R.603-04. PVFD is also a part of the governmental function of the City of Pierre and has no independent finances or stockholders. R.645; Tammen App.128-30. At the time of the accident, Tronvold was driving to the fire station to attend monthly engine company training. R.878-79. Tronvold was driving his own vehicle, because he was required to have his own mode of reliable transportation to get expeditiously to the station or the scene of a fire. R.869. Members of PVFD are required to have their own personal vehicle. R.599. Fire Department Chief Ian Paul is unable to recall any person who has ever been a member of PVFD who did not have their own vehicle to respond to a fire. R.606. He also agrees that it would be difficult to be an effective fireman without having their own personal transportation to respond to calls. R.606. PVFD derives a benefit from its employees when the employees have their own mode of transportation to fulfill their duties. R.627. This is because it is typical that members of PVFD either come from their other jobs or their homes to the scene of a fire or to the fire station for training. R.609-10. Fire Chief Paul agrees that a fireman having a personal vehicle to transport him to the station or training benefits the PVFD because it transports the fireman to the place they need to be to fulfill their duties in a timely manner. R.610. He also

agrees that a fireman attending a training session benefits the PVFD as a whole, because a better trained fireman is a more effective fireman. R.610. If a fireman does not have transportation to get to the fire station, that fireman could not receive training. R.612. Fire Chief Paul agrees that it is "essential to the Pierre Volunteer Fire Department that a fireman have transportation to get to training or fires." R.613. He further agrees that it would be essential and instrumental for the fireman to have transportation to go to the station to attend training sessions. R.614.

In addition to being required to have their own reliable mode of transportation, members of the PVFD are required to attend a certain number of engine company training hours. R.879. In 2016, PVFD required its volunteers to attend as many monthly meetings as they could get to and encouraged its volunteers to go to the monthly meetings. R.935-36. The Bylaws of Tronvold's engine company required all members to make reasonable efforts to attend all company meetings, drills and other functions. R.605.

Further, at the time of the accident, Tronvold had all of his equipment with him, which was issued and owned by the PVFD. R.884-85. His truck also displayed a license plate with the insignia "FIRE DEPT" on it. R.653-54. Each member of the PVFD was issued certain protective fire equipment for use

in responding to fires and for use for training purposes. R.607-08. Each firefighter, including Tronvold, would be expected to bring the personal protective equipment issued by PVFD with him to training sessions. R.608. Tronvold kept the PVFD training equipment in his personal vehicle, which would be typical practice for a member of the PVFD. R.607-08.

The PVFD exercises control over its volunteer firefighters' conduct with regard to driving their own personal vehicles, as it has certain rules in place. R.616. Driving to a training session is naturally and incidentally related to the duties of a member of the PVFD. R.615. The PVFD regulations govern where a fireman can park when responding to an incident, how quickly a fireman can come into an incident scene, and rules that a fireman may not pass another firefighter in responding to an incident. R. 616. The PVFD also regulates firefighters' use of their personal vehicle by dictating that a firefighter must obey the rules of the road when responding to a fire in their personal vehicles and where and when a firefighter may or may not use blue lights in a vehicle. R.616. Members of the PVFD are also issued what is known as a half-plate, which identifies firemen as members of the PVFD, like the one that Tronvold had on his truck. R.617.

Furthermore, the PVFD also issues a Best Practices Manual, which provides its members with the best practices to follow when they are at PVFD

events. R.618. The PVFD Best Practices Manual was in effect as of the date of the accident on August 1, 2016. R.619. The Manual dictates that one of the best practices is that "firemen should carry their issued protective clothing and pagers" at all times, while only keeping their protective clothing at the fire station when they have their captain's approval. R.620.

At the time of the accident, the PVFD had a commercial auto liability policy that provided coverage for accidents. R.275-455. Additionally, the City of Pierre was insured by the South Dakota Public Assurance Alliance. Tammen App.88-110; Tammen App.123-27.

STATEMENT OF THE CASE

On November 7, 2016, Plaintiffs commenced a lawsuit against Tronvold by service of Summons and Complaint. R.3-7. Plaintiffs alleged that Tronvold was negligent in operating his motor vehicle, causing severe injuries to Plaintiffs. R.3-6. During discovery, Plaintiffs learned that Tronvold was working as a volunteer fireman for PVFD at the time of the accident and that the City of Pierre grants exclusive authority to the Pierre Fire Department for "preventing, detecting, reporting, suppressing and extinguishing fires within and for the city. . . ." Section 2-3-401 of Article 3 of Chapter 3 of the Municipal Ordinances of the City of Pierre. Accordingly, Plaintiffs filed a First Amended Complaint on October 4, 2017. R.83-95.

Plaintiffs' First Amended Complaint named the City of Pierre and PVFD as additional defendants. R.79-95. City of Pierre admitted service of such on September 26, 2017. R.78. PVFD admitted service on October 2, 2017. R.98. On October 20, 2017, City of Pierre filed an Answer to Plaintiffs' Amended Complaint. R.99-101. On October 26, 2017, PVFD filed a Separate Answer to Plaintiffs' Amended Complaint. R.102-07. Both Defendants denied liability and alleged that Tronvold was not working within the scope of his employment at the time of the accident. R.99-107.

On February 1, 2019, following further discovery conducted by all parties, Defendants moved for summary judgment. R.161-62; R.246-47. Defendants both contended that Tronvold was not working within the scope of his employment with PVFD under the "coming and going" rule, and that Defendants were entitled to governmental immunity. R.163-82; R.256-68. On June 12, 2019, following briefing by both parties, a hearing was held before the Honorable Retired Judge Thomas Trimble at the Hughes County Courthouse. R.499-500; R.502-03; R.1100-93.

On August 8, 2019, the circuit court issued an Order Granting City of Pierre's Motion for Summary Judgment and Granting Pierre Volunteer Fire Department's Motion for Summary Judgment. Tammen App.5-15. In its opinion, the circuit court rejected the required vehicle exception to the "going

and coming" rule and determined that Tronvold's commute was not within the scope of his agency, despite the fact that he was required to use his own vehicle and carry equipment issued by PVFD on his way to engine training. Tammen App.8-10. Further, the circuit court held that Defendants had governmental immunity that had not been waived. Tammen App.10-13. The circuit court did, however, recognize that if Tronvold were acting within the scope of his employment, there would be a question of material fact for the jury to consider whether statutory immunity under SDCL § 20-9-45 applied, or whether Tronvold was acting with gross negligence, which would be attributable to Defendants. Tammen App.13-14. On August 13, 2019, the circuit court entered Summary Judgment in favor of Defendants. Tammen App.131-32. On August 26, 2019, by stipulation of the parties, the circuit court entered an Amended Judgment certifying the matter as a final judgment pursuant to SDCL § 15-6-54(b). Tammen App.1-4. On September 3, 2019, Plaintiff Tammen filed her Notice of Appeal and Docketing Statement, and ordered the transcript from the June 12, 2019 summary judgment hearing. R.1026-50.

ARGUMENT

Standard of Review

The South Dakota Supreme Court reviews the circuit court's entry of summary judgment under a *de novo* standard of review. *Zochert v. Protective*

Life Insurance Co., 2018 SD 84, ¶ 18, 921 N.W.2d 479, 486 (quoting *Harvieux v. Progressive N. Ins. Co.*, 2018 SD 52, ¶ 9, 915 N.W.2d 697, 700). In determining whether summary judgment should be granted, "[t]he burden of proof is upon the movant to show clearly that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law." *Cooper v. James*, 2001 SD 59, ¶ 6, 627 N.W.2d 784, 787. "It is well settled that 'summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law."'" *Green v. Morgan, Theeler, Cogley & Peterson*, 1998 SD 16, ¶ 6, 575 N.W.2d 457, 459. Accordingly, to obtain summary judgment in this case, Defendants were required to demonstrate "the absence of any genuine issue of material fact and entitlement to judgment on the merits as a matter of law." *Stern Oil Co., Inc. v. Brown*, 2012 SD 56, ¶ 8, 817 N.W.2d 395, 399. Therefore, "[a]ll reasonable inferences drawn from the facts must be viewed in favor of the non-moving party." *Id.* The South Dakota Supreme Court has often reminded us that "[s]ummary judgment is not the proper method to dispose of factual questions." *Id.* ¶ 9 (citing *Bozied v. City of Brookings*, 2001 SD 150, ¶ 8, 638 N.W.2d 264, 268).

Generally, whether an act was within the scope of employment is a question of fact to be determined by a jury. *See Gruhlke v. Sioux Empire Federal Credit Union, Inc.*, 2008 SD 89, ¶ 14, 756 N.W.2d 399, 407. In this case, there are genuine issues of material fact that must be decided by a jury to determine whether Tronvold was acting within the scope of his employment for the PVFD and City of Pierre.

The South Dakota Supreme Court also reviews insurance contracts under a *de novo* standard, including whether the contract is ambiguous. *Friesz ex rel Friesz v. Farm & City Ins. Co.*, 2000 SD 152, ¶ 5, 619 N.W.2d 677, 679 (citations omitted). "Where the provisions of an insurance policy are fairly susceptible of different interpretations, the interpretation most favorable to the insured should be adopted." *Id.* ¶ 8.

I. Whether the Pierre Volunteer Fire Department's transportation requirements for its employees create an exception to the "going and coming" rule, thus placing its employee Tronvold within the scope of his employment at the time of the collision.

In this case, at the time of the collision, Tronvold was acting as an agent within the scope of his employment, because he was required to drive his own personal vehicle, while carrying equipment issued to him by the PVFD, to engine company training for the benefit of the PVFD and the City of Pierre. Therefore, Tronvold was excepted from the "going and coming" rule, upon

which the circuit court erroneously relied. As established by the Pierre Volunteer Fire Department Extension of Corporate Charter, the PVFD is a corporation which "is a part of the Governmental Functions of the City of Pierre, South Dakota … ." Tammen App.130. PVFD acknowledges that it is "the fire department for the City of Pierre"; "it is controlled by the City of Pierre and performs the governmental function of protecting citizens when fires occur"; that the "PVFD equipment is owned by the City of Pierre"; and its "real property infrastructure utilized by the PVFD was funded by the City of Pierre." R.258-59. Thus, as a volunteer fireman, operating under the direction of the Pierre Volunteer Fire Department, a governmental arm of the City of Pierre, there can be no dispute that Tronvold was an employee/volunteer, and an agent, of both Defendants Pierre Volunteer Fire Department and the City of Pierre.

When determining whether an employee was working in the scope of employment, this Court has stated that it will resort to case law regarding workers' compensation, "because those decisions are useful in exploring the themes surrounding scope of employment questions." *South Dakota Public Entity Pool for Liability v. Winger*, 1997 SD 77, ¶ 8, 566 N.W.2d 125, 128. Many of the cases discussing whether an employee was acting in the scope of employment address the "going and coming" rule. South Dakota first

recognized the "going and coming" rule in *Driessen v. Schiefelbein*, which states that "an injury sustained by an employee while going to or from his work is not compensable." *Driessen v. Schiefelbein*, 297 N.W.2d 685, 687 (S.D. 1941). The reason for this rule is that commuting to or from work is generally considered the employee's own responsibility as it does not advance the employer's interest during the time of that commute. However, there are several exceptions to the "going and coming" rule that have been recognized in South Dakota and across several other jurisdictions.

One recognized exception to the going and coming rule is the "required vehicle exception." While the South Dakota Supreme Court has not specifically addressed the required vehicle exception, the South Dakota Supreme Court did recognize a similar exception in *Pickrel v. Martin Beach, Inc.*, 124 N.W.2d 182 (S.D. 1963). In *Pickrel*, an employee was found to have fit the exception to the "going and coming" rule because the vehicle he used was furnished to him by his employer. *Id*. at 183-84. The employee was traveling as a benefit to the employer and was driving the vehicle furnished to him according to the express terms of the contract of employment. *Id*. at 184. Because of the requirements of his employer and the circumstances of the case, the Court found that the employee was acting within the course and scope of his employment as an exception to the "going and coming" rule. *Id.*

South Dakota has determined some of the controlling factors that the court may consider in determining whether "an employee's normal commute to or from work . . . falls outside of the 'going and coming' rule." *See Mudlin v. Hills Materials Co.*, 2005 SD 64, ¶ 18, 698 N.W.2d 67, 74 (finding employee required to use her own vehicle to travel to job site was an exception to the "going and coming" rule). Those factors include "travel pay, custom and usage, and company policy." *Id.* Thus, South Dakota, while not having had an opportunity to specifically address the required vehicle exception, has recognized that there are similar exceptions to the going and coming rule.

This Court has also noted that it is important to review "[c]onsiderations of time, place, and circumstance" in evaluating whether an employee was acting within the scope of employment. *Gruhlke v. Sioux Empire Federal Credit Union, Inc.*, 2008 SD 89, ¶ 14, 756 N.W.2d 399, 407 (quoting *South Dakota Public Entity Pool for Liability v. Winger*, 1997 SD 77, ¶ 9, 566 N.W.2d 125, 128). In doing so, the Court named the following relevant factors to be considered: "(1) did the officer's acts occur substantially within the time and space limits authorized by the employment; (2) were the actions motivated, at least in part, by a purpose to serve the employer; and (3) were the actions of a kind that the officer was hired to perform." *Id.* Further, the Court stated that "[i]f the officer's actions were at least in part motivated by a purpose to serve

the employer, then those actions cannot be the acts of a third party." *Id.* In citing to the Restatement (Second) of Agency, this Court has held that "[a]n officer's actions are outside the scope of employment only if they are 'done with no intention to perform [them] as a[n] . . . incident to a service. . . .'" *Id.* (quoting Restatement (Second) of Agency § 235). In this case, the Court should find that there is at least a question of fact as to whether Tronvold was acting within the scope of his employment when he took his own vehicle, as he was required to do for the benefit of the PVFD, with the intention of going to company engine training.

Several other jurisdictions have specifically recognized the "required vehicle exception" to the "going and coming" rule in the liability context. In *Carter v. Reynolds*, 815 A.2d 460 (N.J. 2003), the Supreme Court of New Jersey held that the employee came within the "required vehicle exception" to the general rule that precluded vicarious liability under a theory of *respondeat superior*. *Carter*, 815 A.2d at 469-70. The court in *Carter* determined that "[d]riving a required vehicle . . . satisfies the control and benefit elements of *respondeat superior*" because the employee is providing an "essential instrumentality" to perform the employer's work and because "the employer benefits by not having to have available an office car and yet possessing a means by which off-site visits can be performed by its employees." *Id.* at 468

(citation omitted). Accordingly, the court concluded that the employee's use of her own vehicle "to advance her employer's business interests fell within the dual purpose, required-vehicle exception to the going and coming rule and placed her squarely . . . within . . . the scope of her employment at the time of the accident." *Id.* at 469. The court stated:

> There are, however, exceptions to the going and coming rule. Those exceptions are also rooted in workers' compensation law but have been engrafted onto tort law. *See, e.g.*, 1 *Larson's Workers' Compensation Law*, §§ 14.05, 15.05, 16.02 (2002). Thus, *respondeat superior* has been held to apply to a situation involving commuting when: (1) the employee is engaged in a special errand or mission on the employer's behalf; (2) the employer requires the employee to drive his or her personal vehicle to work so that the vehicle may be used for work-related tasks; and (3) the employee is "on call".
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> …
>
> It makes sense that those exceptions to the going and coming rule exist. Unlike ordinary commutation in which an employer really has no interest, each of the noted exceptions involves some control over the employee's actions and a palpable benefit to be reaped by the employer, thus squarely placing such conduct back into the vicarious liability construct of the Restatement.

Id. at 467. The New Jersey Supreme Court found that the employer was vicariously liable for the employee's accident even though it occurred as the employee was traveling home from work because the employee spent one-third of her work time on the road, was required to have her own car available for her

job, and because the use of the employee's own vehicle provided an "essential instrumentality for the performance of the employer's work." *Id*. at 468.

In *Lobo v. Tamco,* 182 Ca.App.4th 297 (2010), a deputy sheriff was killed in a motor vehicle accident caused by Luis Del Rosario. The accident occurred when Del Rosario was leaving the premises of his employer, Tamco. As he drove out of the driveway and onto the highway, he failed to notice three motorcycle deputies approaching with lights and sirens activated. One of the deputies was unable to avoid colliding with Del Rosario's car and was killed. *Id*. at 299. The deputy's widow filed a claim against Tamco alleging that Del Rosario was acting within the course and scope of his employment at the time of the accident. Defendant Tamco moved for summary judgment arguing that under the "going and coming" rule, employers are generally exempt from liability for tortious acts committed by employees while on their way to and from work. *Id*. at 301. The California Court of Appeals denied Tamco's motion for summary judgment finding that Del Rosario was acting within the course and scope of his employment under the required vehicle exception. The court stated:

> A well-known exception to the going-and-coming rule arises *where the use of the car gives some incidental benefit to the employer*. Thus, the key inquiry is whether there is an incidental benefit derived by the employer." This exception to the going and coming rule . . . has been referred to as the "required-vehicle" exception. The exception can apply if the use of a personally

> owned vehicle is either an express or implied condition of employment, or if the employee has agreed, expressly or implicitly, to make the vehicle available as an accommodation to the employer and the employer has 'reasonably come to rely upon its use and [to] expect the employee to make the vehicle available on a regular basis while still not requiring it as a condition of employment.'

Id. (internal citations omitted). The Court further noted that a plaintiff's case should not be defeated if "the employer requires or reasonably relies upon the employee to make his personal vehicle available to use for the employer's benefit and the employer derives a benefit from the availability of the vehicle . . . ." *Id*. at 303.

In *Konradi v. United States of America*, 919 F.2d 1207 (7th Cir. 1990), rural mailman, Robert Farringer, while driving to work one morning, struck a car driven by the plaintiff's decedent, Glenn Konradi, killing him. The U.S. District Court dismissed the case on summary judgment finding that because Farringer was commuting to his job, the accident did not occur within the scope of Farringer's employment by the postal service. *Id*. at 1208, 1209. The Seventh Circuit, in a detailed opinion written by Judge Posner, found that the district court "acted prematurely in granting summary judgment." *Id*. at 1213. There were numerous factual disputes to be determined. Specifically, the court analyzed the fact that the employer required the employee to furnish their own vehicle for their routes. *Id.* Because, Farringer conferred a benefit on his

employer by bringing an essential instrumentality of the employer's business when driving his own vehicle to work as required, which precluded summary judgment. *Id*. at 1211, 1213. After a thorough review of numerous aspects of the case, the Seventh Circuit reversed the district court's order granting summary judgment for the United States and remanded the case for further proceedings. *Id*. at 1214.

In *Harleysville Mutual Ins. Co. v. MacDonald*, 2005 WL 8159382 (S.D. W.Va. March 31, 2005), while driving home from his job at Hokie Pizza, Steven MacDonald skidded through a stop sign and hit the side of a car in which Deborah Simmons was riding. Simmons brought suit against MacDonald and his mother (the owner of the vehicle) and subsequently amended her complaint to add Hokie Pizza and its owners as defendants alleging that MacDonald was conducting business for Hokie Pizza at the time of the accident. *Id*. at *1. Hokie Pizza's insurer then filed a declaratory judgment action regarding its obligations under the liability policies issued to Hokie Pizza and its owners. *Id*. Ms. Simmons argued that the insurer was required to provide coverage to MacDonald because MacDonald was required to have and use his own vehicle at work at Hokie Pizza. *Id.* Therefore, his act in driving home on the night of the accident fell within the scope of his employment. *Id.* All parties filed motions for summary judgment on the issue of whether

MacDonald was acting within the course and scope of his employment with Hokie Pizza as he drove home from his job at the time of the accident. *Id.* The United States District Court for the District of West Virginia denied summary judgment. Recognizing that the "required vehicle exception" applies when "the employer requires the employee to drive his or her personal vehicle to work so that the vehicle may be used for work-related tasks." *Id*. at *4 (citing *Carter*, 175 N.J. at 414). The court found that the West Virginia Supreme Court of Appeals would likely adopt the required vehicle exception to the going and coming rule in analyzing scope of employment issues. *Id.* at *5. Further, the court determined that issues of fact existed as to whether MacDonald had deviated from his ride home substantially enough to remove himself from the usual and ordinary course and activities of his employment and therefore denied summary judgment to all parties. *Id*. at *6.

In *Huntsinger v. Glass Containers Corp*., 22 Cal.App.3d 803 (1972), the California Court of Appeals, in recognizing the required vehicle exception to the going and coming rule, explained the exception:

> While it is undoubtedly true that the rule of liberal construction mandated by Labor Code, section 3202 has affected the development of exceptions to the 'going and coming' rule in the workmen's compensation field, and while it may also be true that, historically, the rule and its exceptions in the tort field resulted from other considerations. *Harris v. Oro-Dam Constructors*, 269 Cal.App.2d 911, 915 (Cal.App. 1969); *see also Hinman v. Westinghouse Elec. Co.*, 471 P.2d 988 (Cal. 1970), 'the modern

> justification for vicarious liability (at least where liability is predicated upon negligence) is a rule of policy, a deliberate allocation of a risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business …' *Hinman v. Westinghouse Elec. Co.*, 471 P.2d 988, 990 (Cal. 1970) (quoting *Prosser, Law of Torts*, at 471 (3d ed. 1964)). 'The principal jurisdiction for the application of the doctrine of Respondeat superior … is the fact that the employer may spread the risk through insurance and carry the cost thereof as part of his costs of doing business.' *Johnston v. Long*, 181 P.2d 645, 651 (Cal. 1947); *see also Hinman*, 471 P.2d at 990. '(T)he modern and proper basis of vicarious liability of the master is not his control or fault but the risks incident to his enterprise.'

Id. at 808. Several other jurisdictions have upheld the required vehicle exception in workers' compensation issues. *Whale Communications v. Death of Osborn*, 759 P.2d 848 (Colo.App. 1988); *Pittsburgh Testing Laboratories v. Kiel*, 167 N.E.2d 604 (Ind.App. 1960); *Medical Assoc. Clinic v. First Nat. Bank*, 440 N.W.2d 374 (Iowa 1989); *Gilbert v. Star Tribune/Cowles Media*, 480 N.W.2d 114 (Minn. 1992); *Mang v. Actus Auto. Distributors, Inc.*, 62 A.D.2d 1103 (N.Y.S.2d 1978); *Liberty Northwest Ins. Corp. v. Over*, 810 P.2d 876 (Or.App. 1991). Furthermore, Larson's treatise on workers' compensation explains the exception:

> If the employee as part of his job is required to bring with him his own car, truck or motorcycle for use during his working day, the trip to and from work is by that fact alone embraced within the course of employment. . . . The theory behind this rule is in part

> related to that of the employer-conveyance cases: the obligations of the job reach out beyond the premises, make the vehicle a mandatory part of the employment environment, and compel the employee to submit to the hazards associated with private motor travel, which otherwise he would have the option of avoiding. But in addition there is at work the factor of making the journey part of the job, since it is a service to the employer to convey to the premises a major piece of equipment devoted to the employer's purposes.

1 Arthur Larson, *The Law of Workmen's Compensation* §§ 17.51-17.52 (1992).

In the present case, Tronvold fit within the scope of employment under the required vehicle exception to the going and coming rule. It was the routine procedure and a requirement of the PVFD that employees have their own vehicle to get to and from work functions. As a firefighter, Tronvold was required to have a vehicle as an essential part of and incidental to his work. R.613. His fire chief considered Tronvold's vehicle an essential part of his job as a firefighter to get to training and to fires. R.613. In fact, Chief Paul cannot recall a time in his nineteen years with the fire department that a fireman did not have his own personal form of transportation to get to meetings and to incidents. R.627. Further, Chief Paul stated that as a practical matter, there would be questions to address if a firefighter could only get to a fire on a bicycle (or some other abstract form of transportation) rather than having his own vehicle. R.627. It is undisputed that Defendants benefit from their firefighters having their own mode of transportation. R.627.

At the time of the collision, Tronvold was on his way to a function where his presence was expected as part of his duties as a volunteer fireman. R.865; R.869-70. As a condition of his job, he had an underlying obligation to have the vehicle, to bring it to any given location as requested by the fire department, and to have it ready at any given time. R.869. This obligation carried with it the practical necessity of traveling between home and work, while transporting both himself and the PVFD equipment necessary to train and fight fires as an employee of the PVFD and on behalf of the City of Pierre. Furthermore, his employer derived a monetary and workplace-efficiency benefit by having its employees drive their personal vehicles to and from work. Accordingly, there is a question of fact as to whether Tronvold's conduct fits within the required vehicle exception to the going and coming rule. Accordingly, a trier of fact could find that Tronvold was working in the scope of his employment with Defendants. "It is fundamental that summary judgment cannot be granted if there are questions of fact to be determined." *Delzer Const. Co. v. South Dakota State Bd. of Transp.*, 275 N.W.2d 352, 355 (S.D. 1979).

Alternatively, a fact-finder could determine that Tronvold was in the scope of employment at the time of the collision because he fell within the "special errand exception" to the going and coming rule. Under this exception,

an employer may be held liable for injuries arising from a negligent act committed by an employee while the employee was engaged in a special errand or mission for the employer. *Ducey v. Argo Sales Co.*, 602 P.2d 755, 764 (Cal. 1979); *Munyon v. Ole's, Inc.*, 136 Cal.App.3d 697, 703 (Cal. App. 1982).

South Dakota recognized that a similar exception existed in *South Dakota Public Entity Pool for Liability v. Winger*, 1997 SD 77, 566 N.W.2d 125. In *Winger*, the employee was instructed to inspect a work site after hours and on his days off while using his personal vehicle. *Id.* at ¶ 2, 566 N.W.2d at 126. The employee was involved in a collision with another motorist after going to the worksite, and ultimately sought underinsured motorist coverage from the South Dakota Public Entity Pool for Liability (PEPL Fund) for injuries sustained. *Id.* The PEPL Fund is a state-funded program that indemnifies state employees for liability incurred upon negligence with a motor vehicle while performing acts within an employee's scope of employment, operating much like liability insurance provided to private employers for acts of negligence by their employees. *See* SDCL § 3-22-1. Although the Court recognized that a "special errand" exception exists, it ultimately found that the employee could not recover under the facts of that case because he substantially deviated from his employment by watching the sunset and

drinking beers at a local bar while on his way out to the worksite. *Id.* at ¶ 18, 566 N.W.2d at 131.

Again, in *Terveen v. South Dakota Dept. of Transp.*, 2015 SD 10, 861 N.W.2d 775, the South Dakota Supreme Court recognized the special errand exception. In that case, the employee was on a work-related trip to Yankton from his home in Belle Fourche. *Id.* at ¶ 1, 861 N.W.2d at 777. Although the Court impliedly noted there would be an exception to the going and coming rule when an employee is on a personal errand that is "naturally and incidentally related to his . . . employment" the Court failed to recognize the exception in that case because of the employee's conduct while on his personal errand. *Id.* at ¶ 14, 861 N.W.2d at 779-80. The employee in *Terveen* was on his way back from a work-related trip on behalf of the Department of Transportation, but detoured to go to another site on behalf of another employer. *Id.* at ¶ 24, 861 N.W.2d at 782-83. Because of the detour, the Court found that he was outside the scope of employment because this was an "independent, self-serving endeavor[] unrelated to [the employee's] job." *Id.* at ¶ 14, 861 N.W.2d at 780. Nonetheless, in *Winger* and *Terveen*, the South Dakota Supreme Court illustrated that a "special errand" exception to the going and coming rule exists.

The South Dakota Supreme Court has made clear that the special errand exception does exist under the circumstances present in this case. In the present case, unlike *Winger* and *Terveen*, Tronvold did not substantially deviate from his employment while traveling to engine training on behalf of his employer. Because of the nature of his employment, Tronvold was required to travel to different locations under the direction of the PVFD. This particular occasion required him to travel over ten miles from his home to engine training in his own vehicle and to use his own vehicle as a conveyance for PVFD equipment. The underlying philosophy of this exception is to hold an employer liable for an employee's negligent acts under the sentiment that a business should not be able to disclaim responsibility for accidents which may be the result of its policy.

Both the required vehicle exception and special errand exception are applicable to the present case. Consequently, the "going and coming" rule is not valid and Tronvold was working within the scope of his employment. As a result, this is, at a minimum, a question of fact as to whether Defendants are liable for the injuries that were sustained by Plaintiffs in the collision caused by the negligence of Tronvold.

II. Whether the City of Pierre's Governmental Liability Policy excluding liability for "Fire Department, Fire Fighting activities or Fire Department vehicles" is applicable in this case.

Generally, under South Dakota law, an employee or agent of a public entity while acting within the scope of his employment or agency is immune from suit under the doctrine of sovereign immunity. SDCL § 21-32A-2. The doctrine of sovereign immunity can be waived, however, to the extent that the public entity "participates in a risk sharing pool or purchases liability insurance and to the extent that coverage is afforded thereunder. . . ." SDCL § 21-32A-1. In the present case, the City of Pierre had purchased a liability insurance policy from Continental Western Insurance Company (hereinafter the "Policy"), which provides coverage to the PVFD. The City of Pierre also participates in a risk sharing pool that provides liability coverage for this accident. Accordingly, the doctrine of sovereign immunity is waived by the coverage afforded in the PVFD's Policy and through the risk sharing pool in which the City of Pierre participates.

The South Dakota Supreme Court has determined that there are three steps in determining whether waiver of sovereign immunity has been met under SDCL § 21-32A-1: "(1) participation in a risk sharing pool or purchase of insurance, (2) waiver to the extent of coverage, (3) and by implication, a cause of action occurs which gives rise to a claim against the public entity."

Cromwell v. Rapid City Police Dept., 2001 SD 100, ¶ 19, 632 N.W.2d 20, 25. In the present case, the first factor is undisputed—the City of Pierre obtained insurance from Continental Western Insurance Company for the benefit of the PVFD and participates in a public entity risk sharing pool. R.275-455; Tammen App.88-110; Tammen App.123-27. As to the third factor, Plaintiffs have demonstrated that Tronvold was working within the scope of his employment and Plaintiffs' injuries occurred as a result of the accident that arose out of the employment. Therefore, Defendants have waived sovereign immunity.

In its motion for summary judgment, the City of Pierre claimed that its risk sharing pool did not provide coverage based on the allegations that the Policy contained an exclusion section which precluded coverage for "Fire Department, Fire Fighting activities, or Fire Department vehicles." Additionally, the City of Pierre claimed Tronvold's vehicle is not afforded coverage by the City of Pierre's automobile liability coverage. However, a plain reading of the Memorandum of Automotive Liability coverage demonstrates that coverage should be provided to Tronvold for this accident and, therefore, the City of Pierre has waived sovereign immunity.

In its initial brief, the City of Pierre argued that the insurance policy contained an exception for "Fire Department, Fire Fighting activities or Fire

Department vehicles". R.174. In making this argument, the City of Pierre relied upon an exclusion endorsement containing such exclusion from the coverage provided by the Memorandum of Governmental Liability coverage and not from the Memorandum of Automobile Liability coverage. Tammen App. 107; Tammen App.110. What the City of Pierre failed to recognize was that the coverage provided to the City of Pierre by the South Dakota Public Assurance Alliance contains two separate coverages. One of the coverages is a "Memorandum of Governmental Liability Coverage." Tammen App.88-97. The City of Pierre also has a second type of insurance coverage entitled "Memorandum of Auto Liability Coverage." Tammen App.98-106. The Exclusion Endorsement for "Fire Department, Fire Fighting activities or Fire Department vehicles" referenced in the City of Pierre's summary judgment brief, by its own title, applies only to the "Memorandum of Governmental Liability Coverage" and not to the "Memorandum of Auto Liability Coverage."

The City of Pierre did not provide the circuit court with the Memorandum of Governmental Liability Coverage Declarations and separate Memorandum of Automobile Liability Coverage Declarations. Tammen App.123-27. The Memorandum of *Governmental* Liability Coverage Declarations does not provide automobile liability coverage. Tammen App.123-27. The separate Memorandum of *Automobile* Liability Coverage

Declarations does provide automobile liability coverage. Tammen App.126-27. A review of the Memorandum of Governmental Liability Coverage Declarations states that the forms attached to the Governmental Liability Coverage Declarations includes Endorsement number GL 1150. Tammen App.123-24. Endorsement GL 1150, contained within the Memorandum of Governmental Liability Coverage, is the Exclusion Endorsement which excludes "Fire Department, Fire Fighting activities or Fire Department vehicles" from Governmental Liability Coverage. Tammen App.125. Contrary to the assertions made by the City of Pierre in its summary judgment arguments, the Exclusion Endorsement which excludes coverage for the "Fire Department, Fire Fighting activities or Fire Department vehicles" is not included as an endorsement to the Memorandum of Automobile Liability Coverage. Tammen App.126. The only endorsement to the City of Pierre's Automobile Liability Coverage is Endorsement No. AL 2075, which changes its liability limits for automobile accidents. Tammen App.127. Contrary to the assertions stated by the City of Pierre, the Automobile Liability Coverage contains no exclusion for its fire department. The circuit court was understandably confused by the City of Pierre's argument, and erroneously believed the exclusion for the fire department contained within the Governmental Liability Coverage was applicable to

this case. *See* Tammen App.11.[1] The circuit court, relying on the City of Pierre's mistaken argument, noted in its opinion that "the Memorandum of Governmental Liability Coverage, precludes coverage for 'Fire Department, Fire Fighting activities, or Fire Department vehicles'." Tammen App.11. As addressed above, however, the Governmental Liability Coverage does not apply, as the Automobile Liability Coverage, which does not contain such exclusion, is the applicable endorsement. *See* Tammen App.126; Tammen App.98-99.

In its briefing, the City of Pierre submitted the Affidavit of David Sendelbach, the Claims Administrator for the South Dakota Public Assurance Alliance, which insures the City of Pierre. R.188-89; Tammen App.88-110; R.213-21. Sendelbach's Affidavit contains a reservation of rights letter, which does not state a fire department exclusion as a basis for denial of coverage. R.213-16. This is because under a plain reading of the policy, the automobile coverage portion of the policy does not exclude fire department vehicles from coverage.

[1] The City of Pierre made the argument that coverage for firefighter activities was excluded in its initial brief. R.174. Plaintiff pointed out the error made by the City of Pierre in confusing coverages in her responsive brief. R.526-29. The City of Pierre did not respond to Plaintiff's explanation of why the firefighting exclusion did not apply to its automobile coverage in either its reply brief or oral argument. The City implicitly accepted Plaintiff's position by failing to respond to Plaintiff's argument in its reply brief or raising the issue at oral argument.

As set forth in the section above, Tronvold was an agent (either an employee or volunteer) of the City of Pierre and is entitled to coverage under the City of Pierre's Automobile Liability Coverage, which provides coverage for "damages the covered party legally must pay because of bodily injury or property damage to which this coverage applies caused by an accident during the coverage period and resulting from the ownership, maintenance, or use of an auto." R.200. In fact, the City of Pierre has admitted that if Tronvold was acting in an official capacity, there is a coverable claim under the Automobile Liability Memorandum of Coverage issued by the South Dakota Public Assurance Alliance. R.1110-11.

The Memorandum of Automobile Liability Coverage defines covered party as:

> (a) the Member;
> (b) unless specifically excluded, any and all commissions, councils, agencies, districts, authorities, or boards coming under the member's direction or control of which the member's board sits as the governing body;
> (c) any person who is an official, employee or volunteer of (a) or (b) while acting in an official capacity for (a) or (b), including while acting on an outside board at the direction of (a) or (b); or
> (d) anyone else while using a covered auto with the permission of a covered party, except the owner of that auto or the owner or employee of a business of selling, servicing, repairing or parking autos. This subsection does not apply to any uninsured/underinsured motorist coverage under this memorandum.

Tammen App.99 (emphasis added). As previously discussed, and as conceded by the PVFD, the PVFD "is a part of the Governmental Functions of the City of Pierre, South Dakota . . . ." Tammen App.130. Pierre City Ordinances confirm that the PVFD is a department of the City of Pierre and subordinate to Pierre city authority. Pierre Municipal Ordinance 2-3-401 provides:

> The department in charge of preventing, detecting, reporting, suppressing and extinguishing fires within and for the city shall be known as the Pierre Fire Department, and its officers and employees shall be responsible for the performance of all duties assigned to the department by state law, this code and the city ordinances, the commission, mayor and designated commissioner.

See R.645 (emphasis added). Pierre Municipal Ordinance 2-3-402 provides "The fire department and each fire company may adopt such constitution, by-laws and rules for its regulation and government, subordinate to the ordinances of the city, as may be deemed best calculated to accomplish the object of its organization." *See* R.645 (emphasis added). The Pierre City Ordinances further confirm that the City of Pierre has authority over the fire department, its officers and members. *See* R.645. Pierre City Ordinance 2-3-408 provides that the Pierre City Commission shall have the power to remove the chief, or first or second assistant chief from office, for failure to perform their duties. *See* R.647. Pierre Ordinance 2-3-410 provides that any change in the membership of the fire department must be approved by the City Commission. *See* R.647. Pierre City Ordinance 2-3-411 provides that firemen on duty shall wear the

badge or uniform to be provided by the city and that such uniform shall have been approved by the City Commission. *See* R.647. The City Ordinances also require that in the event a fireman fails to attend company drills or meetings for three successive drills or fails to respond to fires or alarms for three fires in succession without excuse or neglect, that the fire chief is required to dismiss such member from the fire department. *See* R.648. Pierre City Ordinance 2-3-416 gives the Mayor of the City of Pierre the authority to regulate firemen and fire apparatus to go beyond the city limits of the City of Pierre. *See* R.648-49.

Based upon the undisputed evidence that the PVFD is a department within the government of the City of Pierre, and the undisputed fact that Tronvold was an employee/volunteer of the City of Pierre in his capacity as a volunteer fireman, Tronvold was covered under the City of Pierre automobile policy as a matter of law. Had the circuit court found Tronvold may have been acting within the course and scope of his employment, as it should have, then coverage is provided by City of Pierre's insurance policy. The City of Pierre's insurance policy provides coverage to any person who is an official, employee or volunteer of a commission, council, agency, district authority or board coming under the City of Pierre's direction or control. Therefore, the Court should determine that there is a question of fact as to whether Tronvold was acting within the course and scope of his employment at the time of the

accident, and that he was acting in an official capacity of the PVFD which is an authority under the direction and control of the City of Pierre. Thus, coverage exists for the accident at issue, and the City of Pierre has waived sovereign immunity.

III. Whether the Pierre Volunteer Fire Department's Governmental Liability Endorsement is void as against public policy.

The Policy purchased by the PVFD provides coverage for the injuries that were sustained by Plaintiffs. However, the Policy curiously then attempts to eliminate essentially all liability coverage through a sovereign immunity exclusion. Such exclusion should be found void for public policy reasons.

The language contained in the Policy provides that Tronvold was a covered employee and that his truck is a covered auto for liability insurance. In the Auto Declarations provision of the policy, under Item Two, there is a number "1" describing the covered autos for liability insurance. Tammen App.112. The Business Auto Coverage Form states that a number "1" means "Any Auto." Tammen App.113. Accordingly, based upon its plain language, each and every category or "auto" below that description is covered under this specific Policy. One such category is for "Non-Owned 'Autos'" which specifically "includes 'autos' owned by your 'employees.'" Tammen App.113. "Employee" includes a "volunteer worker." Tammen App.111. The Business

Auto Coverage Form provides that the fire department is an insured. Tammen App.114. The Policy provides coverage as follows: "We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies, caused by an 'accident' and resulting from the ownership, maintenance or use of a covered 'auto'". Tammen App.114. That form also notes that an "insured" includes "[y]our 'employee' if the covered 'auto' is owned by that 'employee' or a member of his or her household." Tammen App.115. There is at least a question of fact as to whether Tronvold was acting in the scope of employment on behalf of the PVFD. Accordingly, the PVFD would be covered under the policy for "any auto" as outlined in the Business Coverage Auto Form. The term "Any Auto" unmistakably includes a non-owned auto owned by an employee, such as the vehicle that was owned by Tronvold and driven to work for each shift. Tammen App.113. Tronvold is also undoubtedly an employee under the insurance contract, as he is a volunteer worker. Tammen App.111. As explained in the section above, Tronvold is further covered because he is acting as an agent under *respondeat superior* on behalf of the insured employer, the PVFD.

Despite providing coverage for this situation, Continental Western then attempts to avoid compensating Plaintiffs for their devastating injuries by

including a sovereign immunity endorsement that professes to void all liability coverage. This court should find that such a provision is void as against public policy.

Pursuant to SDCL § 21-32A-1, to the extent that any public entity, other than the state, participates in a risk sharing pool or purchases liability insurance, and to the extent that coverage is afforded thereunder, the public entity shall be deemed to have waived the common law doctrine of sovereign immunity and shall be deemed to have consented to suit in the same manner that any other party may be sued. While the Supreme Court has held that waiver of immunity exists only to the extent of insurance coverage, *see Cromwell v. Rapid City Police Department*, 2001 SD 100, ¶ 17, 632 N.W.2d 20, 25, the PVFD insurance contract with Continental Western Insurance Company plainly defeats the intent of SDCL § 21-32A-1 and should be declared void as against public policy. *See* R.275-455.

"The court in reviewing a policy provision in light of statutory law treats the statute as if it were actually written into the policy. 'The terms of the policy are to be construed in light of the purposes and intent of the applicable statute'." *Kremer v. American Family Mutual Insurance Company*, 501 N.W.2d 765, 768-69 (S.D. 1993) quoting *Veach v. Farmers Ins. Co.*, 460 N.W.2d 845, 847 (Ia. 1990). "Although public policy strongly favors freedom

to contract, '[it] is not an absolute right or superior to the general welfare of the public.'" *A. Unruh Chiropractic Clinic v. DeSmet Insurance Company of South Dakota*, 2010 SD 36, ¶ 16, 782 N.W.2d 367, 372-73 (S.D. 2010) quoting *Siefkes v. Clark Title Co.*, 88 SD 81, 88, 215 N.W.2d 648, 651-52 (1974). The South Dakota Supreme Court has on several occasions voided insurance contract provisions as a matter of public policy. *See National Farmers Union Property and Casualty Company v. Bang*, 516 N.W.2d 313, 321 (S.D. 1994); *see also Wheeler v. Farmers Mut. Ins. Co. of Neb.*, 212 SD 83, ¶ 33, n.5, 824 N.W.2d 102, 111 (2012) (Zinter dissenting) (noting that the South Dakota Supreme Court has "repeatedly voided other policy terms and conditions" with regard to uninsured motorist coverage and providing a list of those cases").

Under SDCL § 21-32A-1, there is nothing that allows a public entity to contract around the waiver of sovereign immunity, as the PVFD suggests. To allow the PVFD to do so would defeat the intent of the statute. This is especially true when the injured party is not privy to the contract. In this case, the PVFD purchased insurance, then attempted to circumvent statutory law, which is in place to protect the public, by adding a broad exclusion indicating the policy is not subject to SDCL § 21-32A-1. Upholding the governmental liability endorsement would illogically allow for payment of first-party claims just as if the Policy were comprehensive, but would not provide coverage for

protection of the public by covering third-party liability claims. This interpretation permits the insurer to avoid its undertaking by setting up an indemnity which it then attempts to avoid. This approach creates the contradictory notion that a governmental subdivision, carrying on its activities for the benefit of the public, is not obligated to provide protection for members of the public whom it may negligently injure, while paying an insurance premium for such protection to exist. In other words, the existence of the governmental liability endorsement limits the entire policy from creating any third-party liability. The absurdity of this exclusion is highlighted by the fact that Tronvold was able to make a claim against the subject PVFD Policy for $1,000 which was paid under the PVFD's Policy to cover the deductible for the property damage claim Tronvold made to his own automobile insurer as a result of the accident. R.892-93.[2] The PVFD admitted this at the summary judgment hearing, stating the following: "Going to a meeting would give [Tronvold] coverage for his vehicle. It does not provide liability coverage for these claims by the Plaintiffs because it's not an emergency." R.1118. Such analysis is illogical and unfair to the public. By accepting premiums from the PVFD, Continental Western Insurance and the PVFD should be estopped from

[2] In other words Tronvold: 1) caused the accident; 2) was given a bumper and repaired his own truck at no cost; and 3) collected $1,000 from the PVFD Policy. R.891-93. Tammen: 1) was an innocent victim of Tronvold's negligence; 2) lost her leg as a result of the accident; and 3) pursuant to the PVFD's argument, is entitled to no compensation under the PVFD Policy.

contending that the Policy does not also cover injuries to third parties due to the negligence of government employees to whom it provides coverage.

CONCLUSION

Because Tronvold was acting on behalf of and for the benefit of Defendants within the scope of his employment, and because Defendants are not protected by sovereign or governmental immunity, Plaintiffs request that the South Dakota Supreme Court reverse the circuit court's entry of summary judgment and remand this case for a jury trial.

Dated at Sioux Falls, South Dakota, this _____ day of January, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Brief of Appellant Lisa A. Tammen complies with the type volume limitations set forth in SDCL § 15-26A-66(b)(2). Based on the information provided by Microsoft Word 2016, this Brief contains 9,080 words, excluding the Table of Contents, Table of Authorities, Jurisdiction Statement, Statement of Legal Issues, any addendum materials, and any Certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2016.

Dated at Sioux Falls, South Dakota, this _____ day of January, 2020.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

* *

LISA A. TAMMEN, Plaintiff and Appellant, and RANDALL R. JURGENS, Plaintiff and Appellee, vs. GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally, Defendants and Appellees.	*	No. 29114 **CERTIFICATE OF SERVICE**
* * * * * * * * * * * * * * *	*	
LISA A. TAMMEN, Plaintiff and Appellee, and RANDALL R. JURGENS, Plaintiff and Appellant, vs. GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly	*	No. 29138

and severally, *
*
Defendants and Appellees. *
*

* *

The undersigned hereby certifies that the "Brief of Appellant Lisa A. Tammen" and "Appendix of Appellant Lisa A. Tammen" were filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capitol Avenue, Pierre, South Dakota, 57501-5070, on December 23, 2019.

The undersigned further certifies that an electronic copy of the "Brief of Appellant Lisa A. Tammen" and "Appendix of Appellant Lisa A. Tammen" were emailed to the attorneys set forth below, on December 23, 2019:

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APPELLANT LISA A. TAMMEN'S APPENDIX
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STATE OF SOUTH DAKOTA) : SS		IN CIRCUIT COURT
COUNTY OF HUGHES)		SIXTH JUDICIAL CIRCUIT
LISA A. TAMMEN and RANDALL R. JURGENS, Plaintiffs, vs. GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally, Defendants.		CIV. 17-42 **AMENDED JUDGMENT**

Defendants, City of Pierre, a South Dakota Municipal Corporation, and Pierre Volunteer Fire Department, a South Dakota nonprofit corporation (collectively referred to herein as Defendants), having moved for summary judgment, pursuant to SDCL § 15-6-56; and the Court having held a hearing on the motions on Wednesday, June 12, 2019; and the Court having considered all of the records and files herein; and the Court having further considered the arguments of counsel and the briefs that have been submitted; and the Court having issued its memorandum opinion dated August 8, 2019; it is hereby

ORDERED ADJUDGED AND DECREED as follows:

1. Defendants' Motions for Summary Judgment are GRANTED;
2. The Complaint of Plaintiffs Lisa A. Tammen and Randall R. Jurgens, as against Defendants City of Pierre, a South Dakota Municipal Corporation, and Pierre

Volunteer Fire Department, a South Dakota nonprofit corporation, are hereby dismissed, on the merits, with prejudice; and that Defendants are entitled to a recovery of their taxable disbursements to be assessed by the Clerk, pursuant to SDCL §§ 15-17-37 and 15-6-54(d);

3. The Court finds that there is no just reason for delay and that this judgment shall be entered as a final judgment pursuant to SDCL § 15-6-54(b). The Court relied upon the following factors in granting this certification:

   a. This case involves alleged injuries stemming from a motor vehicle accident that occurred in August 2016 involving the Plaintiffs and Defendant Gerrit Tronvold;

   b. The Court has determined that Defendant Tronvold was not acting within the scope of any employment or agency at the time that the alleged accident occurred;

   c. Following the order granting Summary Judgment in favor of Defendants, the only remaining claim is against Defendant Tronvold. That claim is separate and distinct and not directly related to the issues addressed by this Court in the Order granting Summary Judgment to these Defendants;

   d. After balancing the competing factors present in the case, the trial court has found that it is in the best interest of sound judicial administration, judicial economy, and public policy to certify the judgment as final pursuant to SDCL § 15-6-54(b), and the court relies on the following factors in reaching this conclusion:

(i) There are no unadjudicated claims against the dismissed Defendants;

(ii) The need for review will not be mooted by further litigation;

(iii) The trial court will not be obliged to consider the claims against the City of Pierre and the Pierre Volunteer Fire Department a second time;

(iv) There are no counterclaims that may result in a setoff against this judgment, if certified as final;

(v) Declining to certify this matter as a final judgment pursuant to SDCL § 15-6-54(b) may result in duplicate proceedings including two jury trials rather than one, and the potential for one or more additional appeals.

e. Given the underlying facts of this case, a final determination of the issues involving the dismissed Defendants will more likely than not decide whether this case goes to trial and whether this, being a final judgment pursuant to SDCL § 15-6-54(b), may eliminate the potential for multiple trials on the same facts. Therefore, final order pursuant to SDCL § 15-6-54(b) would promote judicial economy and efficiency by allowing Plaintiffs to appeal the Court's Order and Judgment while eliminating the potential for duplicate trials on largely identical facts and witnesses.

4. For all of these reasons, this Court orders final judgment in favor of the Defendants City of Pierre and Pierre Volunteer Fire Department, and against

Plaintiffs pursuant to SDCL § 15-6-54(b), on the claims brought by Plaintiffs against these Defendants.

5. The Court's Memorandum Opinion dated August 8, 2019 is incorporated herein by this reference.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that final judgment pursuant to Rule 54(b) is entered in favor of Defendants.

Dated this 26 day of August, 2019.

BY THE COURT

Honorable Thomas L. Trimble
Circuit Court Judge, Retired

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO
FILED
AUG 26 2019
Kerri Stegman Clerk
By _____ Deputy

STATE OF SOUTH DAKOTA))SS COUNTY OF HUGHES)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT 32CIV17-42
LISA A. TAMMEN and RANDALL R. JURGENS, Plaintiffs, v. GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally, Defendants.	**ORDER GRANTING CITY OF PIERRE'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PIERRE VOLUNTEER FIRE DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court on the 12th day of June 2019. The Court, having considered the record, briefs and the arguments of counsel, and being fully advised as to all matters pertinent hereto, for the reasons set forth below, hereby **GRANTS** Defendant City of Pierre's Motion for Summary Judgment. The Court also **GRANTS** Defendant Pierre Volunteer Fire Department's Motion for Summary Judgment.

BACKGROUND

On August 1, 2016, Plaintiff Lisa Tammen, Plaintiff Randall Jurgens, and Defendant Gerrit Tronvold (Tronvold) were involved in a motorcycle-pickup accident resulting in amputation of the left leg of each Plaintiff. Plaintiffs allege that Defendant failed to stop and/or failed to yield as he turned left from Grey Goose Road onto Highway 1804 into the path of Plaintiffs' oncoming motorcycle.

Tronvold became a firefighter for the Pierre Volunteer Fire Department (Department) in December 2015 and was traveling to training when the accident occurred. The vehicle, owned by Tronvold, displayed on its front bumper a half-plate issued by the Department reading "Member Fire Department/Pierre Fire Department." Inside the vehicle, Tronvold carried his personal protective fire gear in the event he was called out for an emergency response. The Department does not pay wages, reimburse mileage, or provide a vehicle to Tronvold; the Department does require training, testing, reliable transportation, and attendance at a minimum number of meetings and call-out incidents.

The City of Pierre (City) funds the Department, owns the Department equipment, and supervises the Department through the City's Office of Public Safety. The City carries liability insurance through the South Dakota Public Assurance Alliance (Alliance) with an exclusion for "Fire Department, Fire Fighting activities or Fire Department vehicles." The City also carries vehicle liability insurance for certain vehicles listed by description and VIN number, not including Tronvold's vehicle.

The Department is a non-profit corporation whose charter indicates that it is part of the governmental functions of the City. The Department has no independent finances or stockholders. The Department, through Continental Western Insurance Company (Continental), carries liability insurance for "employee's covered auto" not owned by the Department when on an "official emergency response." The policy also pays property damage for "employee's

personal auto" "while en route to, during or returning from any official duty authorized" by the Department. Following the accident, Tronvold received $1,000 compensation from Continental for the property damage not covered by his personal automobile comprehensive insurance.

Plaintiffs filed suit against Tronvold individually, and against the Department and the City under a theory of *respondeat superior* because Tronvold was driving to a regularly scheduled Department training meeting. The Department and the City have each moved for Summary Judgment on the issue of vicarious liability.

LEGAL DISCUSSION

I. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no issue as to any material fact and the moving party is entitled to judgment as a matter of law." SDCL § 15-6-56(c). Summary judgment requires the moving party to establish "the right to judgment with such clarity as to leave no room for controversy." *Hanson v. Big Stone Therapies, Inc.*, 2018 S.D. 60, ¶ 38, 916 N.W.2d 151, 161 (quoting *Richards v. Lenz*, 539 N.W.2d 80, 83 (S.D. 1995) (citation omitted). "The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists." *Brandt v. County of Pennington*, 2013 S.D. 22, ¶ 7, 827 N.W.2d 871, 874.

"The existence of a duty in a negligence action is a question of law. . ." *Hohm v. City of Rapid City*, 2008 S.D. 65, ¶ 3, 753 N.W.2d 895, 898 (internal citation omitted).

Judgment granted on the basis of sovereign or governmental immunity is a question of law, suitable for summary judgment. *Truman v. Griese*, 2009 S.D. 8, ¶ 10, 762 N.W.2d 75, 78.

II. Tronvold's commute was not within the scope of his agency.

In their Complaints, Plaintiffs assert that Tronvold was acting on behalf of the Department when the accident occurred. Defendants deny Plaintiffs' claims of *respondeat superior* liability because Tronvold was commuting to a regularly scheduled Department meeting and no exceptions establishing *respondeat superior* liability apply.

Plaintiffs may hold "an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." *Cameron v. Osler*, 2019 S.D. 34, ¶ 6, 903 N.W.2d 661, 663 (internal citations omitted). The acts included within the scope of agency are those "which are so closely connected with what the servant is employed to do, and is so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment." *Deuchar v. Foland Ranch, Inc.*, 410 N.W.2d 177, 180 (S.D. 1987) (internal citations omitted). If a court determines that a tortious act was committed while the agent conducted a dual purpose in serving both the principal's interests and the agent's interests, the court should look to whether the conduct was foreseeable. *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 21, 816 N.W.2d 96, 104.

In the workers' compensation setting, it is well established that employees injured while going to and coming from work are not covered, unless the travel arises from the employment. *Mudlin v. Hills Materials Co.*, 2005 S.D. 64, ¶ 8, 698 N.W.2d 67, 71. The South Dakota Supreme Court notes that workers' compensation decisions, while not binding, are "useful in exploring the themes surrounding scope of

employment questions." *S.D. Pub. Entity Pool for Liability v. Winger*, 1997 S.D. 77, ¶ 8, 566 N.W.2d 125, 128. Exceptions to the "going and coming" rule include situations where the transportation is an "integral part" of the agent's duties or when the agent's actions "naturally and incidentally" relate to his duties. *Id.* ¶ 19.

Here, Plaintiffs assert a *respondeat superior* theory of liability because Tronvold "was on his way to engine training, using his own vehicle and transporting [Department] equipment as required by [Department]." *Tammen Brief in Opposition to Motions for Summary Judgment*, p. 8, June 5, 2019. Tammen further argues that this Court should apply a "required vehicle exception" to the Going and Coming Rule because Department policy requires that firefights have reliable transportation or a "special errand exception" because Tronvold was going to an engine training. *Id.* at p. 9 and p. 17. Plaintiff Jurgens asserts that the monthly training satisfies the dual purpose test because the training was, "at least in part out of the intent to serve his employer's purposes." *Jurgens Brief in Opposition to Motions for Summary Judgment*, p. 19, June 5, 2019.

Considering all facts in the light most favorable to the Plaintiffs, the Court finds no *respondeat superior* liability for the Department nor the City because of the going and coming rule. Tronvold was on his way to a regularly scheduled monthly Department meeting and no exception applies because the engine training was part of a larger array of trainings and meetings, precluding this one training from being required or naturally and incidentally related to Tronvold's firefighter duties.

While the Department requires that its firefighters have reliable transportation and attend a certain percentage of trainings and meetings, the Department in no way indicates that firefighters must drive to the Firehall for the meetings. Nor does the fact that Tronvold had his emergency equipment with him place this commute within the

scope of his agency for the Department. Neither the Department nor the City could foresee that Tronvold's actions driving to a monthly training meeting would result in a consequence for either entity. For these reasons, the Court finds that the accident did not arise out of Tronvold's duties to the Department and thus, the Court finds no *respondeat superior* liability for either the Department or the City.

II. In the alternative, the City and the Department have governmental immunity under SDCL §§ 21-32A-1 et seq. The legislature expressly grants the Department immunity from suit under SDCL § 20-9-45, unless a jury finds Tronvold acted with gross negligence.

A. The City's governmental immunity was not waived.

In the alternative, the Court addresses the City's affirmative defense of governmental immunity, finding that the City is free from liability of this tort claim because there is no waiver by statute and the City's risk sharing pool or liability insurance excludes fire department vehicles, and does not expressly include Tronvold's personally-owned vehicle.

Government immunity arises from common law, Article III of the South Dakota Constitution, and South Dakota statute, unless the public entity waives the immunity. *Unruh v. Davidson* County, 2008 S.D. 9, ¶ 8, 744 N.W.2d 839, 842. Under SDCL § 21-32A-3, the legislature "extended the reach of sovereign immunity to all public entities of this state." *Cromwell v. Rapid City Police Department*, 2001 S.D. 100, ¶ 13, 632 N.W.2d 20, 24. The Court finds that the City, a South Dakota municipal corporation, is a public entity within the scope of SDCL 21-32A-3. *See Olesen v. Town of Hurley*, 2004 S.D. 136, 691 N.W. 324.

Should governmental immunity be waived under SDCL 21-32A-1, "the public entity may be sued in the same manner as a private individual for injuries caused by the public entity's negligence to the extent the public entity participates in a risk

sharing pool or purchases liability insurance." *Maher v. City of Box Elder*, 2019 S.D. 15, ¶ 8.

Here, the City has purchased liability coverage from Alliance. Section C, Exclusion Endorsement 34, of the Memorandum of Governmental Liability Coverage, precludes coverage for "Fire Department, Fire Fighting activities or Fire Department vehicles." Alliance denied coverage to Tronvold because the insurer determined Tronvold was not a covered party nor was the Department a qualifying organization under the City's policy.

The City also purchased automobile liability coverage from Alliance. Tronvold's vehicle was not expressly covered by inclusion in the City's Statement of Values – Vehicles list.

Because the City is subject to an exclusion that prohibits coverage of this incident by Alliance, the Court finds that the City has not waived immunity under SDCL § 21-32A-3, and may not be held liable for Tronvold's accident.

B. The Department's governmental immunity is not waived.

Also in the alternative, the Court addresses the Department's affirmative defenses of governmental immunity under SDCL §§ 21-32A-1 *et seq.* and statutory immunity under SDCL § 20-9-45.

The Court first considers whether the Department is a public entity covered by the governmental immunity of SDCL § 21-32A-1. The Department is a non-profit corporation whose charter states: "This Corporation is a part of the Governmental Functions of the City of Pierre, South Dakota and as such has no independent finances and has no stockholders. The Nature of its business is the prevention and suppression of fires within the City of Pierre." *Application of the Pierre Volunteer*

Fire Department for an Extension of its Corporate Charter. The City owns the Department equipment and supervised by the City's Office of Public Safety.

In *Gabriel v. Bauman*, the South Dakota Supreme Court declined to address the sovereign immunity of the Chester Fire Department because Chester did not assert sovereign immunity as an affirmative defense and the issues related to waiver under SDCL § 21-32A-3 were not raised with the trial court. 2014 S.D. 30, ¶ 24, 847 N.W.2d 537, 545. Here, however, the Department asserts the affirmative defense of governmental immunity and provides undisputed evidence through its charter and reporting structure. The Court finds the Department to be a public entity, within the scope of governmental immunity.

Next, the Court addresses whether the Department waived immunity through the purchase of insurance or a risk-sharing pool. The Department, through Continental, insures personal automobiles for property damage when damage occurs "en route to, during or returning from any official duty authorized by [the Department]." *Continental Policy*, FIRE/EMS-PAK Endorsement, Page 2, Coverage Extensions, Item 3, Personal Effects and Property of Others. As the result of this accident, Tronvold submitted a claim and received a check for $1,000 to cover the expense of his personal automobile insurance deductible. The contract expressly expands coverage to include a commute to an "official duty" and by paying Tronvold's claim acknowledges that the insurer considered the monthly meeting as an official duty authorized by the Department.

The Continental policy expressly provides that it does not waive any governmental immunity under SDCL §§ 21-32A-1 *et seq.* and includes liability coverage to include a "covered 'auto' [the Department doesn't] own," but only for an "official emergency response authorized by [the Department]." In oral arguments, the Department acknowledges that if Tronvold were responding to a call instead of driving to training, the analysis would be different because the Western Casualty policy provides liability coverage for commutes to emergency responses.

Continental paid Tronvold for his property damage from the accident because, under the policy, the insurer determined that driving to a Department meeting was "en route to, during or returning from any official duty authorized by [the Department]." However, the coverage is specifically limited to property damage, not liability coverage.

The Court finds that the Department has not waived its governmental immunity under SDCL §§ 21-32A-1 *et seq.*

C. Whether the statutory immunity of SDCL § 20-9-45 applies is a question for the jury.

The South Dakota legislature expressly provided statutory immunity for nonprofit fire departments in SDCL § 20-9-45. The statute provides immunity from civil liability when the individual is "acting in good faith and within the scope of such individual's official functions and duties" and "the damage or injury was not caused by gross negligence or willful and wanton misconduct by such individual." SDCL 20-9-45.

Should the finding that Tronvold was not acting in the scope of his official duties be set aside, the Court finds that the Department is liable for grossly negligent actions by Tronvold.

The Department argues that the Court should grant summary judgment to the Department under SDCL § 20-9-45 because gross negligence is not specifically alleged in the Complaint and because they assert that Plaintiffs provide insufficient evidence for a finding of gross negligence. In *Gabriel*, the South Dakota Supreme Court affirmed summary judgment for the defendant regarding the gross negligence when the defendant, driving to the firehall to answer an emergency call, activated his lights and had the right of way, but was driving at a speed such that he was unable to stop after the plaintiff's car pulled out in front of him. *Gabriel* at ¶ 18, 847 N.W.2d at 543. The Supreme Court, in affirming summary judgment, stated that "reasonable persons under the same or similar circumstances present in this case would not have consciously realized that speed would—in all probability—result in the accident that occurred." *Id* at ¶ 19.

Here, however, the parties do not submit such undisputed facts that would render summary judgment appropriate as it was in *Gabriel* or in the controlling case cited by *Gabriel*, *Gunderson v. Sopiwnik*, 75 S.D 402, 508, 66 N.W.2d 510, 513 (S.D. 1954). "Whether one acts willfully, wantonly, or recklessly is, like negligence, normally a jury question." *Gabriel* at ¶ 15, 847 N.W.2d 542. The parties present several facts in dispute that could lead reasonable minds to arrive at differing conclusions. Tronvold pled guilty to failure to make a proper stop. Plaintiffs allege he was driving at an excessive and unlawful speed, was distracted by loud music such that he was unable to hear the approaching motorcycle, and that he pulled into oncoming traffic when his vision was obstructed. Viewing the facts in the light most favorable to the non-moving party, the Court finds whether Tronvold's actions were not negligent, negligent, or grossly negligent is a question for the jury.

ORDER

It is hereby:

ORDERED that Defendant City of Pierre's Motion for Summary Judgment is **GRANTED.**

It is further hereby

ORDERED that Defendant Pierre Volunteer Fire Department's Motion for Summary Judgment is **GRANTED.**

Dated this 8 day of August, 2019

FOR THE COURT,

The Honorable Thomas Trible
Circuit Court Judge, Retired

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO
FILED
AUG 08 2019
Kelli Sherman Clerk
By TDC Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT
LISA A. TAMMEN and RANDALL R. JURGENS, PLAINTIFFS, -vs- GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally, DEFENDANTS.	)	32CIV17-000042 **CITY OF PIERRE'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

COMES NOW the Defendant, City of Pierre (hereinafter "Pierre"), by and through its undersigned attorneys of record and hereby submits the following Statement of Undisputed Material Facts pursuant to SDCL § 15-6-56(c)(1).

1. On or about August 1, 2016, Plaintiffs Jurgens and Tammen were riding a motorcycle westbound on South Dakota Highway 1804. (¶ 11 of Plaintiffs' First Amended Complaint).

2. Plaintiffs allege that at approximately 6:00 p.m. on August 1, 2016, Defendant Tronvold, while driving his personally owned 2002 Chevrolet Silverado K2500 extended cab pickup, was traveling southwest on Grey Goose Road toward where it intersects with South Dakota Highway 1804. (¶ 12 of Plaintiffs' First Amended Complaint).

3. Plaintiffs allege Tronvold failed to yield the right-of-way to Plaintiffs and executed a left-hand turn into the path of Plaintiffs' motorcycle. (¶¶ 13 and 14 of Plaintiffs' First Amended Complaint).

4. The two vehicles collided causing significant injuries to Plaintiffs. (¶¶ 13 and 14 of Plaintiffs' First Amended Complaint).

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5. At the time of the motor vehicle accident, Tronvold was a rookie member of the Pierre Volunteer Fire Department (PVFD). (Ian Paul depo. at 17:7-15; attached to Abraham Aff. as Exh. D.)

6. Tronvold was traveling to a monthly training meeting of the PVFD. (Tronvold depo. at 33:22-25, attached to Abraham Aff. as Exh. A).

7. The accident occurred at approximately 6:00 p.m. and the training session was scheduled to commence at 6:30 p.m. (Tronvold depo p. 30:1-4).

8. Tronvold was traveling directly from his residence to the training location at his assigned fire station. (Paul depo. at 121:20-21; 122:4-5) (Tronvold depo. at 33:22-25).

9. The Pierre Volunteer Fire Department is a South Dakota nonprofit corporation and is a corporate entity organized independently from the City of Pierre. (Paul depo. at 34:21-25; 35:5-8).

10. The City of Pierre is a municipality organized under the statutory framework authorized by the State of South Dakota. (See Aff. of Kristi Honeywell, City Manager.)

11. The City of Pierre provides funding for the PVFD and employs a Fire Chief and maintenance worker. (Paul depo. at 6:2-22).

12. The PVFD stations, apparatus, and personal protective equipment are purchased by the City of Pierre. (Paul depo. at 8:18-23).

13. The PVFD self-governs through the election of officers. (Paul depo. at 7:10-25; 8:1-17).

14. While traveling to his home and the fire station on August 1, 2016, Tronvold was not undertaking any action on behalf of the City of Pierre or the PVFD. (Paul depo. at 37:14-18).

15. Tronvold was not conducting any mission or undertaking any act at the direction or control of PVFD or the City of Pierre at the time of the motor vehicle accident. (Paul depo. at 37:14-18).

16. At the time Tronvold was traveling from his residence to the meeting at the Fire Station, there was no active fire call and Tronvold had not been summoned for any emergency by the PVFD. (Paul depo. at 37:5-7; 38:12-15).

17. Members of the PVFD are required to attend 40 hours of training per year and Tronvold had completed in excess of 40 hours of training prior to the date of the accident, August 1, 2016. (Paul depo. at 107:12-17; 23:22-25).

18. PVFD members were also required to participate in a minimum of 25 percent of the calls in any given calendar year. (Paul depo. at 18:3-25; 19:1-10).

19. On the date of the motor vehicle accident, Tronvold had already recorded participation in 51.35 percent of calls which should have been sufficient to meet his obligation for the entirety of the calendar year. (Paul depo. at 22:2-16).

20. The 40 hour annual training requirement may be satisfied through receiving training though a number of sources include classes or monthly training sessions held by the PVFD. (Paul depo. at 36:7-16).

21. Monthly training sessions were not mandatory for PVFD members. Members that did not attend the monthly meeting could obtain training hours in other forms and by attending other sessions. (Tronvold depo. at 31:9-15, 24-25; 32:20-12; Paul depo. at 24:17-22).

22. Members are encouraged to attend monthly meetings but attendance is not required so long as annual requirements are met. (Paul depo. at 185:15-19).

23. PVFD firefighters are volunteers and are not compensated. (Paul depo. at 9:22-24).

24. PVFD firefighters are not reimbursed for mileage for responding to calls or attending monthly training sessions. (Paul depo. at 25:4-18; 26:9-23).

25. Tronvold had his own personal insurance for automobile he was driving at the time of the accident that occurred on August 1,2016. (Tronvold depo. at 76:18-21).

26. At the time of the motor vehicle accident that is the subject to this suit, the City of Pierre had in place a Memorandum of Governmental Liability Coverage with the South Dakota Public Assurance Alliance. (See Exh. A attached to the Aff. of Dave Sendelbach).

27. The Memorandum of Governmental Liability Coverage contained an exclusion endorsement wherein the Exclusion Section, Section C of the aforementioned Memorandum, precludes coverage for "fire department, firefighting activities or fire department vehicles." (See Exh. C attached to the Aff. of Dave Sendelbach).

28. At the time of the subject motor vehicle accident, the City of Pierre had in place a Memorandum of Automobile Liability Coverage with the South Dakota Public Assurance Alliance. (See Exh. B attached to the Aff. of Dave Sendelbach).

29. The Memorandum of Automobile Liability Coverage only provides coverage for a volunteer when such volunteer is "acting in an official capacity for (a) or (b)." (See *Id.* at Section D). The official capacity must be for the member (the City of Pierre) or while acting in an official capacity for one of the members "commissions, councils, agencies, districts,

authorities, or boards, under the member's direction or control of which the member's board sits as the governing body."

30. The City of Pierre's City Commission does not sit as the governing body for the PVFD.

31. At the time of the motor vehicle accident, Tronvold was not acting in an official capacity for the PVFD or the City of Pierre. (Paul depo. at 37:5-18; 38:12-15).

32. A letter denying coverage for Tronvold has been issued by the South Dakota Public Assurance Alliance through its claims adjusters at Claims Associates, Inc. (See Exh. D attached to the Aff. of Dave Sendelbach.)

33. The South Dakota Public Assurance Alliance is providing a defense in relation to this action pursuant to a reservation of rights concerning coverage under the Memorandum of Governmental Liability Coverage and the Memorandum of Automobile Liability Coverage. (See Exh. A and B attached to the Aff of Dave Sendelbach).

Dated this 1st day of February, 2019.

MAY, ADAM, GERDES & THOMPSON LLP

BY: _____
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CERTIFICATE OF SERVICE

Douglas A. Abraham of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 1st day of February, 2019, he electronically filed the foregoing via the Odyssey File and Serve System which will automatically send e-mail notification of such filing to all counsel of record.

_____
Douglas A. Abraham

STATE OF SOUTH DAKOTA) : SS COUNTY OF HUGHES)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
LISA A. TAMMEN and RANDALL R. JURGENS, Plaintiffs, vs. GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally Defendants.	32CIV17-000042 **DEFENDANT PIERRE VOLUNTEER FIRE DEPARTMENT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

COMES NOW Defendant, Pierre Volunteer Fire Department ("PVFD"), by and through its counsel of record, and respectfully submits this Statement of Undisputed Material Facts.

1. Plaintiffs seek damages arising out of a motorcycle/motor vehicle accident that occurred on or about August 1, 2016. First Amended Complaint, ¶ 11.

2. Plaintiffs alleged that Defendant Gerrit Tronvold failed to yield the right-of-way at a stop sign and turned left into the path of Plaintiffs' motorcycle. First Amended Complaint, ¶ 13.

3. Plaintiffs further allege that Defendant Gerrit Tronvold ("Tronvold") was operating his own 2002 Chevrolet pickup at the time of the accident. First Amended Complaint, ¶ 12.

4. Tronvold owned the vehicle that he was operating. Ian Paul Depo. at 37:2-4; Gerrit Tronvold Depo. at 11:1-7.

5. At the time of the accident, Tronvold was a volunteer fireman with the PVFD. He

never held any other position with the PVFD other than a volunteer fireman. G. Tronvold Depo. at 14:13-15.

6. Tronvold joined the PVFD in December, 2015. G. Tronvold Depo. at 13:16-25; 14:1.

7. At the time of the accident, Tronvold was considered to be a rookie firefighter as he had not yet completed the certified firefighter course. I. Paul Depo. at 17:7-15.

8. In order to get certified through the state, firefighters have to attend a series of classes, have some hands-on practical training and have a certain amount of time to get that completed. I. Paul Depo. at 17:9-15.

9. Tronvold was a rookie that has been with PVFD for more than six months at the time of the accident. I. Paul Depo. at 47:24-25; 48:1-4.

10. Besides being on the force for over six months, Tronvold had met the requirements of 40 hours of training by August 1, 2016. This is a requirement of the bylaws for the PVFD. I. Paul Depo. at 107:12-17.

11. By August 1, 2016, Tronvold had met the annual requirements as he already had 64 hours of training. I. Paul Depo. at 23:22-25.

12. Tronvold was also required to document that he participated in a minimum of 25% of the calls to the PVFD for the calendar year. I. Paul Depo. at 18:3-25; 19:1-10.

13. Actually, Tronvold had a recorded participation of 51.35%. I. Paul Depo. at 22:2-16.

14. By the date of the accident, Tronvold had met all of the requirements to take the certification test, and it was scheduled for the next day, August 2, 2016. G. Tronvold Depo. at 16:5-18; 18:18-22.

15. The 40 hours of training can be through classes from a variety of sources, including a monthly training session held by the PVFD. I. Paul Depo. at 36:7-16.

16. Again, Tronvold had met all of his requirements for taking his certification class, and no more classwork was needed. G. Tronvold Depo. at 30:9-10.

17. These monthly training sessions were held on Mondays. Firefighters were not required to attend. If they did not go to this meeting, they could go to another session. G. Tronvold Depo. at 31:9-15, 24-25; 32:20-21.

18. Attendance at the training session on Monday, August 1, 2016, was not required for Tronvold. He had enough hours already to take the test without attending that session. G. Tronvold Depo. at 37:21-25; 38:1-25.

19. Tronvold was a member of Engine Company Three. I. Paul Depo. at 49:10-15.

20. This company had a training session on Monday evening, August 1, 2016, starting at 6:30 p.m. G. Tronvold Depo. at 30:1-4.

21. On the evening of August 1, 2016, as is typical on the first Monday of the month, there would have been two meetings. There was first the training session, and then there was a regular meeting of the company. I. Paul Depo. at 49:19-25; 50: 1-2. Typically the training session goes first, and then the meeting. I. Paul Depo. at 50:3-4.

22. As to the monthly meeting, members are encouraged to attend, but it is not required. I. Paul Depo. at 185:15-19.

23. Tronvold was leaving the home of his parents and on the way to Fire Station Three at 721 North Poplar at the time of the accident. I. Paul Depo. at 121:20-21; 122:4-5; G. Tronvold Depo. at 33:22-25.

24. Tronvold was not acting on behalf of the PVFD at the time of the accident. I.

Paul Depo. 37:14-18.

25. He was not running any mission or doing anything on behalf of the PVFD at the time of the accident. I. Paul Depo. at 37:14-18.

26. This was not a fire call, and Tronvold was not summoned for any emergency by the PVFD. I. Paul Depo. at 37:5-7; 38:12-15.

27. During the time that Tronvold was a member of the PVFD he had not ever been called to a fire. G. Tronvold Depo. at 20:6-12.

28. PVFD is the fire department for the City of Pierre. G. Tronvold Depo. at 83:19-21.

29. Although it is a separate entity, the City of Pierre has certain control over PVFD. I. Paul Depo. at 34:21-25; 35:5-8.

30. PVFD is a non-profit corporation. I. Paul Depo. at 101:4-6; 112:2-3. It was established in 1925 and is recognized to be a part of the governmental function of the City of Pierre. *See* Affidavit of Michael L. Luce, Exhibit A, which states: "This corporation is part of the governmental function of the City of Pierre, South Dakota, and as such has no independent finances and has no stockholders. The nature of its business is the prevention and suppression of fires within the City of Pierre." I. Paul Depo. at 111:20-22.

31. The PVFD equipment is owned by the City of Pierre. I. Paul Depo. at 8:18-23.

32. All equipment and real property infrastructure utilized by the PVFD is funded by the City of Pierre. I. Paul Depo. at 9:16-21.

33. The firefighters for the City of Pierre are volunteers. They are not compensated. I. Paul Depo. at 9:22-24.

34. The firefighters are not paid an hourly wage, and they don't get mileage nor do

they complete a W-2. I. Paul Depo. at 25:4-18.

35. Although they get some discounts from business in town and also have a deferred compensation plan for length of service after five years, there is no compensation or reimbursement for the firefighters. They are not paid expenses for responding to a call. G. Tronvold Depo. at 86:17-25; 40:16-17; 41:2-5; I. Paul Depo. at 26:9-23.

36. The PVFD averages about 60 volunteer members. I. Paul Depo. at 43:1-3.

37. For travel within the city, there is no compensation or reimbursement. Reimbursement is only provided for out-of-town training if that occurs. G. Tronvold Depo. at 40:20, 25; 41:2-5.

38. Tronvold has his own personal insurance for the accident that occurred on August 1, 2016. G. Tronvold Depo. at 76:18-21.

39. PVFD has an insurance policy issued by Continental Western Insurance Company. *See* Affidavit of Luce, Exhibit B and I. Paul Depo. at 153:12-13.

40. That insurance policy provides different types of coverage depending upon the particular claims. *See* Affidavit of Luce, Exhibit B.

41. The coverage afforded under that policy is subject to the terms and conditions of the policy. *See* Affidavit of Luce, Exhibit B.

42. As to insurance coverage for this accident involving a motor vehicle, the liability insurance coverage is set forth in Commercial Auto Enhancement Endorsement, CW33 86 02 15 *See* Affidavit of Luce, Exhibit C.

43. Under who is insured for auto liability coverage, the policy states: "Any 'employee' of yours while using a covered 'auto' you don't own, but only for an official emergency response authorized by you." *See* Affidavit of Luce, Exhibit C, paragraph A.2.

44. At the time of this accident, Tronvold was not responding to any emergency. I. Paul Depo. at 38:12-15.

45. There is no liability insurance provided for this accident. *See* Affidavit of Luce, Exhibit C.

46. The policy also contains a South Dakota governmental liability amendatory endorsement. *See* Affidavit of Luce, Exhibit D. That endorsement does not provide any coverage or any suit for damages which is barred by the doctrine of sovereign immunity or governmental immunity, and the purchase of the insurance does not constitute a waiver of any sovereign immunity or governmental immunity. *See* Affidavit of Luce, Exhibit D.

47. Besides the liability provisions in the policy, the policy provides separate coverage for damage to an auto owned or used by any employee. *See* Affidavit of Luce, Exhibit C.

48. On page 2 of the endorsement, it is provided that with respect to physical damage coverage, payment will be made to a loss to an auto owned or used by an employee if "en route to, during or returning from any official duty authorized by you." *See* Affidavit of Luce, Exhibit C, paragraph E.3.

49. Although Tronvold was not engaged in an emergency call, for which liability insurance in the operation of his personal vehicle would apply, he would have coverage for his personal auto damage as long as he was en route to an official duty. That would include a meeting. *See* Affidavit of Luce, Exhibit C and I. Paul Depo. at 186:11-25; 187:4-24.

50. Tronvold sought property damage coverage under the provisions of this policy. Paula Tronvold Depo. at 18:16-24; 19:20-25.

51. Tronvold was paid the $1,000 deductible for the damage to his vehicle, and the

remainder of that damage was covered by his own policy. I. Paul Depo. at 156:3-6; G. Tronvold Depo. at 44:7-25; 45:1-6.

Dated February 1, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on February 1, 2019, I caused the following document:

- **DEFENDANT PIERRE VOLUNTEER FIRE DEPARTMENT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

to be filed electronically with the Clerk of Court through Odyssey File & Serve, and that Odyssey File & Serve will serve an electronic copy upon the following:

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STATE OF SOUTH DAKOTA) : SS COUNTY OF HUGHES)		IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
LISA A. TAMMEN and RANDALL R. JURGENS, Plaintiffs, vs. GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally, Defendants.		CIV. 17-42 **PLAINTIFF LISA A. TAMMEN'S RESPONSES TO DEFENDANT CITY OF PIERRE'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

Plaintiff Lisa A. Tammen, by and through her attorneys of record, respectfully submits this Response to Defendant City of Pierre's Statement of Undisputed Material Facts.

RESPONSES

1. Undisputed.
2. Undisputed.
3. Undisputed.
4. Undisputed.
5. Undisputed.
6. Undisputed.
7. Undisputed.
8. Undisputed.

Filed: 6/5/2019 2:26 PM CST Hughes County, South Dakota 32CIV17-000042

9. Disputed. The Pierre Volunteer Fire Department is not organized independently from the City of Pierre. The Pierre Volunteer Fire Department "is a part of the Governmental Function of the City of Pierre, South Dakota and as such has no independent finances and has no stockholders." Luce Aff. ¶ 2, Ex. A at 3.

10. Undisputed.

11. Undisputed, but incomplete. The City of Pierre also exercises supervisory control of the Pierre Volunteer Fire Department. *See, e.g.*, Pierre City Ordinances 2-3-401; 2-3-402; 2-3-408; 2-3-410; 2-3-411; 2-3-416.

12. Undisputed, but incomplete. Pierre City Ordinance 2-3-403 defines fire apparatus to include vehicles carrying members of the fire department which vehicles display the insignia provided by the fire department consisting of the letters "P.F.D." in gold on a red background.

13. Disputed. The fire department elects officers, but ultimate authority and funding of the Pierre Volunteer Fire Department rests with the City of Pierre. *See* Pierre City Ordinances 2-3-401; 2-3-402; 2-3-408; 2-3-410; 2-3-411; 2-3-416; *see also* Pierre Fire Department Charter at Luce Aff. ¶ 2, Ex. A at 3.

14. Disputed. On August 1, 2016, Defendant Tronvold was traveling to the Pierre Volunteer Fire Department for engine company training in his own vehicle transporting Pierre Volunteer Fire Department equipment, from which the City of Pierre and the Pierre Volunteer Fire Department derived a benefit. Haigh Aff. ¶ 5, Ex. D (Paul Depo. at 70-71; 190). Defendant Tronvold was acting within the course and scope of his employment with the City of Pierre and the Pierre Volunteer Fire Department under the "required vehicle" and "special errand" exceptions to the "going and coming" rule.

15. Disputed. On August 1, 2016, Defendant Tronvold was traveling to the Pierre Volunteer Fire Department station at the direction and control of the Pierre Volunteer Fire Department and City of Pierre to attend required training sessions. In the course of his travel to the Pierre Volunteer Fire Department station, Defendant Tronvold was operating his required personal vehicle and transporting his fire protection equipment which was owned by the City of Pierre to the fire department training session. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 21-22; 87-88); Haigh Aff. ¶ 5, Ex. D (Paul Depo. at 50).

16. Undisputed, but immaterial.

17. Undisputed, but incomplete. There were several other requirements in addition to the requirement to attend 40 hours of training per year. Defendant Pierre Volunteer Fire Department required its volunteers to attend as many monthly meetings as they could get to. Haigh Aff. ¶ 2, Ex. B (Gerrit Tronvold Depo. at 87-88). Pierre City Ordinance Section 2-3-415 provides: "It shall be the duty of each member of a fire company to attend each and all of the drills and meetings of such company, and to respond to each and every call out for a fire, or to the proper alarms given, in cases of a fire within the corporate limits of the city. In the event that a member of such fire company shall fail or neglect to attend such company drills or meetings for three successive drills or meetings, or should a member fail or neglect to respond to such fire alarm or fail to be present at such fire for three fires in succession, without any sufficient reason or excuse for such failure or neglect, it shall become the duty of the chief of the fire department to make an order in writing, dismissing such member or members from membership in such fire company, and such action on the pat of the chief shall be final as to such dismissal."

18. Disputed. *See* response to City of Pierre's Statement of Undisputed Material Facts No. 17.

19. Undisputed that Defendant Tronvold recorded participation in 51.35 percent of calls, but disputed that it would have been sufficient to meet his obligation for the entirety of the calendar year. There is no evidence or testimony that would provide his call participation would have allowed him to miss calls for the rest of the year. Further, there is no indication of how many more calls there were for the remainder of the year, and how many Defendant Tronvold made it to. Also disputed because Pierre City Ordinance Section 2-3-415 requires each member of the fire company to attend each and all of the drills and meetings of the company and respond to each and every call for a fire.

20. Disputed. Defendant Pierre Volunteer Fire Department required its volunteers to attend as many monthly meetings as they could get to. Haigh Aff. ¶ 2, Ex. B (Gerrit Tronvold Depo. at 87-88). In addition, Pierre City Ordinance required firefighters to attend all of the drills and meetings of the fire department and to attend each and every call for a fire.

21. Disputed. Defendant Pierre Volunteer Fire Department required its volunteers to attend as many monthly meetings as they could get to. Haigh Aff. ¶ 2, Ex. B (Gerrit Tronvold Depo. at 87-88). In addition, Pierre City Ordinance required firefighters to attend "each and all of the drills and meetings of such company."

22. Disputed. Again, Defendant Pierre Volunteer Fire Department would not take any adverse action against an employee who made it to 40 training hours, but that does not mean the meetings were not "mandatory." Defendant Tronvold indicated in his deposition that volunteers were required to attend as many monthly meetings as they could get to. Haigh Aff. ¶ 2, Ex. B (Gerrit Tronvold Depo. at 87-88). Pierre City Ordinance Section 2-3-415 required volunteer firemen to attend each and all of the drills and meetings of their company.

23. Disputed. While firefighters are not paid on an hourly basis, they are compensated with benefits that include workers' compensation insurance, group accident insurance, accidental death and dismemberment insurance and a length of service deferred compensation award. Haigh Aff., ¶ 5, Ex. D (Paul Depo. at 26, 87-88). In addition, the Pierre Volunteer Fire Department insurance policy provided a benefit to fire fighters including Defendant Tronvold which provided a benefit to him through compensation for damage to his vehicle caused by the accident. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 44-45).

24. Disputed. Firefighters would be reimbursed for mileage for responding to calls or meetings out of town. Haigh Aff. ¶ 2, Ex. B (Gerrit Tronvold Depo. at 40-41); Haigh Aff. ¶ 5, Ex. D (Paul Depo. at 25).

25. Undisputed, but immaterial and incomplete. Although Defendant Tronvold had his own personal auto insurance, Defendant Pierre Volunteer Fire Department had an insurance policy, under which Defendant Tronvold submitted a claim and was paid $1,000 to cover the deductible for his personal auto insurance. Haigh Aff. ¶ 2, Ex. B (Gerrit Tronvold Depo. at 44-45).

26. Undisputed, but *see* Plaintiff Lisa A. Tammen's Response to City of Pierre's Statement of Undisputed Material Facts No. 27.

27. Disputed as to the applicability of the Memorandum of Governmental Liability Coverage. The coverage provided to Defendant City of Pierre by the South Dakota Public Assurance Alliance contains two separate coverages. One of the coverages is a "Memorandum of Governmental Liability Coverage" attached to the Affidavit of David Sendelbach as Exhibit A. *See* Sendelbach Aff. ¶ 2, Ex. A at 125. The City also has a second type of insurance coverage entitled "Memorandum of Auto Liability Coverage" attached to the Affidavit of David

Sendelbach as Exhibit B. *See* Sendelbach Aff. ¶ 3, Ex. B. at 135. The Exclusion Endorsement for "Fire Department, Fire Fighting activities or Fire Department vehicles" referenced in Defendant City of Pierre's summary judgment brief, by its own title applies only to the "Memorandum of Governmental Liability Coverage" (Exhibit C to the Affidavit of David Sendelbach) and not to the "Memorandum of Auto Liability Coverage" (Exhibit B to the Affidavit of David Sendelbach). This is confirmed by a review of the Memorandum of Governmental Liability Coverage Declarations and separate Memorandum of Automobile Liability Coverage Declarations which Defendant City of Pierre did not include within the Affidavit of David Sendelbach. A copy of the Memorandum of *Governmental* Liability Coverage Declarations, which does not provide automobile liability coverage, is attached to the Affidavit of Tyler Haigh as Exhibit F. *See* Haigh Affidavit, ¶ 7, Ex. F. The separate Memorandum of *Automobile* Liability Coverage Declarations which does provide automobile liability coverage, is attached to the Affidavit of Tyler Haigh as Exhibit G. *See* Haigh Affidavit, ¶ 8, Ex. G. A review of the Memorandum of Governmental Liability Coverage Declarations states that the forms attached to the Governmental Liability Coverage Declarations includes Endorsement number GL 1150. *See* Haigh Affidavit, ¶ 7, Ex. F, at City 4 and at City 6. Endorsement GL 1150, attached as "City 8" to the Memorandum of Governmental Liability Coverage is the Exclusion Endorsement which excludes "Fire Department, Fire Fighting activities or Fire Department vehicles" from Governmental Liability Coverage. Contrary to the assertions made in City of Pierre's Brief in Support of Motion for Summary Judgment, the Exclusion Endorsement which excludes coverage for the "Fire Department, Fire Fighting activities or Fire Department vehicles" is not included as an endorsement to the Memorandum of Automobile Liability Coverage. *See* Haigh Affidavit, ¶ 8, Ex. G at City 12. The only

endorsement to the City's Automobile Liability Coverage is Endorsement No. AL 2075, which changes the City's liability limits for automobile accidents. *See* Haigh Affidavit, ¶ 8, Ex. G at City 14. Contrary to the assertions stated by Defendant City of Pierre, Defendant City of Pierre's automobile liability coverage contains no exclusion for its fire department. This is further confirmed in Exhibit D to the Affidavit of David Sendelbach. In Exhibit D to the Sendelbach Affidavit, the Claims Administrator for the South Dakota Public Assurance Alliance, which insures Defendant City of Pierre, does not state a fire department exclusion as a basis for its reservation of rights with regard to this accident. *See* Sendelbach Aff. ¶ 5, Ex. D. This is because under a plain reading of the policy, the automobile coverage portion of the policy does not exclude fire department vehicles from coverage.

28. Undisputed.

29. Disputed. The Memorandum of Automobile Liability Coverage provides coverage for volunteers since a volunteer is "acting in an official capacity for (a) or (b)." At the time of the accident, Defendant Tronvold was acting in an official capacity for the Pierre Volunteer Fire Department, a commission, council, agency, or board under the City of Pierre's direction and control.

30. Disputed. Defendant City of Pierre's City Commission takes on several governing roles and has authority over the fire department and its members. *See* Haigh Aff. ¶ 6, Ex. E (Paul Depo., Exhibit 8). The Pierre City Ordinances further confirm that Defendant City of Pierre has authority over the fire department, its officers and members. *Id.* Pierre City Ordinance 2-3-408 provides that the Pierre City Commission shall have the power to remove the chief, or first or second assistant chief from office, for failure to perform their duties. *Id.* Pierre Ordinance 2-3-410 provides that any change in the membership of the fire department must be

approved by the City Commission. *Id.* Pierre City Ordinance 2-3-411 provides that firemen on duty shall wear the badge or uniform to be provided by the city and that such uniform shall have been approved by the City Commission. *Id.* The City Ordinances also require that in the event a fireman fails to attend company drills or meetings for three successive drills or fails to respond to fires or alarms for three fires in succession without excuse or neglect, that the fire chief is required to dismiss such member from the fire department. *Id.* Pierre City Ordinance 2-3-416 gives the Mayor of the City of Pierre the authority to regulate firemen and fire apparatus to go beyond the city limits of the City of Pierre. The City of Pierre provides funding for the Pierre Volunteer Fire Department. The Pierre Volunteer Fire Department is "a part of the Governmental function of the City of Pierre, South Dakota, and as such has no independent finances and no stockholders." Luce Aff. ¶ 2, Ex. A at 3.

31. Disputed. Based upon the undisputed evidence that Defendant Pierre Volunteer Fire Department is a department within the government of the City of Pierre, and the undisputed fact that Defendant Tronvold was an employee/volunteer of the City of Pierre in his capacity as a volunteer fireman, Defendant Tronvold was covered under the City of Pierre automobile policy as a matter of law. If the Court finds that Defendant Tronvold was acting within the course and scope of his employment, then coverage is provided by Defendant City of Pierre's insurance policy. Defendant City of Pierre's insurance policy provides coverage to any person who is an official, employee or volunteer of a commission, council, agency, district authority or board coming under Defendant City of Pierre's direction or control. It is undisputed that Defendant Tronvold was an employee or volunteer of Defendant Pierre Volunteer Fire Department. Therefore, if the Court finds that Defendant Tronvold was acting within the course and scope of his employment at the time of the accident, then he was acting in an official capacity of

Defendant Pierre Volunteer Fire Department which is an authority under the direction and control of Defendant City of Pierre.

32. Undisputed, but immaterial. Based upon the arguments provided in Plaintiff Lisa A. Tammen's Brief in Opposition to Defendant City of Pierre's and Defendant Pierre Volunteer Fire Department's Motions for Summary Judgment, the policy issued by the South Dakota Public Assurance Alliance provides coverage for the subject accident and the South Dakota Public Assurance Alliance should not have issued a reservation of rights to Defendant Tronvold and should provide coverage for the injuries incurred by Plaintiffs.

33. Undisputed, but immaterial. Based upon the arguments provided in Plaintiff Lisa A. Tammen's Brief in Opposition to Defendant City of Pierre's and Defendant Pierre Volunteer Fire Department's Motions for Summary Judgment, the policy issued by the South Dakota Public Assurance Alliance provides coverage for the subject accident and the South Dakota Public Assurance Alliance should not have issued a reservation of rights to Defendant Tronvold and should provide coverage for the injuries incurred by Plaintiffs.

Dated at Sioux Falls, South Dakota, this 5th day of June, 2019.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for *Plaintiff Lisa A. Tammen*, hereby certifies that a true and correct copy of the foregoing "Plaintiff Lisa A. Tammen's Responses to Defendant City of Pierre's Statement of Undisputed Material Facts" was filed electronically with the Clerk of Court using the Odyssey File and Serve system which will send notification of such filing to the following:

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on this 5th day of June, 2019.

STATE OF SOUTH DAKOTA) : SS COUNTY OF HUGHES)		IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
LISA A. TAMMEN and RANDALL R. JURGENS, Plaintiffs, vs. GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally, Defendants.		CIV. 17-42 **PLAINTIFF LISA A. TAMMEN'S RESPONSES TO DEFENDANT PIERRE VOLUNTEER FIRE DEPARTMENT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

Plaintiff Lisa A. Tammen, by and through her attorneys of record, respectfully submits this Response to Defendant Pierre Volunteer Fire Department's Statement of Undisputed Material Facts.

RESPONSES

1. Undisputed.

2. Undisputed.

3. Undisputed, but incomplete. Defendant Tronvold was operating his own vehicle which he was required to have in order to travel to the Pierre Volunteer Fire Department and to respond to calls. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 21); Haigh Aff. ¶ 5, Ex. D (Paul Depo. at 17, 65, 190).

4. Undisputed, but incomplete. Defendant Tronvold was operating his own vehicle which he was required to have in order to travel to the Pierre Volunteer Fire Department and to respond to calls. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 21); Haigh Aff. ¶ 5, Ex. D (Paul Depo. at 17, 65, 190). Defendant Tronvold's vehicle was also covered under the liability policies for Defendants City of Pierre and Pierre Volunteer Fire Department. Luce Aff. ¶ 3, Ex. B (Continental Western Policy); Sendelbach Aff. ¶ 3, Ex. B (South Dakota Public Assurance Alliance Policy). Defendant Tronvold was also transporting protection equipment owned by the Pierre Volunteer Fire Department at the time of the accident. Haigh Aff. ¶ 3, Ex. B. (Gerrit Tronvold Depo. at 36-37).

5. Undisputed.

6. Undisputed, but immaterial.

7. Undisputed, but immaterial.

8. Undisputed.

9. Undisputed, but immaterial.

10. Undisputed, but incomplete. There were several other requirements in addition to the requirement to attend 40 hours of training per year. Defendant Pierre Volunteer Fire Department required its volunteers to attend as many monthly meetings as they could get to. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 87-88). Pierre City Ordinance Section 2-3-415 requires each member of the fire company to attend each and all of the drills and meetings of their company and requires the fire chief to dismiss members who neglect or fail to attend such company drills or meetings for three successive drills or meetings.

11. Disputed. Although Defendant Tronvold may have met the annual requirements for training of the Pierre Volunteer Fire Department, he was required by Pierre City Ordinance to attend each and every drill or meeting of his company.

12. Undisputed, but incomplete. The Pierre Volunteer Fire Department minimum requirement for calls conflicts with Pierre City Ordinance Section 2-3-415 that requires volunteer firemen to "respond to each and every call for a fire" or alarm. *See* Pierre City Ordinance 2-3-415.

13. Undisputed that Defendant Tronvold recorded participation in 51.35 percent of calls, but disputed that it would have been sufficient to meet his obligation for the entirety of the calendar year. There is no evidence or testimony that would provide his call participation would have allowed him to miss calls for the rest of the year. Further, there is no indication of how many more calls there were for the remainder of the year, and how many Defendant Tronvold made it to. *See also* Plaintiff Lisa A. Tammen's Response to Defendant Pierre Volunteer Fire Department's Statement of Undisputed Material Fact No. 12.

14. Undisputed, but immaterial.

15. Undisputed, but immaterial. Defendant Pierre Volunteer Fire Department required its volunteers to attend as many monthly meetings as they could get to. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 87-88). In addition, Pierre City Ordinance Section 2-3-415 required firefighters to attend each and every drill and meeting of their company. *See* Pierre City Ordinance 2-3-415.

16. Undisputed, but incomplete. Defendant Pierre Volunteer Fire Department would not take any adverse action against an employee who made it to 40 training hours, but that does not mean the meetings were not mandatory. Defendant Tronvold indicated in his

deposition that volunteers were required to attend as many monthly meetings as they could get to. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 87-88). Even if no more classwork was needed, firefighters were expected to attend the monthly training sessions. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 17, 87-88).

17. Disputed. Again, Defendant Pierre Volunteer Fire Department would not take any adverse action against an employee who made it to 40 training hours, but that does not mean the meetings were not mandatory. Defendant Tronvold indicated in his deposition that volunteers were required to attend as many monthly meetings as they could get to. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 87-88). In addition, *see* Pierre City Ordinance 2-3-415.

18. Disputed. Again, Defendant Pierre Volunteer Fire Department would not take any adverse action against an employee who made it to 40 training hours, but that does not mean the meetings were not mandatory. Defendant Tronvold indicated in his deposition that volunteers were required to attend as many monthly meetings as they could get to. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 87-88). In addition, *see* Pierre City Ordinance 2-3-415.

19. Undisputed.

20. Undisputed

21. Undisputed.

22. Disputed. Defendant Pierre Volunteer Fire Department would not take any adverse action against an employee who made it to 40 training hours, but that does not mean the meetings were not "required." Defendant Tronvold indicated in his deposition that volunteers were required to attend as many monthly meetings as they could get to. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 87-88). Pierre City Ordinance Section 2-3-415 required firefighters to attend each and every drill and meeting of their company and further required the fire chief to

dismiss members who missed three consecutive drills or meetings. *See* Pierre City Ordinance 2-3-415.

23. Undisputed, but incomplete. Defendant Tronvold was traveling from his residence to the training location at his assigned fire station, which was more than three miles outside the city limits of Pierre, and in violation of the Pierre Volunteer Fire Department's requirement that a volunteer employee "must live or work within the city of Pierre or live within three miles of the city limits." Haigh Aff. ¶ 5, Ex. D (Paul Depo. at 91); Haigh Aff. ¶ 4, Ex. C (Paula Tronvold Depo. at 10). The Pierre Volunteer Fire Department was aware that Defendant Tronvold lived more than three miles outside of the city limits of Pierre.

24. Disputed. On August 1, 2016, Defendant Tronvold was traveling to the Pierre Volunteer Fire Department at the direction and control of the Pierre Volunteer Fire Department and City of Pierre when he was required to drive his own personal vehicle to attend training sessions that were encouraged, and which the volunteer firefighters were expected to attend. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 21-22; 87-88); Haigh Aff. ¶ 5, Ex. D (Paul Depo. at 50). Defendant Tronvold was transporting Pierre Volunteer Fire Department personal protection equipment at the time of the accident. Defendant Tronvold was acting within the course and scope of his employment with the Pierre Volunteer Fire Department and the City of Pierre under the required vehicle and the special errand exceptions to the going and coming rule.

25. Disputed. Defendant Tronvold was traveling to the Pierre Volunteer Fire Department at the direction and control of the Pierre Volunteer Fire Department and City of Pierre when he was required to drive his own personal vehicle to attend training sessions that

were encouraged, and which the volunteer firefighters were expected to attend. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 21-22; 87-88); Haigh Aff. ¶ 5, Ex. D (Paul Depo. at 50).

26. Undisputed, but immaterial.

27. Undisputed, but immaterial. Defendant Tronvold had, however, responded to fire department calls. Haigh Aff. ¶ 5, Ex. D (Paul Depo. at 22).

28. Undisputed.

29. Disputed. The Pierre Volunteer Fire Department is a part of the governmental function of the City of Pierre. *See* Luce Aff. Ex. A. The City of Pierre also funds the Pierre Volunteer Fire Department and exercises substantial control over its operations. *See* Pierre City Ordinances 2-3-401; 2-3-402; 2-3-408; 2-3-410; 2-3-411; 2-3-416; Haigh Aff. ¶ 5, Ex. D (Paul Depo. at 8, 96, 99).

30. Undisputed.

31. Undisputed.

32. Undisputed.

33. Disputed. Although Pierre Volunteer Fire Department members are not paid hourly or by call or meeting, they do receive several forms of compensation including workers' compensation insurance, accident insurance, death and dismemberment insurance and a deferred compensation award at the time of retirement.

34. Undisputed, but incomplete. Pierre Volunteer Fire Department members are paid mileage for travel out of town including the payment of training expenses. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 40-41).

35. Undisputed, but immaterial. *See* Plaintiff Lisa A. Tammen's Response to Defendant Pierre Volunteer Fire Department's Statement of Undisputed Facts No. 33.

36. Undisputed, but immaterial.

37. Undisputed, but immaterial.

38. Undisputed, but immaterial and incomplete. Although Defendant Tronvold had his own personal automobile insurance, the Continental Western Insurance Policy purchased by the Pierre Volunteer Fire Department and at issue in this case, provided insurance coverage to Defendant Tronvold for damage to the vehicle he was driving. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 44-45).

39. Undisputed.

40. Undisputed.

41. Disputed to the extent that additional coverage may be provided as required by the laws of South Dakota and for public policy reasons.

42. Disputed. The Commercial Auto Enhancement Endorsement, CW 33 86 02 15 does not provide the only applicable coverage. The entirety of the policy is controlling and should be read together with all other portions of the policy. *See Mid-Century Ins. Co. v. Lyon*, 1997 SD 50, ¶ 6, 562 N.W.2d 888, 890 (citing 13A Appleman, *Insurance Law and Practice* § 7537 (1976) ("The insurance contract includes the printed form policy, declarations therein, and any endorsements thereto. Provisions of the policy and an endorsement thereon are to be read together . . . .").

43. Undisputed, but incomplete. The Policy also states that an "insured" includes "You for any covered 'auto'." Luce Aff. ¶ 4, Ex. C. "You" is Defendant Pierre Volunteer Fire Department. Luce Aff. ¶ 3, Ex. B at 2; 142. Defendant Pierre Volunteer Fire Department is covered for "Any 'Auto'" under the Business Auto Coverage Form in the Policy. Luce Aff. ¶ 3, Ex. B at 130, 142. "Any 'Auto'" would cover any of the descriptions provided within those

provided in the chart under Business Auto Coverage Form, including, but not limited to, number 9 referred to as "Non-owned 'Autos' Only." Luce Aff. ¶ 3, Ex. B at 142. Therefore, Defendant Pierre Volunteer Fire Department has coverage for "'autos' owned by your 'employees' . . . or members of their households but only while used in your business or personal affairs." Luce Aff. ¶ 3, Ex. B at 142.

44. Undisputed, but immaterial.

45. Disputed. In this case, the Policy purchased by Defendant Pierre Volunteer Fire Department also provides coverage for the injuries that were sustained by Plaintiffs. The language contained in the Policy states that Defendant Tronvold was a covered employee and that his truck is a covered auto for liability insurance. In the Auto Declarations provision of the Policy, under Item Two, there is a number "1" describing the covered autos for liability insurance. Luce Aff. ¶ 3, Ex. B at pg. 130. The Business Auto Coverage Form states that a number "1" means "Any Auto." Luce Aff. ¶ 3, Ex. B at pg. 142. Accordingly, based upon its plain language, each and every category or "auto" below that description is covered under this specific policy. One such category is for "Non-Owned 'Autos'" which specifically "includes 'autos' owned by your 'employees.'" Luce Aff. ¶ 3, Ex. B at pg. 142. "Employees" includes "volunteers." Luce Aff. ¶ 3, Ex. B. at pg. 127. The Business Auto Coverage Form provides that the fire department is an insured. Luce Aff. ¶ 3, Ex. B. at pg. 143. The Policy provides coverage as follows:

> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".

Luce Aff. ¶ 3, Ex. B at pg. 143. Page 3 of that form notes that an "insured" includes "[y]our 'employee' if the covered 'auto' is owned by that 'employee' or a member of his or her

household." Luce Aff. ¶ 3, Ex. B at pg. 144. Defendant Pierre Volunteer Fire Department attempts to argue that the coverage provided by the Auto Enhancement Endorsement narrows the coverage because it indicates that an employee is covered "only for an official emergency response authorized by you." *See* Luce Aff. ¶ 4, Ex. C at 1. First, an endorsement within an auto liability policy is meant to broaden coverage, as indicated in the Auto Enhancement Endorsement in this case, not limit or narrow the coverage. *Id.* Second, despite Defendant Pierre Volunteer Fire Department's argument that coverage is provided only for employees when they are using a covered auto for an official emergency response, that provision only applies to how coverage is afforded to the employee. *See id.* The Auto Enhancement Endorsement in the preceding paragraph provides that "insureds" includes "You for any covered 'auto'." *Id.* "You" is defined as the "Named Insured" shown in the Declarations, which is the "City of Pierre Fire Department," also referred to as Defendant Pierre Volunteer Fire Department. Luce Aff. ¶ 3, Ex. B at 2, 142. Because Defendant Tronvold was acting in the scope of employment on behalf of Defendant Pierre Volunteer Fire Department, the second paragraph of the Auto Enhancement Endorsement is not the applicable paragraph to this case—instead, the first paragraph is what controls this case, and that paragraph indicates that Defendant Pierre Volunteer Fire Department is covered under the policy for "any auto" as outlined in the Business Coverage Auto Form. Luce Aff. ¶ 4, Ex. C at 1; Luce Aff. ¶ 3, Ex. 2 at 142.

46. Undisputed, but inapplicable to the facts of this case.

47. Undisputed.

48. Undisputed.

49. Undisputed, but immaterial and incomplete. Although Defendant Tronvold had his own personal auto insurance, Defendant Pierre Volunteer Fire Department had an insurance policy, under which Defendant Tronvold submitted a claim and was paid $1,000 to cover the deductible for his personal auto insurance. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 44-45).

50. Undisputed.

51. Undisputed.

Dated at Sioux Falls, South Dakota, this 5th day of June, 2019.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for *Plaintiff Lisa A. Tammen*, hereby certifies that a true and correct copy of the foregoing "Plaintiff Lisa A. Tammen's Responses to Defendant Pierre Volunteer Fire Department's Statement of Undisputed Material Facts" was filed electronically with the Clerk of Court using the Odyssey File and Serve system which will send notification of such filing to the following:

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on this 5th day of June, 2019.

STATE OF SOUTH DAKOTA) :ss COUNTY OF HUGHES)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
LISA A. TAMMEN and **RANDALL R. JURGENS,** Plaintiffs, vs. **GERRIT A. TRONVOLD**, an individual, **CITY OF PIERRE**, a South Dakota municipal corporation, and **PIERRE VOLUNTEER FIRE DEPARTMENT**, a South Dakota nonprofit corporation, jointly and severally, Defendants.	File No. 32CIV17-000042 **RESPONSE OF PLAINTIFF RANDALL R. JURGENS TO DEFENDANT PIERRE VOLUNTEER FIRE DEPARTMENT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

Plaintiff Randall R. Jurgens, by and through his undersigned counsel of record, and hereby submits the following Response to Defendant Pierre Volunteer Fire Department's Statement of Undisputed Material Facts pursuant to SDCL § 15-6-56(c)(2). This Response in Opposition to Pierre Volunteer Fire Department's Statement of Undisputed Material Facts sets forth the disputed material facts upon which the Defendant Pierre Volunteer Fire Department's Motion for Summary Judgment must be denied.

The deposition testimony and documents upon which this Response relies are attached to the Affidavit of Tiffany L. Larson, with corresponding citations where available by page or other designation. References to the Affidavit of Tiffany L. Larson are referred to as "Larson Affidavit" followed by the corresponding Exhibit number designated as "Ex. ____." A series of ordinances of the City of Pierre govern the Pierre Fire Department and the "Volunteer Fire

Department." References are made to these ordinances as "Fire Department Ordinances" followed by citations to the ordinance by section number.

1. Plaintiffs seek damages arising out of a motorcycle/motor vehicle accident that occurred on or about August 1, 2016. First Amended Complaint, ¶ 11.

RESPONSE: Admitted that the collision occurred at 6:06 p.m. on August 1, 2016 involving the motorcycle on which the Plaintiffs were riding and the pickup truck that Gerrit Tronvold was driving at the intersection of Grey Goose Road and Highway 1804 in Hughes County, South Dakota.

2. Plaintiffs alleged that Defendant Gerrit Tronvold failed to yield the right-of-way at a stop sign and turned left into the path of Plaintiffs' motorcycle. First Amended Complaint, ¶ 13.

RESPONSE: Admitted.

3. Plaintiffs further allege that Defendant Gerrit Tronvold ("Tronvold") was operating his own 2002 Chevrolet pickup at the time or the accident. First Amended Complaint, ¶ 12.

RESPONSE: Admitted.

4. Tronvold owned the vehicle that he was operating. Ian Paul Depo. at 37:2-4; Gerrit Tronvold Depo. at 11: 1 -7.

RESPONSE: Admitted.

5. At the time of the accident, Tronvold was a volunteer fireman with the PVFD. He never held any other position with the PVFD other than a volunteer fireman. G. Tronvold Depo. at 14:13-15.

RESPONSE: Admitted that Tronvold was a volunteer fireman with the PVFD and a member of the Pierre Fire Department at the time of the crash which is the subject matter of this action.

6. Tronvold joined the PVFD in December, 2015. G. Tronvold Depo. at 13:16-25; 14:1.

RESPONSE: Admitted that Tronvold was approved by the City of Pierre Board of Commissioners on December 22, 2015 for Tronvold as a volunteer fireman with the PVFD and member of the Pierre Fire Department assigned to the fire company of Engine Company 3.

7. At the time of the accident, Tronvold was considered to be a rookie firefighter as he had not yet completed the certified firefighter course. I. Paul Depo. at 17:7-15.

Admitted that Tronovold was considered to be a rookie firefighter for that reason. Disputed that Tronvold's status as a rookie member affected his status as a member of the Pierre Fire Department. Tronvold testified that he was assigned to Engine Company 3 in December, 2015. (Tronvold Depo. 13:16-19; Larson Affidavit, Ex. 1). Engine Company 3 is a "fire company" to which Section 2-3-415 of the Fire Department Ordinances applies. (Paul Dep. 139:24-25-140:8; Larson Affidavit, Ex. 5). On December 22, 2015, Tronvold was issued his firefighter gear. (Pierre Fire Department Equipment Issue Checklist; Larson Affidavit, Ex. 6. "You're issued your gear, your pager, a book of the SOP/SOG standard operating procedures and how the department operates, and then from that point on, you are an active member of the department." (Tronvold Depo. 19:18-23; Larson Affidavit, Ex. 1). Starting in December, 2015, Tronvold would respond to an actual fire as an extra set of hands. (Tronvold Depo. 19:24-25; 20:1-2; Id.). The Fire Department Ordinances to not distinguish between a "rookie member" and a member who has completed the South Dakota Certified Firefighter Course, which Tronvold did not complete until the date after the crash on August 2, 2016.

8. In order to get certified through the state, firefighters have to attend a series of classes, have some hands-on practical training and have a certain amount of time to get that completed. I. Paul Depo. at 17:9-15.

RESPONSE: Admitted.

9. Tronvold was a rookie that has been with PVFD for more than six months at the time of the accident. I. Paul Depo. at 47:24-25; 48:1-4.

RESPONSE: Admitted that Tronvold had been a member of the PVFD and the Pierre Department since approval by the City of Pierre Board of Commissioners on December 22, 2015.

10. Besides being on the force for over six months, Tronvold had met the requirements of 40 hours of training by August 1, 2016. This is a requirement of the bylaws for the PVFD. I. Paul Depo. at 107:12-17.

RESPONSE: Admitted that this requirement of 40 hours of training each calendar year appears in the Bylaws of Pierre Volunteer Fire Department, approved March 6, 2014. (Bylaws of Pierre Volunteer Fire Department, Article V, Section 5(B)(2), Page 7; Larson Affidavit, Ex. 2). Disputed that whether or not Tronvold had completed in excess of 40 hours of training prior to August 1, 2016 is an issue of material fact for purposes of the PVFD's motion for summary judgment, as the Fire Department Ordinances contain no such requirement, and further as Tronvold as of August 1, 2016, was in violation of the "drills and meetings" mandatory attendance and dismissal provisions of Section 2-3-415 of the Fire Department Ordinances. It is undisputed that as of August 1, 2016, Tronvold had failed or neglected to attend more than three (3) successive drills and meetings of Engine Company 3 and documented as "absent" for four (4) successive drills and meetings between February 1 and April, 2016, and that no sufficient reason or excuse is documented for such failure or neglect. The minutes of the monthly meetings of Engine Company No. 3 demonstrate that Tronvold was absent without excuse for four successive meetings of Engine Company No. 3 from February to April, 2016. (Minutes of Engine Company No. 3; Larson Affidavit, Ex. 11); (Paul Depo. 137-147; Larson Affidavit, Ex. 5).

Fire Chief Paul testified regarding Tronvold's documented absences at four (4) successive monthly meetings in view of the mandatory attendance and mandatory dismissal requirements of Section 2-3-415 of the Fire Department Ordinances:

Q. Have you read that ordinance [Section 2-3-415] before, sir?
A. I have and I realize it was outdated.
Q. The ordinance is outdated?
A. Yeah. The ordinance is not the way we practice right now, the way it's written.
Q. I think that's the whole point, sir.
A. I understand that.

(Paul Depo. 138:15-21; Larson Affidavit, Ex. 5).

Q. Okay. We don't need to go into that anymore. So according to these documents, if they're correct, Mr. Tronvold was absent for four successive meetings for engine company three from February to April, 2016, correct?
A. Based on that documentation. I don't know any documentation on that, or the reason for it.
Q. And referring back to section 2-3-415 of Plaintiff's Exhibit 8, calling for dismissal of firemen for failure to attend drills and meetings, you agree that this document required you to dismiss Mr. Tronvold for missing four successive engine company three monthly meetings?
[VARIOUS OBJECTIONS]
Q. Well, do you agree, do you not, Mr. Paul, that the action to be taken is taken by the chief, correct?
A. According to the way it is written.

(Paul Depo. 148:4-6; Larson Affidavit, Ex. 5).

Despite the mandatory attendance and dismissal requirements of Section 2-3-415, at no time as fire chief did Ian Paul have any verbal or written reporting mechanism in place for engine company captains to report up to him when members are absent for monthly meetings and drills of fire engine companies. (Paul Depo.148:10-22; Id.).

11. By August 1, 2016, Tronvold had met the annual requirements as he already had 64 hours of training. I. Paul Depo. at 23:22-25.

RESPONSE: See Response No. 10 which is incorporated herein by this reference. Whether or not Tronvold had completed in excess of 40 hours of training prior to August 1, 2016 is not an issue of material fact for purposes of the PVFD's motion for summary judgment,

12. Tronvold was also required to document that he participated in a minimum of 25% of the calls to the PVFD for the calendar year. l. Paul Depo. at 18:3 -25; 19:1-10.

RESPONSE: Admitted that this requirement appears in the Bylaws of Pierre Volunteer Fire Department, approved March 6, 2014. (Bylaws of Pierre Volunteer Fire Department, Article V, Section 5(B)(3), Page 7; Larson Affidavit, Ex. 2). Disputed that whether or not Tronvold participated in 25 percent or more "of calls in any given calendar year" is an issue of material fact for purposes of the PVFD's motion for summary judgment, as the Fire Department Ordinances contain no such requirement, and further as Tronvold as of August 1, 2016, had failed or neglected to respond to five (5) of the seven (7) fires as documented on Paul Depo. Exhibit 2. (Pierre Fire Department Participation Detail by Staff, Pages 1-3; Larson Affidavit, Ex. 12). Tronvold responded to only two (2), one on 02/06/2016 and the second on 07/21/2016, which are marked with an asterisk to note Tronvold's response. (Id.) There are no such asterisks on the fire calls on 02/08/2016, 04/16/2016, 05/28/2016, 07/03/2016, and 07/09/2016. (Id.).

Tronvold responded to only two of seven alarm fires in 2016. As such, he was in violation of Ordinance Section 2-3-415 as he failed on five occasions "to respond to each and every call out for a fire, or to the proper alarms given, in cases of a fire within the corporate limits of the city." The 25 percent call provision is in complete conflict with Section 2-3-415 of the Fire Department Ordinances, which requires that, "It shall be the duty of each member of a fire company . . . to respond to each and every call out for a fire, or to the proper alarms given, in cases of a fire within the corporate limits of the city. In the event that a member of such fire company shall fail or neglect to . . . respond to such fire alarm or fail to be present at such fire for three fires in succession, without any sufficient reason or excuse for such failure or neglect, it shall become the duty of the chief of the fire department to make an order in writing, dismissing such member or members from membership in such fire company, and such action on the part of

the chief shall be final as to such dismissal." (Fire Department Ordinances, Section 2-3-415; Larson Affidavit, Ex. 3).

13. Actually, Tronvold had a recorded participation of 51.35%. I. Paul Depo. at 22:2-16.

RESPONSE: See Response No. 12 which is incorporated herein by this reference. whether or not Tronvold participated in 51.35% percent or more "of calls in any given calendar year" is not an issue of material fact for purposes of the PVFD's motion for summary judgment. Ordinance Section 2-3-415 required Tronvold "to respond to each and every call out for a fire, or to the proper alarms given, in cases of a fire within the corporate limits of the city" unless he has "sufficient reason or excuse for such failure or neglect" for failing or neglecting "to respond to such fire alarm or fail to be present at such fire for three fires in succession." (Fire Department Ordinances, Section 2-3-415; Larson Affidavit, Ex. 3).

14. By the date of the accident, Tronvold had met all of the requirements to take the certification test, and it was scheduled for the next day, August 2, 2016. G. Tronvold Depo. at 16 :5 -18; 18:18-22.

RESPONSE: Disputed that this is an issue of material fact for purposes of the PVFD's motion for summary judgment.

15. The 40 hours of training can be through classes from a variety of sources, including a monthly training session held by the PVFD. I. Paul Depo. at 36:7-16.

RESPONSE: Disputed that this is an issue of material fact for purposes of the PVFD's motion for summary judgment.

16. Again, Tronvold had met all of his requirements for taking his certification class, and no more classwork was needed. G. Tronvold Depo. at 30:9-10.

RESPONSE: Disputed that this is an issue of material fact for purposes of the PVFD's motion for summary judgment.

17. These monthly training sessions were held on Mondays. Firefighters were not required to attend. If they did not go to this meeting, they could go to another station. G. Tronvold Depo. at 31:9-15, 24-25; 32:20-21.

RESPONSE: Admitted in part that the monthly training sessions were held on Monday at the regular monthly meeting of each fire company. Disputed that firefighters were not required to attend. See Response No. 10 which is incorporated herein by this reference.

18. Attendance at the training session on Monday, August 1, 2016, was not required for Tronvold. He had enough hours already to take the test without attending that session. G. Tronvold Depo. at 37:21-25; 38:1-25.

RESPONSE: See Response No. 10 which is incorporated herein by this reference.

19. Tronvold was a member of Engine Company Three. I. Paul Depo. at 49:10-15.

RESPONSE: Admitted.

20. This company had a training session on Monday evening, August 1, 2016, starting at 6:30 p.m. G. Tronvold Depo. at 30:1-4.

RESPONSE: Admitted.

21. On the evening of August 1, 2016, as is typical on the first Monday of the month, there would have been two meetings. There was first the training session, and then there was a regular meeting of the company. I. Paul Depa. at 49:19-25; 50: 1-2. Typically the training session goes first, and then the meeting. T. Paul Depo. at 50:3-4.

RESPONSE: Admitted.

22. As to the monthly meeting, members are encouraged to attend, but it is not required. I. Paul Depo. at 185:15-19.

RESPONSE: Disputed. See Response to No. 10 which is incorporated herein by this reference.

23. Tronvold was leaving the home of his parents and on the way to Fire Station Three at 721 North Poplar at the time of the accident. I. Paul Depo. at 121:20-21; 122:4-5; G. Tronvold Depo. at 33:22-25.

RESPONSE: Admitted.

24. Tronvold was not acting on behalf of the PVFD at the time of the accident. I. Paul Depo. 37:14-18.

RESPONSE: Disputed. Tronvold had a duty while traveling to his home and the fire station on August 1, 2016 to respond to "each and every call out for fire, or to the proper alarms given, in cases of fire within the corporate limits of the city." (Fire Department Ordinances, Section 2-3-415; Larson Affidavit, Ex. 3). Tronvold had a duty as a "member of a fire company to attend each and all of the drills and meetings of such company." (Fire Department Ordinances, Section 2-3-415; Id.) Chief Paul testified that Engine Company No. 3 is a "fire company" within the meaning of this ordinance. (Paul Depo. 139: 24-25; 140:8; Larson Affidavit, Ex. 5).

Before leaving home at 135 Dove Road, Pierre, South Dakota, Tronvold "made sure" that he had his "gear" (personal protective equipment (PPE)) in his pickup. (Tronvold Dep. 34:10-12; Larson Affidavit, Ex. 1). Tronvold's "PPE" consists of an issued bag, boots, bunker pants with suspenders, bunk coat, nomex hood, helmet, all of which is provided. (Tronvold Dep. 34:24-25; 35: 1-20; Id.) Larson Affidavit, Ex. 1). "They like you to have it with you so you can respond." (Tronvold Dep. 34:19-23; Id.) Tronvold was also issued a portable pager, which he carries with him. (Tronvold Dep. 19:18-19; 20:13-25; 21:1; Id.). Tronvold always keeps his PPE in his pickup, and the only time it would be removed would be if he had to use his backseat to haul something, in which case he would use his pickup in this manner and put the PPE back in his pickup truck. (Tronvold Dep. 34:13-18; Id.).

While traveling to his home and the fire station on August 1, 2016, Tronvold was driving his personal vehicle, the 2002 Chevrolet Silverado K2500 extended cab pickup, which he had a duty to own as a member of the PVFD. (Paul Depo. 17: 20-23; Larson Affidavit, Ex. 5). The PVFD has "certain rules that govern firefighters with regard to driving their own personal vehicles." (Paul Depo. 79:3-6; Id.).

Tronvold's 2002 Chevrolet Silverado K2500 extended cab pickup displayed the half-plate vehicle I.D. plate issued by the fire department which states in large capital letters, "MEMBER FIRE DEPT PIERRE FIRE DEPT" (Larson Affidavit, Exhibit 9). The City of Pierre paid for Tronvold's half-plate vehicle I.D. (Paul Depo. 118:25; 119:1; Larson Affidavit, Ex. 5). Chief Paul testified that the purpose of the half-plate vehicle I.D. is to identify the firefighter's personally owned vehicle to law enforcement securing a scene in the event the firefighter responds in his personal vehicle to that location. (Paul Depo. 29: 13-25; 30: 1-4; Id.). However, the dual purpose of identifying the firefighter's personally owned vehicle to the public at large on a 24/7/365 basis is indisputable.

25. He was not running any mission or doing anything on behalf of the PVFD at the time of the accident. I. Paul Depo. at 37:14-18.

RESPONSE: Disputed. Tronvold had a duty while traveling to his home and the fire station on August 1, 2016 to respond to "each and every call out for fire, or to the proper alarms given, in cases of fire within the corporate limits of the city" and whether or not there was a call out for fire or alarm given. (Fire Department Ordinances, Section 2-3-415, Larson Affidavit, Ex. 3). While traveling to his home and the fire station on August 1, 2016, Tronvold owned a duty to the City of Pierre, the PVFD, the public at large and the Plaintiffs, to "Always act in a professional manner when representing the PFD on and off scene." (Emphasis in original). (Orientation for New Firefighters, Page 2; Larson Affidavit Ex. 10).

26. This was not a fire call, and Tronvold was not summoned for any emergency by the PVFD. I. Paul Depo. at 37:5-7; 38:12-15.

RESPONSE: Admitted.

27. During the time that Tronvold was a member of the PVFD he had not ever been called to a fire. G. Tronvold Depo. at 20:6-12.

RESPONSE: Disputed. As of August 1, 2016, Tronvold had responded to two (2) fires, one on 02/06/2016 and the second on 07/21/2016, which are marked with an asterisk to note Tronvold's participation, as documented on Paul Depo. Exhibit 2. (Pierre Fire Department Participation Detail by Staff, Pages 1-3; Larson Affidavit, Ex. 12).

28. PVFD is the fire department for the City of Pierre. G. Tronvold Depo. at 83:19-21.

RESPONSE: Admitted.

29. Although it is a separate entity, the City of Pierre has certain control over PVFD. I. Paul Depo. at 34:21-25; 35:5-8.

RESPONSE: Admitted in part. Disputed as to the phrase, "certain control over PVFD." The Fire Department Ordinances of the City of Pierre were enacted in 1957. The Office of Public Safety has "general responsibility for the functions of the . . . Volunteer Fire Department . . . and such other functions and general employees as may be authorized and approved." (Fire Department Ordinances, Section 2-3-101(5); Larson Affidavit, Ex. 3). The Public Safety Director is an appointive position filled by majority vote of the members of the City Commission, the same as the City Administrator, Business Manager, City Attorney, City Engineering/Planning Director, Utilities Manager, Park and Recreation Director, Human Resources Director, "and such other officers as may be provided for by ordinance." (Fire Department Ordinances, Section 2-3-102(5); Larson Affidavit, Ex. 3).

Section 2-3-401 is entitled, "Fire Department – responsibility" and provides in full:

> "The department in charge of preventing, detecting, reporting, suppressing and extinguishing fires within and for the city shall be known as the Pierre Fire Department, and its officers and employees shall be responsible for the performance of all duties assigned to the department by state law, this code, and the city ordinances, the commission, mayor and designated commissioner."

(Fire Department Ordinances, Section 2-3-401; Larson Affidavit, Ex. 3).

The Fire Department Ordinances provide a comprehensive structure for the governance and administration of all aspects of the operation of the Pierre Fire Department:

(a) Section 2-3-402 subordinates all bylaws and rules adopted by the fire department and each fire company to the ordinances of the City of Pierre.

(b) Section 2-3-404 establishes fire chief, the first assistant chief, and the second assistant chief to constitute "the executive officers of the fire department" to hold office for terms of one year.

(c) Section 2-3-405 designates the regular monthly meeting of the fire department in December for election by a majority of the members present of "one chief and one first assistant chief and one second assistant chief" and "one department secretary and one treasurer." The election results must be certified to the City Commission and the election results must "consider such elections and if they shall deem the persons so elected to be suitable persons, shall proceed to confirm such election; provided, that a majority of the commission shall be necessary for confirmation of the election."

(d) Section 2-3-407 specifies the duties of the chief, first assistant and second assistant chiefs in cases of fire, to at all times have the general direction and management of all fire trucks, engines, hose, hook and ladders, and other apparatus belonging to the fire department. They must report once each year to the City Commission on condition of the fire department and the engines and apparatus belonging thereto, and shall recommend such alterations, improvements and additions as by them may be deemed necessary and expedient.

(e) Section 2-3-408 provides the City Commission with the power to remove the chief, or the first or second assistant chief from office, for failure to perform his duty as such officer.

(f) Section 2-3-409 requires that all members of any of the fire companies must be "able bodied persons of good moral character" who have been "duly elected as such by a majority of the active members of the company."

(g) Section 2-3-410 requires approval by the City Commission of any changes in the membership of any of the fire companies.

(h) Section 2-3-412 provides for the order of command at fires and for filling vacancies in the officers of chief, the first assistant chief, and the second assistant chief.

(i) Section 2-3-415 establishes the duty of each member of a fire company to mandatory attendance at "all of the drills and meetings of such company" and mandatory response to "each and every call out for a fire, or to the proper alarms given, in cases of a fire within the corporate limits of the city."

(j) Section 2-3-415 also establishes a mandatory dismissal duty that the chief must exercise to make an order in writing dismissing any member who, without sufficient reason or excuse for such failure or neglect, fails or neglects "to attend such company drills or meetings for three successive drills or meetings, or should a member fail or neglect to such fire alarm or fail to be present at such fire for three fires in succession."

(k) Chief Ian Paul testified that the fire stations, the fire apparatus, and all equipment issued to each firefighter are all owned by the City of Pierre and purchased through the funding of the City of Pierre in the fire department budget. (Paul Depo. 8:18-23).

30. PVFD is a non-profit corporation. I. Paul Depo. at 101:4-6; 112:2-3. It was established in 1925 and is recognized to be a part of the governmental function of the City of Pierre. See Affidavit of Michael L. Luce, Exhibit A, which states: "This corporation is part of the governmental function of the City of Pierre, South Dakota, and as such has no independent finances and has no stockholders. The nature of its business is the prevention and suppression of fires within the City of Pierre." I. Paul Depo. at 111:20-22.

RESPONSE: Admitted as an accurate quotation of the text of the referenced document.

31. The PVFD equipment is owned by the City of Pierre. I. Paul Depo. at 8: 18-23.

RESPONSE: Admitted.

32. All equipment and real property infrastructure utilized by the PVFD is funded by the City of Pierre. I. Paul Depo. at 9:16-21.

RESPONSE: Admitted.

33. The firefighters for the City of Pierre are volunteers. They are not compensated. I. Paul Depo. at 9:22-24.

RESPONSE: Disputed that the characterization of the firefighters as "volunteers" is not a material fact for purposes of the PVFD's motion for summary judgment. Disputed that whether firefighters are "compensated or not" is not an issue of material fact for purposes of the PVFD's motion for summary judgment. Whether PVFD firefighters are paid or not paid what is commonly referred to as "W-2" or "payroll" compensation is not an issue of material fact for purposes of the PVFD's motion for summary judgment. At all times material to this action, Tronvold was an "employee" of the public entity known as the City of Pierre, and SDCL § 3-21-

1(1) and his status as employee applies "whether compensated or not." As an employee firefighter, Tronvold either received or was eligible to receive the following fringe benefits, all provided and paid for by the City of Pierre:

(a) Worker's compensation insurance coverage. Injured firefighters are covered by the City of Pierre's worker's compensation insurance. (Paul Dep. 11:7-20; 46:18-25; 57:12-18; Larson Affidavit, Ex. 5).

(b) Property damage coverage and deductible reimbursement for an "Employee's Personal Auto" which is damaged while the firefighter "employee" is "en route to, during or returning from any official duty authorized by you (defined as the "City of Pierre Fire Department" with coverage through Continental Western through Fischer-Rounds Insurance Agency. (Paul Depo. 92:19-23; 93:1-15; Larson Affidavit, Ex. 5; Affidavit of Michael Luce, ¶ 3, Exhibit B – Pages 169-170).

(c) Group accident coverage from the City of Pierre through Fischer Rounds Insurance Agency. (Paul Dep. 87:2-25; 88-89; Larson Affidavit, Ex. 5).

(d) Paid membership dues annually for the South Dakota Firefighters Association. (Paul Dep. 88-89: 1-2; Larson Affidavit, Ex. 5).

(e) Paid a per diem for traveling for training "outside of town." (Paul Dep. 25:6-8; Larson Affidavit, Ex. 5).

(f) "Vested" for the Length of Service Award lump-sum financial payment from the City of Pierre ater completing five (5) years of service, paid from a fund which the City of Pierre makes a $10,000 annual contribution and which, for a firefighter with twenty-five (25) years of service retiring in 2017 would receive a lump-sum payment of $25,000. (Paul Dep. 26:9-25; 27:1-25; 28:1-14; 58:15-25; 59:1-25; 60: 13-24; 92:1-14; Larson Affidavit, Ex. 5).

34. The firefighters are not paid an hourly wage, and they don' t get mileage nor do they complete a W-2. I. Paul Depo. at 25:4-18.

RESPONSE: Admitted. Disputed that this is a material fact for purposes of the PVFD's motion for summary judgment.

35. Although they get some discounts from business in town and also have a deferred compensation plan for length of service after five years, there is no compensation or reimbursement for the firefighters. They arc not paid expenses for responding to a call. G. Tronvold Depo. at 86:17-25; 40: J 6-17; 41:2-5; I. Paul Dcpo. at 26:9-23.

RESPONSE: Admitted in part. See Response Nos. 33 and 34 which are incorporated herein by this reference.

36. The PVFD averages about 60 volunteer members. I. Paul Depo. at 43:1-3.

RESPONSE: Admitted. Disputed that this is a material fact for purposes of the PVFD's motion for summary judgment.

37. For travel within the city, there is no compensation or reimbursement. Reimbursement is only provided for out-of-town training if that occurs. G. Tronvold Depo. at 40:20, 25; 41:2-5.

RESPONSE: Admitted. Disputed that this is a material fact for purposes of the PVFD's motion for summary judgment.

38. Tronvold has his own personal insurance for the accident that occurred on August 1, 2016. G. Tronvold Depo. at 76:18-21.

RESPONSE: Admitted. Disputed that this is a material fact for purposes of the PVFD's motion for summary judgment.

39. PVFD has an insurance policy issued by Continental Western Insurance Company. See Affidavit of Luce, Exhibit Band I. Paul Depo. at 153:12-13.

RESPONSE: Disputed that the policyholder is "PVFD." The policyholder and named insured is "City of Pierre Fire Department." The City of Pierre pays the premiums for these insurance coverages through Fischer-Rounds Insurance Agency in Pierre, South Dakota.

40. That insurance policy provides different types of coverage depending upon the particular claims . See Affidavit of Luce, Exhibit B.

RESPONSE: Admitted.

41. The coverage afforded under that policy is subject to the terms and conditions of the policy. See Affidavit of Luce, Exhibit B.

RESPONSE: Admitted.

42. As to insurance coverage for this accident involving a motor vehicle, the liability insurance coverage is set forth in Commercial Auto Enhancement Endorsement, CW33 86 02 15 See Affidavit of Luce, Exhibit C.

RESPONSE: Admitted.

43. Under who is insured for auto liability coverage, the policy states: "Any 'employee' of yours while using a covered 'auto' you don't own, but only for an official emergency response authorized by you." See Affidavit of Luce, Exhibit C, paragraph A.2.

RESPONSE: Admitted.

44. At the time of this accident, Tronvold was not responding to any emergency. I. Paul Depo. at 38:12-15.

RESPONSE: Admitted.

45. There is no liability insurance provided for this accident. See Affidavit of Luce, Exhibit C.

RESPONSE: Admitted.

46. The policy also contains a South Dakota governmental liability amendatory endorsement. See Affidavit of Luce, Exhibit D. That endorsement does not provide any coverage or any suit for damages which is barred by the doctrine of sovereign immunity or governmental immunity, and the purchase of the insurance does not constitute a waiver of any sovereign immunity or governmental immunity. See Affidavit of Luce, Exhibit D.

RESPONSE: Disputed. The purchase of insurance waives sovereign immunity or governmental immunity.

47. Besides the liability provisions in the policy, the policy provides separate coverage for damage to an auto owned or used by any employee. See Affidavit of Luce, Exhibit C.

RESPONSE: Admitted.

48. On page 2 of the endorsement, it is provided that with respect to physical damage coverage, payment will be made to a loss to an auto owned or used by an employee if "en route to, during or returning from any official duty authorized by you." See Affidavit of Luce, Exhibit C, paragraph E.3.

RESPONSE: Admitted.

49. Although Tronvold was not engaged in an emergency call, for which liability ty insurance in the operation of his personal vehicle would apply, he would have coverage for his personal auto dam age as long as he was en route to an official duty. That would include a meeting. See Affidavit of Luce, Exhibit C and I. Paul Depo. at 186:11 - 25; 187:4 - 24.

50. Tronvold sought property damage coverage under the provisions of this policy. Paula Tronvold Depo. at 18: 16-24; 19:20-25.

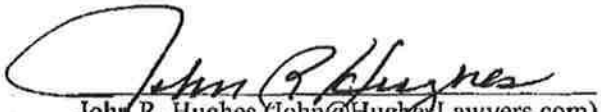
RESPONSE: Admitted.

51. Tronvold was paid the $1,000 deductible for the damage to his vehicle, and the remainder of that damage was covered by his own policy. I. Paul Depo. at 156:3-6; G. Tronvold Depo. at 44:7-25; 45:1-6.

RESPONSE: Admitted.

Dated at Sioux Falls, South Dakota, on this 5th day of June, 2019.

HUGHES LAW OFFICE



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Attorneys for Plaintiff Randall R. Jurgens

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of June, 2019, a true and correct copy of the above and foregoing Response of Plaintiff Randall R. Jurgens to Pierre Volunteer Fire Department's Statement of Undisputed Material Facts was served electronically using the Odyssey File and Serve system which will send notification of such filing to the following:

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John R. Hughes

STATE OF SOUTH DAKOTA) :ss COUNTY OF HUGHES)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
LISA A. TAMMEN and **RANDALL R. JURGENS,** Plaintiffs, vs. **GERRIT A. TRONVOLD,** an individual, **CITY OF PIERRE,** a South Dakota municipal corporation, and **PIERRE VOLUNTEER FIRE DEPARTMENT,** a South Dakota nonprofit corporation, jointly and severally, Defendants.	File No. 32CIV17-000042 **RESPONSE OF PLAINTIFF RANDALL R. JURGENS TO DEFENDANT CITY OF PIERRE'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

Plaintiff, Randall R. Jurgens ("Jurgens"), by and through his undersigned counsel of record, and hereby submits the following Statement of Undisputed Material Facts pursuant to SDCL § 15-6-56(c)(2). This Response in Opposition to City of Pierre's Statement of Undisputed Material Facts sets forth the disputed material facts upon which the Defendant City of Pierre's Motion for Summary Judgment must be denied.

The deposition testimony and documents upon which this Response relies are attached to the Affidavit of Tiffany L. Larson, with corresponding citations where available by page or other designation. References to the Affidavit of Tiffany L. Larson are referred to as "Larson Affidavit" followed by the corresponding Exhibit number designated as "Ex. ____." A series of ordinances of the City of Pierre govern the Pierre Fire Department and the "Volunteer Fire Department." References are made to these ordinances as "Fire Department Ordinances" followed by citations to the ordinance by section number.

Filed: 6/6/2019 4:47 PM CST Hughes County, South Dakota 32CIV17-000042

1. On or about August 1, 2016, Plaintiffs Jurgens and Tammen were riding a motorcycle westbound on South Dakota Highway 1804. (¶ 11 of Plaintiffs ' First Amended Complaint).

1. **RESPONSE**: Admitted.

2. Plaintiffs allege that at approximately 6:00 p.m. on August 1, 2016, Defendant Tronvold, while driving his personally owned 2002 Chevrolet Silverado K2500 extended cab pickup, was traveling southwest on Grey Goose Road toward where it intersects with South Dakota Highway 1804. (¶ 12 of Plaintiffs' First Amended Complaint).

2. RESPONSE: Admitted.

3. Plaintiffs allege Tronvold failed to yield the right-of-way to Plaintiffs and executed a left-hand turn into the path of Plaintiffs' motorcycle. (¶¶ 13 and 14 of Plaintiffs' First Amended Complaint).

3. RESPONSE: Admitted. Tronvold was charged with failure to yield/failure to stop at a controlled intersection in violation of SDCL § 32-29-2.1 and a seat belt violation as well. Tronvold pled guilty and paid the fine. (Tronvold Depo. 70:25; 71:1-3; Larson Affidavit, Ex. 1).

4. The two vehicles collided causing significant injuries to Plaintiffs. (¶¶ 13and 14 of Plaintiffs' First Amended Complaint).

4. RESPONSE: Admitted. Plaintiffs each suffered multiple, catastrophic and permanent life-altering injuries, including amputation of their respective left legs above the knee.

5. At the time of the motor vehicle accident, Tronvold was a rookie member of the Pierre Volunteer Fire Department (PVFD). (Ian Paul depo. at 17:7-15; attached to Abraham Aff. as Exh. D.)

5. **RESPONSE**: Admitted that on August 1, 2016, Tronvold a rookie member of the PVFD as defined in the bylaws of the PVFD because as of that date, Tronvold had not yet completed the South Dakota Certified Firefighter Course. (Bylaws of Pierre Volunteer Fire Department, Article V – Membership, Section 5; Larson Affidavit, Ex. 2). Tronvold was also a member of the Pierre Fire Department since December 22, 2015, when his application for membership was approved by the Board of Commissioners of the City of Pierre, as required by the Fire Department Ordinances. (Fire Department Ordinances, Section 2-3-410; Larson Affidavit, Ex. 3); (Minutes of City of Pierre Board of Commissioners, 12/22/2015 and Memorandum from Fire Chief Ian Paul to Twila Hight, dated 12/21/2015, requesting that Gerrit Tronvold be added to the agenda for approval at the next Commission meeting; Larson Affidavit, Ex. 4).

Disputed that Tronvold's status as a rookie member affected his status as a member of the Pierre Fire Department. Tronvold testified that he was assigned to Engine Company 3 in December, 2015. (Tronvold Depo. 13:16-19; Larson Affidavit, Ex. 1). Tronvold's mother, Paula Tronvold, "has been a member for a long time." (Tronvold Depo. 13:20-21; Id.). Engine Company 3 is a "fire company" to which Section 2-3-415 of the Fire Department Ordinances applies. (Paul Dep. 139:24-25-140:8; Larson Affidavit, Ex. 5).

On December 22, 2015, Tronvold was issued his firefighter gear. (Pierre Fire Department Equipment Issue Checklist; Larson Affidavit, Ex. 6). "You're issued your gear, your pager, a book of the SOP/SOG standard operating procedures and how the department operates, and then from that point on, you are an active member of the department." (Tronvold Depo. 19:18-23; Larson Affidavit, Ex. 1). Starting in December, 2015, Tronvold would respond to an actual fire as an extra set of hands. (Tronvold Depo. 19:24-25; 20:1-2; Id.). The Fire Department

Ordinances to not distinguish between a "rookie member" and a member who has completed the South Dakota Certified Firefighter Course, which Tronvold did not complete until the date after the crash on August 2, 2016.

6. Tronvold was traveling to a monthly training meeting of the PVFD. (Tronvold depo. at 33:22-25, attached to Abraham Aff. as Exh. A).

6. **RESPONSE**: Admitted that on Monday, August 1, 2016, Tronvold was traveling to the regular monthly meeting and drill of Engine Company No. 3, the "fire company" of which he was assigned, and whose physical address is Fire Station No. 3, 721 North Poplar, Pierre, South Dakota. The training part of the meeting was the EVOC (Emergency Vehicle Operator Course) which is "driver training" maneuvering the fire engine "through a predetermined course with cones and things." (Paul Depo. 94:15-25; 95:1-4, and Ex. 22, Page 001; Larson Affidavit, Ex. 5).

7. The accident occurred at approximately 6:00 p.m. and the training session was scheduled to commence at 6:30 p.m. (Tronvold depo p. 30:1-4).

7. **RESPONSE**: Disputed that the crash occurred at approximately 6:00 p.m. Law enforcement who investigated the crash documents 6:06 p.m. as the time of the crash, with officers on the scene at 6:16 p.m. (State of South Dakota Investigator's Motor Vehicle Traffic Accident Report, Page 1; Larson Affidavit, Ex. 7). Admitted that the meeting was scheduled to commence at 6:30 p.m.

8. Tronvold was traveling directly from his residence to the training location at his assigned fire station. (Paul depo. at 121:20-21; 122:4-5) (Tronvold depo. at 33:22-25).

8. **RESPONSE**: Admit that Tronvold was traveling from his residence of 135 Dove Road, Pierre, South Dakota, and that the meeting and training location was 721 North Poplar,

Pierre, South Dakota, where he was assigned to Engine Company 3 of Fire Station No. 3). (Paul Dep. 54:1-6; 121:13-25-122:1-3; Tronvold Dep. 33:22-25; Larson Affidavit, Ex. 5 and 1).

9. The Pierre Volunteer Fire Department is a South Dakota nonprofit corporation and is a corporate entity organized independently from the City of Pierre. (Paul depo. at 34:21-25; 35:5-8).

9. **RESPONSE**: Admitted that the Pierre Volunteer Fire Department was organized on December 2, 1925.

Disputed that this corporate entity is organized or operated "independently from the City of Pierre." The Application of the Pierre Volunteer Fire Department for an Extension of its Corporation Charter states that, "This Corporation is part of the Governmental Functions of the City of Pierre, South Dakota and as such has no independent finances and has no stockholders. The Nature of its business is the prevention and suppression of fires within the City of Pierre." (Application of the Pierre Volunteer Fire Department for an Extension of its Corporation Charter, Exhibit "A"; Larson Affidavit, Ex. 8).

The Fire Department Ordinances were enacted in 1957. The Office of Public Safety has "general responsibility for the functions of the . . . Volunteer Fire Department . . . and such other functions and general employees as may be authorized and approved." (Fire Department Ordinances, Section 2-3-101(5); Larson Affidavit, Ex. 3). The Public Safety Director is an appointive position filled by majority vote of the members of the City Commission, the same as the City Administrator, Business Manager, City Attorney, City Engineering/Planning Director, Utilities Manager, Park and Recreation Director, Human Resources Director, "and such other officers as may be provided for by ordinance." (Fire Department Ordinances, Section 2-3-102(5); Larson Affidavit, Ex. 3).

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> "The department in charge of preventing, detecting, reporting, suppressing and extinguishing fires within and for the city shall be known as the Pierre Fire Department, and its officers and employees shall be responsible for the performance of all duties assigned to the department by state law, this code, and the city ordinances, the commission, mayor and designated commissioner."

(Fire Department Ordinances, Section 2-3-401; Larson Affidavit, Ex. 3).

The Fire Department Ordinances provide a comprehensive structure for the governance and administration of all aspects of the operation of the Pierre Fire Department:

(a) Section 2-3-402 subordinates all bylaws and rules adopted by the fire department and each fire company to the ordinances of the City of Pierre.

(b) Section 2-3-404 establishes fire chief, the first assistant chief, and the second assistant chief to constitute "the executive officers of the fire department" to hold office for terms of one year.

(c) Section 2-3-405 designates the regular monthly meeting of the fire department in December for election by a majority of the members present of "one chief and one first assistant chief and one second assistant chief" and "one department secretary and one treasurer." The election results must be certified to the City Commission and the election results must "consider such elections and if they shall deem the persons so elected to be suitable persons, shall proceed to confirm such election; provided, that a majority of the commission shall be necessary for confirmation of the election."

(d) Section 2-3-407 specifies the duties of the chief, first assistant and second assistant chiefs in cases of fire, to at all times have the general direction and management of all fire trucks, engines, hose, hook and ladders, and other apparatus belonging to the fire department. They must report once each year to the City Commission on condition of the fire department and the engines and apparatus belonging thereto, and shall recommend such alterations, improvements and additions as by them may be deemed necessary and expedient.

(e) Section 2-3-408 provides the City Commission with the power to remove the chief, or the first or second assistant chief from office, for failure to perform his duty as such officer.

(f) Section 2-3-409 requires that all members of any of the fire companies must be "able bodied persons of good moral character" who have been "duly elected as such by a majority of the active members of the company."

(g) Section 2-3-410 requires approval by the City Commission of any changes in the membership of any of the fire companies.

(h) Section 2-3-412 provides for the order of command at fires and for filling vacancies in the officers of chief, the first assistant chief, and the second assistant chief.

(i) Section 2-3-415 establishes the duty of each member of a fire company to mandatory attendance at "all of the drills and meetings of such company" and mandatory response to "each and every call out for a fire, or to the proper alarms given, in cases of a fire within the corporate limits of the city."

(j) Section 2-3-415 also establishes a mandatory dismissal duty that the chief must exercise to make an order in writing dismissing any member who, without sufficient reason or excuse for such failure or neglect, fails or neglects "to attend such company drills or meetings for three successive drills or meetings, or should a member fail or neglect to such fire alarm or fail to be present at such fire for three fires in succession."

(k) Chief Ian Paul testified that the fire stations, the fire apparatus, and all equipment issued to each firefighter are all owned by the City of Pierre and purchased through the funding of the City of Pierre in the fire department budget. (Paul Depo. 8:18-23).

10. The City of Pierre is a municipality organized under the statutory framework authorized by the State of South Dakota. (See Aff. of Kristi Honeywell, City Manager.)

10. **RESPONSE**: Admitted.

11. The City of Pierre provides funding for the PVFD and employs a Fire Chief and maintenance worker. (Paul depo. at 6:2-22).

11. **RESPONSE**: Admitted that the City of Pierre provides all of the funding for the PVFD. Disputed that the City of Pierre's funding of the Pierre Fire Department established by the Fire Department Ordinances is limited to funding the PVFD and employing a Fire Chief and maintenance worker. See Response to No. 9 which is incorporated into this Response by this reference.

12. The PVFD stations, apparatus, and personal protective equipment are purchased by the City of Pierre. (Paul depo. at 8:18-23).

12. **RESPONSE**: Admitted.

13. The PVFD self-governs through the election of officers. (Paul depo. at 7:10-25; 8:1-17).

13. **RESPONSE**: Disputed. See Response to No. 9 which is incorporated into this Response by this reference.

14. While traveling to his home and the fire station on August 1, 2016, Tronvold was not undertaking any action on behalf of the City of Pierre or the PVFD. (Paul depo. At 37:14-18).

14. **RESPONSE**: Disputed.

Tronvold had a duty while traveling to his home and the fire station on August 1, 2016 to respond to "each and every call out for fire, or to the proper alarms given, in cases of fire within the corporate limits of the city." (Fire Department Ordinances, Section 2-3-415; Larson Affidavit, Ex. 3). Tronvold had a duty as a "member of a fire company to attend each and all of the drills and meetings of such company." (Fire Department Ordinances, Section 2-3-415; Id.) Chief Paul testified that Engine Company No. 3 is a "fire company" within the meaning of this ordinance. (Paul Depo. 139: 24-25; 140:8; Larson Affidavit, Ex. 5).

Before leaving home at 135 Dove Road, Pierre, South Dakota, Tronvold "made sure" that he had his "gear" (personal protective equipment (PPE)) in his pickup. (Tronvold Dep. 34:10-12; Larson Affidavit, Ex. 1). Tronvold's "PPE" consists of an issued bag, boots, bunker pants with suspenders, bunk coat, nomex hood, helmet, all of which is provided. (Tronvold Dep. 34:24-25; 35: 1-20; Id.) Larson Affidavit, Ex. 1). "They like you to have it with you so you can respond." (Tronvold Dep. 34:19-23; Id.) Tronvold was also issued a portable pager, which he carries with him. (Tronvold Dep. 19:18-19; 20:13-25; 21:1; Id.). Tronvold always keeps his PPE in his

pickup, and the only time it would be removed would be if he had to use his backseat to haul something, in which case he would use his pickup in this manner and put the PPE back in his pickup truck. (Tronvold Dep. 34:13-18; Id.).

While traveling to his home and the fire station on August 1, 2016, Tronvold was driving his personal vehicle, the 2002 Chevrolet Silverado K2500 extended cab pickup, which he had a duty to own as a member of the PVFD. (Paul Depo. 17: 20-23; Larson Affidavit, Ex. 5). The PVFD has "certain rules that govern firefighters with regard to driving their own personal vehicles." (Paul Depo. 79:3-6; Id.).

Tronvold's 2002 Chevrolet Silverado K2500 extended cab pickup displayed the half-plate vehicle I.D. plate issued by the fire department which states in large capital letters, "MEMBER FIRE DEPT PIERRE FIRE DEPT" (Larson Affidavit, Ex. 9). The City of Pierre paid for Tronvold's half-plate vehicle I.D. (Paul Depo. 118:25; 119:1; Larson Affidavit, Ex. 5). Chief Paul testified that the purpose of the half-plate vehicle I.D. is to identify the firefighter's personally owned vehicle to law enforcement securing a scene in the event the firefighter responds in his personal vehicle to that location. (Paul Depo. 29: 13-25; 30: 1-4; Id.). However, the dual purpose of identifying the firefighter's personally owned vehicle to the public at large on a 24/7/365 basis is indisputable.

15. Tronvold was not conducting any mission or undertaking any act at the direction or control of PVFD or the City of Pierre at the time of the motor vehicle accident. (Paul depo. at 37:14-18).

15. **RESPONSE**: Disputed. Tronvold had a duty while traveling to his home and the fire station on August 1, 2016, to respond to "each and every call out for fire, or to the proper alarms given, in cases of fire within the corporate limits of the city" and whether or not there was

a call out for fire or alarm given. (Fire Department Ordinances, Section 2-3-415, Larson Affidavit, Ex. 3). While traveling to his home and the fire station on August 1, 2016, Tronvold owned a duty to the City of Pierre, the PVFD, the public at large and the Plaintiffs, to "Always act in a professional manner when representing the PFD on and off scene." (Emphasis in original). (Orientation for New Firefighters, Page 2; Larson Affidavit Ex. 10).

16. At the time Tronvold was traveling from his residence to the meeting at the Fire Station, there was no active fire call and Tronvold had not been summoned for any emergency by the PVFD. (Paul depo. at 37:5-7; 38:12-15).

16. RESPONSE: Admitted. Disputed that the absence of an active fire call or that Tronvold was not summoned for any emergency are issues of material fact for purposes of the City of Pierre's motion for summary judgment.

17. Members of the PVFD are required to attend 40 hours of training per year and Tronvold had completed in excess of 40 hours of training prior to the date of the accident, August 1, 2016. (Paul depo. at 107:12-17; 23:22-25).

17. RESPONSE: Admitted that this requirement appears in the Bylaws of Pierre Volunteer Fire Department, approved March 6, 2014. (Bylaws of Pierre Volunteer Fire Department, Article V, Section 5(B)(2), Page 7; Larson Affidavit, Ex. 2). Disputed that whether or not Tronvold had completed in excess of 40 hours of training prior to August 1, 2016 is an issue of material fact for purposes of the City of Pierre's motion for summary judgment, as the Fire Department Ordinances contain no such requirement, and further as Tronvold as of August 1, 2016, was in violation of the "drills and meetings" mandatory attendance and dismissal provisions of Section 2-3-415 of the Fire Department Ordinances. It is undisputed that as of August 1, 2016, Tronvold had failed or neglected to attend more than three (3) successive drills

and meetings of Engine Company 3 and documented as "absent" for four (4) successive drills and meetings between February 1 and April, 2016, and that no sufficient reason or excuse is documented for such failure or neglect.

The minutes of the monthly meetings of Engine Company No. 3 demonstrate that Tronvold was absent without excuse for four successive meetings of Engine Company No. 3 from February to April, 2016. (Minutes of Engine Company No. 3; Larson Affidavit, Ex. 11); (Paul Depo. 137-147; Larson Affidavit, Ex. 5).

Fire Chief Paul testified regarding Tronvold's documented absences at four (4) successive monthly meetings in view of the mandatory attendance and mandatory dismissal requirements of Section 2-3-415 of the Fire Department Ordinances:

Q. Have you read that ordinance [Section 2-3-415] before, sir?
A. I have and I realize it was outdated.
Q. The ordinance is outdated?
A. Yeah. The ordinance is not the way we practice right now, the way it's written.
Q. I think that's the whole point, sir.
A. I understand that.

(Paul Depo. 138:15-21; Larson Affidavit, Ex. 5).

Q. Okay. We don't need to go into that anymore. So according to these documents, if they're correct, Mr. Tronvold was absent for four successive meetings for engine company three from February to April, 2016, correct?
A. Based on that documentation. I don't know any documentation on that, or the reason for it.
Q. And referring back to section 2-3-415 of Plaintiff's Exhibit 8, calling for dismissal of firemen for failure to attend drills and meetings, you agree that this document required you to dismiss Mr. Tronvold for missing four successive engine company three monthly meetings?
[VARIOUS OBJECTIONS]
Q. Well, do you agree, do you not, Mr. Paul, that the action to be taken is taken by the chief, correct?
A. According to the way it is written.

(Paul Depo. 148:4-6; Larson Affidavit, Ex. 5).

Despite the mandatory attendance and dismissal requirements of Section 2-3-415, at no time as fire chief did Ian Paul have any verbal or written reporting mechanism in place for engine company captains to report up to him when members are absent for monthly meetings and drills of fire engine companies. (Paul Depo.148:10-22; Id.).

18. PVFD members were also required to participate in a minimum of 25 percent of the calls in any given calendar year. (Paul depo. at 18:3-25; 19:1-10).

18. **RESPONSE**: Admitted that this requirement appears in the Bylaws of Pierre Volunteer Fire Department, approved March 6, 2014. (Bylaws of Pierre Volunteer Fire Department, Article V, Section 5(B)(3), Page 7; Larson Affidavit, Ex. 2). Disputed that whether or not Tronvold participated in 25 percent or more "of calls in any given calendar year" is an issue of material fact for purposes of the City of Pierre's motion for summary judgment, as the Fire Department Ordinances contain no such requirement, and further as Tronvold as of August 1, 2016, had failed or neglected to respond to five (5) of the seven (7) fires as documented on Paul Depo. Exhibit 2. (Pierre Fire Department Participation Detail by Staff, Pages 1-3; Larson Affidavit, Ex. 12). Tronvold responded to only two (2), one on 02/06/2016 and the second on 07/21/2016, which are marked with an asterisk to note Tronvold's response. (Id.) There are no such asterisks on the fire calls on 02/08/2016, 04/16/2016, 05/28/2016, 07/03/2016, and 07/09/2016. (Id.).

Tronvold responded to only two of seven alarm fires in 2016. As such, he was in violation of Ordinance Section 2-3-415 as he failed on five occasions "to respond to each and every call out for a fire, or to the proper alarms given, in cases of a fire within the corporate limits of the city." The 25 percent call provision is in complete conflict with Section 2-3-415 of the Fire Department Ordinances, which requires that, "It shall be the duty of each member of a

fire company . . . to respond to each and every call out for a fire, or to the proper alarms given, in cases of a fire within the corporate limits of the city. In the event that a member of such fire company shall fail or neglect to . . . respond to such fire alarm or fail to be present at such fire for three fires in succession, without any sufficient reason or excuse for such failure or neglect, it shall become the duty of the chief of the fire department to make an order in writing, dismissing such member or members from membership in such fire company, and such action on the part of the chief shall be final as to such dismissal." (Fire Department Ordinances, Section 2-3-415; Larson Affidavit, Ex. 3).

19. On the date of the motor vehicle accident, Tronvold had already recorded participation in 51.35 percent of calls which should have been sufficient to meet his obligation for the entirety of the calendar year. (Paul depo. at 22:2-16).

19. RESPONSE: Disputed. See Response Nos. 17-18 which are incorporated herein by this reference. Section 2-3-415 of the Fire Department Ordinances required Chief Paul to enter an order dismissing Tronvold from the fire department.

20. The 40 hour annual training requirement may be satisfied through receiving training though a number of sources include classes or monthly training sessions held by the PVFD. (Paul depo. at 36:7-16).

20. RESPONSE: Disputed. See Response Nos. 17-19 which are incorporated herein by this reference. Whether or not the 40 annual training requirement of the Bylaws may be satisfied as stated is not an issue of material fact for purposes of the City of Pierre's motion for summary judgment and is irrelevant to the genuine issue of material fact as to whether Tronvold should have been subjected to mandatory dismissal by the fire chief for failing or neglecting to attend the monthly meetings and drills as required by Section 2-3-415 of the Fire Department

Ordinances. The Bylaws are subordinated to the Fire Department Ordinances by Section 2-3-402. (Fire Department Ordinances, Section 2-3-402, Larson Affidavit, Ex. 3).

21. Monthly training sessions were not mandatory for PVFD members. Members that did not attend the monthly meeting could obtain training hours in other forms and by attending other sessions. (Tronvold depo. at 31:9-15, 24-25; 32:20-12; Paul depo. at 24:17-22).

21. **RESPONSE**: Disputed. See Responses Nos. 17-20 which are incorporated herein by this reference. The City of Pierre erroneously conflates the separate requirement of minimum training hours required in the Bylaws of the Pierre Volunteer Fire Department, Article V – Membership, Section 5(A)(2) and Section 5(B)(2), with the wholly separate duties prescribed by Section 2-3-415 that "each member of a fire company to attend each and all of the drills and meetings of such company" and without having sufficient reason or excuse for such failure or neglect to attend such company drills or meetings for three successive drills or meetings, to be dismissed from membership in the fire company. The self-serving testimony of Tronvold and Chief Ian Paul cannot supplant the ordinances of the City of Pierre.

22. Members are encouraged to attend monthly meetings but attendance is not required so long as annual requirements are met. (Paul depo. at 185:15-19).

22. **RESPONSE**: Disputed. See Responses Nos. 17-21 which are incorporated herein by this reference.

23. PVFD firefighters are volunteers and are not compensated. (Paul depo. at 9:22-24).

23. **RESPONSE**: Disputed. Whether PVFD firefighters are paid or not paid what is commonly referred to as "W-2" or "payroll" compensation is not an issue of material fact for purposes of the City of Pierre's motion for summary judgment. At all times material to this action, Tronvold was an "employee" of the public entity known as the City of Pierre, and SDCL

§ 3-21-1(1) and his status as employee applies "whether compensated or not." As an employee firefighter, Tronvold either received or was eligible to receive the following fringe benefits, all provided and paid for by the City of Pierre:

(a) Worker's compensation insurance coverage. Injured firefighters are covered by the City of Pierre's worker's compensation insurance. (Paul Dep. 11:7-20; 46:18-25; 57:12-18; Larson Affidavit, Ex. 5).

(b) Property damage coverage and deductible reimbursement for an "Employee's Personal Auto" which is damaged while the firefighter "employee" is "en route to, during or returning from any official duty authorized by you (defined as the "City of Pierre Fire Department" with coverage through Continental Western through Fischer-Rounds Insurance Agency. (Paul Depo. 92:19-23; 93:1-15; Larson Affidavit, Ex. 5; Affidavit of Michael Luce, ¶ 3, Exhibit B – Pages 169-170).

(c) Group accident coverage from the City of Pierre through Fischer Rounds Insurance Agency. (Paul Dep. 87:2-25; 88-89; Larson Affidavit, Ex. 5).

(d) Paid membership dues annually for the South Dakota Firefighters Association. (Paul Dep. 88-89: 1-2; Larson Affidavit, Ex. 5).

(e) Paid a per diem for traveling for training "outside of town." (Paul Dep. 25:6-8; Larson Affidavit, Ex. 5).

(f) "Vested" for the Length of Service Award lump-sum financial payment from the City of Pierre ater completing five (5) years of service, paid from a fund which the City of Pierre makes a $10,000 annual contribution and which, for a firefighter with twenty-five (25) years of service retiring in 2017 would receive a lump-sum payment of $25,000. (Paul Dep. 26:9-25; 27:1-25; 28:1-14; 58:15-25; 59:1-25; 60: 13-24; 92:1-14; Larson Affidavit, Ex. 5).

24. PVFD firefighters are not reimbursed for mileage for responding to calls or attending monthly training sessions. (Paul depo. at 25:4-18; 26:9-23).

24. **RESPONSE**: Admitted. Disputed that whether such reimbursement is made or not is an issue of material fact for purposes of the City of Pierre's motion for summary judgment.

25. Tronvold had his own personal insurance for automobile he was driving at the time of the accident that occurred on August 1, 2016. (Tronvold depo. at 76:18-21).

25. RESPONSE: Admitted. Disputed that this is an issue of material fact for purposes of the City of Pierre's motion for summary judgment, other than to the extent that City of Pierre and the PVFD that by providing coverage and payment to Tronvold for the repair estimate and payment of the $1,000 deductible constitutes an admission against interest that on August 1, 2016, Tronvold was "en route to, during or returning from any official duty authorized by" the Pierre Fire Department.

26. At the time of the motor vehicle accident that is the subject to this suit, the City of Pierre had in place a Memorandum of Governmental Liability Coverage with the South Dakota Public Assurance Alliance. (See Exh. A attached to the Aff. of Dave Sendelbach).

26. RESPONSE: Admitted in part. Disputed that this Memorandum of Governmental Liability Coverage with the South Dakota Public Assurance Alliance is the basis for the insurance coverages at issue for purposes of the subject matter of this action.

27. The Memorandum of Governmental Liability Coverage contained an exclusion endorsement wherein the Exclusion Section, Section C of the aforementioned Memorandum, precludes coverage for "fire department, firefighting activities or fire department vehicles." (See Exh. C attached to the Aff. of Dave Sendelbach).

27. RESPONSE: Admitted in part. Disputed that this exclusion of coverage for "fire department, firefighting activities or fire department vehicles" applies to the South Dakota Public Assurance Alliance MEMORANDUM OF AUTO LIABILITY COVERAGE attached to the Affidavit of David Sendelbach as Exhibit B and which is identified by him as "the separate Memorandum of Auto Liability Coverage." There is no corresponding "Exclusion Endorsement" for "fire department, firefighting activities or fire department vehicles" in the South Dakota Public Assurance Alliance MEMORANDUM OF AUTO LIABILITY

COVERAGE as is the case in the Memorandum of Governmental Liability Coverage attached to the Affidavit of David Sendelbach as Exhibit A and with the Exclusion Endorsement identified by the City of Pierre as CITY 8 and appearing on the last page of Exhibit C attached to the Affidavit of David Sendelbach. Neither of the reservation of rights letters issued by the South Dakota Public Assurance Alliance to the City of Pierre and attached to the Affidavit of David Sendelbach as Exhibit D and Exhibit E references or even mentions the Exclusion Endorsement attached to the Affidavit of David Sendelbach as Exhibit C as a basis for denial of coverage to Tronvold or Plaintiffs.

28. At the time of the subject motor vehicle accident, the City of Pierre had in place a Memorandum of Automobile Liability Coverage with the South Dakota Public Assurance Alliance. (See Exh. B attached to the Aff. of Dave Sendelbach).

28. **RESPONSE**: Admitted in part. This document by its express terms states as follows on CITY 135: "We [South Dakota Public Assurance Alliance] will pay damages the covered party legally must pay because of bodily injury or property damage to which this coverage applies cause by an accident during the coverage period and resulting from the ownership, maintenance, or use of an auto." No exclusion from coverage is included in this insuring agreement for "fire department, firefighting activities or fire department vehicles" as is the case in the Memorandum of Governmental Liability Coverage attached to the Affidavit of David Sendelbach as Exhibit C.

29. The Memorandum of Automobile Liability Coverage only provides coverage for a volunteer when such volunteer is "acting in an official capacity for (a) or (b)." (See Id. at Section D). The official capacity must be for the member (the City of Pierre) or while acting in an official capacity for one of the members "commissions, councils, agencies, districts,

authorities, or boards, under the member's direction or control of which the member's board sits as the governing body."

29. RESPONSE: Admitted in part. Disputed that the City of Pierre has accurately stated the terms and conditions of the applicable provisions of The Memorandum of Automobile Liability Coverage. The term "Covered Party" means: (a) "the Member" which in this action is the City of Pierre; (b) "boards coming under the Member's direction or control or for which the Member's board [Pierre City Commission] sits as the governing body;" or (c) "any person who is an . . . employee or volunteer of (a) or (b) while acting in an official capacity for (a) or (b) . . ." (Exhibit B, Affidavit of David Sendelbach, at CITY 136). (Emphasis added).

30. The City of Pierre's City Commission does not sit as the governing body for the PVFD.

30. RESPONSE: Disputed. See Response to No. 9 which is incorporated herein by this reference. Even the bylaws of the Pierre Volunteer Fire Department recognize that the "Pierre Volunteer Fire Department" when referred to as "department" is the same "department" established by Section 2-3-401 of the Fire Department Ordinances as, "The department in charge of preventing, detecting, reporting, suppressing and extinguishing fires within and for the city." (Fire Department Ordinances, Section 2-3-401; Larson Affidavit, Ex. 3). Section 2-3-401 establishes the Pierre Fire Department and charges "its officers and employees" with responsibility "for the performance of all duties assigned to the department by state law, this code and the city ordinances, the commission, mayor and designated commissioner." (Id.) The Office of Public Safety has general responsibility for the "Volunteer Fire Department." (Fire Department Ordinances Section 2-3-101; Id.).

Chief Ian Paul testified that he was appearing on behalf of both the City of Pierre and the Pierre Volunteer Fire Department. (Paul Dep. 39:1-10; Larson Affidavit, Ex. 5). Chief Paul further testified that he considered himself jointly represented by the counsel of record for the City of Pierre and counsel of record for the Pierre Volunteer Fire Department. (Paul Dep. 39:1-10; Larson Affidavit, Ex. 5).

31. At the time of the motor vehicle accident, Tronvold was not acting in an official capacity for the PVFD or the City of Pierre. (Paul depo. at 37:5-18; 38:12-15).

31. **RESPONSE**: Disputed. See Response Nos. 14-16 which are incorporated herein by this reference.

32. A letter denying coverage for Tronvold has been issued by the South Dakota Public Assurance Alliance through its claims adjusters at Claims Associates, Inc. (See Exh. D attached to the Aff. of Dave Sendelbach.)

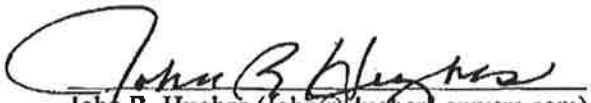
32. **RESPONSE**: Admitted part. Disputed that that the issuance of this letter and its contents is a material fact for purposes of the City of Pierre's motion for summary judgment.

33. The South Dakota Public Assurance Alliance is providing a defense in relation to this action pursuant to a reservation of rights concerning coverage under the Memorandum of Governmental Liability Coverage and the Memorandum of Automobile Liability Coverage. (See Exh. A and B attached to the Aff of Dave Sendelbach).

33. **RESPONSE**: Admitted part. Disputed that that the providing of a defense in relation to this action pursuant to a reservation of rights concerning coverage under the Memorandum of Governmental Liability Coverage and the Memorandum of Automobile Liability Coverage is a material fact for purposes of the City of Pierre's motion for summary judgment.

Dated at Sioux Falls, South Dakota, on this 5th day of June, 2019.

HUGHES LAW OFFICE



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of June, 2019, a true and correct copy of the above and foregoing Response of Plaintiff Randall R. Jurgens to Defendant City of Pierre's Statement of Undisputed Material Facts was served electronically using the Odyssey File and Serve system which will send notification of such filing to the following:

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John R. Hughes

South Dakota Public Assurance Alliance
MEMORANDUM OF GOVERNMENTAL LIABILITY COVERAGE

The liability coverage provided to the Member is described in this Memorandum of Coverage and with all endorsements, coverage parts and the Declarations and the Intergovernmental Contract for the South Dakota Public Assurance Alliance.

Words used in this Memorandum that are in bold have special meaning. The definitions are provided in Section D which should be consulted to gain an informed understanding of the coverage provided herein.

SECTION A – COVERAGE

Subject to the limit of coverage and deductible specified in the Declarations:

We will pay damages the covered party becomes legally obligated to pay caused by an occurrence during the coverage period, except as excluded herein.

SECTION B – DEFENSE AND SETTLEMENT

We have the right and duty to defend any claims or suits against a covered party seeking damages, however:

(1) we may investigate, defend and settle any claim or suit at our discretion;
(2) we have the right, but not the obligation, to appeal any judgment against the covered party;
(3) we will pay defense costs we incur in the adjustment, investigation, defense or litigation of any claim or suit;
(4) defense costs are payable in addition to the limit of coverage; and
(5) our right and duty to defend end when we have paid the limit of coverage for judgments or settlements.

SECTION C – EXCLUSIONS

We will not pay or defend claims or suits arising from:

(1) the ownership, operation, use, maintenance or entrustment of any aircraft owned or operated by, rented or loaned to, a covered party.
(2) the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of or exposure to radon, asbestos, asbestos products, asbestos fibers, asbestos dust or silica dust or:

    (a) any obligation of the covered party to indemnify any party because of such claims; or
    (b) any obligation to defend any suit or claims against the covered party because of such claims.

(3) failure to perform, or breach of, a contractual obligation.
(4) claimants seeking redress under quasi contractual theories such as unjust enrichment or quantum meruit.

EXHIBIT A

CITY 125

(5) the partial or complete structural failure or overtopping of a dam.
(6) a written or oral contract in which the covered party assumes tort liability of another to pay damages if such assumption is made after the damages occur.
(7) bodily injury to the covered party arising out of and in the course of employment by the Member.
(8) benefits payable under any employee benefits plan, (whether the plan is voluntarily established by the Member or mandated by statute).
(9) obligations under any workers' compensation, unemployment compensation or disability law or any similar law.
(10) liability imposed under the Employee Retirement Income Security Act of 1974, and any law amendatory thereof.
(11) preparation of bids, bid specifications, or plans, including architectural plans.
(12) the failure to supply or provide an adequate or specific supply of gas, water, steam, electricity or sewage treatment capacity resulting from or caused by planning, engineering, design, or failure to produce, secure, contract for, or otherwise obtain such supplies or capacity.
(13) the following conduct of any covered party:

(a) willful, wanton, fraudulent, malicious or criminal acts;
(b) gaining illegal profit, advantage or remuneration;
(c) with intent to cause improper harm;
(d) with conscious disregard of the rights or safety of others; or
(e) with malice.

This exclusion does not apply to claims based solely on vicarious liability where the covered party did not authorize, ratify, participate in, or consent to such conduct.

(14) eminent domain, condemnation proceedings, inverse condemnation, dedication by adverse use or other taking of private property for public use, except claims or suits related to zoning actions.
(15) the ownership, use, operations or maintenance of any airport, runway, hangar or other aviation facility.
(16) the rendering or the failure to render professional legal services to a third-party.
(17) the ownership, use, operation or maintenance of any hospital, medical clinic, assisted living, nursing home, intermediate care facility or other health care facility.
(18) the rendering or failure to render medical or personal care services, unless such claims or suits arise from an emergency or the operations of the Member's emergency medical technicians, paramedics, nurses, firefighters or law enforcement officials.
(19) the hazardous properties of nuclear material.
(20) the actual, alleged or threatened discharge, dispersal, release or escape of pollutants, unless the discharge, dispersal, release or escape is sudden and accidental and:

(a) the covered party discovered the occurrence within seven days of its commencement; and
(b) the occurrence was reported in writing to us within 21 days of its discovery by the covered party; and
(c) the covered party expended reasonable effort to terminate the discharge, dispersal, release or escape of pollutants as soon as conditions permitted.

This exclusion does not apply to:

(i) use of the Member's premises to store household waste for 90 days or less;
(ii) Fire Department training or emergency operations;
(iii) pesticide or herbicide spraying;
(iv) use of chlorine or sodium hypochlorite in the Member's sewage or water treatment or swimming pool maintenance operations;
(v) storage and application of road salt, sand, anti-skid and similar materials,

provided all such activities meet federal, state and local government statutes, ordinances, regulations and license requirements.

(21) any site or location principally used by the covered party, or by others on the covered party's behalf, for the handling, storage, disposal, dumping, processing, or treatment of waste material, other than wastewater treatment facilities and sewer systems.
(22) any loss, cost or expense arising out of any governmental directions or requests that the covered party or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.
(23) damage to property rented or leased to the covered party where the covered party has assumed liability for damage to or destruction of such property, unless the covered party would have been liable in absence of such assumption of liability.
(24) damage to aircraft or watercraft in the care, custody, or control of any covered party.
(25) war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution.
(26) the ownership, operation, use, maintenance or entrustment of any auto.
(27) the Member:

(a) collecting, refunding, disbursing or applying taxes, fees, fines, liens or assessments;
(b) failing to anticipate tax revenue shortfalls;
(c) issuing, guaranteeing or failing to repay bonds, notes or debentures;
(d) utilizing federal or state funds, appropriations or grants;
(e) violating any law or regulation governing the issuance or sale of securities;
(f) purchasing or failing to purchase and maintain insurance or pooled self-insurance.

(28) housing authorities.
(29) motorized racing events or facilities.
(30) trampolines, other rebounding devices and inflatables.
(31) amusement or carnival rides and devices.
(32) down-hill ski runs, ski lifts and ski tows.
(33) railroads.

SECTION D – DEFINITIONS

Aircraft – means any machine designed to travel through the air, including but not limited to airplanes, dirigibles, hot air balloons, helicopters, hang gliders and drones.

Auto – means a land motor vehicle, trailer, or semi-trailer, including any attached machinery or equipment, designed for travel principally on public roads. It does not include vehicles that travel on

crawler treads, snowmobiles, vehicles located for use as a residence on premises, or road maintenance equipment owned by the Member.

Bodily Injury – means bodily injury, sickness or disease sustained by a person, including death resulting from any of these.

Covered Party – means:

(a) the Member;
(b) unless specifically excluded, any and all commissions, agencies, councils, districts, authorities, or boards coming under the Member's direction or control, or for which the Member's board sits as the governing body;
(c) any person who is an official, employee or volunteer of (a) or (b) while acting in an official capacity for (a) or (b), including while acting on an outside board at the direction of (a) or (b).

Dam – means:

(a) any artificial barrier, together with appurtenant works, which does or may impound or divert water, and which either:

(i) is 25 feet or more in height from the natural bed of the stream or watercourse at the downstream toe of the barrier, or from the lowest elevation of the outside limit of the barrier, if it is not across a stream, channel or watercourse, to the maximum possible water storage elevation; or
(ii) has an impounding capacity of 50 acre-feet or more.

Any such barrier which is not in excess of 6 feet in height, regardless of storage capacity, or which has a storage capacity not in excess of 15 acre-feet, regardless of height, shall not be considered a dam.

(b) Dams do not include:

(i) obstruction in a canal used to raise or lower water therein or divert water therefrom;
(ii) levee, including but not limited to a levee on the bed of a natural lake the primary purpose of which levee is to control flood water;
(iii) railroad fill or structure;
(iv) tank constructed of steel or concrete or of a combination thereof;
(v) tank elevated above the ground;
(vi) water or wastewater treatment facility;
(vii) barrier which is not across a stream channel, watercourse, or natural drainage area and which has the principal purpose of impounding water for agricultural use;
(viii) obstruction in the channel of a stream or watercourse which is 15 feet or less in height from the lowest elevation of the obstruction and which has the single purpose of spreading water within the bed of the stream or watercourse upstream from the construction for percolation underground; or
(ix) any impoundment constructed and utilized to hold treated water from a sewage treatment plant.

Damages – means money due a third party, including attorney's fees, interest on judgments, and costs. Damages do not include:

(a) punitive, exemplary or treble damages and fines or penalties;
(b) injunctive, equitable, or other non-monetary relief, or any monetary relief or expense in connection therewith; or
(c) damage to property owned by the Member or to the property of others in the Member's care, custody or control.

Deductible – means the amount of damages and defense costs the Member is obligated to pay. The deductible is stated in the Declarations. Any deductible amount we may pay shall be promptly reimbursed to us by the Member, upon notification.

Defense Costs – means all fees and expense we incur relating to the adjustment, investigation, defense or litigation of a claim for damages to which this coverage applies. Defense costs include:

(a) defense attorney fees;
(b) court costs;
(c) appeal bonds for our appeals; and
(d) reasonable expenses incurred by the covered party at our request to assist us in the investigation or defense of claims or suits.

Limit of Coverage – means the most we will pay for damages arising out of one occurrence regardless of the number of covered parties, claimants, claims made or suits brought. The limit of coverage is stated in the Declarations.

Member – means the governmental entity specifically identified in the Declarations attached to this Memorandum.

Memorandum – means this Memorandum of Governmental Liability Coverage and any endorsements attached hereto.

Nuclear Material – means source material, special nuclear material or byproduct material. Source material, special nuclear material and byproduct material have the meanings given to them by the Atomic Energy Act of 1954 or in any law amendatory thereto.

Occurrence – means an accident, act, error, omission or event, including continuous or repeated exposure to substantially the same generally harmful conditions, causing damages. An occurrence taking place over more than one coverage period shall be deemed to have taken place during the coverage period when the occurrence began and shall be treated as a single occurrence in that coverage period.

Pollutants – means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, fungi, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed. The term pollutants as used herein is not defined to mean potable water or agricultural water or water furnished to commercial users or water used for fire suppression.

Third Party – means any person making a claim against a covered party.

We, Us, & Our – means the South Dakota Public Assurance Alliance.

SECTION E – COVERAGE EXTENTIONS

(1) MEDICAL PAYMENTS

Subject to the limit of coverage for Medical Payments specified in the Declarations, we will pay *medical expenses*, as defined below, for bodily injury:

(a) in excess of all health and/or disability insurance benefits available to the injured person, including Medicaid whether collectible or not; and
(b) co-payments or deductibles the injured person is obligated to satisfy for applicable health and disability insurance,

caused by an occurrence during the coverage period on premises owned, rented or used by the Member, provided that:

(a) premises owned, rented or used by the Member do not include:

(i) streets and alleys owned, rented or maintained by the Member; or
(ii) sidewalks adjoining real property not owned by the Member;

(b) the *medical expenses* are incurred and reported to us within one year of the occurrence;
(c) the injured person submits to an exam by our physician at our expense, as often as we reasonably require; and
(d) any payment we make does not constitute an admission of liability.

Medical expenses mean reasonable expenses for:

(a) first aid administered at the time of the occurrence;
(b) necessary medical, surgical, chiropractic, x-ray and dental services, including prosthetic devices; and
(c) necessary ambulance, hospital, professional nursing and funeral services.

We will not pay *medical expenses* resulting from bodily injury:

(a) arising from operations, other than maintenance and repair of the Member's premises, performed by independent contractors;
(b) to a covered party arising out of and in the course of employment;
(c) to tenants of the Member's premises and their employees;
(d) to any person engaged in maintenance, repair, demolition or construction at the Member's premises;
(e) to participants in an athletic, physical training or sporting activity;
(f) to any person entitled to workers' compensation benefits for bodily injury; or
(g) to inmates or prisoners.

(2) INJUNCTIVE RELIEF

Subject to the limit of coverage and deductible for Injunctive Relief specified in the Declarations, we will pay reasonable expenses incurred to defend the Member against non-monetary claims, demands or actions seeking provisional remedies, relief or redress. Such expenses must result from an occurrence during the coverage period.

We will not pay for expenses:

(a) excluded by Section C in this Memorandum;
(b) related to any suit against the Member by, about or from any federal, state or local governmental entity or any commission, department, unit or organization of any federal, state or local governmental entity or agency other than the Equal Employment Opportunity Commission (or a state Department of Human Relations); or
(c) related to any suit resulting from the Member's failure to comply with or qualify for any provision of the National Flood Insurance Act of 1968 or any amendment thereof.

(3) BROAD LEGAL DEFENSE

Subject to the limit of coverage for Broad Legal Defense specified in the Declarations, we will indemnify the Member for reasonable expenses incurred to defend the Member against suits or claims seeking damages caused by an occurrence during the coverage period for which no coverage is provided elsewhere in this Memorandum.

SECTION F – CONDITIONS

(1) ACTION AGAINST US

We will have no liability hereunder nor shall action be taken against us unless:

(a) the covered party has fully complied, and continues to fully comply, with all of the terms of this Memorandum and the Intergovernmental Contract; and
(b) the covered party's obligation to pay damages shall have been finally determined either by judgment after actual trial or by written agreement of the covered party, us and the claimant. Any person or organization or legal representative thereof who has secured such judgment or written agreement shall be entitled to recover under this Memorandum to the extent of the coverage afforded by this Memorandum. No person or organization shall have any right under this Memorandum to join us, our agents, employees or independent contractors as a party to any action against the covered party to determine their liability nor shall we be impleaded by the covered party or their legal representative.

(2) ARBITRATION

Decisions about whether to investigate, settle, or defend any claim or suit or whether coverage exists are at our sole discretion. If the covered party and we agree, disputes about such matters may be submitted to binding arbitration to expedite their resolution.

If the covered party and we agree to submit such issues to binding arbitration, the arbitration shall be conducted pursuant to South Dakota law and in particular, but not in limitation, the provisions of SDCL ch. 21-25A. The covered party shall select one arbitrator; we shall select one arbitrator; and the two arbitrators shall agree on a third arbitrator. The arbitration panel shall hear and decide the dispute. The arbitration hearing shall be held in the state of South Dakota and in the county where the covered party

shall be located. The decision of the arbitration panel is final and binding and shall not be subject to appeal.

Each party shall bear the cost of the arbitrator it selects and shall bear one-half the cost of the third arbitrator. Each party shall bear its own costs and expenses of arbitration, including attorney fees.

(3) ASSIGNMENT
We will not be bound by the covered party's assignment of interest under this Memorandum unless we agree to it in writing.

(4) BANKRUPTCY OR INSOLVENCY
The covered party's bankruptcy or insolvency will not release us from our obligations under this Memorandum.

(5) CHANGES
This Memorandum and the Intergovernmental Contract for the South Dakota Public Assurance Alliance constitute the total agreement between the Member and us concerning the coverages afforded. The terms of the Intergovernmental Contract may only be changed as stated in that document. The terms of this Memorandum shall not be waived or changed except by endorsement issued by us to form a part of this Memorandum.

(6) COMPLIANCE
If any provision of this Memorandum is determined by an appropriate governing body to be prohibited, illegal or void by any law controlling its construction, the provision shall be deemed to be modified or amended to comply with the minimum requirements of the law. The invalidity of any provision does not invalidate the remainder of this Memorandum. If any coverage provided for in this Memorandum is similarly determined to not comply with the required coverages of any statutory law, this Memorandum is amended to provide the minimum coverage required by such law.

(7) DUTIES IN THE EVENT OF A CLAIM OR SUIT

(a) The Member must see to it that we are notified in writing as soon as practicable of any occurrence which may result in a claim. Notice should include, to the extent possible:

(i) details of the situation;
(ii) how, when and where the occurrence took place;
(iii) the nature and location of the occurrence; and
(iv) the names and addresses of any injured persons and witnesses.

(b) If a claim is made or a suit is brought against a covered party, the Member must, immediately:

(i) record the specifics of the claim or suit and the date and manner received;
(ii) notify us in writing;
(iii) send us copies of any demands, notices, summonses or legal papers received in connection with the claim or suit;
(iv) authorize us to obtain records and other information;
(v) fully cooperate with us in the investigation, settlement or defense of the claim or suit; and

(vi) assist us, upon our request, and obtain any necessary assignment, in the enforcement of any right against any person or organization which may be liable to the covered party because of the occurrence.

(c) No covered party will, except at that covered party's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our written consent.

(d) We shall conduct the defense of any claim in the covered party's name and prosecute in their name for their coverage any claim for indemnity or damages or otherwise against any third party and shall have full discretion in the handling of any claim.

(e) If the Member gives timely prior written notice to us that any claim is not to be settled without the Member's consent, we shall not settle such claim without the Member's consent.

If, however, the Member refuses to consent to any settlement agreeable to the claimant and us or any reasonable offer of settlement recommended by us:

(i) our ultimate liability with respect to such claim shall not exceed the amount for which the claim may have been settled or the amount recommended for settlement by us plus claim expense incurred up to the date of such refusal; and

(ii) the Member has the right to appeal any judgment awarded over the amount for which the claim may have been settled or the amount recommended for settlement by us.

(f) All notification required by this condition shall be mailed to the address shown in the Declarations.

(g) The issuance of this Memorandum shall not be deemed a waiver of any statutory or common law immunities that apply. Use of the governmental immunity defense will be at our discretion.

(8) INTENTIONAL FAILURE TO DISCLOSE

This Memorandum has been issued based upon our reliance on representations made by the Member. Intentional non-disclosure or misrepresentation of any material fact may entitle us to void this Memorandum and relieve us of any obligation hereunder.

(9) INSPECTIONS

We shall be permitted, but not obligated, to inspect the Member's property and operations at any time. Our right to inspect, the actual inspection, or any report made shall not warrant that such property or operations are safe or that they comply with any applicable laws or regulations.

(10) LIBERALIZATION

If we revise this edition of the Memorandum to provide broader coverages without an additional contribution charge, we will automatically provide these broader coverages as of the day the revision is effective, subject, however, to all of the terms of this Memorandum and the Intergovernmental Contract to which this Memorandum attaches.

(11) OTHER COVERAGES

If any covered party has valid and collectible insurance, self-insurance or pooled coverage for an occurrence covered by this Memorandum, the coverage provided by this Memorandum will be excess

over such other coverage, except that the Member may purchase coverage which is specifically issued to be excess of the coverage provided by this Memorandum.

This coverage is excess over any other primary insurance available to the covered party covering liability for damages arising out of the premises and operations for which the covered party has been added as an additional insured by attachment or endorsement.

(12) SEVERABILITY OF INTERESTS

Except with respect to the limit of coverage and any rights or duties specifically assigned in this Memorandum to the Member, this Memorandum applies as if each Member were the only Member and separately to each covered party against whom a claim is made or a suit is brought.

(13) TRANSFER OF RIGHTS OF RECOVERY

In the event of any payment under this Memorandum, we will be subrogated to all of the covered party's rights of recovery against any person or organization and the covered party shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The covered party shall do nothing to prejudice such rights.

South Dakota Public Assurance Alliance
MEMORANDUM OF AUTO LIABILITY COVERAGE

The liability coverage provided to the Member is described in this Memorandum of Coverage and with all endorsements, coverage parts and the Declarations and the Intergovernmental Contract for the South Dakota Public Assurance Alliance.

Words used in this Memorandum that are in bold have special meaning. The definitions are provided in Section D which should be consulted to gain an informed understanding of the coverage provided herein.

SECTION A – COVERAGE

Subject to the limit of coverage and deductible specified in the Declarations:

We will pay damages the covered party legally must pay because of bodily injury or property damage to which this coverage applies caused by an accident during the coverage period and resulting from the ownership, maintenance, or use of an auto.

SECTION B – DEFENSE AND SETTLEMENT

We have the right and duty to defend any claims or suits against a covered party seeking damages, however:

(1) we may investigate, defend and settle any claim or suit at our discretion;
(2) we have the right, but not the obligation, to appeal any judgment against the covered party;
(3) we will pay defense costs we incur in the adjustment, investigation, defense or litigation of any claim or suit;
(4) defense costs are payable in addition to the limit of coverage; and
(5) our right and duty to defend end when we have paid the limit of coverage for judgments or settlements.

SECTION C – EXCLUSIONS

We will not pay or defend claims or suits arising from:

(1) bodily injury or property damage expected or intended from the standpoint of the covered party, except actions of the covered party to protect persons or property.
(2) liability assumed under any contract or agreement in which the covered party assumes the tort liability of another to pay damages if such assumption is made after the damages occur.
(3) any obligation for which the covered party or its insurer may be held liable under any workers' compensation, disability benefits or unemployment compensation law or any similar law.
(4) bodily injury to:
    (a) an employee of the Member arising out of and in the course of employment by the Member; or
    (b) the spouse, child, parent, brother, or sister of that employee as a consequence of paragraph (a) above.

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This exclusion applies:

(a) whether the covered party may be liable as an employer or in any other capacity; and
(b) to any obligation to share damages with or repay someone else who must pay damages because of the injury.

(5) the actual, alleged or threatened discharge, dispersal, release or escape of pollutants, unless the discharge, dispersal, release or escape is sudden and accidental and:

(a) the covered party discovered the accident within seven days of its commencement;
(b) the accident was reported in writing to us within 21 days of its discovery by the covered party; and
(c) the covered party expended reasonable effort to terminate the discharge, dispersal, release or escape of pollutants as soon as conditions permitted.

This exclusion does not apply to emergency operations or training activities within the scope of the Member's fire protection duties.

(6) bodily injury or property damage arising out of war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution.

(7) autos while used in any professional or organized racing or demolition contest or stunting activity or while practicing for such contest or activity.

SECTION D – DEFINITIONS

Auto – means a land motor vehicle, trailer or semi-trailer, including any attached machinery or equipment, designed for travel principally on public roads. It does not include vehicles that travel on crawler treads, snowmobiles, vehicles located for use as a residence on premises, or road maintenance equipment owned by the Member.

Bodily Injury – means bodily injury, sickness or disease sustained by a person, including death resulting from any of these.

Covered Party – means:

(a) the Member;
(b) unless specifically excluded, any and all commissions, councils, agencies, districts, authorities, or boards coming under the Member's direction or control or for which the Member's board sits as the governing body;
(c) any person who is an official, employee or volunteer of (a) or (b) while acting in an official capacity for (a) or (b), including while acting on an outside board at the direction of (a) or (b); or
(d) anyone else while using a covered auto with the permission of a covered party, except the owner of that auto or the owner or employee of a business of selling, servicing, repairing or parking autos. This subsection does not apply to any Uninsured/Underinsured Motorists coverage under this Memorandum.

Damages – means money due a third party, including attorney's fees, interest on judgments, and costs. Damages do not include:

(a) punitive, exemplary or treble damages and fines or penalties;
(b) injunctive, equitable, or other non-monetary relief, or any monetary relief or expense in connection therewith; or
(c) damage to property owned by the Member or to the property of others in the Member's care, custody or control.

Deductible – means the amount of damages and defense costs the Member is obligated to pay. The deductible is stated in the Declarations. Any deductible amount we may pay shall be promptly reimbursed to us by the Member, upon notification.

Defense Costs – means all fees and expense we incur relating to the adjustment, investigation, defense or litigation of a claim for damages to which this coverage applies. Defense costs include:

(a) defense attorney fees;
(b) court costs;
(c) appeal bonds for our appeals; and
(d) reasonable expenses incurred by the covered party at our request to assist us in the investigation or defense of claims or suits.

Limit of Coverage – means the most we will pay for damages arising out of one accident regardless of the number of covered parties, claimants, claims made or suits brought. The limit of coverage is stated in the Declarations.

Member – means the governmental entity specifically identified in the Declarations attached to this Memorandum.

Memorandum – means this Memorandum of Auto Liability Coverage and any endorsements attached hereto.

Pollutants – means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, fungi, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed. The term pollutants as used herein is not defined to mean potable water or agricultural water or water furnished to commercial users or water used for fire suppression.

Property Damage – means damage to or loss of use of tangible property.

Third Party – means any person making a claim against a covered party.

We, Us & Our – means the South Dakota Public Assurance Alliance.

SECTION E – COVERAGE EXTENSIONS

(1) COVERED POLLUTION COST & EXPENSE

Subject to the limit of coverage and deductible specified in the Declarations, we will pay damages that the covered party legally must pay as a *covered pollution cost or expense* (defined below) caused by an accident and arising out of the ownership, maintenance or use of covered autos, but only if there is bodily injury or property damage, covered herein, caused by the same accident.

Covered pollution cost or expense means any cost or expense arising out of any request, demand, order or any claim or suit by or on behalf of a governmental authority demanding that the Member or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.

Covered pollution cost or expense does not mean:

(a) any cost or expense arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

(i) before the pollutants, or any property in which the pollutants are contained, are moved from the place where they are accepted by the Member for movement into or onto the covered auto; or

(ii) after the pollutants, or any property in which the pollutants are contained, are moved from the covered auto to the place where they are finally delivered, disposed of or abandoned by the Member.

This does not apply to accidents that occur away from premises the Member owns or rents with respect to pollutants not in or upon a covered auto if:

(i) the pollutants, or any property in which the pollutants are contained, are upset, overturned or damaged as a result of the maintenance or use of a covered auto; and

(ii) the discharge, dispersal, seepage, migration, release or escape of the pollutants is caused directly by such upset, overturn or damage.

(b) damages arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants that are, or that are contained in any property that is:

(ii) being transported or towed by, handled or handled for movement into, onto or from the covered auto;

(iii) otherwise in the course of transit by the Member or on the Member's behalf; or

(iv) being stored, disposed of, treated or processed in or upon the covered auto.

If the Member's liability for such damages or expenses is incurred by the Member's assumption of liability in any contract or agreement.

(2) UNISURED/UNDERINSURED MOTORISTS

We will pay those amounts that a covered party is legally entitled to recover as damages from the owner or operator of an *uninsured auto* or *underinsured auto* (defined below). The damages must

result from bodily injury sustained by the covered party and caused by an accident resulting from the ownership, maintenance or use of, or when struck by, an *uninsured auto* or *underinsured auto*. Use includes operating the vehicle as well as getting into or out of, or being in or on the vehicle.

The limit of coverage for Uninsured Motorists specified in the Declarations is the most we will pay for all damages a covered party is legally entitled to recover from the owner or operator of an *uninsured auto* arising out of any one accident. The limit of coverage for Underinsured Motorists specified in the Declarations is the most we will pay for all damages a covered party is legally entitled to recover from the owner or operator of an *underinsured auto* arising out of any one accident.

The right to coverages and the amount payable will be decided by agreement between the covered party and us. If an agreement cannot be reached, and if the covered party and we agree, such dispute may be submitted to binding arbitration, as set forth in Section F – CONDITIONS, to expedite resolution.

The damages payable will be reduced by:

(i) all amounts paid by the owner or operator of the *uninsured auto* or *underinsured auto* or anyone else responsible. This includes all amounts paid under any section of the Memorandum or any auto insurance policy; and
(ii) all amounts payable under any workers' compensation law, disability benefits law, or similar law, or any auto medical payments or personal injury protection coverage.

We are not obligated to make any payment for damages which arise out of the use of an underinsured auto until after the limits of coverage for all protection in effect and applicable at the time of the accident have been exhausted by payment of judgments or settlements. We are also not obligated to make any payment for any claim the covered party settles without our written consent.

UnderInsured Auto:

(a) means an auto which has liability protection in effect and applicable at the time of an accident in an amount equal to or greater than the amounts specified for bodily injury liability by the financial responsibility laws of South Dakota, but less than the applicable damages the covered party is legally entitled to recover.
(b) does not mean an auto that is lawfully self-insured, an auto owned by any federal, state or local government or agency, or an auto owned by the covered party.

Uninsured Auto:

(a) means:

(i) an auto for which no liability bond or insurance policy provides bodily injury coverage at the time of the accident;
(ii) an auto covered by a liability bond or insurance policy which does not provide at least the minimum financial responsibility requirements of South Dakota;
(iii) an auto for which the insurer denies coverage or the insurer becomes insolvent; or
(iv) a hit-and-run auto where neither the operator nor owner can be identified and which causes bodily injury to a covered party:

1) by physical contact with the covered party or with a vehicle occupied by the covered party;
2) without physical contact with the covered party or with a vehicle occupied by the covered party, if the facts of the accident can be proven by independent corroborative evidence, other than the testimony of the covered party making a claim under this Memorandum, unless such testimony is supported by additional evidence.

The accident must be reported promptly to law enforcement and us. If the covered party was occupying an auto at the time of the accident, we have a right to inspect it.

(b) does not mean an auto that is lawfully self-insured, an auto owned by any federal, state or local government or agency, or any auto which is owned by the covered party.

(3) MEDICAL EXPENSES

We will pay reasonable expenses, up to the limit of coverage for Medical Expenses specified in the Declarations, incurred for necessary medical and funeral services to anyone who sustains bodily injury caused by an accident while in, on, getting into, or getting out of a covered auto. We will pay only those expenses incurred and reported to us within one year from the date of the accident.

We will not pay for:

(a) bodily injury caused by an accident which does not take place during the coverage period;
(b) bodily injury sustained by a covered party while occupying a vehicle located for use as a residence or premises;
(c) bodily injury to any employee, except volunteer fire fighters and volunteer workers not entitled to workers compensation coverages, arising out of and in the course of employment by the Member; or
(d) bodily injury to anyone using a vehicle without a reasonable belief that the person is entitled to do so.

SECTION F – CONDITIONS

(1) ACTION AGAINST US

We will have no liability hereunder nor shall action be taken against us unless:

(a) the covered party has fully complied, and continues to fully comply, with all of the terms of this Memorandum and the Intergovernmental Contract; and
(b) the covered party's obligation to pay damages shall have been finally determined either by judgment after actual trial or by written agreement of the covered party, us and the claimant. Any person or organization or legal representative thereof who has secured such judgment or written agreement shall be entitled to recover under this Memorandum to the extent of the coverage afforded by this Memorandum. No person or organization shall have any right under this Memorandum to join us, our agents, employees or independent contractors as a party to any action against the covered party to determine their liability nor shall we be impleaded by the covered party or their legal representative.

(2) ARBITRATION

Decisions about whether to investigate, settle, or defend any claim or suit or whether coverage exists are at our sole discretion. If the covered party and we agree, disputes about such matters may be submitted to binding arbitration to expedite the resolution of such disputes.

If the covered party and we agree to submit such issues to binding arbitration, the arbitration shall be conducted pursuant to South Dakota law and in particular, but not in limitation, the provisions of SDCL ch. 21-25A. The covered party shall select one arbitrator; we shall select one arbitrator; and the two arbitrators shall agree on a third arbitrator. The arbitration panel shall hear and decide the dispute. The arbitration hearing shall be held in the state of South Dakota and in the county where the covered party shall be located. The decision of the arbitration panel is final and binding and shall not be subject to appeal.

Each party shall bear the cost of the arbitrator it selects and shall bear one-half the cost of the third arbitrator. Each party shall bear its own costs and expenses of arbitration, including attorney fees.

(3) ASSIGNMENT

We will not be bound by the covered party's assignment of interest under this Memorandum unless we agree to it in writing.

(4) BANKRUPTCY OR INSOLVENCY

The covered party's bankruptcy or insolvency will not release us from our obligations under this Memorandum.

(5) CHANGES

This Memorandum and the Intergovernmental Contract for the South Dakota Public Assurance Alliance constitute the total agreement between the Member and us concerning the coverages afforded. The terms of the Intergovernmental Contract may only be changed as stated in that document. The terms of this Memorandum shall not be waived or changed except by endorsement issued by us to form a part of this Memorandum.

(6) COMPLIANCE

If any provision of this Memorandum is determined by an appropriate governing body to be prohibited, illegal or void by any law controlling its construction, the provision shall be deemed to be modified or amended to comply with the minimum requirements of the law. The invalidity of any provision does not invalidate the remainder of this Memorandum. If any coverage provided for in this Memorandum is similarly determined to not comply with the required coverages of any statutory law, this Memorandum is amended to provide the minimum coverage required by such law.

(7) DUTIES IN THE EVENT OF A CLAIM OR SUIT

(a) The Member must see to it that we are notified in writing as soon as practicable of any accident which may result in a claim. Notice should include, to the extent possible:

(i) details of the situation;
(ii) how, when and where the accident took place;
(iii) the nature and location of the accident; and

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(iv) the names and addresses of any injured persons and witnesses.

(b) If a claim is made or a suit is brought against a covered party, the Member must, immediately:

(i) record the specifics of the claim or suit and the date and manner received;
(ii) notify us in writing;
(iii) send us copies of any demands, notices, summonses or legal papers received in connection with the claim or suit;
(iv) authorize us to obtain records and other information;
(v) fully cooperate with us in the investigation, settlement or defense of the claim or suit; and
(vi) assist us, upon our request, and obtain any necessary assignment, in the enforcement of any right against any person or organization which may be liable to the covered party because of the accident.

(c) No covered party will, except at that covered party's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our written consent.
(d) We shall conduct the defense of any claim in the covered party's name and prosecute in their name for their coverage any claim for indemnity or damages or otherwise against any third party and shall have full discretion in the handling of any claim.
(e) If the Member gives timely prior written notice to us that any claim is not to be settled without the Member's consent, we shall not settle such claim without the Member's consent.

If, however, the Member refuses to consent to any settlement agreeable to the claimant and us or any reasonable offer of settlement recommended by us:

(i) Our ultimate liability with respect to such claim shall not exceed the amount for which the claim may have been settled or the amount recommended for settlement by us plus claim expense incurred up to the date of such refusal; and
(ii) The Member has the right to appeal any judgment awarded over the amount for which the claim may have been settled or the amount recommended for settlement by us.

(f) All notification required by this condition shall be mailed to the address shown in the Declarations.
(g) The issuance of this Memorandum shall not be deemed a waiver of any statutory or common-law immunities that apply. Use of the governmental immunity defense will be at our discretion.

(8) INTENTIONAL FAILURE TO DISCLOSE

This Memorandum has been issued based upon our reliance on representations made by the Member. Intentional non-disclosure or misrepresentation of any material fact may entitle us to void this Memorandum and relieve us of any obligation hereunder.

(9) INSPECTIONS

We shall be permitted, but not obligated, to inspect the Member's property and operations at any time. Our right to inspect, the actual inspection, or any report made shall not warrant that such property or operations are safe or that they comply with any applicable laws or regulations.

(10) LIBERALIZATION
If we revise this edition of the Memorandum to provide broader coverages without an additional contribution charge, we will automatically provide these broader coverages as of the day the revision is effective, subject, however, to all of the terms of this Memorandum and the Intergovernmental Contract to which this Memorandum attaches.

(11) OTHER COVERAGES
If any covered party has valid and collectible insurance, self-insurance or pooled coverage for an accident covered by this Memorandum, the coverage provided by this Memorandum will be excess over such other coverage, except that the Member may purchase coverage which is specifically issued to be excess of the coverage provided by this Memorandum.

This coverage is excess over any other primary insurance available to the covered party covering liability for damages arising out of the premises or operations for which the covered party has been addedas an additional insured by attachment of an endorsement.

(12) SEVERABILITY OF INTERESTS
Except with respect to the limit of coverage and any rights or duties specifically assigned in this Memorandum to the Member, this Memorandum applies as if each Member were the only Member and separately to each covered party against whom a claim is made or a suit is brought.

(13) TRANSFER OF RIGHTS OF RECOVERY
In the event of any payment under this Memorandum, we will be subrogated to all of the covered party's rights of recovery against any person or organization and the covered party shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The covered party shall do nothing to prejudice such rights.

South Dakota Public Assurance Alliance
MEMORANDUM OF GOVERNMENTAL LIABILITY COVERAGE

The liability coverage provided to the Member is described in this Memorandum of Coverage and with all endorsements, coverage parts and the Declarations and the Intergovernmental Contract for the South Dakota Public Assurance Alliance.

Words used in this Memorandum that are in bold have special meaning. The definitions are provided in Section D which should be consulted to gain an informed understanding of the coverage provided herein.

SECTION A – COVERAGE

Subject to the limit of coverage and deductible specified in the Declarations:

We will pay damages the covered party becomes legally obligated to pay caused by an occurrence during the coverage period, except as excluded herein.

SECTION B – DEFENSE AND SETTLEMENT

We have the right and duty to defend any claims or suits against a covered party seeking damages, however:

(1) we may investigate, defend and settle any claim or suit at our discretion;
(2) we have the right, but not the obligation, to appeal any judgment against the covered party;
(3) we will pay defense costs we incur in the adjustment, investigation, defense or litigation of any claim or suit;
(4) defense costs are payable in addition to the limit of coverage; and
(5) our right and duty to defend end when we have paid the limit of coverage for judgments or settlements.

SECTION C – EXCLUSIONS

We will not pay or defend claims or suits arising from:

(1) the ownership, operation, use, maintenance or entrustment of any aircraft owned or operated by, rented or loaned to, a covered party.
(2) the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of or exposure to radon, asbestos, asbestos products, asbestos fibers, asbestos dust or silica dust or:

    (a) any obligation of the covered party to indemnify any party because of such claims; or
    (b) any obligation to defend any suit or claims against the covered party because of such claims.

(3) failure to perform, or breach of, a contractual obligation.
(4) claimants seeking redress under quasi contractual theories such as unjust enrichment or quantum meruit.

EXHIBIT C

CITY 125

(5) the partial or complete structural failure or overtopping of a dam.
(6) a written or oral contract in which the covered party assumes tort liability of another to pay damages if such assumption is made after the damages occur.
(7) bodily injury to the covered party arising out of and in the course of employment by the Member.
(8) benefits payable under any employee benefits plan, (whether the plan is voluntarily established by the Member or mandated by statute).
(9) obligations under any workers' compensation, unemployment compensation or disability law or any similar law.
(10) liability imposed under the Employee Retirement Income Security Act of 1974, and any law amendatory thereof.
(11) preparation of bids, bid specifications, or plans, including architectural plans.
(12) the failure to supply or provide an adequate or specific supply of gas, water, steam, electricity or sewage treatment capacity resulting from or caused by planning, engineering, design, or failure to produce, secure, contract for, or otherwise obtain such supplies or capacity.
(13) the following conduct of any covered party:

(a) willful, wanton, fraudulent, malicious or criminal acts;
(b) gaining illegal profit, advantage or remuneration;
(c) with intent to cause improper harm;
(d) with conscious disregard of the rights or safety of others; or
(e) with malice.

This exclusion does not apply to claims based solely on vicarious liability where the covered party did not authorize, ratify, participate in, or consent to such conduct.

(14) eminent domain, condemnation proceedings, inverse condemnation, dedication by adverse use or other taking of private property for public use, except claims or suits related to zoning actions.
(15) the ownership, use, operations or maintenance of any airport, runway, hangar or other aviation facility.
(16) the rendering or the failure to render professional legal services to a third-party.
(17) the ownership, use, operation or maintenance of any hospital, medical clinic, assisted living, nursing home, intermediate care facility or other health care facility.
(18) the rendering or failure to render medical or personal care services, unless such claims or suits arise from an emergency or the operations of the Member's emergency medical technicians, paramedics, nurses, firefighters or law enforcement officials.
(19) the hazardous properties of nuclear material.
(20) the actual, alleged or threatened discharge, dispersal, release or escape of pollutants, unless the discharge, dispersal, release or escape is sudden and accidental and:

(a) the covered party discovered the occurrence within seven days of its commencement; and
(b) the occurrence was reported in writing to us within 21 days of its discovery by the covered party; and
(c) the covered party expended reasonable effort to terminate the discharge, dispersal, release or escape of pollutants as soon as conditions permitted.

This exclusion does not apply to:

(i) use of the Member's premises to store household waste for 90 days or less;
(ii) Fire Department training or emergency operations;
(iii) pesticide or herbicide spraying;
(iv) use of chlorine or sodium hypochlorite in the Member's sewage or water treatment or swimming pool maintenance operations;
(v) storage and application of road salt, sand, anti-skid and similar materials,

provided all such activities meet federal, state and local government statutes, ordinances, regulations and license requirements.

(21) any site or location principally used by the covered party, or by others on the covered party's behalf, for the handling, storage, disposal, dumping, processing, or treatment of waste material, other than wastewater treatment facilities and sewer systems.
(22) any loss, cost or expense arising out of any governmental directions or requests that the covered party or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.
(23) damage to property rented or leased to the covered party where the covered party has assumed liability for damage to or destruction of such property, unless the covered party would have been liable in absence of such assumption of liability.
(24) damage to aircraft or watercraft in the care, custody, or control of any covered party.
(25) war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution.
(26) the ownership, operation, use, maintenance or entrustment of any auto.
(27) the Member:

(a) collecting, refunding, disbursing or applying taxes, fees, fines, liens or assessments;
(b) failing to anticipate tax revenue shortfalls;
(c) issuing, guaranteeing or failing to repay bonds, notes or debentures;
(d) utilizing federal or state funds, appropriations or grants;
(e) violating any law or regulation governing the issuance or sale of securities;
(f) purchasing or failing to purchase and maintain insurance or pooled self-insurance.

(28) housing authorities.
(29) motorized racing events or facilities.
(30) trampolines, other rebounding devices and inflatables.
(31) amusement or carnival rides and devices.
(32) down-hill ski runs, ski lifts and ski tows.
(33) railroads.

SECTION D – DEFINITIONS

Aircraft – means any machine designed to travel through the air, including but not limited to airplanes, dirigibles, hot air balloons, helicopters, hang gliders and drones.

Auto – means a land motor vehicle, trailer, or semi-trailer, including any attached machinery or equipment, designed for travel principally on public roads. It does not include vehicles that travel on

South Dakota Public Assurance Alliance
GOVERNMENTAL LIABILITY COVERAGE EXCLUSION

This Endorsement Changes the Memorandum of Governmental Liability Coverage. Please Read It Carefully.

EXCLUSION ENDORSEMENT

SECTION C. – Exclusions

Exclusion (34) is added as follows:

(34) Fire Department, Fire Fighting activities or Fire Department vehicles

All other terms and conditions remain unchanged.

This endorsement forms a part of the Memorandum of Governmental Liability Coverage to which it is attached, effective during the Coverage Period stated in the Declarations unless otherwise stated herein.

(The following information is required only when this endorsement is issued subsequent to the inception of the Agreement Period.)

Endorsement Effective: 1/14/2016
Endorsement No.: GL 1150

Member No.: 089
Member: City of Pierre

Countersigned By: Kristina A Peterson
Director of Underwriting

CITY 8

COMMERCIAL GENERAL LIABILITY
CW 35 44 08 15

THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.

AMENDED DEFINITION OF EMPLOYEE

This endorsement modifies insurance provided under the following:

LIQUOR LIABILITY COVERAGE PART

In **SECTION V – DEFINITIONS,** change the following:

Paragraph **3.** "Employee" is deleted and replaced with the following:

3. "Employee" includes a "leased worker", a "volunteer worker" or a "temporary worker".

Policy No.: FDK 2396925 - 33

ITEM TWO

Schedule of Coverages and Covered Autos

This policy provides only those coverages where a charge is shown in the premium column below. Each of these coverages will apply only to those autos shown as covered autos. **Autos are shown as covered autos for a particular coverage by the entry of one or more of the symbols from the Covered Autos Section of the Business Auto Coverage Form next to the name of the coverage.**

Coverages & Limits	Covered Autos	Premium
Liability Limit = $2,000,000	1	$ 1,893
Personal Injury Protection **(Or Equivalent No-Fault Coverage)** Limit = Separately Stated In Each PIP Endorsement Minus $ *Item Three Schedule* Deductible.		$
Added Personal Injury Protection **(Or Equivalent Added No-Fault Coverage)** Limit = Separately Stated In Each Added PIP Endorsement		$
Property Protection Insurance (Michigan Only) Deductible =		$
Medical Payments Limit = $		$
Medical Expense And Income Loss Benefits **(Virginia Only)** Limit = Separately Stated In Each Medical Expense And Income Loss Benefits Endorsement		$
Uninsured Motorists Limit = Separately Stated In Each UM Endorsement	7	$ 54
Underinsured Motorists **(When not Included In Uninsured Motorists Coverage)** Limit = Separately Stated In Each UIM Endorsement	7	$ 178
Supplementary Uninsured Motorists (New York Only) Limit = The maximum amount payable under SUM Coverage shall Be the policys SUM limits reduced and thus offset by motor vehicle bodily injury liability insurance policy or bond payments received from, or on behalf of, any negligent party involved in the accident as specified in the SUM endorsement.		$
Physical Damage Comprehensive Coverage Limit = Actual Cash Value Or Cost Of Repair, Whichever Is Less, Minus $ *Item Three Schedule* Deductible For Each - Covered Auto or Designated Value (see CW 33 79), But No Deductible Applies To Loss Caused By Fire Or Lightning. See Item Four For Hired Or Borrowed Autos.	7, 8	$ 3,097
Physical Damage Specified Causes Of Loss Coverage Limit = Actual Cash Value Or Cost Of Repair, Whichever Is Less, Minus $ *Item Three Schedule* Deductible For Each Covered Auto, For Loss Caused By Mischief Or Vandalism. See Item Four For Hired Or Borrowed Autos		$
Physical Damage Collision Coverage Limit = Actual Cash Value Or Cost Of Repair, Whichever Is Less, Minus $ *Item Three Schedule* Deductible For Each Covered Auto or Designated Value (see CW 33 79). See Item Four For Hired Or Borrowed Autos	7, 8	$ 7,827
Physical Damage Towing and Labor Limit = $2500 For Each Disablement Of A Private Passenger Auto	7	$ Included
	Premium For Endorsements	$ 0
	Estimated Total Premium*	$ 13,049

COMMERCIAL AUTO
CA 00 01 10 13

BUSINESS AUTO COVERAGE FORM

Various provisions in this policy restrict coverage. Read the entire policy carefully to determine rights, duties and what is and is not covered.

Throughout this policy the words "you" and "your" refer to the Named Insured shown in the Declarations. The words "we", "us" and "our" refer to the company providing this insurance.

Other words and phrases that appear in quotation marks have special meaning. Refer to Section V – Definitions.

SECTION I – COVERED AUTOS

Item Two of the Declarations shows the "autos" that are covered "autos" for each of your coverages. The following numerical symbols describe the "autos" that may be covered "autos". The symbols entered next to a coverage on the Declarations designate the only "autos" that are covered "autos".

A. Description Of Covered Auto Designation Symbols

Symbol	Description Of Covered Auto Designation Symbols	
1	Any "Auto"	
2	Owned "Autos" Only	Only those "autos" you own (and for Covered Autos Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" you acquire ownership of after the policy begins.
3	Owned Private Passenger "Autos" Only	Only the private passenger "autos" you own. This includes those private passenger "autos" you acquire ownership of after the policy begins.
4	Owned "Autos" Other Than Private Passenger "Autos" Only	Only those "autos" you own that are not of the private passenger type (and for Covered Autos Liability Coverage any "trailers" you don't own while attached to power units you own). This includes those "autos" not of the private passenger type you acquire ownership of after the policy begins.
5	Owned "Autos" Subject To No-fault	Only those "autos" you own that are required to have no-fault benefits in the state where they are licensed or principally garaged. This includes those "autos" you acquire ownership of after the policy begins provided they are required to have no-fault benefits in the state where they are licensed or principally garaged.
6	Owned "Autos" Subject To A Compulsory Uninsured Motorists Law	Only those "autos" you own that because of the law in the state where they are licensed or principally garaged are required to have and cannot reject Uninsured Motorists Coverage. This includes those "autos" you acquire ownership of after the policy begins provided they are subject to the same state uninsured motorists requirement.
7	Specifically Described "Autos"	Only those "autos" described in Item Three of the Declarations for which a premium charge is shown (and for Covered Autos Liability Coverage any "trailers" you don't own while attached to any power unit described in Item Three).
8	Hired "Autos" Only	Only those "autos" you lease, hire, rent or borrow. This does not include any "auto" you lease, hire, rent or borrow from any of your "employees", partners (if you are a partnership), members (if you are a limited liability company) or members of their households.
9	Non-owned "Autos" Only	Only those "autos" you do not own, lease, hire, rent or borrow that are used in connection with your business. This includes "autos" owned by your "employees", partners (if you are a partnership), members (if you are a limited liability company) or members of their households but only while used in your business or your personal affairs.

19	Mobile Equipment Subject To Compulsory Or Financial Responsibility Or Other Motor Vehicle Insurance Law Only	Only those "autos" that are land vehicles and that would qualify under the definition of "mobile equipment" under this policy if they were not subject to a compulsory or financial responsibility law or other motor vehicle insurance law where they are licensed or principally garaged.

B. Owned Autos You Acquire After The Policy Begins

1. If Symbols **1, 2, 3, 4, 5, 6** or **19** are entered next to a coverage in Item Two of the Declarations, then you have coverage for "autos" that you acquire of the type described for the remainder of the policy period.
2. But, if Symbol **7** is entered next to a coverage in Item Two of the Declarations, an "auto" you acquire will be a covered "auto" for that coverage only if:
   a. We already cover all "autos" that you own for that coverage or it replaces an "auto" you previously owned that had that coverage; and
   b. You tell us within 30 days after you acquire it that you want us to cover it for that coverage.

C. Certain Trailers, Mobile Equipment And Temporary Substitute Autos

If Covered Autos Liability Coverage is provided by this Coverage Form, the following types of vehicles are also covered "autos" for Covered Autos Liability Coverage:

1. "Trailers" with a load capacity of 2,000 pounds or less designed primarily for travel on public roads.
2. "Mobile equipment" while being carried or towed by a covered "auto".
3. Any "auto" you do not own while used with the permission of its owner as a temporary substitute for a covered "auto" you own that is out of service because of its:
   a. Breakdown;
   b. Repair;
   c. Servicing;
   d. "Loss"; or
   e. Destruction.

SECTION II – COVERED AUTOS LIABILITY COVERAGE

A. Coverage

We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".

We will also pay all sums an "insured" legally must pay as a "covered pollution cost or expense" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of covered "autos". However, we will only pay for the "covered pollution cost or expense" if there is either "bodily injury" or "property damage" to which this insurance applies that is caused by the same "accident".

We have the right and duty to defend any "insured" against a "suit" asking for such damages or a "covered pollution cost or expense". However, we have no duty to defend any "insured" against a "suit" seeking damages for "bodily injury" or "property damage" or a "covered pollution cost or expense" to which this insurance does not apply. We may investigate and settle any claim or "suit" as we consider appropriate. Our duty to defend or settle ends when the Covered Autos Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements.

1. Who Is An Insured

The following are "insureds":

a. You for any covered "auto".

b. Anyone else while using with your permission a covered "auto" you own, hire or borrow except:

(1) The owner or anyone else from whom you hire or borrow a covered "auto".

This exception does not apply if the covered "auto" is a "trailer" connected to a covered "auto" you own.

(2) Your "employee" if the covered "auto" is owned by that "employee" or a member of his or her household.

(3) Someone using a covered "auto" while he or she is working in a business of selling, servicing, repairing, parking or storing "autos" unless that business is yours.

(4) Anyone other than your "employees", partners (if you are a partnership), members (if you are a limited liability company) or a lessee or borrower or any of their "employees", while moving property to or from a covered "auto".

(5) A partner (if you are a partnership) or a member (if you are a limited liability company) for a covered "auto" owned by him or her or a member of his or her household.

c. Anyone liable for the conduct of an "insured" described above but only to the extent of that liability.

2. Coverage Extensions

a. Supplementary Payments

We will pay for the "insured":

(1) All expenses we incur.

(2) Up to $2,000 for cost of bail bonds (including bonds for related traffic law violations) required because of an "accident" we cover. We do not have to furnish these bonds.

(3) The cost of bonds to release attachments in any "suit" against the "insured" we defend, but only for bond amounts within our Limit of Insurance.

(4) All reasonable expenses incurred by the "insured" at our request, including actual loss of earnings up to $250 a day because of time off from work.

(5) All court costs taxed against the "insured" in any "suit" against the "insured" we defend. However, these payments do not include attorneys' fees or attorneys' expenses taxed against the "insured".

(6) All interest on the full amount of any judgment that accrues after entry of the judgment in any "suit" against the "insured" we defend, but our duty to pay interest ends when we have paid, offered to pay or deposited in court the part of the judgment that is within our Limit of Insurance.

These payments will not reduce the Limit of Insurance.

b. Out-of-state Coverage Extensions

While a covered "auto" is away from the state where it is licensed, we will:

(1) Increase the Limit of Insurance for Covered Autos Liability Coverage to meet the limits specified by a compulsory or financial responsibility law of the jurisdiction where the covered "auto" is being used. This extension does not apply to the limit or limits specified by any law governing motor carriers of passengers or property.

(2) Provide the minimum amounts and types of other coverages, such as no-fault, required of out-of-state vehicles by the jurisdiction where the covered "auto" is being used.

We will not pay anyone more than once for the same elements of loss because of these extensions.

B. Exclusions

This insurance does not apply to any of the following:

1. Expected Or Intended Injury

"Bodily injury" or "property damage" expected or intended from the standpoint of the "insured".

2. Contractual

Liability assumed under any contract or agreement.

But this exclusion does not apply to liability for damages:

a. Assumed in a contract or agreement that is an "insured contract", provided the "bodily injury" or "property damage" occurs subsequent to the execution of the contract or agreement; or

b. That the "insured" would have in the absence of the contract or agreement.

3. Workers' Compensation

Any obligation for which the "insured" or the "insured's" insurer may be held liable under any workers' compensation, disability benefits or unemployment compensation law or any similar law.

STATE OF SOUTH DAKOTA INVESTIGATOR'S MOTOR VEHICLE TRAFFIC ACCIDENT REPORT		Mail to: Office of Accident Records, 118 W. Capitol Ave., Pierre, SD 57501	
		TraCS ID: **155346-132**	TraCS Sequence: **1608010008**
Form DPS - AR1 12/12/2014		Agency Use	Report Type
☐ Is this only a Wild Animal Hit Report?	Agency Name **SD HIGHWAY PATROL**	Date of Accident **08/01/2016**	Time of Accident **18:06 Hrs.**
Reporting Officer Last Name **O'NEILL**	Reporting Officer First Name **ZACHARY**	Reporting Officer Middle Name **TYLER**	Reporting Officer # **132-155346**

LOCATION						
Location Description **ON SD HWY 1804 AT ITS INTERSECTION WITH GREY GOOSE RD**						
Latitude **44.428802**			Longitude **-100.351964**			
County **33**	County Name **33 - HUGHES**		City or Rural **0000 - Rural**		Roadway Surface Condition **01 - Dry**	
On Road, Street, or Highway **SD HWY 1804**					Roadway Surface Type **01 - Concrete**	
At Intersection with **GREY GOOSE RD**					Roadway Align/Grade **06 - Curve on grade**	
Distance **0.5965**	Units **Miles/ Tenths**	Direction of **North**	MRM (milepost) **253.00**		Relation to Junction **02 - T - intersection**	
Distance	Units	Direction and	Distance		Units	Direction of
Junction or Intersecting Street			Name of Junction, Road, Street, or Highway			

EXHIBIT tabbies A

UNIT 001

Unit Type **01 - Motor vehicle in transport with driver**					Hit and Run **02 - No**
Driver's Name - Last **TRONVOLD**		First **GERRIT**		Middle **AARON JUSTUS**	
Address **135 DOVE RD**			Address (Line 2)		
City **PIERRE**	State **SD**	Zip **57501**	Date of Birth	Sex **1 - Male**	
		Non - Motorist Location **96 - Not Applicable**			
Phone **6052952054**	DL State **SD**	DL Class **2**	Non - Motorist Action **96 - Not Applicable**		
DL Status **01 - Normal within restrictions**			Non - Motorist Contributing Circumstances (Up to Two) **96 - Not Applicable**		
Driver Contributing Circumstances (Up to Two) **01 - Failed to yield to vehicle**			Drug Use **00 - None used**	Drug Test **02 - Test not given**	
Vision Contributing Circumstance **08 - Motor vehicle (including load) not parked**			Alcohol Use **00 - None used**	Alcohol Test **00 - .00 NONE**	
Injury Status **05 - No Injury**			Ejection **00 - Not ejected**		
Saftey Equipment **00 - None used**			Citation Charge? **01 - Yes**		
Seating Position **01 - Operator**			Citation #1 **32-29-2.1 - FAIL TO STOP FOR STOP SIGN / YIELD AFTER STOP**		
Air Bag Deployed **00 - Not deployed**			Citation #2 **32-38-1 - ADULT SEATBELT VIOLATION ---- AFTER 9/1/73**		
Transported To			Citation #3		
Source of Transport **00 - Not Transported**			Citation #4		
Is Driver the Owner **Yes**					
Owner's Name - Last **TRONVOLD**		First **GERRIT**		Middle **AARON JUSTUS**	
Address 135 DOVE RD			Address (Line 2)		
City **PIERRE**	State **SD**	Zip **57501**	Red Tag **A103681**		
Year **2002**	Make **Chevrolet - CHEV**	Model **SILVERADO**	VIN **1GCHK29U82E216263**		
License Plate # **NG5641**	State **SD**	Year **2016**	Estimated Travel Speed **55**	Speed - How Estimated? **02 - Driver Statement**	
Speed Limit **55**	Total Occupants **1**		Damage Extent **01 - Minor Damage**	Vehicle Towed **02 - No**	
Damage Amount (Vehicle and Contents) **3000**			Insurance Co. Name **25178 - STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY**		
Insurance Policy # **048-3576-D15-41**			Effective Date **04/15/2016**	Expiration Date **10/15/2016**	
Emergency Vehicle Use?			Vehicle Configuration **02 - SUV (sport utility/suburban)**		
Trailer Type **00 - No trailer/attachment**			Cargo Body Type **00 - No cargo body**		
Direction of Travel Before Crash **04 - Westbound**		Trailer LP # Attached to Power Unit	State	Year	
Initial Point of Impact **06 - Position 6**	Most Damaged Area **06 - Position 6**	Trailer 2 License Plate #	State	Year	
Underride/Override **00 - No underride or override**		Trailer 3 License Plate #	State	Year	
Traffic Control Device Type **04 - Stop sign**			Vehicle Contributing Circumstance **00 - None**		
Vehicle Maneuver **06 - Turning left**			Road Contributing Circumstance **00 - None**		
First Event **25 - Motor vehicle in transport**			Second Event		
Third Event			Fourth Event		

Most Harmful Event for this Vehicle **25 - Motor vehicle in transport**						
Does the accident involve one or more of the following: • a truck having a GCWR of 10,001 or more pounds; OR • a vehicle displaying a hazardous material placard; OR • a vehicle designed to transport 9 or more people, including driver			Did the accident result in one or more of the following: • a fatality; OR • an injury requiring transportation for immediate medical attention; OR • a vehicle was disabled requiring a towaway from the scene			
Accident Involved Vehicle - Purpose			Carrier Name			
Street Address			Street Address (Line 2)			
City	State	Zip	US DOT # **98**	GVWR	GCWR	
Hazardous Material Released?	Hazardous Material Content Code	Hazardous Material Class Code		Hazardous Materials Description		

UNIT 002	Unit Type **01 - Motor vehicle in transport with driver**					Hit and Run **02 - No**
	Driver's Name - Last **JURGENS**	First **RANDALL**		Middle **RAY**		
	Address **317 N COVELL AVE**			Address (Line 2)		
	City **SIOUX FALLS**	State **SD**		Zip **57104**	Date of Birth	Sex **1 - Male**
				Non - Motorist Location **96 - Not Applicable**		
				Non - Motorist Action **96 - Not Applicable**		
	Phone	DL State **SD**	DL Class **2**	Non - Motorist Contributing Circumstances (Up to Two) **96 - Not Applicable**		
	DL Status **01 - Normal within restrictions**					
	Driver Contributing Circumstances (Up to Two) **00 - None**			Drug Use **00 - None used**	Drug Test **03 - Test given, no drugs reported**	
	Vision Contributing Circumstance **99 - Unknown**					
				Alcohol Use **01 - Alcohol used**	Alcohol Test **03 - .03 BAC**	
	Injury Status **02 - Incapacitating injury**			Ejection **96 - Not Applicable (motorcycle, snowmobile, pedestrian, pedalcyclist, etc.)**		
	Saftey Equipment **00 - None used**					
	Seating Position **01 - Operator**			Citation Charge? **02 - No**		
	Air Bag Deployed **96 - Not Applicable (motorcycle, snowmobile, pedestrian, pedalcycle, etc.)**			Citation #1		
				Citation #2		
	Transported To **AVERA PIERRE/SIOUX FALLS**			Citation #3		
	Source of Transport **01 - EMS**			Citation #4		
	Is Driver the Owner **Yes**					
	Owner's Name - Last **JURGENS**	First **RANDALL**		Middle **RAY**		
	Address 317 N COVELL AVE			Address (Line 2)		
	City **SIOUX FALLS**	State **SD**		Zip **57104**	Red Tag **A103683**	
	Year **2009**	Make **Harley Davidson - HAR**		Model **FLSTC**	VIN **1HD1BW5179Y060924**	
	License Plate # **M16161**	State **SD**		Year **2017**	Estimated Travel Speed **55**	Speed - How Estimated? **04 - Witness Statement**
	Speed Limit **55**	Total Occupants **2**		Damage Extent **03 - Disabling Damage**		Vehicle Towed **01 - Yes**
	Damage Amount (Vehicle and Contents) **5000**			Insurance Co. Name **19283 - AMERICAN STANDARD INS CO OF WI**		
	Insurance Policy # **2322-6926-02**				Effective Date **06/11/2015**	Expiration Date **06/11/2016**
	Emergency Vehicle Use?			Vehicle Configuration **09 - Motorcycle**		
	Trailer Type **00 - No trailer/attachment**			Cargo Body Type **00 - No cargo body**		
	Direction of Travel Before Crash **01 - Northbound**		Trailer LP # Attached to Power Unit	State	Year	
	Initial Point of Impact **12 - Position 12**	Most Damaged Area **12 - Position 12**	Trailer 2 License Plate #	State	Year	
	Underride/Override **00 - No underride or override**		Trailer 3 License Plate #	State	Year	
	Traffic Control Device Type **00 - No controls**			Vehicle Contributing Circumstance **00 - None**		
	Vehicle Maneuver **01 - Straight ahead**			Road Contributing Circumstance **00 - None**		

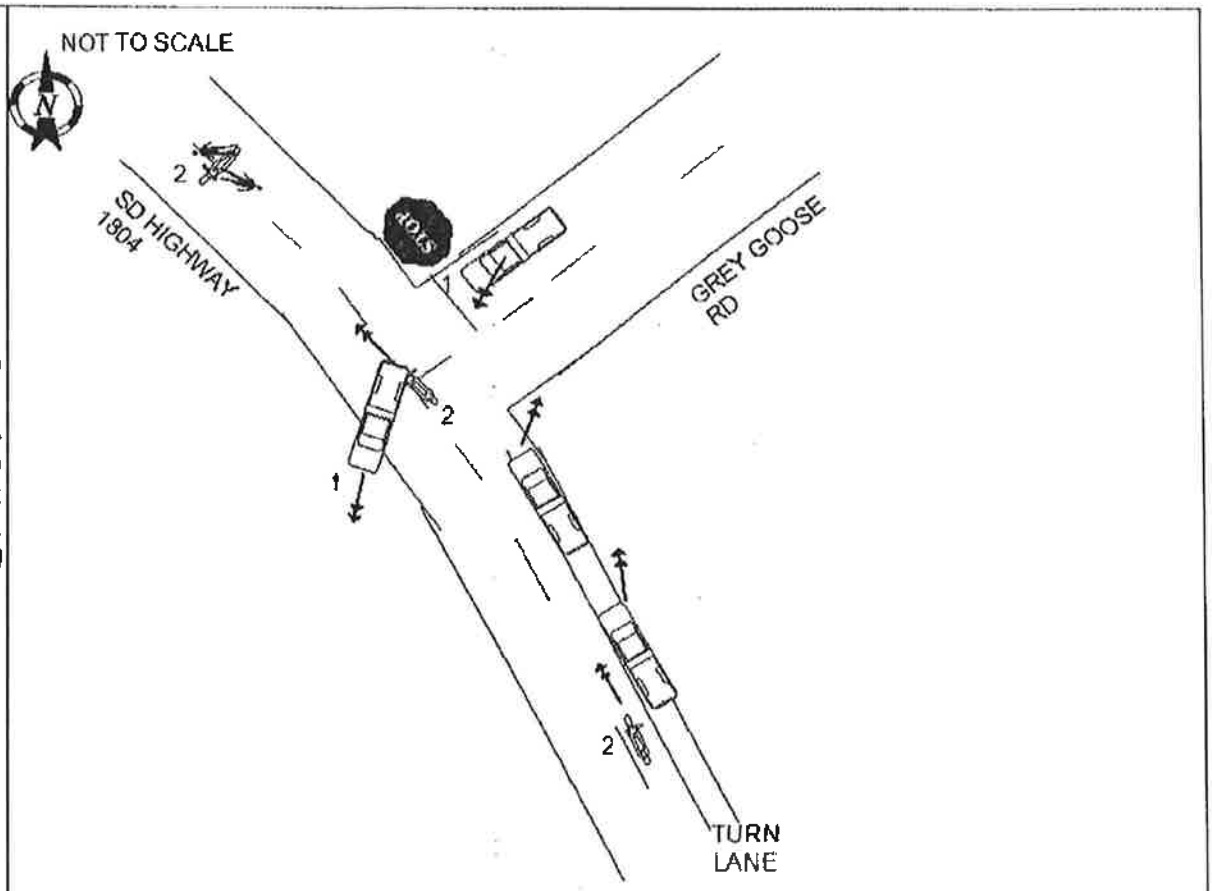
	First Event **25 - Motor vehicle in transport**			Second Event		
	Third Event			Fourth Event		
	Most Harmful Event for this Vehicle **25 - Motor vehicle in transport**					
	Does the accident involve one or more of the following: • a truck having a GCWR of 10,001 or more pounds; OR • a vehicle displaying a hazardous material placard; OR • a vehicle designed to transport 9 or more people, including driver			Did the accident result in one or more of the following: • a fatality; OR • an injury requiring transportation for immediate medical attention; OR • a vehicle was disabled requiring a towaway from the scene		
	Accident Involved Vehicle - Purpose			Carrier Name		
	Street Address			Street Address (Line 2)		
	City	State	Zip	US DOT # **98**	GVWR	GCWR
	Hazardous Material Released?	Hazardous Material Content Code	Hazardous Material Class Code	Hazardous Materials Description		

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

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

	Unit # **2**	Last Name **TAMMEN**	First Name **LISA**		Middle Name
I P	Address **614 W DAKOTA #8**		Address (Line 2)		
N E	City **PIERRE**	State **SD**	Zip **57501**	Date of Birth	Sex **2 - Female**
J R U S	Injury Status **02 - Incapacitating injury**		Ejection **96 - Not Applicable (motorcycle, snowmobile, pedestrian, pedalcyclist, etc.)**		
R O	Seating Position **17 - Motorcycle passenger**		Safety Equipment **00 - None used**		
E N D	Air Bag Deployed **96 - Not Applicable (motorcycle, snowmobile, pedestrian, pedalcycle, etc.)**		Source of Transport **01 - EMS**		
	Transported to **AVERA PIERRE/SIOUX FALLS**		EMS Trip # **16-1007**		

DIAGRAM



NARRATIVE
UNIT 1 WAS APPROACHING THE INTERSECTION OF GREY GOOSE RD AND SD HIGHWAY 1804. UNIT 1 DRIVER STATED THAT UNIT 1 OBSERVED VEHICLES SIGNALLING TO MAKE A RIGHT-TURN ONTO GREY GOOSE RD FROM SD 1804. UNIT 1 CONTINUED WITH HIS INTENTIONS TO MAKE A LEFT-TURN ONTO SD 1804. UNIT 1 DRIVER STATED THAT WHILE ALREADY ON 1804, UNIT 1 DRIVER OBSERVED UNIT 2 APPROACHING. UNIT 1 ATTEMPTED TO DRIVE STRAIGHT INTO THE DITCH IN AVOIDANCE, AS UNIT 2 ATTEMPTED TO BRAKE. UNIT 2 STRUCK UNIT 1'S REAR BUMPER. AFTER STRIKING UNIT 1'S BUMPER, UNIT 2 CONTINUED MOVING AS IT EVENTUALLY SLID TO A STOP. UNIT 2 DRIVER AND PASSENGER REMAINED WITH THE BIKE AS IT SLID TO A STOP AND SUSTAINED HEAVY LIFE-THREATENING INJURIES. UNIT 1 DRIVER DID NOT SUSTAIN ANY INJURIES. UNIT 2 DRIVER AND PASSENGER WERE NOT WEARING ANY PROTECTIVE GEAR. UNIT 2 DRIVER AND PASSENGER WERE AIR-LIFTED TO SIOUX FALLS AND BROUGHT TO AVERA MCKENNAN. UNIT 1 WAS CITED FOR A STOP SIGN VIOLATION AND NOT WEARING A SEATBELT.

WITNESS				
	Last Name **ALBERTSON**	First Name **KEITH**		Middle Name **FLETCHER**
	Address **520 N CENTRAL AVE**			
	Address (Line 2)			
	City **PIERRE**	State **SD**	Zip **57501**	Phone #

Date Notified **08/01/2016**	Time Notified **18:06** Hrs.	Date Arrived **08/01/2016**	Time Arrived **18:16** Hrs.
Agency Type **01 - Highway patrol**	Investigation Made at Scene? **01 - Yes**	Photos Taken? **Y**	Date Approved **08/15/2016**
Approval Officer	Last Name **STAHL**	First Name **JON**	Middle Name

SOUTH DAKOTA PUBLIC ASSURANCE ALLIANCE
(A Local Government Risk Pool)

MEMORANDUM OF GOVERNMENTAL LIABILITY COVERAGE

DECLARATIONS

Subject to the terms of this Memorandum of Governmental Liability Coverage, we agree with the Member to provide the coverages as stated in this Memorandum.

This Memorandum of Governmental Liability Coverage is issued under and pursuant to the terms, conditions, covenants and stipulations of the Intergovernmental Contract dated 01/14/1988 between the Member stated herein and SOUTH DAKOTA PUBLIC ASSURANCE ALLIANCE (SDPAA) and any amendments thereto. All terms and conditions of said Contract are incorporated herein by reference. In the event that any provision of this Memorandum of Governmental Liability Coverage is in conflict with or is inconsistent with the Intergovernmental Contract, the terms and conditions of such Intergovernmental Contract shall prevail and take precedence to the extent of such conflict or inconsistency.

MEMBER:	City of Pierre
MAILING ADDRESS:	PO Box 1258 Pierre, SD 57501
MEMBER NUMBER:	089
COVERAGE PERIOD:	01/14/2016 - 01/14/2017 Commencing at 12:01 A.M. on the effective date indicated on the Schedule of Coverages until terminated in accordance with the Intergovernmental Contract.

LIMIT OF COVERAGE:	$	2,000,000 per occurrence, except:
Sublimits:	$	5,000 per occurrence for Medical Expenses
	$	25,000 per occurrence for Injunctive Relief
	$	5,000 per occurrence/5,000 aggregate for Broad Legal Defense
	$	100,000 per occurrence for Property of Others
DEDUCTIBLE:	$	0 per occurrence, except:
	$	5,000 per occurrence for Injunctive Relief
	$	5,000 per occurrence for Employment Related Claims

FORMS ATTACHED: GL 1025, GL 1075, GL 1150, GL 1200, GL 1250, GL 1400

THIS MEMORANDUM OF COVERAGE REPLACES ALL PREVIOUSLY ISSUED RISK SHARING CERTIFICATES FOR THIS COVERAGE AND IS NOT IN addition THERETO.

THESE DECLARATIONS, TOGETHER WITH THE MEMORANDUM OF COVERAGE, ANY ENDORSEMENTS AND THE INTERGOVERNMENTAL CONTRACT COMPLETE THE COVERAGE PROVIDED.

Countersigned: June 6, 2016
Date

By: Kristina Albertson
Director of Underwriting

EXHIBIT tabbies F

MEMBER NUMBER: 089

FORM	ENDORSEMENTS
GL 1075	DEDUCTIBLE ENDORSEMENT
GL 1150	EXCLUSION ENDORSEMENT
GL 1200	MORAL OBLIGATION TO PAY
GL 1250	PROPERTY OF OTHERS COVERAGE EXTENSION
GL 1400	CHANGE OF LIMITS ENDORSEMENT

CITY 6

South Dakota Public Assurance Alliance
GOVERNMENTAL LIABILITY COVERAGE EXCLUSION

This Endorsement Changes the Memorandum of Governmental Liability Coverage.
Please Read It Carefully.

EXCLUSION ENDORSEMENT

SECTION C. – Exclusions

Exclusion (34) is added as follows:

(34) Fire Department, Fire Fighting activities or Fire Department vehicles

All other terms and conditions remain unchanged.

This endorsement forms a part of the Memorandum of Governmental Liability Coverage to which it is attached, effective during the Coverage Period stated in the Declarations unless otherwise stated herein.

(The following information is required only when this endorsement is issued subsequent to the inception of the Agreement Period.)

Endorsement Effective: 1/14/2016
Endorsement No.: GL 1150

Member No.: 089
Member: City of Pierre

Countersigned By: Kristina A Peterson
Director of Underwriting

CITY 8

SOUTH DAKOTA PUBLIC ASSURANCE ALLIANCE
(A Local Government Risk Pool)

MEMORANDUM OF AUTOMOBILE LIABILITY COVERAGE

DECLARATIONS

Subject to the terms of this Memorandum of Automobile Liability Coverage, we agree with the Member to provide the coverages as stated in this Memorandum.

This Memorandum of Automobile Liability Coverage is issued under and pursuant to the terms, conditions, covenants and stipulations of the Intergovernmental Contract dated 01/14/1988 between the Member stated herein and SOUTH DAKOTA PUBLIC ASSURANCE ALLIANCE (SDPAA) and any amendments thereto. All terms and conditions of said contract are incorporated herein by reference. In the event that any provision of this Memorandum of Automobile Liability Coverage is in conflict with or is inconsistent with the Intergovernmental Contract, the terms and conditions of such Intergovernmental Contract shall prevail and take precedence to the extent of such conflict or inconsistency.

MEMBER:	City of Pierre
MAILING ADDRESS:	PO Box 1253 Pierre, SD 57501
MEMBER NUMBER:	089
COVERAGE PERIOD:	01/14/2016 - 01/14/2017 Commencing at 12:01 A.M. on the effective date indicated on the Schedule of Coverages until terminated in accordance with the Intergovernmental Contract.

LIMIT OF COVERAGE:	$ 2,000,000	per accident; except
Sublimits:	$ 5,000	per person per accident, subject to a maximum per accident of $25,000 for Medical Expenses
	$ 50,000	per person per accident, subject to a maximum per accident of 100,000 for Uninsured Motorists or Underinsured Motorists
DEDUCTIBLE:	$ 0	per accident
FORMS ATTACHED:	AL 2075	

THIS MEMORANDUM OF AUTOMOBILE LIABILITY COVERAGE PROVIDES COVERAGE TO ALL OWNED, NON-OWNED AND HIRED AUTOS AND REPLACES ALL PREVIOUSLY ISSUED RISK SHARING CERTIFICATES FOR THIS COVERAGE AND IS NOT IN ADDITION THERETO.

THESE DECLARATIONS, TOGETHER WITH THE MEMORANDUM OF AUTOMOBILE LIABILITY COVERAGE, ANY ENDORSEMENTS AND THE INTERGOVERNMENTAL CONTRACT COMPLETE THE COVERAGE PROVIDED.

Countersigned: June 6, 2016
Date

By: Kristina Peterson
Director of Underwriting

AL 2000 SDPAA 01/01/2016

EXHIBIT 6

South Dakota Public Assurance Alliance

AUTO LIABILITY COVERAGE CHANGE OF LIMITS ENDORSEMENT

This Endorsement Changes the Memorandum of Auto Liability Coverage.
Please Read It Carefully.

CHANGE OF LIMITS LIABILITY

This endorsement modifies the Coverages stated in the Declarations.

SUBJECT TO THE MEMORANDUM TERMS AND CONDITIONS, THE PRIOR LIMITS AND DEDUCTIBLES APPLY TO CLAIMS FOR DAMAGES MADE DURING THE CURRENT COVERAGE TERM FOR ANY INCIDENT (OCCURRENCE, ACCIDENT OR WRONGFUL ACT) THAT TAKES PLACE BEFORE THIS CHANGE OF LIMITS EFFECTIVE DATE.

COVERAGE	PRIOR LIMITS EFFECTIVE DATE	PRIOR COVERAGE LIMIT	PRIOR DEDUCTIBLE
AUTOMOBILE LIABILITY	1/14/1997	$1,000,000	$0

All other terms and conditions remain unchanged.

This endorsement forms a part of the Memorandum of Auto Liability Coverage to which it is attached, effective during the Agreement Period stated in the Declarations unless otherwise stated herein.

(The following information is required only when this endorsement is issued subsequent to the inception of the Agreement Period.)

Endorsement Effective: 1/14/2016
Endorsement No.: AL 2075

Member No.: 089
Member: City of Pierre

Countersigned By: Krystina A Peterson
Director of Underwriting

CITY 14

Application Of

PIERRE VOLUNTEER FIRE DEPARTMENT

For an Extension of its Corporation Charter

Pierre Volunteer Fire Department a corporation organized and existing under the laws of the State of South Dakota, incorporated on the 2nd day of Dec., 1925 for the period of 20 years, hereby makes application to the Secretary of State of the State of South Dakota for an extension of its term of existence for a further term of Perpetual years

IN TESTIMONY WHEREOF, the undersigned, comprising a majority of the Board of Directors of the above named corporation, have hereunto set their hands and seals; after being authorized to do so by the stockholders or the members of said corporation, pursuant to motion or resolution adopted at the annual meeting or special (state which) meeting called and noticed for that purpose, held at Pierre, South Dakota, on the 7th day of December, 19 66.

Attached hereto and made part hereof is the statement required by law, duly verified.

DIRECTORS

Thomas H. Brady

Louis Harding

Richard Singer

Maynard Thompson

John Woods

State of South Dakota
County of Hughes } ss.

BE IT REMEMBERED, That on this 29th day of December A. D. 1966, before me a notary public, within and for said county and state, personally appeared Thomas H. Brady, Louis Harding, Richard Singer, Maynard Thompson and John Woods to me personally known to be directors of the Pierre Volunteer Fire Department a corporation, and the persons who are described in and who executed the foregoing application and duly and severally acknowledged to me that they executed the same.

WITNESS my hand and notarial seal the day and year last above written.

Notary Public

Hughes County, South Dakota

My commission expires 12-29-66

EXHIBIT
Part
A-V 2
7-10-18 BM

[redacted]

IN THE MATTER OF THE APPLICATION OF

PIERRE VOLUNTEER FIRE DEPARTMENT

FOR AN EXTENSION OF ITS CORPORATION CHARTER

State of South Dakota
County of Hughes } ss.

Thomas H. Brady, Chief President of the _____ and

John Woods, Secretary of the _____

each being severally duly and solemnly sworn upon his oath states that the statement hereto attached marked exhibit "A" and made a part hereof, is a true statement of the assets and liabilities of the Pierre Volunteer Fire Department, of the nature of its business, of the number of its shares of stock issued and outstanding, of the number of its shares of stock subscribed and not issued, and the name and post-office address of each stockholder, and of the number of shares owned by each, and of the names and postoffice addresses of each and all of its directors.

Thomas H. Brady
President

John Woods
Secretary

Subscribed and sworn to before me this 29th day of [illegible] A. D. 1966.

[illegible]
Notary Public Hughes County, South Dakota

[redacted]

EXHIBIT "A"
FINANCIAL STATEMENT AND NATURE OF BUSINESS

This Corporation is a part of the Governmental Functions of the City of Pierre, South Dakota and as such has no independent finances and has no stockholders. The Nature of its business is the prevention and suppression of fires within the City of Pierre.

Number of shares of stock issued and outstanding _____

Number of shares of stock subscribed and not issued _____

Name and postoffice address of directors:

Name Address

NONE

STATE OF SOUTH DAKOTA : SS COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT

LISA A. TAMMEN and RANDALL R. JURGENS, Plaintiffs, vs. GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally Defendants.	32CIV17-000042 **SUMMARY JUDGMENT**

Defendants, City of Pierre, a South Dakota Municipal Corporation, and Pierre Volunteer Fire Department, a South Dakota nonprofit corporation (collectively referred to herein as Defendants), having moved for summary judgment, pursuant to SDCL § 15-6-56; and the Court having held a hearing on the motions on Wednesday, June 12, 2019; and the Court having considered all of the records and files herein; and the Court having further considered the arguments of counsel and the briefs that have been submitted; and the Court having issued its memorandum opinion dated August 8, 2019; it is hereby

ORDERED, ADJUDGED AND DECREED that the Motions of Defendants for summary judgment be, and hereby is, GRANTED. It is further

ORDERED, ADJUDGED AND DECREED that the Complaint of Plaintiffs Lisa A. Tammen and Randall R. Jurgens, as against Defendants City of Pierre, a South Dakota Municipal Corporation, and Pierre Volunteer Fire Department, a South Dakota nonprofit corporation, be, and it is hereby, dismissed, on the merits, with prejudice, and that Defendants

32CIV17-000042

are entitled to a recovery of their taxable disbursements to be assessed by the Clerk, pursuant to SDCL §§ 15-17-37 and 15-6-54(d).

Dated this 13 day of August, 2019.

BY THE COURT:

Honorable Thomas L. Trimble
Circuit Court Judge, Retired

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NOS. 29114, 29138

LISA A. TAMMEN,

Plaintiff and Appellant,

and

RANDALL R. JURGENS,

Plaintiff and Appellant,

vs.

GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota municipal corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally,

Defendants and Appellees.

LISA A. TAMMEN,

Plaintiff and Appellant,

and

RANDALL R. JURGENS,

Plaintiff and Appellant,

vs.

GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota municipal corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally,

Defendants and Appellee

Notice of Appeal of Plaintiff and Appellant Randall R. Jurgens filed September 23, 2019, and Notice of Appeal of Lisa A. Tammen filed September 3, 2019

Appeal from the Circuit Court
Sixth Judicial Circuit
Hughes County, South Dakota

The Honorable Thomas L. Trimble, Circuit Court Judge, Retired

BRIEF OF APPELLANT RANDALL R. JURGENS

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Attorneys for Defendant and Appellee Pierre Volunteer Fire Department

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases cited:

Statutes cited:

Other authorities cited:

PRELIMINARY STATEMENT

Citations to the Certified Record are "R." followed by the applicable page numbers in the Clerk's Index. Plaintiff and Appellant Randall R. Jurgens is referred to as Randall. Plaintiff and Appellant Lisa A. Tammen is referred to as Lisa. Defendant and Appellee City of Pierre is referred to as City. Defendant and Appellee City of Pierre Volunteer Fire Department is referred to as Fire Department. Defendant Gerrit A. Tronvold is referred to as Tronvold. References to Randall's Appendix are designated as "App." There is one transcript in this appeal. References to the transcript of the summary judgment hearing held on June 7, 2018, are designated as "HT."

JURISDICTIONAL STATEMENT

Randall and Lisa appeal separately from the Order Granting City of Pierre's Motion for Summary Judgment and Granting Pierre Volunteer Fire Department's Motion for Summary Judgment, dated August 8, 2019. R. 1002-11. An Amended Judgment was entered on August 26, 2019, granting summary judgment and directing entry of final judgment pursuant to SDCL § 15-6-54(b) on the claims brought by Randall and Lisa against City and Fire Department. R. 1016-19. Notice of Entry of Judgment was filed on August 27, 2019. R.1020-25. Randall timely filed a Notice of Appeal on September 23, 2019. R.1059-61. This Court has jurisdiction pursuant to SDCL § 15-6-54(b).

REQUEST FOR ORAL ARGUMENT

Randall A. Jurgens respectfully requests oral argument.

STATEMENT OF LEGAL ISSUES

I. **Whether the record establishes that Tronvold was acting within the scope of his employment or agency at the time of the collision.**

The trial court ruled that neither City nor Fire Department was vicariously liable to Randall and Lisa under the doctrine of *respondeat superior* because of the going and coming rule.

Hass v. Wentzlaff, 2012 S.D. 50, 816 N.W.2d 96

Kirlin v. Halverson, 2008 S.D. 107, 758 N.W.2d 436

Deuchar v. Foland Ranch, Inc., 410 N.W.2d 177 (S.D. 1987)

Albert v. Mutual Serv. Casualty Inc. Co., 80 S.D. 303, 123 N.W.2d 96 (S.D. 1963)

II. **Whether City's liability insurance endorsement excluding coverage for "Fire Department, Fire Fighting activities or Fire Department vehicles" in its Governmental Liability policy applies in this case.**

The trial court granted summary judgment to City on the alternative ground of governmental immunity that is not waived due to an exclusion of coverage for "Fire Department, Fire Fighting activities or Fire Department vehicles" in City's Governmental Liability policy when this exclusion is inapplicable because it applies only to the Governmental Liability portion of City's South Dakota Public Assurance Alliance Policy, and not City's Automobile liability policy which establishes liability limits for automobile accidents.

III. **Whether Fire Department's Governmental Liability Endorsement is void as against public policy.**

The trial court granted summary judgment to Fire Department on the alternative ground that Fire Department has governmental immunity that is not waived by Fire Department's Governmental Liability Endorsement when Fire Department's Governmental Liability Endorsement is void on public policy grounds because it provides Fire Department with comprehensive coverage for damages to property while allowing the insurer to deny liability coverage to persons injured by the insured.

STATEMENT OF THE CASE

This is a personal injury action in the Sixth Judicial Circuit Court against Tronvold, City, and Fire Department for the catastrophic bodily injuries sustained by Randall and Lisa in the collision involving the pickup truck driven by Tronvold on August 1, 2016. The original complaint was against Tronvold only, and was filed on February 8, 2017. R.3-6.

Randall and Lisa filed their First Amended Complaint against City and Fire Department and Tronvold, with liability of City and Fire Department based upon *respondeat superior*. R.83-95. Randall and Lisa allege that Tronvold was acting within the scope of his employment or agency as a firefighter with City and Department when at the intersection of Highway 1804 and Grey Goose Road, Tronvold turned his pickup left at a controlled intersection, failed to yield the right of way to oncoming traffic, failed to maintain a proper lookout for oncoming traffic, and drove into the oncoming traffic lane when his view was obstructed by other vehicle traffic, and caused his pickup and the oncoming motorcycle on which Randall and Lisa were lawfully riding to collide, causing severe and life-threatening injuries to Randall and Lisa, resulting in amputation of each of their left legs above the knee. City and Fire Department denied liability and alleged that Tronvold was not working within the scope of his employment at the time of the collision. R.99-107.

City and Fire Department filed separate motions for summary judgment, arguing that there were no disputed issues of material fact and that each was entitled to judgment as a matter of law. R. 161-62; 246-47. Randall and Lisa separately resisted the motions.

R. 506-659; 660-828. A hearing was held before the Honorable Thomas L. Trimble, Circuit Court Judge, Retired. Jurgens App. 001-004; R. 499-500; R.501-503.

The trial court granted both motions for summary judgment and ruled that "Tronvold was not acting within the scope of any employment or agency at the time the alleged accident occurred." Jurgens App. 005-015; R. 1002-1012. The trial court further held that City and Fire Department had governmental immunity that had not been waived. Jurgens App. 006-015; R. 1007-1012. The trial court further concluded that if the ruling on the scope of employment issue were reversed, a question of fact for the jury to decide at trial would be whether the statutory immunity of SDCL § 20-9-45 applied, or whether Tronvold was acting with gross negligence. R. 1002, 1010.

The trial court granted Summary Judgment in favor of City and Fire Department. R. 1013-1014. After stipulation of the parties, the trial court entered an Amended Judgment certifying its judgment as a final judgment pursuant to R. 1016-1019. On August 27, 2019, notice of entry of amended judgment was filed. R. 1020 -1025. On September 23, 2019, Randall timely filed his Notice of Appeal and Docketing Statement. R.1059-1067.

STATEMENT OF THE FACTS

On August 1, 2016, at approximately 6:00 p.m., nineteen-year-old Tronvold was driving his personally owned vehicle ("POV"), a 2002 Chevrolet Silverado K2500 extended cab pickup, from his rural residence on Grey Goose Road to the "T-intersection" with Highway 1804, which is controlled by a stop sign giving the right of way to cross traffic on Highway 1804. Jurgens App. 088-094; R. 876, 858, 902.

Tronvold was driving to a monthly meeting of Engine Company 3, to which he was assigned. Tronvold's attendance was required by municipal ordinance of City. R. 754, 756. Section 2-3-415 of the Fire Department Ordinances of City requires that each firefighter must attend "each and all of the drills and meetings" of the engine company to which he or she is assigned, and that dismissal by the fire chief is mandatory in the event a firefighter misses three such successive meetings or drills "without having sufficient reason or excuse." R. 754, 759. All bylaws of Fire Department and any engine company are subordinated to the Fire Department Ordinances by Section 2-3-402. R. 754, 756.

Tronvold's destination was the fire station at 721 North Poplar Avenue in Pierre, approximately ten miles from his rural residence. R.874.

The bylaws of Fire Department require that a firefighter must either be employed at a job within the city limits, or live within three miles of the city limits. R.750. Tronvold worked as a mechanic at Morris Equipment in Pierre. A drive of approximately ten miles is required to arrive at the fire station. Tronvold had already worked a full day at Morris Equipment in Pierre. R.848,854,855 857. Tronvold left work at 4:30 p.m. drove home, and "kind of relaxed after work." R. 848, 877. Tronvold testified that it takes "15, 20 minutes by way I drive" to travel from Morris Equipment to his home, which places him at his home about 5:00 p.m. R.848,877. The Engine Company meeting was scheduled to begin at 6:30 p.m. with "EVOC" training. EVOC training consists of firefighters simulating an emergency response by driving the fire engine and maneuvering through an obstacle course with "cones and things." R. 768, 781.

Tronvold was a rookie member of the Pierre Volunteer Fire Department who was approved by the Board of Commissioners of the City of Pierre on December 22, 2015. R.

761, 767. Tronvold has dual employee and agent status with the City and Fire Department. The Fire Department Ordinances of City establish Fire Department as a department of the municipal government of City. R. 754-755.

Fire Department is a corporation that is funded and regulated by City. R.791-793. The Application of the Pierre Volunteer Fire Department for an Extension of its Corporation Charter states: "This Corporation is part of the Governmental Functions of the City of Pierre, South Dakota and as such has no independent finances and has no stockholders. The Nature of its business is the prevention and suppression of fires within the City of Pierre." R.791,793. The Fire Department stations, apparatus, and personal protective equipment of Fire Department are all purchased by City. R.982-984.

Tronvold was driving his own private vehicle, as he was required to have to drive to the fire station or the scene of a fire or other emergency. R. 596,599, 848-849,869. Firefighters are required to have their own private vehicle. The fire chief cannot recall any person who has ever been a member of Fire Department who did not have his or her own vehicle. R.596,606. Having his own private vehicle is essential to Tronvold, as he lives more than ten miles from his assigned fire station. R.848, 874.

The fire chief testified that when a firefighter attends training, the department as a whole is benefited, because a better-trained fireman is a more effective fireman. R.768, 776. The fire chief also testified that when a firefighter provides his own transportation to training or a meeting, that he provides a benefit to Fire Department. R.768, 776. Attending meetings benefits the fire department and members are encouraged to be as active as possible. R.768,776. It is "essential and instrumental for a firefighter to have

transportation to a fire station and to attend training sessions." R.768,777. Training is "essential" to being an effective firefighter. R.768,778.

In addition to the requirement that every firefighter have a personal vehicle to drive to the fire station, attend training, and respond to calls. Tronvold carries with him in his pickup all of the personal protective equipment[1] ("PPE") issued to him by Fire Department. City owns all of the PPE issued to firefighters. R.848,882-885. PPE consists of a firefighter's "turnout gear," which is the heavy structure firefighting gear, hood, gloves, helmet and boots. R.982,984. The purpose of PPE is to protect the firefighter when responding to incidents and fighting fires. R.768,775,789. Tronvold always carries this equipment with him, because the Pierre Fire Department wants him to do so. R.741,746.

Firefighters are expected to have their PPE with them every time there is a call. R.741,746. Firefighters are required to have their PPE with them each time they report for an incident and for training. Firefighters are required to have their PPE with them, or they may store it at the fire station. R.768,775. Tronvold kept his PPE in his pickup truck, which is a typical practice for firefighters. R.768,775. Tronvold testified that he always keeps his PPE in his pickup, and the only time it would be removed would be if he had to use his backseat to haul something, in which case he would use the pickup for this task and then put his PPE back in the pickup. R.741,746. Tronvold testified that before leaving home at 135 Dove Road, he "made sure" that he had his "gear" in his pickup.

[1] The Equipment Issue Checklist dated 12/22/15 signed by Tronvold describes the PPE issued to him as: Bumker Coat, Bunker Pants, Boots, Gloves Structure, Gloves Rescue, Hood, Gear Bag, Helmet, White Shirt, Blue Hat,, Black Polo, Key, Spanner, Pager, Auto ID Plate, SOG's, and Flashlight. R.789.

R.741,746. Tronvold was also carrying on his person a pager issued to him by Fire Department that enables him to be summoned to respond to a call at any time. R.741-744.

Tronvold was an "employee" of the public entity known as the City, and SDCL § 3-21-1(1) and his status as employee applies "whether compensated or not." Firefighters are not paid what is commonly referred to as "W-2" or "payroll" compensation, and are not reimbursed for mileage for responding to calls or attending monthly training sessions. R.768,770. However, Tronvold either received or was eligible to receive the following benefits, all provided and paid for by City as a member of Fire Department:

(a) Workers' compensation insurance coverage. Injured firefighters are covered by the City of Pierre's workers' compensation insurance. R.768,772,774.

(b) Property damage coverage and deductible reimbursement for an "Employee's Personal Auto" which is damaged while the firefighter "employee" is "en route to, during or returning from any official duty authorized by you" (defined as the "City of Pierre Fire Department" with coverage through Continental Western through Fischer-Rounds Insurance Agency. R.768,780-781; 275,443-444.

(c) Group accident coverage from the City of Pierre through Fischer-Rounds Insurance Agency. R.768,779-780.

(d) Membership dues annually for the South Dakota Firefighters Association. R.768,779.

(e) Per diem for traveling for training "outside of town." R.768,770.

(f) "Vested" for the Length of Service Award lump-sum financial payment from the City of Pierre after completing five years of service, paid from a fund to which the City of Pierre makes a $10,000 annual contribution and which, for a firefighter with twenty-five years of service retiring in 2017 would receive a lump-sum payment of $25,000. R.768,770,774,780.

In addition the property damage coverage and deductible reimbursement for an "Employee's Personal Auto" which is damaged while the firefighter "employee" is "en route to, during or returning from any official duty is important to the "within the scope

of employment" question, Tronvold also had his own personal auto insurance with State Farm. R.848, 924-925. Following the crash, Tronvold reported the crash to his mother Paula Tronvold, the assistant fire chief for Fire Department. Mrs. Tronvold contacted State Farm, who insured Tronvold and his personal vehicle, and inquired as to the availability of insurance coverage. State Farm paid Tronvold for the amount of the estimate, less the $1,000 deductible. Tronvold collected $2,443.76 ($3,443.76 less his $1,000 deductible) from State Farm for the amount of a repair estimate from Beck Motors Collision Center in Pierre. R. 813-816. However, instead of repairing the property damage, Tronvold was given a replacement bumper from his employer at no cost. Continental Western reimbursed Tronvold $1,000 for the State Farm deductible for property damage to Tronvold's pickup that cost Tronvold nothing.

Fire Department exercises control over its firefighters' conduct with respect to driving their personal vehicles by written policies. R.596,616. Driving to engine company drills and meetings is a natural and incidental activity of a firefighter. R.596, 615.

Fire Department policies prescribe where a firefighter may park his or her privately owned vehicle in responding to a call, the manner in which a firefighter is to arrive at an incident scene, and that a firefighter may not pass another firefighter in driving to an incident scene. R.596, 616-617. Fire Department also regulates the use of personal vehicles by firefighters by requiring that a firefighter comply with the rules of the road when responding to a call. R.596,616-617.

Immediately above the license plate on the front bumper of Tronvold's pickup, a "fire engine red" "half-plate" displays in large white capital letters against a "fire engine red" background: "MEMBER FIRE DEPT." Underneath in smaller, capitalized white

letters: “PIERRE FIRE DEPT.” The half-plate was issued to him by Fire Department and paid for by City. R.794.

The “Best Practices Manual” of Fire Department prescribes the best practices that firefighters are to follow. R.596,618. The Best Practices Manual was effective on August 1, 2016. R.596,619. The Manual states that “firemen should carry their issued protective clothing and pagers” at all times unless their captain approves storing their PPE at the fire station. R.596,620.

At approximately 6:00 p.m., Tronvold approached the stop sign on Grey Goose Road where it ends in a T-intersection with Highway 1804. He needed to turn left onto Highway 1804 in order to reach his destination. Tronvold disregarded the rules of the road governing stop signs and yielding the right-of-way, which he had promised to obey as part of the laws of South Dakota when he became a firefighter. R.596, 616. Tronvold turned left onto Highway 1804, and into the oncoming lane occupied by the motorcycle on which Randall and Lisa were riding. Randall and Lisa slammed into the left rear of Tronvold’s pickup truck. The collision was reported to law enforcement at 6:06 p.m. R.790.

Tronvold told law enforcement that he could not see the motorcycle on which Randall and Lisa were riding because his view was obstructed by other vehicle traffic making right-hand turns in the turning lane off of Highway 1804 onto Grey Goose Road. R.848,898-906. Tronvold told the investigating officers that he did not see or hear the oncoming motorcycle. R.817. The first law enforcement officer on the scene reported to his colleague that the radio in Tronvold’s pickup was blaring “extremely loud” when he arrived at the scene. R.817. Tronvold was charged by law enforcement with violating

SDCL § 32-29-2.1 for failure to yield/stop at a controlled intersection and for not wearing a seat belt. He pled guilty and was fined. R. 848,918-919. Randall was not charged with any violations.

Randall and Lisa sustain multiple, catastrophic, and permanent life-altering injuries, with the amputation of each of their left legs above the knee, along with other severe and permanent bodily injuries, months of hospitalization, extensive in-patient and out-patient physical therapy and rehabilitation, additional surgeries, prosthetic limbs, loss of mobility, loss of income, loss of employment, and huge hospital and medical bills. While Randall and Lisa were hospitalized in critical condition in Sioux Falls and fighting for their lives, Tronvold completed the remaining portions of the South Dakota Certified Firefighter Course. He was issued the "yellow helmet" which signifies the end of his rookie member status R.768,783.

At the time of the collision, Fire Department had a commercial auto liability policy that provided coverage for certain accidents and injuries, and City was insured by the South Dakota Public Assurance Alliance. Tammen App.111-115.

STANDARD OF REVIEW

The South Dakota Supreme Court "reviews summary judgment determinations de novo, independent of the trial court's decision." Johnson v. Rapid City Softball Ass'n, 514 N.W.2d 693, 695 (S.D. 1994):

> "[W]e must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific showing that a genuine, material issue for trial exists. Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any

> basis which supports the ruling of the trial court, affirmance of a summary judgment is proper."

Hass v. Wentzlaff, 2012 S.D. 50, P11, 816 N.W.2d 96, 101, citing Saathoff v. Kuhlman, 2009 S.D. 17, P11, 763 N.W.2d 800, 804.

A *prima facie* case is established for summary judgment purposes when there are facts in evidence which if unanswered would justify persons of ordinary reason and fairness in affirming the question which the plaintiff is bound to maintain. Domson, Inc. v. Kadrmas Lee & Jackson, 2018 S.D. 67, P23, 918 N.W.2d 396, 403. "The existence of a duty in a negligence action is a question of law, subject to de novo review by this Court." Kirlin v. Halverson, 2008 S.D. 107, 758 N.W.2d 436.

"The question of whether the act of a servant was within the scope of employment must, in most cases, be a question of fact for the jury." Deuchar v. Foland Ranch, Inc., 410 N.W.2d 177 (S.D. 1987).

ARGUMENT

I. The trial court erred in applying the going and coming rule as the sole basis to determine scope of employment and failed to apply the test of foreseeability adopted by this Court to analyze *respondeat superior* claims based upon the Restatement (Second) of Agency and enterprise liability.

The trial court ruled that Tronvold's actions were not foreseeable as a matter of law and granted City and Fire Department's motions for summary judgment, concluding that: "[T]he Court finds no *respondeat superior* liability for the Department nor the City because of the going and coming rule." Jurgens App 005-15. The trial court made findings of fact that:

> "[T]he Department in no way indicates that firefighters must drive to the Firehall for the meetings. Nor does the fact that Tronvold had his emergency equipment with him place this commute within the scope of his agency for the Department. Neither the Department nor the City could foresee that Tronvold's actions driving to a monthly meeting would result in a consequence for either entity. For these

> reasons, the Court finds that the accident did not arise out of Tronvold's duties to the Department and thus, the Court finds no *respondeat superior* liability for either the Department or the City." Jurgens App. 005-15.

The trial court relied exclusively on the going and coming rule in worker's compensation cases to find that Tronvold was not acting within the scope of any employment or agency at the time of the collision. In basing its decision solely on the going and coming rule, the trial court ignored the well-established precedent of this Court in determining vicarious liability in employment and agency cases under the doctrine of *respondeat superior* and the Restatement (Second) of Agency[2].

The undisputed material facts demonstrate clearly that Tronvold's actions at the time and place of the collision were, at least in part, to benefit City and Fire Department and further their activities. Consequently, a proper analysis of vicarious liability for purposes of *respondeat superior* and the principles set forth in Restatement (Second) of Agency and the foreseeability test adopted by this Court was neither undertaken nor articulated by the trial court and the trial court based its analysis solely on the going and coming rule which is applicable to worker's compensation cases.

The following decisions discuss the going and coming rule: Lloyd v. Byrne Brands, 2011 S.D. 28, 799 N.W.2d 727; Mudlin v. Hills Materials Co., 2005 S.D. 64, 698 N.W.2d 67; Bender v. Dakota Resorts Mgmt. Group, Inc., 2005 S.D. 81, 700 N.W.2d 739; South Dakota Pub. Entity Pool for Liab. v. Winger, 1997 S.D. 77, 566 N.W.2d 125;

[2] In particular, §§ 228 (General Statement) and 229 (Kinds of Conduct Within Scope of Employment) of the Restatement (Second) of Agency. "Restatement (Second) of Agency has played a prevalent role in our vicarious liability jurisprudence as we often look to it for guidance." Hass v. Wentzlaff, 2012 S.D. at ¶21, 816 N.W.2d at 103, n. 3. "Of course, the Restatement's pronouncements are not binding on this Court; nevertheless, have found its reasoning persuasive in many instances." Chem-Age Indus., Inc. v. Glover, 2002 S.D. 122, 33, 652 N.W.2d 756, 770.

Aadland v. St. Luke's Midland Regional Medical Ctr., 537 N.W.2d 666 (S.D. 1995); Pickrel v. Martin Beach, Inc., 80 S.D. 376, 124 N.W.2d 182 (S.D. 1963).

This Court describes workers' compensation cases "useful" for purposes of determining "scope of employment questions. However, to focus only on these cases ignores the substantial body of authority dating back from at least 1963 in the well-established principles of vicarious liability in the doctrine of *respondeat superior* and Restatement (Second) of Agency in the employment context. This body of authority determines foreseeability in the context of the "particular enterprise" in which the employer or agent is engaged for purposes of determining the "scope of employment" in each factual context. Justice Konenkamp explains this analysis in South Dakota Pub. Entity Pool for Liab. v. Winger, 1997 S.D. 77, ¶ 8:

> "We resort to worker's compensation cases because those decisions are useful in exploring the themes surrounding scope of employment questions. Yet we are not bound here to liberally construe coverage as we are in workers' compensation matters. . . . Legal precepts surrounding respondeat superior also help to conceptualize activities encompassed within 'scope of employment,' meaning "in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.' *Leafgreen v. American Family Mut. Ins. Co., 393 N.W.2d 275, 280 (SD 1986*) (quoting *Rodgers v. Kemper Const. Co., 50 Cal. App. 3d 608, 124 Cal. Rptr. 143, 148-49 (CalCtApp 1975)); Deuchar v. Foland Ranch, Inc., 410 N.W.2d 177, 180 (S.D. 1987); Alberts v. Mut. Serv. CAs. Ins. Co., 80 S.D. 303, 306-07, 123 N.W.2d 96, 98 (1963*)." (Emphasis added).

These authorities place the focus properly on the "particular enterprise" to determine "scope of employment" issues and incorporate "the enterprise liability justification for respondeat superior" that was first adopted by the California Supreme Court in Hinman v.

Westinghouse Electric Co., 471 P.2d 988, 991 (Cal. 1970)[3]. The *Hinman* test, as formulated by the California Supreme Court, states "that exceptions will be made to the 'going and coming' rule where the trip involves an incidental benefit to the employer, not common to commute trips by ordinary members of the work force.'" Id. It is implicit in the trial court's ruling, although not articulated as such, that the trial court found that Tronvold's drive to the monthly mandatory engine company meeting was a "common commute trip made by ordinary members[4] of the work force."

This Court follows the Restatement when applying that doctrine of respondeat superior in employment-related contexts. Leafgreen v. Am. Family Mut. Ins. Co., 393 N.W.2d 275 (S.D. 1986); Deuchar v. Foland Ranch, Inc., 410 N.W.2d 177 (S.D. 1977); Hass v. Wentzlaff, 2012 S.D. 50, 816 N.W.2d 96, 104; Kirlin v. Halverson, 2008 S.D. 107, 758 N.W.2d 436.

These principles are summarized in in Hass v. Wentzlaff, 2012 S.D. 50, 816 N.W.2d 96, 102-103:

> "The doctrine of *respondeat superior* 'holds an employer or principal liable for the employer's or agent's wrongful acts committed within the scope of the employment or agency.' *Black's Law Dictionary* 1426 (9th ed. 2009). '[The question of whether the act of a servant was within the scope of employment must, in most cases, be a question of fact for the jury.' *Kirlin v. Halverson, 2008 S.D. 107, ¶ 16, 758 N.W.2d 436, 444* (citations omitted).
>
> We apply a two-part test when analyzing vicarious liability claims. *See id. ¶¶ 24-25*. [Footnote omitted]. '[T]he fact finder must first determine whether the [act] was *wholly* motivated by the agent's personal interests or whether the act had a dual purpose, that is, to serve the master and to further personal interests.' *Id. ¶ 24.* 'When a servant acts with an intention

[3] Comment, Pouring New Wine Into An Old Bottle: A Recommendation for Determining Liability of An Employer Under Respondeat Superior, 39 S.D. L. Rev. 570, 583-85 ("New Wine Into An Old Bottle").
[4] New Wine Into An Old Bottle, *supra* note 3, at 583-84.

> to serve solely his own interests, this act is not within the scope of employment and his master may not be liable for it. *Id*. 'If the act was for a dual purpose, the fact finder must then consider the case presented and the factors relevant to the act's foreseeability in order to determine whether a nexus of foreseeability existed between the agent's employment and the activity which caused the injury.' Id. ¶ 25. 'If such a nexus exists, the fact finder must, finally, consider whether the conduct is so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the employer's business.' Id. (citing *Leafgreen v. Am. Family Mut. Ins. Co., 393 N.W.2d 275, 280-81 (S.D. 1986))*. Hass v. Wentzlaff, 2012 S.D. 50 ¶¶ 20-21, 816 N.W.2d 96, 102-103. (Emphasis added).

Kirlin states that, "In *respondeat superior*, foreseeability includes a range of conduct which is 'fairly regarded as typical of or broadly incidental to the enterprise undertaken by the employer.' *Id*. (citing *Rodgers v. Kemper Construction Co., 50 CalApp3d 608, 618-190, 124 Cal. Rptr. 143 (1975)*) (emphasis added). The *Leafgreen* foreseeability formulation was guided by *Rodgers* and the *Restatement (Second) of Agency.* Both continue to provide guidance on what is foreseeable and, therefore, what is within the scope of employment." 2008 S.D. at ¶ 14, 758 N.W.2d at 444.

Foreseeability is viewed from the negligent party's perspective. Iverson v. NPC Int'l, Inc., 2011 S.D. 40, 801 N.W.2d 275. "[N]ormal human traits" should be considered in determining scope of employment and foreseeability. Kirlin v. Halverson, 2008 S.D. 107 ¶ 47, 758 N.W.2d 436, 452

The holdings in these decisions are applicable to this case to determine the question of foreseeability in the context of Tronvold's scope of employment inquiry. These principles were applied in Alberts v. Mutual Serv. Casualty Inc. Co., 80 S.D. 303, 123 N.W.2d 96 (S.D. 1963), in which the doctrine of respondent superior was applied in a in an automobile collision context..

In *Alberts*, a state highway employee was involved in an automobile accident, in his own vehicle, while returning from another shop after retrieving a necessary lawnmower part. 123 N.W.2d at 98-99. The jury found in favor of the employee and the defendant's insurance company appealed. Although the employee did not have express permission to drive to the other shop and obtain the part, this Court held that the drive was reasonably incidental to his employment for purposes of whether the employee was acting within the scope of his employment. Id. at 98. This Court cited Restatement (Second) Agency, §§ 228(1) and 229 and analyzed the employee's actions under these principles. Id. at 98-99. The Court noted that travel regulations of the State Board of Finance did not provide for travel reimbursement to the employee when he used his personal car and the accident occurred. Id. at 102.

The Court affirmed the jury verdict for the employee and held:

> The evidence establishes no prohibition to the use of personal cars on state business and no orders or directions from Dangel or any superior employee of the highway department as to what should be done in a similar situation. Under these facts and circumstances, we conclude that reasonable minds could differ and it was for the jury to decide whether or not Anderson had implied authority to use his own car to make the trip to Sioux Falls for the repair part. In our modern industry, the use of a car by an employee who owns one to perform tasks incidental to his employment has become so normal that implied authority for such usage is readily accepted. See Boynton v. McKales, 139 Cal. App. 2d 777, 294 P.2d 733." Id. at 101-02. (Emphasis added).

In the 1963 Alberts opinion, in its analysis of the "scope of employment" question, the Court quoted in full the ten factors set forth in Restatement (Second) Agency § 229 that this Court nearly fifty years later would again set forth in full in Hass v. Wentzlaff, 2012 S.D. 50, 816 N.W.2d 96,. *Compare* Alberts, 123 N.W.2d at 98-99 with Hass, 2012 S.D. at ¶ 28, 816 N.W.2d at 104-05.

In Hass, this Court observed that it looks to Restatement (Second) of Agency, § 229(2) for "helpful criteria" in analyzing foreseeability as it relates to vicarious liability. Ten factors are identified that are relevant to the scope of employment inquiry: (1) whether or not the act is commonly done by such servants; (2) the time, place, and purpose of the act; (3) the previous relations between the master and the servant; (4) the extent to which the business of the master is apportioned between different servants; (5) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant; (6) whether or not the master has reason to expect that such an act will be done; (7) the similarity in quality of the act done to the act authorized; (8) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant; (9) the extent of departure from the normal method of accomplishing an authorized result; and (10) whether or not the act is seriously criminal. Id.

The facts of this case present this Court with application of the enterprise theory of liability for *respondeat superior* in a motor vehicle case not arising from the narrow principles of the "going and coming" rule in workers' compensation cases.

For example, other analogous decisions of this Court look to Restatement (Second) Agency § § 228, 229, outside of the motor vehicle context. The precedent developed in the workers' compensation context, although somewhat useful, is not binding on this Court, and the principles applied have been characterized by "archaic law and precedent" and requiring "reliance on antiquated views that deprives deserving

plaintiffs of the right to reach the 'deep pocket' of employers for compensation for accident-related injuries.[5]"

For example, Deuchar v. Foland Ranch, Inc., 410 N.W.2d 177, 180 (S.D. 1987), followed Restatement (Second) Agency §§ 228-229 to determine whether a ranch employee's actions in leading an unauthorized hunting expedition were within the "scope of employment." It was undisputed that the hunt had no business purpose and that no money exchanged hands. The ranch employee mistook the plaintiff for a wounded deer and shot him. The trial court granted summary judgment in favor of the employer. 410 N.W.2d at 181-82. This Court reversed the trial court and remanded to the trial court, concluding that summary judgment in favor of the employer was erroneous. Id. at 182.

The Court declared that:

> "Issues of negligence or related matters are ordinarily not susceptible of summary adjudication. *Wilson, 83 S.D. at 213; 157 N.W.2d at 22*. This Court has specifically held that the question of whether the act of a servant was within the scope of employment must, in most cases, be a question of fact for the jury. *Lovejoy v. Campbell, 16 S.D. 231, 237, 92 N.W. 24, 26 (1902)*. See *Restatement (Second) of Agency § 228, comment d*. Therefore, we reverse and remand to the circuit court, as summary judgment in favor of Foland Ranch was erroneously granted. Genuine issues of material fact remain as to whether Anderson was within the scope of his employment (as measured by the *Leafgreen* foreseeability test. 393 N.W.2d at 280-81) when he guided plaintiff's hunting party and fired the bullet which struck plaintiff in the leg." Id. at 181-82.

Deuchar relies upon the *Leafgreen* foreseeability test that was formulated in superior described in Rodgers v. Kemper Const. Co[6]., 50 Cap. App.3d 608, 124 Cal. Rptr. 143 (1975). Leafgreen states the test as follows:

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[5] New Wine Into An Old Bottle, *supra* note 3, at 570.

[6] In New Wine Into An Old Bottle, *supra* note 3, at n. 111, the author states that, "The Rodgers decision, which the court follows, draws from the Hinman decision for the proposition of enterprise liability. Rodgers, 124 Cal. Rptr. At 148-49. Although the Rodgers decision does not address the 'going to and from work' scenario, it would not be

> "We think it fairly stated that a principal is liable for the tortious harm cause by an agent where a nexus sufficient to make the harm foreseeable exists between the agent's employment and the activity which actually caused the injury; foreseeable is used in the sense that the employee's conduct must not be so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the employer's business." Leafgreen v. American Family Mut. Ins. Co., 393 N.W.2d 275, 280-81 (S.D. 1986). (Emphasis added).

In addition to identifying the proper test of foreseeability to apply to the question whether test to determine whether the conduct of an employee was "within the scope of his employment," Deuchar recites the ten factors of Restatement (Second) of Agency, § 229 that the Court identified in *Alberts* in 1963, to determine whether the act of any employee is within the scope of employment. Deuchar, 410 N.W.2d at 180-81. Nevertheless, the holding in Deuchar rests on the focal question of, "Were the servant's acts in furtherance of his employment?" Id. at 181.

Although *Leafgreen* does not rely upon Restatement (Second) Agency §§ 228-229, Leafgreen clearly adopts the enterprise theory, through the *Rodgers* decision, as the basis for its application of *respondeat superior*.

Kirlin v. Halverson holds that:

> "Wrongful activity can be foreseeable upon common experience. We use the 'totality of circumstances test' in evaluating foreseeability. Liability is not contingent upon foreseeability of the 'extent of the harm or the manner in which it occurred. This means that the *exact harm* need not be foreseeable. Rather, the harm need only be *within the class* of reasonably foreseeable hazards that the duty exists to prevent." 2008 S.D. 107, ¶ 38, 758 N.W.2d 436, 451. (quoting State Auto Ins. Companies, 2005 SD 89, P 25, 702 NW2d at 388-89). (Emphasis added). (Italics in original).

In analyzing scope of employment questions, this Court has observed:

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difficult to postulate that South Dakota could adopt the Hinman decision in its own 'going to and from work' situations. Deuchar, 410 N.W.2d 181 (focusing on employee's actions that appear to further the employer's interests)."

> "In giving meaning to the phrase 'within the scope of employment,' we have stated: '[W]ithin the scope of employment' has been called vague but flexible, referring to "those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.'" Kirlin v. Halverson, 2008 S.D. 107, ¶ 12, 758 N.W.2d 436, 445.

Kirlin reversed and remanded the case to the circuit court, ruling that the circuit court erroneously granted summary judgment in favor of employer and genuine issues of material fact remained whether employee was within the scope of his employment when he assaulted another worker.

Randall and Lisa contend that under these well-established principles of respondeat superior and the summary judgment standard of review, and the principles set forth in Restatement (Second) Agency, §§ 228-229, that Tronvold's actions on August 1, 2016, at the time and place of the collision, have a nexus sufficient to make the harm foreseeable as to Tronvold's employment and the activity which actually caused the injury, and that his conduct is foreseeable as a matter of law such that nothing in Tronvold's conduct was so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the employer's business. Tronvold's actions were not seriously criminal, although Randall and Lisa do contend that Tronvold's actions were grossly negligent, or constitute willful and wanton conduct.

Randall contends that the following constitute impermissible factual findings made by the trial court that require reversal of the summary judgment motions and remand to the trial court.

First, the trial court ruled as a matter of law that neither City nor Fire Department "could foresee that Tronvold's actions driving to a monthly training meeting would result

in a consequence for either entity" as the trial court ruled. Jurgens App.005-015; R. 1002-1007.

Second, the trial court's memorandum decision rejected Randall's request that the monthly engine company training "satisfies the dual purpose test because the training was, 'at least in part out of the intent to serve his employer's purposes.'" Jurgens App.005-016; R.1002,1006.

Third, the trial court found that the only requirement of City and Fire Department with respect to driving vehicles was that "firefighters have reliable transportation and attend a certain percentage of meetings . . ." R.1002,1006. The fire chief testified unequivocally that firefighters must have their own personal vehicles. R.596,599.

Fourth, the trial court found that, "the Department in no way indicates that firefighters must drive to the Firehall for the meetings." R.1002-1006. The fire chief testified that driving to Engine Company meeting, trainings and drills is an "essential part of being a firefighter." Tronvold's home is approximately ten miles from the fire station. For purposes of summary judgment, Randall and Lisa, as the non-moving parties, are entitled to have Tronvold's age of nineteen, the distance from the fire station, and the testimony of the fire chief, all viewed in the light most favorable to them.

Fifth, the trial court found that, "Nor does the fact that Tronvold had his emergency equipment with him place this commute within the scope of his agency for the Department." R.1002,1006-1007. The trial court decided this question of fact against Randall and Lisa and in favor of City and Fire Department. The trial court, in making these findings of fact, disregarded that City and Fire Department provided property damage coverage and deductible reimbursement for an "Employee's Personal Auto"

which is damaged while the firefighter "employee" is "en route to, during or returning from any official duty authorized by you (defined as the "City of Pierre Fire Department" with coverage through Continental Western. R.768,780-781; 275, 443-444.

Moreover, as noted above, Fire Department provided and City paid for property damage coverage for Tronvold's privately owned pickup, and Tronvold's insurance claim was paid on the basis that he was engaged in an "official duty" at the time of the drive to engine company training. On that basis, the scope of Tronvold's employment was expanded for purposes of his employment and agency with City and Fire Department within the meaning of Pickrel v. Martin Beach, Inc., 80 S.D. 376, 124 N.W.2d 182 (S.D. 1963).

This Court has recognized that transportation benefits provided to an employer can be sufficient to expand the course of employment. Pickrel v. Martin Beach, Inc., 80 S.D. 376, 124 N.W.2d 182. The Court held that: "The facts here fall squarely within the above exception to the 'going and coming' rule. Pickrel was an outside employee injured and killed while riding home in a conveyance belonging to and furnished by his employer according to the express terms of the contract of employment which in effect, expanded the course of employment." Id. at 183-84.

In construing the phrases "arising out of employment" and "in the course of employment" for purposes of workers' compensation cases, this Court states that, "while each factor must be analyzed independently, they are part of the general inquiry of whether the injury or condition complained of is connected to the employment. Therefore, the factors are prone to some interplay and deficiencies in the strength of one

factor are sometimes allowed to be made up by strength in the other." Mudlin v. Hills Materials Co., 2005 S.D. 64, ¶ 9, 698 N.W.2d 67, 71.

Vanessa Mudlin was employed in highway construction as a flagger, laborer, and material spreader. When she drove to company headquarters to travel with her crew to the jobsite, the crew had already departed and she drove her personal vehicle to the site. On the way to the site, she fell asleep at the wheel, and as a result her car left the road and rolled twice, causing her to suffer injuries that required several weeks of hospitalization. She was not wearing a seatbelt.

Mudlin brought a claim for workers' compensation benefits and was awarded benefits at the administrative hearing. Hills appealed and the circuit court affirmed the award. This Court noted that it was typical for Hills' employees to drive their personal vehicles to job sites. While meeting beforehand at the quarry was a common company practice, it was not required. Ultimately, the employees were required to show up at the job site at a certain time regardless of their method of transportation. 2005 S.D. 64, ¶ 3, 698 N.W.2d at 70, n. 2. Hills had a specific policy that required employees to use their personal vehicles to get to and from the job site when company vehicles were not available. Id. at ¶ 3, 698 N.W.2d at 72.

The Court first concluded that with respect to the "arising out of the employment," the act of traveling to the job site in her personal vehicle on the day of the accident was an activity "in which the employee might reasonably engage." Id. at ¶ 13, 698 N.W.2d at 73. The Court concluded that, "Nothing in the record suggests that Hills would not have expected Mudlin to use her personal vehicle to travel to the job site on June 7, 1999, and compensate her for the trip." Id. As such, the Court reasoned, "there is

a casual connection between the injuries that Mudlin sustained and her employment. Therefore, Mudlin's injuries 'arose out of her employment.'" Id. at ¶ 14, 698 N.W.2d at 73.

In addressing the "in the course of employment," *Mudlin* emphasizes that:

> "This Court has made it clear that the words 'in the course of employment' refer to the time, place and circumstances of the injury. *Bearshield v. City of Gregory, 278 N.W.2d 166, 168 (SD 1979).* 'An employee is considered within the scope of his employment if he is doing something that is either naturally or incidentally related to his employment or which he is either expressly or impliedly authorized to do by the contract or the nature of the employment." Id. at ¶ 15, 698 N.W.2d at 73.

Mudlin affirmed the award of workers' compensation benefits and concluded that, "In summary, the controlling factors here are travel pay, custom and usage, and company policy. Mudlin's travel extended beyond an employee's normal commute to or from work, and falls outside of the 'going and coming' rule." Id. at ¶ 18, 698 N.W.2d at 74.

In this case, Tronvold was required to attend the monthly engine company meeting by municipal ordinance. In this case where Tronvold, in addition to being impliedly, if not expressly authorized to use his personal vehicle to attend a mandatory engine company meeting, and where property damage insurance was provided at no cost to Tronvold in the event he was in a motor vehicle collision while en route to, during, or returning from the engine company meeting, once which the insurance carrier and Fire Department considered an "official duty," the trial court found that Tronvold was simply engaged in a "commute" and that the engine company training that Tronvold was driving to attend was "one training" that was not "required or naturally and incidentally related to Tronvold's firefighter duties." R.1002,1006.

Benefits, such as an employee permitted by his supervisor to take a ski run during an afternoon break at a ski resort has been held to constitute implied authorization by his employer for purposes of determining whether an injury occurring during that activity was within the scope of employment. Bender v. Dakota Resorts Mgmt. Group, Inc., 2005 S.D. 81, 700 N.W.2d 739. The Court based its holding on the activity being a "common and accepted practice and a regular incident of employment."

The Court further determined that the ski resort "derived a substantial direct benefit from the activity in that the opportunity to ski and snowboard during work breaks was an inducement to attract employees." 2005 S.D. at ¶ 18, 700 N.W.2d at 745.

In addition to constituting an express or at least impliedly authorized use of Tronvold's private vehicle in the scope of his employment, the property damage coverage provided to Tronvold with Continental Western provided by Fire Department and paid for by City, served as an inducement for Tronvold to use his own vehicle to drive to Engine Company meetings, training, and drills, and to use his vehicle carrying his PPE on board, ready and able to respond to calls and emergencies on a 24/7 basis.

If the trial court is affirmed and its decision stands, it would be the equivalent of a finding that at the time of the collision, Tronvold had "embarked on a frolic of his own with no underlying purpose of furthering his master's business." Deuchar v. Foland Ranch, Inc., 410 N.W.2d at 181 (citing Restatement (Second) of Agency § 234).

One cannot say that under these undisputed material facts, that Tronvold's "conduct is to unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the employer's business."

Viewing the facts in the light most favorable to Randall and Lisa, Tronvold was driving to comply with the duties of his employment and agency as a firefighter of City and Fire Department within the scope of his employment.

II. **Whether City's liability insurance endorsement excluding coverage for "Fire Department, Fire Fighting activities or Fire Department vehicles" in its Governmental Liability policy applies in this case.**

Plaintiff and Appellant Randall R. Jurgens joins in the Arguments and Authorities of Plaintiff and Appellant Lisa A. Tammen as set forth in her Brief of Appellant Lisa A. Tammen. The issue as stated by Randall is worded differently from the Brief of Appellant Lisa A. Tammen.

III. Whether Fire Department's Governmental Liability Endorsement is void as against public policy.

Plaintiff and Appellant Randall R. Jurgens joins in the Arguments and Authorities of Plaintiff and Appellant Lisa A. Tammen as set forth in her Brief of Appellant Lisa A. Tammen. The issue as stated by Randall is worded differently from the Brief of Appellant Lisa A. Tammen.

CONCLUSION

Tronvold was acting on behalf of and for the benefit of City and Fire Department within the scope of his employment and agency. Neither City nor Fire Department is protected by sovereign immunity. Randall and Lisa therefore request that this Court reverse the trial court's entry of summary judgment and remand this case for jury trial.

Dated at Sioux Falls, South Dakota, on this 17th day of December, 2019.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Brief of Appellant Randall R. Jurgens complies with the type volume limitations set forth in SDCL § 15-26A-66(b)(2). Based upon the information provided by Microsoft Word 2010, this Brief contains 8,363 words, excluding the Table of Contents, Table of Authorities, Jurisdictional Statement, Statement of Legal Issues, and any Certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, on this 17th day of December, 2019.

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TO

APPENDIX OF APPELLANT RANDALL R. JURGENS

DOCUMENT **APPENDIX PAGE(S)**

STATE OF SOUTH DAKOTA) : SS COUNTY OF HUGHES)		IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
LISA A. TAMMEN and RANDALL R. JURGENS, Plaintiffs, vs. GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally, Defendants.		CIV. 17-42 **AMENDED JUDGMENT**

Defendants, City of Pierre, a South Dakota Municipal Corporation, and Pierre Volunteer Fire Department, a South Dakota nonprofit corporation (collectively referred to herein as Defendants), having moved for summary judgment, pursuant to SDCL § 15-6-56; and the Court having held a hearing on the motions on Wednesday, June 12, 2019; and the Court having considered all of the records and files herein; and the Court having further considered the arguments of counsel and the briefs that have been submitted; and the Court having issued its memorandum opinion dated August 8, 2019; it is hereby

ORDERED ADJUDGED AND DECREED as follows:

1. Defendants' Motions for Summary Judgment are GRANTED;
2. The Complaint of Plaintiffs Lisa A. Tammen and Randall R. Jurgens, as against Defendants City of Pierre, a South Dakota Municipal Corporation, and Pierre

Volunteer Fire Department, a South Dakota nonprofit corporation, are hereby dismissed; on the merits, with prejudice; and that Defendants are entitled to a recovery of their taxable disbursements to be assessed by the Clerk, pursuant to SDCL §§ 15-17-37 and 15-6-54(d);

3. The Court finds that there is no just reason for delay and that this judgment shall be entered as a final judgment pursuant to SDCL § 15-6-54(b). The Court relied upon the following factors in granting this certification:

   a. This case involves alleged injuries stemming from a motor vehicle accident that occurred in August 2016 involving the Plaintiffs and Defendant Gerrit Tronvold;

   b. The Court has determined that Defendant Tronvold was not acting within the scope of any employment or agency at the time that the alleged accident occurred;

   c. Following the order granting Summary Judgment in favor of Defendants, the only remaining claim is against Defendant Tronvold. That claim is separate and distinct and not directly related to the issues addressed by this Court in the order granting Summary Judgment to these Defendants;

   d. After balancing the competing factors present in the case, the trial court has found that it is in the best interest of sound judicial administration, judicial economy, and public policy to certify the judgment as final pursuant to SDCL § 15-6-54(b), and the court relies on the following factors in reaching this conclusion:

(i) There are no unadjudicated claims against the dismissed Defendants;

(ii) The need for review will not be mooted by further litigation;

(iii) The trial court will not be obliged to consider the claims against the City of Pierre and the Pierre Volunteer Fire Department a second time;

(iv) There are no counterclaims that may result in a setoff against this judgment, if certified as final;

(v) Declining to certify this matter as a final judgment pursuant to SDCL § 15-6-54(b) may result in duplicate proceedings including two jury trials rather than one, and the potential for one or more additional appeals.

e. Given the underlying facts of this case, a final determination of the issues involving the dismissed Defendants will more likely than not decide whether this case goes to trial and whether this, being a final judgment pursuant to SDCL § 15-6-54(b), may eliminate the potential for multiple trials on the same facts. Therefore, final order pursuant to SDCL § 15-6-54(b) would promote judicial economy and efficiency by allowing Plaintiffs to appeal the Court's Order and Judgment while eliminating the potential for duplicate trials on largely identical facts and witnesses.

4. For all of these reasons, this Court orders final judgment in favor of the Defendants City of Pierre and Pierre Volunteer Fire Department, and against

Plaintiffs pursuant to SDCL § 15-6-54(b), on the claims brought by Plaintiffs against these Defendants.

5. The Court's Memorandum Opinion dated August 8, 2019 is incorporated herein by this reference.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that final judgment pursuant to Rule 54(b) is entered in favor of Defendants.

Dated this 26 day of August, 2019.

BY THE COURT

Honorable Thomas L. Trimble
Circuit Court Judge, Retired

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO
FILED
AUG 26 2019
Clerk
By Deputy

STATE OF SOUTH DAKOTA)SS COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT 32CIV17-42
LISA A. TAMMEN and RANDALL R. JURGENS, Plaintiffs, v. GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally, Defendants.	)	**ORDER GRANTING CITY OF PIERRE'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PIERRE VOLUNTEER FIRE DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court on the 12th day of June 2019. The Court, having considered the record, briefs and the arguments of counsel, and being fully advised as to all matters pertinent hereto, for the reasons set forth below, hereby **GRANTS** Defendant City of Pierre's Motion for Summary Judgment. The Court also **GRANTS** Defendant Pierre Volunteer Fire Department's Motion for Summary Judgment.

BACKGROUND

On August 1, 2016, Plaintiff Lisa Tammen, Plaintiff Randall Jurgens, and Defendant Gerrit Tronvold (Tronvold) were involved in a motorcycle-pickup accident resulting in amputation of the left leg of each Plaintiff. Plaintiffs allege that Defendant failed to stop and/or failed to yield as he turned left from Grey Goose Road onto Highway 1804 into the path of Plaintiffs' oncoming motorcycle.

Tronvold became a firefighter for the Pierre Volunteer Fire Department (Department) in December 2015 and was traveling to training when the accident occurred. The vehicle, owned by Tronvold, displayed on its front bumper a half-plate issued by the Department reading "Member Fire Department/Pierre Fire Department." Inside the vehicle, Tronvold carried his personal protective fire gear in the event he was called out for an emergency response. The Department does not pay wages, reimburse mileage, or provide a vehicle to Tronvold; the Department does require training, testing, reliable transportation, and attendance at a minimum number of meetings and call-out incidents.

The City of Pierre (City) funds the Department, owns the Department equipment, and supervises the Department through the City's Office of Public Safety. The City carries liability insurance through the South Dakota Public Assurance Alliance (Alliance) with an exclusion for "Fire Department, Fire Fighting activities or Fire Department vehicles." The City also carries vehicle liability insurance for certain vehicles listed by description and VIN number, not including Tronvold's vehicle.

The Department is a non-profit corporation whose charter indicates that it is part of the governmental functions of the City. The Department has no independent finances or stockholders. The Department, through Continental Western Insurance Company (Continental), carries liability insurance for "employee's covered auto" not owned by the Department when on an "official emergency response." The policy also pays property damage for "employee's

personal auto" "while en route to, during or returning from any official duty authorized" by the Department. Following the accident, Tronvold received $1,000 compensation from Continental for the property damage not covered by his personal automobile comprehensive insurance.

Plaintiffs filed suit against Tronvold individually, and against the Department and the City under a theory of *respondeat superior* because Tronvold was driving to a regularly scheduled Department training meeting. The Department and the City have each moved for Summary Judgment on the issue of vicarious liability.

LEGAL DISCUSSION

I. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no issue as to any material fact and the moving party is entitled to judgment as a matter of law." SDCL § 15-6-56(c). Summary judgment requires the moving party to establish "the right to judgment with such clarity as to leave no room for controversy." *Hanson v. Big Stone Therapies, Inc.*, 2018 S.D. 60, ¶ 38, 916 N.W.2d 151, 161 (quoting *Richards v. Lenz*, 539 N.W.2d 80, 83 (S.D. 1995) (citation omitted). "The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists." *Brandt v. County of Pennington*, 2013 S.D. 22, ¶ 7, 827 N.W.2d 871, 874.

"The existence of a duty in a negligence action is a question of law. . ." *Hohm v. City of Rapid City*, 2008 S.D. 65, ¶ 3, 753 N.W.2d 895, 898 (internal citation omitted).

Judgment granted on the basis of sovereign or governmental immunity is a question of law, suitable for summary judgment. *Truman v. Griese*, 2009 S.D. 8, ¶ 10, 762 N.W.2d 75, 78.

II. Tronvold's commute was not within the scope of his agency.

In their Complaints, Plaintiffs assert that Tronvold was acting on behalf of the Department when the accident occurred. Defendants deny Plaintiffs' claims of *respondeat superior* liability because Tronvold was commuting to a regularly scheduled Department meeting and no exceptions establishing *respondeat superior* liability apply.

Plaintiffs may hold "an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." *Cameron v. Osler*, 2019 S.D. 34, ¶ 6, 903 N.W.2d 661, 663 (internal citations omitted). The acts included within the scope of agency are those "which are so closely connected with what the servant is employed to do, and is so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment." *Deuchar v. Foland Ranch, Inc.*, 410 N.W.2d 177, 180 (S.D. 1987) (internal citations omitted). If a court determines that a tortious act was committed while the agent conducted a dual purpose in serving both the principal's interests and the agent's interests, the court should look to whether the conduct was foreseeable. *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 21, 816 N.W.2d 96, 104.

In the workers' compensation setting, it is well established that employees injured while going to and coming from work are not covered, unless the travel arises from the employment. *Mudlin v. Hills Materials Co.*, 2005 S.D. 64, ¶ 8, 698 N.W.2d 67, 71. The South Dakota Supreme Court notes that workers' compensation decisions, while not binding, are "useful in exploring the themes surrounding scope of

employment questions." *S.D. Pub. Entity Pool for Liability v. Winger*, 1997 S.D. 77, ¶ 8, 566 N.W.2d 125, 128. Exceptions to the "going and coming" rule include situations where the transportation is an "integral part" of the agent's duties or when the agent's actions "naturally and incidentally" relate to his duties. *Id.* ¶ 19.

Here, Plaintiffs assert a *respondeat superior* theory of liability because Tronvold "was on his way to engine training, using his own vehicle and transporting [Department] equipment as required by [Department]." *Tammen Brief in Opposition to Motions for Summary Judgment*, p. 8, June 5, 2019. Tammen further argues that this Court should apply a "required vehicle exception" to the Going and Coming Rule because Department policy requires that firefights have reliable transportation or a "special errand exception" because Tronvold was going to an engine training. *Id.* at p. 9 and p. 17. Plaintiff Jurgens asserts that the monthly training satisfies the dual purpose test because the training was, "at least in part out of the intent to serve his employer's purposes." *Jurgens Brief in Opposition to Motions for Summary Judgment*, p. 19, June 5, 2019.

Considering all facts in the light most favorable to the Plaintiffs, the Court finds no *respondeat superior* liability for the Department nor the City because of the going and coming rule. Tronvold was on his way to a regularly scheduled monthly Department meeting and no exception applies because the engine training was part of a larger array of trainings and meetings, precluding this one training from being required or naturally and incidentally related to Tronvold's firefighter duties.

While the Department requires that its firefighters have reliable transportation and attend a certain percentage of trainings and meetings, the Department in no way indicates that firefighters must drive to the Firehall for the meetings. Nor does the fact that Tronvold had his emergency equipment with him place this commute within the

scope of his agency for the Department. Neither the Department nor the City could foresee that Tronvold's actions driving to a monthly training meeting would result in a consequence for either entity. For these reasons, the Court finds that the accident did not arise out of Tronvold's duties to the Department and thus, the Court finds no *respondeat superior* liability for either the Department or the City.

II. In the alternative, the City and the Department have governmental immunity under SDCL §§ 21-32A-1 et seq. The legislature expressly grants the Department immunity from suit under SDCL § 20-9-45, unless a jury finds Tronvold acted with gross negligence.

A. The City's governmental immunity was not waived.

In the alternative, the Court addresses the City's affirmative defense of governmental immunity, finding that the City is free from liability of this tort claim because there is no waiver by statute and the City's risk sharing pool or liability insurance excludes fire department vehicles, and does not expressly include Tronvold's personally-owned vehicle.

Government immunity arises from common law, Article III of the South Dakota Constitution, and South Dakota statute, unless the public entity waives the immunity. *Unruh v. Davidson* County, 2008 S.D. 9, ¶ 8, 744 N.W.2d 839, 842. Under SDCL § 21-32A-3, the legislature "extended the reach of sovereign immunity to all public entities of this state." *Cromwell v. Rapid City Police Department*, 2001 S.D. 100, ¶ 13, 632 N.W.2d 20, 24. The Court finds that the City, a South Dakota municipal corporation, is a public entity within the scope of SDCL 21-32A-3. *See Olesen v. Town of Hurley*, 2004 S.D. 136, 691 N.W. 324.

Should governmental immunity be waived under SDCL 21-32A-1, "the public entity may be sued in the same manner as a private individual for injuries caused by the public entity's negligence to the extent the public entity participates in a risk

sharing pool or purchases liability insurance." *Maher v. City of Box Elder*, 2019 S.D. 15, ¶ 8.

Here, the City has purchased liability coverage from Alliance. Section C, Exclusion Endorsement 34, of the Memorandum of Governmental Liability Coverage, precludes coverage for "Fire Department, Fire Fighting activities or Fire Department vehicles." Alliance denied coverage to Tronvold because the insurer determined Tronvold was not a covered party nor was the Department a qualifying organization under the City's policy.

The City also purchased automobile liability coverage from Alliance. Tronvold's vehicle was not expressly covered by inclusion in the City's Statement of Values – Vehicles list.

Because the City is subject to an exclusion that prohibits coverage of this incident by Alliance, the Court finds that the City has not waived immunity under SDCL § 21-32A-3, and may not be held liable for Tronvold's accident.

B. The Department's governmental immunity is not waived.

Also in the alternative, the Court addresses the Department's affirmative defenses of governmental immunity under SDCL §§ 21-32A-1 *et seq.* and statutory immunity under SDCL § 20-9-45.

The Court first considers whether the Department is a public entity covered by the governmental immunity of SDCL § 21-32A-1. The Department is a non-profit corporation whose charter states: "This Corporation is a part of the Governmental Functions of the City of Pierre, South Dakota and as such has no independent finances and has no stockholders. The Nature of its business is the prevention and suppression of fires within the City of Pierre." *Application of the Pierre Volunteer*

Fire Department for an Extension of its Corporate Charter. The City owns the Department equipment and supervised by the City's Office of Public Safety.

In *Gabriel v. Bauman*, the South Dakota Supreme Court declined to address the sovereign immunity of the Chester Fire Department because Chester did not assert sovereign immunity as an affirmative defense and the issues related to waiver under SDCL § 21-32A-3 were not raised with the trial court. 2014 S.D. 30, ¶ 24, 847 N.W.2d 537, 545. Here, however, the Department asserts the affirmative defense of governmental immunity and provides undisputed evidence through its charter and reporting structure. The Court finds the Department to be a public entity, within the scope of governmental immunity.

Next, the Court addresses whether the Department waived immunity through the purchase of insurance or a risk-sharing pool. The Department, through Continental, insures personal automobiles for property damage when damage occurs "en route to, during or returning from any official duty authorized by [the Department]." *Continental Policy*, FIRE/EMS-PAK Endorsement, Page 2, Coverage Extensions, Item 3, Personal Effects and Property of Others. As the result of this accident, Tronvold submitted a claim and received a check for $1,000 to cover the expense of his personal automobile insurance deductible. The contract expressly expands coverage to include a commute to an "official duty" and by paying Tronvold's claim acknowledges that the insurer considered the monthly meeting as an official duty authorized by the Department.

The Continental policy expressly provides that it does not waive any governmental immunity under SDCL §§ 21-32A-1 *et seq.* and includes liability coverage to include a "covered 'auto' [the Department doesn't] own," but only for an "official emergency response authorized by [the Department]." In oral arguments, the Department acknowledges that if Tronvold were responding to a call instead of driving to training, the analysis would be different because the Western Casualty policy provides liability coverage for commutes to emergency responses.

Continental paid Tronvold for his property damage from the accident because, under the policy, the insurer determined that driving to a Department meeting was "en route to, during or returning from any official duty authorized by [the Department]." However, the coverage is specifically limited to property damage, not liability coverage.

The Court finds that the Department has not waived its governmental immunity under SDCL §§ 21-32A-1 *et seq.*

C. Whether the statutory immunity of SDCL § 20-9-45 applies is a question for the jury.

The South Dakota legislature expressly provided statutory immunity for nonprofit fire departments in SDCL § 20-9-45. The statute provides immunity from civil liability when the individual is "acting in good faith and within the scope of such individual's official functions and duties" and "the damage or injury was not caused by gross negligence or willful and wanton misconduct by such individual." SDCL 20-9-45.

Should the finding that Tronvold was not acting in the scope of his official duties be set aside, the Court finds that the Department is liable for grossly negligent actions by Tronvold.

The Department argues that the Court should grant summary judgment to the Department under SDCL § 20-9-45 because gross negligence is not specifically alleged in the Complaint and because they assert that Plaintiffs provide insufficient evidence for a finding of gross negligence. In *Gabriel*, the South Dakota Supreme Court affirmed summary judgment for the defendant regarding the gross negligence when the defendant, driving to the firehall to answer an emergency call, activated his lights and had the right of way, but was driving at a speed such that he was unable to stop after the plaintiff's car pulled out in front of him. *Gabriel* at ¶ 18, 847 N.W.2d at 543. The Supreme Court, in affirming summary judgment, stated that "reasonable persons under the same or similar circumstances present in this case would not have consciously realized that speed would—in all probability—result in the accident that occurred." *Id* at ¶ 19.

Here, however, the parties do not submit such undisputed facts that would render summary judgment appropriate as it was in *Gabriel* or in the controlling case cited by *Gabriel*, *Gunderson v. Sopiwnik*, 75 S.D 402, 508, 66 N.W.2d 510, 513 (S.D. 1954). "Whether one acts willfully, wantonly, or recklessly is, like negligence, normally a jury question." *Gabriel* at ¶ 15, 847 N.W.2d 542. The parties present several facts in dispute that could lead reasonable minds to arrive at differing conclusions. Tronvold pled guilty to failure to make a proper stop. Plaintiffs allege he was driving at an excessive and unlawful speed, was distracted by loud music such that he was unable to hear the approaching motorcycle, and that he pulled into oncoming traffic when his vision was obstructed. Viewing the facts in the light most favorable to the non-moving party, the Court finds whether Tronvold's actions were not negligent, negligent, or grossly negligent is a question for the jury.

ORDER

It is hereby:

ORDERED that Defendant City of Pierre's Motion for Summary Judgment is **GRANTED**.

It is further hereby

ORDERED that Defendant Pierre Volunteer Fire Department's Motion for Summary Judgment is **GRANTED**.

Dated this 8 day of August, 2019

FOR THE COURT,

The Honorable Thomas Trible
Circuit Court Judge, Retired

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

STATE OF SOUTH DAKOTA)SS COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
LISA A. TAMMEN and RANDALL R. JURGENS, PLAINTIFFS, -vs- GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally, DEFENDANTS.	)	32CIV17-000042 **CITY OF PIERRE'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

COMES NOW the Defendant, City of Pierre (hereinafter "Pierre"), by and through its undersigned attorneys of record and hereby submits the following Statement of Undisputed Material Facts pursuant to SDCL § 15-6-56(c)(1).

1. On or about August 1, 2016, Plaintiffs Jurgens and Tammen were riding a motorcycle westbound on South Dakota Highway 1804. (¶ 11 of Plaintiffs' First Amended Complaint).

2. Plaintiffs allege that at approximately 6:00 p.m. on August 1, 2016, Defendant Tronvold, while driving his personally owned 2002 Chevrolet Silverado K2500 extended cab pickup, was traveling southwest on Grey Goose Road toward where it intersects with South Dakota Highway 1804. (¶ 12 of Plaintiffs' First Amended Complaint).

3. Plaintiffs allege Tronvold failed to yield the right-of-way to Plaintiffs and executed a left-hand turn into the path of Plaintiffs' motorcycle. (¶¶ 13 and 14 of Plaintiffs' First Amended Complaint).

4. The two vehicles collided causing significant injuries to Plaintiffs. (¶¶ 13 and 14 of Plaintiffs' First Amended Complaint).

Filed: 2/1/2019 2:56 PM CST Hughes County, South Dakota 32CIV17-000042

5. At the time of the motor vehicle accident, Tronvold was a rookie member of the Pierre Volunteer Fire Department (PVFD). (Ian Paul depo. at 17:7-15; attached to Abraham Aff. as Exh. D.)

6. Tronvold was traveling to a monthly training meeting of the PVFD. (Tronvold depo. at 33:22-25, attached to Abraham Aff. as Exh. A).

7. The accident occurred at approximately 6:00 p.m. and the training session was scheduled to commence at 6:30 p.m. (Tronvold depo p. 30:1-4).

8. Tronvold was traveling directly from his residence to the training location at his assigned fire station. (Paul depo. at 121:20-21; 122:4-5) (Tronvold depo. at 33:22-25).

9. The Pierre Volunteer Fire Department is a South Dakota nonprofit corporation and is a corporate entity organized independently from the City of Pierre. (Paul depo. at 34:21-25; 35:5-8).

10. The City of Pierre is a municipality organized under the statutory framework authorized by the State of South Dakota. (See Aff. of Kristi Honeywell, City Manager.)

11. The City of Pierre provides funding for the PVFD and employs a Fire Chief and maintenance worker. (Paul depo. at 6:2-22).

12. The PVFD stations, apparatus, and personal protective equipment are purchased by the City of Pierre. (Paul depo. at 8:18-23).

13. The PVFD self-governs through the election of officers. (Paul depo. at 7:10-25; 8:1-17).

14. While traveling to his home and the fire station on August 1, 2016, Tronvold was not undertaking any action on behalf of the City of Pierre or the PVFD. (Paul depo. at 37:14-18).

15. Tronvold was not conducting any mission or undertaking any act at the direction or control of PVFD or the City of Pierre at the time of the motor vehicle accident. (Paul depo. at 37:14-18).

16. At the time Tronvold was traveling from his residence to the meeting at the Fire Station, there was no active fire call and Tronvold had not been summoned for any emergency by the PVFD. (Paul depo. at 37:5-7; 38:12-15).

17. Members of the PVFD are required to attend 40 hours of training per year and Tronvold had completed in excess of 40 hours of training prior to the date of the accident, August 1, 2016. (Paul depo. at 107:12-17; 23:22-25).

18. PVFD members were also required to participate in a minimum of 25 percent of the calls in any given calendar year. (Paul depo. at 18:3-25; 19:1-10).

19. On the date of the motor vehicle accident, Tronvold had already recorded participation in 51.35 percent of calls which should have been sufficient to meet his obligation for the entirety of the calendar year. (Paul depo. at 22:2-16).

20. The 40 hour annual training requirement may be satisfied through receiving training though a number of sources include classes or monthly training sessions held by the PVFD. (Paul depo. at 36:7-16).

21. Monthly training sessions were not mandatory for PVFD members. Members that did not attend the monthly meeting could obtain training hours in other forms and by attending other sessions. (Tronvold depo. at 31:9-15, 24-25; 32:20-12; Paul depo. at 24:17-22).

22. Members are encouraged to attend monthly meetings but attendance is not required so long as annual requirements are met. (Paul depo. at 185:15-19).

23. PVFD firefighters are volunteers and are not compensated. (Paul depo. at 9:22-24).

24. PVFD firefighters are not reimbursed for mileage for responding to calls or attending monthly training sessions. (Paul depo. at 25:4-18; 26:9-23).

25. Tronvold had his own personal insurance for automobile he was driving at the time of the accident that occurred on August 1,2016. (Tronvold depo. at 76:18-21).

26. At the time of the motor vehicle accident that is the subject to this suit, the City of Pierre had in place a Memorandum of Governmental Liability Coverage with the South Dakota Public Assurance Alliance. (See Exh. A attached to the Aff. of Dave Sendelbach).

27. The Memorandum of Governmental Liability Coverage contained an exclusion endorsement wherein the Exclusion Section, Section C of the aforementioned Memorandum, precludes coverage for "fire department, firefighting activities or fire department vehicles." (See Exh. C attached to the Aff. of Dave Sendelbach).

28. At the time of the subject motor vehicle accident, the City of Pierre had in place a Memorandum of Automobile Liability Coverage with the South Dakota Public Assurance Alliance. (See Exh. B attached to the Aff. of Dave Sendelbach).

29. The Memorandum of Automobile Liability Coverage only provides coverage for a volunteer when such volunteer is "acting in an official capacity for (a) or (b)." (See *Id.* at Section D). The official capacity must be for the member (the City of Pierre) or while acting in an official capacity for one of the members "commissions, councils, agencies, districts,

authorities, or boards, under the member's direction or control of which the member's board sits as the governing body."

30. The City of Pierre's City Commission does not sit as the governing body for the PVFD.

31. At the time of the motor vehicle accident, Tronvold was not acting in an official capacity for the PVFD or the City of Pierre. (Paul depo. at 37:5-18; 38:12-15).

32. A letter denying coverage for Tronvold has been issued by the South Dakota Public Assurance Alliance through its claims adjusters at Claims Associates, Inc. (See Exh. D attached to the Aff. of Dave Sendelbach.)

33. The South Dakota Public Assurance Alliance is providing a defense in relation to this action pursuant to a reservation of rights concerning coverage under the Memorandum of Governmental Liability Coverage and the Memorandum of Automobile Liability Coverage. (See Exh. A and B attached to the Aff of Dave Sendelbach).

Dated this 1st day of February, 2019.

MAY, ADAM, GERDES & THOMPSON LLP

BY: _____
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CERTIFICATE OF SERVICE

Douglas A. Abraham of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 1st day of February, 2019, he electronically filed the foregoing via the Odyssey File and Serve System which will automatically send e-mail notification of such filing to all counsel of record.

Douglas A. Abraham

Filed: 2/1/2019 2:56 PM CST Hughes County, South Dakota 32CIV17-000042

STATE OF SOUTH DAKOTA : SS COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT

LISA A. TAMMEN and RANDALL R. JURGENS, Plaintiffs, vs. GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally Defendants.	32CIV17-000042 **DEFENDANT PIERRE VOLUNTEER FIRE DEPARTMENT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

COMES NOW Defendant, Pierre Volunteer Fire Department ("PVFD"), by and through its counsel of record, and respectfully submits this Statement of Undisputed Material Facts.

1. Plaintiffs seek damages arising out of a motorcycle/motor vehicle accident that occurred on or about August 1, 2016. First Amended Complaint, ¶ 11.

2. Plaintiffs alleged that Defendant Gerrit Tronvold failed to yield the right-of-way at a stop sign and turned left into the path of Plaintiffs' motorcycle. First Amended Complaint, ¶ 13.

3. Plaintiffs further allege that Defendant Gerrit Tronvold ("Tronvold") was operating his own 2002 Chevrolet pickup at the time of the accident. First Amended Complaint, ¶ 12.

4. Tronvold owned the vehicle that he was operating. Ian Paul Depo. at 37:2-4; Gerrit Tronvold Depo. at 11:1-7.

5. At the time of the accident, Tronvold was a volunteer fireman with the PVFD. He

never held any other position with the PVFD other than a volunteer fireman. G. Tronvold Depo. at 14:13-15.

6. Tronvold joined the PVFD in December, 2015. G. Tronvold Depo. at 13:16-25; 14:1.

7. At the time of the accident, Tronvold was considered to be a rookie firefighter as he had not yet completed the certified firefighter course. I. Paul Depo. at 17:7-15.

8. In order to get certified through the state, firefighters have to attend a series of classes, have some hands-on practical training and have a certain amount of time to get that completed. I. Paul Depo. at 17:9-15.

9. Tronvold was a rookie that has been with PVFD for more than six months at the time of the accident. I. Paul Depo. at 47:24-25; 48:1-4.

10. Besides being on the force for over six months, Tronvold had met the requirements of 40 hours of training by August 1, 2016. This is a requirement of the bylaws for the PVFD. I. Paul Depo. at 107:12-17.

11. By August 1, 2016, Tronvold had met the annual requirements as he already had 64 hours of training. I. Paul Depo. at 23:22-25.

12. Tronvold was also required to document that he participated in a minimum of 25% of the calls to the PVFD for the calendar year. I. Paul Depo. at 18:3-25; 19:1-10.

13. Actually, Tronvold had a recorded participation of 51.35%. I. Paul Depo. at 22:2-16.

14. By the date of the accident, Tronvold had met all of the requirements to take the certification test, and it was scheduled for the next day, August 2, 2016. G. Tronvold Depo. at 16:5-18; 18:18-22.

15. The 40 hours of training can be through classes from a variety of sources, including a monthly training session held by the PVFD. I. Paul Depo. at 36:7-16.

16. Again, Tronvold had met all of his requirements for taking his certification class, and no more classwork was needed. G. Tronvold Depo. at 30:9-10.

17. These monthly training sessions were held on Mondays. Firefighters were not required to attend. If they did not go to this meeting, they could go to another session. G. Tronvold Depo. at 31:9-15, 24-25; 32:20-21.

18. Attendance at the training session on Monday, August 1, 2016, was not required for Tronvold. He had enough hours already to take the test without attending that session. G. Tronvold Depo. at 37:21-25; 38:1-25.

19. Tronvold was a member of Engine Company Three. I. Paul Depo. at 49:10-15.

20. This company had a training session on Monday evening, August 1, 2016, starting at 6:30 p.m. G. Tronvold Depo. at 30:1-4.

21. On the evening of August 1, 2016, as is typical on the first Monday of the month, there would have been two meetings. There was first the training session, and then there was a regular meeting of the company. I. Paul Depo. at 49:19-25; 50: 1-2. Typically the training session goes first, and then the meeting. I. Paul Depo. at 50:3-4.

22. As to the monthly meeting, members are encouraged to attend, but it is not required. I. Paul Depo. at 185:15-19.

23. Tronvold was leaving the home of his parents and on the way to Fire Station Three at 721 North Poplar at the time of the accident. I. Paul Depo. at 121:20-21; 122:4-5; G. Tronvold Depo. at 33:22-25.

24. Tronvold was not acting on behalf of the PVFD at the time of the accident. I.

Paul Depo. 37:14-18.

25. He was not running any mission or doing anything on behalf of the PVFD at the time of the accident. I. Paul Depo. at 37:14-18.

26. This was not a fire call, and Tronvold was not summoned for any emergency by the PVFD. I. Paul Depo. at 37:5-7; 38:12-15.

27. During the time that Tronvold was a member of the PVFD he had not ever been called to a fire. G. Tronvold Depo. at 20:6-12.

28. PVFD is the fire department for the City of Pierre. G. Tronvold Depo. at 83:19-21.

29. Although it is a separate entity, the City of Pierre has certain control over PVFD. I. Paul Depo. at 34:21-25; 35:5-8.

30. PVFD is a non-profit corporation. I. Paul Depo. at 101:4-6; 112:2-3. It was established in 1925 and is recognized to be a part of the governmental function of the City of Pierre. *See* Affidavit of Michael L. Luce, Exhibit A, which states: "This corporation is part of the governmental function of the City of Pierre, South Dakota, and as such has no independent finances and has no stockholders. The nature of its business is the prevention and suppression of fires within the City of Pierre." I. Paul Depo. at 111:20-22.

31. The PVFD equipment is owned by the City of Pierre. I. Paul Depo. at 8:18-23.

32. All equipment and real property infrastructure utilized by the PVFD is funded by the City of Pierre. I. Paul Depo. at 9:16-21.

33. The firefighters for the City of Pierre are volunteers. They are not compensated. I. Paul Depo. at 9:22-24.

34. The firefighters are not paid an hourly wage, and they don't get mileage nor do

they complete a W-2. I. Paul Depo. at 25:4-18.

35. Although they get some discounts from business in town and also have a deferred compensation plan for length of service after five years, there is no compensation or reimbursement for the firefighters. They are not paid expenses for responding to a call. G. Tronvold Depo. at 86:17-25; 40:16-17; 41:2-5; I. Paul Depo. at 26:9-23.

36. The PVFD averages about 60 volunteer members. I. Paul Depo. at 43:1-3.

37. For travel within the city, there is no compensation or reimbursement. Reimbursement is only provided for out-of-town training if that occurs. G. Tronvold Depo. at 40:20, 25; 41:2-5.

38. Tronvold has his own personal insurance for the accident that occurred on August 1, 2016. G. Tronvold Depo. at 76:18-21.

39. PVFD has an insurance policy issued by Continental Western Insurance Company. *See* Affidavit of Luce, Exhibit B and I. Paul Depo. at 153:12-13.

40. That insurance policy provides different types of coverage depending upon the particular claims. *See* Affidavit of Luce, Exhibit B.

41. The coverage afforded under that policy is subject to the terms and conditions of the policy. *See* Affidavit of Luce, Exhibit B.

42. As to insurance coverage for this accident involving a motor vehicle, the liability insurance coverage is set forth in Commercial Auto Enhancement Endorsement, CW33 86 02 15 *See* Affidavit of Luce, Exhibit C.

43. Under who is insured for auto liability coverage, the policy states: "Any 'employee' of yours while using a covered 'auto' you don't own, but only for an official emergency response authorized by you." *See* Affidavit of Luce, Exhibit C, paragraph A.2.

44. At the time of this accident, Tronvold was not responding to any emergency. I. Paul Depo. at 38:12-15.

45. There is no liability insurance provided for this accident. *See* Affidavit of Luce, Exhibit C.

46. The policy also contains a South Dakota governmental liability amendatory endorsement. *See* Affidavit of Luce, Exhibit D. That endorsement does not provide any coverage or any suit for damages which is barred by the doctrine of sovereign immunity or governmental immunity, and the purchase of the insurance does not constitute a waiver of any sovereign immunity or governmental immunity. *See* Affidavit of Luce, Exhibit D.

47. Besides the liability provisions in the policy, the policy provides separate coverage for damage to an auto owned or used by any employee. *See* Affidavit of Luce, Exhibit C.

48. On page 2 of the endorsement, it is provided that with respect to physical damage coverage, payment will be made to a loss to an auto owned or used by an employee if "en route to, during or returning from any official duty authorized by you." *See* Affidavit of Luce, Exhibit C, paragraph E.3.

49. Although Tronvold was not engaged in an emergency call, for which liability insurance in the operation of his personal vehicle would apply, he would have coverage for his personal auto damage as long as he was en route to an official duty. That would include a meeting. *See* Affidavit of Luce, Exhibit C and I. Paul Depo. at 186:11-25; 187:4-24.

50. Tronvold sought property damage coverage under the provisions of this policy. Paula Tronvold Depo. at 18:16-24; 19:20-25.

51. Tronvold was paid the $1,000 deductible for the damage to his vehicle, and the

remainder of that damage was covered by his own policy. I. Paul Depo. at 156:3-6; G. Tronvold Depo. at 44:7-25; 45:1-6.

Dated February 1, 2019.

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies on February 1, 2019, I caused the following document:

- **DEFENDANT PIERRE VOLUNTEER FIRE DEPARTMENT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

to be filed electronically with the Clerk of Court through Odyssey File & Serve, and that Odyssey File & Serve will serve an electronic copy upon the following:

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STATE OF SOUTH DAKOTA) :ss COUNTY OF HUGHES)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
LISA A. TAMMEN and **RANDALL R. JURGENS,** Plaintiffs, vs. **GERRIT A. TRONVOLD,** an individual, **CITY OF PIERRE,** a South Dakota municipal corporation, and **PIERRE VOLUNTEER FIRE DEPARTMENT,** a South Dakota nonprofit corporation, jointly and severally, Defendants.	File No. 32CIV17-000042 **RESPONSE OF PLAINTIFF RANDALL R. JURGENS TO DEFENDANT CITY OF PIERRE'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

Plaintiff, Randall R. Jurgens ("Jurgens"), by and through his undersigned counsel of record, and hereby submits the following Statement of Undisputed Material Facts pursuant to SDCL § 15-6-56(c)(2). This Response in Opposition to City of Pierre's Statement of Undisputed Material Facts sets forth the disputed material facts upon which the Defendant City of Pierre's Motion for Summary Judgment must be denied.

The deposition testimony and documents upon which this Response relies are attached to the Affidavit of Tiffany L. Larson, with corresponding citations where available by page or other designation. References to the Affidavit of Tiffany L. Larson are referred to as "Larson Affidavit" followed by the corresponding Exhibit number designated as "Ex. ____." A series of ordinances of the City of Pierre govern the Pierre Fire Department and the "Volunteer Fire Department." References are made to these ordinances as "Fire Department Ordinances" followed by citations to the ordinance by section number.

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1. On or about August 1, 2016, Plaintiffs Jurgens and Tammen were riding a motorcycle westbound on South Dakota Highway 1804. (¶ 11 of Plaintiffs ' First Amended Complaint).

1. **RESPONSE**: Admitted.

2. Plaintiffs allege that at approximately 6:00 p.m. on August 1, 2016, Defendant Tronvold, while driving his personally owned 2002 Chevrolet Silverado K2500 extended cab pickup, was traveling southwest on Grey Goose Road toward where it intersects with South Dakota Highway 1804. (¶ 12 of Plaintiffs' First Amended Complaint).

2. **RESPONSE**: Admitted.

3. Plaintiffs allege Tronvold failed to yield the right-of-way to Plaintiffs and executed a left-hand turn into the path of Plaintiffs' motorcycle. (¶¶ 13 and 14 of Plaintiffs' First Amended Complaint).

3. **RESPONSE**: Admitted. Tronvold was charged with failure to yield/failure to stop at a controlled intersection in violation of SDCL § 32-29-2.1 and a seat belt violation as well. Tronvold pled guilty and paid the fine. (Tronvold Depo. 70:25; 71:1-3; Larson Affidavit, Ex. 1).

4. The two vehicles collided causing significant injuries to Plaintiffs. (¶¶ 13and 14 of Plaintiffs' First Amended Complaint).

4. **RESPONSE**: Admitted. Plaintiffs each suffered multiple, catastrophic and permanent life-altering injuries, including amputation of their respective left legs above the knee.

5. At the time of the motor vehicle accident, Tronvold was a rookie member of the Pierre Volunteer Fire Department (PVFD). (Ian Paul depo. at 17:7-15; attached to Abraham Aff. as Exh. D.)

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5. **RESPONSE**: Admitted that on August 1, 2016, Tronvold a rookie member of the PVFD as defined in the bylaws of the PVFD because as of that date, Tronvold had not yet completed the South Dakota Certified Firefighter Course. (Bylaws of Pierre Volunteer Fire Department, Article V – Membership, Section 5; Larson Affidavit, Ex. 2). Tronvold was also a member of the Pierre Fire Department since December 22, 2015, when his application for membership was approved by the Board of Commissioners of the City of Pierre, as required by the Fire Department Ordinances. (Fire Department Ordinances, Section 2-3-410; Larson Affidavit, Ex. 3); (Minutes of City of Pierre Board of Commissioners, 12/22/2015 and Memorandum from Fire Chief Ian Paul to Twila Hight, dated 12/21/2015, requesting that Gerrit Tronvold be added to the agenda for approval at the next Commission meeting; Larson Affidavit, Ex. 4).

Disputed that Tronvold's status as a rookie member affected his status as a member of the Pierre Fire Department. Tronvold testified that he was assigned to Engine Company 3 in December, 2015. (Tronvold Depo. 13:16-19; Larson Affidavit, Ex. 1). Tronvold's mother, Paula Tronvold, "has been a member for a long time." (Tronvold Depo. 13:20-21; Id.). Engine Company 3 is a "fire company" to which Section 2-3-415 of the Fire Department Ordinances applies. (Paul Dep. 139:24-25-140:8; Larson Affidavit, Ex. 5).

On December 22, 2015, Tronvold was issued his firefighter gear. (Pierre Fire Department Equipment Issue Checklist; Larson Affidavit, Ex. 6). "You're issued your gear, your pager, a book of the SOP/SOG standard operating procedures and how the department operates, and then from that point on, you are an active member of the department." (Tronvold Depo. 19:18-23; Larson Affidavit, Ex. 1). Starting in December, 2015, Tronvold would respond to an actual fire as an extra set of hands. (Tronvold Depo. 19:24-25; 20:1-2; Id.). The Fire Department

Ordinances to not distinguish between a "rookie member" and a member who has completed the South Dakota Certified Firefighter Course, which Tronvold did not complete until the date after the crash on August 2, 2016.

6. Tronvold was traveling to a monthly training meeting of the PVFD. (Tronvold depo. at 33:22-25, attached to Abraham Aff. as Exh. A).

6. **RESPONSE**: Admitted that on Monday, August 1, 2016, Tronvold was traveling to the regular monthly meeting and drill of Engine Company No. 3, the "fire company" of which he was assigned, and whose physical address is Fire Station No. 3, 721 North Poplar, Pierre, South Dakota. The training part of the meeting was the EVOC (Emergency Vehicle Operator Course) which is "driver training" maneuvering the fire engine "through a predetermined course with cones and things." (Paul Depo. 94:15-25; 95:1-4, and Ex. 22, Page 001; Larson Affidavit, Ex. 5).

7. The accident occurred at approximately 6:00 p.m. and the training session was scheduled to commence at 6:30 p.m. (Tronvold depo p. 30:1-4).

7. **RESPONSE**: Disputed that the crash occurred at approximately 6:00 p.m. Law enforcement who investigated the crash documents 6:06 p.m. as the time of the crash, with officers on the scene at 6:16 p.m. (State of South Dakota Investigator's Motor Vehicle Traffic Accident Report, Page 1; Larson Affidavit, Ex. 7). Admitted that the meeting was scheduled to commence at 6:30 p.m.

8. Tronvold was traveling directly from his residence to the training location at his assigned fire station. (Paul depo. at 121:20-21; 122:4-5) (Tronvold depo. at 33:22-25).

8. **RESPONSE**: Admit that Tronvold was traveling from his residence of 135 Dove Road, Pierre, South Dakota, and that the meeting and training location was 721 North Poplar,

Pierre, South Dakota, where he was assigned to Engine Company 3 of Fire Station No. 3). (Paul Dep. 54:1-6; 121:13-25-122:1-3; Tronvold Dep. 33:22-25; Larson Affidavit, Ex. 5 and 1).

9. The Pierre Volunteer Fire Department is a South Dakota nonprofit corporation and is a corporate entity organized independently from the City of Pierre. (Paul depo. at 34:21-25; 35:5-8).

9. **RESPONSE**: Admitted that the Pierre Volunteer Fire Department was organized on December 2, 1925.

Disputed that this corporate entity is organized or operated "independently from the City of Pierre." The Application of the Pierre Volunteer Fire Department for an Extension of its Corporation Charter states that, "This Corporation is part of the Governmental Functions of the City of Pierre, South Dakota and as such has no independent finances and has no stockholders. The Nature of its business is the prevention and suppression of fires within the City of Pierre." (Application of the Pierre Volunteer Fire Department for an Extension of its Corporation Charter, Exhibit "A"; Larson Affidavit, Ex. 8).

The Fire Department Ordinances were enacted in 1957. The Office of Public Safety has "general responsibility for the functions of the . . . Volunteer Fire Department . . . and such other functions and general employees as may be authorized and approved." (Fire Department Ordinances, Section 2-3-101(5); Larson Affidavit, Ex. 3). The Public Safety Director is an appointive position filled by majority vote of the members of the City Commission, the same as the City Administrator, Business Manager, City Attorney, City Engineering/Planning Director, Utilities Manager, Park and Recreation Director, Human Resources Director, "and such other officers as may be provided for by ordinance." (Fire Department Ordinances, Section 2-3-102(5); Larson Affidavit, Ex. 3).

Section 2-3-401 is entitled, "Fire Department – responsibility" and provides in full:

> "The department in charge of preventing, detecting, reporting, suppressing and extinguishing fires within and for the city shall be known as the Pierre Fire Department, and its officers and employees shall be responsible for the performance of all duties assigned to the department by state law, this code, and the city ordinances, the commission, mayor and designated commissioner."

(Fire Department Ordinances, Section 2-3-401; Larson Affidavit, Ex. 3).

The Fire Department Ordinances provide a comprehensive structure for the governance and administration of all aspects of the operation of the Pierre Fire Department:

(a) Section 2-3-402 subordinates all bylaws and rules adopted by the fire department and each fire company to the ordinances of the City of Pierre.

(b) Section 2-3-404 establishes fire chief, the first assistant chief, and the second assistant chief to constitute "the executive officers of the fire department" to hold office for terms of one year.

(c) Section 2-3-405 designates the regular monthly meeting of the fire department in December for election by a majority of the members present of "one chief and one first assistant chief and one second assistant chief" and "one department secretary and one treasurer." The election results must be certified to the City Commission and the election results must "consider such elections and if they shall deem the persons so elected to be suitable persons, shall proceed to confirm such election; provided, that a majority of the commission shall be necessary for confirmation of the election."

(d) Section 2-3-407 specifies the duties of the chief, first assistant and second assistant chiefs in cases of fire, to at all times have the general direction and management of all fire trucks, engines, hose, hook and ladders, and other apparatus belonging to the fire department. They must report once each year to the City Commission on condition of the fire department and the engines and apparatus belonging thereto, and shall recommend such alterations, improvements and additions as by them may be deemed necessary and expedient.

(e) Section 2-3-408 provides the City Commission with the power to remove the chief, or the first or second assistant chief from office, for failure to perform his duty as such officer.

(f) Section 2-3-409 requires that all members of any of the fire companies must be "able bodied persons of good moral character" who have been "duly elected as such by a majority of the active members of the company."

(g) Section 2-3-410 requires approval by the City Commission of any changes in the membership of any of the fire companies.

(h) Section 2-3-412 provides for the order of command at fires and for filling vacancies in the officers of chief, the first assistant chief, and the second assistant chief.

(i) Section 2-3-415 establishes the duty of each member of a fire company to mandatory attendance at "all of the drills and meetings of such company" and mandatory response to "each and every call out for a fire, or to the proper alarms given, in cases of a fire within the corporate limits of the city."

(j) Section 2-3-415 also establishes a mandatory dismissal duty that the chief must exercise to make an order in writing dismissing any member who, without sufficient reason or excuse for such failure or neglect, fails or neglects "to attend such company drills or meetings for three successive drills or meetings, or should a member fail or neglect to such fire alarm or fail to be present at such fire for three fires in succession."

(k) Chief Ian Paul testified that the fire stations, the fire apparatus, and all equipment issued to each firefighter are all owned by the City of Pierre and purchased through the funding of the City of Pierre in the fire department budget. (Paul Depo. 8:18-23).

10. The City of Pierre is a municipality organized under the statutory framework authorized by the State of South Dakota. (See Aff. of Kristi Honeywell, City Manager.)

10. **RESPONSE**: Admitted.

11. The City of Pierre provides funding for the PVFD and employs a Fire Chief and maintenance worker. (Paul depo. at 6:2-22).

11. **RESPONSE**: Admitted that the City of Pierre provides all of the funding for the PVFD. Disputed that the City of Pierre's funding of the Pierre Fire Department established by the Fire Department Ordinances is limited to funding the PVFD and employing a Fire Chief and maintenance worker. See Response to No. 9 which is incorporated into this Response by this reference.

12. The PVFD stations, apparatus, and personal protective equipment are purchased by the City of Pierre. (Paul depo. at 8:18-23).

12. **RESPONSE**: Admitted.

13. The PVFD self-governs through the election of officers. (Paul depo. at 7:10-25; 8:1-17).

13. **RESPONSE**: Disputed. See Response to No. 9 which is incorporated into this Response by this reference.

14. While traveling to his home and the fire station on August 1, 2016, Tronvold was not undertaking any action on behalf of the City of Pierre or the PVFD. (Paul depo. At 37:14-18).

14. **RESPONSE**: Disputed.

Tronvold had a duty while traveling to his home and the fire station on August 1, 2016 to respond to "each and every call out for fire, or to the proper alarms given, in cases of fire within the corporate limits of the city." (Fire Department Ordinances, Section 2-3-415; Larson Affidavit, Ex. 3). Tronvold had a duty as a "member of a fire company to attend each and all of the drills and meetings of such company." (Fire Department Ordinances, Section 2-3-415; Id.) Chief Paul testified that Engine Company No. 3 is a "fire company" within the meaning of this ordinance. (Paul Depo. 139: 24-25; 140:8; Larson Affidavit, Ex. 5).

Before leaving home at 135 Dove Road, Pierre, South Dakota, Tronvold "made sure" that he had his "gear" (personal protective equipment (PPE)) in his pickup. (Tronvold Dep. 34:10-12; Larson Affidavit, Ex. 1). Tronvold's "PPE" consists of an issued bag, boots, bunker pants with suspenders, bunk coat, nomex hood, helmet, all of which is provided. (Tronvold Dep. 34:24-25; 35: 1-20; Id.) Larson Affidavit, Ex. 1). "They like you to have it with you so you can respond." (Tronvold Dep. 34:19-23; Id.) Tronvold was also issued a portable pager, which he carries with him. (Tronvold Dep. 19:18-19; 20:13-25; 21:1; Id.). Tronvold always keeps his PPE in his

pickup, and the only time it would be removed would be if he had to use his backseat to haul something, in which case he would use his pickup in this manner and put the PPE back in his pickup truck. (Tronvold Dep. 34:13-18; Id.).

While traveling to his home and the fire station on August 1, 2016, Tronvold was driving his personal vehicle, the 2002 Chevrolet Silverado K2500 extended cab pickup, which he had a duty to own as a member of the PVFD. (Paul Depo. 17: 20-23; Larson Affidavit, Ex. 5). The PVFD has "certain rules that govern firefighters with regard to driving their own personal vehicles." (Paul Depo. 79:3-6; Id.).

Tronvold's 2002 Chevrolet Silverado K2500 extended cab pickup displayed the half-plate vehicle I.D. plate issued by the fire department which states in large capital letters, "MEMBER FIRE DEPT PIERRE FIRE DEPT" (Larson Affidavit, Ex. 9). The City of Pierre paid for Tronvold's half-plate vehicle I.D. (Paul Depo. 118:25; 119:1; Larson Affidavit, Ex. 5). Chief Paul testified that the purpose of the half-plate vehicle I.D. is to identify the firefighter's personally owned vehicle to law enforcement securing a scene in the event the firefighter responds in his personal vehicle to that location. (Paul Depo. 29: 13-25; 30: 1-4; Id.). However, the dual purpose of identifying the firefighter's personally owned vehicle to the public at large on a 24/7/365 basis is indisputable.

15. Tronvold was not conducting any mission or undertaking any act at the direction or control of PVFD or the City of Pierre at the time of the motor vehicle accident. (Paul depo. at 37:14-18).

15. **RESPONSE**: Disputed. Tronvold had a duty while traveling to his home and the fire station on August 1, 2016, to respond to "each and every call out for fire, or to the proper alarms given, in cases of fire within the corporate limits of the city" and whether or not there was

a call out for fire or alarm given. (Fire Department Ordinances, Section 2-3-415, Larson Affidavit, Ex. 3). While traveling to his home and the fire station on August 1, 2016, Tronvold owned a duty to the City of Pierre, the PVFD, the public at large and the Plaintiffs, to "Always act in a professional manner when representing the PFD on and off scene." (Emphasis in original). (Orientation for New Firefighters, Page 2; Larson Affidavit Ex. 10).

16. At the time Tronvold was traveling from his residence to the meeting at the Fire Station, there was no active fire call and Tronvold had not been summoned for any emergency by the PVFD. (Paul depo. at 37:5-7; 38:12-15).

16. **RESPONSE**: Admitted. Disputed that the absence of an active fire call or that Tronvold was not summoned for any emergency are issues of material fact for purposes of the City of Pierre's motion for summary judgment.

17. Members of the PVFD are required to attend 40 hours of training per year and Tronvold had completed in excess of 40 hours of training prior to the date of the accident, August 1, 2016. (Paul depo. at 107:12-17; 23:22-25).

17. **RESPONSE**: Admitted that this requirement appears in the Bylaws of Pierre Volunteer Fire Department, approved March 6, 2014. (Bylaws of Pierre Volunteer Fire Department, Article V, Section 5(B)(2), Page 7; Larson Affidavit, Ex. 2). Disputed that whether or not Tronvold had completed in excess of 40 hours of training prior to August 1, 2016 is an issue of material fact for purposes of the City of Pierre's motion for summary judgment, as the Fire Department Ordinances contain no such requirement, and further as Tronvold as of August 1, 2016, was in violation of the "drills and meetings" mandatory attendance and dismissal provisions of Section 2-3-415 of the Fire Department Ordinances. It is undisputed that as of August 1, 2016, Tronvold had failed or neglected to attend more than three (3) successive drills

and meetings of Engine Company 3 and documented as "absent" for four (4) successive drills and meetings between February 1 and April, 2016, and that no sufficient reason or excuse is documented for such failure or neglect.

The minutes of the monthly meetings of Engine Company No. 3 demonstrate that Tronvold was absent without excuse for four successive meetings of Engine Company No. 3 from February to April, 2016. (Minutes of Engine Company No. 3; Larson Affidavit, Ex. 11); (Paul Depo. 137-147; Larson Affidavit, Ex. 5).

Fire Chief Paul testified regarding Tronvold's documented absences at four (4) successive monthly meetings in view of the mandatory attendance and mandatory dismissal requirements of Section 2-3-415 of the Fire Department Ordinances:

Q. Have you read that ordinance [Section 2-3-415] before, sir?
A. I have and I realize it was outdated.
Q. The ordinance is outdated?
A. Yeah. The ordinance is not the way we practice right now, the way it's written.
Q. I think that's the whole point, sir.
A. I understand that.

(Paul Depo. 138:15-21; Larson Affidavit, Ex. 5).

Q. Okay. We don't need to go into that anymore. So according to these documents, if they're correct, Mr. Tronvold was absent for four successive meetings for engine company three from February to April, 2016, correct?
A. Based on that documentation. I don't know any documentation on that, or the reason for it.
Q. And referring back to section 2-3-415 of Plaintiff's Exhibit 8, calling for dismissal of firemen for failure to attend drills and meetings, you agree that this document required you to dismiss Mr. Tronvold for missing four successive engine company three monthly meetings?
[VARIOUS OBJECTIONS]
Q. Well, do you agree, do you not, Mr. Paul, that the action to be taken is taken by the chief, correct?
A. According to the way it is written.

(Paul Depo. 148:4-6; Larson Affidavit, Ex. 5).

Despite the mandatory attendance and dismissal requirements of Section 2-3-415, at no time as fire chief did Ian Paul have any verbal or written reporting mechanism in place for engine company captains to report up to him when members are absent for monthly meetings and drills of fire engine companies. (Paul Depo.148:10-22; Id.).

18. PVFD members were also required to participate in a minimum of 25 percent of the calls in any given calendar year. (Paul depo. at 18:3-25; 19:1-10).

18. **RESPONSE**: Admitted that this requirement appears in the Bylaws of Pierre Volunteer Fire Department, approved March 6, 2014. (Bylaws of Pierre Volunteer Fire Department, Article V, Section 5(B)(3), Page 7; Larson Affidavit, Ex. 2). Disputed that whether or not Tronvold participated in 25 percent or more "of calls in any given calendar year" is an issue of material fact for purposes of the City of Pierre's motion for summary judgment, as the Fire Department Ordinances contain no such requirement, and further as Tronvold as of August 1, 2016, had failed or neglected to respond to five (5) of the seven (7) fires as documented on Paul Depo. Exhibit 2. (Pierre Fire Department Participation Detail by Staff, Pages 1-3; Larson Affidavit, Ex. 12). Tronvold responded to only two (2), one on 02/06/2016 and the second on 07/21/2016, which are marked with an asterisk to note Tronvold's response. (Id.) There are no such asterisks on the fire calls on 02/08/2016, 04/16/2016, 05/28/2016, 07/03/2016, and 07/09/2016. (Id.).

Tronvold responded to only two of seven alarm fires in 2016. As such, he was in violation of Ordinance Section 2-3-415 as he failed on five occasions "to respond to each and every call out for a fire, or to the proper alarms given, in cases of a fire within the corporate limits of the city." The 25 percent call provision is in complete conflict with Section 2-3-415 of the Fire Department Ordinances, which requires that, "It shall be the duty of each member of a

fire company . . . to respond to each and every call out for a fire, or to the proper alarms given, in cases of a fire within the corporate limits of the city. In the event that a member of such fire company shall fail or neglect to . . . respond to such fire alarm or fail to be present at such fire for three fires in succession, without any sufficient reason or excuse for such failure or neglect, it shall become the duty of the chief of the fire department to make an order in writing, dismissing such member or members from membership in such fire company, and such action on the part of the chief shall be final as to such dismissal." (Fire Department Ordinances, Section 2-3-415; Larson Affidavit, Ex. 3).

19. On the date of the motor vehicle accident, Tronvold had already recorded participation in 51.35 percent of calls which should have been sufficient to meet his obligation for the entirety of the calendar year. (Paul depo. at 22:2-16).

19. **RESPONSE**: Disputed. See Response Nos. 17-18 which are incorporated herein by this reference. Section 2-3-415 of the Fire Department Ordinances required Chief Paul to enter an order dismissing Tronvold from the fire department.

20. The 40 hour annual training requirement may be satisfied through receiving training though a number of sources include classes or monthly training sessions held by the PVFD. (Paul depo. at 36:7-16).

20. **RESPONSE**: Disputed. See Response Nos. 17-19 which are incorporated herein by this reference. Whether or not the 40 annual training requirement of the Bylaws may be satisfied as stated is not an issue of material fact for purposes of the City of Pierre's motion for summary judgment and is irrelevant to the genuine issue of material fact as to whether Tronvold should have been subjected to mandatory dismissal by the fire chief for failing or neglecting to attend the monthly meetings and drills as required by Section 2-3-415 of the Fire Department

Ordinances. The Bylaws are subordinated to the Fire Department Ordinances by Section 2-3-402. (Fire Department Ordinances, Section 2-3-402, Larson Affidavit, Ex. 3).

21. Monthly training sessions were not mandatory for PVFD members. Members that did not attend the monthly meeting could obtain training hours in other forms and by attending other sessions. (Tronvold depo. at 31:9-15, 24-25; 32:20-12; Paul depo. at 24:17-22).

21. RESPONSE: Disputed. See Responses Nos. 17-20 which are incorporated herein by this reference. The City of Pierre erroneously conflates the separate requirement of minimum training hours required in the Bylaws of the Pierre Volunteer Fire Department, Article V – Membership, Section 5(A)(2) and Section 5(B)(2), with the wholly separate duties prescribed by Section 2-3-415 that "each member of a fire company to attend each and all of the drills and meetings of such company" and without having sufficient reason or excuse for such failure or neglect to attend such company drills or meetings for three successive drills or meetings, to be dismissed from membership in the fire company. The self-serving testimony of Tronvold and Chief Ian Paul cannot supplant the ordinances of the City of Pierre.

22. Members are encouraged to attend monthly meetings but attendance is not required so long as annual requirements are met. (Paul depo. at 185:15-19).

22. RESPONSE: Disputed. See Responses Nos. 17-21 which are incorporated herein by this reference.

23. PVFD firefighters are volunteers and are not compensated. (Paul depo. at 9:22-24).

23. RESPONSE: Disputed. Whether PVFD firefighters are paid or not paid what is commonly referred to as "W-2" or "payroll" compensation is not an issue of material fact for purposes of the City of Pierre's motion for summary judgment. At all times material to this action, Tronvold was an "employee" of the public entity known as the City of Pierre, and SDCL

§ 3-21-1(1) and his status as employee applies "whether compensated or not." As an employee firefighter, Tronvold either received or was eligible to receive the following fringe benefits, all provided and paid for by the City of Pierre:

(a) Worker's compensation insurance coverage. Injured firefighters are covered by the City of Pierre's worker's compensation insurance. (Paul Dep. 11:7-20; 46:18-25; 57:12-18; Larson Affidavit, Ex. 5).

(b) Property damage coverage and deductible reimbursement for an "Employee's Personal Auto" which is damaged while the firefighter "employee" is "en route to, during or returning from any official duty authorized by you (defined as the "City of Pierre Fire Department" with coverage through Continental Western through Fischer-Rounds Insurance Agency. (Paul Depo. 92:19-23; 93:1-15; Larson Affidavit, Ex. 5; Affidavit of Michael Luce, ¶ 3, Exhibit B – Pages 169-170).

(c) Group accident coverage from the City of Pierre through Fischer Rounds Insurance Agency. (Paul Dep. 87:2-25; 88-89; Larson Affidavit, Ex. 5).

(d) Paid membership dues annually for the South Dakota Firefighters Association. (Paul Dep. 88-89: 1-2; Larson Affidavit, Ex. 5).

(e) Paid a per diem for traveling for training "outside of town." (Paul Dep. 25:6-8; Larson Affidavit, Ex. 5).

(f) "Vested" for the Length of Service Award lump-sum financial payment from the City of Pierre ater completing five (5) years of service, paid from a fund which the City of Pierre makes a $10,000 annual contribution and which, for a firefighter with twenty-five (25) years of service retiring in 2017 would receive a lump-sum payment of $25,000. (Paul Dep. 26:9-25; 27:1-25; 28:1-14; 58:15-25; 59:1-25; 60: 13-24; 92:1-14; Larson Affidavit, Ex. 5).

24. PVFD firefighters are not reimbursed for mileage for responding to calls or attending monthly training sessions. (Paul depo. at 25:4-18; 26:9-23).

24. **RESPONSE**: Admitted. Disputed that whether such reimbursement is made or not is an issue of material fact for purposes of the City of Pierre's motion for summary judgment.

25. Tronvold had his own personal insurance for automobile he was driving at the time of the accident that occurred on August 1, 2016. (Tronvold depo. at 76:18-21).

25. **RESPONSE**: Admitted. Disputed that this is an issue of material fact for purposes of the City of Pierre's motion for summary judgment, other than to the extent that City of Pierre and the PVFD that by providing coverage and payment to Tronvold for the repair estimate and payment of the $1,000 deductible constitutes an admission against interest that on August 1, 2016, Tronvold was "en route to, during or returning from any official duty authorized by" the Pierre Fire Department.

26. At the time of the motor vehicle accident that is the subject to this suit, the City of Pierre had in place a Memorandum of Governmental Liability Coverage with the South Dakota Public Assurance Alliance. (See Exh. A attached to the Aff. of Dave Sendelbach).

26. **RESPONSE**: Admitted in part. Disputed that this Memorandum of Governmental Liability Coverage with the South Dakota Public Assurance Alliance is the basis for the insurance coverages at issue for purposes of the subject matter of this action.

27. The Memorandum of Governmental Liability Coverage contained an exclusion endorsement wherein the Exclusion Section, Section C of the aforementioned Memorandum, precludes coverage for "fire department, firefighting activities or fire department vehicles." (See Exh. C attached to the Aff. of Dave Sendelbach).

27. **RESPONSE**: Admitted in part. Disputed that this exclusion of coverage for "fire department, firefighting activities or fire department vehicles" applies to the South Dakota Public Assurance Alliance MEMORANDUM OF AUTO LIABILITY COVERAGE attached to the Affidavit of David Sendelbach as Exhibit B and which is identified by him as "the separate Memorandum of Auto Liability Coverage." There is no corresponding "Exclusion Endorsement" for "fire department, firefighting activities or fire department vehicles" in the South Dakota Public Assurance Alliance MEMORANDUM OF AUTO LIABILITY

COVERAGE as is the case in the Memorandum of Governmental Liability Coverage attached to the Affidavit of David Sendelbach as Exhibit A and with the Exclusion Endorsement identified by the City of Pierre as CITY 8 and appearing on the last page of Exhibit C attached to the Affidavit of David Sendelbach. Neither of the reservation of rights letters issued by the South Dakota Public Assurance Alliance to the City of Pierre and attached to the Affidavit of David Sendelbach as Exhibit D and Exhibit E references or even mentions the Exclusion Endorsement attached to the Affidavit of David Sendelbach as Exhibit C as a basis for denial of coverage to Tronvold or Plaintiffs.

28. At the time of the subject motor vehicle accident, the City of Pierre had in place a Memorandum of Automobile Liability Coverage with the South Dakota Public Assurance Alliance. (See Exh. B attached to the Aff. of Dave Sendelbach).

28. **RESPONSE**: Admitted in part. This document by its express terms states as follows on CITY 135: "We [South Dakota Public Assurance Alliance] will pay damages the covered party legally must pay because of bodily injury or property damage to which this coverage applies cause by an accident during the coverage period and resulting from the ownership, maintenance, or use of an auto." No exclusion from coverage is included in this insuring agreement for "fire department, firefighting activities or fire department vehicles" as is the case in the Memorandum of Governmental Liability Coverage attached to the Affidavit of David Sendelbach as Exhibit C.

29. The Memorandum of Automobile Liability Coverage only provides coverage for a volunteer when such volunteer is "acting in an official capacity for (a) or (b)." (See Id. at Section D). The official capacity must be for the member (the City of Pierre) or while acting in an official capacity for one of the members "commissions, councils, agencies, districts,

authorities, or boards, under the member's direction or control of which the member's board sits as the governing body."

29. **RESPONSE**: Admitted in part. Disputed that the City of Pierre has accurately stated the terms and conditions of the applicable provisions of The Memorandum of Automobile Liability Coverage. The term "Covered Party" means: (a) "the Member" which in this action is the City of Pierre; (b) "boards coming under the Member's direction or control or for which the Member's board [Pierre City Commission] sits as the governing body;" or (c) "any person who is an . . . employee or volunteer of (a) or (b) while acting in an official capacity for (a) or (b) . . ." (Exhibit B, Affidavit of David Sendelbach, at CITY 136). (Emphasis added).

30. The City of Pierre's City Commission does not sit as the governing body for the PVFD.

30. **RESPONSE**: Disputed. See Response to No. 9 which is incorporated herein by this reference. Even the bylaws of the Pierre Volunteer Fire Department recognize that the "Pierre Volunteer Fire Department" when referred to as "department" is the same "department" established by Section 2-3-401 of the Fire Department Ordinances as, "The department in charge of preventing, detecting, reporting, suppressing and extinguishing fires within and for the city." (Fire Department Ordinances, Section 2-3-401; Larson Affidavit, Ex. 3). Section 2-3-401 establishes the Pierre Fire Department and charges "its officers and employees" with responsibility "for the performance of all duties assigned to the department by state law, this code and the city ordinances, the commission, mayor and designated commissioner." (Id.) The Office of Public Safety has general responsibility for the "Volunteer Fire Department." (Fire Department Ordinances Section 2-3-101; Id.).

Chief Ian Paul testified that he was appearing on behalf of both the City of Pierre and the Pierre Volunteer Fire Department. (Paul Dep. 39:1-10; Larson Affidavit, Ex. 5). Chief Paul further testified that he considered himself jointly represented by the counsel of record for the City of Pierre and counsel of record for the Pierre Volunteer Fire Department. (Paul Dep. 39:1-10; Larson Affidavit, Ex. 5).

31. At the time of the motor vehicle accident, Tronvold was not acting in an official capacity for the PVFD or the City of Pierre. (Paul depo. at 37:5-18; 38:12-15).

31. **RESPONSE**: Disputed. See Response Nos. 14-16 which are incorporated herein by this reference.

32. A letter denying coverage for Tronvold has been issued by the South Dakota Public Assurance Alliance through its claims adjusters at Claims Associates, Inc. (See Exh. D attached to the Aff. of Dave Sendelbach.)

32. **RESPONSE**: Admitted part. Disputed that that the issuance of this letter and its contents is a material fact for purposes of the City of Pierre's motion for summary judgment.

33. The South Dakota Public Assurance Alliance is providing a defense in relation to this action pursuant to a reservation of rights concerning coverage under the Memorandum of Governmental Liability Coverage and the Memorandum of Automobile Liability Coverage. (See Exh. A and B attached to the Aff of Dave Sendelbach).

33. **RESPONSE**: Admitted part. Disputed that that the providing of a defense in relation to this action pursuant to a reservation of rights concerning coverage under the Memorandum of Governmental Liability Coverage and the Memorandum of Automobile Liability Coverage is a material fact for purposes of the City of Pierre's motion for summary judgment.

Dated at Sioux Falls, South Dakota, on this 5th day of June, 2019.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of June, 2019, a true and correct copy of the above and foregoing Response of Plaintiff Randall R. Jurgens to Defendant City of Pierre's Statement of Undisputed Material Facts was served electronically using the Odyssey File and Serve system which will send notification of such filing to the following:

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STATE OF SOUTH DAKOTA) :ss COUNTY OF HUGHES)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
LISA A. TAMMEN and **RANDALL R. JURGENS,** Plaintiffs, vs. **GERRIT A. TRONVOLD**, an individual, **CITY OF PIERRE**, a South Dakota municipal corporation, and **PIERRE VOLUNTEER FIRE DEPARTMENT**, a South Dakota nonprofit corporation, jointly and severally, Defendants.	File No. 32CIV17-000042 **RESPONSE OF PLAINTIFF RANDALL R. JURGENS TO DEFENDANT PIERRE VOLUNTEER FIRE DEPARTMENT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

Plaintiff Randall R. Jurgens, by and through his undersigned counsel of record, and hereby submits the following Response to Defendant Pierre Volunteer Fire Department's Statement of Undisputed Material Facts pursuant to SDCL § 15-6-56(c)(2). This Response in Opposition to Pierre Volunteer Fire Department's Statement of Undisputed Material Facts sets forth the disputed material facts upon which the Defendant Pierre Volunteer Fire Department's Motion for Summary Judgment must be denied.

The deposition testimony and documents upon which this Response relies are attached to the Affidavit of Tiffany L. Larson, with corresponding citations where available by page or other designation. References to the Affidavit of Tiffany L. Larson are referred to as "Larson Affidavit" followed by the corresponding Exhibit number designated as "Ex. ____." A series of ordinances of the City of Pierre govern the Pierre Fire Department and the "Volunteer Fire

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Department." References are made to these ordinances as "Fire Department Ordinances" followed by citations to the ordinance by section number.

1. Plaintiffs seek damages arising out of a motorcycle/motor vehicle accident that occurred on or about August 1, 2016. First Amended Complaint, ¶ 11.

RESPONSE: Admitted that the collision occurred at 6:06 p.m. on August 1, 2016 involving the motorcycle on which the Plaintiffs were riding and the pickup truck that Gerrit Tronvold was driving at the intersection of Grey Goose Road and Highway 1804 in Hughes County, South Dakota.

2. Plaintiffs alleged that Defendant Gerrit Tronvold failed to yield the right-of-way at a stop sign and turned left into the path of Plaintiffs' motorcycle. First Amended Complaint, ¶ 13.

RESPONSE: Admitted.

3. Plaintiffs further allege that Defendant Gerrit Tronvold ("Tronvold") was operating his own 2002 Chevrolet pickup at the time or the accident. First Amended Complaint, ¶ 12.

RESPONSE: Admitted.

4. Tronvold owned the vehicle that he was operating. Ian Paul Depo. at 37:2-4; Gerrit Tronvold Depo. at 11: 1-7.

RESPONSE: Admitted.

5. At the time of the accident, Tronvold was a volunteer fireman with the PVFD. He never held any other position with the PVFD other than a volunteer fireman. G. Tronvold Depo. at 14:13-15.

RESPONSE: Admitted that Tronvold was a volunteer fireman with the PVFD and a member of the Pierre Fire Department at the time of the crash which is the subject matter of this action.

6. Tronvold joined the PVFD in December, 2015. G. Tronvold Depo. at 13:16-25; 14:1.

RESPONSE: Admitted that Tronvold was approved by the City of Pierre Board of Commissioners on December 22, 2015 for Tronvold as a volunteer fireman with the PVFD and member of the Pierre Fire Department assigned to the fire company of Engine Company 3.

7. At the time of the accident, Tronvold was considered to be a rookie firefighter as he had not yet completed the certified firefighter course. I. Paul Depo. at 17:7-15.

Admitted that Tronovold was considered to be a rookie firefighter for that reason. Disputed that Tronvold's status as a rookie member affected his status as a member of the Pierre Fire Department. Tronvold testified that he was assigned to Engine Company 3 in December, 2015. (Tronvold Depo. 13:16-19; Larson Affidavit, Ex. 1). Engine Company 3 is a "fire company" to which Section 2-3-415 of the Fire Department Ordinances applies. (Paul Dep. 139:24-25-140:8; Larson Affidavit, Ex. 5). On December 22, 2015, Tronvold was issued his firefighter gear. (Pierre Fire Department Equipment Issue Checklist; Larson Affidavit, Ex. 6. "You're issued your gear, your pager, a book of the SOP/SOG standard operating procedures and how the department operates, and then from that point on, you are an active member of the department." (Tronvold Depo. 19:18-23; Larson Affidavit, Ex. 1). Starting in December, 2015, Tronvold would respond to an actual fire as an extra set of hands. (Tronvold Depo. 19:24-25; 20:1-2; Id.). The Fire Department Ordinances to not distinguish between a "rookie member" and a member who has completed the South Dakota Certified Firefighter Course, which Tronvold did not complete until the date after the crash on August 2, 2016.

8. In order to get certified through the state, firefighters have to attend a series of classes, have some hands-on practical training and have a certain amount of time to get that completed. I. Paul Depo. at 17:9-15.

RESPONSE: Admitted.

9. Tronvold was a rookie that has been with PVFD for more than six months at the time of the accident. I. Paul Depo. at 47:24-25; 48:1-4.

RESPONSE: Admitted that Tronvold had been a member of the PVFD and the Pierre Department since approval by the City of Pierre Board of Commissioners on December 22, 2015.

10. Besides being on the force for over six months, Tronvold had met the requirements of 40 hours of training by August 1, 2016. This is a requirement of the bylaws for the PVFD. I. Paul Depo. at 107:12-17.

RESPONSE: Admitted that this requirement of 40 hours of training each calendar year appears in the Bylaws of Pierre Volunteer Fire Department, approved March 6, 2014. (Bylaws of Pierre Volunteer Fire Department, Article V, Section 5(B)(2), Page 7; Larson Affidavit, Ex. 2). Disputed that whether or not Tronvold had completed in excess of 40 hours of training prior to August 1, 2016 is an issue of material fact for purposes of the PVFD's motion for summary judgment, as the Fire Department Ordinances contain no such requirement, and further as Tronvold as of August 1, 2016, was in violation of the "drills and meetings" mandatory attendance and dismissal provisions of Section 2-3-415 of the Fire Department Ordinances. It is undisputed that as of August 1, 2016, Tronvold had failed or neglected to attend more than three (3) successive drills and meetings of Engine Company 3 and documented as "absent" for four (4) successive drills and meetings between February 1 and April, 2016, and that no sufficient reason or excuse is documented for such failure or neglect. The minutes of the monthly meetings of Engine Company No. 3 demonstrate that Tronvold was absent without excuse for four successive meetings of Engine Company No. 3 from February to April, 2016. (Minutes of Engine Company No. 3; Larson Affidavit, Ex. 11); (Paul Depo. 137-147; Larson Affidavit, Ex. 5).

Fire Chief Paul testified regarding Tronvold's documented absences at four (4) successive monthly meetings in view of the mandatory attendance and mandatory dismissal requirements of Section 2-3-415 of the Fire Department Ordinances:

Q. Have you read that ordinance [Section 2-3-415] before, sir?
A. I have and I realize it was outdated.
Q. The ordinance is outdated?
A. Yeah. The ordinance is not the way we practice right now, the way it's written.
Q. I think that's the whole point, sir.
A. I understand that.

(Paul Depo. 138:15-21; Larson Affidavit, Ex. 5).

Q. Okay. We don't need to go into that anymore. So according to these documents, if they're correct, Mr. Tronvold was absent for four successive meetings for engine company three from February to April, 2016, correct?
A. Based on that documentation. I don't know any documentation on that, or the reason for it.
Q. And referring back to section 2-3-415 of Plaintiff's Exhibit 8, calling for dismissal of firemen for failure to attend drills and meetings, you agree that this document required you to dismiss Mr. Tronvold for missing four successive engine company three monthly meetings?
[VARIOUS OBJECTIONS]
Q. Well, do you agree, do you not, Mr. Paul, that the action to be taken is taken by the chief, correct?
A. According to the way it is written.

(Paul Depo. 148:4-6; Larson Affidavit, Ex. 5).

Despite the mandatory attendance and dismissal requirements of Section 2-3-415, at no time as fire chief did Ian Paul have any verbal or written reporting mechanism in place for engine company captains to report up to him when members are absent for monthly meetings and drills of fire engine companies. (Paul Depo.148:10-22; Id.).

11. By August 1, 2016, Tronvold had met the annual requirements as he already had 64 hours of training. I. Paul Depo. at 23:22-25.

RESPONSE: See Response No. 10 which is incorporated herein by this reference. Whether or not Tronvold had completed in excess of 40 hours of training prior to August 1, 2016 is not an issue of material fact for purposes of the PVFD's motion for summary judgment,

12. Tronvold was also required to document that he participated in a minimum of 25% of the calls to the PVFD for the calendar year. l. Paul Depo. at 18:3 -25; 19:1-10.

RESPONSE: Admitted that this requirement appears in the Bylaws of Pierre Volunteer Fire Department, approved March 6, 2014. (Bylaws of Pierre Volunteer Fire Department, Article V, Section 5(B)(3), Page 7; Larson Affidavit, Ex. 2). Disputed that whether or not Tronvold participated in 25 percent or more "of calls in any given calendar year" is an issue of material fact for purposes of the PVFD's motion for summary judgment, as the Fire Department Ordinances contain no such requirement, and further as Tronvold as of August 1, 2016, had failed or neglected to respond to five (5) of the seven (7) fires as documented on Paul Depo. Exhibit 2. (Pierre Fire Department Participation Detail by Staff, Pages 1-3; Larson Affidavit, Ex. 12). Tronvold responded to only two (2), one on 02/06/2016 and the second on 07/21/2016, which are marked with an asterisk to note Tronvold's response. (Id.) There are no such asterisks on the fire calls on 02/08/2016, 04/16/2016, 05/28/2016, 07/03/2016, and 07/09/2016. (Id.).

Tronvold responded to only two of seven alarm fires in 2016. As such, he was in violation of Ordinance Section 2-3-415 as he failed on five occasions "to respond to each and every call out for a fire, or to the proper alarms given, in cases of a fire within the corporate limits of the city." The 25 percent call provision is in complete conflict with Section 2-3-415 of the Fire Department Ordinances, which requires that, "It shall be the duty of each member of a fire company . . . to respond to each and every call out for a fire, or to the proper alarms given, in cases of a fire within the corporate limits of the city. In the event that a member of such fire company shall fail or neglect to . . . respond to such fire alarm or fail to be present at such fire for three fires in succession, without any sufficient reason or excuse for such failure or neglect, it shall become the duty of the chief of the fire department to make an order in writing, dismissing such member or members from membership in such fire company, and such action on the part of

the chief shall be final as to such dismissal." (Fire Department Ordinances, Section 2-3-415; Larson Affidavit, Ex. 3).

13. Actually, Tronvold had a recorded participation of 51.35%. I. Paul Depo. at 22:2-16.

RESPONSE: See Response No. 12 which is incorporated herein by this reference. whether or not Tronvold participated in 51.35% percent or more "of calls in any given calendar year" is not an issue of material fact for purposes of the PVFD's motion for summary judgment. Ordinance Section 2-3-415 required Tronvold "to respond to each and every call out for a fire, or to the proper alarms given, in cases of a fire within the corporate limits of the city" unless he has "sufficient reason or excuse for such failure or neglect" for failing or neglecting "to respond to such fire alarm or fail to be present at such fire for three fires in succession." (Fire Department Ordinances, Section 2-3-415; Larson Affidavit, Ex. 3).

14. By the date of the accident, Tronvold had met all of the requirements to take the certification test, and it was scheduled for the next day, August 2, 2016. G. Tronvold Depo. at 16 :5 -18; 18:18-22.

RESPONSE: Disputed that this is an issue of material fact for purposes of the PVFD's motion for summary judgment.

15. The 40 hours of training can be through classes from a variety of sources, including a monthly training session held by the PVFD. I. Paul Depo. at 36:7-16.

RESPONSE: Disputed that this is an issue of material fact for purposes of the PVFD's motion for summary judgment.

16. Again, Tronvold had met all of his requirements for taking his certification class, and no more classwork was needed. G. Tronvold Depo. at 30:9-10.

RESPONSE: Disputed that this is an issue of material fact for purposes of the PVFD's motion for summary judgment.

17. These monthly training sessions were held on Mondays. Firefighters were not required to attend. If they did not go to this meeting, they could go to another station. G. Tronvold Depo. at 31:9-15, 24-25; 32:20-21.

RESPONSE: Admitted in part that the monthly training sessions were held on Monday at the regular monthly meeting of each fire company. Disputed that firefighters were not required to attend. See Response No. 10 which is incorporated herein by this reference.

18. Attendance at the training session on Monday, August 1, 2016, was not required for Tronvold. He had enough hours already to take the test without attending that session. G. Tronvold Depo. at 37:21-25; 38:1-25.

RESPONSE: See Response No. 10 which is incorporated herein by this reference.

19. Tronvold was a member of Engine Company Three. I. Paul Depo. at 49:10-15.

RESPONSE: Admitted.

20. This company had a training session on Monday evening, August 1, 2016, starting at 6:30 p.m. G. Tronvold Depo. at 30:1-4.

RESPONSE: Admitted.

21. On the evening of August 1, 2016, as is typical on the first Monday of the month, there would have been two meetings. There was first the training session, and then there was a regular meeting of the company. I. Paul Depa. at 49:19-25; 50: 1-2. Typically the training session goes first, and then the meeting. T. Paul Depo. at 50:3-4.

RESPONSE: Admitted.

22. As to the monthly meeting, members are encouraged to attend, but it is not required. I. Paul Depo. at 185:15-19.

RESPONSE: Disputed. See Response to No. 10 which is incorporated herein by this reference.

23. Tronvold was leaving the home of his parents and on the way to Fire Station Three at 721 North Poplar at the time of the accident. I. Paul Depo. at 121:20-21; 122:4-5; G. Tronvold Depo. at 33:22-25.

RESPONSE: Admitted.

24. Tronvold was not acting on behalf of the PVFD at the time of the accident. I. Paul Depo. 37:14-18.

RESPONSE: Disputed. Tronvold had a duty while traveling to his home and the fire station on August 1, 2016 to respond to "each and every call out for fire, or to the proper alarms given, in cases of fire within the corporate limits of the city." (Fire Department Ordinances, Section 2-3-415; Larson Affidavit, Ex. 3). Tronvold had a duty as a "member of a fire company to attend each and all of the drills and meetings of such company." (Fire Department Ordinances, Section 2-3-415; Id.) Chief Paul testified that Engine Company No. 3 is a "fire company" within the meaning of this ordinance. (Paul Depo. 139: 24-25; 140:8; Larson Affidavit, Ex. 5).

Before leaving home at 135 Dove Road, Pierre, South Dakota, Tronvold "made sure" that he had his "gear" (personal protective equipment (PPE)) in his pickup. (Tronvold Dep. 34:10-12; Larson Affidavit, Ex. 1). Tronvold's "PPE" consists of an issued bag, boots, bunker pants with suspenders, bunk coat, nomex hood, helmet, all of which is provided. (Tronvold Dep. 34:24-25; 35: 1-20; Id.) Larson Affidavit, Ex. 1). "They like you to have it with you so you can respond." (Tronvold Dep. 34:19-23; Id.) Tronvold was also issued a portable pager, which he carries with him. (Tronvold Dep. 19:18-19; 20:13-25; 21:1; Id.). Tronvold always keeps his PPE in his pickup, and the only time it would be removed would be if he had to use his backseat to haul something, in which case he would use his pickup in this manner and put the PPE back in his pickup truck. (Tronvold Dep. 34:13-18; Id.).

While traveling to his home and the fire station on August 1, 2016, Tronvold was driving his personal vehicle, the 2002 Chevrolet Silverado K2500 extended cab pickup, which he had a duty to own as a member of the PVFD. (Paul Depo. 17: 20-23; Larson Affidavit, Ex. 5). The PVFD has "certain rules that govern firefighters with regard to driving their own personal vehicles." (Paul Depo. 79:3-6; Id.).

Tronvold's 2002 Chevrolet Silverado K2500 extended cab pickup displayed the half-plate vehicle I.D. plate issued by the fire department which states in large capital letters, "MEMBER FIRE DEPT PIERRE FIRE DEPT" (Larson Affidavit, Exhibit 9). The City of Pierre paid for Tronvold's half-plate vehicle I.D. (Paul Depo. 118:25; 119:1; Larson Affidavit, Ex. 5). Chief Paul testified that the purpose of the half-plate vehicle I.D. is to identify the firefighter's personally owned vehicle to law enforcement securing a scene in the event the firefighter responds in his personal vehicle to that location. (Paul Depo. 29: 13-25; 30: 1-4; Id.). However, the dual purpose of identifying the firefighter's personally owned vehicle to the public at large on a 24/7/365 basis is indisputable.

25. He was not running any mission or doing anything on behalf of the PVFD at the time of the accident. I. Paul Depo. at 37:14-18.

RESPONSE: Disputed. Tronvold had a duty while traveling to his home and the fire station on August 1, 2016 to respond to "each and every call out for fire, or to the proper alarms given, in cases of fire within the corporate limits of the city" and whether or not there was a call out for fire or alarm given. (Fire Department Ordinances, Section 2-3-415, Larson Affidavit, Ex. 3). While traveling to his home and the fire station on August 1, 2016, Tronvold owned a duty to the City of Pierre, the PVFD, the public at large and the Plaintiffs, to "Always act in a professional manner when representing the PFD on and off scene." (Emphasis in original). (Orientation for New Firefighters, Page 2; Larson Affidavit Ex. 10).

26. This was not a fire call, and Tronvold was not summoned for any emergency by the PVFD. I. Paul Depo. at 37:5-7; 38:12-15.

RESPONSE: Admitted.

27. During the time that Tronvold was a member of the PVFD he had not ever been called to a fire. G. Tronvold Depo. at 20:6-12.

RESPONSE: Disputed. As of August 1, 2016, Tronvold had responded to two (2) fires, one on 02/06/2016 and the second on 07/21/2016, which are marked with an asterisk to note Tronvold's participation, as documented on Paul Depo. Exhibit 2. (Pierre Fire Department Participation Detail by Staff, Pages 1-3; Larson Affidavit, Ex. 12).

28. PVFD is the fire department for the City of Pierre. G. Tronvold Depo. at 83:19-21.

RESPONSE: Admitted.

29. Although it is a separate entity, the City of Pierre has certain control over PVFD. I. Paul Depo. at 34:21-25; 35:5-8.

RESPONSE: Admitted in part. Disputed as to the phrase, "certain control over PVFD." The Fire Department Ordinances of the City of Pierre were enacted in 1957. The Office of Public Safety has "general responsibility for the functions of the . . . Volunteer Fire Department . . . and such other functions and general employees as may be authorized and approved." (Fire Department Ordinances, Section 2-3-101(5); Larson Affidavit, Ex. 3). The Public Safety Director is an appointive position filled by majority vote of the members of the City Commission, the same as the City Administrator, Business Manager, City Attorney, City Engineering/Planning Director, Utilities Manager, Park and Recreation Director, Human Resources Director, "and such other officers as may be provided for by ordinance." (Fire Department Ordinances, Section 2-3-102(5); Larson Affidavit, Ex. 3).

Section 2-3-401 is entitled, "Fire Department – responsibility" and provides in full:

> "The department in charge of preventing, detecting, reporting, suppressing and extinguishing fires within and for the city shall be known as the Pierre Fire Department, and its officers and employees shall be responsible for the performance of all duties assigned to the department by state law, this code, and the city ordinances, the commission, mayor and designated commissioner."

(Fire Department Ordinances, Section 2-3-401; Larson Affidavit, Ex. 3).

The Fire Department Ordinances provide a comprehensive structure for the governance and administration of all aspects of the operation of the Pierre Fire Department:

(a) Section 2-3-402 subordinates all bylaws and rules adopted by the fire department and each fire company to the ordinances of the City of Pierre.

(b) Section 2-3-404 establishes fire chief, the first assistant chief, and the second assistant chief to constitute "the executive officers of the fire department" to hold office for terms of one year.

(c) Section 2-3-405 designates the regular monthly meeting of the fire department in December for election by a majority of the members present of "one chief and one first assistant chief and one second assistant chief" and "one department secretary and one treasurer." The election results must be certified to the City Commission and the election results must "consider such elections and if they shall deem the persons so elected to be suitable persons, shall proceed to confirm such election; provided, that a majority of the commission shall be necessary for confirmation of the election."

(d) Section 2-3-407 specifies the duties of the chief, first assistant and second assistant chiefs in cases of fire, to at all times have the general direction and management of all fire trucks, engines, hose, hook and ladders, and other apparatus belonging to the fire department. They must report once each year to the City Commission on condition of the fire department and the engines and apparatus belonging thereto, and shall recommend such alterations, improvements and additions as by them may be deemed necessary and expedient.

(e) Section 2-3-408 provides the City Commission with the power to remove the chief, or the first or second assistant chief from office, for failure to perform his duty as such officer.

(f) Section 2-3-409 requires that all members of any of the fire companies must be "able bodied persons of good moral character" who have been "duly elected as such by a majority of the active members of the company."

(g) Section 2-3-410 requires approval by the City Commission of any changes in the membership of any of the fire companies.

(h) Section 2-3-412 provides for the order of command at fires and for filling vacancies in the officers of chief, the first assistant chief, and the second assistant chief.

(i) Section 2-3-415 establishes the duty of each member of a fire company to mandatory attendance at "all of the drills and meetings of such company" and mandatory response to "each and every call out for a fire, or to the proper alarms given, in cases of a fire within the corporate limits of the city."

(j) Section 2-3-415 also establishes a mandatory dismissal duty that the chief must exercise to make an order in writing dismissing any member who, without sufficient reason or excuse for such failure or neglect, fails or neglects "to attend such company drills or meetings for three successive drills or meetings, or should a member fail or neglect to such fire alarm or fail to be present at such fire for three fires in succession."

(k) Chief Ian Paul testified that the fire stations, the fire apparatus, and all equipment issued to each firefighter are all owned by the City of Pierre and purchased through the funding of the City of Pierre in the fire department budget. (Paul Depo. 8:18-23).

30. PVFD is a non-profit corporation. I. Paul Depo. at 101:4-6; 112:2-3. It was established in 1925 and is recognized to be a part of the governmental function of the City of Pierre. See Affidavit of Michael L. Luce, Exhibit A, which states: "This corporation is part of the governmental function of the City of Pierre, South Dakota, and as such has no independent finances and has no stockholders. The nature of its business is the prevention and suppression of fires within the City of Pierre." I. Paul Depo. at 111:20-22.

RESPONSE: Admitted as an accurate quotation of the text of the referenced document.

31. The PVFD equipment is owned by the City of Pierre. I. Paul Depo. at 8: 18-23.

RESPONSE: Admitted.

32. All equipment and real property infrastructure utilized by the PVFD is funded by the City of Pierre. I. Paul Depo. at 9:16-21.

RESPONSE: Admitted.

33. The firefighters for the City of Pierre are volunteers. They are not compensated. I. Paul Depo. at 9:22-24.

RESPONSE: Disputed that the characterization of the firefighters as "volunteers" is not a material fact for purposes of the PVFD's motion for summary judgment. Disputed that whether firefighters are "compensated or not" is not an issue of material fact for purposes of the PVFD's motion for summary judgment. Whether PVFD firefighters are paid or not paid what is commonly referred to as "W-2" or "payroll" compensation is not an issue of material fact for purposes of the PVFD's motion for summary judgment. At all times material to this action, Tronvold was an "employee" of the public entity known as the City of Pierre, and SDCL § 3-21-

1(1) and his status as employee applies "whether compensated or not." As an employee firefighter, Tronvold either received or was eligible to receive the following fringe benefits, all provided and paid for by the City of Pierre:

(a) Worker's compensation insurance coverage. Injured firefighters are covered by the City of Pierre's worker's compensation insurance. (Paul Dep. 11:7-20; 46:18-25; 57:12-18; Larson Affidavit, Ex. 5).

(b) Property damage coverage and deductible reimbursement for an "Employee's Personal Auto" which is damaged while the firefighter "employee" is "en route to, during or returning from any official duty authorized by you (defined as the "City of Pierre Fire Department" with coverage through Continental Western through Fischer-Rounds Insurance Agency. (Paul Depo. 92:19-23; 93:1-15; Larson Affidavit, Ex. 5; Affidavit of Michael Luce, ¶ 3, Exhibit B – Pages 169-170).

(c) Group accident coverage from the City of Pierre through Fischer Rounds Insurance Agency. (Paul Dep. 87:2-25; 88-89; Larson Affidavit, Ex. 5).

(d) Paid membership dues annually for the South Dakota Firefighters Association. (Paul Dep. 88-89: 1-2; Larson Affidavit, Ex. 5).

(e) Paid a per diem for traveling for training "outside of town." (Paul Dep. 25:6-8; Larson Affidavit, Ex. 5).

(f) "Vested" for the Length of Service Award lump-sum financial payment from the City of Pierre ater completing five (5) years of service, paid from a fund which the City of Pierre makes a $10,000 annual contribution and which, for a firefighter with twenty-five (25) years of service retiring in 2017 would receive a lump-sum payment of $25,000. (Paul Dep. 26:9-25; 27:1-25; 28:1-14; 58:15-25; 59:1-25; 60: 13-24; 92:1-14; Larson Affidavit, Ex. 5).

34. The firefighters are not paid an hourly wage, and they don' t get mileage nor do they complete a W-2. I. Paul Depo. at 25:4-18.

RESPONSE: Admitted. Disputed that this is a material fact for purposes of the PVFD's motion for summary judgment.

35. Although they get some discounts from business in town and also have a deferred compensation plan for length of service after five years, there is no compensation or reimbursement for the firefighters. They arc not paid expenses for responding to a call. G. Tronvold Depo. at 86:17-25; 40: J 6-17; 41:2-5; I. Paul Dcpo. at 26:9-23.

RESPONSE: Admitted in part. See Response Nos. 33 and 34 which are incorporated herein by this reference.

36. The PVFD averages about 60 volunteer members. I. Paul Depo. at 43:1-3.

RESPONSE: Admitted. Disputed that this is a material fact for purposes of the PVFD's motion for summary judgment.

37. For travel within the city, there is no compensation or reimbursement. Reimbursement is only provided for out-of-town training if that occurs. G. Tronvold Depo. at 40:20, 25; 41:2-5.

RESPONSE: Admitted. Disputed that this is a material fact for purposes of the PVFD's motion for summary judgment.

38. Tronvold has his own personal insurance for the accident that occurred on August 1, 2016. G. Tronvold Depo. at 76:18-21.

RESPONSE: Admitted. Disputed that this is a material fact for purposes of the PVFD's motion for summary judgment.

39. PVFD has an insurance policy issued by Continental Western Insurance Company. See Affidavit of Luce, Exhibit Band I. Paul Depo. at 153:12-13.

RESPONSE: Disputed that the policyholder is "PVFD." The policyholder and named insured is "City of Pierre Fire Department." The City of Pierre pays the premiums for these insurance coverages through Fischer-Rounds Insurance Agency in Pierre, South Dakota.

40. That insurance policy provides different types of coverage depending upon the particular claims . See Affidavit of Luce, Exhibit B.

RESPONSE: Admitted.

41. The coverage afforded under that policy is subject to the terms and conditions of the policy. See Affidavit of Luce, Exhibit B.

RESPONSE: Admitted.

42. As to insurance coverage for this accident involving a motor vehicle, the liability insurance coverage is set forth in Commercial Auto Enhancement Endorsement, CW33 86 02 15 See Affidavit of Luce, Exhibit C.

RESPONSE: Admitted.

43. Under who is insured for auto liability coverage, the policy states: "Any 'employee' of yours while using a covered 'auto' you don't own, but only for an official emergency response authorized by you." See Affidavit of Luce, Exhibit C, paragraph A.2.

RESPONSE: Admitted.

44. At the time of this accident, Tronvold was not responding to any emergency. I. Paul Depo. at 38:12-15.

RESPONSE: Admitted.

45. There is no liability insurance provided for this accident. See Affidavit of Luce, Exhibit C.

RESPONSE: Admitted.

46. The policy also contains a South Dakota governmental liability amendatory endorsement. See Affidavit of Luce, Exhibit D. That endorsement does not provide any coverage or any suit for damages which is barred by the doctrine of sovereign immunity or governmental immunity, and the purchase of the insurance does not constitute a waiver of any sovereign immunity or governmental immunity. See Affidavit of Luce, Exhibit D.

RESPONSE: Disputed. The purchase of insurance waives sovereign immunity or governmental immunity.

47. Besides the liability provisions in the policy, the policy provides separate coverage for damage to an auto owned or used by any employee. See Affidavit of Luce, Exhibit C.

RESPONSE: Admitted.

48. On page 2 of the endorsement, it is provided that with respect to physical damage coverage, payment will be made to a loss to an auto owned or used by an employee if "en route to, during or returning from any official duty authorized by you." See Affidavit of Luce, Exhibit C, paragraph E.3.

RESPONSE: Admitted.

49. Although Tronvold was not engaged in an emergency call, for which liability ty insurance in the operation of his personal vehicle would apply, he would have coverage for his personal auto dam age as long as he was en route to an official duty. That would include a meeting. See Affidavit of Luce, Exhibit C and I. Paul Depo. at 186:11 - 25; 187:4 - 24.

50. Tronvold sought property damage coverage under the provisions of this policy. Paula Tronvold Depo. at 18: 16-24; 19:20-25.

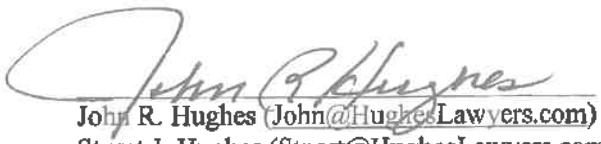
RESPONSE: Admitted.

51. Tronvold was paid the $1,000 deductible for the damage to his vehicle, and the remainder of that damage was covered by his own policy. I. Paul Depo. at 156:3-6; G. Tronvold Depo. at 44:7-25; 45:1-6.

RESPONSE: Admitted.

Dated at Sioux Falls, South Dakota, on this 5th day of June, 2019.

HUGHES LAW OFFICE



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 5th day of June, 2019, a true and correct copy of the above and foregoing Response of Plaintiff Randall R. Jurgens to Pierre Volunteer Fire Department's Statement of Undisputed Material Facts was served electronically using the Odyssey File and Serve system which will send notification of such filing to the following:

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STATE OF SOUTH DAKOTA) : SS COUNTY OF HUGHES)		IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
LISA A. TAMMEN and RANDALL R. JURGENS, Plaintiffs, vs. GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally, Defendants.		CIV. 17-42 **PLAINTIFF LISA A. TAMMEN'S RESPONSES TO DEFENDANT CITY OF PIERRE'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

Plaintiff Lisa A. Tammen, by and through her attorneys of record, respectfully submits this Response to Defendant City of Pierre's Statement of Undisputed Material Facts.

RESPONSES

1. Undisputed.
2. Undisputed.
3. Undisputed.
4. Undisputed.
5. Undisputed.
6. Undisputed.
7. Undisputed.
8. Undisputed.

Filed: 6/5/2019 2:26 PM CST Hughes County, South Dakota 32CIV17-000042

9. Disputed. The Pierre Volunteer Fire Department is not organized independently from the City of Pierre. The Pierre Volunteer Fire Department "is a part of the Governmental Function of the City of Pierre, South Dakota and as such has no independent finances and has no stockholders." Luce Aff. ¶ 2, Ex. A at 3.

10. Undisputed.

11. Undisputed, but incomplete. The City of Pierre also exercises supervisory control of the Pierre Volunteer Fire Department. *See, e.g.*, Pierre City Ordinances 2-3-401; 2-3-402; 2-3-408; 2-3-410; 2-3-411; 2-3-416.

12. Undisputed, but incomplete. Pierre City Ordinance 2-3-403 defines fire apparatus to include vehicles carrying members of the fire department which vehicles display the insignia provided by the fire department consisting of the letters "P.F.D." in gold on a red background.

13. Disputed. The fire department elects officers, but ultimate authority and funding of the Pierre Volunteer Fire Department rests with the City of Pierre. *See* Pierre City Ordinances 2-3-401; 2-3-402; 2-3-408; 2-3-410; 2-3-411; 2-3-416; *see also* Pierre Fire Department Charter at Luce Aff. ¶ 2, Ex. A at 3.

14. Disputed. On August 1, 2016, Defendant Tronvold was traveling to the Pierre Volunteer Fire Department for engine company training in his own vehicle transporting Pierre Volunteer Fire Department equipment, from which the City of Pierre and the Pierre Volunteer Fire Department derived a benefit. Haigh Aff. ¶ 5, Ex. D (Paul Depo. at 70-71; 190). Defendant Tronvold was acting within the course and scope of his employment with the City of Pierre and the Pierre Volunteer Fire Department under the "required vehicle" and "special errand" exceptions to the "going and coming" rule.

15. Disputed. On August 1, 2016, Defendant Tronvold was traveling to the Pierre Volunteer Fire Department station at the direction and control of the Pierre Volunteer Fire Department and City of Pierre to attend required training sessions. In the course of his travel to the Pierre Volunteer Fire Department station, Defendant Tronvold was operating his required personal vehicle and transporting his fire protection equipment which was owned by the City of Pierre to the fire department training session. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 21-22; 87-88); Haigh Aff. ¶ 5, Ex. D (Paul Depo. at 50).

16. Undisputed, but immaterial.

17. Undisputed, but incomplete. There were several other requirements in addition to the requirement to attend 40 hours of training per year. Defendant Pierre Volunteer Fire Department required its volunteers to attend as many monthly meetings as they could get to. Haigh Aff. ¶ 2, Ex. B (Gerrit Tronvold Depo. at 87-88). Pierre City Ordinance Section 2-3-415 provides: "It shall be the duty of each member of a fire company to attend each and all of the drills and meetings of such company, and to respond to each and every call out for a fire, or to the proper alarms given, in cases of a fire within the corporate limits of the city. In the event that a member of such fire company shall fail or neglect to attend such company drills or meetings for three successive drills or meetings, or should a member fail or neglect to respond to such fire alarm or fail to be present at such fire for three fires in succession, without any sufficient reason or excuse for such failure or neglect, it shall become the duty of the chief of the fire department to make an order in writing, dismissing such member or members from membership in such fire company, and such action on the pat of the chief shall be final as to such dismissal."

18. Disputed. *See* response to City of Pierre's Statement of Undisputed Material Facts No. 17.

19. Undisputed that Defendant Tronvold recorded participation in 51.35 percent of calls, but disputed that it would have been sufficient to meet his obligation for the entirety of the calendar year. There is no evidence or testimony that would provide his call participation would have allowed him to miss calls for the rest of the year. Further, there is no indication of how many more calls there were for the remainder of the year, and how many Defendant Tronvold made it to. Also disputed because Pierre City Ordinance Section 2-3-415 requires each member of the fire company to attend each and all of the drills and meetings of the company and respond to each and every call for a fire.

20. Disputed. Defendant Pierre Volunteer Fire Department required its volunteers to attend as many monthly meetings as they could get to. Haigh Aff. ¶ 2, Ex. B (Gerrit Tronvold Depo. at 87-88). In addition, Pierre City Ordinance required firefighters to attend all of the drills and meetings of the fire department and to attend each and every call for a fire.

21. Disputed. Defendant Pierre Volunteer Fire Department required its volunteers to attend as many monthly meetings as they could get to. Haigh Aff. ¶ 2, Ex. B (Gerrit Tronvold Depo. at 87-88). In addition, Pierre City Ordinance required firefighters to attend "each and all of the drills and meetings of such company."

22. Disputed. Again, Defendant Pierre Volunteer Fire Department would not take any adverse action against an employee who made it to 40 training hours, but that does not mean the meetings were not "mandatory." Defendant Tronvold indicated in his deposition that volunteers were required to attend as many monthly meetings as they could get to. Haigh Aff. ¶ 2, Ex. B (Gerrit Tronvold Depo. at 87-88). Pierre City Ordinance Section 2-3-415 required volunteer firemen to attend each and all of the drills and meetings of their company.

23. Disputed. While firefighters are not paid on an hourly basis, they are compensated with benefits that include workers' compensation insurance, group accident insurance, accidental death and dismemberment insurance and a length of service deferred compensation award. Haigh Aff., ¶ 5, Ex. D (Paul Depo. at 26, 87-88). In addition, the Pierre Volunteer Fire Department insurance policy provided a benefit to fire fighters including Defendant Tronvold which provided a benefit to him through compensation for damage to his vehicle caused by the accident. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 44-45).

24. Disputed. Firefighters would be reimbursed for mileage for responding to calls or meetings out of town. Haigh Aff. ¶ 2, Ex. B (Gerrit Tronvold Depo. at 40-41); Haigh Aff. ¶ 5, Ex. D (Paul Depo. at 25).

25. Undisputed, but immaterial and incomplete. Although Defendant Tronvold had his own personal auto insurance, Defendant Pierre Volunteer Fire Department had an insurance policy, under which Defendant Tronvold submitted a claim and was paid $1,000 to cover the deductible for his personal auto insurance. Haigh Aff. ¶ 2, Ex. B (Gerrit Tronvold Depo. at 44-45).

26. Undisputed, but *see* Plaintiff Lisa A. Tammen's Response to City of Pierre's Statement of Undisputed Material Facts No. 27.

27. Disputed as to the applicability of the Memorandum of Governmental Liability Coverage. The coverage provided to Defendant City of Pierre by the South Dakota Public Assurance Alliance contains two separate coverages. One of the coverages is a "Memorandum of Governmental Liability Coverage" attached to the Affidavit of David Sendelbach as Exhibit A. *See* Sendelbach Aff. ¶ 2, Ex. A at 125. The City also has a second type of insurance coverage entitled "Memorandum of Auto Liability Coverage" attached to the Affidavit of David

Sendelbach as Exhibit B. *See* Sendelbach Aff. ¶ 3, Ex. B. at 135. The Exclusion Endorsement for "Fire Department, Fire Fighting activities or Fire Department vehicles" referenced in Defendant City of Pierre's summary judgment brief, by its own title applies only to the "Memorandum of Governmental Liability Coverage" (Exhibit C to the Affidavit of David Sendelbach) and not to the "Memorandum of Auto Liability Coverage" (Exhibit B to the Affidavit of David Sendelbach). This is confirmed by a review of the Memorandum of Governmental Liability Coverage Declarations and separate Memorandum of Automobile Liability Coverage Declarations which Defendant City of Pierre did not include within the Affidavit of David Sendelbach. A copy of the Memorandum of *Governmental* Liability Coverage Declarations, which does not provide automobile liability coverage, is attached to the Affidavit of Tyler Haigh as Exhibit F. *See* Haigh Affidavit, ¶ 7, Ex. F. The separate Memorandum of *Automobile* Liability Coverage Declarations which does provide automobile liability coverage, is attached to the Affidavit of Tyler Haigh as Exhibit G. *See* Haigh Affidavit, ¶ 8, Ex. G. A review of the Memorandum of Governmental Liability Coverage Declarations states that the forms attached to the Governmental Liability Coverage Declarations includes Endorsement number GL 1150. *See* Haigh Affidavit, ¶ 7, Ex. F, at City 4 and at City 6. Endorsement GL 1150, attached as "City 8" to the Memorandum of Governmental Liability Coverage is the Exclusion Endorsement which excludes "Fire Department, Fire Fighting activities or Fire Department vehicles" from Governmental Liability Coverage. Contrary to the assertions made in City of Pierre's Brief in Support of Motion for Summary Judgment, the Exclusion Endorsement which excludes coverage for the "Fire Department, Fire Fighting activities or Fire Department vehicles" is not included as an endorsement to the Memorandum of Automobile Liability Coverage. *See* Haigh Affidavit, ¶ 8, Ex. G at City 12. The only

endorsement to the City's Automobile Liability Coverage is Endorsement No. AL 2075, which changes the City's liability limits for automobile accidents. *See* Haigh Affidavit, ¶ 8, Ex. G at City 14. Contrary to the assertions stated by Defendant City of Pierre, Defendant City of Pierre's automobile liability coverage contains no exclusion for its fire department. This is further confirmed in Exhibit D to the Affidavit of David Sendelbach. In Exhibit D to the Sendelbach Affidavit, the Claims Administrator for the South Dakota Public Assurance Alliance, which insures Defendant City of Pierre, does not state a fire department exclusion as a basis for its reservation of rights with regard to this accident. *See* Sendelbach Aff. ¶ 5, Ex. D. This is because under a plain reading of the policy, the automobile coverage portion of the policy does not exclude fire department vehicles from coverage.

28. Undisputed.

29. Disputed. The Memorandum of Automobile Liability Coverage provides coverage for volunteers since a volunteer is "acting in an official capacity for (a) or (b)." At the time of the accident, Defendant Tronvold was acting in an official capacity for the Pierre Volunteer Fire Department, a commission, council, agency, or board under the City of Pierre's direction and control.

30. Disputed. Defendant City of Pierre's City Commission takes on several governing roles and has authority over the fire department and its members. *See* Haigh Aff. ¶ 6, Ex. E (Paul Depo., Exhibit 8). The Pierre City Ordinances further confirm that Defendant City of Pierre has authority over the fire department, its officers and members. *Id.* Pierre City Ordinance 2-3-408 provides that the Pierre City Commission shall have the power to remove the chief, or first or second assistant chief from office, for failure to perform their duties. *Id.* Pierre Ordinance 2-3-410 provides that any change in the membership of the fire department must be

approved by the City Commission. *Id.* Pierre City Ordinance 2-3-411 provides that firemen on duty shall wear the badge or uniform to be provided by the city and that such uniform shall have been approved by the City Commission. *Id.* The City Ordinances also require that in the event a fireman fails to attend company drills or meetings for three successive drills or fails to respond to fires or alarms for three fires in succession without excuse or neglect, that the fire chief is required to dismiss such member from the fire department. *Id.* Pierre City Ordinance 2-3-416 gives the Mayor of the City of Pierre the authority to regulate firemen and fire apparatus to go beyond the city limits of the City of Pierre. The City of Pierre provides funding for the Pierre Volunteer Fire Department. The Pierre Volunteer Fire Department is "a part of the Governmental function of the City of Pierre, South Dakota, and as such has no independent finances and no stockholders." Luce Aff. ¶ 2, Ex. A at 3.

31. Disputed. Based upon the undisputed evidence that Defendant Pierre Volunteer Fire Department is a department within the government of the City of Pierre, and the undisputed fact that Defendant Tronvold was an employee/volunteer of the City of Pierre in his capacity as a volunteer fireman, Defendant Tronvold was covered under the City of Pierre automobile policy as a matter of law. If the Court finds that Defendant Tronvold was acting within the course and scope of his employment, then coverage is provided by Defendant City of Pierre's insurance policy. Defendant City of Pierre's insurance policy provides coverage to any person who is an official, employee or volunteer of a commission, council, agency, district authority or board coming under Defendant City of Pierre's direction or control. It is undisputed that Defendant Tronvold was an employee or volunteer of Defendant Pierre Volunteer Fire Department. Therefore, if the Court finds that Defendant Tronvold was acting within the course and scope of his employment at the time of the accident, then he was acting in an official capacity of

Defendant Pierre Volunteer Fire Department which is an authority under the direction and control of Defendant City of Pierre.

32. Undisputed, but immaterial. Based upon the arguments provided in Plaintiff Lisa A. Tammen's Brief in Opposition to Defendant City of Pierre's and Defendant Pierre Volunteer Fire Department's Motions for Summary Judgment, the policy issued by the South Dakota Public Assurance Alliance provides coverage for the subject accident and the South Dakota Public Assurance Alliance should not have issued a reservation of rights to Defendant Tronvold and should provide coverage for the injuries incurred by Plaintiffs.

33. Undisputed, but immaterial. Based upon the arguments provided in Plaintiff Lisa A. Tammen's Brief in Opposition to Defendant City of Pierre's and Defendant Pierre Volunteer Fire Department's Motions for Summary Judgment, the policy issued by the South Dakota Public Assurance Alliance provides coverage for the subject accident and the South Dakota Public Assurance Alliance should not have issued a reservation of rights to Defendant Tronvold and should provide coverage for the injuries incurred by Plaintiffs.

Dated at Sioux Falls, South Dakota, this 5th day of June, 2019.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for *Plaintiff Lisa A. Tammen*, hereby certifies that a true and correct copy of the foregoing "Plaintiff Lisa A. Tammen's Responses to Defendant City of Pierre's Statement of Undisputed Material Facts" was filed electronically with the Clerk of Court using the Odyssey File and Serve system which will send notification of such filing to the following:

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on this 5th day of June, 2019.

STATE OF SOUTH DAKOTA) : SS		IN CIRCUIT COURT
COUNTY OF HUGHES)		SIXTH JUDICIAL CIRCUIT
LISA A. TAMMEN and RANDALL R. JURGENS, Plaintiffs, vs. GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally, Defendants.		CIV. 17-42 **PLAINTIFF LISA A. TAMMEN'S RESPONSES TO DEFENDANT PIERRE VOLUNTEER FIRE DEPARTMENT'S STATEMENT OF UNDISPUTED MATERIAL FACTS**

Plaintiff Lisa A. Tammen, by and through her attorneys of record, respectfully submits this Response to Defendant Pierre Volunteer Fire Department's Statement of Undisputed Material Facts.

RESPONSES

1. Undisputed.

2. Undisputed.

3. Undisputed, but incomplete. Defendant Tronvold was operating his own vehicle which he was required to have in order to travel to the Pierre Volunteer Fire Department and to respond to calls. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 21); Haigh Aff. ¶ 5, Ex. D (Paul Depo. at 17, 65, 190).

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4. Undisputed, but incomplete. Defendant Tronvold was operating his own vehicle which he was required to have in order to travel to the Pierre Volunteer Fire Department and to respond to calls. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 21); Haigh Aff. ¶ 5, Ex. D (Paul Depo. at 17, 65, 190). Defendant Tronvold's vehicle was also covered under the liability policies for Defendants City of Pierre and Pierre Volunteer Fire Department. Luce Aff. ¶ 3, Ex. B (Continental Western Policy); Sendelbach Aff. ¶ 3, Ex. B (South Dakota Public Assurance Alliance Policy). Defendant Tronvold was also transporting protection equipment owned by the Pierre Volunteer Fire Department at the time of the accident. Haigh Aff. ¶ 3, Ex. B. (Gerrit Tronvold Depo. at 36-37).

5. Undisputed.

6. Undisputed, but immaterial.

7. Undisputed, but immaterial.

8. Undisputed.

9. Undisputed, but immaterial.

10. Undisputed, but incomplete. There were several other requirements in addition to the requirement to attend 40 hours of training per year. Defendant Pierre Volunteer Fire Department required its volunteers to attend as many monthly meetings as they could get to. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 87-88). Pierre City Ordinance Section 2-3-415 requires each member of the fire company to attend each and all of the drills and meetings of their company and requires the fire chief to dismiss members who neglect or fail to attend such company drills or meetings for three successive drills or meetings.

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11. Disputed. Although Defendant Tronvold may have met the annual requirements for training of the Pierre Volunteer Fire Department, he was required by Pierre City Ordinance to attend each and every drill or meeting of his company.

12. Undisputed, but incomplete. The Pierre Volunteer Fire Department minimum requirement for calls conflicts with Pierre City Ordinance Section 2-3-415 that requires volunteer firemen to "respond to each and every call for a fire" or alarm. *See* Pierre City Ordinance 2-3-415.

13. Undisputed that Defendant Tronvold recorded participation in 51.35 percent of calls, but disputed that it would have been sufficient to meet his obligation for the entirety of the calendar year. There is no evidence or testimony that would provide his call participation would have allowed him to miss calls for the rest of the year. Further, there is no indication of how many more calls there were for the remainder of the year, and how many Defendant Tronvold made it to. *See also* Plaintiff Lisa A. Tammen's Response to Defendant Pierre Volunteer Fire Department's Statement of Undisputed Material Fact No. 12.

14. Undisputed, but immaterial.

15. Undisputed, but immaterial. Defendant Pierre Volunteer Fire Department required its volunteers to attend as many monthly meetings as they could get to. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 87-88). In addition, Pierre City Ordinance Section 2-3-415 required firefighters to attend each and every drill and meeting of their company. *See* Pierre City Ordinance 2-3-415.

16. Undisputed, but incomplete. Defendant Pierre Volunteer Fire Department would not take any adverse action against an employee who made it to 40 training hours, but that does not mean the meetings were not mandatory. Defendant Tronvold indicated in his

deposition that volunteers were required to attend as many monthly meetings as they could get to. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 87-88). Even if no more classwork was needed, firefighters were expected to attend the monthly training sessions. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 17, 87-88).

17. Disputed. Again, Defendant Pierre Volunteer Fire Department would not take any adverse action against an employee who made it to 40 training hours, but that does not mean the meetings were not mandatory. Defendant Tronvold indicated in his deposition that volunteers were required to attend as many monthly meetings as they could get to. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 87-88). In addition, *see* Pierre City Ordinance 2-3-415.

18. Disputed. Again, Defendant Pierre Volunteer Fire Department would not take any adverse action against an employee who made it to 40 training hours, but that does not mean the meetings were not mandatory. Defendant Tronvold indicated in his deposition that volunteers were required to attend as many monthly meetings as they could get to. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 87-88). In addition, *see* Pierre City Ordinance 2-3-415.

19. Undisputed.

20. Undisputed

21. Undisputed.

22. Disputed. Defendant Pierre Volunteer Fire Department would not take any adverse action against an employee who made it to 40 training hours, but that does not mean the meetings were not "required." Defendant Tronvold indicated in his deposition that volunteers were required to attend as many monthly meetings as they could get to. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 87-88). Pierre City Ordinance Section 2-3-415 required firefighters to attend each and every drill and meeting of their company and further required the fire chief to

dismiss members who missed three consecutive drills or meetings. *See* Pierre City Ordinance 2-3-415.

23. Undisputed, but incomplete. Defendant Tronvold was traveling from his residence to the training location at his assigned fire station, which was more than three miles outside the city limits of Pierre, and in violation of the Pierre Volunteer Fire Department's requirement that a volunteer employee "must live or work within the city of Pierre or live within three miles of the city limits." Haigh Aff. ¶ 5, Ex. D (Paul Depo. at 91); Haigh Aff. ¶ 4, Ex. C (Paula Tronvold Depo. at 10). The Pierre Volunteer Fire Department was aware that Defendant Tronvold lived more than three miles outside of the city limits of Pierre.

24. Disputed. On August 1, 2016, Defendant Tronvold was traveling to the Pierre Volunteer Fire Department at the direction and control of the Pierre Volunteer Fire Department and City of Pierre when he was required to drive his own personal vehicle to attend training sessions that were encouraged, and which the volunteer firefighters were expected to attend. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 21-22; 87-88); Haigh Aff. ¶ 5, Ex. D (Paul Depo. at 50). Defendant Tronvold was transporting Pierre Volunteer Fire Department personal protection equipment at the time of the accident. Defendant Tronvold was acting within the course and scope of his employment with the Pierre Volunteer Fire Department and the City of Pierre under the required vehicle and the special errand exceptions to the going and coming rule.

25. Disputed. Defendant Tronvold was traveling to the Pierre Volunteer Fire Department at the direction and control of the Pierre Volunteer Fire Department and City of Pierre when he was required to drive his own personal vehicle to attend training sessions that

were encouraged, and which the volunteer firefighters were expected to attend. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 21-22; 87-88); Haigh Aff. ¶ 5, Ex. D (Paul Depo. at 50).

26. Undisputed, but immaterial.

27. Undisputed, but immaterial. Defendant Tronvold had, however, responded to fire department calls. Haigh Aff. ¶ 5, Ex. D (Paul Depo. at 22).

28. Undisputed.

29. Disputed. The Pierre Volunteer Fire Department is a part of the governmental function of the City of Pierre. *See* Luce Aff. Ex. A. The City of Pierre also funds the Pierre Volunteer Fire Department and exercises substantial control over its operations. *See* Pierre City Ordinances 2-3-401; 2-3-402; 2-3-408; 2-3-410; 2-3-411; 2-3-416; Haigh Aff. ¶ 5, Ex. D (Paul Depo. at 8, 96, 99).

30. Undisputed.

31. Undisputed.

32. Undisputed.

33. Disputed. Although Pierre Volunteer Fire Department members are not paid hourly or by call or meeting, they do receive several forms of compensation including workers' compensation insurance, accident insurance, death and dismemberment insurance and a deferred compensation award at the time of retirement.

34. Undisputed, but incomplete. Pierre Volunteer Fire Department members are paid mileage for travel out of town including the payment of training expenses. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 40-41).

35. Undisputed, but immaterial. *See* Plaintiff Lisa A. Tammen's Response to Defendant Pierre Volunteer Fire Department's Statement of Undisputed Facts No. 33.

36. Undisputed, but immaterial.

37. Undisputed, but immaterial.

38. Undisputed, but immaterial and incomplete. Although Defendant Tronvold had his own personal automobile insurance, the Continental Western Insurance Policy purchased by the Pierre Volunteer Fire Department and at issue in this case, provided insurance coverage to Defendant Tronvold for damage to the vehicle he was driving. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 44-45).

39. Undisputed.

40. Undisputed.

41. Disputed to the extent that additional coverage may be provided as required by the laws of South Dakota and for public policy reasons.

42. Disputed. The Commercial Auto Enhancement Endorsement, CW 33 86 02 15 does not provide the only applicable coverage. The entirety of the policy is controlling and should be read together with all other portions of the policy. *See Mid-Century Ins. Co. v. Lyon*, 1997 SD 50, ¶ 6, 562 N.W.2d 888, 890 (citing 13A Appleman, *Insurance Law and Practice* § 7537 (1976) ("The insurance contract includes the printed form policy, declarations therein, and any endorsements thereto. Provisions of the policy and an endorsement thereon are to be read together . . . .").

43. Undisputed, but incomplete. The Policy also states that an "insured" includes "You for any covered 'auto'." Luce Aff. ¶ 4, Ex. C. "You" is Defendant Pierre Volunteer Fire Department. Luce Aff. ¶ 3, Ex. B at 2; 142. Defendant Pierre Volunteer Fire Department is covered for "Any 'Auto'" under the Business Auto Coverage Form in the Policy. Luce Aff. ¶ 3, Ex. B at 130, 142. "Any 'Auto'" would cover any of the descriptions provided within those

provided in the chart under Business Auto Coverage Form, including, but not limited to, number 9 referred to as "Non-owned 'Autos' Only." Luce Aff. ¶ 3, Ex. B at 142. Therefore, Defendant Pierre Volunteer Fire Department has coverage for "'autos' owned by your 'employees' . . . or members of their households but only while used in your business or personal affairs." Luce Aff. ¶ 3, Ex. B at 142.

44. Undisputed, but immaterial.

45. Disputed. In this case, the Policy purchased by Defendant Pierre Volunteer Fire Department also provides coverage for the injuries that were sustained by Plaintiffs. The language contained in the Policy states that Defendant Tronvold was a covered employee and that his truck is a covered auto for liability insurance. In the Auto Declarations provision of the Policy, under Item Two, there is a number "1" describing the covered autos for liability insurance. Luce Aff. ¶ 3, Ex. B at pg. 130. The Business Auto Coverage Form states that a number "1" means "Any Auto." Luce Aff. ¶ 3, Ex. B at pg. 142. Accordingly, based upon its plain language, each and every category or "auto" below that description is covered under this specific policy. One such category is for "Non-Owned 'Autos'" which specifically "includes 'autos' owned by your 'employees.'" Luce Aff. ¶ 3, Ex. B at pg. 142. "Employees" includes "volunteers." Luce Aff. ¶ 3, Ex. B. at pg. 127. The Business Auto Coverage Form provides that the fire department is an insured. Luce Aff. ¶ 3, Ex. B. at pg. 143. The Policy provides coverage as follows:

> We will pay all sums an "insured" legally must pay as damages because of "bodily injury" or "property damage" to which this insurance applies, caused by an "accident" and resulting from the ownership, maintenance or use of a covered "auto".

Luce Aff. ¶ 3, Ex. B at pg. 143. Page 3 of that form notes that an "insured" includes "[y]our 'employee' if the covered 'auto' is owned by that 'employee' or a member of his or her

household." Luce Aff. ¶ 3, Ex. B at pg. 144. Defendant Pierre Volunteer Fire Department attempts to argue that the coverage provided by the Auto Enhancement Endorsement narrows the coverage because it indicates that an employee is covered "only for an official emergency response authorized by you." *See* Luce Aff. ¶ 4, Ex. C at 1. First, an endorsement within an auto liability policy is meant to broaden coverage, as indicated in the Auto Enhancement Endorsement in this case, not limit or narrow the coverage. *Id.* Second, despite Defendant Pierre Volunteer Fire Department's argument that coverage is provided only for employees when they are using a covered auto for an official emergency response, that provision only applies to how coverage is afforded to the employee. *See id.* The Auto Enhancement Endorsement in the preceding paragraph provides that "insureds" includes "You for any covered 'auto'." *Id.* "You" is defined as the "Named Insured" shown in the Declarations, which is the "City of Pierre Fire Department," also referred to as Defendant Pierre Volunteer Fire Department. Luce Aff. ¶ 3, Ex. B at 2, 142. Because Defendant Tronvold was acting in the scope of employment on behalf of Defendant Pierre Volunteer Fire Department, the second paragraph of the Auto Enhancement Endorsement is not the applicable paragraph to this case—instead, the first paragraph is what controls this case, and that paragraph indicates that Defendant Pierre Volunteer Fire Department is covered under the policy for "any auto" as outlined in the Business Coverage Auto Form. Luce Aff. ¶ 4, Ex. C at 1; Luce Aff. ¶ 3, Ex. 2 at 142.

46. Undisputed, but inapplicable to the facts of this case.

47. Undisputed.

48. Undisputed.

49. Undisputed, but immaterial and incomplete. Although Defendant Tronvold had his own personal auto insurance, Defendant Pierre Volunteer Fire Department had an insurance policy, under which Defendant Tronvold submitted a claim and was paid $1,000 to cover the deductible for his personal auto insurance. Haigh Aff. ¶ 3, Ex. B (Gerrit Tronvold Depo. at 44-45).

50. Undisputed.

51. Undisputed.

Dated at Sioux Falls, South Dakota, this 5th day of June, 2019.

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CERTIFICATE OF SERVICE

The undersigned, one of the attorneys for *Plaintiff Lisa A. Tammen*, hereby certifies that a true and correct copy of the foregoing "Plaintiff Lisa A. Tammen's Responses to Defendant Pierre Volunteer Fire Department's Statement of Undisputed Material Facts" was filed electronically with the Clerk of Court using the Odyssey File and Serve system which will send notification of such filing to the following:

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Attorneys for Defendant City of Pierre

on this 5th day of June, 2019.

Filed: 6/5/2019 2:26 PM CST Hughes County, South Dakota 32CIV17-000042

STATE OF SOUTH DAKOTA INVESTIGATOR'S MOTOR VEHICLE TRAFFIC ACCIDENT REPORT		Mail to: Office of Accident Records, 118 W. Capitol Ave., Pierre, SD 57501	
		TraCS ID: **155346-132**	TraCS Sequence: **1608010008**
Form DPS - AR1 12/12/2014		Agency Use	Report Type
☐ Is this only a Wild Animal Hit Report?	Agency Name **SD HIGHWAY PATROL**	Date of Accident **08/01/2016**	Time of Accident **18:06 Hrs.**
Reporting Officer Last Name **O'NEILL**	Reporting Officer First Name **ZACHARY**	Reporting Officer Middle Name **TYLER**	Reporting Officer # **132-155346**

LOCATION						
Location Description **ON SD HWY 1804 AT ITS INTERSECTION WITH GREY GOOSE RD**						
Latitude **44.428802**			Longitude **-100.351964**			
County **33**	County Name **33 - HUGHES**		City or Rural **0000 - Rural**	Roadway Surface Condition **01 - Dry**		
On Road, Street, or Highway **SD HWY 1804**				Roadway Surface Type **01 - Concrete**		
At Intersection with **GREY GOOSE RD**				Roadway Align/Grade **06 - Curve on grade**		
Distance **0.5965**	Units **Miles/ Tenths**	Direction of **North**	MRM (milepost) **253.00**	Relation to Junction **02 - T - intersection**		
Distance	Units	Direction and	Distance	Units	Direction of	
Junction or Intersecting Street			Name of Junction, Road, Street, or Highway			

EXHIBIT
tabbies
A

UNIT 001						
Unit Type **01 - Motor vehicle in transport with driver**						Hit and Run **02 - No**
Driver's Name - Last **TRONVOLD**		First **GERRIT**		Middle **AARON JUSTUS**		
Address **135 DOVE RD**			Address (Line 2)			
City **PIERRE**	State **SD**		Zip **57501**	Date of Birth		Sex **1 - Male**
			Non - Motorist Location **96 - Not Applicable**			
Phone **6052952054**	DL State **SD**	DL Class **2**	Non - Motorist Action **96 - Not Applicable**			
DL Status **01 - Normal within restrictions**			Non - Motorist Contributing Circumstances (Up to Two) **96 - Not Applicable**			
Driver Contributing Circumstances (Up to Two) **01 - Failed to yield to vehicle**			Drug Use **00 - None used**		Drug Test **02 - Test not given**	
Vision Contributing Circumstance **08 - Motor vehicle (including load) not parked**			Alcohol Use **00 - None used**		Alcohol Test **00 - .00 NONE**	
Injury Status **05 - No Injury**			Ejection **00 - Not ejected**			
Saftey Equipment **00 - None used**			Citation Charge? **01 - Yes**			
Seating Position **01 - Operator**			Citation #1 **32-29-2.1 - FAIL TO STOP FOR STOP SIGN / YIELD AFTER STOP**			
Air Bag Deployed **00 - Not deployed**			Citation #2 **32-38-1 - ADULT SEATBELT VIOLATION --- AFTER 9/1/73**			
Transported To			Citation #3			
Source of Transport **00 - Not Transported**			Citation #4			
Is Driver the Owner **Yes**						
Owner's Name - Last **TRONVOLD**		First **GERRIT**		Middle **AARON JUSTUS**		
Address 135 DOVE RD			Address (Line 2)			
City **PIERRE**	State **SD**		Zip **57501**	Red Tag **A103681**		
Year **2002**	Make **Chevrolet - CHEV**		Model **SILVERADO**	VIN **1GCHK29U82E216263**		
License Plate # **NG5641**	State **SD**		Year **2016**	Estimated Travel Speed **55**	Speed - How Estimated? **02 - Driver Statement**	
Speed Limit **55**	Total Occupants **1**		Damage Extent **01 - Minor Damage**		Vehicle Towed **02 - No**	
Damage Amount (Vehicle and Contents) **3000**			Insurance Co. Name **25178 - STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY**			
Insurance Policy # **048-3576-D15-41**				Effective Date **04/15/2016**	Expiration Date **10/15/2016**	
Emergency Vehicle Use?			Vehicle Configuration **02 - SUV (sport utility/suburban)**			
Trailer Type **00 - No trailer/attachment**			Cargo Body Type **00 - No cargo body**			
Direction of Travel Before Crash **04 - Westbound**		Trailer LP # Attached to Power Unit		State	Year	
Initial Point of Impact **06 - Position 6**	Most Damaged Area **06 - Position 6**	Trailer 2 License Plate #		State	Year	
Underride/Override **00 - No underride or override**		Trailer 3 License Plate #		State	Year	
Traffic Control Device Type **04 - Stop sign**			Vehicle Contributing Circumstance **00 - None**			
Vehicle Maneuver **06 - Turning left**			Road Contributing Circumstance **00 - None**			
First Event **25 - Motor vehicle in transport**			Second Event			
Third Event			Fourth Event			

Most Harmful Event for this Vehicle **25 - Motor vehicle in transport**						
Does the accident involve one or more of the following: • a truck having a GCWR of 10,001 or more pounds; OR • a vehicle displaying a hazardous material placard; OR • a vehicle designed to transport 9 or more people, including driver			Did the accident result in one or more of the following: • a fatality; OR • an injury requiring transportation for immediate medical attention; OR • a vehicle was disabled requiring a towaway from the scene			
Accident Involved Vehicle - Purpose			Carrier Name			
Street Address			Street Address (Line 2)			
City	State	Zip	US DOT # **98**	GVWR	GCWR	
Hazardous Material Released?	Hazardous Material Content Code	Hazardous Material Class Code		Hazardous Materials Description		

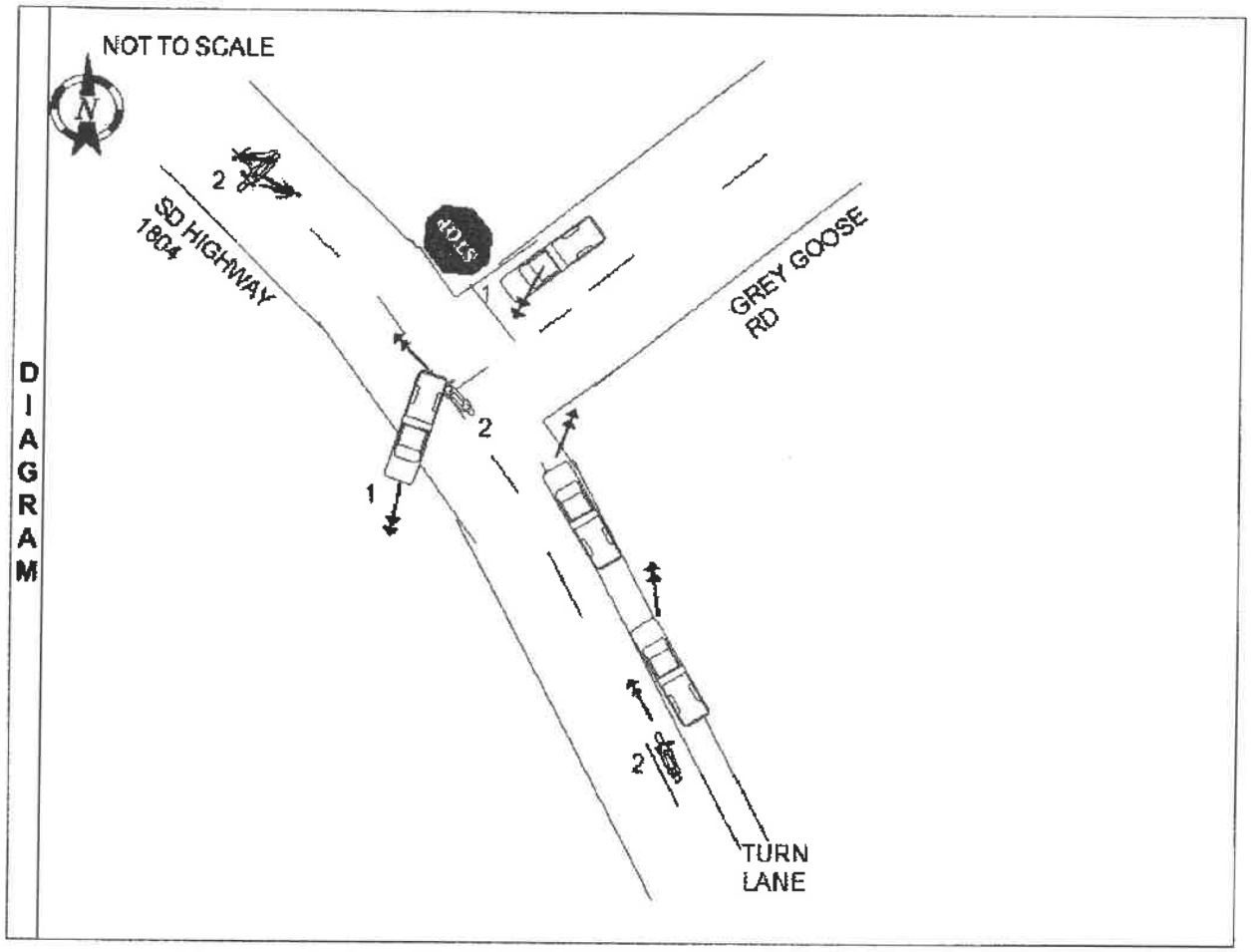
UNIT 002							
Unit Type **01 - Motor vehicle in transport with driver**						Hit and Run **02 - No**	
Driver's Name - Last **JURGENS**		First **RANDALL**		Middle **RAY**			
Address **317 N COVELL AVE**				Address (Line 2)			
City **SIOUX FALLS**		State **SD**		Zip **57104**	Date of Birth	Sex **1 - Male**	
				Non - Motorist Location **96 - Not Applicable**			
				Non - Motorist Action **96 - Not Applicable**			
Phone	DL State **SD**	DL Class **2**		Non - Motorist Contributing Circumstances (Up to Two) **96 - Not Applicable**			
DL Status **01 - Normal within restrictions**							
Driver Contributing Circumstances (Up to Two) **00 - None**				Drug Use **00 - None used**	Drug Test **03 - Test given, no drugs reported**		
Vision Contributing Circumstance **99 - Unknown**							
				Alcohol Use **01 - Alcohol used**	Alcohol Test **03 - .03 BAC**		
Injury Status **02 - Incapacitating injury**				Ejection **96 - Not Applicable (motorcycle, snowmobile, pedestrian, pedalcyclist, etc.)**			
Saftey Equipment **00 - None used**							
Seating Position **01 - Operator**				Citation Charge? **02 - No**			
Air Bag Deployed **96 - Not Applicable (motorcycle, snowmobile, pedestrian, pedalcycle, etc.)**				Citation #1			
				Citation #2			
Transported To **AVERA PIERRE/SIOUX FALLS**				Citation #3			
Source of Transport **01 - EMS**				Citation #4			
Is Driver the Owner **Yes**							
Owner's Name - Last **JURGENS**		First **RANDALL**		Middle **RAY**			
Address 317 N COVELL AVE				Address (Line 2)			
City **SIOUX FALLS**		State **SD**		Zip **57104**	Red Tag **A103683**		
Year **2009**	Make **Harley Davidson - HAR**	Model **FLSTC**		VIN **1HD1BW5179Y060924**			
License Plate # **M16161**		State **SD**	Year **2017**	Estimated Travel Speed **55**	Speed - How Estimated? **04 - Witness Statement**		
Speed Limit **55**	Total Occupants **2**		Damage Extent **03 - Disabling Damage**		Vehicle Towed **01 - Yes**		
Damage Amount (Vehicle and Contents) **5000**			Insurance Co. Name **19283 - AMERICAN STANDARD INS CO OF WI**				
Insurance Policy # **2322-6926-02**				Effective Date **06/11/2015**	Expiration Date **06/11/2016**		
Emergency Vehicle Use?			Vehicle Configuration **09 - Motorcycle**				
Trailer Type **00 - No trailer/attachment**			Cargo Body Type **00 - No cargo body**				
Direction of Travel Before Crash **01 - Northbound**		Trailer LP # Attached to Power Unit		State	Year		
Initial Point of Impact **12 - Position 12**	Most Damaged Area **12 - Position 12**	Trailer 2 License Plate #		State	Year		
Underride/Override **00 - No underride or override**		Trailer 3 License Plate #		State	Year		
Traffic Control Device Type **00 - No controls**			Vehicle Contributing Circumstance **00 - None**				
Vehicle Maneuver **01 - Straight ahead**			Road Contributing Circumstance **00 - None**				

	First Event **25 - Motor vehicle in transport**			Second Event		
	Third Event			Fourth Event		
	Most Harmful Event for this Vehicle **25 - Motor vehicle in transport**					
	Does the accident involve one or more of the following: • a truck having a GCWR of 10,001 or more pounds; OR • a vehicle displaying a hazardous material placard; OR • a vehicle designed to transport 9 or more people, including driver			☐ Did the accident result in one or more of the following: • a fatality; OR • an injury requiring transportation for immediate medical attention; OR • a vehicle was disabled requiring a towaway from the scene		
	Accident Involved Vehicle - Purpose			Carrier Name		
	Street Address			Street Address (Line 2)		
	City	State	Zip	US DOT # **98**	GVWR	GCWR
	Hazardous Material Released?	Hazardous Material Content Code	Hazardous Material Class Code	Hazardous Materials Description		

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

DAMAGED	OBJECT	Damaged Object (Property Other Than Vehicles)		Estimate of Damage
		Owner's Full Name - Last	First Name	Middle Name
		Address	Address (Line 2)	
		City	State	Zip

INJURED	PERSON	Unit # **2**	Last Name **TAMMEN**	First Name **LISA**		Middle Name
		Address **614 W DAKOTA #8**		Address (Line 2)		
		City **PIERRE**	State **SD**	Zip **57501**	Date of Birth	Sex **2 - Female**
		Injury Status **02 - Incapacitating injury**		Ejection **96 - Not Applicable (motorcycle, snowmobile, pedestrian, pedalcyclist, etc.)**		
		Seating Position **17 - Motorcycle passenger**		Safety Equipment **00 - None used**		
		Air Bag Deployed **96 - Not Applicable (motorcycle, snowmobile, pedestrian, pedalcycle, etc.)**		Source of Transport **01 - EMS**		
		Transported to **AVERA PIERRE/SIOUX FALLS**		EMS Trip # **16-1007**		



NARRATIVE
UNIT 1 WAS APPROACHING THE INTERSECTION OF GREY GOOSE RD AND SD HIGHWAY 1804. UNIT 1 DRIVER STATED THAT UNIT 1 OBSERVED VEHICLES SIGNALLING TO MAKE A RIGHT-TURN ONTO GREY GOOSE RD FROM SD 1804. UNIT 1 CONTINUED WITH HIS INTENTIONS TO MAKE A LEFT-TURN ONTO SD 1804. UNIT 1 DRIVER STATED THAT WHILE ALREADY ON 1804, UNIT 1 DRIVER OBSERVED UNIT 2 APPROACHING. UNIT 1 ATTEMPTED TO DRIVE STRAIGHT INTO THE DITCH IN AVOIDANCE, AS UNIT 2 ATTEMPTED TO BRAKE. UNIT 2 STRUCK UNIT 1'S REAR BUMPER. AFTER STRIKING UNIT 1'S BUMPER, UNIT 2 CONTINUED MOVING AS IT EVENTUALLY SLID TO A STOP. UNIT 2 DRIVER AND PASSENGER REMAINED WITH THE BIKE AS IT SLID TO A STOP AND SUSTAINED HEAVY LIFE-THREATENING INJURIES. UNIT 1 DRIVER DID NOT SUSTAIN ANY INJURIES. UNIT 2 DRIVER AND PASSENGER WERE NOT WEARING ANY PROTECTIVE GEAR. UNIT 2 DRIVER AND PASSENGER WERE AIR-LIFTED TO SIOUX FALLS AND BROUGHT TO AVERA MCKENNAN. UNIT 1 WAS CITED FOR A STOP SIGN VIOLATION AND NOT WEARING A SEATBELT.

WITNESS				
	Last Name **ALBERTSON**	First Name **KEITH**		Middle Name **FLETCHER**
	Address **520 N CENTRAL AVE**			
	Address (Line 2)			
	City **PIERRE**	State **SD**	Zip **57501**	Phone #

Date Notified **08/01/2016**	Time Notified **18:06** Hrs.	Date Arrived **08/01/2016**	Time Arrived **18:16** Hrs.
Agency Type **01 - Highway patrol**	Investigation Made at Scene? **01 - Yes**	Photos Taken? **Y**	Date Approved **08/15/2016**
Approval Officer	Last Name **STAHL**	First Name **JON**	Middle Name

P16-848

State of South Dakota

COMPLAINT

OFFICIAL USE ONLY OF THE MAGISTRATE COURT

State of South Dakota
County of Hughes
Vs. TRONVOLD

Judicial Circuit 6th
Incident #

UNIFORM COMPLAINT – SUMMONS

THE UNDERSIGNED OFFICER COMPLAINS AND STATES THAT No. B150414-HP

On or About	At or Near (Location/Milepost)	Intersection	At Time
08/01/2016	MM 253 SD 1804		19:12

City Limits of | Lat | Long

WITHIN THE COUNTY AND STATE AFORESAID

Name (Last, First, Middle)	Sex	Weight	Height
TRONVOLD, GERRIT AARON JUSTUS	M	180	5'09"

Address	Eyes	Hair
135 DOVE RD	HAZ	BRO

City / State / Zip	Telephone	Date of Birth
PIERRE, SD 575016131	(605) 295-2054	10/04/1995

Driver's License Number	State
01336159	SD

Did Unlawfully: ■ Operate ☐ Passenger ☐ Other
Vehicle Year / Make / Model / Style / Color: 2002 Chevrolet SILVERADO Pickup Dk Grey

No ☐ License	Vehicle License No.	Type	State	Ins	VIN (No License Plate)
	NG5641	NG	SD	Yes	1GCHK29U82E216253

Trailer License No.	Trailer Make	State

AND THEN AND THERE COMMITTED THE FOLLOWING OFFENSE(S) TO WIT

In Violation of ■ SDCL
Return Required ☐ PBT:

Code	Description	Amount
32-29-2.1	Stop Sign Violation	$ 120.00
32-38-1	Seatbelts-Fail to Use Seatbelts	$ 25.00
		$
	TOTAL	$ 145.00

Comments

Speeding ☐ Interstate ☐ Municipal ☐ Other ☐ Lidar ☐ Pace ☐ School Zone ☐ Construction
Lidar Ft. 0 Actual 0 M.P.H. 0 M.P.H. Zone 0

☐ Haz Mat Vehicle ☐ Commercial Vehicle ☐ 16 PAS ☐ CDL ■ Accident ☐ DUI	HP #	Emp. ID	Officer Issuing Summons
	132		O'Neill, Zach

Above Complaint is True and I Verify Believe
Officer Sign in Presence of Court or Notary — Date: 8/4/16

Subscribed and Sworn to Me This Date (Name and Title)
Tracy Nast Deputy — 8-4-16

☐ CASH RECEIVED BY OFFICER
■ POWER OF ATTORNEY
☐ COURT APPEARANCE REQUIRED

At (Time)	Court Date
09:00	09/19/2016

Court Address
HUGHES COUNTY CLERK OF COURTS
PO BOX 1238
PIERRE, SD 57501-1238
(605) 773-3713
(Pay Fines at Clerk of Courts or Online)

Parents (If Juvenile)
Parent First Name
Parent Last Name

CITATION INFORMATION

PETTY OFFENSES: If charged with a petty offense involving the operation and use of a motor vehicle, and you possess or have proof of a valid South Dakota driver's license, you may choose alternative 1, 2, 3 below. If unable to meet the license requirement, or if charged with a non-traffic offense, you may choose alternative 2 or 3 below. Upon refusal of the following alternatives, you will be taken immediately to a magistrate for hearing.

1. Promise to Appear. You may sign the complaint as a written promise to appear. Intentional failure to appear is a Class 2 Misdemeanor.
2. Admission and Deposit. You may sign a stipulation admitting allegations in the complaint which, together with the required deposit, will be filed with the clerk of courts.
3. Deposit. You may immediately mail said deposit to the clerk of courts or personally make the deposit, either alternative to be in the presence of the officer. Refer to schedule of petty offenses for amount required for the deposit.

If you chose alternative 2 or 3 and do not appear in court on the date specified, the clerk will enter judgment against you and will forfeit your deposit. You may appear in court after signing an admission and the court may, upon motion, relieve you from the stipulation and effects thereof.

Mail to: HUGHES COUNTY CLERK OF COURTS
PO BOX 1238
PIERRE, SD 57501-1238

If you intend to appear in court to contest this citation, it is recommended that you contact the Clerk of Courts Office listed on the citation before the indicated court date.

POWER OF ATTORNEY

I hereby deposit with the Clerk of Courts of Hughes County, South Dakota as a cash appearance bond the sum of $ 145.00. If desired to contest this matter, I will appear at the date, time and place for my initial appearance or contact the Clerk of Courts before that date and ask the clerk to reschedule the date for my initial appearance. If I do not appear (or contact the clerk of courts within the time period or if after the court date is set, I fail to appear). I hereby plead guilty to the charge and direct the Clerk to apply the money deposited as bond herewith to the payment of the fine and cost assessed against me.

I have read this document and have been given a copy.

B150414-HP

Signed _____ 8-1-16
Defendant Date

Save Time. Pay Online.
Visit HTTPS://UJSPORTAL.SD.GOV/PORTAL

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO
FILED
AUG 04 2016
Clerk
By _____ Deputy

Application Of

PIERRE VOLUNTEER FIRE DEPARTMENT

For an Extension of its Corporation Charter

Pierre Volunteer Fire Department a corporation organized and existing under the laws of the State of South Dakota, incorporated on the 2nd day of Dec., 1925 for the period of 25 years, hereby makes application to the Secretary of State of the State of South Dakota for an extension of its term of existence for a further term of Perpetual ~~years~~

IN TESTIMONY WHEREOF, the undersigned, comprising a majority of the Board of Directors of the above named corporation, have hereunto set their hands and seals; after being authorized to do so by the stockholders or the members of said corporation, pursuant to motion or resolution adopted at the annual meeting or special (state which) meeting called and noticed for that purpose, held at Pierre South Dakota, on the 7th day of December, A.D. 66

Attached hereto and made part hereof is the statement required by law, duly verified.

DIRECTORS

Thomas H. Brady

Louis Harding

Richard Singer

Maynard Thompson

John Woods

State of South Dakota
County of Hughes } ss.

BE IT REMEMBERED, That on this 29th day of December A. D. 1966 before me a notary public within and for said county and state, personally appeared Thomas H. Brady, Louis Harding, Richard Singer, Maynard Thompson and John Woods to me personally known to be directors of the Pierre Volunteer Fire Department a corporation, and the persons who are described in and who executed the foregoing application and duly and severally acknowledged to me that they executed the same.

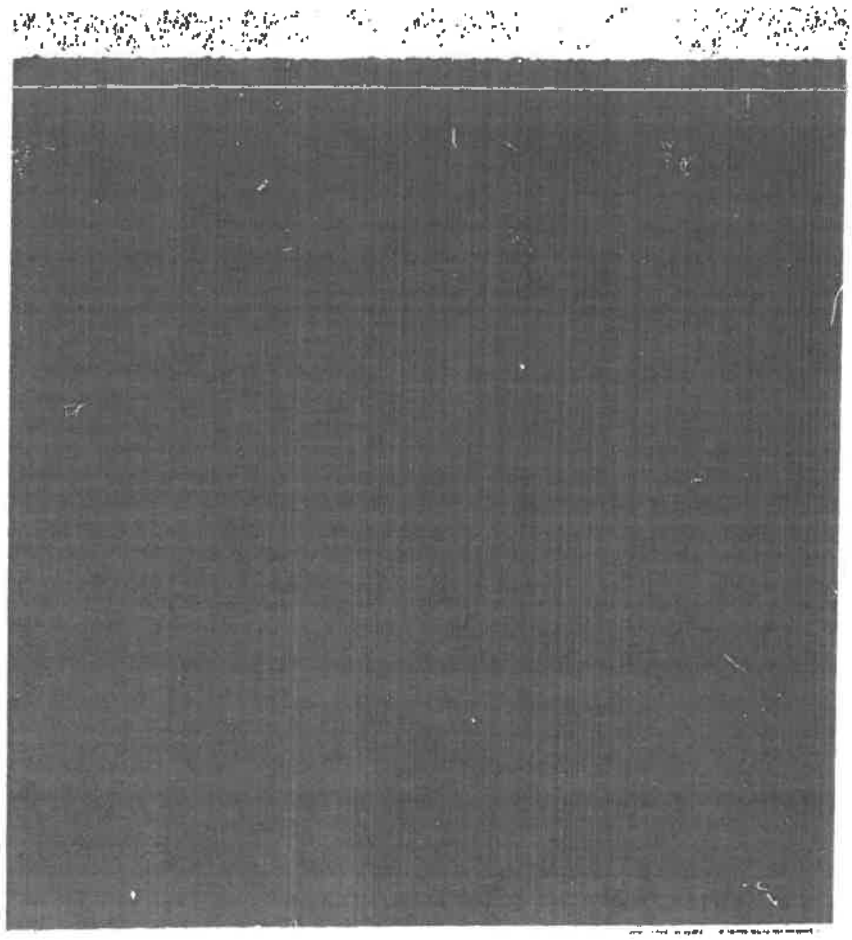
WITNESS my hand and notarial seal the day and year last above written.

Notary Public

Hughes County South Dakota

My commission expires 12-29-66

EXHIBIT
Court
A-K 2
7-10-18 BM



IN THE MATTER OF THE APPLICATION OF

PIERRE VOLUNTEER FIRE DEPARTMENT

FOR AN EXTENSION OF ITS CORPORATION CHARTER

State of South Dakota
County of Hughes } ss.

Thomas H. Brady, Chief [illegible] of the _____ and

John Woods, Secretary of the _____

each being severally duly and solemnly sworn upon his oath states that the statement hereto attached marked exhibit "A" and made a part hereof, is a true statement of the assets and liabilities of the Pierre Volunteer Fire Department of the nature of its business, of the number of its shares of stock issued and outstanding, of the number of its shares of stock subscribed and not issued, and the name and postoffice address of each stockholder, and of the number of shares owned by each, and of the names and postoffice addresses of each and all of its directors.

Thomas H. Brady
President

John Woods
Secretary

Subscribed and sworn to before me this 29th day of [illegible] A. D. 1944.

Edward A. Hafer
Notary Public Hughes County, South Dakota

[redacted]

EXHIBIT "A"
FINANCIAL STATEMENT AND NATURE
OF BUSINESS

This Corporation is a part of the Governmental Functions of the City of Pierre, South Dakota and as such has no independent finances and has no stockholders. The Nature of its business is the prevention and suppression of fires within the City of Pierre.

Number of shares of stock issued and outstanding _____

Number of shares of stock subscribed and not issued _____

Name and postoffice address of directors:

Names	Address
NONE	

STATE OF SOUTH DAKOTA COUNTY OF HUGHES	) : SS)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT

LISA A. TAMMEN and RANDALL R. JURGENS, Plaintiffs, vs. GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally Defendants.	32CIV17-000042 **SUMMARY JUDGMENT**

Defendants, City of Pierre, a South Dakota Municipal Corporation, and Pierre Volunteer Fire Department, a South Dakota nonprofit corporation (collectively referred to herein as Defendants), having moved for summary judgment, pursuant to SDCL § 15-6-56; and the Court having held a hearing on the motions on Wednesday, June 12, 2019; and the Court having considered all of the records and files herein; and the Court having further considered the arguments of counsel and the briefs that have been submitted; and the Court having issued its memorandum opinion dated August 8, 2019; it is hereby

ORDERED, ADJUDGED AND DECREED that the Motions of Defendants for summary judgment be, and hereby is, GRANTED. It is further

ORDERED, ADJUDGED AND DECREED that the Complaint of Plaintiffs Lisa A. Tammen and Randall R. Jurgens, as against Defendants City of Pierre, a South Dakota Municipal Corporation, and Pierre Volunteer Fire Department, a South Dakota nonprofit corporation, be, and it is hereby, dismissed, on the merits, with prejudice, and that Defendants

are entitled to a recovery of their taxable disbursements to be assessed by the Clerk, pursuant to SDCL §§ 15-17-37 and 15-6-54(d).

Dated this 13 day of August, 2019.

BY THE COURT:

Honorable Thomas L. Trimble
Circuit Court Judge, Retired

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NOS. 29114 AND 29138

LISA A. TAMMEN,
Plaintiff and Appellant,

and

RANDALL R. JURGENS,
Plaintiff and Appellee,

-vs-

GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally,
Defendants and Appellees.

****

LISA A. TAMMEN,
Plaintiff and Appellee,

and

RANDALL R. JURGENS,
Plaintiff and Appellant

-vs-

GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally,
Defendants and Appellees.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE THOMAS L. TRIMBLE,
CIRCUIT COURT JUDGE, RETIRED

BRIEF OF APPELLEE CITY OF PIERRE,
a South Dakota Municipal Corporation

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Attorneys for Plaintiff and Appellant Randall R. Jurgens

JURGENS NOTICE OF APPEAL FILED SEPTEMBER 23, 2019
TAMMEN NOTICE OF APPEAL FILED SEPTEMBER 3, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED: Page No.

STATUTES CITED:

OTHER AUTHORITIES

PRELIMINARY STATEMENT

Appellee, the City of Pierre, a South Dakota Municipal Corporation, will utilize the following references throughout this brief:

- Citations to the certified record will be referred to as "R." followed by the applicable page number(s) in the Clerk's Index.
- Appellants Lisa A. Tammen and Randall R. Jurgens may be referred to collectively as "Plaintiffs" and may be referred to separately as "Tammen" and "Jurgens."
- Appellees may be collectively referred to as "Defendants" and may also be referred to separately as "City of Pierre" and "PVFD" referring to the City of Pierre, as South Dakota Municipal Corporation, and the Pierre Volunteer Fire Department, respectively.
- Defendant Gerrit A. Tronvold will be referred to as "Tronvold."
- References made to Plaintiff Tammen's Appendix are "Tammen App." followed by the applicable page number(s).
- References to Plaintiff Jurgens' Appendix are "Jurgens App." followed by the applicable page number(s).
- References to the City of Pierre's Appendix are "Pierre App." followed by the applicable page number(s).

JURISDICTIONAL STATEMENT

The Appellants appeal the Order Granting City of Pierre's Motion for Summary Judgment and Granting Pierre Volunteer Fire Department's Motion for Summary

Judgment, dated August 8, 2019. R. 1002-11. Subsequently, an Amended Judgment was entered on August 26, 2019, granting summary judgment and directing entry of final judgment pursuant to SDCL § 15-6-54(b) on all claims brought by Appellants concerning the City of Pierre and the Pierre Volunteer Fire Department. R. 1016-19. A Notice of Entry of Judgment was filed on August 27, 2019. R. 1020-25. Jurgens filed a Notice of Appeal on September 23, 2019. R. 1059-61. Tammen filed a Notice of Appeal on September 3, 2019. R. 1026-28.

STATEMENT OF LEGAL ISSUES

Issue 1. WHETHER THE COMING AND GOING RULE DEEMS TRONVOLD WAS OUTSIDE THE SCOPE OF EMPLOYMENT AT THE TIME OF THE COLLISION?

The coming and going rule precludes *respondeat superior* liability of the City of Pierre. Tronvold was engaged in an ordinary commute and was not subject to any exception to the rule. Tronvold was not subject to the control of the City of Pierre at the time of the motor vehicle accident and was commuting to a regularly scheduled monthly training meeting.

Authority: *Mudlin v. Hills Materials Co.*, 2005 SD 64, P8

Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 479 (1947)

Carnes v. Phoenix Newspapers, Inc., 251 P.3d 411, 415-416 (Az. 2011)

Jorge v. Culinary Institute of America, 3 Cal. App. 5th 382, 406 (2016)

Issue 2. WHETHER THE CIRCUIT COURT CORRECTLY HELD THERE WAS NO LIABILITY COVERAGE PURSUANT TO THE CITY OF PIERRE'S COVERAGE AGREEMENT?

The express language of the coverage agreement between the City of Pierre and the South Dakota Pubic Assurance Alliance precludes liability coverage pursuant to the coverage agreement. Due to the lack of liability coverage the City of Pierre has governmental immunity pursuant to Article III of the South Dakota Constitution and SDCL § 21-32A-3. Although Tronvold was a member of the Pierre Volunteer Fire Department, he was not taking part in his official duties or serving in an official capacity at the time of his motor vehicle accident.

Authority:

Ass Kickin' Ranch, LLC v. North Star Mutual Ins. Co., 2012 S.D. 73

Cromwell v. Rapid City Police Department, 2001 S.D. 100

American Family Mut. Ins. v. Elliot, 523 N.W.2d 100, 102 (S.D. 1994)

STATEMENT OF THE CASE

This matter involves a personal injury action commenced by two plaintiffs who suffered significant injuries when occupying a motorcycle that was in a motor vehicle accident with a pickup driven by Gerrit A. Tronvold on August 2, 2016. Although severe injuries were sustained the present collision is not unique or particularly remarkable.

The original Complaint named Defendant Tronvold only and was filed on February 8, 2017. A First Amended Complaint alleging *respondeat superior* and vicarious liability of the City of Pierre and Pierre Volunteer Fire Department was filed September 26, 2017. After commencing suit and determining there was what they perceived to be insufficient insurance coverage for Tronvold, Tammen and Jurgens sought out deeper pockets and a dramatic expansion of the current state of *respondeat*

superior and vicarious liability law by targeting the City of Pierre and the Pierre Volunteer Fire Department. The City and Fire Department both denied liability since Tronvold was not subject to their control at the time of the motor vehicle accident and was engaged in an ordinary commute.

The City and Fire Department filed motions for summary judgment since there are no genuine disputed issues of material fact. Both the City and Fire Department maintain that Tronvold's commute was ordinary, scheduled, and there were no unique factors to his commute that would take Tronvold outside of South Dakota's well-established precedent that an ordinary commute is not within the scope of employment. The trial court agreed. Further, the City and Fire Department both argued that as a separate, independent basis for summary judgment, the governmental immunity of each entity was applicable and had not been waived.

The trial court granted summary judgment for the aforementioned reasons in favor of both the City of Pierre and the Pierre Volunteer Fire Department. Pursuant to a stipulation of all parties, the trial court entered an Amended Judgment certifying the summary judgment as a final judgment pursuant to SDCL § 15-6-54(b). Tammen and Jurgens now appeal.

STATEMENT OF THE FACTS

On August 1, 2016, Jurgens and Tammen were riding a motorcycle operated by Jurgens generally northbound on South Dakota Highway 1804. At approximately 6:00 p.m. on the same date, Tronvold was driving his personally owned vehicle, a 2002 Chevrolet Silverado K2500 extended cab pickup, south on Grey Goose Road

toward Grey Goose Road's intersection with South Dakota Highway 1804. Traffic turning from Highway 1804 onto Grey Goose Road obscured Tronvold's view of oncoming traffic onto Highway 1804 and he executed a left-hand turn to travel generally southbound on South Dakota Highway 1804 in front of the motorcycle occupied by Jurgens and Tammen. The motorcycle and pickup collided causing significant injuries to both Jurgens and Tammen. The motor vehicle accident was reported to emergency personnel at 6:06 p.m.

On the date of the motor vehicle accident, Tronvold was a member of the Pierre Volunteer Fire Department and was traveling to a regularly scheduled monthly training meeting of his fire engine company. The regularly scheduled training meeting was set to commence at 6:30 p.m. Tronvold was traveling from his residence to his engine company's fire station located at 721 North Poplar Avenue in Pierre, a distance of approximately seven road miles.

At the time of the motor vehicle accident Tronvold was not undertaking any special duty, task, or other objective on behalf of the Pierre Volunteer Fire Department. He was engaged in what can only classified as an ordinary commute to a regularly scheduled meeting.

The Pierre Volunteer Fire Department (hereinafter "PVFD") is a South Dakota nonprofit corporation organized independently of the City of Pierre. The City of Pierre (hereinafter "City") is a South Dakota municipality organized under the statutory framework authorized by the laws of the State of South Dakota. The City of Pierre provides most of the funding for the PVFD and employs a full-time fire chief and

maintenance worker. The PVFD self-governs through the election of officers by its members. During his commute on August 1, 2016, Tronvold was not undertaking any action on behalf of the City or the PVFD. He was not responding to a call for service or other emergency. Tronvold was commuting to a regularly scheduled monthly training. The training schedule of August 1, 2016, was led by members of the PVFD, organized by members of the PVFD, scheduled by members of the PVFD and was not controlled by the City in any way.

STANDARD OF REVIEW

This Court has consistently held "[u]nder our familiar standard of review in summary judgment cases, we decide only whether genuine issues of material fact exist and whether the law was correctly applied." *Zephier v. Catholic Diocese of Sioux Falls*, 2008 SD 56, ¶6, 752 N.W.2d 658; *One Star v. Sisters of St. Francis*, 2008 SD 55, 752 N.W.2d 668; *Bordeaux v. Shannon County Sch.*, 2005 SD 117, 707 N.W.2d 123. In reviewing insurance contracts, the Supreme Court has routinely applied the de novo standard of review. *See De Smet Ins. Co. v. Gibson*, 1996 SD 102 ¶5, 552 N.W.2d 98, 99; *Economic Aero Club, Inc. v. Avemco Ins. Co.*, 540 N.W.2d 644, 645 (SD 1995).

This Court has also stated "our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied. If there exists any basis which supports the ruling of the trial court, affirmance of the summary judgment is proper." *Gasper v. Freidel*, 450 N.W.2d 226, 228 (S.D. 1990) citing *Weatherwax v. Hiland Potato Chip Co.*, 372 N.W.2d 118, 120 (S.D. 1985).

ARGUMENTS AND AUTHORITY

I. WHETHER THE COMING AND GOING RULE DEEMS TRONVOLD WAS OUTSIDE THE SCOPE OF EMPLOYMENT AT THE TIME OF THE COLLISION?

Respondeat superior is "a legal fiction designed to bypass impecunious individual tort-feasors for the deep pocket of a vicarious tort-feasor." *See Bass v. Happy West, Inc.*, 507 N.W.2d 317, 320 (SD 1993). This is precisely the design of the Appellants in the present action, target these appellees by exceeding the recognized limits of *respondeat superior* liability. Under the doctrine of *respondeat superior*, an employer or principal may be held liable for "the employee's or agent's wrongful acts committed within the scope of the employment or agency." *Bernie v. Catholic Diocese of Sioux Falls*, 2012 SD 63, ¶ 8 (citing *Hass v. Wentzlaff*, 2012 SD 50, ¶ 20).

This Court has also characterized *respondeat superior* as being "universally recognized that a master is liable for injuries to the person or property of third persons caused by the negligence of his employee when such negligence occurs within the scope of his employment." *See Deuchar v. Foland Ranch, Inc.*, 410 N.W.2d 177, 180 (1987). Notably, the phrase "within the scope of employment" has been "called vague but flexible, referring to 'those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment.'" *Id.* citing Prosser and Keeton on the Law of Torts Section 70, p. 502.

This Court has recognized that the general rule in South Dakota is that a commute is not within the scope of employment. *See Mudlin v. Hills Materials Co.*, 2005 SD 64,

P8. The Supreme Court of the United States has explained that the risks posed by the standard commute do not relate to or arise out of the employment agency relationship but "rather they arise out of the ordinary hazards of the journey, hazards which are faced by all travelers and which are unrelated to the employer's business." *Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 479 (1947).

Appellee City of Pierre does not concede that Tronvold was a gratuitous employee and contends that that question very much remains in doubt. However, given the applicable summary judgment standard, the City of Pierre has presumed for purposes of this brief and the underlying motion for summary judgment that in light of the summary judgment standard, Tronvold may be considered a gratuitous employee and Appellees remain entitled to affirmation of the Court's order granting summary judgment.

a. WORKERS' COMPENSATION EXCEPTIONS TO THE GOING AND COMING RULE ARE INAPPLICABLE IN TORT CASES

The Appellants attempt to invoke exceptions to the going and coming rule without acknowledging the inapplicability of those exceptions in tort liability cases. The justification for workers compensation was to provide faultless protection to workers injured on the job. Tort liability relies upon the breach of a duty. The workers compensation scope of employment precedent is useful in the sense that conduct excluded from being within the scope of employment for workers compensation is necessarily excluded in the tort concept as workers compensation is construed broadly, for the benefit of the injured worker. This is why exceptions to the workers compensation

coming and going rule have not been applied in the tort concept, the purposes are disparate.

In a very similar case, the Colorado Court of Appeals held:

> Extending liability to defendant in this circumstance, in the form of an exception to the going and coming rule, would not prove the purposes of the doctrine of *respondeat superior*. While the employee may have used his own car to do his job, there is no evidence the employee was engaged in any act connected to his work or furthering defendant's interests at the time of the crash.

Stokes v. Denver Newspaper Agency, LLP, 159 P.3d 691, 696 (Co. Ct. of App. 2006). Applying broad exceptions meant to further the policies of workers' compensation law to *respondeat superior* claims can be dangerous and misguided. As Colorado's precedent explains,

> Applying cases furthering the policies of Colorado's workers' compensation law to *respondeat superior* claims would expand an employer's liability to third parties significantly, creating a form of portal-to-portal responsibility. This result is inconsistent with the basic concept of enterprise liability, which limits *respondeat superior* liability to negligent acts committed in the furtherance of the employer's business, because driving to and from work, even the personal vehicle used for it, does little to serve the employer's purposes, aside from delivering the employee and the vehicle to the work site.

Id. at 695. Numerous courts from other jurisdictions have reached similar conclusions. *See, Freeman v. Manpower, Inc.*, 453 So.2d 208 (Florida District Court of Appeals 1994); *Beard v. Seamon*, 175 So.2d 671 (La. Ct. App. 1965); *Oaks v. Connors*, 339 Md. 24, 660 A.2d 423 (1995); *Heide v. T.C.I., Inc.*, 264 Or. 535, 506 P.2d 486 (1973); *Whitehead v. Variable Annuity Life Ins. Co.*, 801 P.2d 934 (Utah 1989). To fall within the scope of employment, the act must be so crucial and incidental to the employment that it is foreseeable. *Kirlin v. Halverson*, 2008 SD 107, P11-14. As nearly every court

from the Supreme Court of the United States to the South Dakota Supreme Court has held, a commute is not a foreseeable risk that falls within the scope of employment. *See Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 479 (1947).

An overwhelming majority of state courts have also applied the general rule that an employer will not be vicariously liable for an accident that occurs while an employee is driving to or from work within the tort context. *See generally, Karnes v. Phoenix Newspapers, Inc.*, 227 Ariz. 32, 37-38 (Arizona Appeals 2011).

b. THE REQUIRED VEHICLE EXCEPTION IS INAPPLICABLE

Both Jurgens and Tammen attempt to rely on the required vehicle exception as somehow taking Tronvold's motor vehicle accident outside the normal preclusion of the going and coming rule. Not only was Tronvold's vehicle not required, it served no purpose after he arrived at the fire station, the location he was travelling to when the subject motor vehicle accident occurred. Upon arriving at the fire station, Tronvold would crew his assigned fire engine if an emergency arose. The entire basis of appellants' required vehicle exception argument is predicated on a hypothetical that did not exist here.

Further, Appellants rely on *Pickrel v. Martin Beach, Inc.*, 80 SD 376, 124 N.W.2d 182 (1963), for a point of law that the case does not embody. The Appellants also ignore the fact that *Pickrel* was distinguished and clarified by *South Dakota Pub. Entity Pool for Liab. v. Winger*, 1997 SD 77, P19. *Winger* explained that in *Pickrel* we noted compensation is recoverable "to an outside employee who is injured while being transported to or from work in a mode or means of transportation furnished by the

employer as an integral part of the contract of employment." *Id*. The facts in *Pickrel* bear no resemblance to those at hand.

The favored position in most jurisdictions is to avoid applying exceptions to the going and coming rule in tort cases. This is important and significant because the justification for liability in *respondeat superior* tort cases and workers' compensation cases involve entirely distinct considerations. *See generally Taylor v. Pate*, 859 P.2d 1124, 1125-26 (Ok. 1993). Oklahoma courts have rejected exceptions to the going and coming rule in *respondeat superior* liability cases stating:

> This is a complete non sequitur. The liability of an employer to pay workmen's compensation to an injured employee, and the liability of any employer to a third person on the doctrine of *respondeat superior*, depend upon entirely distinct considerations. Similarly, Arizona has adopted the going and coming rule and the general approach that employers are not responsible for the negligent acts of employees in an ordinary commute.

See generally Carnes v. Phoenix Newspapers, Inc., 251 P.3d 411, 415-416 (Az. 2011).

The required vehicle exception is known historically as the "employee's own conveyance rule." *See Id*. In explaining why exclusions to the going and coming rule are inappropriate in tort cases, the Arizona courts have held:

> Because of the differences between workers' compensation and the tort system, we are not persuaded by workers' compensation principles that the employee's own conveyance rule should be applied as an exception to the going and coming rule in tort actions. We also conclude that the employee's own conveyance rule is inconsistent with Arizona law regarding the termination of *respondeat superior* liability when an employee has an accident driving to or from work. The going and coming rule recognizes that employers generally do not have control or the right of control over their employees traveling to and from their work. To adopt the employee's own conveyance rule to *respondeat superior* determinations would alter Arizona law by eviscerating the importance of control or right of control and over emphasizing the importance of the benefit to the employer. Application of the rule would result in the

> explanation of employer's liability – inconsistent with present Arizona law – and make the employers responsible for their employees' actions even when the employers have no control or right of control over the employees.

Id. at 416. This is consistent with South Dakota's concepts of *respondeat superior* liability and the substantial difference between the justifications for workers compensation and tort law.

In contrast to Appellants' argument, California has also cautioned against using workers' compensation exceptions in *respondeat superior* cases. "We are mindful of the fact that Le Febvre is a workers' compensation case. "In the 'going and coming' cases, the California courts often cite tort and workers' compensation cases interchangeably. As Mr. Witkin points out, however, 'This practice has been questioned, for compensation rules were developed from a distinct social philosophy, with fault eliminated as a test, and liberal construction of the act required.'" *Henderson v. Adia Servs.*, 182 Cal. App. 3d 1069, 1077-1078 (1986).

South Dakota has similarly clarified that while workers' compensation's "arising out of the course of employment" is construed liberally, vicarious liability within the context of *respondeat superior* claims are construed narrowly, mandating the action must be within the scope of employment and so crucial and incidental to the employment that it is foreseeable. Contrast *Mudlin v. Hills Materials Co.*, 2005 SD 64, P7-9; *Kirlin v. Halverson*, 2008 SD 107, P11-14.

Florida has explicitly rejected the concept in holding:

> an employer is, of course, liable to third parties for injury or damage caused by negligence of his employee when committed within the scope of his employment. Nevertheless, it is equally well-settled that an

> employee driving to or from work is not within the scope of employment so as to impose liability on the employer. And this is true even though the vehicle was used in the work and partly maintained by the employer.

Freeman v. Manpower, Inc., 453 So.2d 208, 209 (Fla. 1994).

The Maryland Court of Appeals has also explained why an employee on his commute is not within the scope of employment:

> [The employer] exerted no control over the method or means by which Oaks operated his vehicle. It did not supply or pay for the vehicle that Oaks used or for its maintenance, fuel, or repair. It also did not specify the type of vehicle to be used or the route to be taken to or from the [employment] facility. Finally, the use of an automobile was not of such vital importance in furthering [employer]'s business that [employer]'s control over it, as Oaks commuted to work, can reasonably be inferred.

Oaks v. Connors, 660 A.2d 423, 427 (Md. 1995) (explaining even though the employee was transporting the vehicle that employer required him to have for use in the course of his employment such did not invoke *respondeat superior* principles for purposes of tort liability, which differ from workers' compensation principles). The Maryland court explained:

> The 'right to control' concept is key to a *respondeat superior* analysis in the motor vehicle context. The doctrine may only be successfully invoked when an employer has either 'expressly or impliedly, authorized the servant to use his personal vehicle in the execution of his duties, and the employee is in fact engaged in such endeavors at the time of the accident.'

Id. at 426-427. As explained by the Maryland court, "driving to and from work is generally not considered to be the within the scope of a servant's employment because getting to work is the employee's own responsibility and normally does not involve advancing the employer's interest." *Id.* at 427. Thus, as applied to South Dakota law concerning *respondeat superior*, the commute driving to and from work by Tronvold is

not within the "scope of employment or agency." The commute is not "so closely connected with what the servant is employed to do, and so thoroughly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of employment." *See generally Kirlin v. Halverson*, 2008 S.D. 107, p12. Here, Tronvold was simply traveling on an ordinary commute and had some of his personal protective gear that did not require any special conveyance and was simply in a bag in his back seat. Fire Chief Ian Paul explained the ability of volunteer fireman to have reliable transportation was important but they did not mandate a particular conveyance.

In explaining a similar issue, the Louisiana Court of Appeals explained:

> [It] is manifest that in all cases one can travel faster and arrive at his destinations quicker by bicycle or automobile than on foot. If this alone established liability the employer would always be responsible. Something more is required, some distinguishing fact establishing that under the peculiar facts of employment the business interest is directly benefitted. For example, when an employee works for another at a given place of employment, and lives at home or boards himself, it is the business of the employee to present himself at the place of employment, and the relation of master and servant does not exist when he is going between his home and his place of employment.

Beard v. Seamon, 175 So.2d 671, 675 (La. 1965). Prior to the time that work "had actually commenced" the employee is not within the scope of his employment. *Id*. As recognized by the Louisiana court, if this court would accept Plaintiffs' arguments concerning *respondeat superior* liability it would rewrite agency law in South Dakota. It would create an unending stream of liability for any employer and as simply stated by the Louisiana court, "[employee] in driving his own automobile to the place of business of his employer under the circumstances shown here, was not acting within the scope of his

employment. If he was so acting, then every employee in going to work should also be held to be acting within the scope of his employment." *Id.* It must be recognized here that Plaintiffs do not seek to invoke minor exceptions to recognized case law, they seek to create broad and sweeping change to the existing agency law in South Dakota. They seek to rewrite South Dakota's agency law not because of policy or law requires it, but because Plaintiffs' own interest would be advanced in locating additional insurance coverage, nothing more and nothing less.

As contemplated by *Hass v. Wentzlaff*, 2012 S.D. 50, p28, *respondeat superior* liability in South Dakota is flexible and amorphous but relies upon a foreseeability standard. That foreseeability "includes a range of conduct which is 'fairly regarded as typical or broadly incidental to the enterprises that are taken by the employer.'" *Id*. at p. 27. As explained by numerous courts, but particularly succinctly by the Texas Supreme Court, commutes are not typical or broadly incidental to the enterprise of an employee because "in most situations such an injury is suffered as a consequence of risks and hazards to which all members of the traveling public are subject rather than risk and hazards having to do with and originating in the work or business of the employer." *Texas General Indem. Co. v. Bottom*, 365 S.W.2d 350, 353 (Tx. 1963). Negligent acts during commutes are not foreseeable and the commute is not incidental to employment "because driving to and from work, even the personal vehicle used for it, does little to serve the employer's purposes, aside from delivering the employee and the vehicle to the work site." *Stokes*, 159 P.3d at 696.

Ordinary commutes, such as Tronvold's simply do not relate to the employer's enterprise. They relate to the general risk of any individual who commutes to and from work. Tronvold was commuting to an ordinary, scheduled monthly meeting. The meetings occur 12 times a year on the same day of the month at the same time and location. There was nothing unique about his commute here. As such, for purposes of the going and coming rule and for purposes of general agency law considered in the context of *respondeat superior* liability, Tronvold's acts were not within the scope of his employment for the Pierre Volunteer Fire Department and especially the City of Pierre's business enterprise.

The cases relied upon by Appellants are readily distinguished from the present matter. *Carter v. Reynolds* involved a car accident where the employee was "on her way home from an off-site client's location and when she was required by her employer to use her personal car on mandatory client visits." 815 A.2d 460, 461 (NJ 2003). The facts in *Carter* bear no analogous relationship to Tronvold's commute. *Id*.

Additionally, the Appellants plainly misstate the effect of the holding in *Lobo v. Tamco*, 182 Ca. App. 4th 297 (2010). In *Lobo v. Tamco*, 230 Cal. App. 4th 438, 447 (2014), a subsequent decision involving the same case, the California court affirmed the jury's determination that "the employee's use of his or her vehicle was too infrequent to confer a sufficient benefit to the employer so as to make it reasonable to require the employer to bear the cost of the employee's negligence in operating the vehicle." It is notable Appellants cherry-picked the prior decision and failed to convey the latter holding to this Court. The decision in *Konradi v. United States of America*, is also

greatly overstated by Appellants. 919 F.2d 1207 (7th Cir. 1990). *Konradi* involved a rural mail carrier who drove his own vehicle to deliver mail. The *Konradi* defendant's vehicle was used in every aspect of his employment and yet, the Court indicated an insufficient factual record was developed as to the scope of employment question. *Id*. at 1213.

Last, Appellants' reliance on *Harleysville Mutual Ins. Co. v. MacDonald* is also misplaced. 2005 WL 8159382 (S.D. W.Va.). It involved a pizza delivery driver who struck another motorist in his own vehicle that he utilized for pizza deliveries.

Tronvold was not required to use his vehicle for his role at the PVFD. He was required to have reliable transportation to arrive at the fire hall. The fire department relied on Tronvold to use the fire engines in his role as a fireman. The use of his vehicle did not extend beyond his commute.

The Court reviewed the competing Statements of Undisputed Material Facts and resolved the issue as to whether the vehicle was mandated and determined that it was not. Like all employment, the Pierre Volunteer Fire Department and City of Pierre relies on its employees, gratuitous or otherwise to arrive at their duty stations. There is nothing unique in relation to Tronvold's role and it can be said that his vehicle is mandated and the Circuit Court acknowledged as much.

c. THE DUAL PURPOSE EXCEPTION IS INAPPLICABLE

Appellants argue the fact PVFD and Pierre received a benefit from its' gratuitous employee arriving at his duty station excepts the present scenario from the going and coming rule. Further, Appellants place much reliance on the fact that Tronvold had PPE in his vehicle. This does not establish the commute was within the scope of employment

and Appellants' reliance on this fact is overstated and misplaced. Interestingly, one of the cases Jurgens relied upon before the Circuit Court, *Jorge v. Culinary Institute of America*, 3 Cal. App. 5th 382, 406 (2016) stands in stark contrast to many of both Appellants' arguments concerning Tronvold's protective equipment. In *Jorge*, the California Court of Appeals explained how situations such as Tronvold's do not except a commute from the going and coming rule. The court therein explained:

> Finally, DaFonseca's use of his car to transport his chef's bags and jackets to and from the St. Helena campus to off campus work commitments, and, in the case of his soiled chef's jackets, to the cleaner, did not extend liability to the Culinary Institute. Carrying employer-owned tools of the trade to work does not render an employee's commute within the course and scope of employment, as the Supreme Court has recognized: transporting work materials – even essential ones – to facilitate work does not warrant exception to the going and coming rule 'unless such materials require a special route or mode of transportation or increase the risk of injury . . .." (*Wilson v. Workers' Comp Appeals Board* (1976) 16 Cal. 3D 181, 185.) 'Such cartage is common and must be viewed as an incident to the commute rather than as part of the employment.' (*Id.; see also Ducey, supra*, 25 Cal. 3D at p. 714 [evidence did not establish applicability of required vehicle exception as a matter of law even though employee sometimes transported cleaning equipment and small furnishings in her car].)

The *Jorge* decision is nearly identical and directly controlling on the going and coming issue. Tronvold's PPE was stored at all times in his personal motor vehicle and did not necessitate a special route or mode of transportation or in any way increase the risk of injury in his commute. It was simply something he stored in his back seat to have available should he receive an emergency call.

The facts and law are clear, the going and coming rule precludes *respondeat superior* liability here. *See Fackrell v. Marshall*, 490 F.3d 997, 1000 (2007) ("the employee is not acting within the scope of his employment in traveling to work, even

though he uses his employer's motor vehicle, and therefore the employer cannot be held liable under the doctrine of *respondeat superior* to one injured by the employee's negligent operation of the vehicle on such trip"); *Halliburton Energy Services, Inc. v. Department of Transportation*, 220 Cal. App. 4th 87, 95-96 (2013)("'going and coming rule' is sometimes described as if the employment relationship is 'suspended' from the time the employee leaves until he returns or that in commuting he is not rendering service to his employer").

The Appellants seek to dramatically change South Dakota law and expand employer liability in the face of overwhelming controlling and persuasive precedent. The Circuit Court correctly determined no vicarious liability existed due to the going and coming rule. Tronvold's commute was nothing more than ordinary, his PPE was mere cartage which did not "require a special route or mode of transportation or increase the risk of injury". *Jorge*, 3 Cal. App. 5th at 406.

II. WHETHER THE CIRCUIT COURT CORRECTLY HELD THE CITY WAS IMMUNE FROM SUIT AS THERE IS NO LIABILITY COVERAGE PURSUANT TO THE CITY OF PIERRE'S COVERAGE AGREEMENTS?

The Circuit Court correctly determined that sovereign immunity would also bar Plaintiffs' claims. First, coverage is expressly excluded pursuant to a coverage agreement exclusion. Second, the automobile coverage agreement excludes coverage for employees unless such employees are acting in an official capacity.

Any public entity is immune from liability for damages when the function in which it is involved is governmental or proprietary. *See* SDCL § 21-32A-3. This immunity is waived to the extent the public entity participates in a risk sharing pool or

insurance is purchased pursuant to SDCL § 21-32A-1. However, such a waiver exists only to the extent that coverage is afforded and is limited to the limit of liability contained within such coverage. *See* SDCL § 21-32A-1. The City of Pierre expressly denies that Tronvold was in any way acting within the scope of any agency relationship that would give rise to a *respondeat superior* claim. Even if it would be presumed for purposes of this Motion for Summary Judgment that Tronvold was a gratuitous employee acting within the scope of agency when he was driving his vehicle to training, the governmental immunity of the City of Pierre would bar the present action.

The codification set forth in SDCL §§ 21-32A-1 through 33 recognized previous holdings of the South Dakota Supreme Court on this very issue. *See generally, Conway v. Humbert*, 82 S.D. 317, 145 N.W.2d 524 (1966); *High Grade Oil Co., et al v. Sommer*, 295 N.W.2d 736, 738 (S.D. 1980); and *Sioux Falls Construction Co. v. Sioux Falls*, 297 N.W.2d 454, 457 (S.D. 1980). Thus, the provisions contained within SDCL § 21-32A-3 represent the South Dakota Legislature's acknowledgement and continued enforcement of the principles of governmental immunity for public entities. Essentially, public entities are immune from liability absent an express waiver. However, should a public entity purchase insurance or participate in a risk pooling agreement, that immunity is waived only to the extent of the coverage of the insurance or risk pool agreement. Here, although the City of Pierre participates in a risk pool arrangement through a Memorandum of Coverage for Governmental Liability with the South Dakota Public Assurance Alliance, such coverage contains applicable exclusions.

The City of Pierre is a municipal corporation organized under the laws of the State of South Dakota. See ¶ 7, First Amended Complaint. A municipality is undoubtedly a "public entity." *See e.g., Olesen v. Town of Hurley*, 2004 S.D. 136; *Hall v. City of Watertown*, 2001 S.D. 137. The operative provision of SDCL § 21-32A-1 which limits the exception when a public entity participates in a risk sharing pool is "to the extent that coverage is afforded thereunder." However, subject to the terms and exclusions of the aforementioned memoranda of coverage, no coverage exists for the Appellants' loss as is set forth in greater detail below.

a. THE FIRE DEPARTMENT EXCLUSION BARS COVERAGE

The Memorandum of Governmental Liability Coverage affords coverage and identifies that "We will pay damages the covered party becomes legally obligated to pay caused by an occurrence during the coverage period, except as excluded herein." See Section A – Coverage, Memorandum of Governmental Liability Coverage attached to the Affidavit of Dave Sendelbach as Exhibit A, Pierre App. 22. Notably, there is an exclusion section, Section C in the Memorandum of Governmental Liability Coverage, which provides: "We will not pay or defend claims or suits arising from:" along with enumerated exclusions. *Id.* The City of Pierre's particular Memorandum of Governmental Liability Coverage also contained an Exclusion Endorsement. See Exhibit C attached to the Dave Sendelbach Affidavit, Pierre App. 41. That Exclusion Endorsement explicitly added to the list of exclusions "fire department, firefighting activities or fire department vehicles." *Id*. at Exhibit C of Sendelbach Affidavit, Pierre App. 44. Such endorsement was effective January 14, 2016 and applies to the

Memorandum of Governmental Liability Coverage as identified in the Exclusion Endorsement. *Id.* No specific definition is included to define "fire department," "firefighting activities" or "fire department vehicles."

Due to the fact that the aforementioned terms are not defined within the policy, a plain meaning definition is applied. The Memorandum of Governmental Liability Coverage with the South Dakota Public Assurance Alliance is not an insurance policy, however, risk pooling agreements are akin to insurance policies for purposes and interpretation of terms. A court may not "seek out a strange or unusual meaning for the benefit of [governmental liability coverage beneficiary]." *Ass Kickin' Ranch, LLC v. North Star Mutual Ins. Co.,* 2012 S.D. 73, ¶ 10, quoting *Rumpza v. Donalar Enterprises, Inc.*, 1998 S.D. 79, ¶ 12, 581 N.W.2d 517, 521. Such "language must be construed according to its plain and ordinary meaning and a court cannot make a forced construction or a new contract for the parties." *Id*. quoting *Stene v. State Farm Mut. Auto Ins. Co.*, 1998 S.D. 95 ¶ 14, 581 N.W.2d 399, 402. "[W]hen the terms . . . are unambiguous, these terms 'cannot be enlarged or diminished by judicial construction.'" *Id.* quoting *American Family Mut. Ins. v. Elliot*, 523 N.W.2d 100, 102 (S.D. 1994). Further, "policies must be subject to a reasonable interpretation and not one that amounts to an absurdity." *Id.* quoting *Prokop v. North Star Mut. Ins. Co.*, 457 N.W.2d 862, 864 (S.D. 1990), (citing *Helmboldt v. LeMars Mut. Ins. Co., Inc.*, 404 N.W.2d 55, 59 (S.D. 1987)).

In determining the "plain meaning" of a term, the South Dakota Supreme Court has frequently utilized dictionary definitions. *See generally, In Re: Petition of West River*

Electric Assn, 2004 S.D. 11, ¶ 22; *Selway Homeowners Assn v. Cummings*, 2003 S.D. 11, ¶ 37. Merriam Webster's on-line dictionary defines "fire department" as "1: an organization for preventing or extinguishing fires especially: a government division (as in a municipality) having these duties to: the members of a fire department." *See* excerpt from Merriam Webster's on-line dictionary, Pierre App. 59. For purposes of the applicability of governmental immunity under SDCL §§ 21-32A-1 through 3, the Exclusion Endorsement would preclude coverage from existing under the Memorandum of Governmental Liability for the facts and allegations set forth in Plaintiffs' Complaint.

b. THE OFFICIAL CAPACITY REQUIREMENT IS NOT SATISFIED AND BARS AUTO COVERAGE

Tronvold's vehicle is not afforded coverage by the City of Pierre's Memorandum of Automobile Liability Coverage. The Memorandum of Automobile Liability Coverage provides:

> We will pay damages the covered party legally must pay because of bodily injury or property damage to which this coverage applies caused by an accident during the coverage period and resulting from the ownership, maintenance, or use of an auto.

See Memorandum of Automobile Liability Coverage, Section A, Pierre App. 22.

The Memorandum of Automobile Liability Coverage also defines <u>covered party</u>:

> (a) The member;
> (b) unless specifically excluded, any and all commissions, councils, agencies, districts, authorities, or boards coming under the member's direction or control of which the member's board sits as the governing body;
> (c) Any person who is an official, employee or volunteer of (a) or (b) while acting in an official capacity for (a) or (b), including while acting on an outside board at the direction of (a) or (b); or
> (d) Anyone else while using a covered auto with the permission or a covered party, except the owner of that auto or the owner or employee of a

> business of selling, servicing, repairing or parking autos. This subsection does not apply to any uninsured/underinsured motorist coverage under this memorandum.

Id. at Section D, Pierre App. 25.

Member is defined as "the governmental entity specifically identified in the declarations attached to this Memorandum." *Id.* Further, a Statement of Values for vehicles is attached to the policy identifying the set replacement value of the vehicles as set forth in the Memorandum of Automobile Liability Coverage and the declarations and rating supplement provided completed pursuant thereto. Tronvold's vehicle was not included as a scheduled vehicle on the Statement of Values for vehicles of the City of Pierre. *See* Statement of Values, Pierre App. 49. The Memorandum of Automobile Liability Coverage declarations coverage specifically identifies the member as the "City of Pierre." *See* Memorandum of Automobile Liability Coverage declarations, Pierre App. 32. The Statement of Values identifies that the vehicles covered by the Memorandum of Automobile Liability Coverage. See Replacement Value Schedule, Pierre App. 52.

Under the terms of the Memorandum of Automobile Liability Coverage, the only potential provision offering inclusion to Tronvold as a "covered party" is subparagraph (c) of Section D which provides coverage for "any person who is an official, employee or volunteer of (a) or (b) while acting in an official capacity for (a) or (b)." Tronvold is not the employee or volunteer of the City of Pierre or any of the City of Pierre's commissions, councils, agencies, districts, authorities, or boards coming under the City of Pierre's direction or control. Further, the City of Pierre does not sit on the governing

body for the Pierre Volunteer Fire Department, Inc. The Pierre Volunteer Fire Department, Inc. is a nonprofit corporation formed independently of the City of Pierre. Further, at the time the motor vehicle accident which forms the basis of this suit occurred, Tronvold was not "acting in an official capacity" for the City of Pierre or its commissions, councils, agencies, districts, authorities, or boards. As set forth in Section I of this brief, Tronvold was not acting in an official capacity when traveling to and from training at its normally scheduled location. The Merriam-Webster's online dictionary defines official as "one who holds or is invested with an office: officer." The Merriam-Webster's online dictionary also defines capacity as "legal competency or fitness." When applying the standards to Tronvold and his operation of a motor vehicle on his way to volunteer training, this is a significantly heightened standard from that of general agency as set forth in Section I of this brief. Further, on his own terms and in his private, personally owned vehicle, Tronvold was not operating within the scope of any office or within the general scope of any "official capacity." He was not conducting any official business and was not acting within the scope of any office. The argument contained within Section I of this brief effectively addresses Tronvold's scope and clearly dictates that he was not acting within any official capacity of the City of Pierre at the time of the motor vehicle accident.

As explained in *Cromwell v. Rapid City Police Department*, sovereign immunity is only waived to the extent coverage is afforded. 2001 S.D. 100 at ¶¶ 14 through 23. Coverage does not exist under the express terms of the subject Memorandum of Governmental Liability Coverage or the Memorandum of Automobile Liability

Coverage. Thus no waiver of sovereign immunity is effective because it is only effective "to the extent of coverage afforded." *See id*. at ¶ 32. Here, unlike in *Cromwell*, from the initiation of the Memorandum of Governmental Liability Coverage, an exclusion applied and an exclusion applied at the date of loss. *See* Endorsement effective 01-14-2016 on Exclusion Endorsement, Pierre App. 44. No waiver of sovereign immunity for claims set forth in the First Amended Complaint has occurred and the immunity provisions set forth in SDCL §§ 21-32A-1 through 3 apply here.

Similarly, coverage is excluded from the Memorandum of Automobile Liability Coverage. *See* Memorandum of Automobile Liability Coverage, Pierre App. 32. That coverage memorandum excludes Tronvold as he was not acting within the scope of any employment or volunteer role at the time of the motor vehicle accident. *Id*. Specifically, the coverage agreement does not include Tronvold within the scope of a "Covered Party." For an individual to be considered a "Covered Party", they must be acting in an "official capacity" and be a volunteer or employee of the member (City of Pierre). *Id*. at Section D, Pierre App. 33. As identified in Section I of this brief, Tronvold was not acting within the scope of any volunteer or gratuitous employment when traveling to his assigned fire station for training. *Supra*. Thus, coverage cannot exist under the Memorandum of Automobile Liability Coverage Agreement and pursuant thereto, sovereign immunity bars the present action as to Pierre.

CONCLUSION

The Appellants seek to rewrite South Dakota law in regard to *respondeat superior* liability. There are no unique factors present here, Tronvold was engaged in an ordinary

commute which served no further purpose than to deliver him to his monthly meeting location at the prearranged time. The only incidental benefit to PVFD and Pierre was Tronvold's presence which no Court has found sufficient to negate the going and coming rule. If the Appellants' arguments concerning the going and coming rule are accepted, South Dakota would have portal to portal liability for an employer during an employee's commute. The result would be not only absurd but would serve to undermine the entire body of law concerning vicarious liability. In addition, the City is immune from suit. The Circuit Court's dismissal of this action should be affirmed.

Respectfully submitted this 25th day of February, 2020.

MAY, ADAM, GERDES & THOMPSON LLP

BY: /s/Douglas A. Abraham
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CERTIFICATE OF SERVICE

The undersigned hereby certifies on the date above written one electronic copy of the Brief of Appellee City of Pierre in the above-entitled action was e-mailed to Edwin Evans, Mark W. Haigh, Tyler W. Haigh, William Fuller, Michael L. Luce, John R. Hughes and Stuart J. Hughes, to-wit:

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The undersigned further certifies that one original and two (2) copies of the Brief of Appellee City of Pierre in the above-entitled action were mailed by first class mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, South Dakota, 57501 and one electronic copy of the Brief of Appellant in the above-entitled action was emailed to scclerkbriefs@ujs.state.sd.us on the date above written.

/s/Douglas A. Abraham

CERTIFICATE OF COMPLIANCE

Douglas A. Abraham, attorney for Appellee City of Pierre, hereby certifies that the foregoing Brief of Appellee City of Pierre complies with the type volume limitation imposed by the Court by Order dated March 15, 1999. Proportionally spaced typeface Times New Roman has been used. Brief of Appellee contains 9060 words and does not exceed 32 pages. Microsoft Word processing software has been used.

Dated this 25th day of February, 2020.

/s/Douglas A. Abraham

APPENDIX

Appellee Appendix Page No.

STATE OF SOUTH DAKOTA) : SS		IN CIRCUIT COURT
COUNTY OF HUGHES)		SIXTH JUDICIAL CIRCUIT
LISA A. TAMMEN and RANDALL R. JURGENS, Plaintiffs, vs. GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally, Defendants.		CIV. 17-42 **AMENDED JUDGMENT**

Defendants, City of Pierre, a South Dakota Municipal Corporation, and Pierre Volunteer Fire Department, a South Dakota nonprofit corporation (collectively referred to herein as Defendants), having moved for summary judgment, pursuant to SDCL § 15-6-56; and the Court having held a hearing on the motions on Wednesday, June 12, 2019; and the Court having considered all of the records and files herein; and the Court having further considered the arguments of counsel and the briefs that have been submitted; and the Court having issued its memorandum opinion dated August 8, 2019; it is hereby

ORDERED ADJUDGED AND DECREED as follows:

1. Defendants' Motions for Summary Judgment are GRANTED;
2. The Complaint of Plaintiffs Lisa A. Tammen and Randall R. Jurgens, as against Defendants City of Pierre, a South Dakota Municipal Corporation, and Pierre

Volunteer Fire Department, a South Dakota nonprofit corporation, are hereby dismissed, on the merits, with prejudice, and that Defendants are entitled to a recovery of their taxable disbursements to be assessed by the Clerk, pursuant to SDCL §§ 15-17-37 and 15-6-54(d);

3. The Court finds that there is no just reason for delay and that this judgment shall be entered as a final judgment pursuant to SDCL § 15-6-54(b). The Court relied upon the following factors in granting this certification:

   a. This case involves alleged injuries stemming from a motor vehicle accident that occurred in August 2016 involving the Plaintiffs and Defendant Gerrit Tronvold;

   b. The Court has determined that Defendant Tronvold was not acting within the scope of any employment or agency at the time that the alleged accident occurred;

   c. Following the order granting Summary Judgment in favor of Defendants, the only remaining claim is against Defendant Tronvold. That claim is separate and distinct and not directly related to the issues addressed by this Court in the Order granting Summary Judgment to these Defendants;

   d. After balancing the competing factors present in the case, the trial court has found that it is in the best interest of sound judicial administration, judicial economy, and public policy to certify the judgment as final pursuant to SDCL § 15-6-54(b), and the court relies on the following factors in reaching this conclusion:

(i) There are no unadjudicated claims against the dismissed Defendants;

(ii) The need for review will not be mooted by further litigation;

(iii) The trial court will not be obliged to consider the claims against the City of Pierre and the Pierre Volunteer Fire Department a second time;

(iv) There are no counterclaims that may result in a setoff against this judgment, if certified as final;

(v) Declining to certify this matter as a final judgment pursuant to SDCL § 15-6-54(b) may result in duplicate proceedings including two jury trials rather than one, and the potential for one or more additional appeals.

e. Given the underlying facts of this case, a final determination of the issues involving the dismissed Defendants will more likely than not decide whether this case goes to trial and whether this, being a final judgment pursuant to SDCL § 15-6-54(b), may eliminate the potential for multiple trials on the same facts. Therefore, final order pursuant to SDCL § 15-6-54(b) would promote judicial economy and efficiency by allowing Plaintiffs to appeal the Court's Order and Judgment while eliminating the potential for duplicate trials on largely identical facts and witnesses.

4. For all of these reasons, this Court orders final judgment in favor of the Defendants City of Pierre and Pierre Volunteer Fire Department, and against

Plaintiffs pursuant to SDCL § 15-6-54(b), on the claims brought by Plaintiffs against these Defendants.

5. The Court's Memorandum Opinion dated August 8, 2019 is incorporated herein by this reference.

IT IS FURTHER ORDERED ADJUDGED AND DECREED that final judgment pursuant to Rule 54(b) is entered in favor of Defendants.

Dated this 26 day of August, 2019.

BY THE COURT

Honorable Thomas L. Trimble
Circuit Court Judge, Retired

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO
FILED
AUG 26 2019
Kelli Sherman Clerk
By _____ Deputy

STATE OF SOUTH DAKOTA)SS COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT 32CIV17-42
LISA A. TAMMEN and RANDALL R. JURGENS, Plaintiffs, v. GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally, Defendants.	)	**ORDER GRANTING CITY OF PIERRE'S MOTION FOR SUMMARY JUDGMENT AND GRANTING PIERRE VOLUNTEER FIRE DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court on the 12th day of June 2019. The Court, having considered the record, briefs and the arguments of counsel, and being fully advised as to all matters pertinent hereto, for the reasons set forth below, hereby **GRANTS** Defendant City of Pierre's Motion for Summary Judgment. The Court also **GRANTS** Defendant Pierre Volunteer Fire Department's Motion for Summary Judgment.

BACKGROUND

On August 1, 2016, Plaintiff Lisa Tammen, Plaintiff Randall Jurgens, and Defendant Gerrit Tronvold (Tronvold) were involved in a motorcycle-pickup accident resulting in amputation of the left leg of each Plaintiff. Plaintiffs allege that Defendant failed to stop and/or failed to yield as he turned left from Grey Goose Road onto Highway 1804 into the path of Plaintiffs' oncoming motorcycle.

Tronvold became a firefighter for the Pierre Volunteer Fire Department (Department) in December 2015 and was traveling to training when the accident occurred. The vehicle, owned by Tronvold, displayed on its front bumper a half-plate issued by the Department reading "Member Fire Department/Pierre Fire Department." Inside the vehicle, Tronvold carried his personal protective fire gear in the event he was called out for an emergency response. The Department does not pay wages, reimburse mileage, or provide a vehicle to Tronvold; the Department does require training, testing, reliable transportation, and attendance at a minimum number of meetings and call-out incidents.

The City of Pierre (City) funds the Department, owns the Department equipment, and supervises the Department through the City's Office of Public Safety. The City carries liability insurance through the South Dakota Public Assurance Alliance (Alliance) with an exclusion for "Fire Department, Fire Fighting activities or Fire Department vehicles." The City also carries vehicle liability insurance for certain vehicles listed by description and VIN number, not including Tronvold's vehicle.

The Department is a non-profit corporation whose charter indicates that it is part of the governmental functions of the City. The Department has no independent finances or stockholders. The Department, through Continental Western Insurance Company (Continental), carries liability insurance for "employee's covered auto" not owned by the Department when on an "official emergency response." The policy also pays property damage for "employee's

personal auto" "while en route to, during or returning from any official duty authorized" by the Department. Following the accident, Tronvold received $1,000 compensation from Continental for the property damage not covered by his personal automobile comprehensive insurance.

Plaintiffs filed suit against Tronvold individually, and against the Department and the City under a theory of *respondeat superior* because Tronvold was driving to a regularly scheduled Department training meeting. The Department and the City have each moved for Summary Judgment on the issue of vicarious liability.

LEGAL DISCUSSION

I. Summary Judgment Standard

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no issue as to any material fact and the moving party is entitled to judgment as a matter of law." SDCL § 15-6-56(c). Summary judgment requires the moving party to establish "the right to judgment with such clarity as to leave no room for controversy." *Hanson v. Big Stone Therapies, Inc.*, 2018 S.D. 60, ¶ 38, 916 N.W.2d 151, 161 (quoting *Richards v. Lenz*, 539 N.W.2d 80, 83 (S.D. 1995) (citation omitted). "The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists." *Brandt v. County of Pennington*, 2013 S.D. 22, ¶ 7, 827 N.W.2d 871, 874.

"The existence of a duty in a negligence action is a question of law. . ." *Hohm v. City of Rapid City*, 2008 S.D. 65, ¶ 3, 753 N.W.2d 895, 898 (internal citation omitted).

Judgment granted on the basis of sovereign or governmental immunity is a question of law, suitable for summary judgment. *Truman v. Griese*, 2009 S.D. 8, ¶ 10, 762 N.W.2d 75, 78.

II. Tronvold's commute was not within the scope of his agency.

In their Complaints, Plaintiffs assert that Tronvold was acting on behalf of the Department when the accident occurred. Defendants deny Plaintiffs' claims of *respondeat superior* liability because Tronvold was commuting to a regularly scheduled Department meeting and no exceptions establishing *respondeat superior* liability apply.

Plaintiffs may hold "an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency." *Cameron v. Osler*, 2019 S.D. 34, ¶ 6, 903 N.W.2d 661, 663 (internal citations omitted). The acts included within the scope of agency are those "which are so closely connected with what the servant is employed to do, and is so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment." *Deuchar v. Foland Ranch, Inc.*, 410 N.W.2d 177, 180 (S.D. 1987) (internal citations omitted). If a court determines that a tortious act was committed while the agent conducted a dual purpose in serving both the principal's interests and the agent's interests, the court should look to whether the conduct was foreseeable. *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 21, 816 N.W.2d 96, 104.

In the workers' compensation setting, it is well established that employees injured while going to and coming from work are not covered, unless the travel arises from the employment. *Mudlin v. Hills Materials Co.*, 2005 S.D. 64, ¶ 8, 698 N.W.2d 67, 71. The South Dakota Supreme Court notes that workers' compensation decisions, while not binding, are "useful in exploring the themes surrounding scope of

employment questions." *S.D. Pub. Entity Pool for Liability v. Winger*, 1997 S.D. 77, ¶ 8, 566 N.W.2d 125, 128. Exceptions to the "going and coming" rule include situations where the transportation is an "integral part" of the agent's duties or when the agent's actions "naturally and incidentally" relate to his duties. *Id.* ¶ 19.

Here, Plaintiffs assert a *respondeat superior* theory of liability because Tronvold "was on his way to engine training, using his own vehicle and transporting [Department] equipment as required by [Department]." *Tammen Brief in Opposition to Motions for Summary Judgment*, p. 8, June 5, 2019. Tammen further argues that this Court should apply a "required vehicle exception" to the Going and Coming Rule because Department policy requires that firefights have reliable transportation or a "special errand exception" because Tronvold was going to an engine training. *Id.* at p. 9 and p. 17. Plaintiff Jurgens asserts that the monthly training satisfies the dual purpose test because the training was, "at least in part out of the intent to serve his employer's purposes." *Jurgens Brief in Opposition to Motions for Summary Judgment*, p. 19, June 5, 2019.

Considering all facts in the light most favorable to the Plaintiffs, the Court finds no *respondeat superior* liability for the Department nor the City because of the going and coming rule. Tronvold was on his way to a regularly scheduled monthly Department meeting and no exception applies because the engine training was part of a larger array of trainings and meetings, precluding this one training from being required or naturally and incidentally related to Tronvold's firefighter duties.

While the Department requires that its firefighters have reliable transportation and attend a certain percentage of trainings and meetings, the Department in no way indicates that firefighters must drive to the Firehall for the meetings. Nor does the fact that Tronvold had his emergency equipment with him place this commute within the

scope of his agency for the Department. Neither the Department nor the City could foresee that Tronvold's actions driving to a monthly training meeting would result in a consequence for either entity. For these reasons, the Court finds that the accident did not arise out of Tronvold's duties to the Department and thus, the Court finds no *respondeat superior* liability for either the Department or the City.

II. In the alternative, the City and the Department have governmental immunity under SDCL §§ 21-32A-1 et seq. The legislature expressly grants the Department immunity from suit under SDCL § 20-9-45, unless a jury finds Tronvold acted with gross negligence.

A. The City's governmental immunity was not waived.

In the alternative, the Court addresses the City's affirmative defense of governmental immunity, finding that the City is free from liability of this tort claim because there is no waiver by statute and the City's risk sharing pool or liability insurance excludes fire department vehicles, and does not expressly include Tronvold's personally-owned vehicle.

Government immunity arises from common law, Article III of the South Dakota Constitution, and South Dakota statute, unless the public entity waives the immunity. *Unruh v. Davidson* County, 2008 S.D. 9, ¶ 8, 744 N.W.2d 839, 842. Under SDCL § 21-32A-3, the legislature "extended the reach of sovereign immunity to all public entities of this state." *Cromwell v. Rapid City Police Department*, 2001 S.D. 100, ¶ 13, 632 N.W.2d 20, 24. The Court finds that the City, a South Dakota municipal corporation, is a public entity within the scope of SDCL 21-32A-3. *See Olesen v. Town of Hurley*, 2004 S.D. 136, 691 N.W. 324.

Should governmental immunity be waived under SDCL 21-32A-1, "the public entity may be sued in the same manner as a private individual for injuries caused by the public entity's negligence to the extent the public entity participates in a risk

sharing pool or purchases liability insurance." *Maher v. City of Box Elder*, 2019 S.D. 15, ¶ 8.

Here, the City has purchased liability coverage from Alliance. Section C, Exclusion Endorsement 34, of the Memorandum of Governmental Liability Coverage, precludes coverage for "Fire Department, Fire Fighting activities or Fire Department vehicles." Alliance denied coverage to Tronvold because the insurer determined Tronvold was not a covered party nor was the Department a qualifying organization under the City's policy.

The City also purchased automobile liability coverage from Alliance. Tronvold's vehicle was not expressly covered by inclusion in the City's Statement of Values - Vehicles list.

Because the City is subject to an exclusion that prohibits coverage of this incident by Alliance, the Court finds that the City has not waived immunity under SDCL § 21-32A-3, and may not be held liable for Tronvold's accident.

B. The Department's governmental immunity is not waived.

Also in the alternative, the Court addresses the Department's affirmative defenses of governmental immunity under SDCL §§ 21-32A-1 *et seq.* and statutory immunity under SDCL § 20-9-45.

The Court first considers whether the Department is a public entity covered by the governmental immunity of SDCL § 21-32A-1. The Department is a non-profit corporation whose charter states: "This Corporation is a part of the Governmental Functions of the City of Pierre, South Dakota and as such has no independent finances and has no stockholders. The Nature of its business is the prevention and suppression of fires within the City of Pierre." *Application of the Pierre Volunteer*

Fire Department for an Extension of its Corporate Charter. The City owns the Department equipment and supervised by the City's Office of Public Safety.

In *Gabriel v. Bauman*, the South Dakota Supreme Court declined to address the sovereign immunity of the Chester Fire Department because Chester did not assert sovereign immunity as an affirmative defense and the issues related to waiver under SDCL § 21-32A-3 were not raised with the trial court. 2014 S.D. 30, ¶ 24, 847 N.W.2d 537, 545. Here, however, the Department asserts the affirmative defense of governmental immunity and provides undisputed evidence through its charter and reporting structure. The Court finds the Department to be a public entity, within the scope of governmental immunity.

Next, the Court addresses whether the Department waived immunity through the purchase of insurance or a risk-sharing pool. The Department, through Continental, insures personal automobiles for property damage when damage occurs "en route to, during or returning from any official duty authorized by [the Department]." *Continental Policy*, FIRE/EMS-PAK Endorsement, Page 2, Coverage Extensions, Item 3, Personal Effects and Property of Others. As the result of this accident, Tronvold submitted a claim and received a check for $1,000 to cover the expense of his personal automobile insurance deductible. The contract expressly expands coverage to include a commute to an "official duty" and by paying Tronvold's claim acknowledges that the insurer considered the monthly meeting as an official duty authorized by the Department.

The Continental policy expressly provides that it does not waive any governmental immunity under SDCL §§ 21-32A-1 *et seq.* and includes liability coverage to include a "covered 'auto' [the Department doesn't] own," but only for an "official emergency response authorized by [the Department]." In oral arguments, the Department acknowledges that if Tronvold were responding to a call instead of driving to training, the analysis would be different because the Western Casualty policy provides liability coverage for commutes to emergency responses.

Continental paid Tronvold for his property damage from the accident because, under the policy, the insurer determined that driving to a Department meeting was "en route to, during or returning from any official duty authorized by [the Department]." However, the coverage is specifically limited to property damage, not liability coverage.

The Court finds that the Department has not waived its governmental immunity under SDCL §§ 21-32A-1 *et seq.*

C. Whether the statutory immunity of SDCL § 20-9-45 applies is a question for the jury.

The South Dakota legislature expressly provided statutory immunity for nonprofit fire departments in SDCL § 20-9-45. The statute provides immunity from civil liability when the individual is "acting in good faith and within the scope of such individual's official functions and duties" and "the damage or injury was not caused by gross negligence or willful and wanton misconduct by such individual." SDCL 20-9-45.

Should the finding that Tronvold was not acting in the scope of his official duties be set aside, the Court finds that the Department is liable for grossly negligent actions by Tronvold.

The Department argues that the Court should grant summary judgment to the Department under SDCL § 20-9-45 because gross negligence is not specifically alleged in the Complaint and because they assert that Plaintiffs provide insufficient evidence for a finding of gross negligence. In *Gabriel*, the South Dakota Supreme Court affirmed summary judgment for the defendant regarding the gross negligence when the defendant, driving to the firehall to answer an emergency call, activated his lights and had the right of way, but was driving at a speed such that he was unable to stop after the plaintiff's car pulled out in front of him. *Gabriel* at ¶ 18, 847 N.W.2d at 543. The Supreme Court, in affirming summary judgment, stated that "reasonable persons under the same or similar circumstances present in this case would not have consciously realized that speed would—in all probability—result in the accident that occurred." *Id* at ¶ 19.

Here, however, the parties do not submit such undisputed facts that would render summary judgment appropriate as it was in *Gabriel* or in the controlling case cited by *Gabriel*, *Gunderson v. Sopiwnik*, 75 S.D 402, 508, 66 N.W.2d 510, 513 (S.D. 1954). "Whether one acts willfully, wantonly, or recklessly is, like negligence, normally a jury question." *Gabriel* at ¶ 15, 847 N.W.2d 542. The parties present several facts in dispute that could lead reasonable minds to arrive at differing conclusions. Tronvold pled guilty to failure to make a proper stop. Plaintiffs allege he was driving at an excessive and unlawful speed, was distracted by loud music such that he was unable to hear the approaching motorcycle, and that he pulled into oncoming traffic when his vision was obstructed. Viewing the facts in the light most favorable to the non-moving party, the Court finds whether Tronvold's actions were not negligent, negligent, or grossly negligent is a question for the jury.

ORDER

It is hereby:

ORDERED that Defendant City of Pierre's Motion for Summary Judgment is **GRANTED.**

It is further hereby

ORDERED that Defendant Pierre Volunteer Fire Department's Motion for Summary Judgment is **GRANTED.**

Dated this 8 day of August, 2019

FOR THE COURT:

The Honorable Thomas Trible
Circuit Court Judge, Retired

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT
LISA A. TAMMEN and RANDALL R. JURGENS,	)	32CIV17-000042
PLAINTIFFS,	)	
-vs-	)	
GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally,	)	**CITY OF PIERRE'S STATEMENT OF UNDISPUTED MATERIAL FACTS**
DEFENDANTS.	)	

COMES NOW the Defendant, City of Pierre (hereinafter "Pierre"), by and through its undersigned attorneys of record and hereby submits the following Statement of Undisputed Material Facts pursuant to SDCL § 15-6-56(c)(1).

1. On or about August 1, 2016, Plaintiffs Jurgens and Tammen were riding a motorcycle westbound on South Dakota Highway 1804. (¶ 11 of Plaintiffs' First Amended Complaint).

2. Plaintiffs allege that at approximately 6:00 p.m. on August 1, 2016, Defendant Tronvold, while driving his personally owned 2002 Chevrolet Silverado K2500 extended cab pickup, was traveling southwest on Grey Goose Road toward where it intersects with South Dakota Highway 1804. (¶ 12 of Plaintiffs' First Amended Complaint).

3. Plaintiffs allege Tronvold failed to yield the right-of-way to Plaintiffs and executed a left-hand turn into the path of Plaintiffs' motorcycle. (¶¶ 13 and 14 of Plaintiffs' First Amended Complaint).

4. The two vehicles collided causing significant injuries to Plaintiffs. (¶¶ 13 and 14 of Plaintiffs' First Amended Complaint).

5. At the time of the motor vehicle accident, Tronvold was a rookie member of the Pierre Volunteer Fire Department (PVFD). (Ian Paul depo. at 17:7-15; attached to Abraham Aff. as Exh. D.)

6. Tronvold was traveling to a monthly training meeting of the PVFD. (Tronvold depo. at 33:22-25, attached to Abraham Aff. as Exh. A).

7. The accident occurred at approximately 6:00 p.m. and the training session was scheduled to commence at 6:30 p.m. (Tronvold depo p. 30:1-4).

8. Tronvold was traveling directly from his residence to the training location at his assigned fire station. (Paul depo. at 121:20-21; 122:4-5) (Tronvold depo. at 33:22-25).

9. The Pierre Volunteer Fire Department is a South Dakota nonprofit corporation and is a corporate entity organized independently from the City of Pierre. (Paul depo. at 34:21-25; 35:5-8).

10. The City of Pierre is a municipality organized under the statutory framework authorized by the State of South Dakota. (See Aff. of Kristi Honeywell, City Manager.)

11. The City of Pierre provides funding for the PVFD and employs a Fire Chief and maintenance worker. (Paul depo. at 6:2-22).

12. The PVFD stations, apparatus, and personal protective equipment are purchased by the City of Pierre. (Paul depo. at 8:18-23).

13. The PVFD self-governs through the election of officers. (Paul depo. at 7:10-25; 8:1-17).

14. While traveling to his home and the fire station on August 1, 2016, Tronvold was not undertaking any action on behalf of the City of Pierre or the PVFD. (Paul depo. at 37:14-18).

15. Tronvold was not conducting any mission or undertaking any act at the direction or control of PVFD or the City of Pierre at the time of the motor vehicle accident. (Paul depo. at 37:14-18).

16. At the time Tronvold was traveling from his residence to the meeting at the Fire Station, there was no active fire call and Tronvold had not been summoned for any emergency by the PVFD. (Paul depo. at 37:5-7; 38:12-15).

17. Members of the PVFD are required to attend 40 hours of training per year and Tronvold had completed in excess of 40 hours of training prior to the date of the accident, August 1, 2016. (Paul depo. at 107:12-17; 23:22-25).

18. PVFD members were also required to participate in a minimum of 25 percent of the calls in any given calendar year. (Paul depo. at 18:3-25; 19:1-10).

19. On the date of the motor vehicle accident, Tronvold had already recorded participation in 51.35 percent of calls which should have been sufficient to meet his obligation for the entirety of the calendar year. (Paul depo. at 22:2-16).

20. The 40 hour annual training requirement may be satisfied through receiving training though a number of sources include classes or monthly training sessions held by the PVFD. (Paul depo. at 36:7-16).

21. Monthly training sessions were not mandatory for PVFD members. Members that did not attend the monthly meeting could obtain training hours in other forms and by attending other sessions. (Tronvold depo. at 31:9-15, 24-25; 32:20-12; Paul depo. at 24:17-22).

22. Members are encouraged to attend monthly meetings but attendance is not required so long as annual requirements are met. (Paul depo. at 185:15-19).

23. PVFD firefighters are volunteers and are not compensated. (Paul depo. at 9:22-24).

24. PVFD firefighters are not reimbursed for mileage for responding to calls or attending monthly training sessions. (Paul depo. at 25:4-18; 26:9-23).

25. Tronvold had his own personal insurance for automobile he was driving at the time of the accident that occurred on August 1,2016. (Tronvold depo. at 76:18-21).

26. At the time of the motor vehicle accident that is the subject to this suit, the City of Pierre had in place a Memorandum of Governmental Liability Coverage with the South Dakota Public Assurance Alliance. (See Exh. A attached to the Aff. of Dave Sendelbach).

27. The Memorandum of Governmental Liability Coverage contained an exclusion endorsement wherein the Exclusion Section, Section C of the aforementioned Memorandum, precludes coverage for "fire department, firefighting activities or fire department vehicles." (See Exh. C attached to the Aff. of Dave Sendelbach).

28. At the time of the subject motor vehicle accident, the City of Pierre had in place a Memorandum of Automobile Liability Coverage with the South Dakota Public Assurance Alliance. (See Exh. B attached to the Aff. of Dave Sendelbach).

29. The Memorandum of Automobile Liability Coverage only provides coverage for a volunteer when such volunteer is "acting in an official capacity for (a) or (b)." (See *Id.* at Section D). The official capacity must be for the member (the City of Pierre) or while acting in an official capacity for one of the members "commissions, councils, agencies, districts,

authorities, or boards, under the member's direction or control of which the member's board sits as the governing body."

30. The City of Pierre's City Commission does not sit as the governing body for the PVFD.

31. At the time of the motor vehicle accident, Tronvold was not acting in an official capacity for the PVFD or the City of Pierre. (Paul depo. at 37:5-18; 38:12-15).

32. A letter denying coverage for Tronvold has been issued by the South Dakota Public Assurance Alliance through its claims adjusters at Claims Associates, Inc. (See Exh. D attached to the Aff. of Dave Sendelbach.)

33. The South Dakota Public Assurance Alliance is providing a defense in relation to this action pursuant to a reservation of rights concerning coverage under the Memorandum of Governmental Liability Coverage and the Memorandum of Automobile Liability Coverage. (See Exh. A and B attached to the Aff of Dave Sendelbach).

Dated this 1st day of February, 2019.

MAY, ADAM, GERDES & THOMPSON LLP

BY: _____
DOUGLAS A. ABRAHAM
Attorneys for Defendant City of Pierre
503 South Pierre Street
P.O. Box 160
Pierre, South Dakota 57501-0160
Telephone: (605)224-8803
Telefax: (605)224-6289
E-mail: daa@mayadam.net

CERTIFICATE OF SERVICE

Douglas A. Abraham of May, Adam, Gerdes & Thompson LLP hereby certifies that on the 1st day of February, 2019, he electronically filed the foregoing via the Odyssey File and Serve System which will automatically send e-mail notification of such filing to all counsel of record.

_____
Douglas A. Abraham

STATE OF SOUTH DAKOTA)SS COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
LISA A. TAMMEN and RANDALL R. JURGENS, PLAINTIFFS, -vs- GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally, DEFENDANTS.	)	32CIV17-000042 **AFFIDAVIT OF DAVID SENDELBACH IN SUPPORT OF CITY OF PIERRE'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW, David Sendelbach, being first duly sworn, and states as follows:

1. I am a claims adjuster for Claims Associates of Sioux Falls, South Dakota.

2. Attached to this Affidavit as **Exhibit A** is a true and correct copy of the Memorandum of Governmental Liability Coverage from the South Dakota Public Assurance Alliance to the City of Pierre (City 125 through 134).

3. Attached to this Affidavit as **Exhibit B** is a true and correct copy of the separate Memorandum of Automobile Liability Coverage (City 135 through 143).

4. Attached to this Affidavit as **Exhibit C** is a true and correct copy of the Exclusion Endorsement contained in the City of Pierre's Memorandum of Governmental Liability Coverage and in supplement to (City 8, 125 through 127).

5. Attached to this Affidavit as **Exhibit D** is a true and correct copy of the reservation of rights letter issued by the South Dakota Public Assurance Alliance to the City of Pierre (City 416 through 419).

6. Attached to this Affidavit as **Exhibit E** is a true and correct copy of the Statement of Values (City 146 through 154) and Replacement Value Schedules (City 52 through 56) from the Memorandum for Governmental Liability Coverage.

Dated this 1st day of February, 2019.

David Sendelbach

David Sendelbach, CPCU AIC
Claims Associates
Casualty Supervisor
P.O. Box 1898
Sioux Falls, SD 57108
Telephone: (605)333-9810
E-mail: dsendelbach@claimsassoc.com

State of South Dakota)
)ss
County of Lincoln)

Subscribed and sworn to before me this 1st day of February, 2019.

KAY GREVE
NOTARY PUBLIC
SOUTH DAKOTA
SEAL

Kay Greve

Notary Public – South Dakota

Notary Print Name: Kay Greve
My Commission Expires: 11/3/23

South Dakota Public Assurance Alliance
MEMORANDUM OF GOVERNMENTAL LIABILITY COVERAGE

The liability coverage provided to the Member is described in this Memorandum of Coverage and with all endorsements, coverage parts and the Declarations and the Intergovernmental Contract for the South Dakota Public Assurance Alliance.

Words used in this Memorandum that are in bold have special meaning. The definitions are provided in Section D which should be consulted to gain an informed understanding of the coverage provided herein.

SECTION A – COVERAGE

Subject to the limit of coverage and deductible specified in the Declarations:

We will pay damages the covered party becomes legally obligated to pay caused by an occurrence during the coverage period, except as excluded herein.

SECTION B – DEFENSE AND SETTLEMENT

We have the right and duty to defend any claims or suits against a covered party seeking damages, however:

(1) we may investigate, defend and settle any claim or suit at our discretion;
(2) we have the right, but not the obligation, to appeal any judgment against the covered party;
(3) we will pay defense costs we incur in the adjustment, investigation, defense or litigation of any claim or suit;
(4) defense costs are payable in addition to the limit of coverage; and
(5) our right and duty to defend end when we have paid the limit of coverage for judgments or settlements.

SECTION C – EXCLUSIONS

We will not pay or defend claims or suits arising from:

(1) the ownership, operation, use, maintenance or entrustment of any aircraft owned or operated by, rented or loaned to, a covered party.
(2) the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of or exposure to radon, asbestos, asbestos products, asbestos fibers, asbestos dust or silica dust or:

  (a) any obligation of the covered party to indemnify any party because of such claims; or
  (b) any obligation to defend any suit or claims against the covered party because of such claims.

(3) failure to perform, or breach of, a contractual obligation.
(4) claimants seeking redress under quasi contractual theories such as unjust enrichment or quantum meruit.

(5) the partial or complete structural failure or overtopping of a dam.
(6) a written or oral contract in which the covered party assumes tort liability of another to pay damages if such assumption is made after the damages occur.
(7) bodily injury to the covered party arising out of and in the course of employment by the Member.
(8) benefits payable under any employee benefits plan, (whether the plan is voluntarily established by the Member or mandated by statute).
(9) obligations under any workers' compensation, unemployment compensation or disability law or any similar law.
(10) liability imposed under the Employee Retirement Income Security Act of 1974, and any law amendatory thereof.
(11) preparation of bids, bid specifications, or plans, including architectural plans.
(12) the failure to supply or provide an adequate or specific supply of gas, water, steam, electricity or sewage treatment capacity resulting from or caused by planning, engineering, design, or failure to produce, secure, contract for, or otherwise obtain such supplies or capacity.
(13) the following conduct of any covered party:

(a) willful, wanton, fraudulent, malicious or criminal acts;
(b) gaining illegal profit, advantage or remuneration;
(c) with intent to cause improper harm;
(d) with conscious disregard of the rights or safety of others; or
(e) with malice.

This exclusion does not apply to claims based solely on vicarious liability where the covered party did not authorize, ratify, participate in, or consent to such conduct.

(14) eminent domain, condemnation proceedings, inverse condemnation, dedication by adverse use or other taking of private property for public use, except claims or suits related to zoning actions.
(15) the ownership, use, operations or maintenance of any airport, runway, hangar or other aviation facility.
(16) the rendering or the failure to render professional legal services to a third-party.
(17) the ownership, use, operation or maintenance of any hospital, medical clinic, assisted living, nursing home, intermediate care facility or other health care facility.
(18) the rendering or failure to render medical or personal care services, unless such claims or suits arise from an emergency or the operations of the Member's emergency medical technicians, paramedics, nurses, firefighters or law enforcement officials.
(19) the hazardous properties of nuclear material.
(20) the actual, alleged or threatened discharge, dispersal, release or escape of pollutants, unless the discharge, dispersal, release or escape is sudden and accidental and:

(a) the covered party discovered the occurrence within seven days of its commencement; and
(b) the occurrence was reported in writing to us within 21 days of its discovery by the covered party; and
(c) the covered party expended reasonable effort to terminate the discharge, dispersal, release or escape of pollutants as soon as conditions permitted.

This exclusion does not apply to:

(i) use of the Member's premises to store household waste for 90 days or less;
(ii) Fire Department training or emergency operations;
(iii) pesticide or herbicide spraying;
(iv) use of chlorine or sodium hypochlorite in the Member's sewage or water treatment or swimming pool maintenance operations;
(v) storage and application of road salt, sand, anti-skid and similar materials,

provided all such activities meet federal, state and local government statutes, ordinances, regulations and license requirements.

(21) any site or location principally used by the covered party, or by others on the covered party's behalf, for the handling, storage, disposal, dumping, processing, or treatment of waste material, other than wastewater treatment facilities and sewer systems.
(22) any loss, cost or expense arising out of any governmental directions or requests that the covered party or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.
(23) damage to property rented or leased to the covered party where the covered party has assumed liability for damage to or destruction of such property, unless the covered party would have been liable in absence of such assumption of liability.
(24) damage to aircraft or watercraft in the care, custody, or control of any covered party.
(25) war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution.
(26) the ownership, operation, use, maintenance or entrustment of any auto.
(27) the Member:

(a) collecting, refunding, disbursing or applying taxes, fees, fines, liens or assessments;
(b) failing to anticipate tax revenue shortfalls;
(c) issuing, guaranteeing or failing to repay bonds, notes or debentures;
(d) utilizing federal or state funds, appropriations or grants;
(e) violating any law or regulation governing the issuance or sale of securities;
(f) purchasing or failing to purchase and maintain insurance or pooled self-insurance.

(28) housing authorities.
(29) motorized racing events or facilities.
(30) trampolines, other rebounding devices and inflatables.
(31) amusement or carnival rides and devices.
(32) down-hill ski runs, ski lifts and ski tows.
(33) railroads.

SECTION D – DEFINITIONS

Aircraft – means any machine designed to travel through the air, including but not limited to airplanes, dirigibles, hot air balloons, helicopters, hang gliders and drones.

Auto – means a land motor vehicle, trailer, or semi-trailer, including any attached machinery or equipment, designed for travel principally on public roads. It does not include vehicles that travel on

crawler treads, snowmobiles, vehicles located for use as a residence on premises, or road maintenance equipment owned by the Member.

Bodily Injury – means bodily injury, sickness or disease sustained by a person, including death resulting from any of these.

Covered Party – means:

(a) the Member;
(b) unless specifically excluded, any and all commissions, agencies, councils, districts, authorities, or boards coming under the Member's direction or control, or for which the Member's board sits as the governing body;
(c) any person who is an official, employee or volunteer of (a) or (b) while acting in an official capacity for (a) or (b), including while acting on an outside board at the direction of (a) or (b).

Dam – means:

(a) any artificial barrier, together with appurtenant works, which does or may impound or divert water, and which either:

(i) is 25 feet or more in height from the natural bed of the stream or watercourse at the downstream toe of the barrier, or from the lowest elevation of the outside limit of the barrier, if it is not across a stream, channel or watercourse, to the maximum possible water storage elevation; or
(ii) has an impounding capacity of 50 acre-feet or more.

Any such barrier which is not in excess of 6 feet in height, regardless of storage capacity, or which has a storage capacity not in excess of 15 acre-feet, regardless of height, shall not be considered a dam.

(b) Dams do not include:

(i) obstruction in a canal used to raise or lower water therein or divert water therefrom;
(ii) levee, including but not limited to a levee on the bed of a natural lake the primary purpose of which levee is to control flood water;
(iii) railroad fill or structure;
(iv) tank constructed of steel or concrete or of a combination thereof;
(v) tank elevated above the ground;
(vi) water or wastewater treatment facility;
(vii) barrier which is not across a stream channel, watercourse, or natural drainage area and which has the principal purpose of impounding water for agricultural use;
(viii) obstruction in the channel of a stream or watercourse which is 15 feet or less in height from the lowest elevation of the obstruction and which has the single purpose of spreading water within the bed of the stream or watercourse upstream from the construction for percolation underground; or
(ix) any impoundment constructed and utilized to hold treated water from a sewage treatment plant.

Damages – means money due a third party, including attorney's fees, interest on judgments, and costs. Damages do not include:

(a) punitive, exemplary or treble damages and fines or penalties;
(b) injunctive, equitable, or other non-monetary relief, or any monetary relief or expense in connection therewith; or
(c) damage to property owned by the Member or to the property of others in the Member's care, custody or control.

Deductible – means the amount of damages and defense costs the Member is obligated to pay. The deductible is stated in the Declarations. Any deductible amount we may pay shall be promptly reimbursed to us by the Member, upon notification.

Defense Costs – means all fees and expense we incur relating to the adjustment, investigation, defense or litigation of a claim for damages to which this coverage applies. Defense costs include:

(a) defense attorney fees;
(b) court costs;
(c) appeal bonds for our appeals; and
(d) reasonable expenses incurred by the covered party at our request to assist us in the investigation or defense of claims or suits.

Limit of Coverage – means the most we will pay for damages arising out of one occurrence regardless of the number of covered parties, claimants, claims made or suits brought. The limit of coverage is stated in the Declarations.

Member – means the governmental entity specifically identified in the Declarations attached to this Memorandum.

Memorandum – means this Memorandum of Governmental Liability Coverage and any endorsements attached hereto.

Nuclear Material – means source material, special nuclear material or byproduct material. Source material, special nuclear material and byproduct material have the meanings given to them by the Atomic Energy Act of 1954 or in any law amendatory thereto.

Occurrence – means an accident, act, error, omission or event, including continuous or repeated exposure to substantially the same generally harmful conditions, causing damages. An occurrence taking place over more than one coverage period shall be deemed to have taken place during the coverage period when the occurrence began and shall be treated as a single occurrence in that coverage period.

Pollutants – means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, fungi, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed. The term pollutants as used herein is not defined to mean potable water or agricultural water or water furnished to commercial users or water used for fire suppression.

Third Party – means any person making a claim against a covered party.

We, Us, & Our -- means the South Dakota Public Assurance Alliance.

SECTION E – COVERAGE EXTENTIONS

(1) MEDICAL PAYMENTS

Subject to the limit of coverage for Medical Payments specified in the Declarations, we will pay *medical expenses*, as defined below, for bodily injury:

(a) in excess of all health and/or disability insurance benefits available to the injured person, including Medicaid whether collectible or not; and
(b) co-payments or deductibles the injured person is obligated to satisfy for applicable health and disability insurance,

caused by an occurrence during the coverage period on premises owned, rented or used by the Member, provided that:

(a) premises owned, rented or used by the Member do not include:

(i) streets and alleys owned, rented or maintained by the Member; or
(ii) sidewalks adjoining real property not owned by the Member;

(b) the *medical expenses* are incurred and reported to us within one year of the occurrence;
(c) the injured person submits to an exam by our physician at our expense, as often as we reasonably require; and
(d) any payment we make does not constitute an admission of liability.

Medical expenses mean reasonable expenses for:

(a) first aid administered at the time of the occurrence;
(b) necessary medical, surgical, chiropractic, x-ray and dental services, including prosthetic devices; and
(c) necessary ambulance, hospital, professional nursing and funeral services.

We will not pay *medical expenses* resulting from bodily injury:

(a) arising from operations, other than maintenance and repair of the Member's premises, performed by independent contractors;
(b) to a covered party arising out of and in the course of employment;
(c) to tenants of the Member's premises and their employees;
(d) to any person engaged in maintenance, repair, demolition or construction at the Member's premises;
(e) to participants in an athletic, physical training or sporting activity;
(f) to any person entitled to workers' compensation benefits for bodily injury; or
(g) to inmates or prisoners.

(2) INJUNCTIVE RELIEF

Subject to the limit of coverage and deductible for Injunctive Relief specified in the Declarations, we will pay reasonable expenses incurred to defend the Member against non-monetary claims, demands or actions seeking provisional remedies, relief or redress. Such expenses must result from an occurrence during the coverage period.

We will not pay for expenses:

(a) excluded by Section C in this Memorandum;
(b) related to any suit against the Member by, about or from any federal, state or local governmental entity or any commission, department, unit or organization of any federal, state or local governmental entity or agency other than the Equal Employment Opportunity Commission (or a state Department of Human Relations); or
(c) related to any suit resulting from the Member's failure to comply with or qualify for any provision of the National Flood Insurance Act of 1968 or any amendment thereof.

(3) BROAD LEGAL DEFENSE

Subject to the limit of coverage for Broad Legal Defense specified in the Declarations, we will indemnify the Member for reasonable expenses incurred to defend the Member against suits or claims seeking damages caused by an occurrence during the coverage period for which no coverage is provided elsewhere in this Memorandum.

SECTION F – CONDITIONS

(1) ACTION AGAINST US

We will have no liability hereunder nor shall action be taken against us unless:

(a) the covered party has fully complied, and continues to fully comply, with all of the terms of this Memorandum and the Intergovernmental Contract; and
(b) the covered party's obligation to pay damages shall have been finally determined either by judgment after actual trial or by written agreement of the covered party, us and the claimant. Any person or organization or legal representative thereof who has secured such judgment or written agreement shall be entitled to recover under this Memorandum to the extent of the coverage afforded by this Memorandum. No person or organization shall have any right under this Memorandum to join us, our agents, employees or independent contractors as a party to any action against the covered party to determine their liability nor shall we be impleaded by the covered party or their legal representative.

(2) ARBITRATION

Decisions about whether to investigate, settle, or defend any claim or suit or whether coverage exists are at our sole discretion. If the covered party and we agree, disputes about such matters may be submitted to binding arbitration to expedite their resolution.

If the covered party and we agree to submit such issues to binding arbitration, the arbitration shall be conducted pursuant to South Dakota law and in particular, but not in limitation, the provisions of SDCL ch. 21-25A. The covered party shall select one arbitrator; we shall select one arbitrator; and the two arbitrators shall agree on a third arbitrator. The arbitration panel shall hear and decide the dispute. The arbitration hearing shall be held in the state of South Dakota and in the county where the covered party

shall be located. The decision of the arbitration panel is final and binding and shall not be subject to appeal.

Each party shall bear the cost of the arbitrator it selects and shall bear one-half the cost of the third arbitrator. Each party shall bear its own costs and expenses of arbitration, including attorney fees.

(3) ASSIGNMENT
We will not be bound by the covered party's assignment of interest under this Memorandum unless we agree to it in writing.

(4) BANKRUPTCY OR INSOLVENCY
The covered party's bankruptcy or insolvency will not release us from our obligations under this Memorandum.

(5) CHANGES
This Memorandum and the Intergovernmental Contract for the South Dakota Public Assurance Alliance constitute the total agreement between the Member and us concerning the coverages afforded. The terms of the Intergovernmental Contract may only be changed as stated in that document. The terms of this Memorandum shall not be waived or changed except by endorsement issued by us to form a part of this Memorandum.

(6) COMPLIANCE
If any provision of this Memorandum is determined by an appropriate governing body to be prohibited, illegal or void by any law controlling its construction, the provision shall be deemed to be modified or amended to comply with the minimum requirements of the law. The invalidity of any provision does not invalidate the remainder of this Memorandum. If any coverage provided for in this Memorandum is similarly determined to not comply with the required coverages of any statutory law, this Memorandum is amended to provide the minimum coverage required by such law.

(7) DUTIES IN THE EVENT OF A CLAIM OR SUIT

(a) The Member must see to it that we are notified in writing as soon as practicable of any occurrence which may result in a claim. Notice should include, to the extent possible:

(i) details of the situation;
(ii) how, when and where the occurrence took place;
(iii) the nature and location of the occurrence; and
(iv) the names and addresses of any injured persons and witnesses.

(b) If a claim is made or a suit is brought against a covered party, the Member must, immediately:

(i) record the specifics of the claim or suit and the date and manner received;
(ii) notify us in writing;
(iii) send us copies of any demands, notices, summonses or legal papers received in connection with the claim or suit;
(iv) authorize us to obtain records and other information;
(v) fully cooperate with us in the investigation, settlement or defense of the claim or suit; and

(vi) assist us, upon our request, and obtain any necessary assignment, in the enforcement of any right against any person or organization which may be liable to the covered party because of the occurrence.

(c) No covered party will, except at that covered party's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our written consent.

(d) We shall conduct the defense of any claim in the covered party's name and prosecute in their name for their coverage any claim for indemnity or damages or otherwise against any third party and shall have full discretion in the handling of any claim.

(e) If the Member gives timely prior written notice to us that any claim is not to be settled without the Member's consent, we shall not settle such claim without the Member's consent.

If, however, the Member refuses to consent to any settlement agreeable to the claimant and us or any reasonable offer of settlement recommended by us:

(i) our ultimate liability with respect to such claim shall not exceed the amount for which the claim may have been settled or the amount recommended for settlement by us plus claim expense incurred up to the date of such refusal; and

(ii) the Member has the right to appeal any judgment awarded over the amount for which the claim may have been settled or the amount recommended for settlement by us.

(f) All notification required by this condition shall be mailed to the address shown in the Declarations.

(g) The issuance of this Memorandum shall not be deemed a waiver of any statutory or common law immunities that apply. Use of the governmental immunity defense will be at our discretion.

(8) INTENTIONAL FAILURE TO DISCLOSE

This Memorandum has been issued based upon our reliance on representations made by the Member. Intentional non-disclosure or misrepresentation of any material fact may entitle us to void this Memorandum and relieve us of any obligation hereunder.

(9) INSPECTIONS

We shall be permitted, but not obligated, to inspect the Member's property and operations at any time. Our right to inspect, the actual inspection, or any report made shall not warrant that such property or operations are safe or that they comply with any applicable laws or regulations.

(10) LIBERALIZATION

If we revise this edition of the Memorandum to provide broader coverages without an additional contribution charge, we will automatically provide these broader coverages as of the day the revision is effective, subject, however, to all of the terms of this Memorandum and the Intergovernmental Contract to which this Memorandum attaches.

(11) OTHER COVERAGES

If any covered party has valid and collectible insurance, self-insurance or pooled coverage for an occurrence covered by this Memorandum, the coverage provided by this Memorandum will be excess

over such other coverage, except that the Member may purchase coverage which is specifically issued to be excess of the coverage provided by this Memorandum.

This coverage is excess over any other primary insurance available to the covered party covering liability for damages arising out of the premises and operations for which the covered party has been added as an additional insured by attachment or endorsement.

(12) SEVERABILITY OF INTERESTS

Except with respect to the limit of coverage and any rights or duties specifically assigned in this Memorandum to the Member, this Memorandum applies as if each Member were the only Member and separately to each covered party against whom a claim is made or a suit is brought.

(13) TRANSFER OF RIGHTS OF RECOVERY

In the event of any payment under this Memorandum, we will be subrogated to all of the covered party's rights of recovery against any person or organization and the covered party shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The covered party shall do nothing to prejudice such rights.

South Dakota Public Assurance Alliance
MEMORANDUM OF AUTO LIABILITY COVERAGE

The liability coverage provided to the Member is described in this Memorandum of Coverage and with all endorsements, coverage parts and the Declarations and the Intergovernmental Contract for the South Dakota Public Assurance Alliance.

Words used in this Memorandum that are in bold have special meaning. The definitions are provided in Section D which should be consulted to gain an informed understanding of the coverage provided herein.

SECTION A – COVERAGE

Subject to the limit of coverage and deductible specified in the Declarations:

We will pay damages the covered party legally must pay because of bodily injury or property damage to which this coverage applies caused by an accident during the coverage period and resulting from the ownership, maintenance, or use of an auto.

SECTION B – DEFENSE AND SETTLEMENT

We have the right and duty to defend any claims or suits against a covered party seeking damages, however:

(1) we may investigate, defend and settle any claim or suit at our discretion;
(2) we have the right, but not the obligation, to appeal any judgment against the covered party;
(3) we will pay defense costs we incur in the adjustment, investigation, defense or litigation of any claim or suit;
(4) defense costs are payable in addition to the limit of coverage; and
(5) our right and duty to defend end when we have paid the limit of coverage for judgments or settlements.

SECTION C – EXCLUSIONS

We will not pay or defend claims or suits arising from:

(1) bodily injury or property damage expected or intended from the standpoint of the covered party, except actions of the covered party to protect persons or property.
(2) liability assumed under any contract or agreement in which the covered party assumes the tort liability of another to pay damages if such assumption is made after the damages occur.
(3) any obligation for which the covered party or its insurer may be held liable under any workers' compensation, disability benefits or unemployment compensation law or any similar law.
(4) bodily injury to:

    (a) an employee of the Member arising out of and in the course of employment by the Member; or
    (b) the spouse, child, parent, brother, or sister of that employee as a consequence of paragraph (a) above.

This exclusion applies:

(a) whether the covered party may be liable as an employer or in any other capacity; and
(b) to any obligation to share damages with or repay someone else who must pay damages because of the injury.

(5) the actual, alleged or threatened discharge, dispersal, release or escape of pollutants, unless the discharge, dispersal, release or escape is sudden and accidental and:

(a) the covered party discovered the accident within seven days of its commencement;
(b) the accident was reported in writing to us within 21 days of its discovery by the covered party; and
(c) the covered party expended reasonable effort to terminate the discharge, dispersal, release or escape of pollutants as soon as conditions permitted.

This exclusion does not apply to emergency operations or training activities within the scope of the Member's fire protection duties.

(6) bodily injury or property damage arising out of war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution.

(7) autos while used in any professional or organized racing or demolition contest or stunting activity or while practicing for such contest or activity.

SECTION D – DEFINITIONS

Auto – means a land motor vehicle, trailer or semi-trailer, including any attached machinery or equipment, designed for travel principally on public roads. It does not include vehicles that travel on crawler treads, snowmobiles, vehicles located for use as a residence on premises, or road maintenance equipment owned by the Member.

Bodily Injury – means bodily injury, sickness or disease sustained by a person, including death resulting from any of these.

Covered Party – means:

(a) the Member;
(b) unless specifically excluded, any and all commissions, councils, agencies, districts, authorities, or boards coming under the Member's direction or control or for which the Member's board sits as the governing body;
(c) any person who is an official, employee or volunteer of (a) or (b) while acting in an official capacity for (a) or (b), including while acting on an outside board at the direction of (a) or (b); or
(d) anyone else while using a covered auto with the permission of a covered party, except the owner of that auto or the owner or employee of a business of selling, servicing, repairing or parking autos. This subsection does not apply to any Uninsured/Underinsured Motorists coverage under this Memorandum.

Damages – means money due a third party, including attorney's fees, interest on judgments, and costs. Damages do not include:

(a) punitive, exemplary or treble damages and fines or penalties;
(b) injunctive, equitable, or other non-monetary relief, or any monetary relief or expense in connection therewith; or
(c) damage to property owned by the Member or to the property of others in the Member's care, custody or control.

Deductible – means the amount of damages and defense costs the Member is obligated to pay. The deductible is stated in the Declarations. Any deductible amount we may pay shall be promptly reimbursed to us by the Member, upon notification.

Defense Costs – means all fees and expense we incur relating to the adjustment, investigation, defense or litigation of a claim for damages to which this coverage applies. Defense costs include:

(a) defense attorney fees;
(b) court costs;
(c) appeal bonds for our appeals; and
(d) reasonable expenses incurred by the covered party at our request to assist us in the investigation or defense of claims or suits.

Limit of Coverage – means the most we will pay for damages arising out of one accident regardless of the number of covered parties, claimants, claims made or suits brought. The limit of coverage is stated in the Declarations.

Member – means the governmental entity specifically identified in the Declarations attached to this Memorandum.

Memorandum – means this Memorandum of Auto Liability Coverage and any endorsements attached hereto.

Pollutants – means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, fungi, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed. The term pollutants as used herein is not defined to mean potable water or agricultural water or water furnished to commercial users or water used for fire suppression.

Property Damage – means damage to or loss of use of tangible property.

Third Party – means any person making a claim against a covered party.

We, Us & Our – means the South Dakota Public Assurance Alliance.

SECTION E – COVERAGE EXTENSIONS

(1) COVERED POLLUTION COST & EXPENSE

Subject to the limit of coverage and deductible specified in the Declarations, we will pay damages that the covered party legally must pay as a *covered pollution cost or expense* (defined below) caused by an accident and arising out of the ownership, maintenance or use of covered autos, but only if there is bodily injury or property damage, covered herein, caused by the same accident.

Covered pollution cost or expense means any cost or expense arising out of any request, demand, order or any claim or suit by or on behalf of a governmental authority demanding that the Member or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize, or in any way respond to, or assess the effects of pollutants.

Covered pollution cost or expense does not mean:

(a) any cost or expense arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants:

(i) before the pollutants, or any property in which the pollutants are contained, are moved from the place where they are accepted by the Member for movement into or onto the covered auto; or

(ii) after the pollutants, or any property in which the pollutants are contained, are moved from the covered auto to the place where they are finally delivered, disposed of or abandoned by the Member.

This does not apply to accidents that occur away from premises the Member owns or rents with respect to pollutants not in or upon a covered auto if:

(i) the pollutants, or any property in which the pollutants are contained, are upset, overturned or damaged as a result of the maintenance or use of a covered auto; and

(ii) the discharge, dispersal, seepage, migration, release or escape of the pollutants is caused directly by such upset, overturn or damage.

(b) damages arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of pollutants that are, or that are contained in any property that is:

(ii) being transported or towed by, handled or handled for movement into, onto or from the covered auto;

(iii) otherwise in the course of transit by the Member or on the Member's behalf; or

(iv) being stored, disposed of, treated or processed in or upon the covered auto,

if the Member's liability for such damages or expenses is incurred by the Member's assumption of liability in any contract or agreement.

(2) UNISURED/UNDERINSURED MOTORISTS

We will pay those amounts that a covered party is legally entitled to recover as damages from the owner or operator of an *uninsured auto* or *underinsured auto* (defined below). The damages must

result from bodily injury sustained by the covered party and caused by an accident resulting from the ownership, maintenance or use of, or when struck by, an *uninsured auto* or *underinsured auto*. Use includes operating the vehicle as well as getting into or out of, or being in or on the vehicle.

The limit of coverage for Uninsured Motorists specified in the Declarations is the most we will pay for all damages a covered party is legally entitled to recover from the owner or operator of an *uninsured auto* arising out of any one accident. The limit of coverage for Underinsured Motorists specified in the Declarations is the most we will pay for all damages a covered party is legally entitled to recover from the owner or operator of an *underinsured auto* arising out of any one accident.

The right to coverages and the amount payable will be decided by agreement between the covered party and us. If an agreement cannot be reached, and if the covered party and we agree, such dispute may be submitted to binding arbitration, as set forth in Section F – CONDITIONS, to expedite resolution.

The damages payable will be reduced by:

(i) all amounts paid by the owner or operator of the *uninsured auto* or *underinsured auto* or anyone else responsible. This includes all amounts paid under any section of the Memorandum or any auto insurance policy; and
(ii) all amounts payable under any workers' compensation law, disability benefits law, or similar law, or any auto medical payments or personal injury protection coverage.

We are not obligated to make any payment for damages which arise out of the use of an underinsured auto until after the limits of coverage for all protection in effect and applicable at the time of the accident have been exhausted by payment of judgments or settlements. We are also not obligated to make any payment for any claim the covered party settles without our written consent.

UnderInsured Auto:

(a) means an auto which has liability protection in effect and applicable at the time of an accident in an amount equal to or greater than the amounts specified for bodily injury liability by the financial responsibility laws of South Dakota, but less than the applicable damages the covered party is legally entitled to recover.
(b) does not mean an auto that is lawfully self-insured, an auto owned by any federal, state or local government or agency, or an auto owned by the covered party.

Uninsured Auto:

(a) means:

(i) an auto for which no liability bond or insurance policy provides bodily injury coverage at the time of the accident;
(ii) an auto covered by a liability bond or insurance policy which does not provide at least the minimum financial responsibility requirements of South Dakota;
(iii) an auto for which the insurer denies coverage or the insurer becomes insolvent; or
(iv) a hit-and-run auto where neither the operator nor owner can be identified and which causes bodily injury to a covered party:

1) by physical contact with the covered party or with a vehicle occupied by the covered party;
2) without physical contact with the covered party or with a vehicle occupied by the covered party, if the facts of the accident can be proven by independent corroborative evidence, other than the testimony of the covered party making a claim under this Memorandum, unless such testimony is supported by additional evidence.

The accident must be reported promptly to law enforcement and us. If the covered party was occupying an auto at the time of the accident, we have a right to inspect it.

(b) does not mean an auto that is lawfully self-insured, an auto owned by any federal, state or local government or agency, or any auto which is owned by the covered party.

(3) MEDICAL EXPENSES

We will pay reasonable expenses, up to the limit of coverage for Medical Expenses specified in the Declarations, incurred for necessary medical and funeral services to anyone who sustains bodily injury caused by an accident while in, on, getting into, or getting out of a covered auto. We will pay only those expenses incurred and reported to us within one year from the date of the accident.

We will not pay for:

(a) bodily injury caused by an accident which does not take place during the coverage period;
(b) bodily injury sustained by a covered party while occupying a vehicle located for use as a residence or premises;
(c) bodily injury to any employee, except volunteer fire fighters and volunteer workers not entitled to workers compensation coverages, arising out of and in the course of employment by the Member; or
(d) bodily injury to anyone using a vehicle without a reasonable belief that the person is entitled to do so.

SECTION F – CONDITIONS

(1) ACTION AGAINST US

We will have no liability hereunder nor shall action be taken against us unless:

(a) the covered party has fully complied, and continues to fully comply, with all of the terms of this Memorandum and the Intergovernmental Contract; and
(b) the covered party's obligation to pay damages shall have been finally determined either by judgment after actual trial or by written agreement of the covered party, us and the claimant. Any person or organization or legal representative thereof who has secured such judgment or written agreement shall be entitled to recover under this Memorandum to the extent of the coverage afforded by this Memorandum. No person or organization shall have any right under this Memorandum to join us, our agents, employees or independent contractors as a party to any action against the covered party to determine their liability nor shall we be impleaded by the covered party or their legal representative.

(2) ARBITRATION

Decisions about whether to investigate, settle, or defend any claim or suit or whether coverage exists are at our sole discretion. If the covered party and we agree, disputes about such matters may be submitted to binding arbitration to expedite the resolution of such disputes.

If the covered party and we agree to submit such issues to binding arbitration, the arbitration shall be conducted pursuant to South Dakota law and in particular, but not in limitation, the provisions of SDCL ch. 21-25A. The covered party shall select one arbitrator; we shall select one arbitrator; and the two arbitrators shall agree on a third arbitrator. The arbitration panel shall hear and decide the dispute. The arbitration hearing shall be held in the state of South Dakota and in the county where the covered party shall be located. The decision of the arbitration panel is final and binding and shall not be subject to appeal.

Each party shall bear the cost of the arbitrator it selects and shall bear one-half the cost of the third arbitrator. Each party shall bear its own costs and expenses of arbitration, including attorney fees.

(3) ASSIGNMENT

We will not be bound by the covered party's assignment of interest under this Memorandum unless we agree to it in writing.

(4) BANKRUPTCY OR INSOLVENCY

The covered party's bankruptcy or insolvency will not release us from our obligations under this Memorandum.

(5) CHANGES

This Memorandum and the Intergovernmental Contract for the South Dakota Public Assurance Alliance constitute the total agreement between the Member and us concerning the coverages afforded. The terms of the Intergovernmental Contract may only be changed as stated in that document. The terms of this Memorandum shall not be waived or changed except by endorsement issued by us to form a part of this Memorandum.

(6) COMPLIANCE

If any provision of this Memorandum is determined by an appropriate governing body to be prohibited, illegal or void by any law controlling its construction, the provision shall be deemed to be modified or amended to comply with the minimum requirements of the law. The invalidity of any provision does not invalidate the remainder of this Memorandum. If any coverage provided for in this Memorandum is similarly determined to not comply with the required coverages of any statutory law, this Memorandum is amended to provide the minimum coverage required by such law.

(7) DUTIES IN THE EVENT OF A CLAIM OR SUIT

(a) The Member must see to it that we are notified in writing as soon as practicable of any accident which may result in a claim. Notice should include, to the extent possible:

(i) details of the situation;
(ii) how, when and where the accident took place;
(iii) the nature and location of the accident; and

(v) the names and addresses of any injured persons and witnesses.

(b) If a claim is made or a suit is brought against a covered party, the Member must, immediately:

(i) record the specifics of the claim or suit and the date and manner received;
(ii) notify us in writing;
(iii) send us copies of any demands, notices, summonses or legal papers received in connection with the claim or suit;
(iv) authorize us to obtain records and other information;
(v) fully cooperate with us in the investigation, settlement or defense of the claim or suit; and
(vi) assist us, upon our request, and obtain any necessary assignment, in the enforcement of any right against any person or organization which may be liable to the covered party because of the accident.

(c) No covered party will, except at that covered party's own cost, voluntarily make a payment, assume any obligation, or incur any expense, other than for first aid, without our written consent.
(d) We shall conduct the defense of any claim in the covered party's name and prosecute in their name for their coverage any claim for indemnity or damages or otherwise against any third party and shall have full discretion in the handling of any claim.
(e) If the Member gives timely prior written notice to us that any claim is not to be settled without the Member's consent, we shall not settle such claim without the Member's consent.

If, however, the Member refuses to consent to any settlement agreeable to the claimant and us or any reasonable offer of settlement recommended by us:

(i) Our ultimate liability with respect to such claim shall not exceed the amount for which the claim may have been settled or the amount recommended for settlement by us plus claim expense incurred up to the date of such refusal; and
(ii) The Member has the right to appeal any judgment awarded over the amount for which the claim may have been settled or the amount recommended for settlement by us.

(f) All notification required by this condition shall be mailed to the address shown in the Declarations.
(g) The issuance of this Memorandum shall not be deemed a waiver of any statutory or common-law immunities that apply. Use of the governmental immunity defense will be at our discretion.

(8) INTENTIONAL FAILURE TO DISCLOSE

This Memorandum has been issued based upon our reliance on representations made by the Member. Intentional non-disclosure or misrepresentation of any material fact may entitle us to void this Memorandum and relieve us of any obligation hereunder.

(9) INSPECTIONS

We shall be permitted, but not obligated, to inspect the Member's property and operations at any time. Our right to inspect, the actual inspection, or any report made shall not warrant that such property or operations are safe or that they comply with any applicable laws or regulations.

(10) LIBERALIZATION
If we revise this edition of the Memorandum to provide broader coverages without an additional contribution charge, we will automatically provide these broader coverages as of the day the revision is effective, subject, however, to all of the terms of this Memorandum and the Intergovernmental Contract to which this Memorandum attaches.

(11) OTHER COVERAGES
If any covered party has valid and collectible insurance, self-insurance or pooled coverage for an accident covered by this Memorandum, the coverage provided by this Memorandum will be excess over such other coverage, except that the Member may purchase coverage which is specifically issued to be excess of the coverage provided by this Memorandum.

This coverage is excess over any other primary insurance available to the covered party covering liability for damages arising out of the premises or operations for which the covered party has been added as an additional insured by attachment of an endorsement.

(12) SEVERABILITY OF INTERESTS
Except with respect to the limit of coverage and any rights or duties specifically assigned in this Memorandum to the Member, this Memorandum applies as if each Member were the only Member and separately to each covered party against whom a claim is made or a suit is brought.

(13) TRANSFER OF RIGHTS OF RECOVERY
In the event of any payment under this Memorandum, we will be subrogated to all of the covered party's rights of recovery against any person or organization and the covered party shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The covered party shall do nothing to prejudice such rights.

South Dakota Public Assurance Alliance
MEMORANDUM OF GOVERNMENTAL LIABILITY COVERAGE

The liability coverage provided to the Member is described in this Memorandum of Coverage and with all endorsements, coverage parts and the Declarations and the Intergovernmental Contract for the South Dakota Public Assurance Alliance.

Words used in this Memorandum that are in bold have special meaning. The definitions are provided in Section D which should be consulted to gain an informed understanding of the coverage provided herein.

SECTION A – COVERAGE

Subject to the limit of coverage and deductible specified in the Declarations:

We will pay damages the covered party becomes legally obligated to pay caused by an occurrence during the coverage period, except as excluded herein.

SECTION B – DEFENSE AND SETTLEMENT

We have the right and duty to defend any claims or suits against a covered party seeking damages, however:

(1) we may investigate, defend and settle any claim or suit at our discretion;
(2) we have the right, but not the obligation, to appeal any judgment against the covered party;
(3) we will pay defense costs we incur in the adjustment, investigation, defense or litigation of any claim or suit;
(4) defense costs are payable in addition to the limit of coverage; and
(5) our right and duty to defend end when we have paid the limit of coverage for judgments or settlements.

SECTION C – EXCLUSIONS

We will not pay or defend claims or suits arising from:

(1) the ownership, operation, use, maintenance or entrustment of any aircraft owned or operated by, rented or loaned to, a covered party.
(2) the manufacture of, mining of, use of, sale of, installation of, removal of, distribution of or exposure to radon, asbestos, asbestos products, asbestos fibers, asbestos dust or silica dust or:

   (a) any obligation of the covered party to indemnify any party because of such claims; or
   (b) any obligation to defend any suit or claims against the covered party because of such claims.

(3) failure to perform, or breach of, a contractual obligation.
(4) claimants seeking redress under quasi contractual theories such as unjust enrichment or quantum meruit.

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(5) the partial or complete structural failure or overtopping of a dam.

(6) a written or oral contract in which the covered party assumes tort liability of another to pay damages if such assumption is made after the damages occur.

(7) bodily injury to the covered party arising out of and in the course of employment by the Member.

(8) benefits payable under any employee benefits plan, (whether the plan is voluntarily established by the Member or mandated by statute).

(9) obligations under any workers' compensation, unemployment compensation or disability law or any similar law.

(10) liability imposed under the Employee Retirement Income Security Act of 1974, and any law amendatory thereof.

(11) preparation of bids, bid specifications, or plans, including architectural plans.

(12) the failure to supply or provide an adequate or specific supply of gas, water, steam, electricity or sewage treatment capacity resulting from or caused by planning, engineering, design, or failure to produce, secure, contract for, or otherwise obtain such supplies or capacity.

(13) the following conduct of any covered party:

(a) willful, wanton, fraudulent, malicious or criminal acts;
(b) gaining illegal profit, advantage or remuneration;
(c) with intent to cause improper harm;
(d) with conscious disregard of the rights or safety of others; or
(e) with malice.

This exclusion does not apply to claims based solely on vicarious liability where the covered party did not authorize, ratify, participate in, or consent to such conduct.

(14) eminent domain, condemnation proceedings, inverse condemnation, dedication by adverse use or other taking of private property for public use, except claims or suits related to zoning actions.

(15) the ownership, use, operations or maintenance of any airport, runway, hangar or other aviation facility.

(16) the rendering or the failure to render professional legal services to a third-party.

(17) the ownership, use, operation or maintenance of any hospital, medical clinic, assisted living, nursing home, intermediate care facility or other health care facility.

(18) the rendering or failure to render medical or personal care services, unless such claims or suits arise from an emergency or the operations of the Member's emergency medical technicians, paramedics, nurses, firefighters or law enforcement officials.

(19) the hazardous properties of nuclear material.

(20) the actual, alleged or threatened discharge, dispersal, release or escape of pollutants, unless the discharge, dispersal, release or escape is sudden and accidental and:

(a) the covered party discovered the occurrence within seven days of its commencement; and
(b) the occurrence was reported in writing to us within 21 days of its discovery by the covered party; and
(c) the covered party expended reasonable effort to terminate the discharge, dispersal, release or escape of pollutants as soon as conditions permitted.

This exclusion does not apply to:

(i) use of the Member's premises to store household waste for 90 days or less;
(ii) Fire Department training or emergency operations;
(iii) pesticide or herbicide spraying;
(iv) use of chlorine or sodium hypochlorite in the Member's sewage or water treatment or swimming pool maintenance operations;
(v) storage and application of road salt, sand, anti-skid and similar materials,

provided all such activities meet federal, state and local government statutes, ordinances, regulations and license requirements.

(21) any site or location principally used by the covered party, or by others on the covered party's behalf, for the handling, storage, disposal, dumping, processing, or treatment of waste material, other than wastewater treatment facilities and sewer systems.
(22) any loss, cost or expense arising out of any governmental directions or requests that the covered party or others test for, monitor, clean up, remove, contain, treat, detoxify or neutralize pollutants.
(23) damage to property rented or leased to the covered party where the covered party has assumed liability for damage to or destruction of such property, unless the covered party would have been liable in absence of such assumption of liability.
(24) damage to aircraft or watercraft in the care, custody, or control of any covered party.
(25) war, whether or not declared, or any act or condition incident to war. War includes civil war, insurrection, rebellion or revolution.
(26) the ownership, operation, use, maintenance or entrustment of any auto.
(27) the Member:

(a) collecting, refunding, disbursing or applying taxes, fees, fines, liens or assessments;
(b) failing to anticipate tax revenue shortfalls;
(c) issuing, guaranteeing or failing to repay bonds, notes or debentures;
(d) utilizing federal or state funds, appropriations or grants;
(e) violating any law or regulation governing the issuance or sale of securities;
(f) purchasing or failing to purchase and maintain insurance or pooled self-insurance.

(28) housing authorities.
(29) motorized racing events or facilities.
(30) trampolines, other rebounding devices and inflatables.
(31) amusement or carnival rides and devices.
(32) down-hill ski runs, ski lifts and ski tows.
(33) railroads.

SECTION D – DEFINITIONS

Aircraft – means any machine designed to travel through the air, including but not limited to airplanes, dirigibles, hot air balloons, helicopters, hang gliders and drones.

Auto – means a land motor vehicle, trailer, or semi-trailer, including any attached machinery or equipment, designed for travel principally on public roads. It does not include vehicles that travel on

South Dakota Public Assurance Alliance
GOVERNMENTAL LIABILITY COVERAGE EXCLUSION

This Endorsement Changes the Memorandum of Governmental Liability Coverage.
Please Read It Carefully.

EXCLUSION ENDORSEMENT

SECTION C. – Exclusions

Exclusion (34) is added as follows:

(34) Fire Department, Fire Fighting activities or Fire Department vehicles

All other terms and conditions remain unchanged.

This endorsement forms a part of the Memorandum of Governmental Liability Coverage to which it is attached, effective during the Coverage Period stated in the Declarations unless otherwise stated herein.

(The following information is required only when this endorsement is issued subsequent to the inception of the Agreement Period.)

Endorsement Effective: 1/14/2016
Endorsement No.: GL 1150

Member No.: 089
Member: City of Pierre

Countersigned By: Kristina A Peterson
Director of Underwriting

CITY 8

CLAIMS associates INCORPORATED

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

November 15, 2018

Bill Fuller
Fuller & Williamson, LLP
7521 South Louise Ave.
Sioux Falls SD 57108

Re:
Certificate Number:	089
Member:	City of Pierre
Claimant:	Lisa Tammen-Randall Jurgens
Date of Loss:	8/1/16
Claim No:	GC16-89840
Case Number:	CIV17-0042

Dear Bill,

Following our recent phone discussion this letter is being sent to you as counsel for Gerrit Tronvold in reference to the automobile accident captioned above.

Claims Associates, Inc. is the Claims Administrator for the South Dakota Public Assurance Alliance of which the City of Pierre is a Member. This letter confirms receipt of the Summons and Complaint filed by Lisa Tammen and Randall Jurgens.

We have reviewed the allegations contained in the Complaint and must deny coverage for Gerrit Tronvold for all counts and damages listed. This denial is based on our review of the Certificate issued to the City of Pierre bearing Certificate Number 089 with effective dates of 1/14/16 to 1/14/17 and a retroactive date of 1/14/1988, under the City's Automobile Liability coverage document. This denial is being made for the following reasons:

> Gerrit Tronvold was operating his personal vehicle on the way to a meeting with the Pierre Volunteer Fire Department when this accident happened. Citing the following definition of the coverage document for the City of Pierre, SECTION D – DEFINITIONS

Covered Party – means:

(a) the Member;

(b) unless specifically excluded, any and all commissions, councils, agencies, districts, authorities, or boards coming under the Member's direction or control or for which the Member's board sits as the governing body;

(c) any person who is an official, employee or volunteer of (a) or (b) while acting in an official capacity for (a) or (b), including while acting on an outside board at the direction of (a) or (b); or

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4901 Isabel Place • Suite 100 • P.O. Box 1898 • Sioux Falls, South Dakota • 57101 • Phone: (605) 333-9810 • Fax: (605) 333-98CITY 416

(d) anyone else while using a covered auto with the permission of a covered party, except the owner of that auto or the owner or employee of a business of selling, servicing, repairing or parking autos. This subsection does not apply to any Uninsured/Underinsured Motorists coverage under this Memorandum.

In this case, Mr. Tronvold does not qualify as a Covered Party for the City of Pierre in this automobile accident. Further, the Pierre Volunteer Fire Department is not a commission, council, agency, district, authority or board that comes under the City's direction or control or for which the City's board sits as the governing agency. Additionally, should there be any reference to the City of Pierre's General Liability coverage, no coverage is afforded Mr. Tronvold as this is specifically excluded given this incident resulted from the use of an auto.

We wish to advise you that we are denying coverage and declining a defense to Mr. Tronvold due to the above cited certificate exclusion and provisions.

Our decision to deny coverage is based on the facts presented to date. We reserve the right to review any additional information and to make a separate determination as to whether defense or indemnity may be provided.

While we regret that this claim does not fall within the certificate of coverage, it is our every intent to fully afford those coverages that are available.

Should you have any questions relative to this letter, please do not hesitate to contact our office.

Very truly yours,

Dave Sendelbach, CPCU
Casualty Supervisor

cc: SDPAA
City of Pierre

CLAIMS associates INCORPORATED

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

November 13, 2018

Lindsey Riter-Rapp
Riter, Rogers, Wattier & Northrup
319 S. Coteau Street
Pierre SD 57501-0280

Re:		
	Certificate Number:	089
	Member:	City of Pierre
	Claimant:	Lisa Tammen-Randall Jurgens
	Date of Loss:	8/1/16
	Claim Number:	GC16-89840
	Case Number:	CIV. 17-0042

Dear Lindsey,

Claims Associates, Inc. is the Claims Administrator for the South Dakota Public Assurance Alliance (SDPAA), of which the city of Pierre is a Member.

This letter sets forth our position with respect to coverage under the Automobile Liability Coverage Agreement ("the Agreement") between the SDPAA and the City of Pierre for the claims asserted in the lawsuit entitled Lisa Tammen and Randall Jurgens vs. Gerrit Tronvold, the City of Pierre and the Pierre Volunteer Fire Department, case number CIV. 17-0042 filed in Hughes County Circuit Court.

We have forwarded a copy of your claim file to Rob Anderson and Doug Abraham of the law firm of May, Adam, Gerdes and Thompson and have requested that they handle the defense of this lawsuit. We appreciate and thank you for your cooperation with this attorney in the handling of this matter.

Please do not discuss this suit with anyone other than an authorized representative of Claims Associates, Inc. or your attorney.

We wish to call to your attention to the fact that we specifically reserve our rights concerning coverage and defense under your certificate for the following reasons:

> The plaintiffs allege that Gerrit Tronvold is an employee of the City. The coverage document does not support this allegation. Citing the applicable section of the coverage document: SECTION D – DEFINITIONS

Covered Party – means:

(a) the Member;

(b) unless specifically excluded, any and all commissions, councils, agencies, districts, authorities, or boards coming under the Member's direction or control or for which the Member's board sits as the governing body;

(c) any person who is an official, employee or volunteer of (a) or (b) while acting in an official capacity for (a) or (b), including while acting on an outside board at the direction of (a) or (b); or

(d) anyone else while using a covered auto with the permission of a covered party, except the owner of that auto or the owner or employee of a business of selling, servicing, repairing or parking autos. This subsection does not apply to any Uninsured/Underinsured Motorists coverage under this **Memorandum**.

In this case, Mr. Tronvold does not qualify as a Covered Party for the City of Pierre in this automobile accident. Further, the Pierre Volunteer Fire Department is <u>not</u> a commission, council, agency, district, authority or board that comes under the City's direction or control or for which the City's board sits as the governing agency. Additionally, should there be any reference to the City of Pierre's General Liability coverage, no coverage is afforded Mr. Tronvold as this is specifically excluded given this incident resulted from the use of an auto.

The SDPAA expressly reserves any and all other provisions or exclusions contained in the Agreement, although not set forth in this letter, as a basis to deny coverage under the Agreement.

We will continue to investigate the circumstances of this claim and provide a defense of this lawsuit. No action we have taken to date or may take in the future is deemed a waiver of those rights.

Should you at any time have any questions relative to this claim or to the progress of this matter, please do not hesitate to contact our office at 1-888-613-7064.

Very truly yours,

Dave Sendelbach, CPCU
Casualty Supervisor

cc: SDPAA

Statement of Values - Vehicles

City of Pierre

No.	Year, Make, Model	VIN	New/Stated Cost	Valu-ation	Garaging Address	Benefit Deductible ($) SP	Comp	Coll
1	1997 IHC Truck	8558	$108,922	ACV	1700 E Dakota	N/C	100	1,000
2	2000 Ford F450 Truck w/Terex Tel	8200	$59,900	ACV	1700 E Dakota	N/C	100	1,000
3	1990 IHC Plow Truck	3246	$49,122	ACV	Airport	N/C	100	1,000
4	2001 IHC 4900 Truck	6777	$53,987	ACV	Street Dept	N/C	100	1,000
5	2001 IHC 4900 Truck	6776	$53,987	ACV	Street Dept	N/C	100	1,000
6	1996 IHC 4900 Truck	8656	$51,841	ACV	Street Dept	N/C	100	1,000
7	1997 IHC 4900 Truck	9280	$51,841	ACV	Street Dept	N/C	100	1,000
8	1997 IHC 4900 Truck	9283	$51,841	ACV	Street Dept	N/C	100	1,000
9	1997 IHC 4900 Truck	9277	$51,841	ACV	Street Dept	N/C	100	1,000
10	2000 Chevrolet Truck w/box & Hois	4390	$27,062	ACV	Street Dept	N/C	100	1,000
11	1989 Ford Dump Truck	5258	$50,107	ACV	Street Dept	N/C	100	1,000
12	2003 Freightliner Truck	5184	$103,000	ACV	Electric	N/C	100	1,000
13	2003 Dodge Durango	3797	$29,700	ACV	222 E Dakota	N/C	100	1,000
14	2004 Freightliner Tractor	7862	$71,635	ACV	2800 E Park	N/C	100	1,000
15	2004 Ford F250 Truck	2889	$18,638	ACV	1100 S. Buchanan	N/C	100	1,000
16	2005 Chevrolet Silverado Pickup	0650	$16,500	ACV	222 E Dakota	N/C	100	1,000
17	2005 Chevrolet Impala	1921	$14,400	ACV	222 E Dakota	N/C	100	1,000
18	2005 Dodge Durango	1037	$32,000	ACV	222 E Dakota	N/C	100	1,000
19	2005 Chevrolet Colorado Pickup	7430	$15,600	ACV	Pierre	N/C	100	1,000
20	2005 Ford Van	3625	$17,000	ACV	3200 E. Hwy 34	N/C	100	1,000
21	2005 Sterling LT7500 Truck	4939	$59,600	ACV	2800 E. Park	N/C	100	1,000
22	2005 International 7400 SFA Truck	9335	$87,841	ACV	715 E Dakota	N/C	100	1,000
23	2005 Chevrolet Silverado Pickup	6595	$30,000	ACV	222 E Dakota	N/C	100	1,000
24	2005 Chevrolet Silverado Pickup	0392	$26,000	ACV	Pierre	N/C	100	1,000
25	2006 Chevrolet 3/4T Pickup	4152	$20,478	ACV	Airport	N/C	100	1,000
26	2006 Chevrolet Silverado	7422	$17,200	ACV	1626 E Dakota	N/C	100	1,000
27	2006 Ford Ranger	8490	$16,000	ACV	222 E. Dakota	N/C	100	1,000
28	2006 Ford Ranger	3652	$16,000	ACV	222 E. Dakota	N/C	100	1,000
29	2007 Chevrolet Silverado Pickup	1902	$24,316	ACV	Electric Dept	N/C	100	1,000
30	2007 Chevrolet CK15 Pickup	2647	$17,387	ACV	Parks Dept	N/C	100	1,000
31	2007 Chevrolet CK15 Pickup	4736	$17,387	ACV	1100 S Buchanan	N/C	100	1,000
32	2007 Chevrolet Silverado Pickup	2279	$17,452	ACV	Golf	N/C	100	1,000
33	2006 Chevrolet Silverado Pickup	5810	$20,435	ACV	Water	N/C	100	1,000
34	1995 IHC 4900 Truck	9556	$50,000	ACV	Street	N/C	100	1,000
35	2007 Dodge Ram Pickup	3127	$31,234	ACV		N/C	100	1,000
36	2007 Chevrolet Impala	2530	$15,483	ACV	222 E. Dakota	N/C	100	1,000
37	2007 Chevrolet Impala	2566	$15,633	ACV	3200 E. Hwy 34	N/C	100	1,000
38	2007 Dodge R15 Pickup	3281	$21,000	ACV	3200 E. Hwy 34	N/C	100	1,000
39	1996 Ford CFT8000 Truck	5274	$5,000	ACV	1700 E. Dakota	N/C	100	1,000
40	1996 Ford CFT8000 Truck	5275	$8,000	ACV	1700 E. Dakota	N/C	100	1,000
41	2007 Sterling Sewer Truck	9599	$260,600	ACV	1100 S Buchanan	N/C	100	1,000

Statement of Values - Vehicles

City of Pierre

No.	Year, Make, Model	VIN	New/Stated Cost	Valu-ation	Garaging Address	Benefit Deductible ($) SP	Comp	Coll
42	2007 Ford F150 Pickup	6064	$19,103	ACV	Water	N/C	100	1,000
43	1996 Ford Side Dump Truck	5274	$30,000	ACV	Street	N/C	100	1,000
44	1996 Ford Water Truck	5275	$15,000	ACV	Street	N/C	100	1,000
45	2007 JTC Trailer	0R20	$5,700	ACV	Electric	N/C	100	1,000
46	2007 JTC Trailer	0R21	$5,700	ACV	Electric	N/C	100	1,000
47	2007 JTC Trailer	0R22	$5,700	ACV		N/C	100	1,000
48	2007 Maum Trailer	2394	$6,865	ACV	Street	N/C	100	1,000
49	2008 Chevrolet Impala	9489	$15,551	ACV	222 E. Dakota	N/C	100	1,000
50	2008 Chevrolet K-10 Pickup	4851	$25,518	ACV	222 E. Dakota	N/C	100	1,000
51	2008 Dodge Ram 3500 Pickup w/D	6231	$34,476	ACV	1614 E Dakota	N/C	100	1,000
52	2008 Ford F350 Pickup	1811	$20,658	ACV	400 S Roosevelt	N/C	100	1,000
53	2008 Chevrolet Impala	3619	$15,551	ACV	215 W Dakota	N/C	100	1,000
54	2008 Chevrolet Impala	8036	$15,534	ACV	3200 SD Hwy 34	N/C	100	1,000
55	2008 Chevrolet Impala	8638	$15,534	ACV	3200 SD Hwy 34	N/C	100	1,000
56	2008 Chevrolet Silverado Pickup	1146	$21,960	ACV	Water Dept	N/C	100	1,000
57	2008 Freightliner Truck	0587	$99,655	ACV	Water Dept	N/C	100	1,000
58	2008 Chevrolet C3500 w/dump bod	3745	$27,617	ACV	Street	N/C	100	1,000
59	2008 Chevrolet Silverado Pickup	1613	$24,212	ACV	Electric	N/C	100	1,000
60	2008 KDEE Trailer	H007	$6,040	ACV	Electric	N/C	100	1,000
61	2008 KDEE Trailer	0040	$15,206	ACV	Electric	N/C	100	1,000
62	2008 Chevrolet Silverado	7840	$24,318	ACV	Park	N/C	100	1,000
63	2007 Kawasaki ATV	6373	$13,157	ACV	Park	N/C	100	1,000
64	2009 Chevrolet Silverado Pickup	0046	$24,000	ACV	2800 E. Park	N/C	100	1,000
65	2006 Ford Cutaway E350	7220	$16,300	ACV	Park	N/C	100	1,000
66	2009 Chevrolet Silverado Pickup	9001	$20,925	ACV	1201 E. Sully	N/C	100	1,000
67	2009 Chevrolet Silverado Pickup	3232	$29,969	ACV	1700 E Dakota	N/C	100	1,000
68	2010 Maurer Tilt Bed Bob Cat Trail	2608	$8,770	ACV	Park	N/C	100	1,000
69	2009 IHC 7300 Truck	6319	$85,000	ACV	Street	N/C	100	1,000
70	2009 IHC 7300 Truck	6320	$85,000	ACV	Street	N/C	100	1,000
71	2010 Freightliner M2 106 Truck	6902	$85,000	ACV	Water	N/C	100	1,000
72	2009 Chevrolet Silverado 1500 Pick	0041	$23,000	ACV	Water	N/C	100	1,000
73	2009 Chevrolet Impala	0368	$16,799	ACV	Administration	N/C	100	1,000
74	2010 Freightliner Loadmaster Garb	1253	$101,440	ACV	Garbage	N/C	100	1,000
75	2009 Ford Crown Vic	5114	$33,000	ACV	Police	N/C	100	1,000
76	2010 Chevrolet Silverado 1500 Pick	9213	$20,970	ACV	STP	N/C	100	1,000
77	2011 Freightliner M2 106 Truck	5811	$110,000	ACV	Elec	N/C	100	1,000
78	2011 Dodge Ram 2500 Pickup	7934	$24,461	ACV	Park	N/C	100	1,000
79	2011 Chevrolet Impala LS - Police	9507	$17,421	ACV	Police	N/C	100	1,000
80	2011 Dressen Custom Trail 7x12 Tr	2132	$5,140	ACV	Electric	N/C	100	1,000
81	2009 Sterling Hook L8500 Truck	9886	$87,500	ACV	2800 E Park	N/C	100	1,000
82	2000 GMC Dump Truck	9267	$66,016	ACV	Airport	N/C	100	1,000

Statement of Values - Vehicles

City of Pierre

No.	Year, Make, Model	VIN	New/Stated Cost	Valu-ation	Garaging Address	Benefit Deductible ($) SP	Comp	Coll
83	1997 IHC Sander Truck	4062	$31,243	ACV	Airport	N/C	100	1,000
84	2000 Ford Bucket Truck	5390	$25,000	ACV	Electric	N/C	100	1,000
85	2005 Trail King Traile: TKT12U	1291	$6,400	ACV	Electric	N/C	100	1,000
86	2012 Titan Dump Trailer	3567	$7,950	ACV	Electric	N/C	100	1,000
87	2004 Trail King Trailer TKT124	9005	$6,400	ACV	Electric	N/C	100	1,000
88	1994 GMC 3500 1T Dump	4580	$17,838	ACV	Golf	N/C	100	1,000
89	1993 Chevrolet K2500 Pickup w/To	3060	$14,100	ACV	Golf	N/C	100	1,000
90	1995 Ford Ranger Pickup	6718	$12,061	ACV	Golf	N/C	100	1,000
91	1980 IHC 1854 Concover Truck	4099	$24,206	ACV	Landfill	N/C	100	1,000
92	1980 Ford 8000 Water Truck	7638	$14,500	ACV	Landfill	N/C	100	1,000
93	2000 Chevy 1500 4x4 Pickup	5662	$18,051	ACV	Landfill	N/C	100	1,000
94	2002 Chevy 1500 4x4 Pickup	5932	$17,724	ACV	Landfill	N/C	100	1,000
95	1986 Ford F800 Chipper Truck	1368	$47,847	ACV	Park	N/C	100	1,000
96	1985 IHC S1600 Flat Bed Truck	9367	$18,290	ACV	Park	N/C	100	1,000
97	1998 Chevy C1500 Pickup	0208	$13,821	ACV	Park	N/C	100	1,000
98	2003 Chevy C150 Excap Pickup	0487	$15,655	ACV	Park	N/C	100	1,000
99	1994 Ford F150 Pickup	5557	$14,001	ACV	Park	N/C	100	1,000
100	1996 Dodge D1500 Pickup	6794	$13,986	ACV	Park	N/C	100	1,000
101	2003 Chevy C1500 4x4 Pickup	6943	$16,550	ACV	Park	N/C	100	1,000
102	2001 Chevy C1500 4X4 Pickup	8381	$14,311	ACV	Park	N/C	100	1,000
103	2001 Chevy C1500 4x4 Pickup	8848	$18,010	ACV	Park	N/C	100	1,000
104	2013 Ford Taurus-V6	4498	$28,000	ACV	Police	N/C	100	1,000
105	2013 Ford Explorer Police Intercept	6893	$27,000	ACV	Police	N/C	100	1,000
106	1988 IHC Tandem Axel Semi-Truck	2492	$8,800	ACV	Street	N/C	100	1,000
107	1992 IHC Single Axle Distributor Tr	3454	$3,454	ACV	Street	N/C	100	1,000
108	1992 IHC Single Axle End Dump Tr	3455	$44,000	ACV	Street	N/C	100	1,000
109	2012 IHC Dump Truck w/Plow & Sa	5232	$166,765	ACV	Street	N/C	100	1,000
110	1992 IHC Single Axle Sander	5263	$12,000	ACV	Street	N/C	100	1,000
111	1993 Chevy K1500 Pickup	1562	$14,100	ACV	Street	N/C	100	1,000
112	1999 Dodge 1/2 T Pickup	7604	$16,600	ACV	Street	N/C	100	1,000
113	1994 Ford 1/2 T Pickup	9910	$16,500	ACV	Street	N/C	100	1,000
114	2000 Chevy 1500 4x4 Pickup	5249	$18,000	ACV	Wastewater	N/C	100	1,000
115	1991 IHC IH4900 Dump Truck	5532	$39,963	ACV	Water	N/C	100	1,000
116	1995 IHC IH4900 Dump Truck	5807	$38,000	ACV	Water	N/C	100	1,000
117	2005 Dodge K3500 Pickup	2543	$14,650	ACV	Water	N/C	100	1,000
118	2004 GMC K1500 Pickup	3245	$15,500	ACV	Water	N/C	100	1,000
119	2013 Ford F350	2300	$38,000	ACV		N/C	100	1,000
120	2013 Ford F150 Pickup	9740	$21,631	ACV	Airport	N/C	100	1,000
121	2013 Ford F350 Truck	2347	$37,553	ACV	Electric	N/C	100	1,000
122	2013 Ford F350 Super Duty Truck	2346	$37,553	ACV	Electric	N/C	100	1,000
123	2013 3 Reel Trailer	7214	$24,725	ACV	Electric	N/C	100	1,000

Statement of Values - Vehicles

City of Pierre

No.	Year, Make, Model	VIN	New/Stated Cost	Valu-ation	Garaging Address	Benefit Deductible ($) SP	Comp	Coll
124	2013 Ford Explorer - Police	6105	$26,128	ACV	Non-Garaged	N/C	100	1,000
125	2013 Ford Explorer - Police	6104	$26,128	ACV	Non-Garaged	N/C	100	1,000
126	2013 Chevrolet Tahoe - Police	2926	$29,194	ACV	Non-Garaged	N/C	100	1,000
127	2013 Chevrolet Pickup	6467	$23,891	ACV	Street	N/C	100	1,000
128	2013 Ford F150 Pickup	2499	$20,511	ACV	Wastewater	N/C	100	1,000
129	2013 Dodge Ram Truck	6548	$24,560	ACV	Water	N/C	100	1,000
130	1999 Freightliner FLD120	0092	$25,000	ACV		N/C	100	1,000
131	2014 Wilkens Air Tandem Trailer	8582	$86,905	ACV		N/C	100	1,000
132	2016 Altec T370 Crane Truck	2820	$196,150	ACV		N/C	100	1,000
133	2008 Chevrolet Silverado 3500 Ext	9570	$27,000	ACV		N/C	100	1,000
134	2016 Chevrolet 1 Ton Pickup	7494	$49,689	ACV	Electric Dept	N/C	100	1,000
135	2016 Side Dump Trailer	8034	$51,084	ACV	Water	N/C	100	1,000
136	2016 Chevrolet Silverado	8548	$43,103	ACV	Water	N/C	100	1,000
137	2016 Ford Explorer	5200	$28,575	ACV	Police	N/C	100	1,000
138	2016 Felling 18' Deck Trailer	4624	$13,963	ACV	Electric	N/C	100	1,000
139	2016 Kenworth Bucket Truck	4144	$186,969	ACV	Electric	N/C	100	1,000
140	1998 Chevrolet Ques Seal	0062	$159,998	ACV	Wastewater	N/C	100	1,000
141	1994 Titan ARFF Crash Truck	2087	$322,191	ACV	Airport	N/C	100	1,000
142	2007 Chevrolet 1500	9973	$18,988	ACV	Street	N/C	100	1,000
143	1997 Ford F-150	7838	$19,558	ACV	Electric	N/C	100	1,000
144	1990 Dodge 1500		$8,125	ACV	Wastewater	N/C	100	1,000
145	1999 Dodge K1500	4327	$16,661	ACV	Water	N/C	100	1,000
146	1998 Dodge D3500	0140	$17,020	ACV	Golf	N/C	100	1,000
147	1990 Dodge Ram Van	8702	$12,607	ACV	Park	N/C	100	1,000
148	1998 GMC Savanah Van	1139	$23,005	ACV	Electric	N/C	100	1,000
149	1994 Chevrolet Lumina	9071	$13,926	ACV	Park	N/C	100	1,000
150	2003 Ford Ranger	8345	$15,242	ACV	Admin	N/C	100	1,000
151	2004 Ford D350	2353	$29,568	ACV	Admin	N/C	100	1,000
152	2005 Hyundai HL 760	0383	$135,510	ACV	Landfill	N/C	100	1,000
153	2007 Chevrolet Impala		$15,483	ACV	Police	N/C	100	1,000
154	2008 Oshkosh Firetruck	3017	$655,242	ACV	Airport	N/C	100	1,000
155	2013 Freightliner Truck	3835	$72,434	ACV	Electric	N/C	100	1,000
156	1992 International Tank Truck	0094	$7,500	ACV	Electric	N/C	100	1,000
157	Homemade Trailer	HMDE	$1,000	ACV	Cemetary	N/C	100	1,000
158	2014 Commander 800		$11,500	ACV	Electric	N/C	100	1,000
159	2014 Ford Truck	8099	$31,750	ACV	Electric	N/C	100	1,000
160	2014 Ford F250	8085	$29,449	ACV	Airport	N/C	100	1,000
161	1984 Trailer 16' Deck	4635	$6,825	ACV	Electric	N/C	100	1,000
162	1984 Trailer 16' Deck	4636	$6,825	ACV	Electric	N/C	100	1,000
163	2014 Ford Explorer	2645	$26,676	ACV	Police	N/C	100	1,000
164	2014 Ford Explorer	2646	$26,676	ACV	Police	N/C	100	1,000

Statement of Values - Vehicles

City of Pierre

No.	Year, Make, Model	VIN	New/Stated Cost	Valu-ation	Garaging Address	Benefit Deductible ($) SP	Comp	Coll
165	2014 Ford F150 Pickup	8583	$24,036	ACV	Park	N/C	100	1,000
166	2015 International Snow Plow w/Du	3716	$135,033	ACV	Landfill	N/C	100	1,000
167	2015 International Snow Plow w/Du	3657	$136,887	ACV	Street	N/C	100	1,000
168	2014 Chevrolet Crew Cab	7924	$24,181	ACV	Landfill	N/C	100	1,000
169	1985 Midsota Tiltbed Trailer	0146	$5,577	ACV	Street	N/C	100	1,000
170	2015 Chevrolet Crew Cab	8372	$28,139	ACV	Admin	N/C	100	1,000
171	2015 Ford F-350	2434	$69,991	ACV	Electric	N/C	100	1,000
172	2015 Ford F-350	2435	$69,991	ACV	Electric	N/C	100	1,000
173	2015 Ford F-350	0583	$30,575	ACV	Street	N/C	100	1,000
174	2015 Ford F-350	0584	$31,175	ACV	Street	N/C	100	1,000
175	2015 Ford Explorer	7487	$27,047	ACV	Police	N/C	100	1,000
176	2015 Ford Explorer	7488	$27,047	ACV	Police	N/C	100	1,000
177	2015 Chevrolet Silverado	8275	$26,601	ACV	Admin	N/C	100	1,000
178	2015 Chevrolet Silverado	6570	$27,026	ACV	Wastewater	N/C	100	1,000
179	Big Tex Gooseneck Trailer	6744	$9,859	ACV	Water	N/C	100	1,000
180	2015 Chevrolet Silverado	6969	$40,366	ACV	Water	N/C	100	1,000
181	2015 Oshkosh Plow Truck	4034	$365,000	ACV	Airport	N/C	100	1,000
182	Lo-Riser Trailer	L021	$17,243	ACV	Electric	N/C	100	1,000
183	2016 Polaris Ranger	1344	$10,642	ACV	Electric	N/C	100	1,000
184	2016 Chevrolet Impala	3637	$17,850	ACV	Admin	N/C	100	1,000
185	1990 Bomag Compact Trailer	7862	$5,000	ACV	Street	N/C	100	1,000
186	1991 Chevrolet Lumina	6077	$12,194	ACV	Park	N/C	100	1,000
187	1994 GMC C2500 Suburban	8351	$25,388	ACV	Park	N/C	100	1,000
188	1995 Chevrolet S10	8255	$8,637	ACV	Park	N/C	100	1,000
189	1997 IH Dump Truck	7283	$51,841	ACV	Street	N/C	100	1,000
190	1990 Dodge D-250		$8,125	ACV	Street	N/C	100	1,000
191	1960 Martin/Hyster 40 Ton Lowboy	9174	$9,500	ACV	Water	N/C	100	1,000
192	Any "Hired Auto" Not to exceed valu	$20,000	$0	ACV		N/C	100	1,000
193	Any Newly Acquired, Owned Automobile		$0	ACV		N/C	100	1,000
	Total		$7,810,034			(N/C = No Coverage)		

STATE OF SOUTH DAKOTA)SS COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
LISA A. TAMMEN and RANDALL R. JURGENS, PLAINTIFFS, -vs- GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally, DEFENDANTS.	)	32CIV17-000042 **AFFIDAVIT OF DOUG ABRAHAM IN SUPPORT OF CITY OF PIERRE'S MOTION FOR SUMMARY JUDGMENT**

COMES NOW, Douglas A. Abraham, being first duly sworn, and states as follows:

1. I am one of the attorneys of record for the City of Pierre, one of the Defendants in the above-captioned matter.

2. Attached to this Affidavit as **Exhibit A** is a true and correct copy of excerpts from the deposition of Gerrit Tronvold.

3. Attached to this Affidavit as **Exhibit B** is a true and correct copy of an excerpt from Merriam Webster's on-line dictionary for the term "fire department."

4. Attached to this Affidavit as **Exhibit C** is a true and correct copy of excerpts from the deposition of Ian Paul.

Dated this 1st day of February, 2019.

Douglas A. Abraham
May, Adam, Gerdes & Thompson
P.O. Box 160
Pierre, SD 57501-0160
(605)224-8803
daa@mayadam.net

Filed: 2/1/2019 2:56 PM CST Hughes County, South Dakota 32CIV17-000042

State of South Dakota)
)ss
County of Hughes)

Subscribed and sworn to before me this 1st day of February, 2019.

MARGARET A. WITHERS
Notary Public
SEAL
South Dakota
(SEAL)

Margaret A. Withers
Notary Public – South Dakota

Notary Print Name:
My Commission Expires: Margaret A. Withers My Commission Expires November 30, 2023

kind of waiting and making sure I had all of my gear in my pick up and approximately left the house at 6 o' clock, training started at 6:30. I wasn't in no hurry, just kind of driving along.

Q Okay. You said that your typical classroom sessions or lectures were Tuesday nights and this is a Monday night and you said you were going for engine company training, what does that mean?

A The certified fire class was over. We weren't doing anymore classroom work.

Q You passed the first two parts of the test?

A I passed the two written tests prior to that. We weren't doing any classroom work. I had all of my practical skills, classes signed off how to do certain hands-on skills and the test date was set for August 2 to take the practical test to complete certified fire class. Engine company training is a once a month, the ladder company does it, too, the rescue company does it. It's a once a month get together with your engine company, sometimes two engines get together. Sometimes two companies get together in training and you get together with the other people on your engine and you train whatever, whoever planned it that month, you could be doing pump operations, you could be shuttling water. It just depends on whoever was running it.

Q This was in preparation for your test the next day?

EXHIBIT A

to have it at the first Monday of each month?
A That's the usual.
Q And this was the first Monday of August?
A Yup. And we have our company meeting, we go over minutes and checkbook, and we do training.
Q So you go over the minutes of the prior meeting?
A Yup.
Q You go over the checkbook to see what the balance is?
A Yes.
Q And then there's a supervisor, a captain or something, that decides what we're going to review this month?
A The captain, normally, kind of asks for volunteers who wants to run this training this month who wants to, you know, do you want -- and everybody kind of decides, together, what we want to do prior months so somebody has time to prepare. We just received a new engine, so in the emails that I'm a part of I believe most of their training, so far, has been how to run that new apparatus.
Q But it's kind of the people of that engine company that are deciding this is what we like to study?
A Yes.
Q So at the time of the accident, you were on your way from where you lived with your folks to this training session at the fire department?
A Yes.

other documents regarding liability that you were required to sign before you became a firefighter?
A No.
Q Would those documents be in your personnel file?
A Yes.
Q And that would be kept at the fire department?
A Station one.
Q What is the physical address of station one?
A I don't know the physical address. It's on Dakota Avenue in Pierre.
Q It's not on Madison or Harrison?
A No.
Q Are you required by the department to have insurance on your personal vehicle?
A I don't know if the department requires it.
Q Don't know one way or the other?
A I do not.
Q But you ended up taking on a policy with State Farm with the minimum liability limits?
A I'm not sure. I don't know all the details to my insurance policy.
Q Did you personally work with the agent to obtain this insurance?
A No.
Q Your mom did it for you?

fire department

noun

Definition of *fire department*

1 : an organization for preventing or extinguishing fires especially : a government division (as in a municipality) having these duties
2 : the members of a fire department

Examples of *fire department* in a Sentence

Recent Examples on the Web

The Fort Worth *fire department* dispatched 26 units to combat the two-alarm fire, Star-Telegram reported. — *Fox News*, "Texas IHOP roof collapses from raging fire," 19 July 2018 Also assisting with the accident were the Liberty Township Volunteer and the Chesterton *fire departments*, Joe's Towing and CSX Railroad. — Amy Lavalley, *Post-Tribune*, "Man killed in Porter County crash," 19 June 2018

These example sentences are selected automatically from various online news sources to reflect current usage of the word 'fire department.' Views expressed in the examples do not represent the opinion of Merriam-Webster or its editors. Send us feedback.

years.

Q. Now, as a chief of the Volunteer and the Pierre Fire Department, what is the interaction between the Pierre Fire Department and the Volunteer Fire Department, and your role?

A. Can you clarify that?

Q. Fair enough. You're a City employee, correct?

A. Correct.

Q. And so were you hired directly by the Pierre City Commission?

A. Yes. My hiring process involved -- the city commission has to approve it, but the city administrator, which was Leon Schochenmaier at that time, was the person that was the main hiring person on that.

Q. Okay. And are there other full-time employees at the Pierre Fire Department?

A. There's one other full-time employee. He is not a firefighter under the City of Pierre Fire Department. He is our mechanic, or maintenance guy.

Q. And what's his name?

A. Denny Jensen. Jensen is "E-N."

Q. And what are your job responsibilities as the Pierre Fire Department chief?

A. There's a lot of them. You know, I'm responsible

mainly to protect the citizens and property of the city, and also some outlying counties with the rescue, land, and water rescues. That's my primary responsibility, but there's a lot of administrative stuff that goes along as well. I do a lot of the documentation, entering information into our database. I also do a lot of public education and appearances, and things of that nature. Some inspections throughout the city are just a few -- some of the majority and major things that I do.

Q. Now, is there a separate entity that's referred to as Pierre Fire Department, Inc.?

A. Yeah, there is separation. I'm hired by the City of Pierre. In order to become a Pierre Fire Department member, it's through PFD, Inc., which is governed by a board of directors. And there's a process that's in place there.

Q. Okay. And who sits on that board of directors?

A. That board of directors is governed -- the chairperson is the deputy chief, which is the highest rank on the volunteer position, which would be the deputy chief. And then there's also an assistant chief. And then we have six captains. We have four engines, a ladder truck, and a rescue. So those make up to six captains for a total of eight people.

Q. And are you a member of that board of directors?

A. I am not.

Q. How does an individual become a member of the Pierre Volunteer Fire Department?

A. The individual will submit an application, and we have an interview committee which is typically made up of, depending on who can make it to the interview, of myself, a volunteer chief, and the captain of the engine company that that person may be assigned to once they get put on. Once they go through the interview process and we move forward from there, we complete a background check. And if the background check is good, we have them do a medical physical at our expense, the City of Pierre's expense. And once the medical physical -- the doctor checks off that says they're fit for duty for the most part, then they're issued gear and approved to the city commission -- final approval, just to go that process.

Q. And if I'm understanding you correctly, who owns the equipment that the Volunteer Fire Department completes their work with?

A. The stations, the apparatus, their PPE that are issued are all purchased through my budget, the City of Pierre funding.

Q. Okay. And when you say "PPE," can you explain to me what you mean by that?

A. Yep. You bet. Personal Protective Equipment. So that would be your turnout gear, your heavy structure firefighting gear, your gloves, your helmets, your boots, the things.

Q. And for terms of service areas, what areas does the Pierre Fire Department cover?

A. For fire structure response, we cover within the City of Pierre. We also have -- we do provide some mutual aid to Fort Pierre at times, and to Pierre Rural Fire Department, which is a separate entity, at times. So the Pierre Fire Department for fires covers everything within the city limits for normal response. As far as our rescue, we cover a three-county area. Two of those counties we cover land and water. One of those counties we just cover water.

Q. So I'm understanding you correctly, all of the equipment and real property infrastructure for the Pierre Fire Department, and utilized by the Pierre Volunteer Fire Department, are funded by the City of Pierre?

A. Correct.

Q. Are Volunteer Fire Department firefighters compensated in any way?

A. They are not.

Q. You quickly described the process by which a

issue gear, fire turnout gear.

Q. Okay. And they have a rookie status for a set period?

A. They do. They are considered a rookie firefighter until they complete the certified firefighter course and then on a certain length of time.

Q. What is required for a rookie to become a certified firefighter?

A. A firefighter has to go through the state course of a certified firefighter one and two, state-sponsored course. It's a series of different classes involving different topics and we usually teach that. And also some hands-on practical training that is required through the state certification process. And they have a certain amount of time to get that completed.

Q. Okay. Now, as a member of the Pierre Volunteer Fire Department, are individuals required to have their own personal vehicle?

A. Can you repeat the question?

Q. As a member of the Pierre Volunteer Fire Department, are individual members required to have their own personal vehicle?

A. Correct.

Q. And are they required to meet any requirements to maintain a membership as a volunteer fire department

member?

A. Yes.

Q. What are those requirements?

A. Each firefighter is responsible for maintaining at least 25 percent of the calls through a calendar year starting January 1. And each firefighter is required to maintain at least 40 hours of continuing education per calendar year as well.

Q. And how do individual members meet those training hours?

A. We offer hundreds of hours of training in-house. So, for example, if they attend a company-level training, if they attend a department training, if they attend a training that is first responder related even at their work place, they can submit that for documentation to be approved for training hours that way. If they attend a fire school somewhere in the state, if they attend out-of-state, there's basically anything first responder related they can submit as training hours for their 40-hour requirement.

Q. And when you referred to minimum run call requirements, can you explain that in a little greater detail? What do you mean by 25 percent minimum run?

A. Sure. We require throughout just to maintain people being active within the fire department, to have

A. It is.

Q. Okay. And does it indicate what his participation rate was and the calls from January 1st, 2016, through August 1st, 2016?

A. It does. It shows that there was available 75 calls during that timeframe, and Mr. Tronvold had participated in 38 of those calls, which puts him at 51.35 percent response to available calls.

Q. What is the minimum response -- excuse me, strike that.

What's the minimum run call requirement for participation of Pierre Volunteer Fire Department members?

A. On a calendar, January 1 to December 31st, basis, it's 25 percent of the calls that are available that calendar year.

Q. And on Exhibit 2, the calls that Mr. Tronvold participated in are denoted by an asterisk on the left-hand column?

A. Correct.

Q. What happens if a volunteer fireman does not meet the minimum run requirements? Doesn't hit that 25 percent in any given calendar year?

A. What we do is we have a probationary status because there are certain circumstances where something

Q. So as of August 1st, 2016, he'd already met his minimum training requirements for the 2016 calendar year, correct?

A. Correct.

Q. Now, are there monthly meetings for each of the engine companies?

A. There is.

Q. And what time did those -- strike that.

When did those occur?

A. Engine one, engine two, and engine three meet the first Monday of every month beginning at 6:30. Engine four meets the first Thursday of the month starting at 6:30. Ladder truck meets second or the first Thursday and the third Thursday of every month starting at 6:30, and rescue meets the fourth Monday every month, starts at 6:30.

Q. And is attendance at those monthly trainings mandatory?

A. They are not.

Q. Does attendance at the monthly training sessions count towards their annual total?

A. They do.

Q. So given that Mr. Tronvold had already completed 40 hours for the calendar year 2016, fair to say he could have avoided any participation for the remainder

of the year and still met the minimum requirements of the Pierre Volunteer Fire Department?

A. Correct.

Q. Are volunteer firefighters paid an hourly wage?

A. They are not.

Q. Okay. Are they reimbursed any of their expenses?

A. Only if they are traveling outside of town for training per diem.

Q. So if a Pierre volunteer fireman responds to a fire call within the city limits of the City of Pierre, do they receive mileage?

A. No.

Q. And they're not paid for the time they are on scene?

A. No.

Q. Do they complete a W-2 when they're accepted as a member of the Pierre Volunteer Fire Department?

A. They do not.

Q. How are they assigned to an engine company?

A. We take a few different things into consideration. We take a look at their preference. We take a look at geographically where they are at within the city because our engine companies are disbursed throughout the city. So for a response to a particular station, we take a look at maybe where they're at. We

take a look at where they work. But one of the bigger things, we take a look at the need for a particular engine company. If someone's short-handed, got less folks, we might consider that one as a priority.

Q. Who makes that ultimate decision as far as assignment?

A. It's a group decision made by the interview committee, typically.

Q. Now, is there a deferred compensation or Length of Service award plan in place for the Pierre Fire Department?

A. There is.

Q. Can you describe that to me?

A. Yes. The program is in place, I believe it was started back in the 80s, but what it is is once you become what we call a vested member to some extent, once you've been on the fire department for five years and you've met your membership requirements -- once you've been on the fire department for a minimum of five years and you've met membership requirements for all five years, you are eligible for the deferred or Length of Service award program, formally known as the deferred compensation program.

Q. Okay.

A. That program is, once you retire from the fire

A. I don't know if that was his intentions.
Q. There would have been an engine three monthly meeting that night?
A. Correct.
Q. That's not required?
A. Correct.
Q. A volunteer fireman can get his training from a variety of other sources and he can choose to attend or can choose not to?
MR. J. HUGHES: Objection. Leading. Foundation.
BY MR. LUCE:
Q. Let me rephrase that. Can a volunteer get training from other sources besides attending that particular meeting?
A. Correct.
Q. And did or did not Gerrit Tronvold need that attendance at that meeting to meet the requirements you spelled out?
MR. J. HUGHES: Objection. Foundation.
THE WITNESS: Did not.
BY MR. LUCE:
Q. And that's reflected on Exhibit 2?
A. Correct.
MR. J. HUGHES: Same objection.

BY MR. LUCE:

Q. Your understanding at the time of this accident Gerrit Tronvold was operating his own vehicle?

A. Correct.

Q. He was not summoned for any emergency by the Pierre Volunteer Fire Department?

A. Correct.

Q. You had no control of -- the fire department, did they have any control over the operation of his vehicle that evening.

MR. J. HUGHES: Objection. Foundation. And calls for a legal conclusion.

BY MR. LUCE:

Q. Was he acting on behalf of Pierre Volunteer Fire Department, running any mission, or doing anything on behalf of the Pierre Volunteer Fire Department at the time of this accident?

A. No.

MR. J. HUGHES: Objection. Foundation.

Sir, you have to wait a brief moment to allow me to object. I ask that the objection be interposed before the answer.

Objection. Foundation. Calls for a legal conclusion.

///

BY MR. LUCE:

Q. Did anybody with the Pierre Volunteer Fire Department send Gerrit Tronvold on any mission that night?

MR. J. HUGHES: Objection. Foundation. Calls for a legal conclusion.

THE WITNESS: No.

BY MR. LUCE:

Q. Did you ever talk to Gerrit Tronvold about this accident?

A. I have not.

Q. And, again, was Gerrit Tronvold responding to any fire emergency that had been designated by the Pierre Volunteer Fire Department?

A. At the time of the accident, he was not.

Q. I don't have anything further.

MR. J. HUGHES: Could I ask that we take a five-minute break so I can have some exhibits marked?

(A pause in the proceedings at 10:38 a.m.)

BY MR. HAIGH:

Q. Ian, my name is Mark Haigh, and I represent Lisa Tammen, who is one of the plaintiffs in this case. I have some questions for you and then I think Mr. Hughes, who represents Mr. Jurgens, also has some questions.

driving record for volunteer firemen when they weren't responding to a call?

A. No.

Q. And is that something you describe as a frequent occurrence or you're just aware it has occurred in the past?

MR. S. HUGHES: I'm not sure what the question is referring to. Objection.

MR. LUCE: Okay. I don't think both of you can object.

MR. ABRAHAM: Are you both objecting?

MR. J. HUGHES: I'll join the objection.

MR. ABRAHAM: Okay. Fair enough.

MR. J. HUGHES: Maybe just a point of clarification. Not really an objection.

MR. ABRAHAM: No, you're fine.

I don't think I have any additional questions for you, Mr. Paul.

THE WITNESS: Okay.

BY MR. LUCE:

Q. Ian, I'm Mike Luce, and I represent the Pierre Volunteer Fire Department. As I understand it from your testimony, the Pierre Volunteer Fire Department is a non-profit separate entity, for which the City has certain authority and control?

MR. J. HUGHES: Objection. Misstates the testimony of the witness.

MR. LUCE: Okay.

BY MR. LUCE:

Q. Correct me if I'm wrong on that.

A. Correct.

Q. I am correct?

A. Right.

Q. And the person from the City who has authority over this Volunteer Fire Department is yourself?

A. Over the equipment and buildings and some level over the firefighters.

Q. More so than anybody else associated with the City?

A. Correct.

Q. Somewhat the buck stops with you on the Volunteer Fire Department as far as the City is concerned?

A. Correct.

Q. Now, we're here today because of an accident that occurred on August 1 of 2016, which would have been a Monday. Is that your understanding?

A. Yes.

Q. And as a member of engine three, your understanding is Gerrit Tronvold was en route to this monthly meeting you talked about? Or don't you know?

described in section 5A of page 6?

A. Yes.

Q. And then on page 7, and that's a carry over from section 5, paragraph E, membership requirements. I believe this is what you've testified to and been asked a lot of questions about specifically -- do you see at the top of page 7 of 11 that there are provisions on continuing training and alarm response requirements?

A. Yes, I see that.

Q. Were those in effect of August 1 of 2016?

A. Yes.

Q. So the continuing training is the member must attend a minimum of 40 hours continuing fire service training; is that correct?

A. Forty hours is still current. I believe it's still worded the same, but it is 40 hours. It is required, 40 hours.

Q. And then there's also a 25 percent participation or response, I should say, to 25 percent of the documented alarms of each calendar year?

A. Yes.

Q. And it was your testimony that the participation detail by staff of the Pierre Fire Department, which is Defense Exhibit 2, is a document that confirms that Mr. Tronvold met those requirements; is that correct?

A. It does not have anything pertaining directly to Pierre Fire Department. It's a generic emblem with a blue dress hat.

Q. How about the black polo, does that have the fire department --

A. That is exactly what I'm wearing today. It just says Pierre Fire Department over the left chest area.

Q. And then there's a key. What is the key to?

A. That is a key to open up the fire stations.

Q. Does it apply to open all of the fire station locations?

A. Yes.

Q. And just so we have this in the record, there's fire station number one is 219 West Dakota Avenue, is that correct?

A. No, that's inaccurate. Fire station number one is 215 West Dakota Avenue.

Q. Where is fire station number two?

A. I believe that's 1415 East Erskine.

Q. And how about fire station number three?

A. I believe it's 721 North Poplar.

Q. And fire station number four?

A. I believe that is 800 block of North Pierce, I think.

Q. And those are the four fire stations located

going to that training session or not. He was driving into town.

Q. If he testified that's where he was going, would you have any reason to dispute that?

A. I would not.

Q. Okay. And, again, the training session is not required?

A. Correct.

MR. J. HUGHES: Well, wait. I'm going to object on multiple grounds. One of which it calls for a legal conclusion. It contradicts the ordinances. But you can answer.

MR. LUCE: He did.

BY MR. LUCE:

Q. Is the meeting that occurs after the training session, is that required?

MR. J. HUGHES: Same objection. There's no foundation.

THE WITNESS: It is not.

BY MR. LUCE:

Q. And he asked -- go to Exhibit 12, will you, please.

Mr. Hughes talked about wanting to be fair with you when he first asked you about do you know, if you get a $1,000 deductible, whether you have to repair the

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal Nos. 29114, 29138

LISA A. TAMMEN,
Plaintiff and Appellant,

and

RANDALL R. JURGENS,
Plaintiff and Appellee,

v.

GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota municipal corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally,
Defendants and Appellees.

LISA A. TAMMEN,
Plaintiff and Appellee,

and

RANDALL R. JURGENS,
Plaintiff and Appellant,

v.

GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota municipal corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally,
Defendants and Appellees.

Appeal from the Circuit Court,
Sixth Judicial Circuit
Hughes County, South Dakota
The Honorable Thomas L. Trimble, Circuit Court Judge, Retired, Presiding

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NOTICE OF APPEAL OF PLAINTIFF / APPELLANT LISA A. TAMMEN FILED SEPTEMBER 3, 2019
NOTICE OF APPEAL OF PLAINTIFF / APPELLANT RANDALL R. JURGENS FILED SEPTEMBER 23, 2019

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JURISDICTIONAL STATEMENT

Defendant/Appellee, Pierre Volunteer Fire Department ("Department"), agrees with the jurisdictional statements proffered by Plaintiffs/Appellees, Lisa A. Tammen and Randall R. Jurgens.

LEGAL ISSUES

1. Whether Tronvold was acting within the scope of his agency at the time of the collision?

The circuit court held Tronvold was not acting within the scope of his agency with the Department at the time of the collision.

Most apposite authorities:

Hass v. Wentzlaff, 2012 S.D. 50, ¶ 20, 816 N.W.2d 96, 102-03

Fiano v. Old Saybrook Fire Company No.1, Inc., 184 A.3d 1218 (Conn. Ct. App. 2018)

Harn v. Cont'l Lumber Co., 506 N.W.2d 91, 95 (S.D. 1993)

Mudlin v. Hills Materials Co., 2005 S.D. 64, ¶ 8, 698 N.W.2d 67, 71

2. Whether the Department has sovereign/governmental immunity from suit pursuant to SDCL § 21-32A-1?

The circuit court held the Department was immune from suit pursuant to SDCL § 21-32A-1.

Most apposite authorities

In re Request for Opinion of Supreme Court Relative to Constitutionality of SDCL 21-32-17, 379 N.W.2d 822, 826 (S.D. 1985)

State ex rel. Board of Trustees v. Russell, 843 S.W.2d 353, 360 (Mo. 1992) (en banc)

Lunsford v. Renn, 700 S.E.2d 94, 100-01 (N.C. Ct. App. 2010)

Cromwell v. Rapid City Policy Dep't, 2002 S.D. 100, ¶ 12, 632 N.W.2d 20, 23-24

3. Whether the Department is immune from liability pursuant to SDCL § 20-9-45?

The circuit held there were disputed material facts regarding this immunity.

Most apposite authorities

SDCL § 20-9-45

Fischer v. City of Sioux Falls, 2018 S.D. 71, ¶¶ 8-9, 919 N.W.2d 211, 215

Tranby v. Brodock, 348 N.W.2d 458, 461 (S.D. 1984)

Gabriel v. Bauman, 2014 S.D. 30, ¶ 16, 847 N.W.2d 537, 542-43

REQUEST FOR ORAL ARGUMENT

The Pierre Volunteer Fire Department respectfully requests oral argument.

STATEMENT OF THE CASE

This appeal arose from an accident in which Defendant, Gerrit Tronvold, struck the motorcycle on which Lisa Tammen and Randall Jurgens were riding. At the time of the accident, Tronvold, a volunteer firefighter with the Department, was on his way to a meeting for the Department, and he was driving his personal vehicle. Initially, Tammen and Jurgens commenced this action against Gerrit A. Tronvold alone, alleging only negligence by Tronvold. Tammen and Jurgens later amended their Complaint, adding the City of Pierre ("City") and the Department as defendants, again alleging only negligence on the part of Tronvold, but also alleging that Tronvold was acting within the scope of his employment with the City and Department, and that the City and Department were vicariously liable for Tronvold's negligence. The City and Department filed separate Answers, both denying that Tronvold was acting as an agent of the City or Department and asserting sovereign/governmental immunity.

The City and Department moved for summary judgment on the basis that Tronvold was not acting within the scope of his agency with the City or Department and on the basis that the City and Department are entitled to sovereign/governmental immunity. In addition, the Department moved for summary judgment based on immunity as a non-profit, volunteer fire department, pursuant to SDCL § 20-9-45. The circuit court, the Honorable Thomas Trimble (retired), presiding, concluded Tronvold was not within the scope of his agency with the City or Department, and they could not be held vicariously liable for

Tronvold's negligence. Additionally, the circuit court concluded the City and Department were shielded from liability by governmental liability pursuant to SDCL § 21-32A-1 et seq., and that such liability was not waived by their purchase of liability coverage. The court found issues of fact precluded summary judgment based on the non-profit, volunteer immunity under SDCL § 20-9-45.

Amended Judgment was entered on August 26, 2019, and Notice of Entry of Judgment was filed on August 27, 2019. Tammen and Jurgens timely filed separate Notices of Appeal on September 3, 2019, and September 23, 2019, respectively. In their appeal briefs, Tammen and Jurgens make the same three arguments: (1) that the circumstances of Tronvold's volunteer position make his travel to a Department meeting outside the "going and coming" rule and, therefore, within the scope of his agency with the City and Department; (2) that the City had an insurance policy that provided liability coverage for it and the Department, thereby waiving its sovereign/governmental immunity; and (3) that the Governmental Liability Endorsement, excluding coverage for non-owned automobiles, is void for public policy reasons. Neither addressed the Department's immunity under SDCL § 20-9-45 in their opening briefs.

STATEMENT OF THE FACTS

At the relevant time period, both Tammen and Jurgens were residents of Pierre, South Dakota. CR 3.[1] On August 1, 2016, Plaintiffs were traveling by motorcycle on South Dakota Highway 1804. CR 3. At that same time, Tronvold was traveling in his personally-owned pickup truck and attempted to make a left turn onto SD Hwy 1804. CR 3. Tammen and Jurgens allege that Tronvold failed to stop or failed to yield the right of way, entered the intersection, and collided with the motorcycle on which Tammen and Jurgens were riding. CR 4. Tammen and Jurgens were both seriously injured. CR 4.

At the time of the accident, Tronvold was a volunteer firefighter with the Department. Tronvold was not an "employee" of the Department and he received no compensation or even a W-2 from the Department. CR 236. The Department is a non-profit corporation and was established in 1925. CR 251. All of the Department's firefighters are volunteers, who are not compensated by way of wages, mileage or expenses. CR 251-52. They are reimbursed only for expenses in connection with out-of-town-training, but not for travel within the city. CR 252. The volunteers receive some discounts and can participate in a Length of Service Award Program with the Department. CR 465, 472.

On the day of the accident, Tronvold was traveling to a monthly training meeting of the Department. CR 248, 250. Throughout this case, it has been undisputed that Tronvold was *not* responding to a fire or other emergency call.

[1] All factual citations are to the certified record, as indicated by the designation "CR."

CR 248, 250. In fact, both Tammen and Jurgens admitted in their responses to the Department's statement of undisputed material facts that Tronvold "was not summoned for any emergency" and he "was not responding to any emergency." CR 251, 253, 553, 555, 690, 696.

No one with the Department sent Tronvold on a mission that night. CR 467. Tronvold was considered a rookie firefighter with the Department because he had not yet taken the certified firefighter course. CR 249. However, Tronvold had already completed 64 hours of training, more than the 40 hours required under the Department's by-laws. CR 249, 464. In addition, Tronvold had participated in over 51% of the Department's calls for that calendar year, double the 25% minimum requirement. CR 249; 464. By the day of the accident, Tronvold had met all requirements to take the certification test, which was scheduled for the next day, August 2, 2016. CR 249.

The 40 hours of required training could be satisfied through a variety of resources, including the Department's monthly training meetings. CR 250, 466. The monthly training meetings were held on Mondays, and while volunteers are encouraged to attend, they are not mandatory. CR 250, 464. Although Tronvold was on his way to the Department's monthly training meeting at the time of the accident, his attendance there was not required, as he already had sufficient training hours. CR 250, 464-65, 467.

Tronvold had his own personal liability policy that covered the accident. The City participates in a public entity risk sharing pool with the South Dakota

Public Assurance Alliance, which provides liability coverage to the City. CR 252, 193.

The Department was also covered by an insurance policy issued by Continental Western Insurance Company. CR 252, 275-455. The Business Auto Coverage Form of that Policy provides: "We will pay all sums an 'insured' legally must pay as damages because of 'bodily injury' or 'property damages' to which this insurance applies, cause by an 'accident' *and* resulting from the ownership, maintenance or use of a covered 'auto'." CR 417. While "insured" is later defined in Section II, A. 1. (CR 417), the policy contained an Auto Enhancement Endorsement, which amended and broadened that definition. CR 456. Under the Auto Enhancement Endorsement, "insureds" include employees using an auto not owned by the Department, "*but only for an official emergency response*." CR 456 (emphasis added).

The Department's insurance policy contains an amendatory endorsement, which provides:

> This endorsement modifies insurance under the following:
>
> COMMERCIAL GENERAL LIABILITY COVERAGE FORM
> BUSINESS AUTO COVERAGE FORM
> COMMERCIAL LIABILITY UMBRELLA COVERAGE FORM
> COMMERCIAL EXCESS LIABILITY COVERAGE FORM
>
> A. It is both your and our understanding that you wish to fully invoke and take advantage of all immunities you and/or any other insured has or has been granted against liabilities, including, without implied limitation, immunities which would be waived by the purchase of insurance.

B. This insurance does not include coverage for any liability or "suit" for damages which is barred by the doctrines of sovereign immunity or governmental immunity, as set forth in South Dakota Codified Laws §§ 21-32A- et seq.

C. This insurance does not afford any coverage that would constitute a waiver of any sovereign immunity or government immunity, as set forth in South Dakota Codified Laws §§ 21 -32A-1 et seq.

CR 326.[2] The Continental Western policy does not provide liability coverage for this accident. Jurgens even admitted in the response to the Departments statement of undisputed facts that there "is no liability insurance provided for this accident." CR 253, 696.

Tammen and Jurgens initially brought suit only against Tronvold (CR 3-6), and later amended their Complaint alleging no more than simple negligence. CR 83-93. Count I of the First Amended Complaint alleges "NEGLIGENCE (Personal Injury)," and claimed that Tronvold breached his duties of care "by operating his motor vehicle in a negligent manner and using his motor vehicle in a negligent manner." CR 86. Tammen and Jurgens alleged "breach of each and all of these duties by Defendant Tronvold constitute negligence as matter of law. . . ." CR 87. Later, they allege that as "a direct and proximate result of Defendant

[2] As previously mentioned, the vehicle Tronvold was operating was his own pickup truck, and was not owned by the Department. The Continental Western policy provided various coverages. CR 252. The coverage at issue here, since this involved a motor vehicle accident, was the business auto coverage. The general liability policy excluded coverage for injuries or damages "arising out of the use" of an auto. CR 345. Tronvold submitted a claim for the damage to his truck under a different policy provision. CR 253. That provision only required him to be en route to a function that was part of his duties as a volunteer for coverage to apply. CR 253. That is not the policy provision, however, applicable to a liability claim, which is what is involved here.

Tronvold's negligence, which negligence is imputed to Defendants," they were injured. CR 91-92. There is no mention of gross negligence or willful and wanton conduct in the entire First Amended Complaint, nor is there any claim against the Department for negligent hiring, or any direct claim of negligence against the Department. CR 83-93.

The City and the Department each moved for summary judgment based on the fact that Tronvold was not an agent or employee acting within the scope of his agency at the time of the accident and that they are immune from suit under sovereign immunity. CR 165-180; CR 261-267. The Department also based its motion for summary judgment on SDCL § 20-9-45, which affords immunity to a volunteer fire department. CR 267. The Department's Brief in Support of Motion for Summary Judgment is the first time the certified record contains any mention at all of gross negligence. *See generally* Certified Record.

These facts, applied to the relevant authorities below, demonstrate that at the time of the accident, Tronvold was not acting in the scope of his agency with the Department at the time of the accident. Further, there exists no insurance coverage for the Department for this lawsuit or for Tammen's and Jurgens' injuries, and sovereign immunity applies and protects the Department from this suit. Finally, the Department is entitled to immunity under SDCL § 20-9-45.

ARGUMENT AND AUTHORITIES

Standard of Review

The Court recently summarized the standard of review of a circuit court's entry of summary judgment:

> We review a circuit court's entry of summary judgment under the de novo standard of review." . . . When conducting a de novo review, "[w]e give no deference to the circuit court's decision[.]" . . . "Our task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied." . . . "Unsupported conclusions and speculative statements do not raise a genuine issue of fact." . . . "[T]his Court will affirm the circuit court's ruling granting a motion for summary judgment if any basis exists to support the ruling.". . . .

Estate of Stoebner v. Huether, 2019 S.D. 58, ¶ 16, 935 N.W.2d 262, 266-67 (internal and other citations omitted).

Summary judgment is particularly suited for the issues in this case, as it involves legal questions regarding whether sovereign immunity applies and whether there exists coverage under an insurance policy, both questions of law. *See Brown Eyes v. South Dakota Dep't of Soc. Servs*., 2001 S.D. 81, ¶ 6, 630 N.W.2d 501, 505; *Lowery Constr. & Concrete, LLC v. Owners Ins. Co*., 2017 S.D. 53, ¶ 7, 901 N.W.2d 481, 484 ("the interpretation of an insurance contract presents a question of law, which we review de novo."). This Court can affirm the circuit court's ruling on any basis supported by the record. *See Wolff v. Sec'y of S. Dakota Game, Fish & Parks Dep't*, 1996 S.D. 23, ¶ 32, 544 N.W.2d 531, 537 ("it is a well entrenched rule of this Court that, where a judgment is correct, it will not be reversed even though it is based on erroneous conclusions or wrong reasons... .

In fact, this Court has gone so far as to state that, '[s]ummary judgment will be affirmed if there exists any basis which would support the trial court's ruling.'" (quoting *St. Paul Fire & Marine Ins. v. Schilling*, 520 N.W.2d 884, 886 (S.D. 1994)) (other citations omitted).

A. The Department is Not Liable for Tronvold's Actions

1. Tronvold Was Not Acting within the Scope of His Agency for the Department

Tammen and Jurgens seek to hold the Department liable for Tronvold's actions and alleged negligence via respondeat superior. *See* Tammen's Brief, p. 9; Jurgens Brief, p. 12-13. Yet, neither Tammen nor Jurgens establish that Tronvold was an agent of the Department, but instead jump to whether the exception to the "going and coming rule" applies. As explained below, the "going and coming rule" applies in the context of workers' compensation, and an exception to that rule allows for a finding that an employee was within the scope of his employment under certain circumstances. Such a rule and its exception do not lend support to Tammen's and Jurgens' argument that Tronvold was acting within the scope of his duties as a volunteer firefighter at the time of the accident.

There has been no showing, factually or legally, that Tronvold was acting as an employee or agent of the Department at the time of the accident. Tammen states, without citation to any authority, that "Tronvold was acting as an agent within the scope of his employment, because he was required to drive his own personal vehicle, while carrying equipment issue to him by the PVFD, to engine

company training for the benefit of the PVFD and the City of Pierre." These facts are simply insufficient to establish that Tronvold was within the scope of his agency with the PVFD at the time of his accident.

"Respondeat superior is 'a legal fiction designed to bypass impecunious individual tortfeasors for the deep pocket of a vicarious tortfeasor.'" *Bernie v. Catholic Diocese of Sioux Falls*, 2012 S.D. 63, ¶ 8, 821 N.W.2d 232, 237 (quoting *Bass v. Happy Rest, I*nc., 507 N.W.2d 317, 320 (S.D. 1993)). "Under the doctrine of respondeat superior, an employer or principal may be held liable for 'the *employee's or agent's* wrongful acts committed within the scope of the employment or agency.'" *Bernie*, 2012 S.D. 63, ¶ 8, 821 N.W.2d at 237 (quoting *Hass v. Wentzlaff*, 2012 S.D. 50, ¶ 20, 816 N.W.2d 96, 102-03)) (emphasis added). Tronvold was not an employee or an agent of the Department at the time of the accident.

Unquestionably, Tronvold was not an "employee," as the facts establish he was a volunteer firefighter, who received no compensation from the Department. Thus, the only avenue for respondeat superior liability is through agency. "Agency is the fiduciary relationship that arises when one person (a "principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." RESTATEMENT (THIRD) OF AGENCY § 1.01 (2006). "When an agent is not an employee, the principal lacks the right to

control the manner and means of the agent's physical conduct in how work is performed." RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006).

The Court in *Hass*, explained the concept of respondeat superior and the factors taken into consideration to determine whether the principle is liable for an agent's acts:

> "The doctrine of respondeat superior 'hold[s] an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency.' . . . '[T]he question of whether the act of a servant was within the scope of employment must, in most cases, be a question of fact for the jury.'" . . . We apply a two-part test when analyzing vicarious liability claims. . . . "[T]he fact finder must first determine whether the [act] was wholly motivated by the agent's personal interests or whether the act had a dual purpose, that is, to serve the master and to further personal interests." . . . "When a servant acts with an intention to serve solely his own interests, this act is not within the scope of employment and his master may not be held liable for it." . . . "If the act was for a dual purpose, the fact finder must then consider the case presented and the factors relevant to the act's foreseeability in order to determine whether a nexus of foreseeability existed between the agent's employment and the activity which caused the injury." . . . "If such a nexus exists, the fact finder must, finally, consider whether the conduct is so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of the employer's business."

Hass, 2012 S.D. 50, ¶¶ 20-21, 816 N.W.2d at 102-03 (internal and other citations omitted). "An essential focus of inquiry remains: Were the [agent's] acts in furtherance of his [agency]? If the answer is yes, then employer liability may exist even if his [agent's] conduct was expressly forbidden by the [principal] ... When a[n agent] acts with an intention to serve solely his own interests, this act is not

within the scope of employment, and [the principal] may not be held liable for it." *Id.* at ¶ 23, 816 N.W.2d at 103-04.

Under these guidelines, it becomes clear that Tronvold was not within the scope of his agency with the PVFD at the time of the accident. As noted above, Tronvold was driving his own personal vehicle at the time. He was not on his way to a fire or other emergency; rather, he was en route to a *meeting* for the Department, a meeting that he was not required to attend, because at that point in time, Tronvold had already satisfied the requisite hours of training. No one with the Department sent Tronvold on a mission that night. And, there is no evidence that the Department provided any direction to Tronvold that night – for example, no one told Tronvold when to leave, what way to take to get there, or what he could or could not do on his way there. These facts demonstrate Tronvold was not acting with the scope of his agency with the Department, a conclusion supported by a case involving very similar allegations and facts, *Fiano v. Old Saybrook Fire Company No.1, Inc.*, 184 A.3d 1218 (Conn. Ct. App. 2018), *aff'd*, 209 A.3d 629 (Conn. 2019).

In *Fiano*, the plaintiff was seriously injured when he was struck by James Smith, a volunteer firefighter who was driving his own vehicle. *Fiano*, 184 A.3d at 1220-21. At the time of the accident, Smith was departing the fire department premises after having spent time there "monitoring the radio for emergency calls." *Id.* at 1229. The fire department (and the town, which was also sued), moved for summary judgment, arguing Smith was not acting for their benefit at the time of

the accident. *See id.* at 1224-25. The trial court agreed and granted the motion for summary judgment.

On appeal, the plaintiff argued there was a genuine issue of material fact regarding whether Smith was acting in the course of employment or official duties at the time of the accident. *See id.* at 1228. The court noted that "whether an agent is serving the benefit of his employer is generally a question of fact, there are instances, such as the present case, where the question is so obvious that it becomes one of law." *Id.* at 1230 (other citations omitted). In determining the issue on appeal, the court recited the following relevant facts, which are strikingly similar to the facts here, and rejected arguments similar to those made by Tammen and Jurgens:

> Smith became a junior member of the fire company in 2012. As a junior member, he was authorized to fight exterior fires and respond to other emergency calls. Smith possessed an electronic key fob that enabled him to enter the firehouse during the day. Smith, along with the other members of the fire company, was encouraged to spend time at the firehouse monitoring the radio for emergency calls in order to quicken response times, perform training exercises, and to build comradery with one another. In order to entice members to spend time at the firehouse, the fire company provided televisions, computers, a weight room, laundry facilities, and showers.
>
> *The fire company utilized a "points system" in order to track a firefighter's participation and the firefighters were required to obtain a minimum number of points in order to maintain active membership. Firefighters earned points by responding to emergency calls, staffing the firehouse during emergencies, and, at the fire company's discretion, spending time at the firehouse waiting for a call.* Additionally, although the fire company is a volunteer department, the town's firefighters received monetary compensation for their duties. Full members of the fire company are eligible for pensions and receive tax abatements from the town. Members are

> also paid in the event they respond to a brush fire. Prior to the accident, Smith personally received payment for his time spent staffing the firehouse during emergencies.
>
> As a junior member, Smith was not allowed to drive any of the fire company's vehicles. *Thus, Smith used his personal vehicle to respond to emergency calls, travel to and from the firehouse, and to attend training.* Using this vehicle, Smith also would transport other members of the company to emergencies and other fire company related events. *The fire company instructed how its members were to use their personal vehicles when responding to emergencies, such as how to properly park at the scene. In his personal vehicle, Smith kept his company issued firefighting equipment, which included a helmet, coat, bunker pants, and fire boots. His vehicle was adorned with a special license plate that identified him as a member of the fire company, which grants him access to closed roads during emergencies.*

Id. at 1228-29 (emphasis added).

The plaintiff argued Smith was acting with the scope of his employment or agency in part because he "provided a benefit to the defendants because he went to the firehouse on the day of the accident in order to respond to emergency calls, and that the fire company, generally, encourage this activity because it quickened response times." This is an argument very similar to that made by Tammen and Jurgens, but even more compelling than here, since Smith was actually leaving the fire department, where he participated in calls and was on the department's property when the accident occurred. In *Fiano*, there was also evidence that Smith kept his firefighting equipment in his personal truck, and had a firefighter license plate, facts also relied upon by Tammen and Jurgens here. Faced with these similar and some more compelling facts, the court in *Fiano* concluded Smith was not acting with the scope of his employment or official duties. *Id.* at 1230-31.

The same conclusion is warranted here – Tronvold was on his way to a meeting that was not required, he was not directed by the Department to attend the meeting or how he should get to the meeting should he attend, he was driving his personal vehicle, and the accident did not occur on fire department premises. Such undisputed facts support a finding that vicarious liability should not be imposed on the Department.

2. Workers' Compensation Principles Do Not Establish Vicarious Liability

In an attempt to establish the Department's liability for Tronvold's negligence where none exists, Tammen and Jurgens rely on workers' compensation principles and an exception to the "going and coming" rule, which states that generally, employees injured on their way to work or their way home from work, are not within the scope of their employment an not entitled to workers' compensation benefits. Tammen and Jurgens argue that the exception to the going and coming rule is applicable here, such that Tronvold, on his way to a meeting, should be found with the scope of his agency for the Department. The Department maintains that Tronvold was not acting within the scope of his agency under workers' compensation or any other principles of law.[3]

First, the going and coming rule is a workers' compensation rule used to determine compensability; it is not a rule used to determine vicarious liability. *See e.g. South Dakota Pub. Entity Pool for Liab. v. Winger*, 1997 S.D. 77, ¶ 19, 566

[3] To the extent applicable, the Department incorporates the arguments and authorities presented by the City regarding this issue.

N.W.2d 125, 131 (explaining the going and coming rule states that "[g]enerally, employees injured while going to and coming from work are not covered.").[4] The Court has apparently never applied this rule to determine whether an agent was acting within the scope of his agency outside the context of workers' compensation, and neither Tammen nor Jurgens cite to such authority. Indeed, every single one of the cases cited by Tammen and Jurgens in support of applying the exception to the going and coming rule involve an actual *employee*, who was unquestionably on his way to work. *See* Tammen Brief, pp. 11-16 and cases cited therein.

In this case, Tronvold was indisputably not an employee, and he was on his way to a meeting, not on his way to work. As such, the personal vehicle exception to the going and coming rule also has no application here. Further, whether a person is acting within the scope of employment or agency is different in the context of workers' compensation than in the context of respondeat superior. *See e.g. Fiano v. Old Saybrook Fire Company No. 1, Inc.*, 209 A.3d 629, 640-42 (Conn. 2019). The Connecticut Supreme Court in *Fiano* was faced with a similar argument and noted that "'courts have repeatedly noted the distinction between [workers'] compensation law and the theory of vicarious liability." *Id.*

[4] In *Winger*, the Court noted that it will look to "workers' compensation cases because those decisions are useful in exploring the themes surrounding scope of employment questions. Yet we are not bound here to liberally construe coverage as we are in workers' compensation matters." *Winger*, 1997 S.D. 77, ¶ 8, 566 N.W.2d 125, 128. But, in that case, there was no question that Winger was an employee, and the question was whether he was acting within the scope of his employment. Here, Tronvold is indisputably not an employee of the Department.

The court explained that workers' compensation principles are not helpful to determining whether a volunteer fireman was acting within the scope of his duties in terms of respondeat superior:

> Even if we were to assume that Smith was acting within the scope of his employment for purposes of workers' compensation law—an issue on which we express no opinion—that would not necessarily mean that he was acting within the scope of his employment for purposes of imposing vicarious liability on his employer. *The public policies underlying workers' compensation and the doctrine of respondeat superior are very different.* Specifically, "[t]he purpose of the [workers'] compensation statute is to compensate the worker for injuries arising out of and in the course of employment, without regard to fault, by imposing a form of strict liability on the employer.... The Workers' Compensation Act compromise[s] an employee's right to a [common-law] tort action for work related injuries in return for relatively quick and certain compensation." . . . In contrast, the public policy underlying the doctrine of respondeat superior is that "substantial justice is best served by making a master responsible for the injuries caused by his servant acting in his service, when set to work by him to prosecute his private ends, with the expectation of deriving from that work private benefit." . . . Accordingly, although there may be some overlap in the factors to be considered in determining whether an employee is acting within the scope of his employment for purposes of workers' compensation law—many of which are established by statute—and the factors to be considered under the doctrine of respondeat superior, there is no reason to expect that those factors will be identical in all respects. We conclude, therefore, that, even if the plaintiff were correct that Smith was acting within the scope of his employment for purposes of workers' compensation law at the time of the accident because he was in close proximity to the firehouse, where he had been engaged in fire duties for purposes of § 7-314, Smith was not acting within the scope of his employment for purposes of establishing vicarious liability because he was engaged in the pursuit of purely personal affairs and was not acting for the benefit of or under the control of the fire department when the accident occurred.

Id. (emphasis added).

The same logic applies here. In fact, the Court has recognized that workers' compensation is distinct from ordinary tort law. *See Steinberg v. South Dakota Dep't of Military & Veterans Affairs,* 2000 S.D. 36, ¶ 15, 607 N.W.2d 596, 602. "The purpose behind the South Dakota Worker's Compensation Act is twofold. First, the worker's compensation provision is to provide an injured employee a remedy which is both expeditious and independent of proof of fault. . . Secondly, the legislation is to provide employers and co-employees a liability which is limited and determinate. . . . *To this end, the legislation employs the highest standard of liability possible*." *Harn v. Cont'l Lumber Co*., 506 N.W.2d 91, 95 (S.D. 1993) (internal and other citations omitted) (emphasis added). Thus, "*it is the public policy of this state that worker's compensation statutes be liberally construed in favor of injured employees*, and to effectuate the purpose of the workers' compensation system. . . . The overall purpose of the worker's compensation act is to compensate an employee and dependents for the loss of income-earning ability where the loss is caused by injury, disability or death due to an employment-related accident, casualty or disease." *Thomas v. Custer State Hosp*., 511 N.W.2d 576, 579 (S.D. 1994). And specifically, the Court construes the phrase "'arising out of and in the course of employment' liberally" in the context of workers' compensation benefits. *Mudlin v. Hills Materials Co*., 2005 S.D. 64, ¶ 8, 698 N.W.2d 67, 71.

These presumptions and public policies do not exist in ordinary personal injury/negligence cases. In light of these important differences between workers'

compensation purposes and rules (such as the going and coming rule and the personal vehicle exception), and civil cases and rules (such as respondeat superior and vicarious liability), the Department respectfully submits that a finding that an employee is within the scope of employment for workers' compensation purposes is not determinative of whether an agent (not an employee) is within the scope of his agency for respondeat superior/vicarious liability purposes.

Even if those were applied, the determination is the same: Tronvold was not acting within the scope of his agency for the Department at the time of the accident. As acknowledged by Tammen, the "controlling factors" for determining whether an employee on his way to or from work is within the scope of his agency and falls outside the going and coming rule are "travel pay, custom and usage, and company policy." *Mudlin*, 2005 S.D. 64, ¶ 18, 698 N.W.2d at 74. The facts of *Mudlin* are distinguishable from the present:

> Mudlin's crew was performing road construction at a remote job site which was 125 miles from the company's base location. Because employees were required to travel from the company's base location to the job site in order to perform their individual job duties, it can be said that the journey between the base location and the job site was naturally related to the employment.
>
> Additionally, *Hills has a specific policy* governing travel from its base location in Rapid City to remote job sites. This policy expressly requires employees "to furnish personal transportation to the jobsite" when company vehicles are unavailable and establishes *partial reimbursement for travel expenses*. As indicated, prior to the day of the accident Mudlin had used her personal vehicle to travel to the job site on a number of occasions and Hills had provided partial reimbursement for her travel expenses. Therefore, Mudlin's journey to Faith on the date of the accident was impliedly authorized by Hills and, as such, was "in the course of employment."

> At the time of the accident, Mudlin was traveling from her employer's base location to a remote job site. Pursuant to company policy, this was a trip Mudlin was required to make for which she was to be partially reimbursed. In summary, the controlling factors here are travel pay, custom and usage, and company policy. Mudlin's travel extended beyond an employee's normal commute to or from work, and falls outside of the "going and coming" rule.

Id. at ¶¶ 16-18, 698 N.W.2d at 73-74. The Court held, "[b]ased on the above, it has not been shown that the trial court erred in holding that the injuries Mudlin sustained "arose out of and in the course of the employment." *Id.* at ¶ 19.

In this case, Tronvold was not paid, either for his time attending the meetings or for emergencies, nor was he reimbursed for in-town travel expenses to attend them. The "custom and usage" reveals the same – that none of the volunteer firefighters were paid either for their time or reimbursed for travel expenses. Volunteers with the Department utilized their private vehicles, and there is no evidence that the Department dictated the means or direction to get to the fire house. Further, the Department's "company policy" required 40 hours of training and participation in 25% of calls. At the time of the accident, Tronvold had already completed more than the required numbers of training hours and participated in double the required number of calls, making his presence at the meeting that night completely optional.

In short, the controlling factors identified by this Court in determining whether an employee on his way to work is within the scope of employment demonstrate that Tronvold, who was not even an employee on his way to work,

was not within the scope of his agency with the Department. Thus, even if the Court were to apply workers' compensation principles espoused by Tammen and Jurgens, the result is the same – Tronvold was not acting with the scope of his agency with the Department at the time of the accident, and the Department is not vicariously liable for Tronvold's negligence.

B. The Department is Immune from Suit under Sovereign Immunity

If Tronvold were an agent of the Department and acting within the scope of that agency at the time of the accident, the Department is, in any event, immune from suit via sovereign/governmental immunity. "Sovereign immunity is the right of public entities to be free from liability for tort claims unless waived by legislative enactment." *Brown Eyes*, 2001 S.D. 81, ¶ 5, 630 N.W.2d at 505 (other citations omitted). "In the absence of constitutional or statutory authority, an action cannot be maintained against the State." *Id.* (other citations omitted).

Sovereign immunity can be waived, but only "[t]o the extent such liability insurance is purchased pursuant to § 21-32-15 and to the extent coverage is afforded thereunder." SDCL § 21-32-16. Without insurance and coverage, sovereign immunity remains and applies. *See* SDCL § 21-32-17 ("Except as provided in § 21-32-16, any employee, officer, or agent of the state, while acting within the scope of his employment or agency, whether such acts are ministerial or discretionary, is immune from suit or liability for damages brought against him in either his individual or official capacity."). "In 1986, the Legislature extended sovereign immunity and the waiver provisions of SDCL chapter 21–32 to all

public entities." *Unruh v. Davison Cty.*, 2008 S.D. 9, ¶ 10, 744 N.W.2d 839, 843 (citing SDCL 21-32A-1) ("To the extent that any public entity, other than the state, participates in a risk sharing pool or purchases liability insurance and to the extent that coverage is afforded thereunder, the public entity shall be deemed to have waived the common law doctrine of sovereign immunity and shall be deemed to have consented to suit in the same manner that any other party may be sued. The waiver contained in this section and §§ 21–32A–2 and 21–32A–3 is subject to the provisions of § 3-22-17.")).

Thus, in order to establish a waiver of sovereign immunity by the Department, Tammen and Jurgens must establish two things: (1) liability insurance was purchased and (2) coverage is afforded to the defendants under that liability insurance. *See In re Request for Opinion of Supreme Court Relative to Constitutionality of SDCL 21-32-17*, 379 N.W.2d 822, 826 (S.D. 1985) ("Under SDCL 21-32-16 the legislature waived the common law doctrine of sovereign immunity "[t]o the extent such liability insurance is purchased" and "to the extent coverage is afforded thereunder."); *Cromwell v. Rapid City Policy Dep't*, 2002 S.D. 100, ¶ 19, 632 N.W.2d 20, 25. It is Tammen's and Jurgens' burden to establish that the Department has waived its immunity and their burden to establish "the existence of insurance and that it covers the particular claim." *See* 57 AM.JUR.2D *Municipal Tort Liability* § 22. They have not and cannot sustain that burden.

There are three policies that provide liability coverage to the City and/or the Department: (1) Governmental Liability Coverage issued *to the City of Pierre* by the South Dakota Public Assurance Alliance for the City of Pierre; (2) Automobile Liability Coverage *issued to the City of Pierre* by the South Dakota Public Assurance Alliance; and (3) the Continental Western Insurance policy *issued to the Pierre Volunteer Fire Department*. In her Brief, Tammen states that the first policy, the "the Governmental Liability Coverage" does not apply here. *See* Tammen Brief, p. 24.[5] Further, the Automobile Liability Coverage issued *to the City* by the South Dakota Public Assurance Alliance does not extend coverage to the Department for Tronvold's acts, and Tammen and Jurgens do not argue that it does. Rather, as to the Department, the only possible coverage for Tronvold's negligence – and possible waiver of sovereign immunity – is through the Continental Western policy issued to the Department.

1. There is No Coverage for the Accident

The Department did not waive sovereign immunity because there is no coverage for Tronvold's alleged actions. The Continental Western liability policy provides liability coverage such as that sought to apply here, but only to its "insureds." CR 456. "Insureds" includes an "employee" of the Department "while using a covered 'auto' you don't own, *but only for an official emergency response* authorized by you." CR 456 (emphasis added). Unquestionably, at the

[5] Jurgens refers to and relies on Tammen's arguments and authorities in regarding to the issue of sovereign immunity.

time of the accident, Tronvold was not engaged in an "official emergency response." As noted, both Tammen and Jurgens admitted in their responses to the Department's statement of undisputed material facts that Tronvold "was not responding to any emergency." CR 253, 555, 696. Jurgens even admitted there "is no liability insurance provided for this accident." CR 696.

Tronvold was not an insured under this policy and there is no coverage for the accident he allegedly caused, as a matter of law. Without coverage, there is no waiver of the Department's sovereign immunity. *See In re SDCL 21-32-17*, 379 N.W.2d at 826.

2. Sovereign or Governmental Immunity is Expressly Maintained

Further, even if there were coverage, which is denied, the Department's sovereign immunity was expressly maintained by the terms of the amendatory endorsement to the Department's Continental Western policy. That endorsement specifically states that any coverage provided under the policy does not waive sovereign or other immunity:

> A. It is both your and our understanding that you wish to fully invoke and take advantage of all immunities you and/or any other insured has or has been granted against liabilities, including, without implied limitation, immunities which would be waived by the purchase of insurance.
>
> B. This insurance does not include coverage for any liability or "suit" for damages which is barred by the doctrines of sovereign immunity or governmental immunity, as set forth in South Dakota Codified Laws §§ 21-32A- et seq.

C. This insurance does not afford any coverage that would constitute a waiver of any sovereign immunity or government immunity, as set forth in South Dakota Codified Laws §§ 21 -32A-1 et seq.

CR 326.

Tammen's and Jurgens' only response to this amendatory endorsement is their argument that such an endorsement is void for public policy reasons. *See* Tammen's Brief, pp. 27-31. In *Truman v. Griese,* 2009 S.D. 8, ¶ 13, 762 N.W.2d 75, 79, while not specifically addressing the exclusions in this case, the Court recognized that a liability policy issued to a state entity may exclude coverage for certain claims. Other courts have specifically addressed this precise argument, with all of them concluding that such an endorsement is valid, such that the governmental entity's sovereign immunity remains in tact. For example, in *State ex rel. Board of Trustees v. Russell,* 843 S.W.2d 353, 360 (Mo. 1992) (en banc), the Missouri Supreme Court considered a similar endorsement that stated: "NOTHING CONTAINED IN THIS POLICY (OR THIS ENDORSEMENT THERETO SHALL CONSTITUTE ANY WAIVER OR WHATEVER KIND OF THESE DEFENSES OF SOVEREIGN IMMUNITY OR OFFICE IMMUNITY." *Id.* Like South Dakota, Missouri allows an entity to waive its sovereign immunity, but only "to the extent of the insurance" purchased. *Id.* The court held the "endorsement disclaiming coverage of any claim barred by the doctrine of sovereign immunity avoids any waiver of sovereign immunity in this suit." *Id. See also Hendrick v. Curators of Univ. of Missouri,* 308 S.W.3d 740, 744 (Mo. 2010) (court decisions have held that "an express non-waiver provision in a

liability insurance policy purchased by a government entity defeats any waiver of sovereign immunity.").

The Missouri Supreme Court reaffirmed this view in *State ex rel. City of Grandview v. Grate*, 490 S.W.3d 368, 372 (Mo. 2016), stating, "the City is a municipality entitled to sovereign immunity so long as it is engaged in a governmental function or the claims against it do not fall within one of the statutory exceptions to immunity. The operation of a police department is a governmental function sovereign immunity. While the City purchased insurance coverage, *the policy expressly disclaims a waiver of sovereign immunity, and provides coverage to the City only for those claims for which sovereign immunity has been statutorily waived. Therefore, the City did not waive sovereign immunity when it purchased an insurance policy that disclaimed coverage for any actions that would be prohibited by sovereign immunity*." *Id.* (emphasis added).

In *Lunsford v. Renn*, 700 S.E.2d 94, 100-01 (N.C. Ct. App. 2010), the city's liability policy contained a "Sovereign Immunity Non–Waiver Endorsement" that stated: "In consideration of the premium charged, it is hereby agreed and understood that the policy(ies) coverage part(s) or coverage form(s) issued by us provide(s) no coverage for any "occurrence", "offense", "accident", "wrongful act", claim or suit for which any insured would otherwise have an exemption or no liability because of sovereign immunity, any governmental tort claims act or laws, or any other state or federal law. *Nothing in this policy, coverage part or coverage form waives sovereign immunity for any insured.*" *Id.* (emphasis added).

Relying on a similar case, the court in *Lunsford* held the city's liability policy "is not intended by the insured to waive its governmental immunity as allowed by North Carolina General Statutes Sec. 153A–435. Accordingly, subject to this policy and the Limits of Liability shown on the Declarations, this policy provides coverage only for occurrences or wrongful acts for which the defense of governmental immunity is clearly not applicable or for which, after the defenses is asserted, a court of competent jurisdiction determines the defense of governmental immunity not to be applicable." *Id.* (other citations omitted). The court, therefore, held, "[s]ince the record shows that defendants have not waived governmental immunity through their insurance policy, summary judgment was proper on this issue." *Id. See also Yarbrough v. East Wake First Charter Sch.*, 108 F.Supp.3d 331, 338-39 (E.D.N.C. 2015) (noting non-waiver "endorsements preclude the waiver of governmental immunity because they limit the extent of coverage" and holding the defendant "did not waive its governmental immunity by purchasing liability insurance.") (other citations omitted). *See also Lively v. City of Blackfoot*, 416 P.2d 27, 30 (Idaho 1966) (holding "[t]he municipality is not required under law to purchase such insurance, and it therefore follows that a municipality may itself determine the scope of coverage made available.").

Tammen cites no authorities indicating that such an endorsement is invalid, against public policy, or otherwise unenforceable. *See* Tammen Brief, pp. 27-31. Instead, Tammen relies entirely on general principles of public policy and argues that to allow the Department to "contract around the waiver of sovereign immunity

. . . would defeat the intent" of SDCL § 21-32A-1. *See id.*, p. 30. What Tammen ignores, however, is that SDCL § 21-32A-1 is the exception to the norm and that sovereign immunity was long the rule until the legislature created exceptions. *See Cromwell,* 2001 S.D. 100, ¶ 12, 632 N.W.2d at 23-24 ("When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent in its own courts." . . . "Although the American people had rejected other aspects of English political theory, the doctrine that a sovereign could not be sued without its consent was universal in the States when the Constitution was drafted and ratified.") (internal and other citations omitted). Tammen further ignores that "[t]his Court still 'adhere[s] to the opinion that if there is to be a departure from the rule of governmental immunity it should result from legislative action.'" *Id.* at ¶ 23, 632 N.W.2d at 26. A public policy argument such as that presented by Tammen can have no effect on the long-standing principles that sovereign immunity protects the Department from suit and that if there is to be a departure from such immunity, it must come from the legislature.

In short, while sovereign immunity is waived to the extent there exists insurance coverage, in this case, there is no coverage for the accident, and if there were, the insurance policy that would provide such coverage expressly states that such immunity is not waived. Tammen and Jurgens have not cited any authorities indicating such a policy provision is not enforceable. To the contrary, the Court has indicted that it will preserve the long-standing rule of sovereign immunity,

except upon specific legislative pronouncement. The Department and the City are protected from Tammen's and Jurgens' suit by sovereign immunity.

C. The Department is Immune from Liability Under SDCL § 20-9-45

If, as Tammen and Jurgens claim, Tronvold was acting with the scope of his duties with the Department, the Department is also immune from liability under SDCL § 20-9-45, which provides:

> A nonprofit fire, ambulance, or search and rescue entity organized or incorporated in the State of South Dakota and its volunteer officers and directors are immune from civil liability for any action brought in any court in this state on the basis of any act or omission resulting in damage or injury if:
>
> (1) The individual was acting in good faith and within the scope of such individual's official functions and duties for the nonprofit organization or corporation; and
>
> (2) The damage or injury was not caused by gross negligence or willful and wanton misconduct by such individual.

SDCL § 20-9-45.[6] At the circuit court level, Tammen argued there was a question of fact regarding whether Tronvold was grossly negligent.[7] CR 535. There are, as a matter of law, insufficient facts to establish such a claim, and the circuit court could have and should have made this determination and granted summary judgment on this basis as well. *See Wolff*, 1996 S.D. 23, ¶ 32, 544 N.W.2d at 537

[6] Tammen's and Jurgen's briefing to this Court does not address the issue of immunity under SDCL § 20-9-45.

[7] Jurgens argued to the circuit court that the statute was inapplicable because Tronvold was neither an officer nor director. CR 733. However, the argument is that the Department, not Tronvold, is immune from liability. The immunity under SDCL § 20-9-45 clearly applies to the Department, which is a "nonprofit fire . . . entity organized or incorporated in the State of South Dakota."

("it is a well entrenched rule of this Court that, where a judgment is correct, it will not be reversed even though it is based on erroneous conclusions or wrong reasons. . . . In fact, this Court has gone so far as to state that, '[s]ummary judgment will be affirmed if there exists any basis which would support the trial court's ruling.'" (other citations omitted).

As matter of law, Tronvold's actions do not rise to the level of being grossly negligent. *See e.g. Fischer v. City of Sioux Falls,* 2018 S.D. 71, ¶¶ 8-9, 919 N.W.2d 211, 215. The Court recently analyzed the concept of gross negligence in *Fischer* and affirmed the circuit court's summary judgment in favor of the city, concluding that as a matter of law, the city's conduct was not grossly negligent. *See id.* The Court explained:

> In South Dakota, the phrases gross negligence and willful or wanton misconduct mean the same thing. . . . These phrases refer to a category of tort that is "different in kind and characteristics" than negligence. . . . Both categories involve an assessment of the risk that a defendant's conduct poses to others. . . . Negligence involves an "unreasonable risk of harm to another[.]" . . . But for conduct to be willful or wanton, the risk involved must be "substantially greater than that which is necessary to make [the] conduct negligent." . . . And the harm threatened must be "an easily perceptible danger of death or substantial physical harm[.]. . ."
>
> Additionally, establishing willful or wanton misconduct requires proof of an element not present in a negligence claim. "The central issue in the ordinary negligence case is whether the defendant has deviated from the required standard of reasonable care, not his mental state at the time of the conduct." . . . In contrast, "courts have often said that reckless, willful[,] or wanton misconduct ... entails a mental element. The defendant must know or have reason to know of the risk and must in addition proceed without concern for the safety of others. . . ." . . . Or as this Court has said, the "defendant must have 'an affirmatively reckless state of mind.'" . . .

> So while "[w]illful and wanton misconduct is not identical to intentional conduct," . . . willful and wanton misconduct does "partake[ ] to some appreciable extent ... of the nature of a deliberate and intentional wrong."

Id. at ¶¶ 8-9. Thus, the Court held "the requirements for alleging willful or wanton misconduct (i.e., gross negligence) are different than those for alleging negligence. While a plaintiff alleging negligence must prove merely that some harm is possible, a plaintiff alleging willful or wanton misconduct must prove a substantial probability of serious physical harm. Moreover, a plaintiff alleging willful or wanton misconduct *must prove the defendant acted with a culpable mental state*. Thus, while alleging willful or wanton misconduct can raise a jury question as to whether a defendant's conduct has been negligent, . . . alleging negligence is insufficient to raise a jury question as to whether a defendant's conduct has been willful or wanton. . . ." *Id.* at ¶ 10, 919 N.W.2d at 215-16 (emphasis added).

The Court in *Tranby v. Brodock*, 348 N.W.2d 458, 461 (S.D. 1984), explained:

> Willful and wanton misconduct means something more than negligence. It describes conduct which transcends negligence and is different in kind and characteristics. It is conduct which partakes to some appreciable extent, though not entirely, of the nature of a deliberate and intentional wrong. There must be facts that would show that defendant intentionally did something in the operation of the motor vehicle which he should not have done or intentionally failed to do something which he should have done under the circumstances that it can be said that he consciously realized that his conduct would in all probability, as distinguished from possibility, produce the precise result which it did produce and would bring harm to plaintiff. Willful and wanton misconduct demonstrates an

> affirmative, reckless state of mind or deliberate recklessness on the part of the defendant. Such state of mind is determined by an objective standard rather than the subjective state of mind of the defendant.

Applying this standard, the Court in *Tranby* held the following facts were insufficient, as a matter of law, to establish willful and wanton conduct (gross negligence): the defendant, a junior in high school, had seven beers, drove 60 mph, and crashed his car. *See id.* The plaintiff claimed the defendant was guilty of willful and wanton misconduct in driving "after having consumed that quantity of beer, being on a gravel road at night while there was a light mist, traveling in excess of the lawful speed limit with balding tires on his vehicle, and not slowing down a bit when asked to do so." *Id.* The Court held, "[i]n this case there is no evidence of deliberate recklessness or reckless attitude. In a word, there is no evidence from which a jury could find that defendant's conduct was of such a nature that in all probability, as distinguished from possibility, an accident would occur." *Id.* at 461-62.

Similarly, the Court in *Gabriel v. Bauman*, 2014 S.D. 30, ¶ 16, 847 N.W.2d 537, 542-43,[8] held that to establish willful and wanton conduct, the "conduct must be more than mere mistake, inadvertence, or inattention. There need not be an affirmative wish to injure another, but, instead, a willingness to injure another."

[8] In the *Gabriel* case, there was no question that the firefighter, Bauman (who caused the accident), was responding to an emergency, and the issue before the Court was whether the Good Samaritan statute applied.

The Court in *Gabriel* also concluded willful and wanton conduct was not established, as a matter of law:

> Taken in a light most favorable to Gabriel, the facts of this case show that Bauman was speeding to the fire station with his hazard lights engaged. Bauman saw that Gabriel's vehicle intended to turn, but Bauman had the right of way and he did not think Gabriel's vehicle was going to turn in front of him. Despite an unobstructed view of Bauman's oncoming vehicle for approximately 887 feet, Gabriel turned in front of Bauman. Bauman attempted to avoid the accident, but was unable to stop in time.
>
> Reasonable persons may understand that they should not exceed the speed limit and that by exceeding the speed limit, they are undertaking a risk of causing an accident. Under our case law, however, reasonable persons under the same or similar circumstances present in this case would not have consciously realized that speeding would—in all probability—result in the accident that occurred. Nothing in the record can support a jury finding that Bauman consciously realized, before it was too late to avoid the collision, that Gabriel would in all probability turn in front of him.

Id. at ¶¶ 18-19, 847 N.W.2d at 543.

In this case, as in the cases above, Tammen and Jurgens alleged no more than simple negligence in their First Amended Complaint.[9] The First Amended Complaint contains no mention at all of gross negligence or willful and wanton conduct. It was not until the Department moved for summary judgment on the

[9] Further, Tammen and Jurgens alleged the Department is liable on a theory of vicarious liability only. CR 87-93. Neither has ever alleged the Department itself was negligent for hiring Tronvold or failing to properly train him, for example. CR 82-93. Nevertheless, Tammen argued to the circuit court that the Department could be considered "grossly negligent in hiring Defendant Tronvold in the first place." CR 535. Such an argument should be disregarded for the simple fact that as stated above, neither Tammen nor Jurgens has ever asserted any claims against the Department for negligent hiring.

basis of SDCL § 20-9-45 that Tammen attempted to argue that Tronvold was anything more than negligent. CR 535. Tammen pointed out that Tronvold was cited for failing to yield, that the weather was clear, and that he had traveled that road many times. CR 535. In sum, Tammen argued that because Tronvold could not offer "any reasonable explanation for why he did not see" their motorcycle, that a jury could find he was grossly negligent. CR 535. Jurgens never argued to the circuit court that SDCL § 20-9-45 did not apply because Tronvold was grossly negligent or acted willfully or wantonly. CR 733-34.

The allegations and evidence offered by Tammen and Jurgens, at the very most, demonstrate only simple negligence. Even if the evidence suggested, for example, that Tronvold "knew [his] conduct posed an unreasonable risk of harm," that amounts to no more than negligence. *See Fischer*, 2018 S.D. 71, ¶ 11, 919 N.W.2d at 211. There is no evidence that Tronvold acted "with a conscious realization that [a serious physical] injury [was] a probable, as distinguished from a possible (ordinary negligence), result of such conduct." *See id.* There is no evidence, or even an allegation or argument, that Tronvold "acted with a culpable state of mind." There is also no evidence of Tronvold's "deliberate recklessness or reckless attitude" or any evidence that Tronvold's "conduct was of such a nature that in all probability, as distinguished from possibility, an accident would occur." *See Tranby*, 348 N.W.2d at 461-62. Similarly, there is no evidence in the record to support a finding that Tronvold "consciously realized" that he would cause an accident. *See Gabriel*, 2014 S.D. 30, ¶ 19, 847 N.W.2d at 543.

Thus, as this Court held in *Fischer*, "when a plaintiff's cause of action simply resembles ordinary negligence, summary judgment is appropriate" for as the Court noted, "if we draw the line of willful, wanton, or reckless conduct too near to that constituting negligent conduct, we risk 'opening a door leading to impossible confusion and eventual disregard of the legislative intent to give relief from liability for negligence.'" *Id.* (internal and other citations omitted). Summary judgment in favor of the Department based on the immunity provided under SDCL § 20-9-45 was warranted, and the circuit court's judgment should be affirmed for this reason, as well.

In short, there is no evidence that Tronvold was anything more than negligent, and no evidence supporting a theory that he was grossly negligent. Accordingly, the circuit court could have and should have granted summary judgment to the Department based on SDCL § 20-9-45. The Department cannot be held responsible for Tronvold's actions and is protected from liability under both sovereign immunity and statutory immunity under SDCL § 20-9-45.

CONCLUSION

For all these reasons, the Department respectfully requests that the Court affirm the circuit court's summary judgment in its favor.

Dated February 27, 2020.

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CERTIFICATE OF COMPLIANCE

This Brief is compliant with the length requirements of SDCL § 15-26A-66(b). Proportionally spaced font Times New Roman 13 point has been used. Excluding the cover page, Table of Contents, Table of Authorities, Certificate of Service and Certificate of Compliance, Appellee's Brief contains 9,959 words as counted by Microsoft Word.

/s/ Michael L. Luce

Michael L. Luce

CERTIFICATE OF SERVICE

Michael L. Luce, of Lynn, Jackson, Shultz & Lebrun, P.C. hereby certifies that on the 25th day of February, 2020, he electronically filed the foregoing document with the Clerk of the Supreme Court via e-mail at SCClerkBriefs@ujs.state.sd.us, and further certifies that the foregoing document was also e-mailed to:

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The undersigned further certifies that the original and two (2) copies of the Brief of Appellee Pierre Volunteer Fire Department in the above-entitled action were mailed by United States mail, postage prepaid to Ms. Shirley A. Jameson-Fergel, Clerk of the Supreme Court, State Capitol, 500 East Capitol, Pierre, SD 57501 on the above-written date.

/s/ Michael L. Luce

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Nos. 29114, 29138

LISA A. TAMMEN,

Plaintiff and Appellant,

and

RANDALL R. JURGENS,

Plaintiff and Appellee,

vs.

GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally,

Defendants and Appellees.

* * * * * * * * * * * * * * *

LISA A. TAMMEN,

Plaintiff and Appellee,

and

RANDALL R. JURGENS,

Plaintiff and Appellant,

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GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota Municipal Corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally,

Defendants and Appellees.

Appeal from the Circuit Court
Sixth Judicial Circuit
Hughes County, South Dakota

The Honorable Thomas L. Trimble, Circuit Court Judge, Retired

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Notice of Appeal of Plaintiff and Appellant Lisa A. Tammen filed September 3, 2019

Notice of Appeal of Plaintiff and Appellant Randall R. Jurgens filed September 23, 2019

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RESPONSE TO DEFENDANTS' STATEMENT OF FACTS

Plaintiff Lisa A. Tammen disputes the relevancy of many of the facts alleged in Defendants' Briefs. For example, whether Tronvold was an "employee" or whether he received compensation is irrelevant, as his status as a volunteer firefighter undoubtedly subjects Defendants to *respondeat superior* liability. *See Buisker v. Thuringer*, 2002 SD 81, ¶ 11, 648 N.W.2d 817, 820 (noting that "one who undertakes to do a service for another at the other's request but without consideration is a gratuitous employee while engaged in the performance of such service" and therefore may subject the employer to liability) (citation omitted). Further, Defendants accept the fact that Tronvold was traveling to a monthly training meeting that he was encouraged to attend. Defendants, however, attempt to downplay their culpability by concluding that Tronvold was not required to attend the meeting. These facts are also irrelevant, because whether Tronvold was acting on behalf of Defendants as he was required to do, or was doing so on his own accord, does not change whether his actions were done on behalf of his employer. *See Kirlin v. Halverson*, 2008 SD 107, ¶ 14, 758 N.W.2d 436, 444 ("In *respondeat superior*, foreseeability includes a range of conduct which is 'fairly regarded as typical of or *broadly incidental* to the enterprise undertaken by the employer.'") (emphasis in original). Further, the question of whether Tronvold was required

to attend the meeting is a factual inquiry, which makes this case inappropriate for summary judgment. *See Stern Oil Co., Inc. v. Brown*, 2012 SD 56, ¶ 9, 817 N.W.2d 395, 399 ("Summary judgment is not the proper method to dispose of factual questions.").

The issues before this Court are straightforward: First, the Court must decide whether South Dakota will recognize one of the two exceptions to the "going and coming rule." If the Court recognizes either exception, it must then decide whether the City of Pierre and PVFD are protected by governmental immunity, or whether such immunity was waived by Defendants' participation in a risk sharing pool or purchase of liability insurance.

ARGUMENT

Tronvold's conduct fits within an exception to the going and coming rule.

Defendants both note in their briefing that *respondeat superior* is "a legal fiction designed to bypass impecunious individual tort-feasors for the deep pocket of a vicarious tort-feasor." *Bass v. Happy Rest, Inc.*, 507 N.W.2d 317, 320 (S.D. 1993).[1] In that same case cited by Defendants, the Court

[1] Defendants brazenly argue that Plaintiffs are seeking to dig into the deep pockets of Tronvold's employer/principal. It is true that Plaintiffs seek to recover more than the $25,000 liability limits available under Tronvold's personal automobile policy to recover for their injuries, which include the loss of their left legs and over a million dollars in medical bills. The issue before the Court, however, affects both Plaintiffs and Tronvold. The PVFD and City of Pierre, while accepting the benefit of Tronvold's vehicle when it was convenient to do so, now seek to relieve their insurance companies of liability for the accident while forcing their employee to endure the financial hardship of attempting to satisfy a portion of the liability or declare bankruptcy.

continued on, stating that an employee "is personally liable for his intentional tort" but the employer "may be liable too, through *respondeat superior*, if the [employee] was acting on behalf of the corporation when he committed the alleged [tort]." *Id.* In this case, Tronvold committed the negligent act within the scope of his agency and while acting on behalf of Defendants.

City of Pierre also cited to the United States Supreme Court for the proposition that, as a general rule, a standard commute to or from work does not arise out of the employment agency relationship. *See Cardillo v. Liberty Mut. Ins. Co.*, 330 U.S. 469, 479 (1947). The very next few sentences of the Supreme Court's opinion, however, state that "certain exceptions to this general rule may have come to be recognized. These exceptions relate to situations where the hazards of the journey may fairly be regarded as the hazards of service. They are thus dependent upon the nature and circumstances of the particular employment and necessitate a careful evaluation of their employment terms." *Id.*

Contrary to the argument set forth in Defendants' briefing, Tronvold's actions fit within two exceptions to the "going and coming" rule: (1) the required vehicle exception; and (2) the special errand exception. Accordingly, if the South Dakota Supreme Court elects to adopt either of these two exceptions to the going and coming rule, then the remaining issue before this

Court is whether the Defendants have coverage through insurance or through participation in a risk sharing pool that would constitute a waiver of governmental immunity to the extent of that coverage.

Defendants include a number of strawman arguments to address these issues, but the factual assertions included in Defendants' briefing are questions of fact. For example, Defendants allege Tronvold was not required to have a vehicle as part of his job as a volunteer firefighter. While this is contrary to the direct testimony of Fire Chief Ian Paul, at a minimum it is a question of fact which would preclude summary judgment. *See* R.599.

Defendants further argue that workers' compensation exceptions are not applicable in determining vicarious liability. City of Pierre cited to some cases that address the difference between a workers' compensation analysis and a tort liability analysis—stating that "workers compensation is construed broadly, for the benefit of the injured worker" unlike in vicarious liability cases.[2] In *South Dakota Public Entity Pool for Liability v. Winger*, 1997 SD 77, ¶ 8, 566 N.W.2d 125, 128, the South Dakota Supreme Court recognized this principle, stating that "we are not bound . . . to liberally construe coverage as we are in workers' compensation matters." Nevertheless, the Court still

[2] Based upon the cases that were previously cited in Plaintiffs' initial briefing, as well as those cited herein, Plaintiff Tammen disagrees with City of Pierre's assertion that "[t]he favored position in most jurisdictions is to avoid applying exceptions to the going and coming rule in tort cases." *See* City of Pierre Brief at 11.

recognized that it would "resort to workers' compensation cases because those decisions are useful in exploring the themes surrounding scope of employment questions." *Id.* In *Winger*, just like the present case, the question was whether the employee was acting "within the scope of employment" and "on behalf of or in the interest of" his employer at the time of the accident. *Id.* ¶ 1. The Court recognized that, although the employee did not fit within such an exception, there are exceptions to the going and coming rule, even in a vicarious liability analysis. *Id.* ¶ 19. Defendants' blanket arguments that going and coming rule exceptions are only applicable in workers' compensation cases as opposed to vicarious liability cases is contrary to the South Dakota Supreme Court's analysis in *Winger*.

Without citing to any authority, PVFD argues that "Tronvold was indisputably not an employee, and he was on his way to a meeting, not on his way to work." PVFD Brief at 16. The insurance coverage PVFD has through Continental Western Insurance Company specifically includes "volunteer worker" under the definition of "employee." R.170. PVFD provides no support for its conclusion that simply because Tronvold did not receive compensation, he should not be considered an employee, but rather, an agent. Nevertheless, it is undisputed that Tronvold was an agent of PVFD.

PVFD further attempts to support its argument by citing to a decision from the Appellate Court of Connecticut. PVFD Brief at 12-14. In *Fiano v. Old Saybrook Fire Company No. 1, Inc.*, 184 A.3d 1218 (Conn. Ct. App. 2018), the court found that a volunteer firefighter was not acting within the scope of his employment while driving a personal vehicle from a fire station, which ultimately ended up colliding with a motorcyclist. *Fiano*, 184 A.3d at 1220-21. Despite PVFD's contention that the facts in *Fiano* are "strikingly similar to the facts here," the *Fiano* case is unhelpful to the issues in the present case, because the firefighter in that case, James Smith, was undoubtedly working outside the scope of his employment. Although the firefighter in that case used his personal vehicle, there is no indication that he was required to do so, unlike the facts of the present case. In making its argument, PVFD left out the key facts upon which the court made its decision in that case: (1) "There is no evidence that . . . [Smith] was acting for the benefit of the [defendants] at the time of the accident."; and (2) Smith . . . was not requested to come to the firehouse, and, furthermore, was not at the firehouse that day for [the defendants'] affairs". *Id.* at 1223-24. In *Fiano*, the evidence and testimony demonstrated that Smith was "going home to get changed to have his picture taken for the yearbook at the time of the accident and was providing no benefit to the . . . [defendants]." *Id.* 1224. Further, the

only reason that Smith was at the firehouse that day was because he had a "couple [of] extra hours to spare" and decided to visit his girlfriend, who was also a junior member of the fire company. *Id.* 1229. Specifically, the court stated that "the plaintiff does not connect how this provides a basis to determine that the defendants benefitted from Smith's departure from the firehouse, which was when Smith's allegedly tortious conduct occurred." *Id.* at 1231.

Unlike the *Fiano* case cited by PVFD, the present case demonstrates a clearer indication that Tronvold was working within the scope of his employment under the required vehicle exception. Unlike in *Fiano*, the facts here indisputably demonstrate that Tronvold was required to use his own vehicle to get to and from work as a volunteer firefighter. R.599. Further, Tronvold was actually on his way to engine training at the fire station and was conferring a benefit to Defendants by bringing with him his equipment and his own personal vehicle. R.884-85. This is not like the *Fiano* case, in which the volunteer firefighter was *leaving* the fire station to change his clothes to take his senior pictures, after spending time with his girlfriend who was working at the station. *See Fiano*, 184 A.3d at 1223, 1229. Instead, Tronvold was *traveling to* the fire station, in his own vehicle, which he was specifically

required to do, for training that was put on by PVFD for their benefit. R.881-82; R.595.

These facts demonstrate a level of control that Defendants had over Tronvold at the time of the collision. City of Pierre argues that Tronvold's vehicle was not required and served no purpose to Defendants—again a question of fact for the jury. City of Pierre Brief at 10. Such argument is directly contrary to Fire Chief Ian Paul's deposition testimony, in which he testified that it would be difficult to be an effective fireman without having their own personal transportation to respond to calls and that PVFD actually derives a benefit from having employees using their own mode of transportation to fulfill their duties. R.606; R.627. Fire Chief Paul specifically agreed that it is "essential to the Pierre Volunteer Fire Department that a fireman have transportation to get to training or fires." R.613. Defendants' conclusory remarks that Tronvold was not required to bring his own vehicle to training and that Defendants derived no benefit from him doing so are unambiguously refuted by the testimony of the Fire Chief of PVFD.

City of Pierre concedes that "[t]o fall within the scope of employment, the act must be so crucial and incidental to the employment that it is foreseeable." City of Pierre Brief at 9 (citing *Kirlin v. Halverson,* 2008 SD 107, ¶¶ 11-14, 758 N.W.2d 436, 444). A firefighter driving his or her own

vehicle is so crucial and incidental to employment in this case that it is actually required by PVFD. R.613. It is undoubtedly foreseeable that by requiring firefighters to drive their own vehicles to training or fires there could be an accident. As City of Pierre noted in briefing, foreseeability "includes a range of conduct which is 'fairly regarded as typical or broadly incidental to the enterprises that are taken by the employer.'" City of Pierre Brief at 15 (quoting *Hass v. Wentzlaff*, 2012 SD 50, ¶ 27, 816 N.W.2d 96, 104-05). Citing to the Restatement (Second) of Agency, the South Dakota Supreme Court in *Hass* delineated ten factors for analyzing the scope of employment in a tortious liability case, which include:

> (a) whether or not the act is one commonly done by such servants; (b) the time, place and purpose of the act; (c) the previous relations between the master and the servant; (d) the extent to which the business of the master is apportioned between different servants; (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant; (f) whether or not the master has reason to expect that such an act will be done; (g) the similarity in quality of the act done to the act authorized; (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant; (i) the extent of departure from the normal method of accomplishing an authorized result; and (j) whether or not the act is seriously criminal.

Id. In this case, Tronvold fits within the scope of employment under nearly every one of these factors: (a) Tronvold driving his own vehicle is an act that is commonly done by volunteer firefighters; (b) the purpose of the act was to

drive to a meeting for the employer; (c) Tronvold and PVFD undisputedly have a principal-agent relationship; (e) Tronvold's act of driving to work in his own personal vehicle is within the enterprise of Defendants, as it is required of him as part of his job with PVFD; (f) Defendants expected Tronvold to drive his personally owned vehicle to the fire station for training; (h) the vehicle driven by Tronvold, although not furnished by Defendants, was one that Defendants required him to drive; (i) there was no departure or deviation from the normal route to the fire station; and (j) Tronvold's acts were not seriously criminal as to take him outside the scope of his employment. Even under the factors cited to by City of Pierre, Tronvold fits within the scope of employment.

The question that the Court must address is whether Tronvold's acts were in furtherance of his employment. "The following considerations are relevant: (1) did the officer's acts occur substantially within the time and space limits authorized by the employment; (2) were the actions motivated, at least in part, by a purpose to serve the employer; and (3) were the actions of a kind that the officer was hired to perform." *Gruhlke v. Sioux Empire Fed. Credit Union, Inc.*, 2008 S.D. 89, ¶ 14, 756 N.W.2d 399, 407. Each of these three factors is met by mandating employees to utilize their own personal vehicle—(1) Tronvold's act of driving to company training occurs within the time and space limited by Defendants; (2) Tronvold's act of driving his own personal vehicle

is not only motivated by a purpose to serve the employer, but required by Defendants; and (3) Tronvold driving his own personal vehicle is an act that he was required to perform. In other words, Defendants maintain a significant level of control over Tronvold by requiring him to drive his own personal vehicle to trainings for their benefit. "[T]he fact that the predominant motive of the [officer] is to benefit himself . . . does not prevent the act from being within the scope of employment." *Id.* (quoting Restatement (Second) of Agency § 236 cmt. B (1958)). "An officer's actions are outside the scope of employment only if they are done with no intention to perform [them] as a[n] . . . incident to a service. . . ." *Id.* (alterations in original). Using the factors addressed in *Gruhlke*, Tronvold's action of driving his personally-owned vehicle to the fire station as he was required to do was incident to a service to Defendants.

As addressed by PVFD, the controlling factors set forth in *Mudlin v. Hills Materials Co.*, 2005 SD 64, ¶ 18, 698 N.W.2d 67, 74, are "travel pay, custom and usage, and company policy." In the present case, travel pay is impossible to measure because Tronvold was a volunteer employee, so he did not receive pay for any of the work he did. As far as "custom and usage" and "company policy" it should hardly be disputed that it was customary for Tronvold to drive his own vehicle to company trainings, which he was

encouraged to attend, because it was the PVFD's policy that he did so. R.599; R.935-36. The controlling factors set forth in *Mudlin* should be considered by the Court in this case, and dispute PVFD's contention that Tronvold was not acting in the scope of his employment when he caused Plaintiffs' injuries.

Regardless of which factors Defendants rely upon, Tronvold fits within the scope of his employment as a result of the requirement that he is to drive his personally owned vehicle to trainings and fires. In its briefing, City of Pierre indolently attempts to distinguish the cases set forth in Appellants' briefing from the facts of the present case. However, what is clear from the holdings of the various courts in *Carter v. Reynolds*, 815 A.2d 460 (N.J. 2003), *Lobo v. Tamco*, 182 Ca. App.4th 297 (2010), *Konradi v. United States of America*, 919 F.2d 1207 (7th Cir. 1990), *Harleysville Mutual Ins. Co. v. MacDonald*, 2005 WL 8159382 (S.D. W. Va. March 31, 2005), *Huntsinger v. Glass Containers Corp.*, 22 Cal. App.3d 803 (1972), and all other cases previously cited in Plaintiffs' briefing, is that when an employer requires its employee or agent to use his or her own vehicle to commute to work, the required-vehicle exception applies.[3] Accordingly, if the South Dakota

[3] City of Pierre also provides no citation to the record in stating that "Tronvold was not required to use his vehicle for his role at PVFD." To the contrary, Plaintiffs have provided evidence in the record that directly contracts this contention. Fire Chief Ian Paul admitted that "[a]s a member of the Pierre Volunteer Fire Department . . . individual members [are] required to have their own personal vehicle." R.599. Similarly, Tronvold agreed that the PVFD "expect[s] [volunteer firefighters] one way or another, to get expeditiously to the

Supreme Court adopts the required-vehicle exception to the going and coming rule, at a minimum, there is a question of fact as to whether Tronvold fits within that exception which requires a trial by jury.

Defendants have waived governmental immunity.

If the Court finds that Tronvold was acting in the scope of his employment, the Court must then determine if there is coverage for Tronvold afforded under the Defendants' insurance policies. In this case, Defendants admit that they have purchased liability insurance or participate in a risk sharing pool, but dispute whether coverage is provided under their policies. The laws in South Dakota clearly and unmistakably determine that a public entity participating in a risk sharing pool or purchasing liability insurance that affords coverage has waived governmental immunity. SDCL § 21-32A-1. Defendants City of Pierre and PVFD have both waived such immunity through their participation in a risk sharing pool and purchase of liability insurance.

City of Pierre's Automobile Liability Coverage unquestionably provides coverage for this accident.

It is undisputed that City of Pierre participates in a risk sharing pool through the South Dakota Public Assurance Alliance. Tammen App.88-110; Tammen App.123-27. City of Pierre relies heavily upon an exclusion for "Fire

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station or the scene." R.869. The Court should not rely on conclusory remarks stated in Defendants' briefing, which are not supported by the record.

Department, Fire Fighting activities or Fire Department vehicles" contained within the Memorandum of Governmental Liability Coverage within an Exclusion Endorsement. City of Pierre Brief at 21-23; R.174. The Governmental Liability Coverage, however, is irrelevant to the Court's review of whether there is coverage for Plaintiffs. Instead, the Court need only focus on the Memorandum of Auto Liability Coverage contained within the coverage afforded under the South Dakota Public Assurance Alliance.

As addressed in Plaintiffs' initial briefing, there are no similar exclusions for firefighting activities in the Auto Liability Coverage. City of Pierre agrees in its briefing that "[u]nder the terms of the Memorandum of Automobile Liability Coverage, the only potential provision offering inclusion to Tronvold as a 'covered party' is subparagraph (c) of Section D which provides coverage for 'any person who is an official, employee or volunteer of (a) or (b) while acting in an official capacity for (a) or (b)." City of Pierre Brief at 24. Despite City of Pierre's conclusory argument, made without any citation to the record, that it is unaffiliated with the PVFD, the evidence suggests otherwise. The PVFD has confirmed that it "is a part of the Governmental Functions of the City of Pierre. . . ." Tammen App.130. Further, the Pierre City Ordinances verify this notion—Municipal Ordinance 2-3-401 states that the PVFD acts "within and for the city"; Municipal Ordinance 2-3-402 determines that the

PVFD is "subordinate to the ordinances" of the City of Pierre; Municipal Ordinance 2-3-408 gives the City of Pierre authority to remove the fire chief from office; Municipal Ordinance 2-3-410 dictates that the City of Pierre must approve any change in membership of the PVFD; and Municipal Ordinance 2-3-416 defers to the Mayor of the City of Pierre to regulate whether firefighters may go beyond the city limits. R.645-49. There is no reasonable denial that PVFD is a department within the government of the City of Pierre, and that Tronvold was an employee/volunteer who would be covered under the City of Pierre's Automobile Liability Coverage.

The only remaining question is whether Tronvold was working within an official capacity at the time of the accident. As addressed in the section above, Tronvold was acting in his official capacity as he was in the scope of his employment at the time of the collision.[4] Accordingly, if the Court agrees with Plaintiffs' assessment on scope of employment, the Court should also

[4] City of Pierre contends, again without citation to any authority, that finding Tronvold to be acting within his "official capacity" is a "significantly heightened standard from that of general agency." However, the case law in South Dakota demonstrates that an agent can be sued in their "official capacity" if they are working within the scope of their employment. *See, e.g., Hansen v. South Dakota Dept. of Transp.*, 1998 SD 109, ¶ 14, 584 N.W.2d 881, 884 (stating that "an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity" and generally represents "another way of pleading an action against an entity of which an officer is an agent") (quoting *Kentucky v. Graham*, 473 U.S. 159, 165-67 (1985)). Therefore, if the Court finds under the first section that Tronvold was acting within the scope of his employment, he should also be considered to be acting in an official capacity pursuant to the Automobile Liability Coverage afforded under the risk sharing pool in which City of Pierre participates.

determine that Tronvold is afforded coverage under the Automobile Liability coverage.

Furthermore, City of Pierre affords coverage for Tronvold under the Continental Western Insurance Policy, which was purchased by the City of Pierre for the benefit of PVFD, as addressed in the section below. R.275-455.

PVFD's governmental immunity waiver is against public policy.

Plaintiff Tammen agrees with the PVFD's assessment that the only coverage for Tronvold's negligence, through waiver of sovereign immunity, is through the Continental Western Insurance policy that was issued to PVFD. *See* PVFD Brief at 23. Plaintiffs disagree, however, with PVFD's contention that the Continental Western Insurance policy validly maintained sovereign immunity through express language in the policy.

In enacting SDCL § 21-32A-1, the legislature intended that a public entity face liability to the extent coverage is afforded under an insurance contract or risk pool. *See Cromwell v. Rapid City Police Dept.*, 2001 SD 100, ¶ 17, 632 N.W.2d 20, 25. The argument made by public entities has been that "the purpose of sovereign immunity is to make sure that a public entity is not to be held liable for damages *unless there are funds available for the satisfaction of the judgment*." *Id.* ¶ 18 (emphasis added). In the present case, Continental Western Insurance Company has funds available to satisfy any

judgment against PVFD in this action. PVFD argues, however, that it is exempted from such coverage because it purposely contracted with Continental Western Insurance Company to be exempted from such coverage. The Court should not allow for such contracting between these parties, as it is significantly detrimental to innocent third parties who would otherwise be covered, such as Plaintiffs.

"[I]t is the general rule that a contract [that] is contrary to statutory or constitutional law is invalid and unenforceable." *Cole v. Wellmark of South Dakota, Inc.*, 2009 SD 108, ¶ 23, 776 N.W.2d 240, 249 (quoting *Willers v. Wettestad*, 510 N.W.2d 676, 680 (S.D. 1994)). In the present case, the endorsement excluding coverage under governmental immunity is contrary to SDCL § 21-32A-1. Accordingly, this portion of the contract should be invalid and unenforceable. If this kind of endorsement is allowed, it would render SDCL § 21-32A-1 virtually meaningless, because every public entity would use such an endorsement so that first party claims could still be paid, while third party claims, that would ordinarily provide coverage, would not be paid. The South Dakota Supreme Court "should not adopt an interpretation of a statute that renders the statute meaningless when the Legislature obviously passed it for a reason." *Peterson, ex rel. Peterson v. Burns*, 2001 SD 126, ¶ 30,

635 N.W.2d 556, 567-68 (citing *Faircloth v. Raven Industries, Inc.*, 2000 SD 158, ¶ 9, 620 N.W.2d 198, 202).

Plaintiffs agree with PVFD's citation to *Cromwell*, stating that "if there is to be a departure from the rule of governmental immunity it should result from legislative action." PVFD Brief at 28 (citing *Cromwell*, 2001 SD 100, ¶ 23, 632 N.W.2d at 26). Legislative action has been taken in the form of SDCL § 21-32A-1. PVFD and its insurer have attempted to circumvent the legislative action by contracting around the meaning and purpose behind SDCL § 21-32A-1. The South Dakota Supreme Court should not allow them to do so to avoid liability in this case.

Defendants have waived any argument that SDCL § 20-9-45 is inapplicable in this case.

In this case, the trial court determined that "[s]hould the finding that Tronvold was not acting in the scope of his official duties be set aside, the Court finds that the Department is liable for grossly negligent actions by Tronvold." Tammen App.13. Further the trial court stated that "[v]iewing the facts in the light most favorable to the non-moving party, the Court finds whether Tronvold's actions were not negligent, negligent, or grossly negligent is a question for the jury." Tammen App.14.

PVFD argues that it is immune from liability under SDCL § 20-9-45 because there are insufficient facts to establish that Tronvold was grossly

negligent when he caused this collision to occur. Defendants have waived any argument, however, that Tronvold was not grossly negligent as a matter of law. Under SDCL § 1-26-36.1, Defendants were required to file a notice of review in order for the South Dakota Supreme Court to review the trial court's decision on this issue. Defendants failed to do so. "An issue is not properly preserved for appeal when a party fails to file a notice of review with either the circuit court (pursuant to SDCL 1-26-36.1) or the Supreme Court (pursuant to SDCL 15-26A-22) and, therefore, the issue is waived." *Schuck v. John Morrell & Co.*, 529 N.W.2d 894, 897 (S.D. 1995) (citing *Matter of Midwest Motor Exp., Inc., Bismarck*, 431 N.W.2d 160, 162 (S.D. 1988)). Accordingly, PVFD's argument against the trial court's finding that it "is liable for grossly negligent actions by Tronvold" has been waived, and the Court should not consider any of the arguments presented by PVFD regarding this contention.

To the extent the Court does consider such arguments, the trial court listed several reasons that a jury could find Tronvold acted in a grossly negligent manner causing this accident that resulted in significant injuries to Plaintiffs. Specifically, the trial court noted:

> Tronvold pled guilty to failure to make a proper stop. Plaintiffs allege he was driving at an excessive and unlawful speed, was distracted by loud music such that he was unable to hear the approaching motorcycle, and that he pulled into oncoming traffic when his vision was obstructed.

Tammen App.14. Each of these factual assertions create a question of fact as to whether Tronvold acted "with a conscious realization that [a serious physical] injury [was] a probable" result of his conduct. *Fischer v. City of Sioux Falls*, 2018 SD 71, 11, 919 N.W.2d 211, 215. Although the Court should not consider this issue on appeal due to Defendants' waiver of review, the trial court was correct in determining that there were genuine issues of material fact as to whether Tronvold acted with gross negligence.

CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court reverse the trial court's Order Granting City of Pierre's Motion for Summary Judgment and Granting Pierre Volunteer Fire Department's Motion for Summary Judgment. Tronvold was acting in the scope of his employment for Defendants by acting on their behalf in driving his personally owned vehicle to the PVFD fire station. Further, Defendants have waived governmental immunity by participating in a risk sharing pool and purchasing a liability insurance policy under which coverage should be afforded.

Dated at Sioux Falls, South Dakota, this _____ day of March, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Reply Brief of Appellant Lisa A. Tammen complies with the type volume limitations set forth in SDCL § 15-26A-66(b)(2). Based on the information provided by Microsoft Word 2016, this Brief contains 5,000 words, excluding the Table of Contents, Table of Authorities, Jurisdiction Statement, Statement of Legal Issues, any addendum materials, and any Certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2016.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NOS. 29114, 29138

LISA A. TAMMEN,

Plaintiff and Appellant,

and

RANDALL R. JURGENS,

Plaintiff and Appellant,

vs.

GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota municipal corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally,

Defendants and Appellees.

LISA A. TAMMEN,

Plaintiff and Appellant,

and

RANDALL R. JURGENS,

Plaintiff and Appellant,

vs.

GERRIT A. TRONVOLD, an individual, CITY OF PIERRE, a South Dakota municipal corporation, and PIERRE VOLUNTEER FIRE DEPARTMENT, a South Dakota nonprofit corporation, jointly and severally,

Defendants and Appellee

Notice of Appeal of Plaintiff and Appellant Randall R. Jurgens filed September 23, 2019, and Notice of Appeal of Lisa A. Tammen filed September 3, 2019

Appeal from the Circuit Court
Sixth Judicial Circuit
Hughes County, South Dakota

The Honorable Thomas L. Trimble, Circuit Court Judge, Retired

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RESPONSE TO CITY AND FIRE DEPARTMENT'S STATEMENTS OF FACTS

Randall Jurgens takes issue with the following statements which are asserted as "facts" in City and Fire Department's Briefs, as follows:

A. That Tronvold was not an employee because he "received no compensation or even a W-2 from the Department."

Fire Department persists in attempting to evade responsibility for Tronvold's unlawful conduct and actions under *respondeat superior* by claiming on appeal that Tronvold was "unquestionably" not an employee of Fire Department. PVFD Brief at 10. Fire Department's contention fails under the plain language of SDCL § 3-21-1(1) that clearly defines "employee" as "all current and former employees and elected and appointed officers of any public entity whether classified, unclassified, licensed or certified, permanent or temporary whether compensated or not." Ultimately, and as noted as well in Tammen's Reply Brief, regardless of Tronvold's relationship as an agent or uncompensated employee of City and Fire Department, Tronvold's status as a volunteer firefighter firmly ground the City and Fire Department's vicarious liability for Tronvold's conduct and actions.

B. That "the monthly training meetings were held on Mondays, and while volunteers are encouraged to attend, they are not mandatory … his attendance there was not required, as he already had sufficient training hours."

Fire Department continues to insist that Tronvold's attendance at the engine company meeting was optional. However, his attendance was required by municipal ordinance of the City of Pierre.

Section 2-3-415 of the Fire Department Ordinances of City requires that each firefighter must attend "each and all of the drills and meetings" of the engine company to which he or she is assigned, and that dismissal by the fire chief is mandatory in the event

a firefighter misses three such successive meetings or drills "without having sufficient reason or excuse." Jurgens App. 034. Even assuming for purposes of argument that internal policies of Fire Department were such that Tronvold had met certain percentage requirements of runs and calls, the plain and unambiguous language enacted into law by municipal ordinance establishes a legal duty on the part of Tronvold to attend the engine company meeting to which he was en route at the time of the crash.

C. *That "at the time of the motor vehicle accident Tronvold was not undertaking any special duty, task or other objective on behalf of the Pierre Volunteer Fire Department. He was engaged in what can only [sic] classified as an ordinary commute to a regularly scheduled meeting …Tronvold was not undertaking any action on behalf of the City or the PVFD."*

Fire Department's actions after the crash refute the claim of City and Fire Department that Tronvold was "not undertaking any action on behalf of the City or the PVFD." City at 6. Both City and Fire Department deemed that Tronvold was in fact engaged in an "official duty" by providing property damage coverage for Tronvold's pickup truck, plus "reimbursement" for a $1,000 deductible that Tronvold never actually incurred. Jurgens App. 042-043.

It is undisputed that this insurance coverage was obtained by Fire Department and paid for by City. In order to be eligible for this insurance coverage, Fire Department determined by processing Tronvold's insurance claims that Tronvold's pickup truck was "Employee's Personal Auto" that sustained "property damage" while the firefighter "employee" was "en route to, during or returning from any official duty authorized by you." Jurgens App. 062-065. "Fire Department provided and City paid for property damage coverage for Tronvold's privately owned pickup, and Tronvold's insurance claim was paid on the basis that he was engaged in an 'official duty' at the time of the drive to

engine company training." Jurgens at 23. At the time of the crash, Tronvold was traveling to an "official duty" as a Fire Department "employee."

D. That "no one with the Department sent Tronvold on a mission that night" and that neither City nor Fire Department exercised any control over Tronvold as an employer during Tronvold's drive to the mandatory engine company meeting.

Fire Department's own policies exercise multiple controls as an employer of its volunteer firefighters, and specifically so with respect to the transportation of the firefighters. Driving to engine company drills and meetings is a natural and incidental activity of a firefighter. R.596,615. "Fire Department exercises control over its firefighters' conduct with respect to driving their personal vehicles by written policies … Fire Department policies prescribe where a firefighter may park his or her privately owned vehicle in responding to a call, the manner in which a firefighter is to arrive at an incident scene, and that a firefighter may not pass another firefighter in driving to an incident scene. Fire Department also regulates the use of personal vehicles by firefighters by requiring that a firefighter comply with the rules of the road when responding to a call. R.596,616-617." Jurgens at 9.

In addition, the "Best Practices Manual" of Fire Department states that firemen should carry their PPE (personal protective equipment) and pagers with them at all times, unless the captain approves storage at the fire station. Jurgens App 057. Tronvold kept his PPE, which was issued by Fire Department and paid for by City, in his pickup truck at all times. R.848,882. Before driving from his home to the fire station on the day of the crash, Tronvold "made sure" he had his PPE and pager in his pickup. Tronvold always kept his PPE in his vehicle, because the Department wanted him to do so. R.848,882. Tronvold's

pickup was also adorned with a Department half plate reading "MEMBER FIRE DEPT." and "PIERRE FIRE DEPT." Jurgens App. 058.

At the time of the crash, the following facts are undisputed, that Tronvold (1) left his home to drive to a meeting required by City ordinance, (2) checked his vehicle before leaving to make sure he was carrying his PPE at the Department's recommendation, (3) drove to the meeting in a vehicle with a half-plate which identified him as a firefighter, while (4) bound to follow the rules of the road outlined by Fire Department's transportation policy. Together, all these factors demonstrate control exercised by Fire Department over Tronvold at the time of the crash.

E. City claims that the distance from Tronvold's residence to his engine company's fire station was "approximately seven road miles."

It is undisputed that Tronvold's home at the time of the crash was approximately ten miles from his assigned fire station. R.848,874. This fact alone makes it unrealistic and impractical that Tronvold would, or even could, store his PPE at the fire station and fulfill the duties and responsibilities of a firefighter when called upon in emergencies. For example, storage of his PPE at the fire station would require Tronvold to first travel those ten miles to the fire station in order to retrieve his PPE, and only after doing so, would he then be fully equipped to travel from there to the scene.

RESPONSE TO CITY AND FIRE DEPARTMENT'S ARGUMENTS

I. City and Fire Department are jointly and severally liable to Randall and Lisa for Tronvold's actions at the time of the crash through respondeat superior and well-settled principles of vicarious liability.

In their arguments against Tronvold's employment and agency, City and Fire Department rely on unsupported arguments that contradict the undisputed facts of this case.

For example, Fire Department claims that "there has been no showing, factually or legally, that Tronvold was acting as an employee or agent of the Department at the time of the accident" and that the facts "are simply insufficient to establish that Tronvold was within the scope of his agency with the PVFD at the time of the accident." PVFD at 9. According to City and Fire Department, Tronvold was "unquestionably" neither an employee nor agent of the Department, and therefore cannot be held liable through *respondeat superior.*

Compensation is an irrelevant factor in the definition of "employee" under South Dakota law. To determine Tronvold's agency and whether Tronvold was acting within the scope of his agency at the time of the crash, this Court need only examine its well-established principles of vicarious liability, using the test of foreseeability adopted by the Court based on the Restatement (Second) of Agency § 228 and Hass v. Wentzlaff, 2012 S.D. 50, 816 N.W.2d 96.

II. The principles of worker's compensation cases are useful, but not determinative for purposes of *respondeat superior* analysis in the vicarious liability context.

City and Fire Department claim that worker's compensation principles cannot be used to determine vicarious liability. PVFD at 15. They allege that exceptions to the

going and coming rule based on worker's compensation cases are inapplicable in tort liability cases, and therefore any analysis cannot be applied within the context of *respondeat superior.* City at 8.

This Court, however, rejects this contention, and describes worker's compensation cases as "useful" for exploring scope of employment questions. However, to focus only on these cases ignores the substantial body of authority dating back to at least 1963 and the well-established principles of vicarious liability in the doctrine of *respondeat superior* and Restatement (Second) of Agency § 228 in the employment context. This body of authority determines foreseeability in the context of the "particular enterprise" in which the employer or agent is engaged for purposes of determining the "scope of employment" in each factual context. Justice Konenkamp explains this analysis in South Dakota Pub. Entity Pool for Liab. v. Winger, 1997 S.D. 77, ¶ 8:

> "We resort to worker's compensation cases because those decisions are useful in exploring the themes surrounding scope of employment questions. Yet we are not bound here to liberally construe coverage as we are in workers' compensation matters. . . . Legal precepts surrounding respondeat superior also help to conceptualize activities encompassed within 'scope of employment,' meaning "in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.' *Leafgreen v. American Family Mut. Ins. Co., 393 N.W.2d 275, 280 (SD 1986*) (quoting *Rodgers v. Kemper Const. Co., 50 Cal. App. 3d 608, 124 Cal. Rptr. 143, 148-49 (CalCtApp 1975)); Deuchar v. Foland Ranch, Inc., 410 N.W.2d 177, 180 (S.D. 1987); Alberts v. Mut. Serv. Cas. Ins. Co., 80 S.D. 303, 306-07, 123 N.W.2d 96, 98 (1963*)." (Emphasis added).

Through a simple reading of Winger, this Court has not restricted exceptions to the going and coming rule from vicarious liability. City and Fire Department only address the Court's decision in Winger in a footnote, claiming the case is dissimilar because Winger was unquestionably an employee, with the Court in that case simply addressing whether he was acting within scope of employment. PVFD at 16. City and Fire

Department engage in circular reasoning by first making a factually erroneous and unsupported argument that Tronvold was not an employee, and then attempting to utilize this flawed reasoning to argue scope of employment principles in worker's compensation case do not apply to this case.

Tronvold was unquestionably an employee and agent at the time of the crash. The question therefore becomes what principles should this Court apply in this case.

III. The Court should analyze Tronvold's employment and agency through *respondeat superior* using Hass v. Wentzlaff and the Restatement (Second) of Agency § 228.

City and Fire Department raised going and coming rule principles in the trial court as the sole legal basis to deny liability for Tronvold's conduct and actions. Nevertheless, City and Fire Department on this appeal go beyond the going and coming rule and for the first time, raise arguments not made to the trial court, that purport to analyze City's, Fire Department's, and Tronvold's conduct and actions under the principles established by this Court in Hass v. Wentzlaff, 2012 S.D. 50, 816 N.W.2d 96, and Restatement (Second) of Agency § 228.

Fire Department makes the conclusory argument that under the factors in Hass, "it becomes clear that Tronvold was not within the scope of his agency with the PVFD." PVFD at 12. City is also now applying the Restatement (Second) of Agency § 228 even though it relied exclusively on the "going and coming rule" for its defense to the trial court.

In their analysis of Hass, City and Fire Department simply state that Tronvold was not an agent at the time of the crash because he was driving his own vehicle, to an optional meeting, without direction from Fire Department. City claims that "as

contemplated by *Hass v. Wentzlaff*, 2012 S.D. 50, p28, *respondeat superior* liability in South Dakota is flexible and amorphous but relies upon a foreseeability standard…[n]egligent acts during commutes are not foreseeable and the commute is not incidental to employment." City at 15.

Randall and Lisa have previously outlined several important arguments that overcome this specious analysis. First, Tronvold's use of a personal vehicle was required by Fire Department. City claims that, "Tronvold was not required to use his vehicle for his role at the PVFD. He was required to have reliable transportation to arrive at the fire hall…the use of his vehicle did not extend beyond his commute." City at 17. However, Fire Chief Ian Paul testified unequivocally that firefighters must have their own personal vehicles. R.596,599. At the very least, whether Tronvold was required to drive his personal vehicle is a matter of disputed material fact inappropriate for summary judgment. Second, Tronvold was required to attend the engine company meeting that day, which was mandated by city ordinance and enforced by threat of dismissal. Jurgens App. 032-034; 052-055.

Finally, City and Fire Department argue that at the time of the crash Tronvold was simply traveling on an ordinary commute. The undisputed facts classify Tronvold's drive to the station as far beyond an "ordinary commute." Fire Chief Ian Paul testified that driving to monthly meetings is an essential part of being a firefighter. R.778. Engine company meetings are also an "official duty" of the position of a firefighter. The property damage and deductible insurance coverage provided by Fire Department and paid for by City overcome the argument that Tronvold was simply commuting to work at the time of the crash. City and Fire Department admittedly were benefitted by Tronvold's drive to

the station. R.776. City cites a single authority to ostensibly refute the significance of Tronvold's PPE on board his pickup at all times, his pager, and his vehicle half-plate identifying Tronvold as a member of Fire Department.

City cites Jorge v. Culinary Institute of America, 3 Cal. App. 5th 382, 406 (2016), which states that "unless such materials require a special route or mode of transportation or increase the risk of injury…carrying employer-owned tools of the trade to work does not render an employee's commute within the course and scope of employment." Therefore, according to Defendants, the dual purpose exception is inapplicable. City at 18.

Because Tronvold's PPE did not necessitate a special route or mode of transportation, and did not increase the likelihood of injury in the commute, City argues that the going and coming rule applies, precluding *respondeat superior*. However, Tronvold's PPE is only one factor regarding his scope of employment. The advancement of Fire Department's interest through training and personal transportation to the fire station more than satisfies the dual purpose test used in Hass.

A correct application of *respondeat superior* principles outlined in Hass compels the conclusion that Tronvold was acting within his scope of employment and agency at the time and place of the crash, and City and Fire Department are jointly and severally liable for Tronvold's wrongful conduct and actions. This Court in Hass, citing Leafgreen v. Am. Family Mut. Ins. Co., 393 N.W.2d 275 (S.D. 1986) holds:

> If the act was for a dual purpose, the fact finder must then consider the case presented and the factors relevant to the act's foreseeability in order to determine whether a nexus of foreseeability existed between the agent's employment and the activity which caused the injury." Id. ¶ 25. "If such a nexus exists, the fact finder must, finally, consider whether the conduct is so unusual or startling that it would

> be unfair to include the loss caused by the injury among the costs of the employer's business.

Tronvold's drive to the fire station fulfilled a dual purpose. His drive to the fire station furthered the interests of City and Fire Department. Fire Department benefitted from Tronvold attending the meetings and training, and Fire Department also benefitted from Tronvold driving himself to the meetings. R.776. Fire Chief Ian Paul testified that firefighters, including Tronvold, when attending engine company meetings and receiving training, are engaged in activities that are "essential" to their overall effectiveness. R.778.

The California Supreme Court in Hinman v. Westinghouse Electric Co., 471 P.2d 988, 991 (Cal. 1970) held "that exceptions will be made to the 'going and coming' rule where the trip involves an incidental benefit to the employer, not common to commute trips by ordinary members of the work force."

Following the application of the Hinman test, and the guidelines of analyzing vicarious liability in Hass, Tronvold's actions at the time of the crash clearly and demonstrably served a dual purpose, and were foreseeable when analyzed through the Restatement (Second) of Agency § 228 and the well-established opinions of this Court. Utilizing these authorities, Tronvold was acting within the scope of his employment and agency and the Court should find that City and Fire Department are vicariously liable for Tronvold's tortious actions under *respondeat superior*.

Finally, for purposes of the foreseeability test, Tronvold's conduct "is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." South Dakota Pub. Entity Pool for Liab. v. Winger, 1997 S.D. 77, ¶ 8. "Foreseeability is viewed from the negligent party's perspective. Iverson v. NPC Int'l, Inc., 2011 S.D. 40, 801 N.W.2d 275. "[N]ormal human

traits" should be considered in determining scope of employment and foreseeability." Kirlin v. Halverson, 2008 S.D. 107 ¶ 47, 758 N.W.2d 436, 452.

Tronvold was nineteen years old at the time of the crash; he held a full-time job in Pierre, while living approximately ten miles north of Pierre. R.848,874. A motor vehicle crash involving a firefighter, especially young Tronvold, while driving to the fire station for an engine company meeting is unquestionably foreseeable. The property damage and deductible insurance provided by Fire Department and paid for by City to Tronvold supports this fact.

In consideration of these undisputed facts, Tronvold's drive to the station furthered the interest of City and Fire Department, and the crash that occurred during that drive to the station was foreseeable. As a result, City and Fire Department are liable for the harms and losses sustained by Randall and Lisa under the doctrine of *respondeat superior*.

IV. Defendants have waived governmental immunity.

Plaintiff and Appellant Randall R. Jurgens joins in the Arguments and Authorities of Plaintiff and Appellant Lisa A. Tammen as set forth in her Brief of Appellant Lisa A. Tammen. The issue as stated by Randall is worded differently from the Brief of Appellant Lisa A. Tammen.

V. Defendants have waived any argument that SDCL 20-9-45 is inapplicable in this case.

Plaintiff and Appellant Randall R. Jurgens joins in the Arguments and Authorities of Plaintiff and Appellant Lisa A. Tammen as set forth in her Brief of Appellant Lisa A. Tammen. The issue as stated by Randall is worded differently from the Brief of Appellant Lisa A. Tammen.

CONCLUSION

For the reasons set forth herein, Randall and Lisa respectfully request that the Court reverse the trial court's Order Granting City of Pierre's Motion for Summary Judgment and Granting Pierre Volunteer Fire Department's Motion for Summary Judgment. Tronvold was acting within the scope of his employment and agency for City and Fire Department and acting on their behalf in driving his personally owned motor vehicle to the fire station to which he was assigned at the time of the crash. Further, City and Fire Department have waived governmental immunity by participating in a risk sharing pool and purchasing a liability insurance policy under which coverage should be afforded.

Dated at Sioux Falls, South Dakota, on this 7th day of May, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Brief of Appellant Randall R. Jurgens complies with the type volume limitations set forth in SDCL § 15-26A-66(b)(2). Based upon the information provided by Microsoft Word 2010, this Brief contains 3,397 words**,** excluding the Table of Contents, Table of Authorities, and any Certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, on this 7th day of May, 2020.

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