IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 29131

JOHN KOENIG and KAREN KOENIG,

Plaintiffs/Appellants,

v.

DONALD G. LONDON and BONITA S. LONDON,

Defendants/Appellees.

Appeal from the First Judicial Circuit
Brule County, South Dakota
The Honorable James Power, Circuit Court Judge

APPELLANTS' BRIEF AND APPENDIX

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PRELIMINARY STATEMENT

For consistency, this Brief adopts the trial court's party designations. Appellant John Koenig will be referred to as "Trooper Koenig." Appellants John and Karen Koenig will be collectively referred to as "the Koenigs." Appellee Bonita S. London will be referred to as "Bonnie." Appellee Donald G. London will be referred to as "Donald." References to the Clerk's Register of Actions in *John Koenig and Karen Koenig v. Donald G. London and Bonita S. London*, 07 CIV. 17-000063, will be referred to as "RA" with the applicable page number. References to the summary judgment hearing transcript will be referred to as "HT" with the applicable page number. References to the Koenigs' Appendix will be referred to as "App." with the applicable page number.

STATEMENT OF JURISDICTION

The Koenigs appeal from the Order Granting Summary Judgment as to Claims Against Bonita S. London (RA 419-20, 423-24; App. 3-4) and Judgment Pursuant to SDCL § 15-6-54(b) (RA 425-28, 434-37; App. 7-10). Notice of Entry of the Order was filed and served on August 21, 2019 (RA 421-24; App. 1-4), and Notice of Entry of the Judgment was filed and served on September 5, 2019 (RA 432-37; App. 5-10). The Koenigs timely filed their Notice of Appeal on September 13, 2019. (RA 438-39.) This Court has jurisdiction pursuant to SDCL § 15-26A-3(1).

REQUEST FOR ORAL ARGUMENT

The Koenigs respectfully request oral argument on each of the issues before this Honorable Court.

STATEMENT OF THE ISSUES

I. Whether the trial court erred when it added a "duty to prevent a third-party's misconduct" as an element of Trooper Koenig's negligence claim against Bonnie for Bonnie's own negligence.

The trial court held that Trooper Koenig's negligence claim against Bonnie needed to establish that Bonnie had a duty to prevent the misconduct of her adult son.

- *Robertson v. LeMaster*, 301 S.E.2d 563 (W. Va. 1983)
- *Leppke v. Segura*, 632 P.2d 1057 (Colo. App. 1981)

II. Whether the trial court erred when it determined that Donald's aggressive behavior toward law enforcement was not foreseeable after construing the disputed facts against the non-moving party, Trooper Koenig.

The trial court held that Donald shooting Trooper Koenig was not foreseeable by construing the disputed facts against Trooper Koenig (the non-moving party).

- *McGuire v. Curry*, 2009 S.D. 40, 766 N.W.2d 501
- *Kirlin v. Halverson*, 2008 S.D. 107, 758 N.W.2d 436

III. Whether the trial court erred when it dismissed Trooper Koenig's negligent supervision claim against Bonnie.

The trial court concluded that Bonnie was entitled to summary judgment on the negligent supervision claim because she owed the Koenigs no duty to supervise Donald.

- *Andrushchenko v. Silchuk*, 2008 S.D. 8, 744 N.W.2d 850
- *Johnson v. Soldan*, 4:14-cv-04029-KES, 2016 WL 1574034 (D.S.D. April 19, 2016)

STATEMENT OF THE CASE

On or about October 4, 2017, the Koenigs initiated a civil lawsuit against Donald, Bonnie, Marian Powers, and the Estate of Michael London in Brule County, First Judicial Circuit, South Dakota, for personal injuries and damages stemming from Donald's shooting of Trooper Koenig on January 7, 2015. (RA 4-13.) The Koenigs dismissed

Marian Powers[1] and the Estate of Michael London[2] on December 20, 2017. (RA 17-18.) The Honorable Bruce Anderson was initially assigned to this matter, but later recused himself.[3] (RA 54.) Eventually, the Honorable James Power was assigned. (RA 239-40; HT 1.)

On March 8, 2019, Bonnie filed a Motion for Summary Judgment. (RA 90-91.) The Motion was heard by the trial court on May 17, 2019. (RA 239-40; HT 1.) Bonnie's Motion was ultimately granted, and the trial court's Memorandum Decision (RA 388-418) and Order Granting Summary Judgment as to Claims Against Bonita S. London (RA 419-20, 423-24; App. 3-4) were both entered on July 24, 2019. The trial court entered Judgment Pursuant to SDCL § 15-6-54(b) on September 4, 2019. (RA 425-28, 434-37; App. 7-10.) Notice of Entry of the Order was filed and served on August 21, 2019 (RA 421-24; App. 1-4), and Notice of Entry of the Judgment was filed and served on September 5, 2019 (RA 432-37; App. 5-10). The Koenigs timely appealed the trial court's summary judgment decision on September 13, 2019. (RA 438-39.)

STATEMENT OF THE FACTS

Trooper Koenig retired from the South Dakota Highway Patrol in 2016 following a thirty year career as a State Trooper. (RA 345 at 413-14.) Throughout his time in law enforcement, Trooper Koenig served the State of South Dakota as a Deputy Sheriff for the Brule County Sheriff's Department, an officer for the Chamberlain Police

[1] Marian Powers owned the property in rural Kimball County where the underlying events occurred, but was hospitalized at all relevant times.
[2] Mike London died on October 16, 2015, with no assets or insurance.
[3] Judge Anderson presided over Donald's criminal matter.

Department, a Certified Law Enforcement Corrections Transport Officer for the Winner Police Department, and a Certified Firearms Instructor at the George S. Mickelson Criminal Justice Center in Pierre. (*See* RA 242; RA 345 at 413-14; RA 367.) Trooper Koenig continues to serve part-time as a Deputy Sheriff for the Brule County Sheriff's Office. Over the course of Trooper Koenig's distinguished career, he worked on assignments related to the Sturgis Motorcycle Rally, natural disaster relief, and dispatch calls, like the one on January 7, 2015. (RA 242.) On January 7, Trooper Koenig responded to an armed standoff between local law enforcement and Donald, who had barricaded himself in his grandmother's farm house ("the farm house") with multiple firearms. (*See* RA 347 at 459-62; RA 365 at ¶ 10.)

When Trooper Koenig responded to the call on January 7, he did not know that he would be shot in the line of duty (RA 347 at 460), that his life would be jeopardized by the 146 rounds of ammunition Donald fired at law enforcement (*see id.*), or that Bonnie had compromised his safety by falsely telling Donald that the ATF (Bureau of Alcohol, Tobacco, and Firearms) was coming to take his guns (RA 292 at ¶ 30; RA 376 at ¶ 18). Bonnie made this statement to Donald despite knowing that Donald had past struggles with paranoid schizophrenia (RA 323 at 686; RA 324 at 367) (including the delusional belief that the police had kidnapped his wife (RA 326 at 698)), a recent violent episode where he tried to fight two men at a local bar (RA 350-51 at 12-13), and an armed confrontation with police the day before (RA 358 at 216).

The issue before this Court is whether Bonnie's act in lying to a mentally ill and violent person about the police coming to take away his guns – which immediately

preceded Donald arming himself and shooting Trooper Koenig – gives rise to civil liability. If summary judgment is affirmed, the Koenigs, in effect, will be left without a legal remedy for their injuries and damages that they have suffered.

I. Donald London.

Donald grew up in South Dakota and graduated from Pierre High School in 1991. (RA 93.) He later moved to Wyoming and married Ruth Martinson, who died in 2012. (*Id*.) Following Ruth's death, Donald's mental health suffered. (RA 324 at 689; RA 326 at 696.) Donald is a paranoid schizophrenic and diagnosed with posttraumatic stress syndrome. (RA 323 at 686; RA 324 at 688.) As part of Donald's mental health struggles, he has delusional episodes during which he blacks out and becomes angry. (RA 324 at 687; RA 330 at 712-13.) During his delusions, Donald cannot distinguish reality from fantasy and loses his sense of location and time. (RA 331 at 723.) For example, Donald believed he was hiding in the mountains when, in reality, he was sitting at home next to his son. (*Id*.) During his delusions and black outs, Donald has, or believes he has, gotten into fights. (*Id*.) Donald has been involuntarily committed to institutions multiple times – including commitments in South Dakota, North Dakota, Wyoming, and Montana. (RA 323-24 at 686-87; RA 331 at 723.)

During his delusions and black outs, Donald also believes that his wife, Ruth, is still alive and that the police, the FBI, Mossad, the military, and/or his family are keeping Ruth from him. (RA 326 at 698; RA 333 at 731.) If Donald sees police during one of his delusional states, he believes that the police are after him and will, according to Bonnie, hit an "insanity point." (RA 326 at 698.) Donald will have no idea why a police officer

is present. (*Id*.) He will only believe that the police are hiding his wife from him. (*Id*.) This problem is exacerbated by Donald's past negative encounters with law enforcement – particularly, Officer Joe Hutmacher ("Officer Hutmacher"), whom Donald previously filed a complaint against with the South Dakota Attorney General's Office regarding allegations that Officer Hutmacher had stolen firearms from Donald's father. (RA 320 at 109; RA 327 at 700-01; RA 331 at 726.)

In short, Donald's delusions make him susceptible to the belief that law enforcement is "out to get him." (RA 334 at 735.) Donald's mental state is important here because Bonnie knew all of this information about Donald and has previously sworn to its accuracy, under oath. (RA 320 at 109; RA 323-24 at 686-89; RA 326 at 696-98; RA 327 at 700-01; RA 330 at 712-13; RA 331 at 723, 726; RA 333 at 731; RA 334 at 735.)

II. Bonnie London.

Bonnie is Donald's mother. Throughout Donald's life, including his adult life, Bonnie has been "instrumental" to his care. (RA 326 at 696.) After Ruth died, Bonnie was "constant[ly]" on the phone with Donald. (*Id*.) She had to "talk him out of his paranoia and tell him that nobody was after him." (*Id*.) She had to "convinc[e] him not to commit suicide." (*Id*.) After Donald entered into his delusional states, he would call Bonnie and tell her that he had gotten into fights. (RA 331 at 723.) Donald would sound sad when Bonnie spoke with him, and she could tell that his mind and heart were "shredded into a million pieces[.]" (*Id*.) Bonnie had an intimate and unparalleled insight into her son's mental state and behavior. (*See* RA 330 at 713-14.) As Bonnie explained,

she "know[s] for a fact" with no "doubt in [her] mind" that if she could have talked with Donald more the day of the shooting, she could have gotten him out of the house without any problems. (*Id*.)

Because of their close relationship, Bonnie knew about Donald's inability to handle police contact. (RA 330 at 712-13.) She described Donald's reaction to the police as "total insanity." (RA 330 at 713.) She knew that when Donald saw police officers, he believed that they were "out to get him and that's all he has on his mind." (RA 334 at 735.) Bonnie knew that if the police showed up where Donald was, it would trigger his delusions and he would hit an "insanity point." (RA 326 at 697-98.) She knew that Donald would believe that the police were hiding his wife from him, and would think the police were after him. (*Id*.) It is these delusional beliefs that provide the necessary context for understanding Donald and Bonnie's actions the days leading up to Trooper Koenig's shooting. And it is this knowledge that make Bonnie's lies to Donald about the police coming to take away his guns so dangerous.

III. December 2014.

Shortly after Christmas in December 2014, after living out of state since 1991, Donald moved into the farm house, owned by his grandmother, in rural Kimball, South Dakota. (RA 325 at 691; RA 333 at 733-34.) Donald planned to watch over the farm house while Marian Powers, his grandmother and Bonnie's mother, recuperated at a facility in Sioux Falls following an illness. (*Id*.)

From late December 2014 to early January 2015, Donald had struggles with his mental health. (RA 335 at 740-41.) He would often call Bonnie crying, telling her how

much he missed Ruth. (*Id.*) During this time, Bonnie would go to the farm house to check on Donald and bring him things.[4] (RA 333 at 734.)

[4] Bonnie has provided testimony about the circumstances surrounding this case on two occasions: during Donald's criminal hearings and during her deposition for this case. The two accounts differ on significant points, including:

- At her deposition, Bonnie claimed that she had not seen Donald for months prior to the shooting, including during December 2014 or prior to January 7, 2015. (RA 312 at 50; RA 316 at 92.) During Donald's criminal hearings, Bonnie testified that she had visited Donald at the farm house more than once between late December 2014 and January 7, 2015. (RA 333 at 731-32, 734.)

- At her deposition, Bonnie was asked whether Donald had been talking about Ruth while he was staying at the farm house and Bonnie replied, "No, not particularly. Not that I recall, much." (RA 312 at 50.) During Donald's criminal hearings, Bonnie testified that during that same time period, Donald would call her crying and talking about how much he missed Ruth. (RA 335 at 741.)

- At her deposition, Bonnie was asked, "[Y]ou knew that Donald would respond poorly if he thought ATF was coming for the guns?" (RA 318 at 101.) Bonnie replied, "I can't answer that." (RA 318 at 102.) During Donald's criminal hearings, Bonnie testified that if police would show up at the farm house, Donald would "go delusional" and "hit another insanity point." (RA 326 at 697-98.) Bonnie also admitted in her answer to the Koenigs' complaint that "she knew or had reason to know that Donald London would become mentally and emotionally upset if he believed that the ATF was coming to the farm." (RA 75 at ¶ 12.)

- At her deposition, Bonnie was asked, "Does your brother keep lots of guns in the farmhouse?" (RA 321 at 143.) Bonnie responded, "I don't know that." (*Id.*) When asked, "Did your brother keep lots of your father's old guns in the farmhouse?" Bonnie replied, "I don't know that either." (*Id.*) During Donald's criminal hearings, Bonnie testified that "[m]y brother has hunters there [Marian's house] all the time. My brother has lots of guns there. My father's old guns. I'm sure there were guns in the house." (RA 337 at 753.)

This is not an exhaustive list of the inconsistencies between Bonnie's two testimonies. Because Bonnie moved for summary judgment, the Koenigs reference the facts most favorable to their claims, as is proper when analyzing a summary judgment motion.

Despite Donald's mental health struggles, he maintained access to firearms – which Bonnie knew. (RA 337 at 753.) Bonnie knew that there were "lots of guns" in the farm house because her brother had hunters there all the time. (*Id*.) In fact, she was "sure there were guns in the house." (*Id*.) And the Chamberlain Police Department later confirmed the presence of firearms at the farm house. (RA 354 at 47-48.) At no point did Bonnie attempt to remove the firearms while at the farm house. (*See* RA 337 at 753.)

IV. Late January 5 and early morning hours of January 6, 2015.

The night of January 5, 2015, Donald was drinking at the Vega Bar in Kimball, South Dakota, when he became drunk and disorderly. (RA 288 at ¶ 4; RA 350-51 at 10-13.) In his intoxicated state, Donald tried to start a fight with another man at the bar. (*Id.*) When the bartender/owner refused to serve Donald more alcohol, Donald attempted to fight him, too. (RA 288 at ¶ 4; RA 350-51 at 12-13.) Donald was then removed from the bar and responded by claiming he had a gun in his coat pocket (which was not true). (RA 288 at ¶ 4; RA 351 at 13.) Brule County Deputy Sheriff Scott Powers ("Deputy Powers") and Kimball Police Chief Frank Scott ("Chief Scott") were dispatched to the bar around 10:00 p.m. By the time they arrived at the bar, however, Donald had left and started driving along gravel roads. (RA 288 at ¶ 5; RA 350-51 at 10-16.)

About an hour later, Donald called Bonnie. (RA 325 at 692.) In a voicemail that he left her, Donald was "screaming and crying hysterically about Ruth and talking about suicide." (*Id*.) Because of Donald's condition, Bonnie knew someone had to find him, so she called her ex-husband, Mike, who lived near Kimball. (*See* RA 323 at 685; RA 325 at 692; RA 391.) Although Bonnie and Mike were divorced, they remained in

frequent contact because of Donald's mental health struggles – and that night was no exception. (RA 323 at 685-86.) Bonnie frequently called Mike to check on Donald. (RA 325 at 692-94.)

Shortly after receiving Donald's voicemail, Bonnie called Donald back. (RA 325 at 693.) During that call, Donald was "hysterical" and "crying and crying and crying." (*Id*.) Bonnie heard Donald's truck door open. (*Id*.) He got out and started vomiting violently. (*Id*.) For about forty minutes, Bonnie listened to her phone as Donald walked farther and farther away from his truck in subzero temperatures. (RA 313 at 61; RA 325 at 693.)

Eventually, Mike, Deputy Powers, and Chief Scott found Donald out in the cold. (RA 288-89 at ¶¶ 5-11.) The police released Donald to Mike's care, and Mike drove Donald to the farm house. (RA 289 at ¶ 12.) Once Mike and Donald arrived at the farm house, Bonnie again called. (RA 325 at 694.) Although Bonnie was talking to Mike, she could hear that Donald was "intoxicated," "crying," and "out of his mind." (*Id*.) Donald was "just insane." (*Id*.) Bonnie could not believe that the police had released Donald into Mike's care. (*Id*.) Donald needed help. (*See id*.)

During Bonnie's call with Mike, she instructed him on how to give Donald his medication. (RA 326 at 695.) Bonnie told Mike that "if you see [Donald] sitting down and his eyes clos[e] for a minute," "he's having a seizure[.]" (*Id*.) Bonnie told Mike that once Donald comes out of the seizure, "he'll be cooperative and you can give him his medicine and he will sleep." (*Id*.)

V. January 6, 2015.

Around 6:00 a.m. on January 6, Bonnie received a call from her daughter who told her that Donald was hysterical again and needed help. (RA 326 at 696.) Bonnie called the Chamberlain police dispatch, who referred the call to Deputy Powers because of his contact with Donald hours before. (*See* RA 352 at 39-40.) Deputy Powers called Bonnie to assess the situation and, even in that moment – at 6:00 a.m. on January 6 – Bonnie knew that the police should not go to the farm house. (RA 289 at ¶ 14; RA 326 at 697-98; RA 352-53 at 40-41.) Bonnie claimed, "[B]ut you don't understand, if the police show up at, at my mother's house and Donny sees them . . . he will go delusional and, and hit another insanity point because he doesn't understand why the police are there and he'll think they're after him." (RA 326 at 698.)

Deputy Powers then called Mike, who told him that Donald was "freaking out about [Ruth] committing suicide." (RA 353 at 41.) Deputy Powers asked if Donald had access to weapons and Mike reported that Donald had a bunch of knives and .38 caliber pistol in the basement. (*Id*.) Given Donald's access to weapons, Deputy Powers requested that additional officers meet him at the farm house.[5] (RA 353 at 41-42.)

Once the officers arrived at the farm house, they initially met with Mike outside. (RA 289 at ¶ 15; RA 339 at 293-94.) Mike was "very distraught," "crying," and "very upset." (RA 289 at ¶ 15; RA 339 at 294.) Sheriff Miller knew this was out of character

[5] The additional reporting officers included Chamberlain Police Officers Catland Landegent ("Officer Landegent") and Dustin Powell ("Officer Powell"), and Brule County Sheriff Darrell Miller ("Sheriff Miller"). (RA 247.)

for Mike.[6] (*Id*.) Mike was clearly concerned about Donald and his mental health. (*See id*.) After talking with Mike about the situation, the officers entered the farm house. (*Id*.) They completed an initial sweep of the main floor and found a pistol and three long guns out in the open. (RA 354 at 47.) Officer Landegent began heading downstairs when Donald cut across the basement and out of sight. (RA 289 at ¶ 16; RA 358 at 213.) Moments later, Donald reappeared – carrying a rifle – then disappeared again. (*Id*.) Officer Landegent raised his firearm and ordered Donald to drop the gun, but, in response, all he heard was "brass clicking and touching each other." (RA 358 at 214-15.) Donald was loading the rifle. (RA 358 at 214.)

A few moments passed and Donald looked around the basement corner. (RA 358 at 215.) Officer Landegent ordered Donald to show his hands and come upstairs, but Donald refused. (RA 358 at 215-16.) Instead, Donald showed his hands once and then continued to conceal the right side of his body. (*Id*.) Officer Landegent continued to give Donald commands, but Donald yelled back expletives. (*Id*.) The situation intensified when Donald yelled, "[D]on't fucking point that gun at me, motherfucker, or I'll give you a reason to, you understand?" (RA 289 at ¶ 17; RA 358 at 216.)

Eventually, Sheriff Miller took over the situation. (RA 290 at ¶ 18; RA 340 at 299.) He instructed Officer Landegent to go into the garage. (*Id*.) Sheriff Miller then talked Donald into coming upstairs. (RA 289 at ¶ 18; RA 340 at 299.) Donald said that he was having trouble with Ruth's death. (RA 340 at 301.) He appeared depressed. (RA

[6] Mike spent a number of years working in law enforcement in the area, including as a dispatcher, city officer, and deputy sheriff. (RA 375 at ¶ 6.)

340 at 302.) Sheriff Miller considered placing Donald on a mental health hold, but everyone at the farm house agreed that Mike should take Donald to see a mental health professional. (*Id.*; RA 290 at ¶ 18; RA 392.)

Before the officers left the farm house, they searched for additional weapons in the basement, where they discovered Donald's private arsenal. (*See* RA 361 at 252-54.) They found six to seven firearms, ammunition canisters, deer knives, and body armor. (*See id.*) They also found cell phones and radios. (*See* RA 361 at 253.) The officers decided to take the firearms from the basement and lock them in a gun safe at the farm house. (RA 290 at ¶ 19; RA 362 at 255.) They gave Mike the key to the safe and took possession of the firearms found on the main floor during the initial sweep. (RA 362 at 255-56.) In total, nine to ten firearms had been scattered around the house. (RA 361-62 at 253-56.)

Following this armed encounter with law enforcement, Bonnie spoke with Mike and Donald via phone. (RA 327 at 699-700.) Donald was still crying and upset. (RA 327 at 699.) Mike mentioned to Bonnie that at some point during the encounter, Office Hutmacher had arrived on scene. (RA 327 at 700.) This upset Bonnie because she knew Officer Hutmacher and Donald had a bad history with each other.[7] (RA 327 at 700-01.) Donald believed that Officer Hutmacher had stolen firearms and animal skins from the Londons in the past. (*See* RA 319-20 at 107-09; RA 331 at 726.) Bonnie knew that

[7] Officer Hutmacher allegedly bullied Donald when the two were in high school together. (RA 319 at 107.)

Officer Hutmacher's presence at the farm house made the situation with Donald more volatile. (*See* RA 319-20 at 107-09.)

At some point, Bonnie contacted a mental health professional in Sioux Falls to make an appointment for Donald. (RA 328 at 703-05.) Mike agreed to drive Donald from Kimball to Sioux Falls. (*See* RA 393.) As Donald and Mike traveled to Sioux Falls, Bonnie decided to have Donald see a counselor at Dakota Counseling in Mitchell instead. (RA 328 at 703-04; RA 393.)

Following that appointment, Donald called Bonnie and claimed that Dakota Counseling had instructed him to stop taking his medication. (RA 328 at 704-05.) Donald also told Bonnie that he had a follow-up appointment scheduled for January 12. (RA 328 at 705.) So, at that point, on January 6, Bonnie knew that Donald was no longer taking his medication and that he was going back to the farm house, less than seven hours after his armed encounter with law enforcement. (RA 328 at 704-06.) Bonnie chose not to place Donald on a mental health hold, even though she had done so in the past. (RA 296.)

VI. January 7, 2015.

Less than thirty hours after the armed encounter with police, Donald called Bonnie around 11:00 a.m. (RA 328 at 705.) He was still crying and upset. (RA 328 at 705-06.) Bonnie could tell that Donald's condition was deteriorating. (*Id.*) She could tell that "he was going into that spiral, I could hear it in his voice." (*Id.*) Bonnie also knew that Donald's lack of medication was contributing to his mental health struggles. (*Id.*) She told him that she was coming to the farm house and she and Donald would call

Dakota Counseling together because "you just can't stop" taking medication that strong. (*Id*.) Bonnie knew that her son was in a fragile state. (*See id*.)

About an hour later, around 12:00 p.m., Bonnie called Donald again. (RA 315 at 81.) This call would light Donald's fuse and trigger his known hostility towards the police, because despite Bonnie's knowledge about: (1) Donald's struggles with paranoid schizophrenia and PTSD (RA 323 at 686; RA 324 at 688); (2) his delusional beliefs about the police hiding Ruth (RA 326 at 698; RA 333 at 731); (3) his unjustified beliefs that the police were out to get him (RA 334 at 735); (4) his recent confrontational behavior that included disorderly conduct at a bar (RA 350-51 at 12-13) and an armed encounter with police (RA 358 at 216); (5) his withdrawal symptoms from his medication (RA 328 at 705-06); and (6) his fragile mental state and his spiraling out of control (*Id.*), Bonnie told Donald that the ATF was coming to the farm house to take his guns, which was not true (*See* RA 318 at 101-02; 377 at ¶ 18). In effect, Bonnie told Donald that the people he believed to be "out to get him" and were "keeping his wife captive" were coming for him. (RA 326 at 697-98; RA 333 at 731; RA 334 at 735; RA 377 at ¶ 18.) And Bonnie made this statement knowing it was completely false. (*See* RA 393-94.)

Immediately following Bonnie's call, Donald became irate. (RA 377 at ¶¶ 17, 18.) He drove to Kimball and retrieved firearms from his father's trailer. (*See* RA 394.) He returned to the farm house armed and ready for law enforcement. (*See* RA 343 at 336-37.) Donald planned to murder Officers Hutmacher and Landegent. (RA 343 at 337.) Sheriff Miller had intermittent conversations with Mike and Donald following Donald's call with Bonnie. Donald told Sheriff Miller that he was going "to shoot that

F'ing Joe Hutmacher right between the eyes" and "that big tall cop that pointed a gun at him." (RA 343 at 335-37.)

Sometime during these calls, Bonnie arrived at the farm house. (RA 328 at 706.) She claims that when she arrived, Donald was calm and talking with Sheriff Miller on the phone. (RA 328-29 at 706-07). However, Donald had already rearmed himself and was prepared for a shootout with police. (RA 343 at 335-37.)

Around 3:00 p.m., Mike went outside and saw cars along the road. (RA 396.) He went back inside and told Bonnie and Donald what he had seen. (*Id*.) In response, Bonnie went outside and drove to the end of the driveway, where she was then detained by law enforcement for her safety. (*See id*.)

What followed next included multiple shots fired between law enforcement and Donald. (RA 295 at ¶¶ 44-47; RA 396-97.) In a volley of fire around 3:52 p.m., Donald shot Trooper Koenig. (RA 397.) After being shot, Trooper Koenig felt as if he had "a Taser [] hooked up to [his] spinal cord." (RA 347 at 460.) As Trooper Koenig laid on the ground going in and out of consciousness, he attempted to call for help, but his speech was slurred from the pain and the shock. (RA 347-48 at 462-64.) He had to be evacuated from the scene. (RA 348 at 464-65.) Donald eventually surrendered to law enforcement on January 8, 2015, around 3:15 p.m. (RA 296 at ¶ 51; RA 369-70 at 819-20.)

STANDARD OF REVIEW

On a motion for summary judgment, this Court views "all reasonable inferences derived from the facts in the light most favorable to the nonmoving party." *Casillas v. Schubauer*, 2006 S.D. 42, ¶ 12, 714 N.W.2d 84, 88 (citation omitted). Summary

judgment may be granted only "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." *Krier v. Dell Rapids Twp.*, 2006 S.D. 10, ¶ 12, 709 N.W.2d 841, 844-45 (citing SDCL § 15-6-56(c)). In negligence cases, determining whether a duty exists is a question of law reviewed *de novo*. *First Am. Bank & Trust, N.A. v. Farmers State Bank of Canton*, 2008 S.D. 83, ¶ 13, 756 N.W.2d 19, 26 (citation omitted).

ARGUMENT

I. Bonnie was negligent because she helped *cause* Donald's misconduct, not because she failed to *prevent* it.

The parties fundamentally disagree on the underlying basis for Trooper Koenig's negligence claim. Trooper Koenig argues that Bonnie was negligent because she actively caused Donald's misconduct through her own actions. In contrast, Bonnie argues that she was not negligent because she had no duty to prevent the misconduct of a third-party.

A similar dispute occurred in *Robertson v. LeMaster*, 301 S.E.2d 563, 567 (W. Va. 1983), when the West Virginia Supreme Court held that a defendant railroad could be liable for its affirmative conduct that caused harm to another via a third-party. The railroad required an employee to do "heavy manual labor," including "lifting railroad ties and shoveling coal," for twenty-seven hours. *Id.* at 564-65. The *Robertson* court noted that "[t]he work was continuous, except for intermittent periods when the workers were required to step back out of the way of the heavy equipment." *Id.* at 564. Following a twenty-seven hour shift, the railroad employee had to drive home and, as he was driving,

collided with another car. *Id.* at 565. The injured plaintiffs sued the railroad for negligence. *Id.* at 564.

The parties' arguments in *Robertson* mirror those before this Court. The railroad argued that "it owed no duty to control an employee acting outside the scope of his employment." *Id.* at 567. The plaintiffs responded that their claim arose from the railroad's affirmative conduct and "amount[ed] to primary negligence," and were not relying on *respondent superior* liability. *Id.*

The West Virginia Supreme Court sided with the plaintiffs and explained that the issue was "not the [railroad's] failure to control [the employee] while driving on the highway," but was "whether the [railroad's] conduct prior to the accident created a foreseeable risk of harm." *Id.* The *Robertson* court concluded that the railroad was liable for its "affirmative conduct" in "requiring [the employee] to work unreasonably long hours and then . . . sending him out on the highway in such an exhausted condition as to pose a danger to himself or others." *Id.* at 568-69. The court reasoned that, "[w]hen such affirmative action is present, liability may be imposed regardless of the existence of a relationship between the defendant and the party injured by the incapacitated individual." *Id.* at 569.

Other similar rulings include *Leppke v. Segura*, 632 P.2d 1057 (Colo. App. 1981) and *Stricklin v. Stefani*, 358 F. Supp. 3d 516 (W.D.N.C. 2018). In *Leppke*, 632 P.2d at 1058, the defendants jump-started the car of an "obviously intoxicated person" who later crashed into another car. The Colorado Court of Appeals, quoting the Restatement (Second) of Torts, stated that "anyone who does an affirmative act is under a duty to

others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act." *Leppke,* 632 P.2d at 1059 (quoting Restatement (Second) of Torts § 320, cmt. a). The *Leppke* court specifically noted that "it is significant" that by jump-starting the intoxicated driver's car, "each defendant performed an affirmative act." *Id.* The court went on to explain that this was not the same as "predicat[ing] liability on a defendant's failure to stop an individual . . . engaged in dangerous behavior." *Id.* Ultimately, the court concluded that the defendants could be liable to the plaintiff for their own actions in jump-starting the car. *Id.*

Stricklin also provides a helpful comparison for this case and is the modern day example of yelling "fire" in a crowded theater. In *Stricklin*, 358 F. Supp. 3d at 522-23, singer Gwen Stefani invited fans at a concert closer to the stage. Her statement triggered a crowd of people to rush forward. *Id.* The plaintiff was trampled by the crowd. *Id.* The district court concluded that the plaintiff's complaint survived summary judgment because it provided "sufficient evidence" for the negligence claim. *Id.* at 526-30. Stefani could be liable for events she set in motion – even though third-parties caused the plaintiff's injury.

Like the defendants above, Bonnie's affirmative conduct caused the Koenigs' injuries and damages. Bonnie knew that Donald was spiraling out of control (RA 328 at 705-06), knew that he had delusional beliefs that the police were holding his wife captive (RA 326 at 698), and knew that he had been in an armed encounter with police the day before. (RA 327 at 699-700.) Despite this knowledge, Bonnie still chose to falsely tell Donald that the ATF was coming – a statement she knew would agitate Donald in his

already delicate state. (RA 75 at ¶ 12; RA 292 at ¶ 30; RA 377 at ¶ 18; RA 394.) This affirmative conduct gives rise to the Koenigs' negligence claim against Bonnie.

II. To establish a negligence claim, the Koenigs do not need to show that Bonnie had a special relationship with Donald.

A negligence claim consists of three elements: "(1) A duty on the part of the defendant; (2) a failure to perform that duty; and (3) an injury to the plaintiff resulting from such a failure." *Stevens v. Wood Sawmill, Inc.*, 426 N.W.2d 13, 14 (S.D. 1988) (citation omitted). The parties' dispute on this issue focuses on the first element – whether Bonnie owed a duty to the Koenigs.

The Koenigs allege that Bonnie's affirmative conduct caused their injuries and damages. Under this legal theory, Bonnie owed the Koenigs a duty of reasonable care if the Koenigs' injuries were foreseeable at the time of Bonnie's actions. *Zerfas v. AMCO Ins. Co.*, 2015 S.D. 99, ¶¶ 14-15, 873 N.W.2d 65, 70-71.

In contrast, Bonnie argues that this case is about whether she had a duty to prevent Donald's misconduct. Based on this legal theory, Bonnie argues that she owes a duty to the Koenigs only if: (1) she had a special relationship with or control over Donald; and (2) the Koenigs' injuries and damages were reasonably foreseeable.

The trial court accepted Bonnie's argument and concluded that when a plaintiff alleges "that a mother had a duty to prevent her emancipated adult son from intentionally inflicting harm on another person, both elements--control/relationship and reasonable foreseeability of injury--are required to establish a duty." (RA 399.)

Although the trial court's conclusion is consistent with South Dakota caselaw premised on a defendant's failure to *prevent* a third-party's misconduct,[8] Trooper Koenig's negligence claim relies on a different legal theory – Bonnie negligently *caused* Donald's misconduct because she knew that he had significant mental health issues, a violent history, and was actively hostile to police. As such, the cases cited by Bonnie and the trial court related to duties to prevent misconduct are not applicable here.

The only question before this Court regarding Trooper Koenig's negligence claim is whether Trooper Koenig's injuries were foreseeable when Bonnie told Donald the ATF was coming. *See Zerfas*, 2015 S.D. 99, ¶ 12, 873 N.W.2d at 70 (stating "[t]he existence, scope, and range of a duty . . . depend upon the foreseeability of the risk of harm") (citations omitted); *McGuire v. Curry*, 2009 S.D. 40, ¶ 21, 766 N.W.2d 501, 509 (stating "Because a duty depends on foreseeability of injury, we examine the alleged negligent conduct to determine whether it was foreseeable that a member of the general public could be injured by that conduct."); *Thompson v. Summers*, 1997 S.D. 103, ¶ 13, 567 N.W.2d 387, 392 (stating "it is *foreseeability* of injury to another, not a *relationship* with another, which is a prerequisite to establishing a duty necessary to sustain a negligence cause of action") (citing SDCL § 20-9-1); *Mark, Inc. v. Maguire Ins. Agency, Inc.*, 518 N.W.2d 227, 229-230 (S.D. 1994) (stating "Whether a duty exists depends on the foreseeability of injury.") (citation omitted). Thus, the trial court incorrectly inserted a

[8] The trial court's opinion primarily cited the following authority for its ruling on this issue: *Kirlin v. Halverson*, 2008 S.D. 107, 758 N.W.2d 436; *E.P. v. Riley*, 1999 S.D. 163, 604 N.W.2d 7; *Walther v. KPKA Meadowlands Ltd. Partner.*, 1998 S.D. 78, 581 N.W.2d 527; and *Small v. McKennan Hospital*, 437 N.W.2d 194 (S.D. 1989).

"special relationship" element into Trooper Koenig's negligence claim against Bonnie for Bonnie's own negligence in telling Donald that the ATF was coming to take his guns.

III. When Bonnie told Donald the ATF was coming, she either foresaw, or should have foreseen, that Donald would act violently.

This Court has previously explained that a negligence claim raises two separate and distinct concepts of foreseeability: (1) "foreseeability of harm as it relates to the element of causation;" and (2) "foreseeability of harm relevant to the element of duty." *Zerfas*, 2015 S.D. 99, ¶ 13, 873 N.W.2d at 70. In determining whether a duty exists, this Court examines "the facts as they appeared at the time, and not by a judgment from actual consequences which were not then to be apprehended by a prudent and competent man." *Id.* at ¶ 14, 873 N.W.2d at 70 (citations omitted). As American Jurisprudence 2d has explained, "[t]he test of foreseeability is whether the ordinary person in the defendant's position, knowing what the defendant kn[e]w or should have known, would anticipate that harm of the general nature of that suffered was likely to result." 57A Am. Jur. 2d *Negligence* § 124 (2019) (citation omitted). In determining foreseeability, courts look to the totality of the circumstances and apply "a balancing approach that acknowledges that duty is a flexible concept and that seeks to balance the degree of foreseeability of harm against the burden of the duty to be imposed." *Id.* (citation omitted). "Foreseeability of harm relates to the general risk of harm, rather than the specific mechanism of injury." *Id.* (citation omitted).

This Court has addressed foreseeability in the duty context multiple times over the last two decades. Although the cases below are not intended to be a comprehensive summary of this Court's decisions on foreseeability as it relates to duty, they illustrate a

pattern in this Court's decisions: foreseeability is largely controlled by a defendant's actual or imputed knowledge.

For example, in *Zerfas*, 2015 S.D. 99, ¶ 9, 873 N.W.2d at 69, an insured filed for uninsured motorist benefits following a car accident caused by a deer carcass that was left on the interstate. The key question on coverage was whether the insured would have been able to recover damages from the unidentified driver; this Court concluded that the insured could not. *Id.* at ¶¶ 9, 16, 873 N.W.2d at 69, 71. In its decision, this Court explained that, "[b]eyond our assumption that the unidentified driver hit the deer and left the carcass in the driving lane of the interstate, we have no additional facts bearing on the unidentified driver's acts or omissions at the time the deer carcass was left on the interstate." *Id.* at ¶ 15, 873 N.W.2d at 70. In other words, no one could determine what the unidentified driver knew at the time of the driver's collision with the deer, or whether the unidentified driver could have foreseen that another driver "would not be able to avoid striking the carcass." *Id.* at ¶ 15. The unidentified driver's knowledge or lack of knowledge was especially important given that other drivers had successfully avoided the carcass. *Id.* In part, because of the lack of knowledge about the unidentified driver, no common law duty was owed to the insured.

In *Johnson v. Haymen & Assoc., Inc.*, 2015 S.D. 63, ¶ 2, 867 N.W.2d 698, 699-700, a home inspection company assessed a home for Fannie Mae. The home was then sold to a couple who resold the home to the plaintiffs. *Id.* at ¶¶ 4-5, 867 N.W.2d at 700. This Court held that the home inspection company was not liable to the plaintiffs, in part, because the company was contracted to do work "solely for the benefit of Fannie Mae."

Id. at ¶ 15, 867 N.W.2d at 702. The company could not have known that the plaintiffs would later rely on the company's written report to Fannie Mae, especially given that the plaintiffs did not even rely on the report. *Id.* at ¶ 14, 867 N.W.2d at 702.

Similarly, in *McGuire*, 2009 S.D. 40, ¶ 23, 766 N.W.2d at 509, a teenage employee of a racetrack had unrestricted access to the racetrack's alcohol. One night, the employee became intoxicated, left work, and crashed into a motorcycle driver. *Id.* at ¶ 2, 766 N.W.2d at 504. This Court concluded that even though the racetrack had "a no-drinking policy for underage employees," the plaintiff's injury was "nonetheless foreseeable" because an underage employee given "unrestricted and unsupervised access to alcoholic beverages" would likely "leave the premises after work unfit to drive" and "injure a member of the general public." *Id.* at ¶¶ 23-24, 766 N.W.2d at 509. In other words, the racetrack knew or should have known that giving an underage employee unfettered access to alcohol could lead to a car crash after the employee left work.

In *Kirlin*, 2008 S.D. 107 at ¶ 40, 758 N.W.2d at 451, an HVAC company sent one of its employees to do work at a site where a known competitor was working, which resulted in the employee assaulting the competitor. The day before the assault, at the same location, a different company employee had confronted the competitor about using materials stored on site. *Id.* This Court concluded that, based on the totality of the circumstances: (1) the company knew its employees believed it owned all materials stored on site; (2) the company knew its employees would confront competitors using materials stored on site; and (3) the company knew that a competitor would be on site the

day of the assault. *Id.* Given the company's knowledge of those facts, this Court concluded the assault was foreseeable. *Id.*

Another example is *Pierce v. City of Belle Fourche*, 2001 S.D. 41, ¶ 2, 624 N.W.2d 353, 354. In *Pierce*, the City of Belle Fourche Municipal Airport allowed people to park their planes at the airport and use tie-down ropes provided by the city. The plaintiff's plane was damaged after the tie-down ropes failed in a windstorm. *Id.* at ¶ 4, 624 N.W.2d at 354. This Court concluded that it was foreseeable that: (1) "airplanes will land at the airport;" (2) "people will park their airplanes at the airport" in parking spaces provided by the city; (3) "the wind will blow in South Dakota and that . . . unsecured airplanes will be damaged;" (4) "the tie-down ropes could break;" and (5) "the ropes would wear out from use and exposure to the elements." *Id.* at ¶¶ 13-17, 624 N.W.2d at 355-56. Accordingly, the city knew that the ropes could break and damage an airplane that came untied. *Id.* at ¶ 17, 624 N.W.2d at 356. Thus, because of the knowledge attributable to the city, the city had "a duty to use reasonable care in selecting the ropes, fabricating the tie-downs and detecting and replacing worn tie-downs." *See id.*

In *E.P.*, 1999 S.D. 163 at ¶¶ 3, 7, 604 N.W.2d at 9-10, the plaintiffs' daughter was sexually assaulted by a child placed in the defendant foster parents' care. This Court held that the foster parents were not liable for the assault because they could not have foreseen the foster child's conduct. *Id.* at ¶ 34, 604 N.W.2d at 16. The plaintiffs failed to provide sufficient evidence to establish that the foster parents knew or had reason to know about the foster child's sexual history. *Id.* In contrast, the Department of Social Services

employees, who knew about the child's sexual history and had been assigned to the case, could have foreseen the assault. *Id.* at ¶ 29, 604 N.W.2d at 15.

In *Walther*, 1998 S.D. 78 at ¶¶ 1, 45, 581 N.W.2d at 529, 536, a tenant's former boyfriend raped and stabbed her after he broke into her apartment. This Court held that the boyfriend's conduct was not foreseeable, in part, because the defendant apartment complex had no knowledge that the boyfriend could climb into the plaintiff's second story window. *Id.* at ¶ 49, 581 N.W.2d at 536-37.

In *Peterson v. Spink Electric Coop., Inc.*, 1998 S.D. 60, ¶ 2, 578 N.W.2d 589, 590, the plaintiff had problems with his electric auger, so he hired an electric co-op to fix the problem. *Id.* Co-op employees discovered a blown fuse and, upon replacing it, asked the plaintiff to plug his auger into a nearby extension cord. *Id.* at ¶ 4, 578 N.W.2d at 589. This resulted in the plaintiff being electrically shocked because it was the extension cord that was defective – not the fuse box. *Id.* at ¶ 20, 578 N.W.2d at 593. This Court held that the co-op owed no duty to the plaintiff because its employees could not have foreseen the plaintiff's injury because they could not have known that the plaintiff's extension cord was defective. *See id.* at ¶¶ 19-20, 578 N.W.2d at 593.

Lastly, in *Thompson*, 1997 S.D. 103 at ¶ 14, 567 N.W.2d at 392-93, this Court concluded that under the rescue doctrine, those who place themselves in danger invite others to rescue them. This is because rescue is the foreseeable consequence of a defendant putting himself in danger. *See id.* at ¶ 15; 567 N.W.2d at 393 (citations omitted). As the above cases illustrate, the essential question in a foreseeability analysis is often, what did the defendant know?

Here, Bonnie knew several crucial facts that made Donald's reaction to her ATF statement foreseeable: (1) Bonnie knew that Donald suffered from paranoid schizophrenia and PTSD (RA 323 at 686; RA 324 at 688); (2) Bonnie knew that Donald suffered from delusions that caused him to become angry and black out (RA 323-24 at 686-87; RA 331 at 723); (3) Bonnie knew that Donald could not distinguish between reality and fantasy during his delusions (RA 331 at 723); (4) Donald previously told Bonnie that he had been in fights during his delusions (RA 323-24 at 686-87; RA 331 at 723); (5) Bonnie knew that Donald had a psychotic belief that the police were keeping his wife hostage (RA 326 at 698; RA 333 at 731); (6) Bonnie knew that if Donald saw police officers, he would hit an "insanity point" and believe that the officers were after him (RA 326 at 698); (7) the day before the shooting, Bonnie told police that they should not go to the farm house because she knew it would trigger Donald's delusions (RA 326 at 697-98); (8) Bonnie had several telephone calls with Mike the night Donald got thrown out of the Vega Bar, and it is reasonable to infer that she learned about Donald's attempts to fight others (*see* RA 325 at 692-94); (9) Bonnie spoke with Mike and Donald after Donald's armed encounter with police, and it is reasonable to infer that Bonnie learned about the encounter (RA 327 at 699-700); (10) Bonnie knew that Donald was off of his medication on the day of the shooting (RA 328 at 704-05); (11) the very morning Bonnie made her ATF comment to Donald, she knew that Donald was spiraling out of control and heading into a delusional state (RA 328 at 705-06); and (12) Bonnie knew that the ATF was not coming to the farm house (RA 377 at ¶ 18). Despite all of these facts, Bonnie made the decision to tell Donald that the ATF was coming. (*Id*.) And the result

was consistent with the "total insanity" that Bonnie had predicted the day before. (RA 330 at 713.) It was, therefore, foreseeable to Bonnie that Donald would act aggressively because she knew that he was mentally ill, violent, and openly hostile against police.[9]

In reaching the opposite conclusion, the trial court put significant weight on the fact that "Donald had not fired a weapon at law enforcement–or anyone–in the past," even the day before the shooting. (RA 412.) But, as this Court has explained, "Once the negligent conduct produces a foreseeable risk of injury, the actor may not find refuge in a 'long history of good fortune.'" *Small*, 437 N.W.2d 194 (S.D. 1989) (citations omitted). In other words, the lack of a similar, past shooting incident does not preclude a ruling that the anticipated harm was foreseeable. The same reasoning applies here. Bonnie cannot escape liability simply because Donald had not shot someone before. If anything, Donald's *armed encounter* with the police on January 6 illustrates just how close Donald had come to shooting a police officer. That encounter also established that Donald was having severe mental health problems and on the verge of explosively violent behavior towards police. The trial court's construing of the fact that the earlier armed encounter ended without a gun fight as a lack of foreseeability improperly construes the evidence in favor of Bonnie. As the non-moving party, the previous armed encounter should be construed in Trooper Koenig's favor.

[9] This conclusion is consistent with that reached during Donald's criminal proceedings. The court wrote, "It was [Donald] and his family who caused Day 3's events. Had it not been for Bonnie's claim that ATF was coming to the farm, [Donald] may not have gotten upset, and threatened to kill Landegent and Hutmacher." (RA 306-07 at ¶ 32.)

Indeed, it is reasonable for a jury to infer that a mentally ill, violent person with a history of an armed encounter with police, will escalate their dangerous behavior when they are not taking their medication. And because Bonnie admits knowing about Donald's mental illness, his past violent behavior, and the fact he was off of his medication, she knew, or should have known, that it was dangerous to tell Donald that the ATF was coming. (RA 75 at ¶ 12; RA 318 at 101-02; RA 377 at ¶ 18.) Given these facts, the Koenigs have established that at the time Bonnie made her ATF statement to Donald, it was foreseeable that Donald would become violent and hurt someone, especially a police officer.[10]

[10] During the summary judgment hearing, the trial court was concerned that a ruling in favor of Trooper Koenig would open the floodgates of tort liability:

> [T]here's one final question I wanted you to address, [Derek], which is if I find that there's a duty here based on foreseeability that he might hurt someone if he got upset, how do I avoid making everyone who came in contact with him during these three days liable? I mean, it seems like everyone who came in contact with this guy during those three days would have known, [h]ey, there's a chance this could go south and end really badly.

(HT 36:16-23.) Here, Bonnie's liability is premised on her intimate knowledge of Donald's behavior, delusions, and acute sensitivity to the police. Other than perhaps Mike London, no one else who came into contact with Donald during that time frame had the same insight into Donald's psyche and past. Furthermore, no one who came into contact with Donald engaged in affirmative conduct that actually triggered Donald's violent reaction like Bonnie did when she lied to Donald about the ATF coming to the farm house.

IV. The trial court erred in dismissing Trooper Koenig's negligent supervision claim against Bonnie.

Under South Dakota law, a person may gratuitously undertake a duty to another. As this Court explained in *Andrushchenko v. Silchuk*, 2008 S.D. 8, ¶ 24, 744 N.W.2d 850, 858, the gratuitous duty doctrine is defined in the Restatement (Second) of Torts § 323, which states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if,
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking

Id. Although this Court has not specifically addressed whether a parent may gratuitously take on a duty to supervise their adult child, a somewhat analogous situation occurred in *Johnson v. Soldan*, 4:14-cv-04029-KES, 2016 WL 1574034 (D.S.D. April 19, 2016). In *Johnson*, the plaintiff brought a negligent supervision claim against a minor's grandfather – alleging the grandfather had undertaken a gratuitous duty to supervise the minor, who shot the plaintiff during a hunting excursion. *Id.* at *1-3. The district court held that the plaintiff was not entitled to summary judgment, in part, because the grandfather had taken actions consistent with supervising the minor and had, therefore, undertaken a gratuitous duty to supervise. *Id.* at *2-3. Here, Bonnie voluntarily undertook a similar duty to supervise Donald.

Bonnie has supported Donald throughout his mental health struggles and has been "instrumental" to his care, especially following Ruth's death in 2012. (RA 326 at 696.) Donald called Bonnie whenever he was having problems, just like he did throughout

January 5, 6, and 7, 2015. (*See* RA 325 at 692-93; RA 331 at 723.) Although these actions, standing alone, may not have imposed a duty on Bonnie to care for Donald, that changed on January 6, 2015.

On January 6, Bonnie voluntarily undertook a duty to supervise Donald when she decided that Donald did not need additional medical treatment. (RA 269 at ¶¶ 3, 4.) Earlier that day, Donald had an armed confrontation with law enforcement. (RA 358 at 216.) In lieu of a mental health hold initiated by law enforcement, Mike and Bonnie arranged for Donald to see a mental health professional. (RA 328 at 703-05.) But instead of having him committed, Bonnie and Mike elected to let Donald go back to the farm house. (*See* RA 296 at ¶ 52.) As Judge Anderson explained during Donald's criminal proceedings, "If the family would have taken [Donald] directly to Avera, he may have been treated and all would be well." (RA 264.) Furthermore, if Bonnie would have attempted to commit Donald or initiate a mental health hold, as she has in the past, perhaps all would be well. As Judge Anderson explained:

> The Court rejects Bonnie's testimony that all they wanted was for law enforcement to commit [Donald] on day 1 or 2 or both. Bonnie never attempted to commit [Donald], even though she had done so in the past and was aware of the commitment process to be followed to get the involuntary commitment completed. Neither Bonnie nor Michael ever contacted the Sheriff or [the county's assigned mental health professional] to complain [Donald] didn't make it to inpatient treatment and that the State commitment process was needed after Dakota Counseling did not give [Donald] the pre-assessment to Avera for inpatient treatment.

(RA 296 at ¶ 52.) Instead of having Donald see a medical professional in Sioux Falls, seeking an involuntary commitment, or contacting law enforcement for an involuntary mental health hold, Bonnie and Mike elected to let Donald go back to the farm house.

Because of this decision, Bonnie had a duty to take reasonable steps for Donald's supervision. Bonnie intervened in Donald's medical care and made the decision about his placement, or lack thereof.

Furthermore, the morning of the shooting, Bonnie again asserted and interjected herself as Donald's caretaker. Bonnie knew that Donald was spiraling out of control. (RA 328 at 705-06.) Instead of having Donald see a medical professional, requesting an involuntary mental health hold, or contacting Sheriff Miller, she told Donald that she would come to him. (RA 296; RA 328 at 705-06.) She once again voluntarily undertook the duty to supervise Donald.

Bonnie breached that duty when she told Donald that the ATF was coming to the farm house. (RA 318 at 101-02; RA 377 at ¶ 18.) This statement – made while Donald was under Bonnie's supervision – set Donald off into a violent spiral resulting in threats to murder police officers, and Donald's actual attempts to do so, which resulted in him shooting Trooper Koenig. Because Bonnie failed to supervise Donald in a reasonable manner, which led to Trooper Koenig being shot, Bonnie is liable for negligent supervision. At the very least, a jury should decide this issue.

CONCLUSION

Trooper Koenig was shot in the line of duty as a direct result of Bonnie's affirmative conduct. Because of Bonnie's unique insight into Donald's prior mental health struggles and his aversion to law enforcement, Bonnie knew or should have known that telling Donald that the ATF was coming for him would cause his violent outburst.

Therefore, the Koenigs respectfully request that this Court reverse the trial court's summary judgment ruling in favor of Bonnie.

Dated: December 27, 2019.

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CERTIFICATE OF SERVICE

I certify that on December 27, 2019, I e-filed with the South Dakota Supreme Court's office, and served via electronic mail, a true and correct copy of Appellants' Brief and Appendix, on:

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this Brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Office Word 2013 and contains 9,197 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this Certificate.

/s/ Derek A. Nelsen
One of the Attorneys for Appellants

APPENDIX

App. 1-4 Notice of Entry of Order Granting as to Claims Against Bonita S. London, filed and served on August 21, 2019

App. 5-10 Notice of Entry of Judgment Pursuant to SDCL § 15-6-54(b), filed and served on September 5, 2019

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: SS	
COUNTY OF BRULE	)	FIRST JUDICIAL CIRCUIT

JOHN KOENIG and KAREN KOENIG, Plaintiffs, vs. DONALD G. LONDON and BONITA S. LONDON, Defendants.	07CIV17-000063 **NOTICE OF ENTRY OF ORDER GRANTING SUMMARY JUDGMENT AS TO CLAIMS AGAINST BONITA S. LONDON**

TO: PLAINTIFFS AND THEIR ATTORNEY OF RECORD, DEREK NELSEN:

PLEASE TAKE NOTICE that an Order Granting Summary Judgment as to Claims Against Bonita S. London, a true and correct copy of which is attached, was entered in the above-entitled matter by the Honorable James A. Powers, Circuit Court Judge, on July 24, 2019.

Dated this 21st day of August, 2019.

MAY & JOHNSON, P.C.

BY _____

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 21st day of August, 2019, a true and correct copy of the foregoing **Notice of Entry of Order Granting Summary Judgment as to Claims Against Bonita S. London** was filed and served via the Odyssey File & Serve system on:

Derek A. Nelsen
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dnelsen@fullerandwilliamson.com
Attorney for Plaintiffs

And served via U.S. Mail, postage prepaid on:

Donald London
Mike Durfee State Prison
1412 Wood Street
Springfield, SD 57062-2238

Richard L. Travis

STATE OF SOUTH DAKOTA) :SS IN CIRCUIT COURT
COUNTY OF BRULE) FIRST JUDICIAL CIRCUIT

JOHN KOENIG and KAREN KOENIG,

Plaintiffs,

v.

DONALD G. LONDON and BONITA S. LONDON,

Defendants

07 CIV. 17-000063

ORDER GRANTING SUMMARY JUDGMENT AS TO CLAIMS AGAINST BONITA S. LONDON

The above-entitled actions came on regularly before the Court, at the Minnehaha County Courthouse in the City of Sioux Falls, South Dakota (by agreement of the parties), on the 17th day of May, 2019; and the Plaintiffs, having been personally present and represented by their attorneys, Derek Nelsen and Andy Fick; and the Defendant Bonita S. London having been personally present and represented by her attorneys, Aaron Fox and Richard Travis; and Pro se Defendant Donald G. London not appearing in person or otherwise participating in the summary judgment proceedings; and the Court having considered the pleadings, legal authorities, and summary judgment record;

IT IS HEREBY ORDERED: that Bonita S. London's motion for summary judgment as to all claims asserted against her is GRANTED for the reasons stated by the Court in its memorandum opinion signed on July 24, 2019, which is incorporated herein

by reference. The Court expresses no opinion as to Plaintiffs' claims against Donald G. London.

Dated at Sioux Falls, South Dakota, this 24th day of July, 2019.

BY THE COURT:

Honorable James Power
Circuit Court Judge

ATTEST: Angela [illegible], Clerk of Courts

By: _____
DEPUTY

STATE OF SOUTH DAKOTA	) :SS	IN CIRCUIT COURT
COUNTY OF BRULE	)	FIRST JUDICIAL CIRCUIT

JOHN KOENIG and KAREN KOENIG, Plaintiff, v. DONALD G. LONDON and BONITA S. LONDON, Defendants.	07 CIV. 17-000063 NOTICE OF ENTRY OF JUDGMENT PURSUANT TO SDCL § 15-6-54(b)

PLEASE TAKE NOTICE that a Judgment Pursuant to SDCL § 15-6-54(b) was signed by the Honorable James A. Power and filed with the Brule County Clerk of Court on September 4, 2019. A true and correct copy of the Judgment is attached to this Notice.

Dated: September 5, 2019.

FULLER, WILLIAMSON, NELSEN & PREHEIM, LLP

/s/ Derek A. Nelsen

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Certificate of Service

I certify that on September 5, 2019, I e-filed and served via Odyssey a true and correct copy of the Notice of Entry of Judgment Pursuant to SDCL § 15-6-54(b), on:

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and served via U.S. mail, postage prepaid, on:

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Pro se Defendant

/s/ Derek A. Nelsen
One of the Attorneys for Plaintiffs

STATE OF SOUTH DAKOTA :SS	IN CIRCUIT COURT
COUNTY OF BRULE)	FIRST JUDICIAL CIRCUIT
JOHN KOENIG and KAREN KOENIG, Plaintiff, v. DONALD G. LONDON and BONITA S. LONDON, Defendants.	07 CIV. 17-000063 JUDGMENT PURSUANT TO SDCL § 15-6-54(b)

1. Plaintiffs John and Karen Koenig filed this action against Defendants Donald London and Bonita London alleging six counts. Counts One and Two were filed against Donald London alone for Negligence and Battery, respectively. Counts Three, Four, and Five were filed solely against Bonita London for Negligence, Negligent Supervision, and Negligent Entrustment. Count Six is a Loss of Consortium claim against both Donald London and Bonita London.

2. Bonita London filed a motion for summary judgment on all claims against her. Plaintiffs opposed her Motion.

3. On July 24, 2019, this Court entered its Memorandum Opinion and Order resolving Bonita London's motion for summary judgment. In that order, this Court dismissed all claims asserted against Bonita London.

4. This Court's Memorandum Opinion and Order thus entirely resolved Counts Three, Four, and Five of Plaintiff's Amended Complaint and partially resolved Count Six of Plaintiffs' Loss of Consortium claim. The Court's Memorandum Opinion and Order did not resolve any of the claims against Donald London.

5. SDCL § 15-6-54(b) provides that, "[w]hen multiple claims for relief or multiple parties are involved in an action, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment."

6. The South Dakota Supreme Court has held that, "[i]n reviewing a judgment entered pursuant to SDCL 15-6-54(b), we first determine whether the action involves multiple claims or multiple parties and thus falls within the purview of Rule 54(b)." *Davis v. Farmland Mut. Ins. Co.*, 2003 S.D. 111, ¶ 11, 669 N.W.2d 713, 718. This action falls within the purview of 54(b) because it involves two Defendants and six claims, three that have been completely resolved by summary judgment and one that has been partially resolved by summary judgment.

7. The South Dakota Supreme Court has further held that once the involvement of multiple claims or parties is established, "[w]e then decide whether the trial court abused its discretion in making the determination that there was no just cause for delay in entering judgment with respect to one or more but fewer than all of the multiple claims." *Id.* at 718. "'This question is not always easy of resolution, for there is no hard and fast test that can be applied in a mechanical manner.'" *Id.* (quoting *Ochs v. Nw. Nat'l Life Ins. Co.*, 254 N.W.2d 163, 168 (S.D. 1977)).

8. The South Dakota Supreme Court has adopted three rules to guide the trial courts in exercising discretion on a 54(b) request: (1) the burden is on the party seeking final certification to convince the trial court that the case is the 'infrequent harsh case' meriting a favorable exercise of discretion; (2) the trial court must balance the competing factors present in the case to determine if it is in the best interest of sound judicial administration and public policy to certify the judgment as final; and (3) the trial court must marshal and articulate the factors upon which it

relied in granting certification so that prompt and effective review can be facilitated. See *Davis*, 669 N.W.2d at 718-19 (quoting *Ochs*, 254 N.W.2d at 169).

9. Competing factors that may be considered when deciding whether to grant 54(b) certification include: (1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the trial court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense and the like. *See Davis*, 669 N.W.2d at 719 (quoting *Ochs*, 254 N.W.2d at 169) (additional citation omitted).

10. In the present action, this Court concludes that 54(b) certification is warranted for the following reasons. The remaining claims in this case are against Donald London, who is currently serving a 25-year prison sentence for his underlying criminal conduct in this case. Donald London is not represented by counsel and is insolvent and "judgment proof." In considering the "economic and solvency considerations" here, it appears that Donald London lacks assets to warrant a trial on Plaintiffs' remaining claims against him if Bonita London is no longer a named-defendant. Thus, the primary issue in this case revolves around Bonita London's liability. Also, a trial on the remaining claims against Donald London could result in the needless duplication of judicial time, resources, and expense should the Supreme Court reach a contrary conclusion on Bonita London's Motion for Summary Judgment. That is, if judgment is not entered pursuant to SDCL § 15-6-54(b), a trial will be necessary to appeal the partial summary judgment. If the appeal results in a reversal, then another trial will have to happen. If

the appeal results in affirming the trial court's partial summary judgment, then the underlying trial will have been effectively meaningless on account of Donald London's 25-year prison sentence and lack of assets. An appeal of the judgment under § 15-6-54(b) will result in either only one trial (if the partial summary judgment is reversed) or no trial (if the partial summary judgment is affirmed) based on Donald London's lack of assets.

11. Pursuant to SDCL § 15-6-54(b), this Court determines that there is no just reason for delay and enters this final judgment upon the claims against Bonita London (Counts Three, Four, Five, and Six of the Plaintiffs' Amended Complaint) resolved in its Memorandum Opinion and Order dated July 24, 2019. Pursuant to SDCL §§ 15-26A-7, 15-26A-10, and 15-26A-22, this Court understands that the parties may seek review of any order, ruling, or determination of this Court addressed in said Order.

12. The remaining claims not resolved in the Memorandum Opinion and Order shall be stayed pending appeal.

Dated: September 4th, 2019.

BY THE COURT:

James A. Power

Honorable James A. Power
Circuit Court Judge

ATTEST: Charlene Miller, Clerk

By: CR Miller
Deputy

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 29131

JOHN KOENIG and KAREN KOENIG,
Plaintiffs/Appellants,

vs.

DONALD G. LONDON and BONITA LONDON
Defendant/Appellee.

Appeal from the First Judicial Circuit
Brule County, South Dakota
The Honorable James Power, Circuit Court Judge

APPELLEE'S BRIEF

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Notice of Appeal Filed: September 13, 2019

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PRELIMINARY STATEMENT

This Brief adopts the trial court's party designations. Appellant John Koenig will be referred to as "Trooper Koenig." Appellee Bonita S. London will be referred to as "Bonnie." Appellee Donald G. London will be referred to as "Donald." References to the Settled Record, Brule County, South Dakota, John Koenig and Karen Koenig v. Donald G. London and Bonita S. London, 07 CIV. 17-000063, shall be denoted by "SR" followed by the applicable page number. References to the summary judgment hearing transcript will be referred to as "HT" with the applicable page number.

JURISDICTIONAL STATEMENT

The Koenigs appeal an Order Granting Summary Judgment as to Claims Against Bonita S. London (SR 419-20, 423-24) and Judgment Pursuant to SDCL § 15-6-54(b). (SR 425-28.) Notice of Entry of Order was filed and served on August 21, 2019 (SR 421-24), and Notice of Entry of Judgment was filed and served on September 5, 2019. (SR 432-37.) The Koenigs filed their Notice of Appeal on September 13, 2019. (SR 438-39.) This Court has jurisdiction pursuant to SDCL § 15-26A-3(1).

STATEMENT OF THE ISSUES PRESENTED

I. Whether the trial court erred when it held the essential element of duty in the context of Trooper Koenig's general negligence claim against Bonnie requires (1) control and/or special relationship, and (2) reasonable foreseeability of harm.

The trial court ruled in accordance with South Dakota Supreme Court precedent when it applied the two-part test in determining whether Bonnie had a duty to control the

conduct of her forty-two year old adult son Donald when he engaged in intentional, unlawful misconduct.

- *Small v. McKennan Hospital*, 437 N.W.2d 194 (S.D. 1989) (*Small II*)
- *Walther v. KPKA Meadowlands Ltd. Partnership*, 1998 S.D. 78, 581 N.W.2d 527
- *E.P. v. Riley*, 1999 S.D. 163, 604 N.W.2d 7
- *Kirlin v. Halverson*, 2008 S.D. 107, 758 N.W.2d 436

II. Whether the trial court erred when it held that Donald's conduct towards law enforcement was not reasonably foreseeable.

The trial court held it is not reasonably foreseeable that a disputed fact construed against Bonnie would cause Donald to use deadly force against law enforcement.

- *Zerfas v. Amco Insurance Company*, 2015 S.D. 99, 873 N.W.2d 65

III. Whether the trial court erred when it dismissed Trooper Koenig's negligent supervision claim against Bonnie.

The trial court held Donald is an emancipated adult, legally responsible for his own care and decisions. Donald never relinquished his care to Bonnie, and Bonnie never gratuitously assumed a duty to supervise Donald.

- *Andrushchenko v. Silchuk*, 2008 S.D. 8, 744 N.W.2d 850

STATEMENT OF THE CASE

On or about October 4, 2017, the Koenigs initiated a civil lawsuit against Donald, Bonnie, Marian Powers, and the Estate of Michael London in Brule County, First Judicial Circuit, South Dakota, arising from an incident when Donald shot John Koenig at a farmhouse owned by Marian Powers (Donald's grandmother) near Kimball, SD, on January 7, 2015. (SR 131-134.) The Koenigs dismissed Marian Powers and the Estate of Michael London on December 20, 2017. (SR 17-18.) The Honorable Bruce Anderson presided over

Donald's criminal matter; thus, recusing himself from Koenig's civil suit. (SR 54.) Eventually, the Honorable James Power was assigned to this case. (SR 239-40.)

Bonnie filed a Motion for Summary Judgment on March 8, 2019. (SR 90-91.) The Motion was heard by the trial court on May 17, 2019. (SR 239-40.) Bonnie's Motion for Summary Judgment was granted, and the trial court's Memorandum Decision (SR 388-418) and Order Granting Summary Judgment as to the Claims Against Bonita S. London (SR 419-20, 423-24) were both entered on July 24, 2019. A Judgment Pursuant to SDCL § 15-6-54(b) was entered on September 4, 2019. (SR 425-28, 434-37.) Notice of Entry of Judgment was filed and served on September 5, 2019. (SR 432-37.) On September 13, 2019, the Koenigs appealed the trial court's summary judgment decision. (SR 438-39.)

STATEMENT OF THE FACTS

This litigation stems from a string of events that eventually led to a shooting between Donald and law enforcement at Donald's grandmother's farmhouse[1] ("farmhouse") near Kimball, SD, on January 7, 2015. Between January 5-7, 2015, Donald had a series of encounters with law enforcement. On January 7, 2015, law enforcement became aware that Donald had threatened two law enforcement officers and had gained access to firearms. (SR 132 at ¶ 14; SR 343 at 337.) John Koenig was a trooper with the South Dakota Highway Patrol and was assigned to be part of a perimeter around and away from the farmhouse while Donald and his parents were inside. (SR 133 at ¶ 15; 342 at 334.) Bonnie left the farmhouse shortly after the perimeter was formed and was detained by law enforcement. (SR 329 at 710.) Once Bonnie was in police custody,

[1] Marian Powers was the owner of the farmhouse property in Brule County, South Dakota, but was hospitalized at all times relevant to this litigation.

Donald and his father, Michael London ("Mike"), went outside and realized law enforcement had surrounded the farmhouse. (SR 175 at 444; SR 176 at 447.) During Donald's encounter with law enforcement, Mike yelled to Donald "shoot those sons of bitches." (SR 176 at 450.) Shortly thereafter, Donald shot at law enforcement. (SR 177 at 453.) One of the shots Donald fired hit Trooper Koenig in the left shoulder. (SR 134 at ¶ 29.) Subsequent to the shooting, Donald was indicted for attempted murder, and pleaded guilty but mentally ill to three counts of aggravated assault against a law enforcement officer. (SR 136 at ¶ 45.) Donald was sentenced to thirty years in the South Dakota State Penitentiary. (SR 216-17.) Mike was also indicted for aiding and abetting Donald in the assault, but Mike died while the charge was pending, resulting in a dismissal of the charge. Bonnie was not charged in the criminal matter.

The undisputed facts establish Bonnie did not have a legal duty for the misconduct of her adult son when he intentionally fired shots at law enforcement on January 7, 2015.

I. Donald London

Donald is forty-seven years old. Donald was forty-two years old when he shot Trooper Koenig in the left shoulder. (SR 134 at ¶ 29.) Donald grew up in Kimball, SD. (SR 234 at ¶ 2.) Donald's parents are Mike and Bonnie London. (SR 234 at ¶ 2; SR 235 at ¶ 12; SR 323 at 685.) Mike and Bonnie divorced, and, in 1987, Bonnie and Donald moved from Kimball to Pierre, SD. (SR 234 at ¶ 2.) Bonnie continues to reside in Pierre. (*Id*.) Donald graduated from Pierre High School in 1991. (*Id*.) Donald has not lived with Bonnie since graduating from high school in 1991. (*Id*.) Eventually Donald married Ruth Mattison and moved to Gillette, WY. (SR 234 at ¶ 3.) In March of 2012, Ruth died. (SR

234 at ¶ 4.) Donald began to struggle with his mental health after the passing of his wife. (SR 234 at ¶ 5.) In the summer of 2014, Donald moved from Wyoming to North Dakota to work in the oil fields. (SR 234 at ¶ 7.) In the fall of 2014, Donald moved from North Dakota to Florida to live with his cousin. (SR 234 at ¶ 8.) Donald occasionally called Bonnie when he lived in Wyoming, North Dakota, and Florida. (SR 234 at ¶ 9.) Donald used prepaid phones, and as a result his number was always changing. (SR 234 at ¶ 9.) Bonnie last visited Donald in Wyoming in 2013. (SR 235 at ¶ 10.) Bonnie did not visit Donald in North Dakota or Florida. (*Id*.) Donald returned to South Dakota in December 2014, to visit his grandmother ("Marian"), who was recuperating from health issues in Sioux Falls, SD. (SR 148 at 49; SR 235 at 11.) During this time, Donald primarily stayed at Marian's farmhouse. (SR 333 at 731-32.) There was some evidence to support that Bonnie had stopped by the farmhouse prior to January 5-7, 2015, to see Donald, but Bonnie was not living or staying at the farmhouse. (SR 333 at 731-32.) Bonnie was either staying at her own residence in Pierre or staying with her brother in Sioux Falls to spend time with Marian. (SR 131 at ¶ 4; SR 235 at ¶ 13.) During this time period, Donald's father Mike lived in a trailer in Kimball. (SR 341 at 326.) Mike's trailer is approximately five miles from the farmhouse. (HT 19 at 21-23.) Mike played a crucial role in the events that took place in January 2015.

II. January 5, 2015

The critical events began on the evening of January 5, 2015, when Donald was drinking alcohol at the Vega Club in Kimball. (SR 196 at 11-12.) Donald was asked to leave the bar for being disorderly. (SR 196 at 12-13.) Donald got in his pickup and drove outside of city limits. (SR 351 at 14.) At approximately 11:00 p.m. Donald called Bonnie

and left a voicemail. (SR 162 at 692.) Donald sounded drunk and hysterical. (*Id*.) Bonnie was in Sioux Falls at the time. (SR 151 at 64.) Bonnie called Donald back and learned Donald's pickup was not working, and that Donald was walking away from the pickup. (SR 162 at 692-93.) Bonnie called Mike to go look for Donald because the weather was dangerously cold. (SR 151 at 61.) Deputy Scott Powers of the Brule County Sheriff's Office was informed of the incident at the Vega Bar and was also out looking for Donald. (SR 196 at 10-12.) Deputy Powers observed Donald's pickup on Highway 45 with its hood up and door open, and Donald was walking down the highway in what appeared to be an intoxicated state. (SR 197 at 14.) Deputy Powers could smell alcoholic beverages on Donald. (SR 198 at 19.) Chief Frank Scott of the Kimball Police Department arrived on scene. Deputy Powers seated Donald in Chief Scott's patrol car. (SR 197 at 15-16.) Thereafter, Mike arrived on scene and spoke with Deputy Powers. (SR 198 at 19.) Deputy Powers asked Mike if he would be willing to take Donald if Donald was released from police custody. (SR 197 at 20.) Mike agreed, and law enforcement observed Mike drive Donald north on Highway 45 and make the appropriate turn toward the farmhouse. (SR 199 at 23.) Later that evening Chief Scott contacted Deputy Powers to inform him that Donald made concerning statements in Chief Scott's patrol car. (SR 200 at 32.)

Later that evening Bonnie spoke with Mike. (SR 162 at 694.) Mike informed Bonnie that law enforcement released Donald and they were at the farmhouse. (SR 162-63 at 694-95.) Law enforcement had no other contact with Donald or Mike that evening.

III. January 6, 2015

At approximately 6:00 a.m. the morning of January 6, 2015, Donald's sister Laura called Bonnie and reported that Donald was hysterical. (SR 163 at 696.) Bonnie was still

in Sioux Falls when she received the call. (SR 201 at 39-40.) At approximately 6:40 a.m. Bonnie called law enforcement dispatch and requested that an ambulance go to the farmhouse. (SR 235 at ¶ 22.) This information was relayed to Deputy Powers, who then called Bonnie. (SR 201 at 39-40.) Bonnie informed Deputy Powers that she was not at the farmhouse but was in Sioux Falls. (SR 201 at 40.) Deputy Powers then called the farmhouse and spoke with Mike. (SR 202 at 44.) At that time, Deputy Powers learned Donald was in the basement, and he had access to knives and a pistol. Further, Mike reported Donald was having a mental episode. (SR 202 at 41.)

Multiple law enforcement officers went to the farmhouse. (SR 202 at 42-43.) When they arrived, Mike allowed all four officers into the farmhouse. (SR 182 at 293-94.) Donald was in the basement when law enforcement entered the farmhouse. (SR 208 at 213-14.) From the top of the stairs, Chamberlain Police Officer Catland Landegent observed Donald in the basement holding a rifle. (*Id*.) Officer Landegent pointed his service weapon at Donald and shouted at Donald to drop the rifle and show his hands. (*Id*. at 214-15.) Donald dropped the rifle, showed both hands and then went out of sight. *(Id*.) When Donald reappeared, he revealed his face and the left side of his body, concealing his right arm. (*Id*. at 216.) Donald then started yelling and cursing at Officer Landegent to stop pointing his (expletive) gun at Donald. (*Id*. at 216.) Brule County Sheriff Darrell Miller instructed Officer Landegent to exit the basement doorway. (*Id.* at 216.) Sheriff Miller then went partway down the stairs and was able to coax Donald upstairs, where officers frisked Donald and determined he no longer had a firearm. (SR 183 at 299-301.) After Donald was checked for weapons, Donald, Mike, and Sheriff Miller had a conversation about Donald's mental health. Donald expressed his difficulty

in coping with his wife's death and his mental health condition. (*Id*. at 301.) During this conversation, Mike gave Donald some medications, and Donald became much more relaxed, almost to the point of falling asleep. (SR 186 at 312-13.)

Sheriff Miller asked Donald if he would agree to seek mental health services, and Donald agreed. (SR 183-84 at 302-04.) Law enforcement called Steve Smith ("Smith"), the chairman of the mental health board in Brule County. (SR 184 at 306.) Law enforcement and Smith elected to permit Mike to take Donald to Sioux Falls for mental health services instead of initiating a formal mental health action. (SR 183-84 at 302-03; SR 185 at 310.)

Law enforcement then swept the main and basement levels of the farmhouse for weapons. (SR 186 at 311-12.) They found multiple deer knives, guns, ammunition canisters, radios, and body armor in the basement. (SR 361-62 at 253-55.) Law enforcement confiscated three firearms and put the remaining items, including firearms, in a safe located in the basement of the farmhouse. (SR 362 at 255-56; SR 186 at 313.) The key to the gun safe was given to Mike.[2, 3] (SR 186 at 313.)

Chief Joe Hutmacher of the Chamberlain Police Department arrived at the farmhouse about the time the other officers were exiting the farmhouse. (SR 223-24 at 171-173.) While outside the farmhouse, Chief Hutmacher informed the other officers that Donald had a felony conviction and was not permitted to be in possession of firearms.

---

[2] Mike use to work with law enforcement as a deputy sheriff under Sheriff Miller. (SR 375 at ¶ 6.)

[3] It is the Koenig's position that because of the ongoing communication between Mike and Bonnie that it is only reasonable to infer that Bonnie was aware of the events that took place at the farmhouse on January 6, and that Bonnie was aware the firearms were put in a safe. (HT 20 at 13-19.)

(SR 224 at 173; SR 204 at 62.) Regardless of this information and Donald's recent mental health episode, law enforcement elected to proceed with their plan and leave some of the firearms at the farmhouse in the locked safe. (SR 186 at 313; SR 190-91 at 327, 330-31; SR 204 at 61-63.)

Mike then drove Donald toward Sioux Falls to see a mental health provider. (SR 188 at 321.) With input from Bonnie, Mike and Donald decided to go to Dakota Counseling in Mitchell, SD. (SR 164 at 703-04.) Donald was assessed at Dakota Counseling, a follow up appointment was scheduled, and Donald was released to Mike. (SR 154 at 75-76.) Mike and Donald returned to the farmhouse the evening of January 6, 2015. (*Id*.) Bonnie told Mike and Donald she would drive to Kimball the next day, January 7, 2015. (SR 315 at 81.) Bonnie did not drive to the farmhouse on January 5th or 6th because of poor weather conditions. (SR 154 at 76.)

IV. January 7, 2015

On January 7, 2015, at approximately 11:11 a.m., Sheriff Miller had a phone conversation with Mike. At that time, things were calm at the farmhouse. (SR 376 at ¶ 16.) At approximately 11:48 a.m. Sheriff Miller received a second call from Mike informing him Donald was upset because of a statement Bonnie allegedly made to Donald over the phone about the ATF coming to the farmhouse to look around. (*Id*. at ¶¶ 17, 18.) At no point in time was the ATF coming to the farmhouse—a fact that Sheriff Miller verified by talking to an ATF agent. (SR 189 at 326.) It was at this time Mike also

informed Sheriff Miller that the family had moved the firearms from the farmhouse to Mike's trailer in Kimball. (*Id.*)[4]

At 12:15 p.m. Mike called Sheriff Miller to report that Donald had left the farmhouse and was headed to Mike's trailer to get firearms. (SR 191 at 332.) Chief Scott also called Sheriff Miller and informed Sheriff Miller he had observed Donald driving through Kimball. (*Id*. at 333.) Bonnie was in Sioux Falls when Donald left the farmhouse to retrieve the firearms from Mike's trailer. (SR 314 at 71.) Sheriff Miller then called Mike and was informed Donald was back at the farmhouse and might have a couple guns. (SR 191 at 333-34.) Mike then informed Sheriff Miller that Donald was distraught and had threatened to shoot Chief Hutmacher and Officer Landegent.[5] (SR 191-92 at 334-35.) Sheriff Miller also spoke with Donald and Donald expressed the same threats. (SR 192 at 337.) After trying to calm Donald for a period of time, Sheriff Miller informed other law enforcement personnel of Donald's threats. (SR 192-93 at 338-40.)

Bonnie arrived at the farmhouse at approximately 2:00 p.m. on January 7, 2015. (SR 164 at 706; SR 226.) Law enforcement was not present when Bonnie arrived at the farmhouse. (SR 164 at 706.) When Bonnie arrived, Donald was on the phone with Sheriff Miller. (*Id.*) At approximately 2:20 p.m., law enforcement established a perimeter around the farmhouse. (SR 171 at 423.) Trooper Koenig was one of the officers that assisted in establishing the perimeter around the farmhouse. (SR 133 at ¶¶ 17, 18). Trooper Koenig took a position behind a tin shed on the southwest part of the property. (*Id.*) From there,

[4] The Koenigs assert that it is reasonable to infer that Bonnie was aware the firearms were moved to Mike's trailer because of the ongoing and regular contact Bonnie had with Mike. (HT 22 at 2-4.)

[5] Donald had past grievances with Chief Hutmacher. (SR 319 at 107.)

Trooper Koenig had a view of the farmhouse's front door and garage. (*Id*. at ¶18.) South Dakota Highway Patrol Trooper Adam Woxland was positioned in a separate shed near Trooper Koenig. (SR 133 at ¶ 19.) So as not to be detected, law enforcement parked their vehicles on a road north of the farm. (SR 171 at 424.) The perimeter of the farmhouse was set up by approximately 2:20 p.m. (SR 226.)

Before 3:00 p.m., Mike was not feeling well and decided to drive to a medical clinic. (SR 236 at ¶ 35.) Mike pulled out of the farmhouse driveway and noticed a line of cars up the road. (SR 165 at 709.) Mike returned to the farmhouse and informed Bonnie and Donald of the cars. (*Id*.) Bonnie went to investigate, drove up the road and was detained by law enforcement at approximately 3:03 p.m. (SR 226.) Bonnie asked to return to the farmhouse to talk to Donald, but law enforcement did not allow her to return or to have any communication with Donald. (SR 166-67 at 713-15.) Bonnie was detained by law enforcement for the next seventeen hours. (SR 167 at 718.). While Bonnie was detained, law enforcement prepared tear gas and other weaponry for possible deployment against Donald. (*Id*.)

At approximately 3:23 p.m., Mike and Donald emerged from the farmhouse. (SR 226.). Donald had a rifle and walked toward the area where Trooper Woxland was positioned. (SR 133 at ¶¶ 20-21.) Trooper Koenig was concerned that Trooper Woxland was not aware Donald was walking toward the shed, so Trooper Koenig exited the shed where he was positioned and pointed his service weapon at Donald, commanding Donald to drop his weapon. (*Id*. at ¶ 21.) Donald immediately dropped his weapon. (*Id*. at ¶ 22.) Trooper Koenig identified himself as a highway patrol officer and commanded Donald to get down on his knees. (SR 175 at 444.) Donald held up his hands, saying "unarmed,

unarmed," and walked back to the farmhouse. (*Id*.) Around this time, Mike, who was angry and mad, called Sheriff Miller and "thanked" Sheriff Miller for keeping him and Donald on the phone while law enforcement surrounded the farmhouse. (SR 294 at ¶ 42; SR 194 at 343.) Mike then told Sheriff Miller "shots [are] going to be fired." (SR 194 at 343.) Subsequently, Donald got into a pickup and drove the short distance to retrieve the gun he had earlier dropped at Koenig's command. He then drove back toward the farmhouse. (SR 176 at 448-50; SR 133 at ¶ 23.) Donald then positioned himself behind the pickup. (*Id*. at ¶ 24) Mike, who was also outside at this time, then yelled "shoot those sons of bitches," eventually pointing his cane in the direction of the shed. (SR 176 at 450.) Shortly thereafter, Donald yelled "I'm going to die today. You're going to die today." (SR 177 at 452.) Donald then began firing rounds toward Trooper Woxland and Trooper Koenig from behind the pickup. (SR 133-34 at ¶¶ 24-26.) Trooper Koenig returned fire. (SR 134 at ¶ 27.) Eventually, Donald shot Trooper Koenig in the left shoulder. (SR 134 at ¶ 29.) There is no evidence to support that Donald had ever shot another person before. Donald surrendered to law enforcement the following day on January 8, 2015, at approximately 3:15 p.m. (SR 296 at ¶ 51.)

STANDARD OF REVIEW

A party is entitled to summary judgment if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is not a genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." SDCL 15-6-56(c); *Hofer v. Redstone Feeders, LLC,* 2015 S.F. 75, ¶ 10, 870 N.W.2d 659, 661-62. "'All reasonable inferences drawn from the facts must be viewed in favor of the non-moving party.'" *Garrido v. Team Auto Sale, Inc.*,

2018 S.D. 41, ¶ 15, 913 N.W.2d 95, 100. (quoting *Hofer v. Redstone Feeders, LLC,* 2015 S.D.75, ¶ 10, 870 N.W.2d 659, 661-62).

"The moving party must substantiate allegations with sufficient probative evidence that would permit a finding in favor on more than mere speculation, conjecture, or fantasy." *Hanson v. Big Stone Therapies, Inc.*, 2018 S.D. 60, ¶ 29, 916 N.W.2d 151. "'Entry of summary judgment is mandated against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Rodriguez v. Miles*, 2011 SD 29, ¶ 6, 799 N.W.2d 722, 724-25 (quoting *Zephier v. Catholic Diocese of Sioux Falls*, 2008 SD 56, ¶ 6, 752 N.W.2d 658, 662). When there are no genuine issues of material fact, summary judgment is looked upon favorably *Owens v. F.E.M. Electric Ass'n, Inc.*, 2005 SD 35, ¶ 6, 694 N.W.2d 274, 277 (additional citations omitted). The existence of a duty is a question of law reviewed de novo. *First Am. Bank & Trust, N.A. v. Farmers State Bank of Canton*, 2008 S.D. 83, ¶ 13, 756 N.W.2d 19, 26.

ARGUMENT

I. Negligence – element of duty

A. Whether Bonnie owed a duty to another for the intentional, unlawful misconduct of a third person.

Duty is an essential element of a negligence claim. *McGuire v. Curry*, 2009 S.D. 40, ¶ 19, 766 N.W.2d 501, 508. Generally, one owes no duty to prevent the misconduct of a third party. *Id*. This general principle includes the parents of emancipated, adult children. See SDCL § 25-5-14. Donald was a forty-two-year-old, emancipated adult when this incident occurred. Thus, Bonnie's responsibility for her adult son Donald is the

same as it would be for any adult third party. There are exceptions that can result in a party having a duty to prevent a third party from intentionally harming another. For the exception to apply, there must be (1) control and/or special relationship, and (2) reasonable foreseeability of harm.

This two-part test originated with *Small v. McKennan Hospital*, 437 N.W.2d 194 (S.D. 1989) (*Small II*), when a woman was abducted from a hospital parking ramp, then raped and murdered by a paroled convict. The woman's husband filed a general negligence claim against McKennan. This Court stated:

> There appears to be two essential elements required in the imposition of a duty to protect against unlawful acts: (1) the existence of a special relationship between the landowner and the injured party, and (2) a finding that the intentional criminal acts are foreseeable.

Id. at 199. This Court held the special relationship was satisfied because the hospital owned the parking ramp, and the woman was its business invitee. *Id*. at 199-200. In regard to foreseeability, *Small II* held the woman's estate produced sufficient evidence that criminal activity was foreseeable to justify submitting the question of foreseeability to a jury. *Id*. at 200-01.

In *Walther v. KPKA Meadowlands Ltd. Partnership*, 1998 S.D. 78, 581 N.W.2d 527, a woman was raped and stabbed in her apartment by a former boyfriend. The woman filed a general negligence claim against the owners and managers of her apartment complex. *Walther* cited *Small II* stating " that a duty to protect a person from the unlawful acts of a third person could arise if the following two elements were met (1) the existence of a special relationship between the landowner and the injured party, and (2) a finding that the intentional criminal acts were foreseeable". *Id*. ¶ 41, 581 N.W.2d at

536. *Walther* held that a landlord-tenant relationship did not satisfy the special relationship element. *Id*. ¶ 42, 581 N.W.2d at 535-36. The Court distinguished this case from *Small II* noting that this attack occurred in the woman's own apartment, "where she alone had the right of possession." *Id*. at ¶ 45, 581 N.W.2d at 536. In regard to foreseeability this Court held there was insufficient evidence that it was reasonably foreseeable to the apartment owners and managers that the woman's ex-boyfriend would climb through her second-story window and attack her. *Id*. ¶ 53, 581 N.W.2d at 537.

In *E.P. v. Riley*, 1999 S.D. 163, 604 N.W.2d 7, a teenage foster child sexually assaulted a younger neighborhood child. The parents of the child victim asserted a general negligence claim against the foster parents and the Department of Social Services ("DSS"). *E.P.* emphasized the importance of both control and foreseeability in regard to whether a duty exists:

> [T]he trial court in the instant case considered foreseeability in addition to control in analyzing whether a duty existed. This two-prong test is appropriate, because foreseeability is as important as control in determining whether a duty to control the conduct of another with dangerous propensities exists. Other courts have created two-part tests for determining whether a duty exists to control the conduct of another with dangerous propensities . . . We agree and now adopt that test. Under our new two-prong test, we must determine whether [the foster parents] had control of the [the assailant] and whether his actions were foreseeable.

Id. ¶¶ 31-32, 604 N.W.2d at 15-16.

In *E.P.* the foster parents and DSS had sufficient control over the teenage foster child to establish a duty to protect others. *Id*. ¶ 28, 604 N.W.2d at 15. A DSS employee had contact and control over the foster child and DSS was responsible for the foster child's care, clothing, education, to name just a few areas of control. *Id*. ¶ 28, 604 N.W.2d at 15. The Court held the relationship between the foster parents and the foster

child was sufficient to satisfy the element of control because the foster parents "had physical, day-to-day custody and control" over the teenage foster child. *Id*. ¶ 32, 604 N.W.2d at 16. The Court agreed with the circuit court that insufficient evidence existed that the assault was foreseeable to the foster parents. *Id*. ¶ 34, 604 N.W.2d at 16.

These holdings were affirmed in *Kirlin v. Halverson*, 2008 S.D. 107, 758 N.W.2d 436, where an employee of PKJ, Inc., ("PKJ") assaulted a man during work hours and on a work site. The victim sued the assailant and the assailant's employer. The South Dakota Supreme Court stated: "In a variety of situations, this Court has stated that in an allegation that a duty exists to prevent the misconduct of a third party, the plaintiff must show the existence of (1) a special relationship between the parties, and (2) that the third party's injurious act was foreseeable." *Id*. ¶ 31, 758 N.W.2d at 448-49.

These decisions establish that a two-part test is required in determining whether a duty exists to protect another against intentional, unlawful acts of a third party. In such situations, a plaintiff must show the existence of (1) a special relationship between the parties, and (2) whether the intentional harm caused by the third person was foreseeable.

The Koenigs assert the special relationship framework does not apply because Bonnie engaged in an alleged affirmative act. The affirmative act alleged is that Bonnie told Donald the ATF was coming to the farmhouse to look around—alleging the statement set Donald off.

The Koenigs first cite *Robertson v. LeMaster*, 301 S.E.2d 563, 567 (W.Va. 1983) in support of this assertion. In *Robertson*, a railroad employee reported to work at 7:00 a.m. and was transported to a derailment site some twenty-five miles away from the home office. From there, the employee worked until 9:00 a.m. the following morning.

Robertson, 301 S.E.2d at 565. During that time the employee made multiple requests to his foreman that he was tired and wanted to go home. *Id*. at 565. After speaking with his boss, the employee was given a ride to his car at the home office. From there, the employee then had a fifty-mile drive home. *Id*. The employee fell asleep on his drive home. Employer was unable to escape liability because the employer actively created the employee's situation of being fifty miles from his home after being required to work physical labor for over twenty-seven hours. *Id*. at 568 ("[Employer] did not provide [employee] sleeping quarters to rest before driving. Neither did [employer] offer to provide [employee] a ride home . . . Rather [employer] provided [employee] transportation to his car at Nolan, approximately twenty-five miles farther from his home than the derailment site.")

Next Koenigs cite *Leppke v. Sergura*, 632 P.2d 1057 (Colo. App. 1981), in support of their claim that the two-part test is not to be applied. In *Leppke*, a patron entered and was refused service at multiple establishments because of his intoxicated state. After the refusals, the patron walked to his car in a parking lot and asked a bar owner to jumpstart his vehicle. The bar owner complied. Thereafter, while driving at a high rate of speed in the wrong lane on a highway, the patron collided with another vehicle.

Lastly, Koenig's cite *Stricklin v. Stefani*, 358 F. Supp. 3d 516 (W.D.N.C. 2018), in which a musical performer encouraged fans to come closer to the stage. *Stricklin*, 358 F. Supp. 3d at 522-23. As a result, plaintiff was trampled by the crowd.

These three opinions come from varying jurisdictions. And these three opinions share a distinct theme differentiating them from the present case—the third party in each

of the respective cases did not engage in intentional, unlawful misconduct to harm another like the assailants did in *Small II*, *Walther*, *E.P.*, *Kirlin* and like Donald did in the present matter.

Furthermore, this Court applied the two-part test in *Kirlin*, in which the defendant engaged in an affirmative act much like that being asserted against Bonnie. In that case, an owner of the company *assigned* an employee to work in an area where a competitor was working and where it was foreseeable a confrontation over material between competitors would ensue. *Kirlin*, *Id.* at ¶ 40, N.W.2d at 451. Regardless of the affirmative act, this Court provided that there must be (1) control and/or a relationship, and (2) the injurious conduct of the third party must be foreseeable. Therefore, whether the conduct is a failure to act as demonstrated in *Small II* or an affirmative act as demonstrated in *Kirlin*, this Court has applied the two-part test in determining whether a party has a duty to another for the intentional, unlawful misconduct of a third party. Furthermore, there is sound policy behind applying the two-part test when a third-party assailant engages in intentional, unlawful misconduct. See *McGuire v. Curry*, 2009 S.D. 40, ¶ 19, 766 N.W.2d 501, 508) (Generally, one owes no duty to prevent the misconduct of a third party.); See Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 19, comment f. (As a general matter, the possibility of criminal misconduct is so slight that an actor is not negligent for failing to take that possibility into account.) The trial court correctly applied the two-part test in determining whether Bonnie had a duty to control the conduct of her adult son when he engaged in intentional, unlawful misconduct that harmed another. Thus, control is the first element of duty to discuss.

i. Bonnie did not have sufficient control over Donald to support the relationship prong of the duty analysis.

Read together, *Small II*, *Walther*, *E.P.*, and *Kirlin* establish that the special relationship needed to create a duty exists when a defendant has control over the wrongdoer or place where the wrongdoing occurred. *E.P.*, 1999 S.D. 163, ¶ 31, 604 N.W.2d 7, 16. ("Under our new two-prong test, we must determine whether [the foster parents] had control of the assailant.") In *E.P.* the Court held it was undisputed that the foster parent had physical, day-to-day custody and control over the foster child. In that decision the Court referenced *Small v. McKennan*, 403 N.W.2d 410 (S.D. 1987) (*Small I*), in which the husband of an assaulted and murdered woman sued a parolee's parole officer for the harm caused to his wife. *E.P.* ¶ 27, 604 N.W.2d at 14. The parolee was on maximum supervision status and received house visits and employment visits. Nonetheless, *Small I* held the parolee was free to conduct his own day-to-day affairs, and the parole officer was not responsible for supervising the parolee on a daily basis. *Id.* (citing *Small v. McKennan*, 403 N.W.2d 410 (S.D. 1987) (*Small I*) Thus, no duty was created.

Similarly, Donald controlled his own day-to-day affairs. Donald was forty-two years old when he decided to return to South Dakota in December of 2014. On January 5, 2015, Donald made the decision to drive to Vega Bar and get drunk. (SR 196 at 11-12.) After consuming too much alcohol Donald made the decision to get in his pickup and drive until his pickup stalled on a highway in the blistering cold. (SR 351 at 14; SR 151 at 61.) The following day, Donald made the decision to have a tense interaction with law enforcement while in the basement of the farmhouse. (SR 208 at 213-16.) After receiving an assessment in Mitchell, Donald permitted his father to drive him back to the

farmhouse. (SR 154 at 75-76.) On January 7, 2015, Donald made the decision to get in his pickup and drive several miles to Mike's trailer to retrieve guns from the safe. (SR 191 at 332.) Thereafter, Donald made the decision to threaten to shoot Chief Hutmacher and Officer Landegent. (SR 191-92 at 334-35.) And most significantly, Donald made the decision to come out of the farmhouse and intentionally fire shots in the direction of Trooper Koenig and other law enforcement personnel. Donald's conduct in the days leading up to the shooting and the shooting itself demonstrate Donald maintained his own day-to-day decisions and affairs.

Donald had not lived with Bonnie for years. Donald was staying at the farmhouse, while Bonnie stayed in Pierre or Sioux Falls during the critical times. It is undisputed that Bonnie had telephone conversations with Donald between January 5-7, 2015. However, during the events in question, Bonnie was only physically present with Donald for approximately one hour before being taken into police custody on January 7, 2015, and she was not permitted to have any further contact with Donald. Bonnie's limited contact with Donald in the days leading up to Donald's shooting of Trooper Koenig demonstrates that Bonnie did not have the ability or authority to control Donald.

Bonnie's ability or authority to control Donald must also take into account Mike's much greater access to Donald in the days leading up to the shooting and the shooting itself. Donald was released to Mike after being in police custody for a drinking and driving and mental health incident on January 5, 2015. (SR 199 at 23.) On January 6, 2015, law enforcement left Donald with Mike after another mental health episode. Thereafter, Mike took Donald to a mental health assessment in Mitchell. (SR 188 at 321.) After the assessment, Donald was released to Mike. (SR 154 at 76.) Mike then drove

Donald back to the farmhouse. (*Id*.) On January 7, Mike was with Donald all day, except when Donald went to Mike's trailer to acquire firearms. (SR 191 at 332.) Moreover, Mike was the only person with Donald when he intentionally shot in the direction of Trooper Koenig. (SR 176 at 450.) These undisputed facts further support that Bonnie did not have the ability or authority to control her adult son from committing the intentional, unlawful act of shooting Trooper Koenig; thus, Koenig's negligence claim fails as a matter of law.

ii. The record does not support that the Koenigs can establish the element of foreseeability.

The undisputed facts do not support the necessary element of control or foreseeability within the context of duty. Foreseeability in defining the boundaries of duty is always a question of law. *Johnson v. Hayman & Associates, Inc*., 2015 S.D. 63, ¶ 13, 867 N.W.2d 698, 702. The totality of circumstances test is used to determine foreseeability. *Small v. McKennan*, 403 N.W.2d 410, 413 (S.D. 1987) (*Small I*) The critical time period is the time of the alleged negligent act or omission. *Zerfas v. Amco Ins. Co.*, 2015 S.D. 99, ¶ 14, 873 N.W.2d at 70. The Court should examine the facts as they appeared at that time, and not by a judgment after the actual consequences which were not then to be expected by a prudent and competent person. *Id*. The exact harm need not be foreseeable. Rather the harm only needs to be within the class of reasonably foreseeable hazard, which the duty exists to prevent. *Kirlin*, 2008 S.D. 107, ¶ 38, 758 N.W.2d at 451. Whether prior similar acts occurred can be significant, but is not the sole factor considered. *Walther*, 1998 S.D. 78, ¶ 50, 581 N.W.2d at 537. "No one is required to guard against or take measures to avert that which a reasonable person under the

circumstances would not anticipate as likely to happen." *Johnson*, 2015 S.D. 63, 867 N.W.2d at 702.

Bonnie knew Donald struggled with his mental health. (SR 323 at 686.) Bonnie was aware that Donald's mental illness involved delusions related to his wife and law enforcement. Bonnie also acknowledged that if Donald knew the ATF was coming, he would likely become upset. (SR 75 ¶ 12.) Bonnie was aware of Donald's encounter with law enforcement on January 5. (SR 162 at 692.) The Koenigs contend that it is only rational to infer that Bonnie was aware of the events that took place at the farmhouse on January 6. (HT 20; 13-19; HT 22 at 2-4; HT 22 at 13-20.) Thus, according to Koenigs, on January 6, Bonnie was aware that: (1) Donald had a mental health episode; (2) during the episode Donald had access to firearms; (3) law enforcement entered the farmhouse; (3) during law enforcement's confrontation with Donald, one officer pointed his service weapon at Donald; (4) the confrontation on January 6 ended with a peaceful conversation taking place between Donald, Mike, and Sheriff Miller; (5) thereafter, law enforcement confiscated some of the firearms at the farmhouse; (6) law enforcement placed the remaining firearms in a safe and gave the key to Mike; and (7) the firearms were transported to Mike's trailer prior to the January 7 events.

Given these undisputed facts, the question is whether Donald's act of intentionally shooting Trooper Koenig is within the class of what is a reasonably foreseeable hazard that a reasonable person in Bonnie's position would anticipate as likely to follow from her knowledge. *Zerfas*, 2015 S.D. 99, ¶ 16, 873 N.W.2d at 71. Foreseeability is examined at the time of the alleged act. *Zerfas*, 2015 S.D. 99 ¶ 14, 873 N.W.2d at 70. To Bonnie's knowledge, at the time of the alleged ATF statement, Donald was at the farmhouse with

Mike, and without access to firearms. Furthermore, Bonnie's knowledge about the prior day was that Donald was struggling with his mental health, he had access to firearms, law enforcement pointed a weapon at Donald, which all took place within the farmhouse, and even then, Donald did not use deadly force toward law enforcement. (*See.* SR 208 at 213-16.) It is also significant that Donald's past mental health crises had never resulted in Donald using deadly force against law enforcement or any other person. While it is likely that the remark would be upsetting to Donald, the undisputed facts do not support that it was foreseeable that Donald would engage in deadly force against law enforcement.

Furthermore, it is not reasonable for a person in Bonnie's situation to assume that Mike, a former law enforcement officer himself, would encourage Donald to engage in a shootout with law enforcement as was apparent when Mike informed Sheriff Miller that "shots [are] going to be fired," or that Mike would go as far as instructing his son Donald to "shoot those sons of bitches" while Donald was standing in the farmhouse yard with a firearm. (SR 294 at ¶ 42; SR 194 at 343.) It is only reasonable that a person in Bonnie's position would assume Donald's father Mike would attempt to discourage Donald from engaging in dangerous and violent conduct toward law enforcement, and that Mike and law enforcement would have attempted to calm Donald as they did the previous two days when Donald was struggling with his mental health.

The trial court compared the present matter to *Zerfas*. There the issue was whether there is a possibility of injury from leaving a deer carcass on a highway was sufficiently foreseeable to create a duty to remove the carcass. *Zerfas*, 2015 S.D. 99, ¶ 15, 873 N.W.2d 65, 70-71. *Zerfas* acknowledged that one can foresee a possibility of injury

associated with leaving a deer carcass in the middle of the road. *Id*. However, it also held that an accident in those circumstances was not sufficiently likely to justify a duty to remove the carcass in part because other drivers have a duty to try to avoid accident. *Id*. Similarly, given Donald's mental health history, it is possible to foresee that one of Donald's mental health episodes may not resolve peacefully. But merely making a statement about the ATF coming to look around (when Donald had no access to weapons and police were not present) is not likely to result in Donald engaging in deadly and unlawful force against law enforcement. Thus, even if foreseeability alone could create a duty, the record does not support a level of foreseeability to impose a duty upon Bonnie.

II. Negligent Supervision

A prerequisite to proceeding on a negligent supervision cause of action is establishing the existence of a duty. *Iverson v. NPC Int'l, Inc.*, 2011 S.D. 40, ¶ 23, 801 N.W.2d 275, 283. No authority has been presented to support that the relationship between a parent and an emancipated adult child support a negligent supervision claim. Typically, such claims involve an employer-employee relationship and an employer's failure to exercise reasonable care in supervising its employees so as to prevent harm to others. *McGuire v. Curry*, 2009 S.D. 40, ¶ 18, 766 N.W.2d at 508. South Dakota does recognize a common law doctrine of gratuitous duty. *State Auto Ins. Co. v. B.N.C.*, 2005 S.D. 89, 702 N.W.2d 379. The common law gratuitous duty rule is defined as:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking if,
> (a) his failure to exercise such care increases the risk of such harm, or
> (b) the harm is suffered because of the other's reliance upon the undertaking.

(quoting Restatement (Second) of Torts 323 (1965).

The Koenigs argue Bonnie voluntary assumed a duty to supervise Donald when she participated in the decision for Donald to seek medical services in Mitchell and in that she allowed Donald to return to the farmhouse after the assessment instead of initiating an involuntary committal.

The common law doctrine of gratuitous duty was discussed in *Andrushchenko v. Silchuk,* 2008 S.D. 8, 744 N.W.2d 850. In *Andrushchenko,* a couple and their young son were invited to friend's home for lunch. During the visit the young boy was burned by hot water from a tub faucet. The boy's parents sued the adult friend on the premise that the friend had gratuitously assumed a duty to protect the boy while in her home. *Id*. ¶ 4, 744 N.W.2d 850, 838, 850. The Supreme Court rejected the theory, holding that at no time had the parents relinquished their responsibility. The general principle is that the individual with the duty must relinquish the duty of care to another and the other must express or imply the undertaking of the gratuitous duty. *Id.* ¶¶ 24, 25, 744 N.W.2d 850, 859. (Also see *Millea v. Erickson*, 2014 S.D. 34, ¶ 20, 848 N.W.2d 272, 278.)

The trial court interpreted the record most favorable to Koenigs and assumed that Bonnie had input into Mike and Donald's decision on January 6 to see a mental health provider in Mitchell instead of traveling to Avera in Sioux Falls. The trial court also assumed that Bonnie attempted to provide Donald with advice during the events that occurred through January 5-7 until she was apprehended by law enforcement and no longer permitted to have contact with Donald.

As discussed in Section I, Donald maintained his own day-to-day decisions and affairs throughout the events in question. While it is undisputed Bonnie provided Donald

advice during this time, providing advice is distinct from undertaking a duty to supervise. And an adult listening to another's advice about mental health care is distinct from relinquishing control over one's own mental health care and other important decisions.

It should also be noted that law enforcement asked Donald if he would agree with a mental health hold initiated by law enforcement. (SR 183 at 302.) Donald agreed, but law enforcement elected to permit Mike to drive Donald to seek mental health services instead. (SR 185 at 310.) Bonnie was not present during this decision, and there is no evidence to support she assisted in that decision-making process. Similarly, Bonnie was not present during Donald's mental health assessment in Mitchell, and there is no evidence to support that she assisted in the decision-making process of the mental health providers when they released Donald to Mike on January 6. Moreover, it is undisputed that: (1) law enforcement released Donald to Mike's care on January 5; (2) law enforcement left Donald with Mike and gave Mike the key to the gun safe on January 6; (3) Mike was the parent who physically took Donald to Mitchell for a health care assessment; (4) Mike was the parent who physically took Donald back to the farmhouse after the assessment; and (5) it was Mike who was physically present with Donald during the shootout, encouraging Donald and his conduct. All of these undisputed facts took place while Bonnie was in Sioux Falls or in police custody where she was prohibited from communication with Donald. These undisputed facts do not support that Donald relinquished his right to make his own decisions, whether it concerned his mental health or other important decisions, to Bonnie, nor do these undisputed facts support that Bonnie gratuitously assumed a duty to supervise Donald. Thus, Bonnie is entitled to summary judgment on the negligent supervision claim.

CONCLUSION

There are two essential elements required in the imposition of a duty to guard against the unlawful acts of a third person: (1) whether the defendant actually had control over the third person, and (2) whether the intentional harm caused by the third person was foreseeable. Here, Bonnie did not have a special relationship or control over Donald. Furthermore, it is not reasonable for a person in Bonnie's position to assume that Donald would engage in deadly force against law enforcement. For the foregoing reasons summary judgment in favor of Bonnie should be upheld.

Dated this _10th__ day of February, 2020.

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In accordance with SDCL § 15-26A-66(b)(4), I certify that this Brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Microsoft Office Word and contains 7,784 words from the Statement of the Case through the Conclusion. I have relied on the work court of a word-processing program to prepare this Certificate.

/s/ Aaron A. Fox
Aaron A. Fox

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 29131

JOHN KOENIG and KAREN KOENIG,

Plaintiffs/Appellants,

v.

DONALD G. LONDON and BONITA S. LONDON,

Defendants/Appellees.

Appeal from the First Judicial Circuit
Brule County, South Dakota
The Honorable James Power, Circuit Court Judge

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ARGUMENT

I. Because Bonnie engaged in affirmative conduct that caused Trooper Koenig's injuries, she had a duty to act reasonably.

A person's negligent acts are analyzed differently than a person's negligent omissions. As the Restatement (Second) of Torts, Div. 2, Ch. 12, Topic 4, Scope Note explains: "Normally, where there is an affirmative act which affects the interests of another, there is a duty not to be negligent with respect to the doing of the act." In contrast, "where the negligence of the actor consists in a failure to act for the protection or assistance of another, there is normally no liability unless some relation between the actor and the other, or some antecedent action on the part of the actor, has created a duty to act for the other's protection or assistance."[1] *Id.* Because Trooper Koenig's negligence claim alleges that Bonnie's actions caused his injuries, the existence and scope of Bonnie's duty depends on the foreseeability of Trooper Koenig's injuries, not whether Bonnie had a special relationship with Trooper Koenig or a duty to control Donald.[2]

---

[1] The Restatement (Second) goes on to explain that the "essential difference between the two is that in the first the other is positively injured by the actor's affirmative action, while in the latter he merely fails to receive the benefit which he would receive if the actor had taken the action necessary for his protection or assistance." *Id.* This difference, "together with the historical development of the law along lines of distinction between 'misfeasance' and 'non-feasance,' has led to much more restricted duties, and hence more limited liabilities, with respect to a mere failure to act." *Id.*

[2] The Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 19 cmt. e, also highlights the difference between affirmative conduct and omissions, stating:

> **cmt e. Defendant conduct versus defendant affirmative duties.** This Section addresses conduct by defendants that increases the likelihood that the plaintiff will be injured on account of the misconduct of a third party.

Bonnie's legal argument, in contrast, does not analyze whether a defendant's conduct was an affirmative act or an omission. Instead, Bonnie argues that whenever "a third-party assailant engages in intentional, unlawful misconduct," there must be a duty to prevent the third-party's misconduct before liability attaches, and such a duty arises only if a special relationship exists between the parties and the intentional misconduct was foreseeable. (Bonnie's Brief at 18.)[3] This argument is inconsistent with South Dakota law, the Restatements (Second) and (Third) of Torts, and the appropriate interpretation of the underlying facts when applying the appropriate standard for summary judgment purposes.

> For example, the defendant's conduct may make available to the third party the instrument eventually used by the third party in inflicting harm; or that conduct may bring the plaintiff to a location where the plaintiff is exposed to third-party misconduct; or that conduct may bring the third party to a location that enables the third party to inflict harm on the plaintiff; or the defendant's business operations may create a physical environment where instances of misconduct are likely to take place; or the defendant's conduct may inadvertently give the third party a motive to act improperly.
>
> These cases, in which the defendant's conduct creates or increases the possibility of harm caused by third-party misconduct, can be contrasted to cases in which the defendant merely takes no action to protect the plaintiff against the possibility of third-party misconduct.

[3] Bonnie states, "[T]here is sound policy behind applying the two-part test in determining whether a party has a duty to another for the intentional, unlawful misconduct of a third party." (Bonnie's Brief at 18 (citing *McGuire v. Curry*, 2009 S.D. 40, ¶ 19, 766 N.W.2d 501, 508; Restatement (Third) of Torts: Liability for Physical and Emotional Harm, § 19)).

A. South Dakota law.

This Court has previously distinguished a duty to prevent a third-party's misconduct from a duty to act reasonably when engaging in affirmative conduct. In *Kirlin v. Halverson*, 2008 S.D. 107, ¶¶ 6-7, 758 N.W.2d 436, 442-43, an employer sent an employee to a location where a known competitor was working, and the employee attacked the competitor. The competitor then sued the employer on two separate theories of negligence. *Id.* at ¶ 43, 758 N.W.2d at 451-52. First, the competitor alleged that the employer had a duty to control its employee given the special employer-employee relationship. *Id.* Second, the competitor alleged that the employer had a general duty to conduct *itself* reasonably. *Id.* Only the first duty implicated the Restatement (Second) of Torts § 315 and the need to control the actions of a third-party. *See Kirlin* at ¶¶ 32-33, 43, 758 N.W.2d at 449, 451-52. The general duty did not. *See id.* at ¶ 43, 758 N.W.2d at 451-52.[4] This is because when a person or entity engages in affirmative, negligent conduct, they can be held liable for that conduct.

This Court made that point explicit in *Thompson v. Summers*, 1997 S.D. 103, ¶ 2, 567 N.W.2d 387, 389, which involved a bystander who was injured while trying to rescue a hot air balloonist. This Court rejected the defendant's argument that "there must be a 'relationship' between the plaintiff and the defendant before a duty can be established" for a person's affirmative acts. *Id.* at ¶ 13, 567 N.W.2d at 392. The Court explained that, "it is *foreseeability* of injury to another, not a *relationship* with another, which is a

[4] Although the analysis in *Kirlin* involved an underlying employment relationship, the overarching legal principle applies here. A duty to prevent the misconduct of a third-party is different than a duty arising from a person's affirmative, negligent acts.

prerequisite to establishing a duty necessary to sustain a negligence cause of action." *Id.* This Court ultimately concluded that because the defendant's negligent acts caused the plaintiff's injuries, the plaintiff had stated a claim for negligence. *Id.* at ¶ 19, 567 N.W.2d at 394. The plaintiff did not have to establish that he had a special relationship with the defendant. *Id.*

This distinction is important because if this Court adopts Bonnie's proposed legal theory, no liability would arise any time a person's actions harmed another through a third-party. For example, suppose A knows that O has a dog that will attack people on command. A gives the attack command, and the dog bites B. Under Bonnie's proposed legal theory, A has no liability to B because A did not own the dog. Also, suppose that G and B are dating. G knows that B has had previous confrontations with men who have flirted with her. G falsely tells B that A flirted with her – knowing that B will become angry. B then has a physical altercation with A, resulting in injuries to A. Under Bonnie's proposed legal theory, G has no liability to A. As these illustrations show, Bonnie's legal theory is inconsistent with the principles of negligence law – and common sense.

B. Restatements of Torts.

The Restatements (Second) and (Third) of Torts both acknowledge that a defendant may be negligent because her actions cause another's misconduct. Section 19 of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm states that, "The conduct of a defendant can lack reasonable care insofar as it foreseeably combines with or permits the improper conduct of the plaintiff or a third party." The

Restatement (Third)'s commentary goes on to explain that the scope of a defendant's liability under this section often converges with the foreseeability of the harm, stating:

> While the foreseeability of this misconduct raises an issue of the defendant's negligence, it also raises an issue of whether the plaintiff's harm is within the defendant's scope of liability. See Chapter 6. However, the issues of defendant negligence and scope of liability often tend to converge. If the third party's misconduct is among the risks making the defendant's conduct negligent, then ordinarily plaintiff's harm will be within the defendant's scope of liability.

Id. cmt. c. Thus, if a third-party's misconduct is a foreseeable risk to a defendant, then a plaintiff's injury is generally within the scope of liability.[5] *Id.*

In her brief, Bonnie noted that, "[a]s a general matter, the possibility of criminal misconduct is so slight that an actor is not negligent for failing to take that possibility into account." (Bonnie's Brief at 18 (citing Restatement (Third) of Torts § 19).) However – and not cited by Bonnie – that section goes on to state:

> Nevertheless, there is an unfortunate amount of crime in society. Accordingly, in certain situations criminal misconduct is sufficiently foreseeable as to require a full negligence analysis of the actor's conduct. *Moreover, the actor may have sufficient knowledge of the immediate circumstances or the general character of the third party to foresee that party's misconduct.* For example, if the owner of a gun who leaves it on a table at home knows that a houseguest has a long record of violent crimes, that knowledge supports the claim that the owner is negligent in giving the guest access to the gun.

[5] The Restatement (Third) goes on to suggest various factors to determine a defendant's liability including: (1) the foreseeability of the third-party's misconduct; (2) the potential severity of the injury; and (3) the burden of available precautions. *Id.* cmt. d. Even under these factors, Bonnie acted negligently given that she knew about Donald's dangerous behavior toward law enforcement the day before the shooting (RA 327 at 699-700), knew there were guns in the house (RA 337 at 753), and could have easily prevented Donald from becoming upset by not falsely telling Donald that the ATF was coming to the farm house. (RA 75 at ¶ 12.)

Id. cmt. f (emphasis added). According to Bonnie's own testimony, she knew about Donald's delusional beliefs regarding law enforcement (RA 326 at 698; RA 333 at 731), knew that Donald was off of his medication (RA 328 at 704-05), knew that Donald was spiraling out of control (RA 328 at 705-06), knew that Donald would hit an "insanity point" if he saw police (RA 326 at 698), and knew that if Donald thought that the police would take his guns away, he would become dangerous. (*See* RA 318 at 101-02; RA 377 at ¶ 18.) Given these facts, Bonnie had sufficient knowledge to foresee Donald's misconduct.[6]

The Restatement (Second) of Torts outlines similar legal principles. Under § 302B, "[a]n act or an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal." The commentary goes on to explain:

> There are, however, situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; or *where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account.* The following are examples of such situations. The list is not an exclusive one, and there may be other situations in which the actor is required to take precautions.

[6] The Restatement (Third) of Torts: Liability for Physical and Emotional Harm § 19, cmt. h, suggests applying a public policy analysis to determine liability for a third-party's actions. This Court has not adopted this approach, but it is noted here for the sake of completeness.

Id. cmt. e (emphasis added). Some of the Restatement (Second)'s examples included situations where "the actor has brought into contact or association with the other a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct" and where "the actor acts with knowledge of peculiar conditions which create a high degree of risk of intentional misconduct." *Id.* cmt. e, subparagraphs (D) and (H).

The Restatement (Second) further explains that, "[i]t is not possible to state definite rules as to when the actor is required to take precautions against intentional or criminal misconduct." *Id.* § 302B, cmt. f. Thus, an analysis must consist of "balancing the magnitude of the risk against the utility of the actor's conduct." *Id.* Factors to consider include:

> the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm, the temptation or opportunity which the situation may afford him for such misconduct, the gravity of the harm which may result, and the possibility that some other person will assume the responsibility for preventing the conduct or the harm, together with the burden of the precautions which the actor would be required to take. Where the risk is relatively slight in comparison with the utility of the actor's conduct, he may be under no obligation to protect the other against it.

Id. Here, Bonnie knew the significant risk her actions could pose, and her conduct had no utility because her statement about the ATF to Donald was knowingly false.[7] Under these circumstances, Bonnie acted negligently.

[7] Bonnie, like Donald, has issues with the police – specifically Officer Joe Hutmacher – because she thinks that they have mistreated her family. (RA 319 at 107-08.)

C. Underlying facts.

Bonnie characterizes Donald's behavior as "intentional, unlawful misconduct to harm another." (Bonnie's Brief at 18.) But the underlying facts related to the intentionality of Donald's conduct must be resolved by a jury. The undisputed facts show that Donald shot at a shed that Trooper Koenig was behind. (RA 347 at 459.) Donald did not shoot directly at Trooper Koenig's body. Whether Donald's conduct was negligent, reckless, or intentional is a question of fact for the jury. Because of this underlying fact question, the Koenigs brought claims against Donald for both negligence and battery. Donald's underlying criminal conviction also does not resolve this fact question because under SDCL § 22-18-1.05, liability stems from negligent, reckless, or intentional conduct. Accordingly, the degree of intentionality attributable to Donald's actions remains an open question, and the factual predicate to Bonnie's argument remains in dispute. And such a dispute cannot be resolved in favor of Bonnie because she moved for summary judgment.

II. Bonnie foresaw (or should have foreseen) Donald's violent behavior.

When Bonnie told Donald that the ATF was coming for him, she knew about Donald's paranoid schizophrenia and PTSD (RA 323 at 686; RA 324 at 688), knew Donald had delusions that caused anger, blackouts, and an inability to distinguish reality from fantasy (RA 324 at 687; RA 330 at 712-13), knew Donald had previously been in fights during his delusions (RA 323-24 at 686-87; RA 331 at 723), knew that Donald believed law enforcement was holding his wife captive (RA 326 at 698; RA 333 at 731), knew Donald would hit an "insanity point" if he saw police (RA 326 at 698), knew

Donald had a few days before been in an armed confrontation with police and removed from a bar for disorderly conduct (RA 325 at 692-94; RA 327 at 699-700), and knew Donald was off of his medication and spiraling out of control (RA 328 at 704-06).

Despite knowing all of this information, Bonnie affirmatively and falsely told Donald that the ATF was coming for him – even though the day before she warned Deputy Scott Powers that he should not go to the farm house because of Donald's delusions. (RA 377 at ¶ 18.) Specifically, Bonnie told Deputy Powers, "[Y]ou don't understand, if the police show up at, at my mother's house and Donny sees them . . . he will go delusional and, and hit another insanity point because he doesn't understand why the police are there and he'll think they're after him." (RA 326 at 698.) Bonnie knew Donald's response to law enforcement would be volatile – explaining that Deputy Powers had to "approach [Donald] very carefully and not threatening." (*Id.*) Bonnie stressed that Donald needed his mediation so that he would calm down. (*Id.*)

When looking at the timeline of these events, the foreseeability and inevitability of Donald's conduct, for someone with intimate knowledge of Donald, like Bonnie, becomes apparent.[8] The day before the shooting, Bonnie stated that Donald would go insane if he saw law enforcement. (RA 326 at 698.) Law enforcement went to Donald's residence, and an armed confrontation resulted. Luckily, no one got shot that day. The reasonable inference to take away from this encounter is that Donald was mentally unstable and willing to put himself, and law enforcement, at risk of a shootout. It is not

[8] Again, when construing the facts in the Koenigs' favor for purposes of summary judgment, the foreseeability and inevitability of Donald's conduct becomes overwhelming.

reasonable to assume that future armed altercations would end peacefully – especially when Bonnie knew that Donald was off of his medication on the day of the shooting. (RA 328 at 704-06.) In general, following a near-miss-disaster, the reasonable inference is not that future encounters will also end safely. Instead, the reasonable inference is that additional precautions must be taken.[9] When Bonnie told Donald that the ATF was coming, she knew or should have known that Donald would become angry – once again requiring law enforcement to intervene or have contact with Donald – leading to a volatile situation, which is exactly what happened. Only the second time, predictably, the altercation did not end safely.

Bonnie argues that this case is analogous to *Zerfas v. AMCO Ins. Co.*, 2015 S.D. 99, ¶¶ 13, 15, 873 N.W.2d 65, 70-71, which held that it was not *per se* foreseeable that a deer carcass left on a roadway would cause an accident. This Court noted, however, that "[b]eyond our assumption that the unidentified driver hit the deer and left the carcass in the driving lane of the interstate, we have *no additional facts* bearing on the unidentified driver's acts or omissions at the time the deer carcass was left on the interstate." *Id.* at ¶ 15, 873 N.W.2d at 70 (emphasis added). Here, the additional facts are known. Bonnie knew about Donald's mental health problems and hostility toward law enforcement. Bonnie knew that Donald was off his medication the day of the shooting. And Bonnie knew that Donald had been in an armed confrontation with police the day before. This would be like if the unidentified driver in *Zerfas* had actually seen cars swerving to avoid

[9] *See* Michael Elliott, *The Shoe Bomber's World*, Time (Feb. 16, 2002), http://content.time.com/time/world/article/0,8599,203478-1,00.html.

the carcass and then **decided to move the carcass farther into the lanes of travel**. Simply put, the facts of *Zerfas* are not analogous to this case because Bonnie's insight into Donald's situation is what made the events foreseeable to her.

In terms of the foreseeability analysis, the better analogy here is *Kirlin*, 2008 S.D. 107, ¶¶ 4-7, 758 N.W.2d at 442-43, which involved an initial and subsequent encounter between a business's employees and a known competitor of the business. During the first encounter, the business's employee berated the competitor and "batted [the competitor's] hand away" during an attempted handshake. *Id.* at ¶ 4, 758 N.W.2d at 442. The following day, the business sent a second employee to the same work site as the competitor, resulting in the employee "beating and kicking [the competitor] into unconsciousness." *Id.* at ¶ 7, 758 N.W.2d at 443. This Court held, under its general duty analysis, that the violent beating was foreseeable given the aggressive encounter the previous day. *Id.* at ¶¶ 55, 57, 758 N.W.2d at 454. The same logic applies here. Bonnie's knowledge about the armed standoff (in addition to the other facts discussed herein) made Donald's subsequent violence toward law enforcement and, specifically, Trooper Koenig, foreseeable to Bonnie.

Finally, to the extent that Bonnie argues that Mike London's conduct was a superseding or intervening cause to Trooper Koenig's injuries, such an argument was never made or asserted by Bonnie. She made no such claims in her Answer. (RA 74-77.) She never filed a third-party complaint against Mike London's estate. And to the extent that Bonnie argues that she could not have foreseen Mike London's statements encouraging Donald to shoot law enforcement, the foreseeability analysis related to duty

examines only "the facts as they appeared at the time" of the negligent act. *Zerfas*, 2015 S.D. 99, ¶ 14, 873 N.W.2d at 70 (citation omitted). Mike London made his statements *after* Bonnie made her false statements about the ATF. Even if Mike London acted negligently, Bonnie would simply be a joint tortfeasor. As the Honorable Bruce Anderson indicated in his order in Donald's underlying criminal case, Bonnie, Donald, and Mike London were all responsible for what happened the day of the shooting. (RA 306-07.) "It was [Donald] and his family who caused Day 3's events. Had it not been for Bonnie's claim that ATF was coming to the farm, [Donald] may not have gotten upset, and threatened to kill Landegent and Hutmacher." (*See id*.) This is a reasonable conclusion that the jury in this case should be allowed to reach after hearing all of the facts.

III. Bonnie undertook a gratuitous duty to supervise Donald.

Bonnie argues that her conduct amounted to no more than advice to her son. This understates the central role Bonnie played in the events that unfolded. Throughout December 2014 and January 2015, Bonnie was in constant contact with Donald. (RA 326 at 696; RA 333 at 734; RA 335 at 740-41.) During the events of January 5-7, 2015, Bonnie repeatedly told Mike London what he had to do to care for Donald. (RA 326 at 695; RA 328 at 703-04; RA 393.) Bonnie also called Chamberlain dispatch for a welfare check on Donald, despite Bonnie being in Sioux Falls, a 2-hour drive away. (RA 352 at 39-40.) But the full of extent of Bonnie's influence over Donald can be summed up in her own words. Bonnie testified that she "know[s] for a fact" with no "doubt in [her] mind" that if she could have talked with Donald more the day of the shooting, she could

have gotten him out of the house without any problems. (RA 330 at 713-14.) Instead of seeking the help of trained medical professionals, Bonnie decided that she would take care of Donald. As Judge Anderson explained during Donald's criminal proceedings:

> The Court rejects Bonnie's testimony that all they wanted was for law enforcement to commit [Donald] on day 1 or 2 or both. Bonnie never attempted to commit [Donald], even though she had done so in the past and was aware of the commitment process to be followed to get the involuntary commitment completed. Neither Bonnie nor Michael ever contacted the Sheriff or [the county's assigned mental health professional] to complain [Donald] didn't make it to inpatient treatment and that the State commitment process was needed after Dakota Counseling did not give [Donald] the pre-assessment to Avera for inpatient treatment.

(RA 296 at ¶ 52.) Because of Bonnie's actions, she had actual control over Donald's affairs – providing a basis for the Koenigs' negligent supervision claim.

CONCLUSION

This case is about whether people are responsible for the injuries they cause through their unreasonable actions. Because of Bonnie's unique insight into Donald's mental health, her knowledge about what happened the days leading up to Trooper Koenig's shooting, and because Bonnie admitted knowing that Donald would become upset if he thought that the police were going to take his guns away, Bonnie is responsible for her actions that caused Donald to become violent and shoot Trooper Koenig. For these reasons, the Koenigs respectfully request that this Court reverse the trial court's summary judgment ruling in favor of Bonnie.

Dated: March 16, 2020.

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