IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

No. 28695

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
A/S/O LOYD NIELSON,
PLAINTIFF/APPELLANT,

vs.

GIYO BRYAN MIRANDA,
DEFENDANT/APPELLEE,

vs.

JOHN DOE,
THIRD PARTY DEFENDANT/APPELLEE.

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

THE HONORABLE ERIC J. STRAWN
Circuit Court Judge

APPELLANT'S BRIEF

Benjamin Kleinjan
Helsper, McCarty, & Rasmussen, P.C.
1441 Sixth Street, Ste. 200
Brookings, S.D. 57006

Attorneys for Appellant

Matthew McIntosh
Beardsley, Jensen & Lee
4200 Beach Dr., Ste #3
PO Box 9579
Rapid City, SD 57709
Attorneys for Appellee

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PRELIMINARY STATEMENT

References to the Settled Record, consisting of Lawrence County Civil File 40CIV15-000052, will be designated by (SR) followed by the appropriate page number. References to the Jury Trial Transcript bear the designation "TT" followed by the page number. References to the Motion Hearing Transcript held on June 27, 2018 are reference "HT" followed by the page number. References to the Trial Deposition Transcript of Kevin Miranda are referenced "KM" followed by the page number.

JURISDICTIONAL STATEMENT

This case arises out of a two-day jury trial in Deadwood, Lawrence County, Fourth Judicial Circuit. On April 26 and 27, 2018 the trial court heard argument

regarding instruction settlement outside the presence of the jury. On April 27, 2018, the trial court instructed the jury. Several instructions dealt with the sudden emergency instruction, both as an affirmative defense and as a legal excuse. An instruction directed a defense verdict upon certain preconditions. The jury found for the defendant. On May 15th, the trial court entered a written judgment in favor of the defendant upon the jury verdict. On May 23, Appellant moved for a new trial. On May 25, the Appellee moved for an extension of time. On May 29, Appellant responded, and the trial court granted additional time for hearing on the motion for new trial. On June 27, 2018, the trial court held a hearing on the motion for new trial. On July 19, the trial court denied the motion for new trial in a written order. On July 23, notice of entry of said order was filed. On August 20, 2018, the Appellant filed a Notice of Appeal. This Court has appellate jurisdiction over the Fourth Judicial Circuit Court, and the orders identified in this jurisdictional statement are appealable under the Rules of Appellate Procedure as a matter of right.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully requests the privilege of oral argument.

STATEMENT OF THE LEGAL ISSUES

1. WHETHER THE TRIAL COURT PROPERLY APPLIED THE SUDDEN EMERGENCY DOCTRINE AS AN AFFIRMATIVE DEFENSE TO NEGLIGENCE AND LEGAL EXCUSE TO NEGLIGENCE PER SE.

Over the Appellant's objections, the trial court applied the sudden emergency doctrine to several of the instructions read to the jury, and subsequently denied the Appellant's motion for a new trial.

Meyer v. Johnson, 254 N.W.2d 107 (S.D. 1977)

Howard v. Sanborn, 483 N.W.2d 796 (S.D. 1992)

Carpenter v. Belle Fourche, 2000 SD 55, 609 N.W.2d 751

Knapp v. Stanford, 392 So. 2d 196 (Miss. 1980)

2. WHETHER THE TRIAL COURT PROPERLY APPLIED THE BURDEN TO PROVE AFFIRMATIVE DEFENSES TO THE DEFENDANT.

Over the Appellant's objections, the trial court instructed the Jury that the Defendant bears the burden to prove some, but not all, of the essential elements of the affirmative defenses raised. The trial court subsequently denied the Appellant's motion for a new trial.

Dartt v. Berghorst, 484 N.W.2d 891, 894 (S.D. 1992)

Frey v. Kouf, 484 N.W.2d 864 (S.D. 1992)

Stevens v. Wood Sawmill, Inc., 426 N.W.2d 13 (S.D. 1988)

3. WHETHER THE TRIAL COURT GAVE AN IMPROPER DIRECTOR INSTRUCTION REMOVING FACT QUESTIONS FROM THE JURY AND DIRECTING VERDICT FOR THE DEFENDANT.

Over the Appellant's objections, the trial court instructed the Jury that it must enter a verdict for the defendant under certain contingent hypothetical scenarios. The trial court subsequently denied the Appellant's motion for a new trial.

Stern Oil Co., Inc. v. Brown, 2018 S.D. 15, 908 N.W.2d 144

Montana-Dakota Utilities Co. v. Parkshill Farms, LLC, 2017 S.D. 88, 905 N.W.2d 334

STATEMENT OF THE CASE

On November 20, 2013, 18-year-old Giyo Miranda drove 30–35 in a 30mph zone on an icy curve. He engaged in evasive maneuvers, lost control, entered oncoming traffic,

and hit Rev. Loyd Nielson head on. Rev. Nielson's insurer pursued subrogation recovery against Mr. Miranda. The case went before the Jury and Hon. Judge Eric J. Strawn at the Lawrence County Courthouse in Deadwood. Plaintiffs pursued theories of negligence, negligence per se, or both against Mr. Miranda as a joint tortfeasor. The defense was the doctrine of sudden emergency. The parties agreed that Rev. Nielson was not even slightly contributorily negligent. The jury returned a verdict in favor of Mr. Miranda and Mr. Doe. The trial court denied a subsequent motion for new trial.

STATEMENT OF THE FACTS

On November 20, 2013, Trooper Chanda Vopat responded to a head-on collision that took place on Highway 34 off the Whitewood exit, number 23, in Lawrence County. TT 53–54. Trooper Volpat arrived first on the scene, having been dispatched there from her stationary patrol less than a mile away. TT 53–54. She arrived within three minutes, at about 5:00 pm. TT 56, 76. She immediately concluded that "the minivan that was traveling westbound had crossed over the center line and went into the oncoming lane of traffic and collided head on with the vehicle that was traveling eastbound, the pickup." TT 56. The pickup was in the south ditch, and the minivan was still on the road. TT 71. The crash was not due to any mechanical failure. TT 56. The road conditions were icy due to some freezing drizzle and snow accumulation on the road. TT 56. Rev. Nielson did nothing to contribute to the crash. TT 57. Simply put, "the minivan had crossed over the center line and had struck the pickup head on." TT 57. Trooper Vopat's first priority was the safety of the occupants, and emergency responders cut the door off the pickup to rescue Rev. Nielson. TT 54–55, 57. Giyo Miranda and his passenger Kevin Miranda were walking around and appeared to be okay. TT 54.

Trooper Vopat demonstrated key locations in this case with an aerial photo. See App. 18. Trooper Vopat labeled the location of her stationary patrol just off the picture with a dot and an "A" on Exhibit "D". TT 59–60. She marked the point of impact with a dot and a "B" on Exhibit "D". TT 61. Highway 34 runs east-west, but this is a curved portion that appears north-south. TT 60. The distance between the stop sign at the bottom of the ramp and the point of impact is about a quarter mile. TT 81.

The speed limit for Mr. Miranda and other westbound traffic on Highway 34 was 30 miles an hour on the curve. TT 63. The 30-mph zone starts between Exit 23 and Whitewood Valley Road. TT 69, Ex. E. The 30-mph zone ends, and a 45-mph zone starts, on the east edge of a single lane driveway for the Black Hills Baptist Church. TT 65–66, 79, Ex. H at p. 2. The crash itself took place right on the west side of that Church driveway. TT 61, Ex. D. "[P]rior to the collision, [Mr. Miranda] would have been traveling in a 30-mile-an-hour speed zone." TT 70. Trooper Vopat opined, "My personal opinion, yes, and professional opinion would be, yes, that you should reduce your speed when the roads are getting icy like that." TT 70:11–15.

Rev. Nielson testified at trial, subject to a motion in limine that he not mention De Smet Insurance, which insured Mr. Miranda, or an offer De Smet's agent had made to Rev. Nielson within hours of the crash. TT 83–84. The Court held a brief colloquy in-chambers with counsel and Rev. Nielson prior to his testimony to verify that he would comply with that order in limine. TT 83–84. The Trial Court granted Plaintiff's counsel latitude to ask leading questions to assist Rev. Nielson in complying.

Rev. Nielson is 73 years old. TT 86. He was a pastor for many years, and a chaplain for the VA and the State Veteran's Home. TT 86. On the afternoon of

November 20, 2013, Rev. Nielson attended a public auction off Highway 34, west of the Black Hills Baptist Church. TT 88. “We were married for 43 years, and I came home one Sunday and a U-Haul truck was backed up to our house, and I found out that my wife was leaving me.” TT 87. “I wanted to attend the auction to see what kinds of things that I could buy or help me with as I began to put my life together again.” TT 88. Rev. Nielson left the auction early due to the weather. TT 89. “I thought we were going to get hit pretty good with snow.” TT 89. He headed back to Hot Springs in his pickup. TT 91.

Rev. Nielson was familiar with the area around the Black Hills Baptist Church, having visited that church many times during his career as a clergyman. TT 92. Rev. Nielson testified there was another eastbound vehicle ahead of him, “I would say 100 yards in front of me or farther.” TT 106. Rev. Nielson testified that he did not think the eastbound vehicle in front of him had anything to do with his crash with Mr. Miranda. TT 93:5–10. Rev. Nielson testified that he did not see this eastbound vehicle ahead of him ever cross over into the westbound lane, “No, not at all.” TT 108. Rev. Nielson also saw the minivan approaching him 50 or 75 yards up ahead. TT 92.

> I noticed that just about a quarter of the van was sticking out in my side of the lane, and I thought, "My goodness. What's going on?" I hit my brake a little bit more, and I thought "What's happening?" And so I slowed down. And so then all of a sudden, I see he's right out in my lane. He's right -- he's right directly ahead of me, and I did not have one chance, not one chance to react at all. I mean, that quick -- (indicating) -- and it was over. I mean, smash. TT 92.

Rev. Nielson described his experience immediately after the collision in vivid detail. TT 93–94.:

> I smelled smoke. . . . [A] loud noise, darkness, smoke, quietness that I've never felt in all of my life. Like I'm going to hell and back. Nothing could describe that quietness. . . . And I'm going down a steep embankment, and I'm -- I'm just feeling a rush of going down this embankment, and I'm

> saying over and over and over and over and over, "Dear God, please don't let me die." And the OnStar lady came on and said, "Mr. Nielson, are you hurt? Are you hurt?" And I have never been more appreciative of somebody's voice in all of my life as that OnStar woman. And she said, "I'll stay with you until the ambulance comes." . . . All of a sudden I was surrounded by all sorts of people. . . . [T]he guy began to cut the left door off and all of a sudden one of them pulled me out. And the next thing I was on a gurney, and I was headed to the hospital. TT 93–94.

During closing argument, defense counsel urged the jury to accept the nature and value of damages as appropriate given Rev. Nielson's testimony. TT 211–12. Invoices and records were admitted without objection. TT 95–97. Property damage was similarly not seriously disputed:

> I was driving the most beautiful truck you ever dreamed of in your life. . . . I had never had anything nice before, and so I had worked so hard to pay our house off and -- after our divorce. So we settled everything. My ex-wife got half and I got half, and so I invested my part most in a new GMC truck. It was graphite gray. It was beautiful and I had so many compliments on it, and I got a license plate that was called "Chappy1." At the VA a lot of the people just called me "Chappy" and so I called it "Chappy1." . . . I put all sorts of trim on it from Street Image, and I had done things to the inside to make it extra special. And I washed it, and I loved that truck. I didn't have nothing else to my life but my truck, and that truck was special to me. It meant everything to me now, and it was gone. TT 90–91.

Dan Laughlin, a field representative, testified regarding the existence and amount of damages and causally connecting the damages to the crash. TT 126–30. Mr. Laughlin was not seriously challenged about the damages testimony. TT 137–39. He was not present for the crash. TT 130–37. He pointed out that prior to the litigation, Mr. Miranda was unresponsive, "He was called, his voicemail was full, and the call was never returned." TT 140.

Giyo Miranda testified. He came to the United States from the Philippines in 2011 at the age of 16. TT 144, 145. On November 20, 2013, he was 18 years old and living

with his parents in Belle Fourche. TT 145. He had a driver's license for about 18 months. TT 146. He took driving lessons in the Philippines, but did not get a license there as a result. TT 152–53.

On November 20, Mr. Miranda drove to Rapid City to help his brother Kevin move back to Belle Fourche. TT 146. He was driving his stepfather's 1998 Ford Windstar minivan. TT 147. It was "in really good condition." TT 147. They loaded up all of Kevin Miranda's belongings into the van. TT 154. After one or two stops, they headed back to Belle Fourche. TT 146, 153.

Mr. Miranda took Exit 23, stopped at the stop sign at the bottom of the exit ramp, and started heading westbound on Highway 34. TT 147, 154. Mr. Miranda testified twice that at the stop sign, he knew that the road was icy and treacherous. TT 154. "I did know that the roads were icy." TT 156. Mr. Miranda also admitted that before turning onto the highway at the stop sign, he knew that he needed to be going slower than he was actually going because of the icy roads. TT 154:16–19. He testified that he was driving "[a]round 30, 35" in the area "immediately before this accident." TT 149. Mr. Miranda then testified that the speed limit "in that area" that was "immediately before this accident [was] 30." TT 150. Mr. Miranda knew his speed was 30–35 because he looked at his speedometer. TT 150:2. On cross-examination he reconfirmed that he got up to "30 to 35;" but he did not get all the way up to 40. TT 155. He accelerated and maintained that same speed, 30 to 35, from after the stop sign, around the 30-mph curve. TT 155. Mr. Miranda admitted on redirect that he understood the question regarding his speed. TT 160–61. While in the curve, Mr. Miranda noticed an oncoming vehicle, "[F]or like a

really quick instant the headlights went like straight towards our vehicle. TT 147–48 (emphasis added).

The encounter with the headlights took place on the 30-mph curve. TT 155. "[Y]our testimony is that you evade a vehicle in this curved area? A Yes, I did." TT 155. The speed limit on the curve was indisputably 30 miles per hour. TT 65–66, 79, 156, Ex. H at p. 1, 2.

> Q I'm showing you, Exhibit H. Stop at the stop sign; right?
> A Yes.
> Q Go around the curve between 30 and 35; right?
> A Yeah.
> Q Your testimony is that as you're going around the curve, you go off the edge into the shoulder; right?
> A Yes, to avoid the vehicle. TT 156.

Giyo Miranda veered to the right onto the shoulder. TT 148. He felt the right side of the tires go off the pavement onto the shoulder, then he steered back to the pavement. TT 148. Once back on the pavement, he started to "fishtail" and lose control. TT 148. He instinctively began steering and counter-steering. TT 148–49. Mr. Miranda eventually crossed over the center line and collided with Rev. Nielson just "inside the 45" zone on the west edge of the church driveway. TT 150, 158. Mr. Miranda confessed that if he had corrected properly after coming back onto the road, then he would have been able to regain control and not hit Rev. Nielson. TT 158:21–23.

Kevin Miranda was a passenger in the minivan who testified by video deposition. KM 7. Kevin Miranda also knew that "the weather got a little harsher, it started . . . snowing really bad as we get closer to home." KM 6–7. Kevin Miranda testified that it was snowing hard enough that you could not see the line dividing the lanes. KM 22.

While on the curve, Kevin Miranda explained that he got scared and yelled Giyo's name. KM 10. "Q Did you just notice it when the -- when the headlights were right there in your face? A·Yes, sir." KM 21. He explained that Giyo swerved to the right. KM 10. "I think he lost control after that, and we ended up on the other lane and some car -- I guess a truck hit us on my side." KM 10. Kevin Miranda verified that, at the time of the encounter with the headlights, Giyo was not speeding up or slowing down; he was going about the same speed throughout. KM 24.

STANDARD OF REVIEW

This Court has addressed sudden emergency cases on several occasions. *E.g. Meyer v. Johnson*, 254 N.W.2d 107 (S.D. 1977). Motions for new trial are evaluated under abuse of discretion. "[W]e note a decision to grant a new trial stands on firmer footing than a decision to deny a new trial." *Dartt v. Berghorst*, 484 N.W.2d 891, 894 (S.D. 1992) (citing *Simmons v. City of Sioux Falls*, 374 N.W.2d 632 (S.D.1985)).

> Orders granting new trials stand on firmer ground than orders denying them as they are not conclusive or decisive of any rights or issues. On the contrary they merely 'open the way for a reinvestigation of the entire case upon its facts and merits'. *Pengilly v. J. I. Case Threshing Mach. Co.*, 11 N.D. 249, 91 N.W. 63. In determining whether the trial court abused its discretion in granting a new trial this court views the evidence most favorable to the conclusion reached by the trial court, *Gamble v. Keyes*, 39 S.D. 592, 166 N.W. 134, rather than most favorable to the verdict when a new trial is denied. *Hanisch v. Body*, 77 S.D. 265, 90 N.W.2d 924. *Jensen v. Miller*, 80 S.D. 384, 389, 124 N.W.2d 394, 396 (1963)

The sudden emergency doctrine standard is reviewable *de novo*. *Meyer v. Johnson*, 254 N.W.2d 107 (S.D. 1977). "[W]hen the question is whether a jury was properly instructed overall, that issue becomes a question of law reviewable *de novo*."

Stern Oil Co., Inc. v. Brown, 2018 S.D. 15, ¶ 12, 908 N.W.2d 144, 150, reh'g denied (Mar. 30, 2018) (quoting *Karst v. Shur-Co.*, 2016 S.D. 35, ¶ 8, 878 N.W.2d 604, 609).

ARGUMENT

1. WHETHER THE TRIAL COURT PROPERLY APPLIED THE SUDDEN EMERGENCY DOCTRINE AS AN AFFIRMATIVE DEFENSE TO NEGLIGENCE AND LEGAL EXCUSE TO NEGLIGENCE PER SE.

Appellant requests that the trial court be reversed and that this Court provide additional guidance to trial courts, lawyers, and insurance adjusters on the availability of the sudden emergency excuse in driver negligence cases in light of the trend toward restricting the use of the sudden emergency doctrine in such cases.

A. Summary of SD Caselaw

Over a dozen cases discuss the sudden emergency doctrine, some of which also discuss the somewhat related unavoidable accident doctrine.

The doctrine was proper in *Trousdale v. Schladweiler*, 74 N.W.2d 841 (S.D. 1956), to excuse contributory negligence because the plaintiff did not contribute in any way to the accident. *Id*. at p. 843. Plaintiff drove within the speed limit on clear roads. A "'digger jeep' appeared from behind the truck he was meeting and turned into his lane of traffic." Plaintiff tried to stop, but collided with the digger jeep. "Wayne, the [plaintiff] driver, testified that he was driving within the posted speed limit, the road was apparently clear except for the approaching truck and without warning the jeep appeared from behind the truck and entered his lane of travel." *Id.* at 843. The proponent of the doctrine did not contribute in any way, such as by speeding on icy roads or swerving.

The doctrine was improper to excuse contributory negligence in *Dwyer v. Christensen*, 75 N.W.2d 650 (S.D. 1956), overruled in part on other grounds by *Corey v.*

Kocer, 193 N.W.2d 589 (1972). The defendant/appellant turned left into a gas station, then backed up onto the road to do a Y turn. The approaching plaintiff had dimmed his headlights, but continued at the same speed rather than slowing down, which was alleged to be negligence more than slight. "While our statute does not specifically require a diminution of speed when proceeding with headlights temporarily on low beam, it may well be that such action is necessary to satisfy the standards of a reasonably prudent person." *Id.* This Court held that "the benefit of the rule is not available to a driver whose negligence caused the emergency." The opinion pointed out, "It is elementary that an instruction respecting sudden emergency should be given only in those cases where it is applicable. It was improper to give it under the facts in this case. The rule is intended to benefit only those whose conduct did not cause or contribute to the creation of the emergency." *Id.* at 655.

These first two cases illustrate that the party invoking the doctrine may not do so if he contributed to the crash. In *Trousdale*, the party invoking the doctrine was blameless—not speeding on clear roads. Dwyer was going too fast. Dwyer's speed did not exclusively cause the other car to make a Y-turn, but he contributed to the crash enough that the doctrine was improper.

The following year, the doctrine properly excused contributory negligence in *Jacobson v. Coady*, 84 N.W.2d 1, 2 (S.D. 1957). This case involved black ice, which is a latent natural condition. The defendant slowed down to below the speed limit. "The first that defendant noticed there was ice on the road was when he got out of the car and 'slipped and almost fell down'. He testified that it was 'clear ice' and that it had the appearance of the dry blacktop surface over which he had been driving." *Id.* at 3. There

was no admission of negligent conduct prior to the curve. The invoking party confronted with the black ice was going below the speed limit, and the road appeared clear.

The doctrine was improper to excuse negligence in *Albers v. Ottenbacher*, 116 N.W.2d 529, 529 (S.D.1962). This Court reversed the defense jury verdict. Defendant rear-ended the plaintiff at a stoplight. Defendant admitted to violating a statute regarding brake maintenance. "The evidence as viewed most favorably to the defendant was not sufficient to make a question of legal excuse one of fact for the jury. The violation of the statute without legal excuse constitute negligence in itself and the court erred in submitting an issue of negligence to the jury." *Id.* at 532. Previously, in *Dwyer*, mere allegedly negligent speed was enough to bar the doctrine. In *Albers*, negligent *per se* brake maintenance barred the doctrine. In both cases, the conduct happened *prior* to any emergency.

The doctrine was improper to excuse negligence, contributory negligence, or negligence *per se* in the hallmark *Meyer v. Johnson*, 254 N.W.2d 107 (S.D. 1977). This Court again reversed a defense jury verdict and remanded. The parties collided head-on at the crest of a hill. "As defendant testified, the [other] car appeared 'right there in front of me, and I hit the brakes,' and 'we collided.'" *Id.* at 111. Defendant knew of the poor road conditions long before the point of impact. "There is no evidentiary foundation in the record to show the necessary element of 'surprise' or that something other than the negligence of one of the drivers caused the mishap which would sustain the giving of this instruction." This Court also concluded that, "The sudden emergency doctrine is merely an expansion of the reasonably prudent person standard of care." *Id.* at 110.

Meyer stands for several important points. First, it took an elemental approach to the doctrine. Second, it expanded the contribution rule of *Trousdale*, *Dwyer*, and *Albers* to *other* negligent parties. Where the "emergency" is the negligence of an adversary, it is a negligence case, not a sudden emergency case. Third, it pointed out that the sudden emergency instruction, like the unavoidable accident instruction, is generally disfavored. Fourth, *Meyer* represents the trend toward recognizing that an ordinary reasonable prudent actor is expected to foresee certain predictable emergencies that he does not actually foresee.

Three years later, the doctrine was again held improper to excuse negligence, and again resulted in a reversal of a defense verdict. In *Del Vecchio v. Lund*, 293 N.W.2d 474 (S.D. 1980), a motorboat going between 20-25 mph hit a skier who suddenly appeared in his lane of travel on a congested lake. The boat driver was faced with a split-second decision on how to turn. Like in *Albers*, *Dwyer*, and *Meyer*, there was sufficient evidence of defendant's negligence to render the doctrine improper and reversible error. "[A] party seeking refuge under the 'sudden emergency' doctrine must not be the party whose actions created the emergency." *Id.* at 477. Boat speed did not make the skier suddenly appear in the water, but it contributed. In addition, under *Meyer's* expansion to exclude foreseeable emergencies, the sudden appearance could have been anticipated, so it did not meet the surprise factor. *Del Vecchio* further expanded *Meyer's* criticism of the doctrine's prejudicial overtones, "this instruction unduly and improperly emphasized defendant's position." *Id.* at 476.

Four years later, the doctrine was again held improper to excuse negligence, and this Court again reversed a defense verdict. In *Hoffman v. Royer*, 359 N.W.2d 387 (S.D.

1984), multiple vehicles were involved in a complex accident. Continuing the criticism of the doctrine's prejudicial overtones from *Meyer* and *Del Vocchio,* the opinion pointed out that the doctrine improperly emphasize defendant's position and "very likely affect[s]" a jury's verdict. *Id.* at 389.

After five consecutive rulings criticizing the doctrine, and twenty-seven years after *Jacobson,* the doctrine was held proper to excuse negligence in *Weber v. Bernard,* 349 N.W.2d 51 (S.D. 1984). The defendant rear-ended another vehicle on "unexpectedly slippery road conditions." Like the black ice in *Jacobson,* the roads did not appear icy. This case differs from *Meyer* in that no other party was negligent under the natural conditions then known to the defendant. It differs from *Dwyer*, *Albers* and *Meyer,* where the defendant admitted facts supporting the allegation of negligence or negligence *per se*.

The related doctrine was held improper to excuse negligence *per se,* resulting in another reversal of a defense jury verdict in *Stevens v. Wood Sawmill, Inc.,* 426 N.W.2d 13 (S.D. 1988). A brake failure in defendant's unattended truck that caused it to roll downhill causing damage. One issue was the surprise factor. Defendant claimed unexpected mechanical failure was a surprise, which fit within *Meyer* dicta. This Court held that even though mechanical failure was in dicta, it did not meet the "surprise factor" justifying a special instruction. Not only can no surprise be claimed about *known* conditions, such as the faulty brakes in *Albers,* but also about *predictable* conditions, even if the exact circumstances are unknown. "It is totally predictable that trucks will roll downhill." *Id*. at 17. Another issue was whether the defendant contributed to the mishap. "Plaintiff demonstrated that Defendants almost certainly violated the statutes. We do not require a plaintiff to eliminate all possible explanations of causation that the ingenuity of

counsel might suggest." *Id.* at 15–16 (citing *Shaffer v. Honeywell, Inc.*, 249 N.W.2d 251, 256 (S.D.1976)).

The doctrine was proper to excuse negligence in *Herren v. Gantvoort*, 454 N.W.2d 539 (S.D. 1990). As the defendant crested a hill, he spotted a slow-moving truck up ahead. Defendant tried to stop and swerve into the ditch but ended up rear-ending the truck. Although Defendant knew about the hill and the ice, he exercised significant caution prior to cresting the hill. This Court affirmed without citing *Trousdale*, but applied similar rationale. No conduct of the defendant contributed to the emergency.

The related doctrine was again held improper to excuse negligence, again resulting in a reversal of a defense verdict in another "surprise factor" case of *Howard v. Sanborn*, 483 N.W.2d 796, 799 (S.D. 1992). Defendant rear-ended a plaintiff after being surprised by skewed headlights. "[I]t has been recognized that the presence of blinding headlights ... [is] not [an] intervening cause but [is among those] conditions which impose on drivers the duty to assure that safety of public by the exercise of a degree of care commensurate with such surrounding circumstances." *Id.* (quoting 2 Blashfield Automobile Law and Practice § 53.6, p. 386). *See also Pleinis v. Wilson Storage and Transfer Company*, 66 N.W.2d 68, 71 (S.D. 1954) (blinding headlights are a condition which would call for some diminution of speed or care on the part of the defendant.). The modern interpretation is that a driver has a duty of reasonable care under ordinary negligence that includes preparation for reasonably predictable occurrences that require evasive maneuvers.

Howard was decided on April 8, 1992. Three weeks later on April 29, the doctrine was held improper in *Dartt v. Berghorst*, 484 N.W.2d 891 (S.D. 1992). The

defendant passed a snowplow and hit plaintiff. Where "the road conditions are generally icy, the driver is deemed to be aware of the poor road conditions. If he fails to drive accordingly and then loses control on ice, breaching the statute, he cannot set up the icy condition as an emergency." *Id.* at 896 (citing *Bannon v. Pfiffner*, 333 N.W.2d 464, 469–70 (Iowa 1983)). "It was certainly foreseeable that once Berghorst entered the snowcloud, he would be blinded." *Id.* at 897. This Court concluded "there is insufficient evidence in the record which could justify a jury finding that Berghorst was faced with a sudden emergency not of his own making. Berghorst saw the snowcloud which he acknowledged was 'pretty much full.' Nonetheless, rather than waiting to see whether visibility would improve, Berghorst drove into the snowcloud." *Id*. at 897. Drivers who go out on hazardous roads must anticipate certain predictable hazards and drive accordingly, not rely on emergency doctrines as an excuse. This Court also emphasized that violation of a safety statute is excusable *only* when compliance is "impossible" and not caused by circumstances produced by the defendant's own misconduct. *Id.* at 896. The concurrence agreed that the burden of the affirmative defense belonged on the defendant, but also pointed out that "any statutory violations occurred *after* Berghorst drove into the whiteout of the snow cloud." *Id*. at 898 (Sabers, J. concurring and dissenting, emphasis added).

The doctrine was proper in *Artz v. Meyers*, 1999 S.D. 156, 603 N.W.2d 532. A defendant hit an unexpected patch of ice, crossed the center line, and collided with the plaintiff. "Meyers testified she had not seen any ice until she reached the curve." *Id.* at ¶ 16. This particular curve had an "advisory" speed limit sign suggesting a safe speed during normal conditions. Although the defendant elected not to follow that advice, the trooper testified that it was *not* a speed limit. *Id*. at ¶ 4. The trooper's testimony

distinguishes *Artz* from *Albers*. The deciding factor was that Meyers testified she had not seen any ice prior to deciding to drive that fast. *Id.* at ¶ 16. This case is closer to *Jacobson* and in contrast to *Meyer*: Jacobson saw no ice until he fell down getting out of the car; in *Meyer*, the driver knew it was icy and could not set it up as an excuse.

The doctrine was improper in *Carpenter v. City of Belle Fourche*, 2000 S.D. 55, 609 N.W.2d 751. The defendant was traveling over the speed limit. The plaintiff driver turned left onto the highway without yielding to the oncoming defendant. The parties quibbled over whether the defendant had more than one option available. This Court emphasized *Meyer v. Johnson* prohibition on the doctrine when negligence of multiple parties is involved. "*Such instruction may properly be given in those cases where there is evidence that something other than the negligence of one of the parties caused the mishap*." *Id.* at ¶ 32 (emphasis in original, quoting *Meyer*). "Here, there was sufficient evidence of Officer Wainman's negligence presented to exclude this instruction that would have served only to improperly emphasize the defendants' position." Since the emergency was contributed to by the defendant's speeding, then the instruction is improper, and courts should not show unfair preference for one party by giving a sudden emergency instruction.

The Court's emphasis was apparently effective, because the doctrine has not been directly addressed in the 18 years since. It was inapplicable to rationalize a defense jury verdict, resulting in reversal in *Cooper v. Rang*, 2011 S.D. 6, 794 N.W.2d 757. The defendant rear-ended the plaintiff while he was stopped at a stop sign at the bottom of a hill. The defendant knew the roads were icy, applied the brakes, but was unable to stop. Although the doctrine was not requested, it was improper anyway. There was no

"element of surprise" or other possible cause of the crash other than some party's negligence.

Here, this case fits among the prior cases as set forth below and shows why the doctrine is so hazardous to the bench and bar. Mr. Miranda was well aware that the roads were slippery and he knew he should be going slower, but declined to do so. TT 154:13–19. *Weber*, cited by the defendant when settling instructions, is easily distinguishable because that defendant denied that the road was icy, and thus had no idea he was violating a safety statute of overdriving conditions. Mr. Miranda gave testimony that he was exceeding the speed limit both *before* and *after* encountering John Doe. The doctrine is only for emergencies *not* created by the neglect of a defendant or other party, such as invisible ice, or a natural obstruction to a cautious driver like in *Herren*. *Meyer* at 110. This case resembles *Meyer*, the only difference is the aftermath injury to an innocent third party.

B. Applying *Meyer* and its progeny

Meyer, *Hoffman*, and *Carpenter*, and the dissent in *Artz*, pointed out the prejudicial overtones of the doctrine. A party in a multiparty negligence case is not entitled to the doctrine, "since the substance of any such instruction is usually covered by other instructions given, especially those on negligence, proximate cause, and burden of proof." *Henrichs v. Inter City Bus Lines*, 111 N.W.2d 327, 332 (S.D. 1961). This Court emphasized the risk of improper use of the doctrine. *See Howard*, 483 N.W.2d at 799. If questions of the defendant's own negligence are presented versus the negligence of others, then the doctrine serves "only to improperly emphasize the defendants' position." *Carpenter*, 2000 S.D. at ¶ 32, 609 N.W.2d at 764. *Meyer* identified four elements to

consider. *Meyer.* at p. 111. But the instruction should still must not be given if it would improperly emphasize one party's negligence over another's. *See Meyer; Hoffman; Carpenter*.

a. No "sudden emergency."

The first *Meyer* element deals with the presence of an emergency or surprise factor. Three possible emergencies were suggested, either (1) the road conditions, (2) the sudden appearance of John Doe's skewed headlights in Giyo Miranda's face, or (3) the conduct of John Doe coming into Mr. Miranda's lane.

A condition is not an emergency if you *actually* know about it. *Compare Cooper*, 2011 S.D. 6 (defendant actually knew it was icy) to *Jacobson*, 84 N.W.2d 1 (black ice) and *Artz,* 1999 S.D. 156 (defendant did not believe it was icy). Even if not *actually* known, there is no surprise factor and the doctrine "is not proper where the incident is reasonably foreseeable." *Howard*, 483 N.W.2d at 799. The defendant in *Del Vecchio* could reasonably foresee there might be people in the water on the congested lake. "It is totally predictable that trucks will roll downhill." *Stevens*, 426 N.W.2d at 17. If "the road conditions are generally icy, the driver is deemed to be aware of the poor road conditions. If he fails to drive accordingly and then loses control on ice, breaching the statute, he cannot set up the icy condition as an emergency."*Dartt*, 484 N.W.2d at 896. The natural road conditions do not meet the surprise factor here. Prior to entering the curve, Mr. Miranda knew it was icy and that he should be going slower. TT at p. 154.

The presence of skewed headlights of John Doe do not meet the surprise factor either. *Howard,* 483 N.W.2d at 799. The skewed headlights shone directly at Giyo and Kevin Miranda's faces, causing alarm and to veer to the right. TT at p. 147–48; KM AT

11, 21. This Court previously held that the sudden appearance of headlights does not satisfy the "surprise factor" required for an emergency. "[I]t has been recognized that the presence of blinding headlights is not an intervening cause but is among those conditions which impose on drivers the duty to assure that safety of public by the exercise of a degree of care commensurate with such surrounding circumstances." *Howard*, 483 N.W.2d at 799 (internal quotes omitted).

The conduct of John Doe crossing the center line on the curve does not satisfy this element for two independent reasons. First, armed with the knowledge of how icy and treacherous the roads were, Mr. Miranda could reasonably have foreseen that others on the road might lose control and act as an ordinary reasonable person without resort to a special doctrine. He can not claim surprise and take refuge under the doctrine. Second, the negligence of *any* party, even if unforeseeable, is emphatically excluded from the doctrine in *Meyer* and *Carptenter*. "There is no evidentiary foundation in the record to show the necessary element of 'surprise' or that something other than the negligence of one of the drivers caused the mishap which would sustain the giving of this instruction." *Meyer*, 254 N.W.2d at 110. *See also Hoffman*, 359 N.W.2d 387. "*Such instruction may properly be given in those cases where there is evidence that something other than the negligence of one of the parties caused the mishap*." *Carpenter*, 2000 S.D. at ¶ 32, (quoting *Meyer*, emphasis in original). Here, circumstantial evidence of John Doe's negligence excludes it from the doctrine. "Some circumstantial evidence is very strong, as when you find a trout in the milk." *Stevens*, 426 N.W.2d at 15 (citation omitted). John Doe almost certainly violated the statute. *See id.* "Under *Vaughn*, *Albers*, *Bothern*, and *Engel*, the technical violation of statute by the defendant in ending up near the middle of

the traveled portion of the highway and failing to yield one-half to the [oncoming] vehicle is 'actionable negligence,' 'negligence as a matter of law,' 'negligence per se' or 'negligence in and of itself' unless excusable or justifiable." *Meyer*, 254 N.W.2d at 111.

In sum (1) if it was road conditions, then Mr. Miranda knew or should have known about it and several cases indicate the doctrine is improper, (2) if it was the headlights, then *Howard* shows that there was no surprise factor, (3) if it was the conduct of John Doe crossing the center line, then it was either foreseeable given the known road conditions, or *Meyer* and *Stevens* control and it was party negligence not under the doctrine.

b. Appellee contributed to the mishap.

The second element is whether "he was not engaged in prior conduct which caused *or contributed* to the emergency." *Meyer*, 254 N.W.2d at p. 112 (emphasis added). If evidence shows defendant was slightly negligent in contributing to the crash, the instruction must be excluded. *See Dwyer*.

One invoking the doctrine must not exceed the posted speed limit. *Trousdale*, 74 N.W.2d at 843; *Herren*, 454 N.W.2d 539. If you exceed a reasonable speed prior or during the emergency, you may not invoke the doctrine. *Dwyer*, ("outdriving" his headlights); *Del Vecchio* (going too fast on the congested lake). In *Dartt*, the defendant was negligent in crowding the plow prior to the crash, and was negligent *per se* after entering the snow cloud. In *Albers*, improper brake maintenance was admitted. If you exceed the speed limit, you may not invoke the doctrine. *Carpenter*, 2000 S.D. 55 (exceeding the posted speed limit). If circumstantial evidence shows you exceeded a reasonable speed or the speed limit, you may not invoke the doctrine. *See Stevens*.

In this case, the defendant actually knew he was going over 30, but not as fast as 40, on a curve that he actually knew was icy. He actually knew it was a 30-mph zone.

> Q Do you know approximately how fast you were going immediately before this accident? [GIYO MIRANDA] Around 30, 35.
>
> Q How do you know that's approximately how fast you were going? A By looking at the speedometer. TT at pp. 149–50.
>
> [. . .]
>
> Q Do you recall what the speed limit was in that area when you were driving immediately before this accident? A 30. TT at p. 150.
>
> Q But you do get up to speed of going about 30 to 35; right? A Yes.
>
> Q And then from your perspective, that road curves to the left; right? A Yes.
>
> Q You don’t think you were going 40, though; right? A No.
>
> Q [W]ere you speeding up or slowing down or going about the same speed? A I was going about the same speed. TT at p. 155.
>
> Q And, in fact, were you going about the same speed, that 30 to 35, the entire time from when you accelerated past the stop sign, around that curve, until ultimately the impact with Mr. Nielson? A Yes. TT at p. 155.
>
> Q So as you're coming down here from the stop sign, you're going around a curve -- (pointing) -- and you – your testimony is that you evade a vehicle in this curved area? A Yes, I did.
>
> Q And your testimony is that you're going between 30 and 35 through this whole period until the impact? A Yes. TT at p. 155.
>
> [. . .]
>
> Q [W]hat's that? (Pointing.) A A 30-mile-per-hour sign.
>
> Q Pardon? A A 30-mile-per-hour sign.
>
> Q And you were going between 30 and 35; right? A If I can remember, it's 30, 35.
>
> Q . . . I'm showing you, Exhibit H. Stop at the stop sign; right? A Yes.

> Q Go around the curve between 30 and 35; right? A Yeah.
>
> Q Your testimony is that as you're going around the curve, you go off the edge into the shoulder; right? A Yes, to avoid the vehicle. TT at p. 156.

Trooper Vopat verified that the speed limit where Mr. Miranda says he swerved to dodge John Doe. TT at p. 63. Mr. Miranda was not confused about the question:

> Q Do you understand the questions that [counsel] asked you when he asked you if you were doing 30 to 35 miles per hour the entire way? A Yes. TT at p. 160–61.

Unlike *Jacobson*, *Arts* and *Weber*, Mr. Miranda *knew* it was icy and he should be going slower. TT 154, 156. Mr. Miranda argued that, although he was going over the speed limit, he did not think that meet the legal definition of speeding. *Cf. Artz*, 1999 S.D. at ¶ 4 (defendant was not exceeding the advisory only speed limit).

Mr. Miranda subsequently confessed that if he had been driving properly he never would have hit Mr. Nielson. TT 158:21–23. "[T]this Court noted the settled rule that 'a party can claim no better version of the facts than he has given in his own testimony.'" *Artz v. Meyers*, 1999 S.D. at ¶ 13 (quoting *Dartt*, 484 N.W.2d at 897).

The proponent of the doctrine was not free of negligence contributing to the circumstances. As pointed out in *Carpenter*, the instruction places an improper emphasis on the defendant's position regarding his negligence, if the negligence of more than one party is at issue.

c. The third element was not met.

The third *Meyer* element requires "that at least two courses of action were available to the party after the dangerous situation was perceived." *Meyer*, 254 N.W.2d at 110. Here, regardless of whether it was headlights or Doe coming into his lane, there was no testimony that there was any option other than swerving to the right in that moment.

After evading Doe, several options presented themselves, such as slowing down or stopping before entering the roadway. In *Carpenter*, "[defendants] believe it should have been given because the Carpenters' expert testified that [defendant] should have turned his patrol car to his right to avoid the accident, allowing him to pass behind [plaintiff's] vehicle. They argue that because there was another course of action available after the dangerous situation was perceived, the instruction was necessary." 2000 S.D. 55, at ¶ 31. This Court held that the defendant's speed *prior* to the accident negated this argument, rendering the doctrine inapplicable.

The virtually identical Mississippi case of *Knapp* is important.

> Appellee testified that he was operating his vehicle on the proper side of the road at a reasonable speed when a vehicle being operated from the opposite direction began coming over on appellee's side of the roadway; that it was necessary for him to turn his vehicle to the right, which caused the right wheels to be driven onto the highway shoulder and down the shoulder. He further testified that when he attempted to drive the vehicle completely back onto the hard surface that the raised part of the hard surfaced road caused him to lose control of his vehicle . . . .
>
> [I]t is clear that the "sudden emergency" was over and that another factor caused the driver to lose control of the vehicle. As stated above, it is undisputed that the sole cause of the accident was either the manner in which appellee attempted to drive back onto the road surface, the speed of the vehicle, or the fact that the right wheel or wheels caught on the raised road surface . . . . *Knapp*, 392 So.2d at 197.

The *Knapp* court analyzed these identical facts the same way that Giyo Miranda did. First, he avoided John Doe by going onto the shoulder. Second, he reentered the roadway, and third, he lost control on the road:

> [Y]ou were able to get into your lane; correct? A Yes.
>
> Q And after that was when you lost control; right? A Yes. [. . .]
>
> [Q Y]ou engaged in sort of this series of countersteering, steering, countersteering in kind of a series there; right? A Yes. Twice.

> Q And if you had corrected properly, would you have been able to redeem control? A Yes. TT at p. 158.

There is no doubt that the loss of control happened *after* Doe passed, just like in *Knapp*. "I tried -- I get back to the pavement, and that's when the van started fishtailing and started to lose control." TT at p. 148.

The emergency, if any, was resolved when Giyo Miranda evaded John Doe. Only afterward did he lose control on the ice. Any alternative options did not arise until *after* the risk of imminent collision with John Doe abated.

> We hold that even assuming the truthfulness of appellee's testimony, the granting of this instruction to the jury was error. According to appellee, the "sudden emergency" existed when an approaching vehicle in Stanford's lane of travel caused him to drive the right wheels of his "Blazer" off the road surface. This resulted in the right wheels of the vehicle traveling down the shoulder of the roadway. Appellee was positive in his testimony that the cause of the vehicle overturning was the manner in which the vehicle returned to the hard surface part of the roadway. Admittedly, appellee at no time applied his brakes. A photograph introduced in evidence clearly showed that the road surface had recently been repaved. Appellee contended that this newly paved surface raised the road level some six or eight inches above the level of the road shoulder, and that this condition caused him to lose control of his vehicle. *Knapp*, 392 So.2d at 197.

This case is easier than the *Knapp* case. Giyo Miranda actually knew about the slippery road conditions, but the defendant in *Knapp* did not known about the hard edge of the road. TT 154:13–15, 156:23. Kevin Miranda testified that the weather was getting "harsh," it was "snowing really bad" and "snowing really hard." KM 7, 22. It was snowing so bad that it was hard to see the line on the road. KM 22.

Here, Giyo Miranda testified that he maintained control throughout the evasive maneuver to dodge John Doe. It was not until he returned into his own lane of travel that

he lost control on the ice and improperly countersteered, resulting in him going into oncoming traffic.

d. The fourth element is not relevant here.

The final element of the analysis is "that the choice of the course of action taken after confrontation was a choice which would have been taken by a reasonably prudent person under similar circumstances, even though it may later develop that some other choice would have been better." *Meyer,* 254 N.W.2d at 110–11. This element precludes consideration of irrational or unreasonable options. A driver always has the option to close his eyes and let go of the wheel. That irrational and unreasonable option is not to be considered. This element is relevant only to the extent appellee suggests that hitting Mr. Doe was one choice of the course of action.

C. Persuasive Authority

The pattern comment cautions that, "appellate courts frequently instruct that the better practice is ordinarily not to give the sudden emergency instruction." 57A Am.Jur.2d *Negligence*, § 229. App. 46. Although it is often reversible error to give such instructions in these cases due to the favor it shows toward one party's argument, omitting such instructions is usually harmless "since the substance of any such instruction is usually covered by other instructions given, especially those on negligence, proximate cause, and burden of proof." *Henrichs,* 111 N.W.2d at 332.

The question of driver negligence in multiparty accidents is properly left to the ordinary negligence principles. *See Knapp,* 392 So.2d 196 (abolishing doctrine in auto cases); *Cowell v. Thompson*, 713 S.W.2d 52 (Mo. App. 1986) ("Emergency instructions are no longer permitted" in Missouri); *McClymont v. Morgan*, 470 N.W.2d 768 (Neb.

1991) ("The giving of an independent sudden emergency instruction is not warranted in a negligence action."); *Davila v. Sanders*, 557 S.W.2d 770 (Tex. 1977) (rejecting doctrine where one driver lost control, causing the codefendant to cross the midline and collide with the plaintiff's vehicle); *Simonson v. White*, 713 P.2d 983 (Mont. 1986)[1]; *Finley v. Wiley*, 246 A.2d715 (N.J. 1968) ("[W]e entertain grave doubt whether a sudden emergency charge should ever be given in an ordinary automobile accident case. There is a modern view that it is argumentative, unnecessary and confusing, and should be eliminated."); *Bjorndal v. Weitman*; 184 P.3d 1115 (Or. 2008) ("The emergency instruction is erroneous because it introduces into the liability determination additional concepts that are not part of the ordinary negligence standard—whether the person had a "choice," whether the person made a "choice" that a reasonable person "might" make, and whether the person made the "wisest" choice or not. The addition of those new, otherwise-undefined concepts to the standard of reasonable care in light of all the circumstances injects a likely source of juror confusion as to the legal standard to be applied"); *Di Cenzo v. Izawa*, 723 P.2d 171, 181 (Haw. 1986) ("Inasmuch as the risk of prejudicial error in instructing the jury on the sudden emergency doctrine exceeds by far the possibility of error in not doing so, the wiser course of action would be to withhold sudden emergency instructions. It would be foolhardy to jeopardize the outcome of trial by giving an instruction adding little to the basic jury charge that must be given in any

[1] "There is no reason for this instruction to ever be given in an automobile accident case. It adds nothing to the established law applicable in any negligence case, that due care under the circumstances must be exercised. 'The circumstances' includes the pressure and split-second decision-making which accompanies the crisis prior to some automobile accidents. Further, a driver is never held responsible for non-negligent actions which prove, with hindsight, to have been incorrect. The instruction adds nothing to the law of negligence and serves only to leave an impression in the minds of the jurors that a driver is somehow excused from the ordinary standard of care because an emergency existed. This is not the law. . . . [T]he use of the sudden emergency instruction in automobile accident cases is hereafter banned."

negligence action."). *See also Keel v. Compton*, 256 N.E.2d 848 (Ill. 1970) (reversing denial of motion for new trial); *Gagnon v. Crane*, 498 A.2d 718 (N.H. 1985) (reversing defense judgment based on the need to anticipate certain emergency situations); *Finley*, 246 A.2d 715 (reversing a judgment for the defendant).

Although outliers certainly exist, the sudden emergency doctrine is disfavored in general, and either extremely disfavored or barred in modern driver negligence cases. It survives in black ice cases, animal cases, and so forth. In *Knapp v. Stanford*, 392 So. 2d at 197, the accident occurred in a left-hand curve, just like this case. The defendant dodged a John Doe coming into his lane, tried to get back on the road, lost control, and the defendant vehicle crashed, injuring an innocent party. *Knapp* is almost exactly what Giyo Miranda testified happened. *Knapp* went on to prohibit the doctrine in multiparty automobile negligence cases. It has remained good law in Mississippi for 38 years regarding negligent driver cases, with its most recent nod in June 2018. *See McLaughlin v. N. Drew Freight, Inc.*, 249 So. 3d 1081, 1085 (Miss. Ct. App. 2018) (affirming *Knapp* analysis on the negligence standard). The *Knapp* decision was unanimous on the issue of whether the trial court should be reversed, with remand for new trial. The *Knapp* ruling was 5-4 in favor of abolishing the instruction.

2. WHETHER THE TRIAL COURT PROPERLY APPLIED THE BURDEN TO PROVE AFFIRMATIVE DEFENSES TO THE DEFENDANT.

Instruction 31 was a "Legal Excuse" instruction, and Instruction 22 discussed the Appellee's burden about that excuse. It is undisputed that the Appellee departed from his lane of travel, first to go off the road to the right, then again after he got back on the road he went across the line into oncoming traffic to hit Rev. Nielson head on. In addition, Mr.

Miranda testified that he exceeded the posted speed limit on icy roads *throughout* the encounter with John Doe. As in *Stevens*, "Plaintiff demonstrated that Defendants almost certainly violated the statutes. We do not require a plaintiff to eliminate all possible explanations of causation that the ingenuity of counsel might suggest." *Id.* at 15–16.

The Appellee argued that the doctrine excused the violation. This Court discussed the applicable law under those circumstances in *Dartt v. Berghorst*, 484 N.W.2d at 894:

> It is settled law that a defendant has the burden of proving legal excuse. *Stevens*[426 N.W.2d at 16]; *Meyer*[254 N.W.2d at 111]. Berghorst does not dispute this. He argues instead, the jury instructions as a whole were sufficient to "give a full and correct statement of the applicable law," relying on *Jahnig v. Coisman*, 283 N.W.2d 557, 560 (S.D.1979). *See also Frazier v. Norton*, 334 N.W.2d 865, 870 (S.D.1983); *Dwyer*[92 N.W.2d 199]. We disagree. . . . Indeed, *Jahnig* held failure to give, in a products liability action, a jury instruction on strict liability constituted prejudicial error because the jury may have concluded that the "plaintiff carried a burden of proof of which she was relieved under the strict liability doctrine." *Jahnig*, 283 N.W.2d at 561. *Dartt*,484 N.W.2d at 894.

The legal excuse defense permits one who is negligent *per se* to escape liability only if complying with the law was impossible. *Dartt*. Plaintiff alleged that Giyo Miranda was negligent *per se* in exceeding the posted speed limit *prior* to the encounter with John Doe and in failing to maintain in his proper lane both *before* the encounter and *after* the encounter with John Doe. It was possible to not speed before encountering Doe. Had he not been speeding, he could have corrected properly and avoided hitting Mr. Nielson, so it was not impossible for Mr. Miranda to not cross the center line. Mr. Miranda confessed that he did not correct properly. TT 158. Appellant objected to the legal excuse instruction (number 31), just as the other sudden emergency issues. The issue was clearly argued, and Defense counsel argued against the version without the legal excuse language proposed by the plaintiff. TT at p. 186:16–21.

The substantive objections to the legal excuse instruction are the same for the sudden emergency doctrine. The appellant is expected to argue that an objection to sudden emergency as a legal excuse was not preserved. "We have held that no particular formality is required when objecting to instructions; the objection is sufficient if the judge was informed of the possible error so that he might have the opportunity to make corrections." *Frey v. Kouf*, 484 N.W.2d 864, 867 (S.D. 1992) (citations omitted). Counsel incorporated the argument "between yesterday and today." TT at p. 189. The trial court made specific rulings on those objections, and the issue was properly before the court and ruled on. The objection to using sudden emergency as a legal excuse was preserved for this Court to review.

Instruction 22, correctly states that issues that must be proven by the appellant. However, this instruction incorrectly states the issues that must be proved by the appellee on his affirmative defenses. Assuming appellant proved its burden, appellee had multiple issues that needed to be proven. First, that he was confronted with a sudden emergency. Second, that he acted reasonably in the face of that emergency. Third, that his violation of a safety statute was legally excused. This instruction improperly eliminated the defendant's burden of proof. *See Dartt*. This instruction was timely and properly objected to. SR 138 (objecting to defendant's proposed instruction); TT 186, 188–189.

3. WHETHER THE TRIAL COURT GAVE AN IMPROPER DIRECTOR INSTRUCTION REMOVING FACT QUESTIONS FROM THE JURY AND DIRECTING VERDICT FOR THE DEFENDANT.

The trial court gave a lengthy director instruction on the issues to be determined at Instruction 20. This case did not require special interrogatories. The trial court gave a

lengthy director instruction over appellant's objection. *See* SR 133 (objecting to proposed director instruction).

> A trial court has discretion in the wording and arrangement of its jury instructions, and therefore we generally review a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard. However, no court has discretion to give incorrect, misleading, conflicting, or confusing instructions. *Stern Oil Co., Inc. v. Brown*, 2018 S.D. 15, ¶ 12, 908 N.W.2d 144, 150, *reh'g denied* (Mar. 30, 2018) (quoting *Karst v. Shur-Co.*, 2016 S.D. 35, ¶ 8, 878 N.W.2d 604, 609). *See also Montana-Dakota Utilities Co. v. Parkshill Farms, LLC*, 2017 S.D. 88, ¶ 28, 905 N.W.2d 334, 343 (reversing jury verdict based on incomplete director instruction).

It is critically important that a verdict director be correct and not invade the province of the factfinder on disputed questions of fact. Instruction 20 excluded a number of the most critical issues of the case, and stated the law in a confusing and misleading way that directed the jury toward the defense verdict.

The first issue is stated as: "Was Defendant Giyo Miranda negligent on November 20, 2013? If your answer is 'no,' you *must* return a verdict for Defendant Giyo Miranda." (emphasis added). This omits the critical issue of John Doe's negligence and excuses him from liability from the beginning, even though that liability formed the entire basis of appellee's case.

The instruction goes on "If you find Defendant's negligence was not a legal cause of Plaintiff State Farm's injuries, *Plaintiff is not entitled to recover damages* and you must return a verdict for the Defendant." (emphasis added). Again, this omits John Doe's negligence, which formed the entire basis for the defense. Appellee argued that John Doe was 100% responsible, but the trial court instructed the jury that the only way it could impose liability on Doe was if it imposed liability on Miranda, which is contrary to both

the facts and the law. Plaintiff may recover from either or both, so long as their conduct was a substantial factor in bringing about the injury.

The instruction goes on "If you find that Giyo Miranda was *confronted* with a sudden emergency, you then *must* return a verdict for Defendant Giyo Miranda." (emphasis added). In this director, the Court directed the jury that all that was required was that the defendant be "confronted" to be excused and absolved from any negligence or obligation to exercise ordinary care under the circumstances, regardless of his response to the confrontation. This is the conceptual equivalent of an unavoidable accident or "imminent peril" director that was rejected by the Texas court in *Davila v. Sanders*. This director eliminated and incorrectly stated the law in South Dakota. Being confronted by an emergency is only the beginning. This instruction directs that the jury "must" absolve the defendant due to the mere *existence* of an emergency, regardless of how the defendant's acted. This instruction is so critically prejudicial to the Plaintiff because one argument of the plaintiff was that the defendant acted unreasonably under the circumstances. The instruction directs the verdict for the defense, even if the defendant acted unreasonably, so long as some sudden emergency existed, and that the defendant was "confronted" by it. This director instruction had the effect of a directed verdict on the issue of the reasonableness of defendant's conduct after being confronted with a sudden emergency. That question is exclusively for the jury. Directing the jury to find the conduct reasonable, simply because an emergency existed, is inconsistent with the law.

The remainder of the director instruction improperly made the negligence of John Doe contingent upon the threshold decision of the three other issues. It is an independent question. The instruction deprived the jury of the ability to find John Doe 100% at fault,

which was essentially the defendant's position throughout trial. "Erroneous instructions are prejudicial under SDCL 15–6–61 when in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party." *Vetter v. Cam Wal Elec. Co-op., Inc.*, 2006 S.D. 21, ¶ 10, 711 N.W.2d 612, 615.

CONCLUSION

This is an automobile negligence case, not a sudden emergency case. The facts came out in one short day of testimony. It is undisputed that someone other than Rev. Nielson caused it by disregarding the rules of the road, either John Doe in crossing into oncoming traffic, or Giyo Miranda, or both. This matter should be reversed.

Dated this 19th day of October, 2018.

HELSPER, McCARTY, & RASMUSSEN P.C.

/s/ Benjamin Kleinjan

Benjamin L. Kleinjan
Attorneys for Appellant
1441 Sixth Street, Suite 200
Brookings, S.D. 57006
(605) 692-7775

CERTIFICATE OF SERVICE

The undersigned certifies that on the 19th day of October, 2018, the foregoing brief and attached appendix were transmitted to the South Dakota Supreme Court electronically, with one Original bearing manually affixed signatures and two photocopies via U.S. mail, and with service upon the following by U.S. Mail:

Matthew McIntosh
4200 Beach Dr Ste 3,
Rapid City, SD 57702

HELSPER, McCARTY, & RASMUSSEN P.C.

/s/ Benjamin Kleinjan

_____

Benjamin L. Kleinjan
Attorneys for Appellant
1441 Sixth Street, Suite 200
Brookings, S.D. 57006
(605) 692-7775

CERTIFICATE OF COMPLIANCE

The undersigned, Benjamin L. Kleinjan, attorney for the Appellant in the above-captioned matter, hereby certifies, pursuant to SDCL 15-26A-66(b)(4) that the Appellant's Brief was completed in Times New Roman typeface, 12 point, and according to the word-processing system used to prepare the brief, Microsoft Word 2016, it contains 9,868 words, excluding table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel.

Dated this 19th day of October, 2018.

HELSPER, McCARTY, & RASMUSSEN P.C.

/s/ Benjamin Kleinjan

Benjamin L. Kleinjan
Attorneys for Appellant
1441 Sixth Street, Suite 200
Brookings, S.D. 57006
(605) 692-7775

APPENDIX

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, vs. GIYO BRYAN MIRANDA, Defendant and Third-Party Claimant, vs. JOHN DOE, Third-Party Defendant.	)	40CIV15-000052 **JUDGMENT ON JURY VERDICT**

This action came on for trial on April 26 and 27, 2018, before this Court and a jury, and the issues having been duly tried and the jury having duly rendered its verdict for the Defendant, GIYO BRYAN MIRANDA, it is hereby

ORDERED and ADJUGED that the Plaintiff, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, takes nothing, and that the action be dismissed on the merits, and that the Defendant, GIYO BRYAN MIRANDA, recover of the Plaintiff, STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, his costs of defending the action in the sum of $ 1266.01 , which are to be hereafter taxed according to applicable law.

Dated this 15TH day of MAY, 2018.

BY THE COURT:
Signed: 5/15/2018 10:22:06 AM

Hon. Eric Strawn
Circuit Court Judge

ATTEST:

CAROL LATUSECK
Clerk of Courts

By: KRISTIE GIBBENS
(Deputy)

STATE OF SOUTH DAKOTA)) SS. COUNTY OF LAWRENCE)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, vs. GIYO BRYAN MIRANDA, Defendant/ Third-Party Claimant, vs. JOHN DOE, Third-party Defendant.	40 CIV. 15-52 **PLAINTIFF'S MOTION FOR NEW TRIAL**

Comes now the above-named Plaintiff, by and through the undersigned attorney of record, and moves that a new trial be granted based on the entire file herein, the supporting brief, an affidavit, and pursuant to SDCL 15-6-59(a)(1), (5)–(7). This motion is being served and filed not later than ten (10) days after the notice of entry of judgment, which was May 15, 2018. As to the grounds set forth is 15-6-59(a)(6), the evidence is insufficient to justify the verdict in the following particulars: That all evidence indicated either John Doe, Giyo Miranda, or both were liable for the damages herein, that no evidence tended to show that both John Doe and Giyo Miranda were not liable, and that the negligence of John Doe was argued by the defense as the cause of the damages, and the excuse of the Defendant, who would not be excused but for the negligence of John Doe causing the damages herein.

WHEREFORE, it is requested that the Court, pursuant to SDCL 15-6-59(b), grant the relief requested herein within twenty (20) days hereof, and grant such other further relief as the Court deems just, proper, equitable, and not inconsistent therewith.

Respectfully submitted and dated this 23rd day of May, 2018.

HELSPER, McCARTY & RASMUSSEN, P.C.

/s/ Benjamin Kleinjan

Benjamin L. Kleinjan
Attorney for Plaintiff
1441 6th Street, Suite 200
Brookings, SD 57006
605-692-7775

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of May, 2018, a true and correct copy of the foregoing PLAINTIFF'S MOTION FOR NEW TRIAL was served upon Matthew McIntosh, attorney for the Defendant, Giyo Miranda, via Odyssey File & Serve.

/s/ Benjamin L. Kleinjan
Benjamin L. Kleinjan

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
) SS.		
COUNTY OF LAWRENCE)		FOURTH JUDICIAL CIRCUIT
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	40 CIV. 15-52
Plaintiff,	)	**PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSION OF LAW AND ORDER**
vs.	)	
GIYO BRYAN MIRANDA,	)	
Defendant/ Third-Party Claimant,	)	
vs.	)	
JOHN DOE,	)	
Third-party Defendant.	)	

Comes now the Plaintiff by and through the undersigned attorney and proposes the following with regard to the Plaintiff's motion for new trial herein:

The above-captioned matter came before the Court on June 27, 2018 regarding the Plaintiff's motion for new trial. The Court enters its findings of fact, conclusions of law, and order as follow:

FINDINGS OF FACT

1. On the evening of November 20, 2013, the Defendant, Giyo Miranda, was traveling on interstate 90 en route from Rapid City toward Whitewood.

2. Defendant Miranda took the Whitewood exit ramp off the interstate.

3. Defendant Miranda stopped at the stop sign at the bottom of the ramp.

4. At the stop sign, the Defendant knew that the road was very treacherous and icy, and knew that he should be traveling slower than usual.

5. The Defendant then made a right-hand turn onto the westbound lane of Highway 34.

6. The Defendant accelerated in his westbound lane on Highway 34 past a posted speed limit sign indicating a speed limit of 30mph.

7. The Defendant accelerated up to a speed of between 30 – 35mph.

8. The Defendant knew he was going between 30 – 35mph because he observed it on his speedometer.

9. As the road curved to the Defendant's left, headlights shined square in his face.

10. The Defendant reacted by swerving to the right, going off the highway and partially onto the shoulder on the outside of the curve.

11. The Defendant then turned his wheel to the left, coming back onto the westbound lane of the highway.

12. The Defendant maintained a speed of 30 – 35 mph.

13. The Defendant then began to skid on the ice and proceeding to steer and counter-steer, turning left into oncoming traffic in the eastbound lane.

14. The Defendant then collided head-on with the Plaintiff's insured.

15. The collision with the plaintiff's insured took place a short distance west of a 45 mile per hour sign.

16. That collision caused property damage and personal injury to the Plaintiff's insured, which was paid for by the Plaintiff, and resulted in this action.

CONCLUSION OF LAW

17. Prior to seeing the headlights in his face, the Defendant was negligent and negligent per se in exceeding the posted speed limit on a road that he knew was icy and treacherous.

18. The only person qualified to testify regarding the Defendant's speed was the Defendant, and a party can claim no better version of the facts than those to which he has testified.

19. The South Dakota Supreme Court has held that the sudden presence of blinding headlights does not satisfy the "surprise factor" required for application of the sudden emergency doctrine. *Howard v. Sanborn*, 483 NW2nd 796, 799 (S.D. 1992).

20. If the road conditions are generally icy, and the driver specifically knows of the poor road conditions, and the driver fails to drive accordingly and then loses control on the ice, he cannot set it up as an emergency. *Dartt v. Berghorst*, 484 N.W.2d 891, 896 (S.D. 1992).

21. Based on the road conditions and the posted speed limit, the Defendant could have reasonably foreseen that he or others could lose control on the slippery roads and slide into oncoming traffic, and was charged by law to drive accordingly in anticipation of the same. As such, departure from one's lane of travel would also not satisfy the "surprise factor" requirement under the emergency doctrine.

22. Defendant Miranda argues that the third party defendant was negligent per se in failing to maintain his proper lane of travel. The South Dakota Supreme Court has held that if the emergency alleged is caused or contributed to by the negligence or negligence per se of any party, then it would be prejudicial and improper to give a sudden emergency instruction. *Meyer v. Johnson*, 254 N.W.2d 107 (S.D. 1977); *Del Vecchio v. Lund*. 293 N.W.2d 474 (S.D. 1980); *Hoffman v. Royer*, 359 N.W.2d 387 (S.D. 1984).

23. Regardless of whether the Defendant was negligent, negligent per se, or otherwise, a party may not be engaged in any conduct which contributes to the existence of the emergency. Without question, the conduct of the Defendant contributed to the circumstances causing him to go off the road, come back on to the road and subsequently enter the oncoming lane of traffic. The particulars of his contribution were related to his speed and lookout for approaching vehicles. The defendant's contribution was clearly more than slight. The plaintiff's insured was not negligent or contributorily negligent.

24. There was sufficient evidence of the Defendant's negligence presented to exclude this instruction that would have served only to improperly emphasis the Defendant's position. *See Carpenter v. City of Belle Fourche*, 2000 S.D. 55 609 N.W.2d 795.

25. The Defendant was negligent per se prior to the headlights shining in his face, so the defendant cannot set up the headlights or the driver behind them as a legal excuse to his negligence per se.

26. The sudden emergency doctrine requires the Defendant to show that at least two courses of action were available when the emergency was first perceived. The Defendant's testimony was that his only option when he saw the headlights was to swerve to the right. As such, he did not satisfy this element.

27. After the Defendant swerved to the right, and it was clear that there was no risk of an imminent head-on collision, the Defendant was faced with multiple choices, including whether to stop, slow down, or re-enter the westbound lane. The

Defendant elected to re-enter. After reentering the highway, the Defendant began losing control on the slippery road. When the Defendant perceived he was losing control on the slippery road, he was faced with multiple choices, including whether to brake, steer to the right onto the shoulder, or steer to the left into oncoming traffic. The Defendant selected the latter choice and steered into oncoming traffic. All of these courses of action were not available when the emergency was first perceived. They came later.

28. The last prong of the analysis is whether the choice of the course of action in face of the eminent emergency was a choice which would have been taken by a reasonably prudent person under similar circumstances. The Defendant previously testified that his only course of action was to swerve to the right. A party can claim no better version of the facts than which he himself has testified to.

29. The facts of this case are virtually identical to *Knapp v. Stanford*, 392 So.2d 196, 197 (Miss. 1980). The Court concludes that the *Knapp* decision is persuasive and guides the Court's analysis here. The Court adopts the reasoning of the *Knapp* court by reference.

30. The Court concludes that the Defendant was not confronted with a sudden emergency, as that concept is defined by the law, that the Defendant sufficiently contributed to the existence of the condition alleged to be an emergency, that the Defendant was not faced with more than one choice at the moment of perception of the condition he alleges as an emergency, and that as such there was not any question as to his choice of action in the moment he perceived the condition he alleges is an emergency.

31. The Court concludes that the sudden emergency doctrine does not apply.

32. The Court concludes that even if the defendant had satisfied the four elements of the sudden emergency doctrine, the prejudice of giving the instruction was too great.

33. The Court further concludes that each instruction which references the sudden emergency doctrine should not have been given, and the proper remedy under the circumstances is to grant a new trial.

34. The Court further concludes that each instruction with regard to the sudden emergency instruction, including but not limited to instruction 20, 22, 25, and 31 should not have been given, was timely objected to, and the appropriate remedy is to grant a new trial.

35. Specifically, instruction 20 improperly directed the jury to find for the defendant. The instruction was convoluted and improperly set forth the issues. The appropriate remedy is to grant the motion for new trial.

36. Specifically, instruction 22 incorrectly states the issues that must be proved by the defendant. Assuming that the Plaintiff had met its burden, the defendant had multiple issues that needed to be proven. First, that he was confronted with a sudden emergency. Second, that he acted reasonably in the face of that emergency. Third, that his violation of a safety statute was legally excused. This instruction improperly minimized or eliminated the defendant's burden of proof. This instruction was timely and properly objected to. This instruction was improperly given and the remedy is to order a new trial.

37. Instruction 25 was improper for the reason that the sudden emergency instruction does not apply and unfairly prejudiced the jury.

38. Specifically, with regard to instruction 31, the court concludes this instruction should not have included the legal excuse addendum. The encounter with the headlights on the curve can not in any way retroactively excuse the defendant's negligence per se prior to encountering said headlights. The court's improper use of the "or" conjunctive allowed the speeding to be excused if the subsequent lane driving violation was excused. This is a misstatement of the legal excuse doctrine, which requires that each instance of negligence per se be excused.

ORDER

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the motion for new should be, and hereby is, granted.

It is requested that the Court adopt the foregoing in its entirety. Respectfully submitted and dated this 2nd day of July, 2018.

HELSPER, McCARTY & RASMUSSEN, P.C.

/s/ Benjamin Kleinjan

Benjamin L. Kleinjan
Attorney for Plaintiff
1441 6th Street, Suite 200
Brookings, SD 57006
605-692-7775

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 2nd day of July, 2018, a true and correct copy of the foregoing PLAINTIFF'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ORDER was served upon Matthew McIntosh, attorney for the Defendant, Giyo Miranda, via Odyssey File & Serve.

/s/ Benjamin L. Kleinjan
Benjamin L. Kleinjan

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, vs. GIYO BRYAN MIRANDA, Defendant and Third-Party Claimant, vs. JOHN DOE, Third-Party Defendant.	)	40CIV15-000052 **FINDINGS OF FACT AND CONCLUSIONS OF LAW RE: PLAINTIFF'S MOTION FOR NEW TRIAL**

The above entitled matter came on before the Court on June 27, 2018 regarding Plaintiff's Motion for New Trial. The Court enters its Findings of Fact and Conclusions of Law as follows:

FINDINGS OF FACT

1. On November 20, 2013, Giyo and Kevin Miranda traveled back to Belle Fourche from Rapid City on Interstate 90. (*See* Trial Tr. 144:12-163:12, April 26, 2018).

2. Giyo was driving and exited Interstate 90 at the Whitewood exit. (*Id.*)

3. Giyo stopped at the stop sign, turned right onto Highway 34, and began to travel westbound. (*Id.*)

4. Prior to this accident, Giyo was not distracted. (Trial Tr. 149:9-24).

5. Prior to this accident, Giyo estimated he was traveling around 30, 35 miles per hour. (*Id.*)

6. As Giyo negotiated the initial curve on Highway 34, an unknown vehicle traveling eastbound entered Miranda's westbound lane causing Giyo to swerve to the shoulder to avoid a head-on collision with the unidentified vehicle. (*Id.* at 144:12-163:12).

7. In an instant, Giyo tried to pull the vehicle back onto the road but the vehicle began to slide. *Id.*

8. Giyo Miranda had multiple courses of conduct available upon encountering the sudden and unexpected danger which included: (1) do nothing and have a head-on collision; (2) swerve right; (3) swerve left; or (4) attempt to stop on the shoulder of the road. (*See* Trial Tr. 156:24-158:6).

9. When Giyo attempted to correct the slide, he slid into the eastbound lane and collided with Plaintiff's insured.

10. The unidentified vehicle never stopped. *Id.*

11. The accident occurred in the 45 mile per hour zone of Highway 34. (*Id.* at 79:22-25).

12. Mr. Nielson testified on direct examination that he did not recall a vehicle driving in front of him. *(See* Trial Tr. 85:12-113:20).

13. On cross-examination, Loyd Nielson admitted there was a car approximately 100 yards in front of him and he could see the vehicle hit its brakes in the area where Giyo and Kevin allege the vehicle came into their lane of travel. *Id.*

14. Plaintiff's "Exhibit A" is not contained in the Court's file along with all the other denied and signed jury instructions.

15. Plaintiff never offered "Exhibit A" during the settling of jury instructions. However, this Court allowed Plaintiff to Supplement the record with its inclusion even though it was never presented to the jury for instruction.

16. Plaintiff drafted and offered Instruction 31 that was ultimately read to the jury.

CONCLUSIONS OF LAW

17. Sufficient evidence was presented at trial that Giyo was in fact confronted by a sudden and unexpected danger when an unidentified vehicle came into his lane of travel. Meyer v. Johnson, 254 N.W.2d 107, 110-11 (S.D. 1977),

18. Sufficient evidence was presented at trial that the sudden and unexpected danger of an unidentified vehicle suddenly coming into Giyo's lane of travel was not brought about by Giyo's own negligence. *Id.*

19. There were factual disputes preventing, as a matter of law, a finding that Giyo was speeding prior to the unidentified vehicle suddenly coming into Giyo and Kevin's lane of travel.

20. There was no evidence presented by Plaintiff that Giyo's alleged speed contributed to or brought about the emergency situation. *Id.*

21. Sufficient evidence was presented at trial that Giyo had multiple courses of conduct available upon encountering the sudden and unexpected danger which included: (1) do nothing and have a head-on collision; (2) swerve right; (3) swerve left; or (4) attempt to stop on the shoulder of the road. (*See* Trial Tr. 156:24-158:6) (*See also Meyer*, at 110).

22. Sufficient evidence was presented at trial that the decision to swerve away from oncoming traffic and immediately attempt to keep the vehicle on the road was reasonable even though it may develop later that a different choice would have been better. *Meyer*, at 110.

23. The record contained sufficient evidence to provide the sudden emergency instruction to the jury.

24. The reasoning, rationale, or other legal support from *Knapp v. Stanford*, 392 So.2d 196, 197 (Miss. 1980) is not controlling, persuasive, or adopted by this Court.

25. When all the jury instructions provided in this matter are read as a whole, they correctly stated the law and informed the jury.

26. The jury was properly instructed according to the pleadings and the issues tried at the trial by the parties.

27. The Plaintiff's Motion for a New Trial is denied.

28. Plaintiff's Emergency Motion to supplement the record as to Exhibit "A" is granted.

29. Plaintiff's Motion to Amend to Conform to the Evidence is granted.

Dated this 19th day of July, 2018.

BY THE COURT:

Eric J. Strawn
Circuit Court Judge

ATTEST:
CLERK OF COURTS
By: _____
Deputy

FILED
JUL 19 2018
SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT
By _____

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	) SS	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, vs. GIYO BRYAN MIRANDA, Defendant and Third-Party Claimant, vs. JOHN DOE, Third-Party Defendant.	)	40CIV15-000052 **ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL**

The above entitled matter came on before the Court on June 27, 2018 regarding Plaintiff's Motion for New Trial. Plaintiff appearing by and through counsel, Benjamin L. Kleinjan, (telephonically), Defendant appearing by and through counsel Matthew J. McIntosh, Court having heard arguments of counsel, and having entered its Findings of Fact and Conclusions of Law, now therefore,

IT IS HEREBY ORDERED, Plaintiff's Motion for New Trial is hereby **DENIED**.

Dated this 19th day of July, 2018.

BY THE COURT:

Honorable Eric James Strawn
Circuit Court Judge

ATTEST:
CLERK OF COURTS

By _____ Clerk/Deputy

FILED

JUL 19 2018

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

STATE OF SOUTH DAKOTA)) SS. COUNTY OF LAWRENCE)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, a/s/o LOYD NIELSON, Plaintiff, vs. GIYO BRYAN MIRANDA, Defendant/ Third-Party Claimant, vs. JOHN DOE, Third-party Defendant.	40 CIV. 15-52 **NOTICE OF APPEAL**

TO: DEFENDANT GIYO BRYAN MIRANDA AND HIS ATTORNEY MATTHEW J. MCINTOSH:

Notice is hereby given that State Farm Mutual Automobile Insurance Company does hereby appeal to the South Dakota Supreme Court from the whole of the Order and Judgment of Court rendered in the above-entitled action, said Court having rendered judgment on jury verdict herein on or about the 15th day of May, 2018 and thereafter denying Plaintiff's post-trial motion for new trial by its Order dated July 19, 2018, notice of which was given on July 23, 2018.

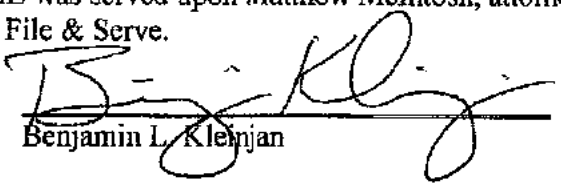
Dated this 20th day of August, 2018.

HELSPER, McCARTY & RASMUSSEN, P.C.

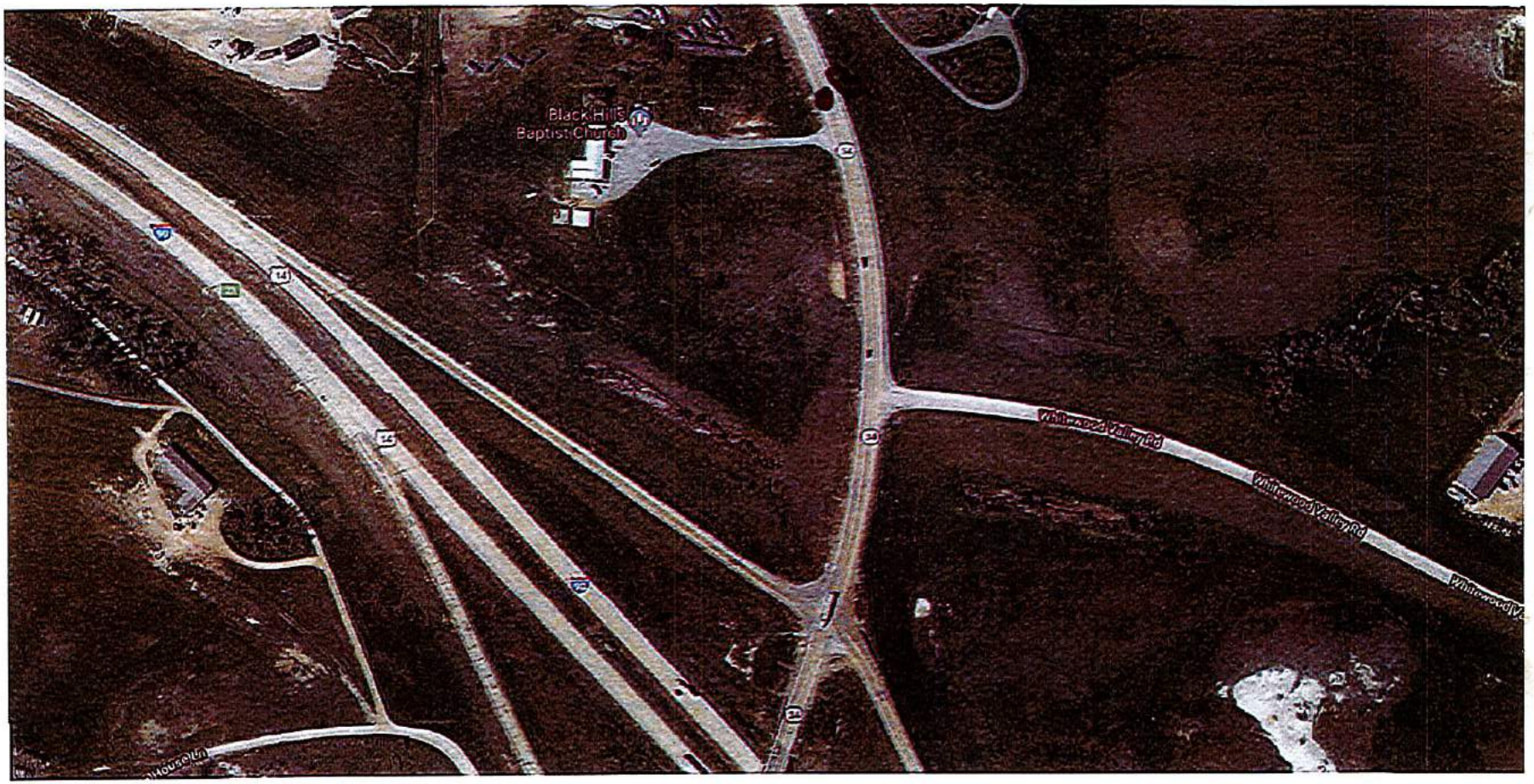
Benjamin L. Kleinjan
Attorney for Plaintiff
1441 6th Street, Suite 200
Brookings, SD 57006
605-692-7775

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 20th day of August, 2018, a true and correct copy of the foregoing NOTICE OF APPEAL was served upon Matthew McIntosh, attorney for the Defendant, Giyo Miranda, via Odyssey File & Serve.



Benjamin L. Kleinjan



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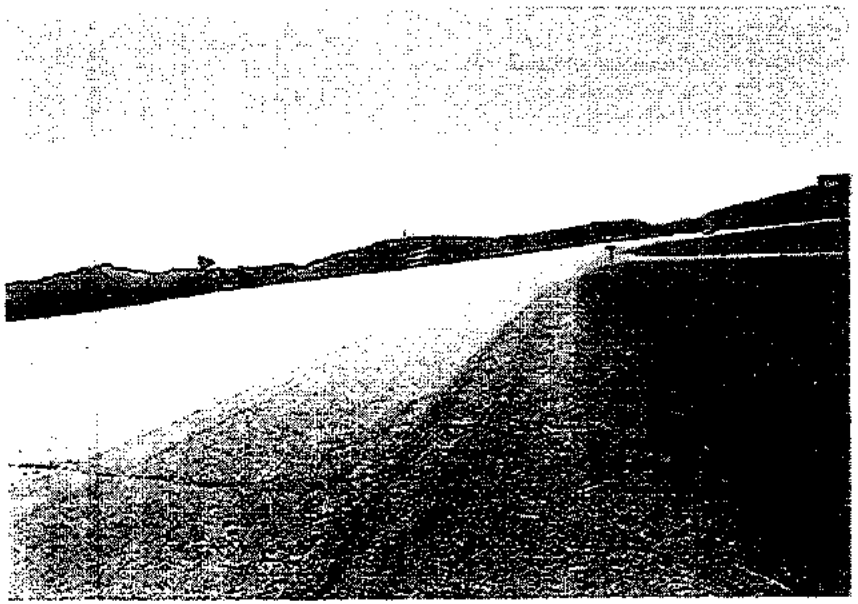

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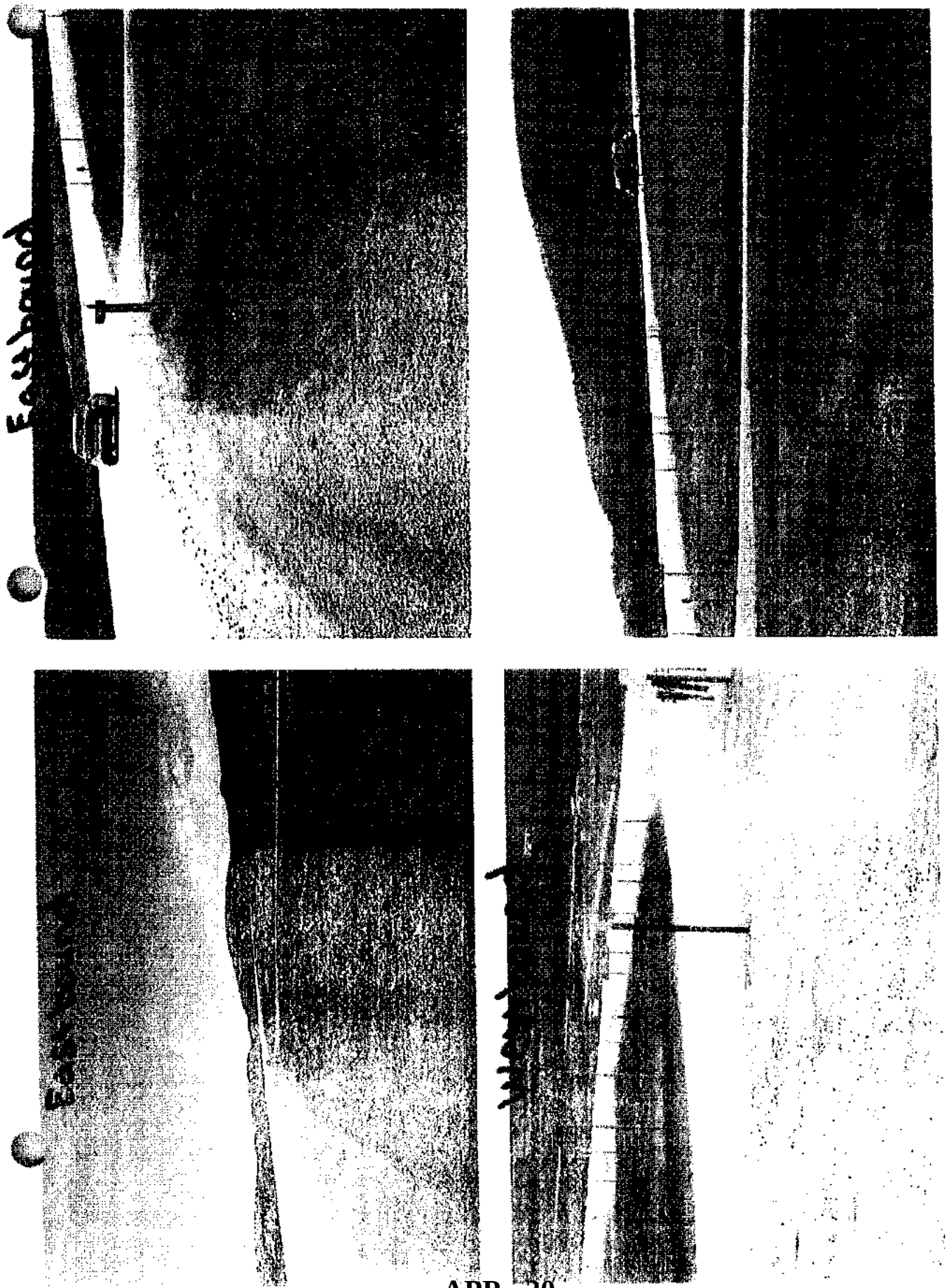
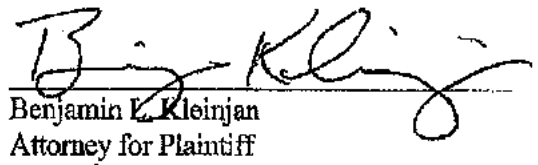


STATE OF SOUTH DAKOTA)) SS. COUNTY OF LAWRENCE)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, vs. GIYO BRYAN MIRANDA, Defendant/ Third-Party Claimant, vs. JOHN DOE, Third-party Defendant.	40 CIV. 15-52 **JURY INSTRUCTIONS PROPOSED**

Comes now the undersigned attorneys, as instructed by the Court in the above captioned matter, and for the above-named parties, and do hereby submit the following Proposed Jury Instructions. Said proposed instructions are consolidated as a single document with objections included. An electronic copy of said instructions are being transmitted to the Court via email in Microsoft Word format.

Dated this 19th day of April, 2018.

HELSPER, McCARTY & RASMUSSEN, P.C.



Benjamin K. Kleinjan
Attorney for Plaintiff
1441 6th Street, Suite 200
Brookings, SD 57006
605-692-7775

Dated this 19th day of April, 2018.

BEARDSLEY, JENSEN & LEE

Matthew McIntosh
Attorney for Defendant
4200 Beach Drive, Suite #3
Rapid City, SD 57709
605-721-2800

Filed: 4/19/2018 12:19:11 PM CST Lawrence County, South Dakota 40CIV15-000052

Instruction No. ___

This is a civil case brought by State Farm Mutual Automobile Insurance Company who is considered a plaintiff against Giyo Bryan Miranda who is a defendant. Giyo Miranda has brought a third-party complaint against John Doe. Giyo Miranda is also known as a third-party Plaintiff and John Doe is a third-party Defendant.

The plaintiff alleges that the defendant negligently caused damages and injuries when he caused his automobile to crash into another, which were paid for by the plaintiff. The Defendant, Giyo Miranda, denies he was negligent and further denies the accident caused the injuries and damages being claimed by the Plaintiff in this lawsuit.

As an affirmative defense, Defendant Giyo Miranda alleges that a vehicle driven by John Doe, crossed into Defendant Giyo Miranda's lane of travel, causing a sudden and unexpected danger that was not of his own making. Defendant Giyo Miranda alleges that the vehicle driven by John Doe created an accident that was an unavoidable accident.

SDPJI 1-10-20 [revised by the defendant]

PLAINTIFF OBJECTS

The Plaintiff respectfully objects to the Defendant's proposed modification to instruction 1-10-20 as it relates to unavoidable accident and sudden emergency. It is critical for the Court to recognize that the only emergency alleged is the negligent driving of a named party, John Doe. The Defendant has affirmatively testified that he knew the roads were slippery but that John Doe came into his lane.

According to the committee, the use of unavoidable accident and sudden emergency language in instructions generally "is disfavored". The SD Supreme Court indicates that the jury may be instructed regarding unavoidable accidents only if something *other than* the negligence of one of the parties to the lawsuit caused the mishap. Otherwise, such instructions serve "only to improperly emphasize the defendants' position." *Carpenter v. City of Belle Fourche,* 2000 S.D. 55 at ¶ 32, 609 N.W.2d 751, 764.

Here, the defendant alleges that John Doe's negligent driving was the cause of the mishap. No other surprise is present or alleged except the negligence of a named party.

The Supreme Court went so far as to reverse a jury verdict upon a virtually identical defense rationale. In *Meyer v. Johnson,* 254 N.W.2d 107 (S.D. 1977), the defendant testified that under slippery and snowy conditions, "the [other] car appeared 'right there in front of me, and I hit the brakes,' and 'we collided.'" *Id.* at 111. The Court held that "it was improper to give this instruction" and reversed the jury. Since the only surprise alleged by the defendant is the negligence of John Doe, any instruction on unavoidable accident or sudden emergency would be improper. If "[t]here is no evidentiary foundation in the record to show the necessary element of 'surprise' or that something other than the negligence of one of the drivers caused the mishap" then nothing "would sustain the giving of this instruction." *Plucker v. Kappler,* 311 N.W.2d 924, 925 (S.D. 1981) (holding use of such instruction constituted error).

Of the fifteen cases identified by the instruction committee, the instruction's use was affirmed only two times. The Court affirmed denial of the instruction five times, and on six occasions held that using the instruction was error. Although it is often error to give the instruction, "it is not ordinarily reversible error to refuse or fail to give an 'unavoidable accident' or an equivalent accident instruction, since the substance of any such instruction is usually covered by other instructions given, especially those on negligence, proximate cause, and burden of proof." *Henrichs v. Inter City Bus Lines,* 111 N.W.2d 327, 332 (S.D. 1961).

Benjamin Kleinjan

Instruction No. ____

The plaintiff claims to have been injured and sustained damages as a legal result of the negligence of the defendant in one or more of the following respects:

As a result of the defendant's negligence, the Plaintiff's insured sustained property damage, medical injuries, and further damages, which were paid for by the Plaintiff pursuant to it's policy of insurance, and for which the plaintiff is subrogated.

The Defendant, Giyo Miranda, denies he was negligent and further denies the accident caused the injuries and damages being claimed by the Plaintiff in this lawsuit.

As an affirmative defense, Defendant Giyo Miranda alleges that a vehicle driven by John Doe, crossed into Defendant Giyo Miranda's lane of travel, causing a sudden and unexpected danger that was not of his own making. Defendant Giyo Miranda alleges that the vehicle driven by John Doe created an accident that was an unavoidable accident.

SDPJI 1-40-10 [revised by Defendant]

PLAINTIFF OBJECTS

The Plaintiff respectfully objects to the Defendant's proposed modification to instruction 1-40-10 for the same reasons as set forth in the objection to 1-10-20.

Benjamin Kleinjan

Instruction No. ____

The issues to be determined by you in this case are these:

First, was Defendant Giyo Miranda negligent on November 20, 2013?

If your answer to that question is "no," you must return a verdict for Defendant Giyo Miranda. If your answer is "yes," you will have a second issue to determine, namely:

Was that negligence a legal cause of any injury to Plaintiff State Farm?

If you find Defendant's negligence was not a legal cause of Plaintiff State Farm's injuries, Plaintiff is not entitled to recover damages and you must return a verdict for the Defendant.

If you find Defendant's negligence was a legal cause of Plaintiffs' injuries, you then must determine a third issue:

Was Defendant Giyo Miranda confronted with a sudden emergency?

If you find that Defendant Giyo Miranda was confronted with a sudden emergency, you then must return a verdict for Defendant Giyo Miranda.

If you find that Defendant Giyo Miranda was not confronted with a sudden emergency, you then must determine a fourth issue, namely:

Was third-party Defendant John Doe also negligent?

If your answer to that question is "no," you must return a verdict for Plaintiff State Farm. If your answer is "yes," you will have a fifth issue to determine, namely:

Was third-party Defendant John Doe's negligence also a legal cause of Plaintiff State Farm's injuries?

If your answer to that question is "no," you must return a verdict for Plaintiff State Farm. If your answer is "yes," you will have a sixth issue to determine, namely:

If you find that third-party Defendant John Doe's negligence contributed as a legal cause of Plaintiff State Farm's injuries, you have a sixth issue to determine.

Whether Defendant Giyo Miranda and John Doe are joint tortfeasors.

As indicated in this instruction, you must first determine the questions of liability before you undertake to determine an amount that would compensate for damages, if any, found to have been suffered.

Reference: S.D. Civil Pattern Jury Instruction 1-50-10 [Modified by defendant]

PLAINTIFF OBJECTS

The Plaintiff respectfully objects to the Defendant's proposed modification to instruction 1-50-10 for the same reasons as set forth in the objection to 1-10-20.

This instruction is also objected to as it will unnecessarily confuses the jury and is unnecessarily cumulative to pattern instruction 1-50-40, which has been stipulated to.

Benjamin Kleinjan

Instruction No. ____

In civil actions, the party who has the burden of proving an issue must prove that issue by greater convincing force of the evidence.

Greater convincing force means that after weighing the evidence on both sides there is enough evidence to convince you that something is more likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater convincing force, then your finding upon the issue must be against the party who has the burden of proving it. In this action, the plaintiff has the burden of proving the following issues:

- *That the Defendant was negligent*
- *That the Defendant's negligence caused the damages claimed.*

If Plaintiff's meets this burden, Defendant Giyo Miranda must prove:

- *That he was faced with a sudden and unexpected emergency or that his violation of a safety statute was legally excused.*

In determining whether or not an issue has been proved by greater convincing force of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

SDPJI 1-60-10 [revised by Defendant]

PLAINTIFF OBJECTS

The Plaintiff respectfully objects to the Defendant's proposed modification to instruction 1-50-10 for the same reasons as set forth in the objection to 1-10-20.

Benjamin Kleinjan

Instruction No. ____

When a person is confronted with a sudden emergency, the person has a duty to exercise the care that an ordinarily prudent person would exercise in the same or similar situation. The defendant is not relieved of liability because of a sudden emergency unless, based on the facts, you find:

(1) that the defendant was confronted with a sudden and unexpected danger; and

(2) that defendant's own negligence did not bring about the dangerous situation; and

(3) that the defendant had at least two courses of action available after perceiving the dangerous situation; and

(4) that the defendant's choice of action after confronting the danger was a choice which a reasonably prudent person would have taken under similar circumstances, even though it may later develop that some other choice would have been better.

SDPJI 20-30-30

PLAINTIFF OBJECTS

The Plaintiff respectfully objects to the Defendant's proposed modification to instruction 1-50-10 for the same reasons as set forth in the objection to 1-10-20.

The pattern instruction committee correctly points out that, "appellate courts frequently instruct that the better practice is ordinarily not to give the sudden emergency instruction."

Benjamin Kleinjan

STATE OF SOUTH DAKOTA	)	IN THE CIRCUIT COURT
	)SS.	
COUNTY OF LAWRENCE	)	FOURTH JUDICIAL CIRCUIT
	)	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY	)	**40CIV15-000052**
	)	
Plaintiff,	)	
	)	
vs.	)	**JURY INSTRUCTIONS**
	)	
GIYO BRYAN MIRANDA,	)	
	)	
Defendant/ Third Party Claimant,	)	
vs.	)	
	)	
JOHN DOE,	)	
	)	
Third Party Defendant.	)	

Instruction No. 20

The issues to be determined by you in this case are these:

First, was Defendant Giyo Miranda negligent on November 20, 2013?

If your answer to that question is "no," you must return a verdict for Defendant Giyo Miranda. If your answer is "yes," you will have a second issue to determine, namely:

Was that negligence a legal cause of any injury to Plaintiff State Farm?

If you find Defendant's negligence was not a legal cause of Plaintiff State Farm's injuries, Plaintiff is not entitled to recover damages and you must return a verdict for the Defendant.

If you find Defendant's negligence was a legal cause of Plaintiffs' injuries, you then must determine a third issue:

Was Defendant Giyo Miranda confronted with a sudden emergency?

If you find that Defendant Giyo Miranda was confronted with a sudden emergency, you then must return a verdict for Defendant Giyo Miranda.

If you find that Defendant Giyo Miranda was not confronted with a sudden emergency, you then must determine a fourth issue, namely:

Was third-party Defendant John Doe also negligent?

If your answer to that question is "no," you must return a verdict for Plaintiff State Farm. If your answer is "yes," you will have a fifth issue to determine, namely:

Was third-party Defendant John Doe's negligence also a legal cause of Plaintiff State Farm's injuries?

If your answer to that question is "no," you must return a verdict for Plaintiff State Farm. If your answer is "yes," you will have a sixth issue to determine, namely:

If you find that third-party Defendant John Doe's negligence contributed as a legal cause of Plaintiff State Farm's injuries, you have a sixth issue to determine.

Whether Defendant Giyo Miranda and John Doe are joint tortfeasors.

As indicated in this instruction, you must first determine the questions of liability before you undertake to determine an amount that would compensate for damages, if any, found to have been suffered.

Instruction No. 22

In civil actions, the party who has the burden of proving an issue must prove that issue by greater convincing force of the evidence.

Greater convincing force means that after weighing the evidence on both sides there is enough evidence to convince you that something is more likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater convincing force, then your finding upon the issue must be against the party who has the burden of proving it. In this action, the plaintiff has the burden of proving the following issues:

- *That the Defendant was negligent*
- *That the Defendant's negligence caused the damages claimed.*

If Plaintiff's meets this burden, Defendant Giyo Miranda must prove:

- *That he was faced with a sudden and unexpected emergency or that his violation of a safety statute was legally excused.*

In determining whether or not an issue has been proved by greater convincing force of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

Instruction No. 25

When a person is confronted with a sudden emergency, the person has a duty to exercise the care that an ordinarily prudent person would exercise in the same or similar situation. The defendant is not relieved of liability because of a sudden emergency unless, based on the facts, you find:

(1) that the defendant was confronted with a sudden and unexpected danger;

(2) that defendant's own negligence did not bring about the dangerous situation;

(3) that the defendant had at least two courses of action available after perceiving the dangerous situation; and

(4) that the defendant's choice of action after confronting the danger was a choice which a reasonably prudent person would have taken under similar circumstances, even though it may later develop that some other choice would have been better.

Instruction No. 31

A statute in this state provides:

Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway.

Another statute in this state provides:

It is unlawful for any person to drive a motor vehicle on a highway located in this state at a speed in excess of those conspicuously posted signs at the beginning and end of a portion of highway to show the maximum speed limit established on that portion of highway.

These statutes sets the standard of care of a reasonable person.

If you find defendant violated either, such violation is negligence unless you find from all the evidence that compliance was excusable because Defendant Giyo Miranda was faced with an emergency, not of his own making, by reason of which he is unable to comply with the statute because of the emergency.

STATUTE OR ORDINANCE — VIOLATION — INTRODUCTION

The following instructions should be given only where the evidence might support a finding that the claim was legally caused by a violation of the statute or ordinance.

Reference:

Albers v. Ottenbacher, 79 S.D. 637, 116 N.W.2d 529 (1962)
An ordinance authorized and duly enacted within a city or municipality has the same local effect as a statute.
C.A. Wayne Const. Co. v. City of Sioux Falls, 27 N.W.2d 916 (S.D. 1947)
McCleod v. Tri-State Milling Co., 71 S.D. 362, 24 N.W.2d 485 (1946)
Harvison v. Herrick, 61 S.D. 245, 248 N.W. 205 (1933)
To apply, the statute or ordinance must be designed for the benefit of individuals and the injured party be within the class of persons for whose protection it was enacted.
Dwyer v. Peters, 58 S.D. 357, 236 N.W. 301 (1931)
Descombaz v. Klock, 58 S.D. 173, 235 N.W. 502 (1931)
City of Huron v. Campbell, 3 S.D. 309, 53 N.W. 182 (1892)

See also:

Highmark Federal Credit Union v. Hunter, 2012 S.D. 37, 814 N.W.2d 413
A federal statute may establish a standard of care, i.e. duty, in a state-based claim.
Baddou v Hall, 2008 S.D. 90, 756 N.W.2d 554
The Court continues to decline to adopt a strict rule or presumption of negligence in cases involving rear end collisions.
Harmon v Washburn, 2008 S.D. 42, 751 N.W.2d 297
Schmidt v. Royer, 1998 S.D. 5, 574 N.W.2d 618
Thompson v. Summers, 1997 S.D. 103, 567 N.W.2d 387
Sommervold v. Grevlos, 518 N.W.2d 733 (S.D. 1994)
Musch v. H-D Co-op., Inc., 487 N.W.2d 623 (S.D. 1992)
Dartt v. Berghorst, 484 N.W.2d 891 (S.D. 1992)
Strain v. Christians, 483 N.W.2d 783 (S.D. 1992)
Hagen v. City of Sioux Falls, 464 N.W.2d 396 (S.D. 1990)
Stevens v. Wood Sawmill, Inc., 426 N.W.2d 13 (S.D. 1988)
Baatz v. Arrow Bar, 426 N.W.2d 298 (S.D. 1988)
The court discusses the "negligence per se" rule.
Amdahl v. Sarges, 405 N.W.2d 638 (S.D. 1987)
Lovell v. Oahe Electric Co-o., 382 N.W.2d 396 (S.D. 1986)
Stevens v. Wood Sawmill, Inc., 426 N.W.2d 13 (S.D. 1988)
Meyer v. Johnson, 254 N.W.2d 107 (S.D. 1977)
Arbach v. Gruba, 89 S.D. 322, 232 N.W.2d 842 (1975)
Engel v. Stock, 88 S.D. 579, 225 N.W.2d 872 (1975)
Alley v. Siepman, 87 S.D. 670, 214 N.W.2d 7 (1974)

Leo v. Adams, 87 S.D. 341, 208 N.W.2d 706 (1973)
Heidemann v. Rohl, 86 S.D. 250, 194 N.W.2d 164 (1972)
Weeks v. Prostrollo Sons, Inc., 84 S.D. 243, 169 N.W.2d 725 (1969)
Bothern v. Peterson, 83 S.D. 84, 155 N.W.2d 308 (1967)
Blakey v. Boos, 83 S.D. 1, 153 N.W.2d 305 (1967)
Cowan v. Dean, 81 S.D. 486, 137 N.W.2d 337 (1965)
Zakrzewski v. Hyronimus, 81 S.D. 428, 136 N.W.2d 572 (1965)
Grob v. Hahn, 80 S.D. 271, 122 N.W.2d 460 (1963)
Roth v. Jelden, 80 S.D. 40, 118 N.W.2d 20 (1962)
Albers v. Ottenbacher, 79 S.D. 637, 116 N.W.2d 529 (1962)
Serles v. Braun, 79 S.D. 456, 113 N.W.2d 216 (1962)
Hullander v. McIntyre, 78 S.D. 453, 104 N.W.2d 40 (1960)
Vaughn v. Payne, 75 S.D. 292, 63 N.W.2d 798 (1954)
Frager v. Tomlinson, 74 S.D. 607, 57 N.W.2d 618 (1953)
Anderson v. Langenfeld, 72 S.D. 438, 36 N.W.2d 388 (1949)
Robertson v. Hennrich, 72 S.D. 37, 29 N.W.2d 329 (1947)
Iverson v. Knorr, 68 S.D. 23, 298 N.W. 28 (1941)
Zeller v. Pikovsky, 66 S.D. 71, 278 N.W. 174 (1938)
Key: Mun. Corps., 120; Negligence, 134(9), 137 *et seq.*

Comment:

A careful check should be made to determine whether the statute or ordinance in question has been judicially construed.

In *Descombaz v. Klock, supra*, and Dwyer v. Peters, supra, the court indicated that a violation of a statute which contributed to, or was the proximate cause of, an injury is negligence as a matter of law. Later decisions, such as *Frager v. Tomlinson, supra*, and *Hullander v. McIntyre, supra*, held that it was a prima facie showing of negligence which could be overcome by evidence of due care. In *Albers v. Ottenbacher, supra*, the Supreme Court disapproved and overruled the "due care" rule as unsound and contrary to earlier decisions.

The general rule now is that violation, without legal excuse, of a statute enacted for reasons of safety constitutes negligence per se and not merely prima facie evidence of negligence.

Instructions on legal cause are still necessary, even if there is negligence *per se, see Schmidt v. Royer, supra*; *Thompson v. Summers, supra*; unless the rule announced in *Strain v. Christians, supra*, has application.

Where the defendant relies upon a legal excuse for violation of a statute or ordinance, the court must instruct the jury that the defendant has the burden of proving that defense. *Dartt v. Berghorst, supra*. Where contributory negligence of a plaintiff is based upon violation of the statute, the plaintiff would have the burden of proof that a legal excuse existed. The jury should be instructed that the plaintiff has this burden of proof under these circumstances. There are four legal excuses recognized by the South Dakota Supreme Court. They are:

(1) anything that would make compliance with the statute or ordinance impossible;

(2) anything over which the driver has no control which places the car in a position violative of the statute;

(3) an emergency not of the driver's own making by reason of which the driver fails to observe the statute; and

(4) an excuse specifically provided by statute.

Albers v. Ottenbacher, supra.

If applicable one of the above legal excuses should be included in Instructions 20-200-20 or 20-200-40.

This instruction was previously numbered 60-00

STATUTE OR ORDINANCE — VIOLATION BY DEFENDANT — NEGLIGENCE

Instruction No. _____

[A statute in this state][An ordinance in the city of _____] provides:

(Quote, or paraphrase, applicable parts of the statute or ordinance as construed by the courts.)

This [statute][ordinance] sets the standard of care of a reasonable person. If you find defendant violated it, such violation is negligence.

Reference:

See Instruction 20-200-00 references

Comment:

This instruction is to be given if there is no evidence of legal excuse.

Instructions on legal cause are still necessary, even if there is negligence per se, see *Schmidt v. Royer*, 1998 S.D. 5, ¶¶27-28, 574 N.W.2d 618; *Thompson v. Summers*, 1997 S.D. 103, ¶18, 567 N.W.2d 387, 394; unless the rule announced in *Strain v. Christians*, 483 N.W.2d 783 (S.D. 1992), has application.

This instruction was previously numbered 60-01-1.

(Revised 2004)
(Reviewed 2009)

STATUTE OR ORDINANCE — VIOLATION BY DEFENDANT — NEGLIGENCE — EXCUSABLE VIOLATION

Instruction No. ____

[A statute in this state][An ordinance in the city of _____] provides:

(Quote or paraphrase applicable parts of the statute or ordinance as construed by the courts.)

This [statute][ordinance] sets the standard of care of a reasonable person.

If you find defendant violated it, such violation is negligence unless you find from all the evidence that compliance was excusable because *(state one or more of the four categories of excusable violations of traffic laws or regulations which can be found from the evidence).*

Reference:

See Instruction 20-200-00 references

Comment:

This instruction is to be given if there is evidence excusing the violation. The four legal excuses are listed in Instruction 20-200-00.

Instructions on legal cause are still necessary, even if there is negligence per se, see *Schmidt v. Royer*, 1998 S.D. 5, ¶¶27-28, 574 N.W.2d 618; *Thompson v. Summers*, 1997 S.D. 103, ¶18, 567 N.W.2d 387, 394; unless the rule announced in *Strain v. Christians*, 483 N.W.2d 783 (S.D. 1992), has application.

Where the defendant relies upon a legal excuse for violation of a statute or ordinance, the court must instruct the jury that the defendant has the burden of proving that defense. *Dartt v. Berghorst*, 484 N.W.2d 891 (S.D. 1992). Where contributory negligence of a plaintiff is based upon violation of the statute, the plaintiff would have the burden of proof that a legal excuse existed. The jury should be instructed that the plaintiff has this burden of proof under these circumstances.

This instruction was previously numbered 60-01-2.

(Revised 2004)
(Reviewed 2009)

UNAVOIDABLE ACCIDENT

No instruction recommended.

Reference:

Carpenter v. City of Belle Fourche, 2000 S.D. 55, 609 N.W.2d 751, 764 (denial of instruction was affirmed)
Artz v. Meyers, 1999 S.D. 156, 603 N.W.2d 532 (use of instruction was affirmed)
Kuper v. Lincoln-Union Elec. Co., 1996 S.D. 145, 557 N.W.2d 748, 759 (denial of instruction was error)
Dartt v. Berghorst, 484 N.W.2d 891 (S.D. 1992) (instruction not given but discussed by the Court)
Howard v. Sanborn, 483 N.W.2d 796, 798 (S.D. 1992) (use of instruction was error)
Stevens v. Wood Sawmill Inc., 426 N.W.2d 13 (S.D. 1988) (use of instruction was error)
Hoffman v. Royer, 359 N.W.2d 387 (S.D. 1984) (use of instruction was error)
Plucker v. Kappler, 311 N.W.2d 924 (S.D. 1981) (use of instruction was error)
Del Vecchio v. Lund, 293 N.W.2d 474 (S.D. 1980) (use of instruction was error)
Meyer v. Johnson, 254 N.W.2d 107 (S.D. 1977) (use of instruction was error)
Alley v. Siepman, 87 S.D. 670, 214 N.W.2d 7 (1974) (denial of instruction was affirmed)
Boyd v. Alguire, 82 S.D. 684, 153 N.W.2d 192 (1967) (denial of instruction was affirmed)
Herman v. Spiegler, 82 S.D. 339, 145 N.W.2d 916 (1966) (use of instruction was affirmed)
Cordell v. Scott, 79 S.D. 316, 111 N.W.2d 594 (1961) (use of instruction was affirmed)
Henrichs v. Inter-City Bus Lines, 79 S.D. 267, 111 N.W.2d 327 (1961) (denial of instruction was affirmed)

Comment:

The South Dakota Supreme Court has consistently held that the propriety of an unavoidable accident instruction depends on the facts of each case but its use is disfavored. "Although we believe unavoidable accident instructions should be restrictively used we do not favor total exclusion. Such instruction may properly be given in those cases where there is evidence that something other than the negligence of one of the parties caused the mishap. It is particularly apt where the further element of 'surprise' is present such as the sudden and unexpected presence of ice, the blowout of a tire, the malfunction of brakes, or other mechanical failure." *Carpenter, supra*; *Howard, supra*; *Stevens, supra*; *Hoffman, supra*; *Del Vecchio, supra*; *Meyer, supra*; *Herman, supra*; *Cordell, supra*. Because such an instruction, when given, depends on the facts and circumstances of each case, no pattern instruction has been drafted.

This instruction was previously numbered 12-01.

SUDDEN EMERGENCY

Instruction No. ____

When a person is confronted with a sudden emergency, the person has a duty to exercise the care that an ordinarily prudent person would exercise in the same or similar situation. The defendant is not relieved of liability because of a sudden emergency unless, based on the facts, you find:

(1) that the defendant was confronted with a sudden and unexpected danger; and

(2) that defendant's own negligence did not bring about the dangerous situation; and

(3) that the defendant had at least two courses of action available after perceiving the dangerous situation; and

(4) that the defendant's choice of action after confronting the danger was a choice which a reasonably prudent person would have taken under similar circumstances, even though it may later develop that some other choice would have been better.

Reference:

Carpenter v. City of Belle Fourche, 2000 S.D. 55, 609 N.W.2d 751
Dartt v. Berghorst, 484 N.W.2d 891 (S.D. 1992)
Weber v. Bernard, 349 N.W.2d 51 (S.D. 1984)
Del Vecchio v. Lund, 293 N.W.2d 474 (S.D. 1980)
Meyer v. Johnson, 254 N.W.2d 107 (S.D. 1977)
Albers v. Ottenbacher, 79 S.D. 637, 116 N.W.2d 529 (1962)
57A Am.Jur.2d (Rev), *Negligence*, §§ 213, 214, 229

Comment:

57A Am.Jur.2d *Negligence*, § 229 warns: "Despite the fact that the propriety of giving a sudden emergency instruction has been upheld in many instances, appellate courts frequently instruct that the better practice is ordinarily not to give the sudden emergency instruction."

This instruction should only be given if there is evidence sufficient to support the four elements cited in the instruction. *Meyer v. Johnson, supra.*

This instruction was previously numbered 12-03.

IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

APPEAL NO. 28695

STATE FARM MUTUAL INSURANCE COMPANY
A/S/O LOYD NIELSON,

Plaintiff and Appellant,

vs.

GIYO BRYAN MIRANDA,

Defendant and Appellee.

vs.

JOHN DOE,

Third-Party Defendant.

APPELLEE'S BRIEF

Appeal from the Circuit Court, Fourth Judicial Circuit
Lawrence County, South Dakota

Honorable Eric J. Strawn, Circuit Court Judge

Attorneys for Appellant:

Benjamin L. Kleinjan
HELSPER, MCCARTY & RASMUSSEN, P.C.
1441 6th Street, Suite 200
Brookings, SD 57706
benkleinjan@lawinsd.com

Attorneys for Appellee:

Matthew J. McIntosh
BEARDSLEY, JENSEN & LEE, PROF. LLC
4200 Beach Drive, Ste. 3
P.O. Box 9579
Rapid City, SD 57709-9579
mmcintosh@blackhillslaw.com

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PRELIMINARY STATEMENT

Appellee will refer to himself as "Miranda." Appellee will refer to Appellant as "State Farm."

Appellee will refer to the Record on Appeal as "R:" followed by the page number(s) assigned by the Lawrence County Clerk of Courts. Appellee will refer to materials in his Appendix by "APP:" followed by the appropriate letter designation. Appellee will refer to materials in Appellant's Appendix by "AP-APP:" followed by the appropriate designation.

JURISDICTIONAL STATEMENT

State Farm appealed from the Order Denying Plaintiff's Motion for New Trial entered on July 19, 2018. (AP-APP: 15.) A Notice of Entry of Order Denying Plaintiff's Motion for New Trial was filed and served on July 23, 2018. (R: 872.) State Farm filed its Notice of Appeal on August 20, 2018. (R: 945.) Miranda served a Notice of Review and Docketing Statement on September 6, 2018. (APP: A.) The Office of the Clerk of the Supreme Court of South Dakota acknowledged receipt of the Notice of Review and Docketing Statement by letter dated September 11, 2018. (APP: B.) This appeal also encompasses the following orders from the Trial Court:

1. Order Granting Motion to Amend to Conform to the Evidence entered on July 19, 2018 (APP: C.)

2. Order Granting Emergency Motion to Supplement entered on July 19, 2018 (APP: D.)

STATEMENT OF THE LEGAL ISSUES

1. Whether the trial court abused its discretion when it submitted the sudden emergency instruction and other related instructions to the jury.

The trial court found sufficient evidence was presented at trial that Miranda was faced with a sudden and unexpected danger when a vehicle came into his lane of travel, the sudden veering of a vehicle into Miranda's lane of travel was not brought about by any negligence of Miranda; Miranda had multiple courses of conduct available upon encountering the sudden and unexpected danger; and Miranda acted reasonably when he swerved away from oncoming traffic and then attempted to keep the vehicle on the road.

Legal Authority:

Meyer v. Johnson, 254 N.W.2d 107 (S.D. 1977)

Weber v. Bernard, 349 N.W.2d 51 (S.D. 1984)

Carpenter v. City of Belle Fourche, 2000 S.D. 55, 609 N.W.2d 751

57A Am. Jur. 2d *Negligence*, § 213, Westlaw (database updated Nov. 2018)

2. Whether the trial court abused its discretion when it submitted the legal excuse instruction to the jury.

Prior to trial, the parties stipulated to a jury instruction that included a legal excuse to SDCL 32-26-6 (failure to maintain a single lane of travel). On the second day of trial, counsel for State Farm drafted and offered an amended Jury Instruction 31, which contained an additional reference to SDCL 32-25-3 (speed greater than is reasonable and prudent) during the settling of jury instructions. However, counsel for State Farm incorrectly drafted the instruction to include a legal excuse to both statutes. This error was not discovered by the court or opposing counsel. The trial court ultimately provided State Farm's proposed Instruction 31 to the jury. State Farm did not properly object to Instruction 31 as it was State Farm's proposed instruction.

Legal Authority:

Dartt v. Berghorst, 484 N.W.2d 891 (S.D. 1992)

Veith v. O'Brien, 2007 S.D. 88, 739 N.W.2d 15

U.S. v. Mariano, 729 F.3d 874 (8th Cir. 2013)

3. Whether the trial court abused its discretion when it submitted jury instruction 22 to the jury.

The trial court provided the jury Miranda's proposed instruction as Jury Instruction 22. Not only did State Farm fail to properly object to preserve this issue for appeal, but the instructions read as a whole and the argument of counsel of Miranda clearly stated the law and informed the jury of the burden of proof.

Legal Authority:

SDCL 15-6-51(c)

In re Brown, 1997 SD 133, 572 N.W.2d 435

Bauman v. Auch, 539 N.W.2d 320 (S.D. 1995)

4. Whether the trial court abused its discretion when it submitted Jury Instruction 20 to the jury.

The trial court provided the jury Miranda's proposed instruction as Jury Instruction 20. State Farm failed to properly object, proposed an alternative instruction with the same language at the settling of jury instructions, and the instructions read as a whole properly stated the law and informed the jury.

Legal Authority:

SDCL 15-6-51(c)

In re Brown, 1997 SD 133, 572 N.W.2d 435

Bauman v. Auch, 539 N.W.2d 320 (S.D. 1995)

5. Whether the trial court abused its discretion when it granted Plaintiff's Motion to Amend the Pleadings to Conform to the Evidence.

After trial, State Farm alleged the jury was required to find either John Doe or Miranda, or both, negligent. State Farm never made a claim against John Doe, and Miranda's third-party claim against John Doe was contingent on the jury first finding negligence on the part of Miranda. State Farm then made an oral motion to Amend the Pleadings to Conform to the Evidence, which was granted by the trial court. It was improper to allow State Farm to amend as the issue of John Doe's negligence in relation to State Farm was never tried or argued at trial because State Farm's position at trial was that there was either no John Doe present or John Doe did not go into Miranda's lane of travel. Further, State Farm never presented a proposed jury instruction for the jury to find John Doe negligent

in relation to State Farm nor did State Farm ever identify in what manner it intended to amend its complaint.

Legal Authority:

SDCL 15-6-15(b)

Sejnoha v. City of Yankton, 2001 S.D. 22, 622 N.W.2d 735

6. Whether the trial court abused its discretion when it granted Plaintiff's Emergency Motion to Supplement.

After trial, State Farm argued the court provided the wrong legal excuse instruction. Miranda pointed out State Farm never presented or offered the legal excuse instruction it relied upon for its argument as the instruction State Farm intended to offer was neither contained in the record nor with all the other jury instructions that were signed and filed by the court. State Farm responded by filing an Emergency Motion to Supplement, which was granted by the Court.

Legal Authority:

Klutman v. Sioux Falls Storm, 2009 S.D. 55, 769 N.W.2d 440

Alvine Family Ltd. P'ship v. Hagemann, 2010 S.D. 28, 780 N.W.2d 507

Veith v. O'Brien, 2007 S.D. 88, 739 N.W.2d 15

STATEMENT OF THE CASE

This case was tried in the Fourth Judicial Circuit Court, County of Lawrence, State of South Dakota, before the Honorable Eric Strawn. The jury trial was held on April 26-27, 2018. The jury returned a verdict in favor of Miranda. Notice of entry of judgment on the jury verdict was served on May 15, 2018. (R: 339.) State Farm filed a Motion for New Trial on May 23, 2018. (R: 343.) On May 25, 2018, Miranda filed a Motion to Extend Time to Enter Order Regarding Motion for New Trial to secure copies of the trial transcript. (R: 419.) After receipt of the trial transcripts, Miranda filed his Brief in Opposition of Plaintiff's Motion for a New Trial on June 22, 2018. (R: 718.)

After realizing State Farm's intended Instruction 31 was not contained in the Court's file, State Farm filed Plaintiff's Emergency Motion to Supplement the Record on June 25, 2018. (R: 749.) Miranda filed his objection to Plaintiff's Motion to Supplement the Record on June 25, 2018. (R: 762.)

On June 27, 2018, the Court held a hearing on State Farm's Motion for a New Trial and State Farm's Emergency Motion to Supplement the Record. During the hearing, State Farm also made an oral Motion to Amend to Conform the Pleadings to the Evidence. The Court denied State Farm's Motion for New Trial, granted State Farm's Emergency Motion to Supplement the Record and granted State Farm's oral Motion to Amend to Conform the Pleadings to the Evidence. A Notice of Entry of Order Denying Plaintiff's Motion for New Trial was filed and served on July 23, 2018. (R: 872.) State Farm filed its Notice of Appeal on August 20, 2018. (R: 945.) Miranda served a Notice of Review and Docketing Statement on September 6, 2018. (APP: A.)

STATEMENT OF FACTS

On November 20, 2013, Miranda and his older brother Kevin traveled back to Belle Fourche from Rapid City on Interstate 90. (R: 575.) Miranda was driving and exited Interstate 90 at the Whitewood exit. (R: 576.) He stopped at the stop sign, turned right onto Highway 34, and began to travel westbound. (*Id*.) As Miranda negotiated the initial curve on Highway 34, an unknown vehicle traveling eastbound entered Miranda's westbound lane. This caused Miranda to take emergency action and swerve to the shoulder to avoid a head-on collision with the unidentified vehicle. (R: 577.) In an instant, Miranda tried to pull the vehicle back onto the road, but the vehicle began to slide. (R: 578.) When Miranda attempted to correct the slide, he skidded into the

eastbound lane and collided with State Farm's insured. (*Id*.) The unidentified vehicle never stopped. (R: 510-11.)

State Farm's insured, Loyd Nielson, testified that he was traveling home after leaving an auction. (R: 521-22.) Mr. Nielson testified on direct examination that he did not recall a vehicle driving in front of him. (R: 523.) However, on cross-examination, Mr. Nielson not only admitted there was a car 100 yards in front of him, but also that he could see the vehicle hit its brakes in the area where Miranda and Kevin allege the vehicle came into their lane of travel. (R: 535-36.) Throughout the case, State Farm maintained the position that John Doe was either non-existent or never came into Miranda's lane of travel. (R: 655.)

After a two day trial, the jury returned a verdict for Miranda. (R: 218.)

STANDARD OF REVIEW

State Farm has appealed the trial court's denial of State Farm's Motion for New Trial. (R: 871.) The denial of a motion for new trial is reviewed under the abuse of discretion standard. *Nicolay v. Stukel*, 2017 S.D. 45, ¶ 22, 900 N.W.2d 71, 80. "An abuse of discretion occurs only if no judicial mind, in view of the law and circumstances of the particular case, could reasonably have reached such a conclusion." *Baddou v. Hall*, 2008 S.D. 90, ¶ 12, 756 N.W.2d 554, 558 (citing *Kappenman v. Stroh*, 2005 S.D. 96, ¶ 24, 704 N.W.2d 36, 42). "The party alleging error on appeal must show error affirmatively by the record, and not only must the error be demonstrated, but it must also be shown to be prejudicial error." *Id*. (citing *Tovsland v. Reub*, 2004 S.D. 93, ¶ 15, 686 N.W.2d 392, 398; *Morrison v. Mineral Palace Ltd. P'ship*, 1998 S.D. 33, ¶ 10, 576 N.W.2d 869, 872). Finally, the evidence is examined in a light most favorable to the

verdict, the non-moving party benefits from all reasonable inferences, and the verdict must be upheld if there is competent evidence to support the verdict. *See Baddou*, 2008 S.D. 90, ¶ 13, 756 N.W.2d at 558-59; *see also* SDCL 15-6-50(a).

ARGUMENT AND AUTHORITIES

1. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SUBMITTED THE SUDDEN EMERGENCY INSTRUCTION AND OTHER RELATED INSTRUCTIONS TO THE JURY IN THIS MATTER.

When deciding whether to give a jury instruction on sudden emergency,

> a court must merely decide whether the record contains the kind of facts to which the emergency doctrine applies; the doctrine has no objective component, and the trial court is not required to draw any legal conclusion to determine whether the doctrine applies.

57A Am. Jur. 2d *Negligence*, § 213, Westlaw (database updated Nov. 2018) (citing *Kappelman v. Lutz*, 217 P.3d 286 (Wash. 2009)). A "trial court should instruct the jury on issues supported by competent evidence in the record." *Bauman v. Auch*, 539 N.W.2d 320, 323 (S.D. 1995)). As demonstrated below, there was competent evidence to submit the sudden emergency instruction to the jury.

A. The facts in the record are the kind of facts to which the Sudden Emergency Doctrine applies.

In *Meyer v. Johnson*, this Court recognized that the sudden emergency instruction should be given if the evidence is sufficient to support a finding:

> (1) that the party invoking the doctrine was in fact confronted by a sudden and unexpected danger; (2) that the dangerous situation was not brought about by the party's own negligence; (3) that at least two courses of action were available to the party after the dangerous situation was perceived; and (4) that the choice of the course of action taken after confrontation was a choice which would have been taken by a reasonably prudent person under similar circumstances, even though it may later develop that some other choice would have been better.

254 N.W.2d 107, 110-11 (S.D. 1977) (citations omitted).

i. *Defendant Miranda was in fact confronted by a sudden and unexpected danger.*

For the sudden emergency doctrine to apply, a party invoking it must in fact be confronted with a sudden and unexpected danger. *See Weber v. Bernard*, 349 N.W.2d 51, 53-54 (S.D. 1984). The sudden and unexpected danger was not the road conditions or the mere fact headlights were suddenly shining in Miranda and Kevin's faces; instead, Miranda and Kevin both unequivocally testified about the unidentified vehicle coming into their lane that created the sudden and unexpected danger.

First, Kevin testified by trial deposition that a vehicle traveling in the opposite direction suddenly came into their lane of travel and that he was sacred because the vehicle was right in front of them and he feared they were going to crash. (R: 820-21.) In response, Kevin yelled out Miranda's name as Miranda swerved to the right. (*Id*.) Similarly, at trial, Miranda testified that the vehicle traveling in the opposite direction suddenly came into his lane of travel. (R: 577-78.) When asked how he knew the vehicle was in his lane of travel, Miranda testified "for like a really quick instant the headlights went like straight towards our vehicle." (*Id*.) Additionally, Plaintiff's own insured, Loyd Nielson, provided the following:

> Q: Okay. I want to make sure I understand your testimony today. Was there a vehicle driving in front of you immediately before this accident?
>
> A: Immediately in front of me?
>
> Q: Yes, sir.
>
> A: There was one probably about, oh, I would say 100 yards in front of me or farther. Something like that. I could see he hit his brake lights, which caused me to hit my brakes.

(R: 535-36.)

The testimony presented by the witnesses confirmed that there was a vehicle traveling in front of Mr. Nielson that was applying its brakes in the area where Miranda and Kevin testified the vehicle veered into their lane of travel. Further, the abruptness of the unidentified vehicle coming into Miranda and Kevin's lane of travel scared Kevin and caused him to yell his brother's name. Whether or not the unidentified vehicle actually veered into Miranda and Kevin's lane of travel was a question for the jury, as the existence or absence of an emergency is a question of fact. 57A Am. Jur. 2d *Negligence*, § 213. As the trial court determined, there was competent evidence viewed in a light most favorable to the verdict and to Appellee, to find in the affirmative and to establish the first element of the sudden emergency instruction. (R: 601.)

State Farm attempts to use the fact that the road was icy to create confusion and claims, without citation to the Record, that the icy condition of the road was "suggested" as the sudden and unexpected danger. (Appellant's Brief, p. 20.) Such a suggestion, however, has been made only by State Farm. (*See, e.g.,* Appellee's closing argument at R: 661 arguing, "This case is about Giyo Miranda and his reaction and whether the way he reacted when a car came into his lane was reasonable.") The sudden and unexpected danger was the unidentified vehicle coming into Miranda's lane of travel, not the icy road. *See Myhaver v. Knutson* 942 P.2d 445 (Ariz. 1997) (holding there was no question about the existence of an emergency when a vehicle suddenly turned toward defendant in the wrong lane of traffic); *Haderlie v. Sondgeroth,* 866 P.2d 703, 718 (Wyo. 1993) (characterizing as "logical" trial court's reasoning that a sudden emergency would be applicable "to a driver finding someone in his own lane"); *Divilly v. Port Auth. of*

Allegheny Co., 810 A.2d 755, 759 (Pa. 2002) (concluding presence of oncoming car in bus driver's lane of travel would constitute sudden emergency); *Piper v. McMillan*, 730 N.E.2d 481, 489 (Ohio 1999) (indicating sudden emergency doctrine encompasses an oncoming vehicle appearing immediately in front of another vehicle).

The above-cited case law demonstrates that a vehicle suddenly veering into another driver's lane of travel creates an emergency situation. *See id*. While a party with prior knowledge may be prohibited from claiming icy road conditions as a sudden emergency, that was not the case in this matter. The sudden and unexpected danger was the unidentified vehicle, not the road conditions.

As it did with the icy road conditions, State Farm attempts to use testimony about the headlights of the unidentified vehicle to create further confusion about the sudden emergency. State Farm suggests the oncoming vehicle was not actually in Miranda's lane but that the headlights created a misconception. (*See* Appellant's Brief, pp. 20-21.) However, both Miranda and Kevin were unequivocal that the unidentified vehicle came into their lane and testified that the vehicle's headlights were one of the reasons the brothers knew the location of the oncoming vehicle. (R: 577-78, 820-21, 832-34.)

State Farm further argues that the "skewed" headlight of the unidentified vehicle shining on Miranda's face was "suggested" as the sudden emergency and is what caused him to veer to the right. (Appellant's Brief, pp. 20-21.) Neither the portions of the record cited by State Farm or the record as a whole support these assertions. There was no testimony or evidence presented at trial that the brightness of the unidentified vehicle's headlights either caused Miranda to swerve or presented a sudden emergency. Instead, the presence of the headlights in Miranda's lane alerted Miranda and Kevin that

the unidentified vehicle was coming at them in their lane. That is what caused the swerve and the sudden emergency. (R: 577-78, 820-21.) The sudden and unexpected danger created by a vehicle coming head on into a driver's lane of travel does not cease being a sudden and unexpected danger merely because the vehicle has headlights.[1]

The first time State Farm acknowledges that John Doe may have come into Miranda's lane of travel is when State Farm also argues, without any authority, that Miranda should have anticipated that another driver would come into his lane of travel on the icy roads. (Appellant's Brief p. 21.) Not only does State Farm fail to present any authority to support its position, but State Farm's argument is contrary to the aforementioned cases finding a vehicle suddenly veering into another driver's lane creates an emergency. *See Myhaver,* 942 P.2d at 450; *Haderlie,* 866 P.2d at 718; *Divilly,* 810 A.2d at 759; *Piper,* 730 N.E.2d at 489. State Farm's argument is also contrary to South Dakota Law, which provides that "a motorist has the right to assume that other drivers will obey the rules of the road." *Harmon v. Washburn*, 2008 S.D. 42, ¶ 17, 751 N.W.2d 297, 302, *abrogated on other grounds by Center of Life Church v. Nelson*, 2018 S.D. 42, ¶ 18, 913 N.W.2d 105, 110; SDPJI 20-30-50 (2017).

[1] *Howard v. Sanborn*, 483 N.W.2d 796 (S.D. 1992), cited by State Farm, is inapposite. In that case, the court addressed whether it was error to give an unavoidable accident instruction where the defendant claimed that a skewed headlight of an oncoming vehicle was blinding, causing him to not see the plaintiff stopped in front of him. By contrast, here, no one testified that the brightness of the headlights caused Miranda to swerve, and the unavoidable accident instruction was not at issue. *Howard* does, however, reveal where State Farm came up with the description of the headlights as "skewed", as neither that word nor any similar description was used by any witness to describe the headlights in this case. Whether with arguments about skewed headlights or icy roads, State Farm is not entitled to its own facts in its attempt to cast this case as within the scope of cases it deems favorable to its position.

Finally, State Farm argues that the conduct by third-party defendant John Doe prevents the use of the sudden emergency doctrine because the doctrine does not apply when the negligence of *any* of the parties caused the accident. (Appellant's Brief pp. 21) (emphasis added.) State Farm suggests "circumstantial evidence of John Doe's negligence excludes it from the doctrine." (*Id*.) While it cites to language set forth in *Carpenter v. City of Belle Fourche*, 2000 S.D. 55, 609 N.W.2d 751, State Farm misinterprets the case through a hyper-technical reading. Neither *Carpenter* nor any other cases cited by State Farm involve a third-party John Doe or phantom vehicle. The relevant element of the doctrine, as continually set forth by this Court, is that the "dangerous situation was not brought about by the party's own negligence." *Meyer*, 255 N.W.2d at 110-11. Admittedly, the sudden emergency doctrine is prohibited when the party invoking the doctrine was negligent, but our case law does not prohibit the use of the doctrine if a third party is negligent. *See Del Vecchio v. Lund*, 293 N.W.2d 474, 477 (S.D. 1980) (finding the sudden emergency instruction was improper only because it failed to mention the fact that a party seeking refuge under the sudden emergency doctrine must not be the party whose actions created the emergency).

Here, Miranda was in fact confronted with a sudden and unexpected danger. The sudden and unexpected danger was not the road conditions or the brightness of the suddenly shining headlights: instead, the sudden and unexpected danger was the unidentified driver coming into Miranda's lane of travel.

ii. *The dangerous situation was not brought about by Defendant Miranda's own negligence*

The second element of the sudden emergency doctrine is that the dangerous situation was not brought about by the negligence of the party invoking the doctrine.

Meyer, 255 N.W.2d at 110-11. Negligence contains the following elements: duty, breach of duty, causation, and damages. *Stensland v. Harding County*, 2015 S.D. 91, ¶ 11, 872 N.W.2d 92, 96. However, similar to its approach at trial, State Farm presents no argument in its brief to establish the required elements of negligence. Instead, State Farm focuses exclusively on Miranda's speed prior to the accident in an attempt to establish negligence per se. Even if State Farm could establish negligence per se, as this Court has noted, negligence per se is not equivalent to the four elements of negligence. *See id*. at ¶ 10.

Further, State Farm cannot establish negligence per se as State Farm's conclusion that Miranda was speeding is unsupported in the facts and testimony of this case. Testimony was presented that on the evening of this accident Miranda and State Farm's insured reported to the responding officer that they were traveling 30 miles per hour prior to the accident. (R: 486.) The responding police officer testified that she did not issue any citations or even warnings to any parties. (R: 510.) Finally, the responding officer testified that where this accident occurred, Miranda had already entered the 45 mile per hour zone of Highway 34. (R: 509.) Nonetheless, State Farm argues Miranda was speeding and thus caused the sudden and unexpected danger of another vehicle veering into his lane of travel. Other courts have denied similar arguments.

For example, in *Stephens v. Hypes*, the court provided a sudden emergency instruction in response to a deer stepping out in front of a vehicle. 610 S.E.2d 631, 632 (Ga. Ct. App. 2005). The driver tried to veer left and then pull back right but lost control when she started fishtailing and skidding sideways across the road into an oncoming vehicle. *Id*. An eye witness testified that the driver was traveling "about the regular

speed limit, about 50, 55" before encountering the deer, while another driver estimated the speed was at least 65 miles per hour. *Id*. The responding officer testified that the speed limit in the area was 50 mph but maintained that he saw no evidence of speeding. *Id*. at 632.

Like State Farm in this case, the opposing party in *Stephens* argued that the trial court erred by providing the sudden emergency instruction because there was evidence presented that demonstrated that the driver helped create the emergency by exceeding the speed limit. *Id*. at 633. The Georgia court held that "conflicts in the testimony of witnesses are a matter of credibility for jury determination" and "within the exclusive province of the jury." *Id*. at 633. The court elaborated, "We have repeatedly held that when a party presents any evidence—even slight evidence—on a particular issue, a trial court does not err in charging the law on that issue." *Id*. Despite testimony of eye witnesses estimating speeds of 50, 55, and 65 miles per hour, the Court found the evidence did not establish as a matter of law that the driver had participated in causing the emergency situation. *Id*. Therefore, the court found that there was some evidence the driver "was confronted by a sudden emergency that she did not participate in creating, and the trial court was correct in charging the jury on that issue." *Id*.

In this matter, State Farm, assumes that where Miranda was traveling "30, 35" miles per hour was in the 30 miles per hour zone. However, there was testimony presented by the responding officer in which she ultimately concluded the accident occurred in the 45 miles per hour zone. (R: 509.) In addition, Miranda and State Farm's insured reported on the date of the accident that they were traveling 30 mph. (R: 510.)

The only testimony State Farm relies upon is Miranda's honest estimate of speed. An estimate of "30, 35" miles per hour means that Miranda's "rough guess" about his speed immediately before this accident was 30 or 35 miles per hour. (R: 589.) This coincides with Miranda's statement to the responding officer on the night of the accident that he was traveling 30 miles per hour. (*Id*.) Somehow, State Farm concludes Miranda's testimony at trial excluded the possibility he was traveling 30 miles per hour.

The evidence does not demonstrate Miranda was speeding as a matter of law. The jury had a sufficient evidentiary basis to conclude Miranda was not speeding and that the dangerous situation was not brought about by Miranda's own negligence. Therefore, it was proper for the Court to submit the sudden emergency instruction under the second element as the "question whether one was without fault in bringing about an emergency generally is for the jury." 57A Am. Jur. 2d *Negligence*, § 213.

Even if Miranda was speeding, there is no evidence that Miranda's speed brought about the emergency situation. The second element of the sudden emergency doctrine prohibits a party from invoking the doctrine if the party's own *negligence* brought about the dangerous situation. *Meyer*, 254 N.W.2d at 110-11 (emphasis added). Absent from State Farm's argument at trial or in its Appellant's Brief is any discussion or evidence that demonstrated Miranda's speed brought about, or caused, the emergency situation. *See Vialpando v. Cooper Cameron Corp*., No. 02-8029, 2004 WL 171634 *6 (10th Cir. 2004) (finding that plaintiff failed to present any evidence under the second element of the sudden emergency doctrine to demonstrate how the alleged speed caused or contributed to another vehicle pulling out in front of defendant).

Miranda testified about the reasonableness of his conduct prior to the accident. (R: 579.) Miranda testified that prior to the accident he was not using his cell phone and he was paying attention to the road. (*Id*.) State Farm presented absolutely no evidence to prove that Miranda's speed brought about or caused the unidentified vehicle to suddenly and unexpectedly enter his lane of travel. Despite the representation in State Farm's brief that "Mr. Miranda subsequently confessed that if he had been driving properly he never would have hit Mr. Nielson[,]" a review of the transcript demonstrates Miranda's testimony was in response to his attempt to correct his vehicle sliding after taking emergency action and had nothing to do with his speed. (Appellant's Brief p. 24; R: 588.)

Therefore, with competent evidence to support a finding that Miranda did not bring about the emergency situation, the questions of fact regarding what speed Miranda was traveling and whether the speed contributed to this accident were all questions of fact for the jury to determine. 57A Am. Jur. 2d *Negligence*, § 213; *see also Jordan v. Sava, Inc.*, 222 S.W.3d 840, 851 (Tex. App. 2007) (holding that if the evidence conflicts regarding actions before the emergency and there is any support for the instruction, the sudden emergency instruction should be given).

iii. *There were at least two courses available to Defendant Miranda.*

For the sudden emergency doctrine to apply, a party invoking the doctrine must also demonstrate that at least two courses of action were available to the party after the dangerous situation was perceived. *Meyer*, 255 N.W.2d at 110-11. State Farm argues that "whether it was headlights or Doe coming into [Miranda's] lane, there was no

testimony that there was any option other than swerving to the right in that moment." (Appellant's Brief p. 24.)

At trial, Miranda provided the following testimony regarding his immediate reaction to the sudden veering of a vehicle into his lane of travel:

> Q: What was your reaction?
>
> A: It's a quick reaction to -- steered to the right so I don't have a head-on collision with that vehicle.
>
> Q: Did you have a head-on collision with that vehicle?
>
> A: No.
>
> Q: What did you do after you steered right?
>
> A: I steered to the right really quick, and then I felt the right side of the vehicle get out of the pavement, so I correct it right away so to stay in the road.
>
> . . . .
>
> Q: If you had to estimate, what was the amount of time that passed by the time you steered to the right and steered to the left?
>
> A: It's a really quick one.
>
> Q: Did you have time to stop and think about anything?
>
> A: No.

(R: 578-79.) After being questioned by State Farm's counsel about other options available to Miranda upon confrontation of the sudden emergency, Miranda testified that he believed if he hit his brakes he would not have been able to stop. (R: 593.)

In *Meyer v. Johnson*, a collision occurred at the crest of a hill when two automobiles hit each other nearly head-on. 254 N.W.2d at 111. This Court quoted a portion of the defendant's testimony that acknowledged the defendant simply hit his brakes when he observed the other vehicle; thus, there was no evidence to show there was

an alternative choice for the defendant. *Id*. Upon examination of the third element of sudden emergency and a finding of a lack of alternative courses, this Court held, neither driver "testified they *swerved or attempted to turn their vehicles* in order to avert the accident." *Id*. (emphasis added). Clearly, in *Meyer*, the defendant presented evidence of a single choice, which was to simply hit his brakes.

In comparison, Miranda testified that rather than hitting his brakes, he did in fact swerve or attempt to turn his vehicle in order to avert the accident. Therefore, under this Court's rationale in *Meyer*, the testimony demonstrates Miranda had two courses of action available: (1) steer right or (2) hit his brakes. (R: 591-92.) Accordingly, at least two courses of action were available to Miranda after the dangerous situation was perceived. Miranda exercised his first option, swerve or attempt to turn his vehicle away from an oncoming vehicle.

iv. *Defendant Miranda's choice was reasonable under the circumstances.*

Finally, for the sudden emergency doctrine to apply, a party invoking the doctrine must also demonstrate that the choice of the course of action taken after confrontation was a choice that would have been taken by a reasonably prudent person under similar circumstances, even though it may later develop that some other choice would have been better. *Meyer*, 255 N.W.2d at 110-11. State Farm simply dismisses this element by suggesting that this element precludes the consideration of irrational or unreasonable options like closing one's eyes or letting go of the wheel. (Appellant's Brief p. 27.)

This final element requires a finding that the action would have been taken by a reasonably prudent person without using the benefit of hindsight. *See Meyer*, 255 N.W.2d at 110-11. Here, Miranda presented testimony that he responded to a vehicle

suddenly and unexpectedly veering into his lane by pulling the vehicle to the right, away from the other lane of travel, and then immediately pulling the vehicle back to the left in an attempt to keep the vehicle on the road. (R: 578-79.) The trial court found, "the course of action taken after the confrontation was a choice which would have been taken by a reasonably [sic] person under similar circumstances." (R: 603.) Specifically, the trial court noted, "[s]werving to the right-hand side was certainly something that a reasonable person would do with oncoming traffic coming from the left, even though it may develop later that other choice would have been better." (*Id*.) State Farm did not present any evidence, nor does it make any argument, to suggest Miranda's course of conduct was unreasonable.

Therefore, there was competent evidence presented that Miranda's decision to immediately pull his vehicle right, away from oncoming traffic, was a choice that would have been taken by a reasonably prudent person under similar circumstances.

v. *Outside Authority*

State Farm's brief carefully avoids asking for abrogation of the sudden emergency doctrine in South Dakota. Yet, State Farm argues it was improper to give the sudden emergency instruction here by relying on authority from other jurisdictions that have abolished the sudden emergency doctrine entirely. (Appellant's Brief pp. 27-28.) State Farm relies heavily on a 1980 decision from a jurisdiction that ultimately abolished the sudden emergency doctrine. (Appellant's Brief p. 27) (citing *Knapp v. Stanford*, 392 So. 2d 196, 197 (Miss. 1980)). However, the *Knapp* decision is not controlling on this issue as the Mississippi Court abolished the sudden emergency doctrine 38 years ago. In comparison, this Court has continued to consider the sudden emergency doctrine and

while its restrictive use has been noted, it has never been abolished. *See Carpenter*, 2000 S.D. 55, ¶ 32, 609 N.W.2d 751, 764 (reiterating the Court's position that while the sudden emergency instruction should be restrictively used, the Court does not favor total exclusion).

Further, the facts in *Knapp* are distinguishable from the facts in this case. First, in *Knapp*, the appellant was a passenger in a single vehicle accident where the appellee driver alleged a John Doe vehicle entered his lane of travel. *Knapp*, 392 So. 2d at 197. The driver further testified that after he veered away from the John Doe vehicle, his wheels went onto the shoulder of the road. *Id*. The driver testified that after two of his wheels went onto the shoulder of the road for two, three or four seconds, he then attempted to pull the vehicle back onto the road. *Id*. at 201. Contrary to the driver's testimony, the appellant passenger alleged the driver was operating the vehicle at a high rate of speed, approximately 90 or 95 miles per hour, and appellant never observed another vehicle on the roadway at any time. *Id*. The parties agreed that it was undisputed that the cause of the accident was either the manner in which the driver attempted to get back onto the road, the speed of the vehicle, or the height difference between the shoulder and the road. *Id*. The appellate court found that it was a jury question whether the driver should have seen the raised roadway before he attempted to enter the roadway again without hitting his brakes. *Id*. at 198.

Here, Miranda testified he was traveling 30, 35 miles per hour. Both Miranda and his passenger testified that another vehicle came into their lane of travel. Further, unlike in *Knapp* where the driver was negligent when he attempted to pull the vehicle back onto

the road after two to four seconds, Miranda testified that the swerving actions happened in an instance. (R: 579.) Miranda testified:

> Q: If you had to estimate, what was the amount of time that passed by the time you steered to the right and steered to the left?
>
> A: It's a really quick one.
>
> Q: Did you have time to stop and think about anything?
>
> A: No.

(*Id*.)

State Farm argues the cause of the accident was not the sudden emergency of a vehicle veering into Miranda's lane of travel, but instead, Miranda's split-second decision to attempt to correct and stay on the road. (Appellant's Brief p. 26.) As outlined above, the fourth element of the sudden emergency doctrine in South Dakota provides that "the *choice of the course of action taken after confrontation* was a choice which would have been taken by a reasonably prudent person under similar circumstances, even though it may later develop that some other choice would have been better." *Meyer*, 254 N.W.2d at 110-11 (emphasis added). A "course of action taken after confrontation" indicates a progress or sequence of events taken after the confrontation, not a single action. *See Course of Action*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/dictionary/course%20of%20action (last visited November 15, 2018) (defining "course of action" as "the actions to be taken // We're trying to determine the best course of action at this point.").

For example, as pointed out in the better reasoned dissent in *Knapp*, an emergency situation is only beginning when a vehicle suddenly veers into a driver's lane of travel that forces the driver's vehicle from the road. *Knapp*, 392 So. 2d at 200. To

suggest the emergency is over once the vehicle passes "defies logic" as a decision to attempt to return the vehicle to the safety of the highway is done under the excitement and confusion created by the situation. *Id*.

In summary, there was competent evidence to submit the sudden emergency instruction to the jury, and the *Knapp* decision and other decisions from jurisdictions that have abolished the sudden emergency doctrine are not controlling or persuasive in interpreting South Dakota's sudden emergency doctrine.

2. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SUBMITTED THE LEGAL EXCUSE INSTRUCTION TO THE JURY.[2]

State Farm argues that Jury Instruction 31 should not have been given to the jury because complying with the law was not impossible. (Appellant's Brief pp. 29-31.) State Farm is incorrect in suggesting that the legal excuse instruction can only be given if complying with the law was impossible. (*Id*.) "There are four circumstances in which the violation of a safety statute may be excused: (1) Anything that would make compliance with the statute impossible; (2) Anything over which the driver has no control which places his car in a position violative of the statute; (3) An emergency not of the driver's own making by reason of which he fails to observe the statute; and (4) An excuse specifically provided by statute." *Dartt v. Berghorst*, 484 N.W.2d 891, 896 (S.D. 1992) (citations omitted). If a legal excuse is based on an emergency, a defendant must prove: (1) an emergency existed; (2) the defendant was not engaged in prior conduct that caused or contributed to the emergency; and (3) the defendant was unable to comply with the statute because of the emergency. *Id*.

[2] Miranda has separated the issues presented in State Farm's second issue to separately address Jury Instruction 31 and Jury Instruction 22.

While the elements of legal excuse based on emergency are similar to that of sudden emergency, those elements are not identical. However, the testimony at trial met both the legal excuse based on emergency and sudden emergency elements. At trial, Miranda and Kevin testified about the vehicle suddenly veering into their lane of travel. Further, Miranda testified about his prior conduct, which included paying attention to the road and not being distracted. Finally, Miranda testified that he was unable to stay on his side of the road after narrowly avoiding the phantom vehicle. (R: 578-80.)

Initially, the parties stipulated to a set of jury instructions that included legal excuse language as it applied to driving upon the right half of the highway. (APP: E.) However, between the first and second days of trial, *State Farm* drafted a second legal excuse instruction to add "violation of speed" language. *State Farm* added the following language to its proposed instruction:

> It is unlawful for any person to drive a motor vehicle on a highway located in this state at a speed in excess of those conspicuously posted signs at the beginning and end of a portion of highway to show the maximum speed limit established on that portion of highway.
>
> These statutes sets [sic] the standard of care of a reasonable person.
>
> If you find defendant violated either, such violation is negligence unless you find from all the evidence that compliance was excusable because Defendant Giyo Miranda was faced with an emergency, not of his own making, by reason of which he is unable to comply with the statute because of the emergency.

(AP-APP: 39.)

Once State Farm's counsel provided the second version of the instruction to the Court and counsel for Miranda, counsel for Miranda removed the original stipulated instruction and used State Farm's instruction in its place. (R: 770-71.) The Court then

wrote “denial,” signed the original stipulated instruction, and then removed it from the jury instructions packet. (APP: F.) During the settlement of the instruction, the following exchanged occurred:

> **MR. KLEINJAN:** And then, also, in light of Trooper Vopat's testimony and the defendant's testimony, I have an obligation to offer an amended negligence per se instruction that adds the speed limit as a potential source of negligence per se. And I have a proposed instruction here; both a clean one and one with a citation, and it does include the sudden emergency kind of defense to the negligence per se, but I'd like to submit that now as well.
>
> **THE COURT:** All right. Thank you. Mr. McIntosh, since we are on that now, so we don't lose it in the fold, I don't have it cited, but this is the South Dakota Pattern Jury Instruction 20-200-20. What's your position regarding giving this instruction?
>
> **MR. MCINTOSH:** I think I'd agree with Mr. Kleinjan. I think he probably is obligated to provide this, and with the language at the bottom that includes the legal excuse, essentially I think is the language, it's very similar to the sudden emergency. I don't have a problem with it. I'll argue against it with that language.
>
> **THE COURT:** What I can do is slip that in somewhere near the discussion with regard to -- there is an instruction that ironically enough states -- the first line is the same. Second one is, "Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway." Now, the proposed is a little bit different because then it goes on to speak to another statute that provides -- so I could throw this one out that was originally proposed, and in its place, put the one that's now been proposed.
>
> **MR. KLEINJAN:** That was kind of my idea.

(R: 634-35.)

As part of its Motion for a New Trial, State Farm argued it was error to give this instruction because it improperly applied the legal excuse to speeding. (R: 402.) In response, Miranda filed its brief establishing State Farm drafted and offered the instruction it complained of as improper. (R: 738-42.) Upon receipt of Miranda’s Brief

in Opposition to the Motion for New Trial, State Farm filed its Emergency Motion to Supplement the Record wherein State Farm argued for the first time that it had intended to offer a third version of the legal excuse instruction. (R: 751-56; APP: G.) However, the Court confirmed State Farm never offered this third version during the settling of jury instructions but allowed State Farm to supplement the record for preservation of the record for appeal. (R: 868.)

Although asking this Court to rule that it was error for the trial court to give Jury Instruction 31, State Farm never informs the Court that State Farm initially stipulated to the legal excuse instruction as it applied to crossing the center line, that State Farm drafted and offered the version of Jury Instruction 31 that was ultimately given to the jury, or that State Farm allegedly intended to offer a third version but failed to do so at trial. Instead, State Farm argues the instruction was inappropriate because if Miranda "had not been speeding he could have corrected properly and avoided hitting Mr. Nielson, so it was not impossible for Mr. Miranda to not cross the center line."[3] (Appellant's Brief p. 30.)

Despite the representation by State Farm in its brief that it objected to the legal excuse instruction, it is clear State Farm never objected to this instruction as it was the instruction State Farm drafted and offered. Further, despite arguing that it was improper to have a legal excuse instruction as applied to crossing the center line, State Farm had stipulated to the use of the original version of Instruction 31, which contained this language. (APP: E.) The doctrine of "invited error" prohibits a party from complaining of errors which he himself induced or provoked the court or the opposite party to commit.

[3] As discussed above, speed was an issue for the jury. Additionally, there was no evidence that Miranda's speed prevented him from correcting properly.

Veith v. O'Brien, 2007 S.D. 88, ¶ 27, 739 N.W.2d 15, 24. It has been held that for the doctrine of invited error to apply, it is sufficient that the party who on appeal complains of the error has contributed to it. *Id*.

Therefore, not only did Miranda prove the three elements of legal excuse based upon emergency to properly submit the instruction, but without a proper objection on the record, stating distinctly the matter objected to and the grounds of the objection, the jury instructions became the law of the case. *See Alvine Family Ltd. P'ship v. Hagemann*, 2010 S.D. 28, ¶ 20, 780 N.W.2d 507, 514. The Court did not abuse its discretion in submitting Instruction 31 to the jury.

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SUBMITTED JURY INSTRUCTION 22 TO THE JURY.

State Farm alleges Instruction 22 "incorrectly states the issues that must be proved by the appellee on his affirmative defenses." (Appellant's Brief p. 31.) Jury Instruction 22 provided, in relevant part:

> If Plaintiff's [sic] meets this burden, Defendant Giyo Miranda must prove:
>
> That he was faced with a sudden and unexpected emergency or that his violation of a safety statute was legally excused.

(AP-APP: 37.) Specifically, State Farm alleges that Instruction 22 did not properly instruct the jury because the instruction only required Miranda to prove that he was "faced with a sudden and unexpected emergency." (*See id*.) State Farm argues that Instruction 22 should have included all the elements of the sudden emergency doctrine to accurately reflect Miranda's burden. (*See id*.)

However, with references to the South Dakota Pattern Jury Instructions, State Farm's objection to Instruction 22 provided only:

> The Plaintiff respectfully objects to the Defendant's proposed modification to instruction 1-50-10 for the same reason as set forth in the objection to 1-10-20.

(AP-APP: 31.) State Farm's objection to 1-10-20 provided a general objection to the use of the sudden emergency doctrine. (AP-APP: 24.) State Farm's general objection served as the basis for all of State Farm's objections in relation to the sudden emergency doctrine. (*Id*.) Nowhere in its general objection is there any reference to an objection to the burden of proof as proposed by Miranda's instruction. (*Id*.) Instead, State Farm attempts to use this general objection to serve as the basis of all objections. However, this general objection is insufficient for properly advising the trial court of a possible error. Absent from the record is any argument by State Farm specifically objecting to the burden of proof language contained in Instruction 22. Therefore, without a proper objection, this instruction became the law of the case. *Hagemann*, 2010 S.D. 28, ¶ 20, 780 N.W.2d at 514.

Further, jury instructions are to be read as a whole to determine if they correctly state the law and inform the jury. *Bauman v. Auch*, 539 N.W.2d 320, 327 (S.D. 1995). Instruction 25 correctly sets forth the complete law as it relates to sudden emergency, and counsel for Miranda reiterated during closing that it was Miranda who had the burden to prove the four elements of the sudden emergency instruction. (R: 202, 661-64.) During the trial, counsel for Miranda provided the following:

> Instruction Number 25 is going to tell you about what a person must do when they are faced with a sudden emergency. There are four different elements that we must have shown because it is our burden.

(R: 661.)

Therefore, not only did State Farm fail to properly object to preserve this issue for appeal, but the instructions read as a whole and the argument of Miranda's counsel clearly stated the law and informed the jury of the burden of proof. The Court did not abuse its discretion in submitting Instruction 22 to the jury.

4. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT SUBMITTED JURY INSTRUCTION 20 TO THE JURY.

Plaintiff argues that Jury Instruction 20 was improperly given to the jury for three reasons: (1) the instruction failed to allow a finding of negligence against John Doe; (2) it allowed the jury to simply find Miranda was "confronted" with a sudden emergency; and (3) the instruction made the negligence of John Doe contingent on a finding of negligence of Miranda. (Appellant's Brief pp. 31-34.)

First, State Farm argues that Instruction 20 improperly allowed the jury to find that if Miranda was not negligent and/or did not legally cause the injuries complained of by State Farm, then a verdict must be made for Miranda. (Appellant's Brief p. 32.) The first two issues posed by Instruction 20 provided:

> Was Defendant Giyo Miranda negligent on November 20, 2013?
>
> If your answer to that question is "no," you must return a verdict for Defendant Giyo Miranda. If your answer is "yes," you will have a second issue to determine, namely:
>
> Was that negligence a legal cause of any injury to Plaintiff State Farm?
>
> If you find Defendant's negligence was not a legal cause of Plaintiff State Farm's injuries, Plaintiff is not entitled to recover damages and you must return a verdict for Defendant.

(AP-APP: 35.) At trial, State Farm's argument against Instruction 20 again relied upon the general objection provided to 1-10-20. (AP-APP: 29.) In addition, State Farm argued

this instruction unnecessarily confused the jury and was unnecessarily cumulative to pattern instruction 1-50-40. (*Id*.) As with State Farm's prior jury instruction arguments in its Appellant's Brief, the reliance upon the general objection to 1-10-20 to the use of the sudden emergency doctrine is insufficient for preserving this specific issue for appeal. Further, the alleged confusing or cumulative objection does not distinctly object to the alleged failure to allow a finding against John Doe as now argued on appeal. This argument was not made during the settling of instructions and thus has not been preserved. As noted above, absent a proper objection, the jury instructions become the law of the case. *Hagemann*, 2010 S.D. 28, ¶ 20, 780 N.W.2d at 514.

Further, State Farm cannot show any prejudice. For example, the proposed instruction from State Farm contained the same language in relation to the issues of Miranda's negligence and/or legal cause. Similar to the instruction given to the jury, State Farm's proposed instruction provided:

> First, was the defendant negligent?
>
> If your answer to that question is "no," you must return a verdict for the defendant. If your answer is "yes," you will have a second issue to determine, namely:
>
> Was that negligence a legal cause of any injury to plaintiff?
>
> If your answer to that question is "no," plaintiff is not entitled to recover;

(APP: H.)

Therefore, not only did the Plaintiff fail to properly object to Instruction 20, but the proposed instruction from Plaintiff contained the same language and would have had the same effect. Therefore, the Court did not abuse its discretion when it provided Instruction 20 to the jury in this regard.

Plaintiff also argues that Instruction 20 improperly allowed a jury to find that Miranda could be relieved of liability if he was simply "confronted" with an emergency. (Appellant's Brief p. 33.) Similar to State Farm's prior argument against Instruction 22, the reliance upon the general objection to 1-10-20 to the use of the sudden emergency doctrine and the alleged confusing or cumulative objection does not create a distinct objection to Instruction 20's use of the term "confronted" as now argued on appeal. This argument was not made during the settling of instructions and thus has not been preserved. (*See* AP-APP: 29.)

Further, jury instructions are to be read as a whole to determine if they correctly state the law and inform the jury. *Bauman*, 539 N.W.2d at 327. As noted above, Instruction 25 correctly set forth the complete law as it relates to sudden emergency and counsel for Defendant argued all four elements in closing, further demonstrating that the jury was provided a correct statement of the law and was correctly informed of the requirements. (AP-APP: 32, R: 661-64.)

Therefore, not only did the Plaintiff fail to properly object to Instruction 20 on these grounds, but the jury was provided a correct statement of the law and was correctly informed of the requirements. Therefore, the Court did not abuse its discretion when it provided Instruction 20 to the jury in this regard.

Finally, State Farm argues Instruction 20 improperly made the negligence of John Doe contingent upon a finding of negligence on behalf of Miranda, which prevented the jury from finding John Doe 100% at fault. (Appellant's Brief pp. 33-34.) As with State Farm's other arguments against Instruction 20, the reliance upon the general objection to 1-10-20 to the use of the sudden emergency doctrine and the alleged confusing or

cumulative objection does not create a distinct objection to the allegedly improper contingency of John Doe's negligence upon a finding of negligence on behalf of Miranda. This argument was not made during the settling of instructions and thus has not been preserved. (*See* AP-APP: 29.) As noted above, absent a proper objection, the jury instructions become the law of the case.

Further, as reflected in State Farm's proposed instruction, State Farm did not request an instruction that asked the jury to make a finding against John Doe. (APP: H.) This is because State Farm's position throughout this litigation and continuing at trial was that either John Doe did not exist or John Doe did not cross into Miranda's lane. During the trial, State Farm's insured provided the following during cross-examination:

> Q: So the vehicle that's in front of you that you see the brake light -- the taillights come on, why are they braking? Can you tell?
>
> A: Well, we're getting closer to the -- number one, we're getting closer to an intersection that is going to require some decision-making.
>
> Q: And when you're going on Highway 34, the direction you were going, eastbound, this curve curves to the right; is that right?
>
> A: That's correct.
>
> Q: Is it your position that that vehicle that was in front of you did not go into the westbound lane?
>
> A: No, not at all.

(R: 537-38.) Counsel for State Farm provided the following during closing arguments:

> Then we've got John Doe, and I don't know whether he's actually here or not. Loyd says there was a car in front of him, and I tell you what, I believe Loyd, but I also believe Loyd when he says that car in front of him wasn't involved.

(R: 655-56.)

In addition, State Farm cites to SDCL 15-5-61 to apparently suggest that the providing of Instruction 20 to the jury was inconsistent with substantial justice. However, State Farm fails to provide any argument to explain how a verdict of 100% against John Doe would be any more beneficial than the current judgment in favor of Miranda. There is no chance State Farm can recoup its losses from John Doe and without any finding against Miranda, State Farm cannot use a joint tortfeasor approach to attempt to collect from Miranda. State Farm cannot show any harm.

State Farm failed to make the arguments at the trial court level during the settling of jury instructions that it now attempts to bring before this Court. This Court should not consider any of State Farm's arguments that were not properly argued at the trial court level. *See Parker v. Casa Del Rey-Rapid City, Inc.*, 2002 S.D. 29, ¶¶ 15-16, 641 N.W.2d 112, 118-19.

ISSUES NOTICED FOR REVIEW

5. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED STATE FARM'S MOTION TO AMEND THE PLEADINGS TO CONFORM TO THE EVIDENCE

Although State Farm has yet to rely upon its motion to amend the pleadings to conform to the evidence in its Appellant's Brief, during the hearing for the Motion for a New Trial, State Farm argued, as they do here, that it was improper to allow the jury to find John Doe negligence free. (Appellant's Brief pp. 33-34.) After Miranda pointed out that State Farm never pled a claim against John Doe, never made a third-party complaint, or asserted any other claim against John Doe directly, State Farm made an oral motion to conform the pleadings to the facts. (R: 912.)

The purpose of a pleading is to frame the issues upon which the case is to be tried and to advise the opposing party of what he is called upon to meet. *See State v. Christian*, 1999 S.D. 4, ¶ 21, 588 N.W.2d 881, 884; *see also In re Brown*, 1997 S.D. 133, ¶ 10, 572 N.W.2d 435, 437. Under SDCL 15-6-15(b), pleadings may be amended if issues not raised by the pleadings are tried by express or implied consent of the parties. However, an amendment should be allowed "so long as the evidence presented supports the amended pleading." *Sejnoha v. City of Yankton*, 2001 S.D. 22, ¶ 7, 622 N.W.2d 735, 737.

The issue of John Doe's negligence in relation to State Farm was never tried or argued because State Farm's own insured testified that John Doe never went into Miranda's lane of travel. Rather than contradicting its insured, State Farm never presented a case against John Doe at trial. Therefore, John Doe's negligence in relation to State Farm was never tried by express or implied consent and thus SDCL 15-6-15(b) is inapplicable. Further, State Farm never offered a proposed instruction for the jury to find John Doe negligent in relation to State Farm, and State Farm has never identified in what manner it proposed to amend its complaint.

State Farm alleges it was error for the jury to not find some negligence against John Doe. Miranda argued State Farm never made a claim against John Doe and did not present a case against John Doe. In response, State Farm moved for a motion to add a claim against John Doe. Allowing State Farm to amend its pleadings to assert a claim against John Doe would prejudice Miranda as it would create an error retroactively. It was an abuse of discretion to allow an amendment of the pleadings in this matter as State Farm never tried a case nor made a claim directly against John Doe.

6. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED STATE FARM'S EMERGENCY MOTION TO SUPPLEMENT THE RECORD

Rather than reasserting the factual background and argument again, Miranda relies upon and incorporates the facts and argument as laid out more fully above under Issue 2 regarding the Legal Excuse Instruction issue. Miranda sets forth this issue for appeal as State Farm made its emergency motion to supplement the record once it discovered its intended legal excuse instruction was not in the file.

It was an abuse of discretion to allow State Farm to supplement the record with this third version as it was never offered during the settlement of jury instructions. While State Farm has not relied upon this supplemented record yet, allowing the record to be supplemented prejudices Miranda as it allows this Court to consider facts that were not before the trial court. *See Klutman v. Sioux Falls Storm*, 2009 S.D. 55, ¶ 36, 769 N.W.2d 440, 453. Therefore, the court abused its discretion in allowing State Farm to supplement the record.

CONCLUSION

After a two day trial, a jury found in favor of the Defendant Giyo Miranda. The trial court did not abuse its discretion in denying State Farm's Motion for New Trial.

The facts of this case fit squarely within the sudden emergency doctrine as defined by this Court. The sudden emergency doctrine has not been abrogated in South Dakota and State Farm never asks this Court to do so. The trial court was required to merely decide whether the record contained the kind of facts to which the emergency

doctrine applies. *See* 57A Am. Jur. 2d *Negligence*, § 213. The trial court had the benefit of hearing the live testimony and properly applied that testimony to the elements of the sudden emergency doctrine. There was competent evidence of each element of the sudden emergency doctrine, and the trial court properly provided the sudden emergency and related instructions.

State Farm argues the trial court improperly instructed the jury on a number of additional issues. However, the only issue properly preserved for review is the use of the sudden emergency instruction as the trial transcript demonstrates State Farm failed to timely object on the record, stating distinctly the matters objected to and the grounds of the objection, in regard to State Farm's other arguments. Nevertheless, even if this Court considered State Farm's arguments, the instructions read as a whole, the statement of Miranda's counsel at closing, and the lack of any prejudice demonstrates it was not an abuse of discretion to provide the jury instructions in this matter. Specifically, State Farm's argument related to Jury Instruction 31 should be rejected as State Farm created the instruction. Under the doctrine of invited error, SDCL 15-6-51(c), SDCL 15-6-59(a)(7), SDCL 15-6-61, State Farm may not use its own error as a basis for a new trial or on appeal.

Examining the evidence in the light most favorable to the verdict for Miranda, State Farm cannot affirmatively show any prejudicial error by the record. The judgment of the trial court should be affirmed.

If this Court should rely upon the supplementation of the record by State Farm's Emergency Motion to Supplement the Record or the trial court's granting of State Farm's

Motion to Amend the Pleadings to Conform to the Evidence, Miranda asks this Court consider Appellee's issues noticed for review.

Respectfully submitted this 6th day of December, 2018.

BEARDSLEY, JENSEN & LEE,
Prof. L.L.C.

By: */s/ Matthew J. McIntosh*
Matthew J. McIntosh
P.O. Box 9579
Rapid City, SD57709
Email: mmcintosh@blackhillslaw.com

REQUEST FOR ORAL ARGUMENT

Appellee respectfully requests the Court grant oral argument on the issues presented in the appeal.

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL § 15-26A-66(b)(4), I certify that Appellee's Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This brief contains 9,890 words and 49,382 characters, excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, any certificates of counsel, and any addendum materials. I have relied on the word and character count of our processing system used to prepare this Brief. The original Appellant's brief and all copies are in compliance with this rule.

BEARDSLEY, JENSEN & LEE,
Prof. L.L.C.

By: */s/ Matthew J. McIntosh*
Matthew J. McIntosh
P.O. Box 9579
Rapid City, SD57709
Email: mmcintosh@blackhillslaw.com

CERTIFICATE OF SERVICE

I certify that on December 6, 2018, I e-mailed a true and correct copy of the foregoing Appellee's Brief to the following:

Mr. Benjamin L. Kleinjan
Helsper, McCarty & Rasmussen, P.C.
1441 6th Street Suite 200
Brookings, SD 57006
benkleinjan@lawinsd.com

I further certify that on December 6, 2018, I e-mailed the foregoing Appellee's Brief and sent the original and two copies of it by U.S. mail, first-class postage prepaid, to:

Shirley A. Jameson-Fergel, Clerk
South Dakota Supreme Court
500 East Capitol Avenue
Pierre, SD 57501-5070
scclerkbriefs@ujs.state.sd.us

/s/ Matthew J. McIntosh
Matthew J. McIntosh

APPENDIX
TABLE OF CONTENTS

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff-Appellant, vs. GIYO BRYAN MIRANDA, Defendant and Third-Party Claimant-Appellee vs. JOHN DOE, Third-Party Defendant.	CIRCUIT COURT FILE NO: 40CIV-15-000052 SUPREME COURT FILE NO: 28695 **APPELLEE'S DOCKETING STATEMENT**

SECTION B.

TIMELINESS OF APPEAL

1. The date the judgment or order appealed from was signed and filed by the trial court: July 19, 2018 for both the Order Granting Motion to Amend to Conform to the Evidence and Order Granting Emergency Motion to Supplement.

2. The date notice of entry of the judgment or order was served on each party: Both Notices of Entry of Order were entered July 27, 2018.

3. State whether either of the following motions was made:

a. Motion for judgment n.o.v., SDCL 15-6-50(b):
____ Yes _X__ No

b. Motion for new trial, SDCL 15-6-59:
____ Yes __X__ No

NATURE AND DISPOSITION OF CLAIMS

4. State the nature of each party's separate claims, counterclaims or cross-claims and the trial court's disposition of each claim (e.g., court trial, jury verdict, summary judgment, default judgment, agency decision, affirmed/reversed, etc.).

After trial, State Farm alleged the jury was required to find either John Doe and/or Miranda negligent. Miranda argued State Farm never made a claim against John Doe and Miranda's third-party claim against John Doe was contingent on the jury first finding negligence on the part of Miranda. State Farm then made an oral Motion to Amend to Conform to the Evidence, which was granted by the Court.

After trial, State Farm also argued the Court provided the wrong legal excuse instruction. Miranda pointed out State Farm never offered the legal excuse instruction given by the Court and never submitted the instruction relied upon for its argument. State Farm responded by filing an Emergency Motion to Supplement, which the Court granted.

5. Appeals of right may be taken only from final, appealable orders. See SDCL 15-26A-3 and 4.

a. Did the trial court enter a final judgment or order that resolves all of each party's individual claims, counterclaims, or cross-claims?

__X__ Yes ____ No

b. If the trial court did not enter a final judgment or order as to each party's individual claims, counterclaims, or cross-claims, did the trial court make a determination and direct entry of judgment pursuant to SDCL 15-6-54(b)?

____ Yes ____ No

6. State each issue intended to be presented for review. (Parties will not be bound by these statements).

Whether the trial court erred by granting State Farm's Motion to Amend to Conform to the Evidence and whether the trial court erred by granting State Farm's Emergency Motion to Supplement.

Dated this 6th day of September, 2018

BEARDSLEY, JENSEN & LEE,
PROF. L.L.C.

By: _____

Matthew J. McIntosh
Attorneys for Appellant
P.O. Box 9579
Rapid City, SD 57709
(605) 721-2800
(605) 721-2801
E-mail: mmcintosh@blackhillslaw.com

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September, 2018, I sent to:

Mr. Benjamin L. Kleinjan
Helsper, McCarty & Rasmussen, P.C.
1441 6th Street Suite 200
Brookings, SD 57006

via first-class mail, postage prepaid, a true and correct copy of the foregoing **APPELLEE'S DOCKETING STATEMENT** relative to the above-entitled action.

_____
Matthew J. McIntosh

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff-Appellant, vs. GIYO BRYAN MIRANDA, Defendant and Third-Party Claimant-Appellee, vs. JOHN DOE, Third-Party Defendant.	CIRCUIT COURT FILE NO: 40CIV-15-000052 SUPREME COURT FILE NO: 28695 **NOTICE OF REVIEW**

To: HELSPER, McCARTY & RASMUSSEN, P.C., attorneys for Plaintiff-Appellant, STATE FARM MUTAL INSURANCE COMPANY

Please take notice that the Defendant-Appellee, GIYO BRYAN MIRANDA, will seek review of the orders of the Circuit Court entered on the July 19, 2018 with Notices of Entry of Order entered July 27, 2018, granting State Farm's Motion to Amend to Conform to the Evidence and Emergency Motion to Supplement.

Dated this 6th day of September, 2018.

BEARDSLEY, JENSEN & LEE,
PROF. L.L.C.

By: _____

Matthew J. McIntosh
P.O. Box 9579
Rapid City, SD 57709
E-mail: mmcintosh@blackhillslaw.com

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of September, 2018, I sent to:

Mr. Benjamin L. Kleinjan
Helsper, McCarty & Rasmussen, P.C.
1441 6th Street Suite 200
Brookings, SD 57006

via first-class mail, postage prepaid, a true and correct copy of the foregoing ***NOTICE OF REVIEW*** relative to the above-entitled action.

Matthew J. McIntosh

Supreme Court of South Dakota

OFFICE OF THE CLERK
500 East Capitol Avenue
Pierre, South Dakota 57501-5070
(605) 773-3511

Shirley A. Jameson-Fergel
Clerk

Laura J. Graves
Chief Deputy

Amy Hudson
Deputy Clerk

Sarah L. Gallagher
Deputy Clerk

September 11, 2018

Mr. Matthew J. McIntosh
Beardsley, Jensen & Lee, Prof. LLC
4200 Beach Drive, Suite 3
PO Box 9579
Rapid City, SD 57709

RECEIVED
SEP 14 2018
BEARDSLEY JENSEN LEE

Re: #28719, State Farm Mutual Automobile Insurance Company v. Giyo Bryan Miranda v. John Doe

Dear Mr. McIntosh:

We acknowledge receipt of the notice of review and docketing statement in the above-referenced matter, together with proof of service thereof.

Very truly yours,

Shirley A. Jameson-Fergel

SAJ/slg

STATE OF SOUTH DAKOTA)		IN CIRCUIT COURT
) SS.		
COUNTY OF LAWRENCE)		FOURTH JUDICIAL CIRCUIT
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	)	40 CIV. 15-52
Plaintiff,	)	
vs.	)	**ORDER GRANTING MOTION TO AMEND TO CONFORM TO THE EVIDENCE**
GIYO BRYAN MIRANDA,	)	
Defendant/ Third-Party Claimant,	)	
vs.	)	
JOHN DOE,	)	
Third-party Defendant.	)	

The above-captioned matter came before the Court on the 27th day of June, 2018 for a motions hearing. Plaintiff was represented telephonically by Benjamin L. Kleinjan of Helsper, McCarty and Rasmussen of Brookings, South Dakota. Defendant, was represented by Matthew McIntosh of Beardsley, Jensen and Lee of Rapid City, South Dakota. Before the Court, Plaintiff made an oral motion pursuant to SDCL 15-6-15(b) to amend the pleadings to conform to the evidence. The Court heard argument from both parties.

The Court finds that the Plaintiff initiated this action by service of a Summons and Complaint. The Court finds that the Defendant subsequently answered the Complaint and initiated a third-party action against the Third-Party Defendant. Thereafter, the Court finds that a trial of the facts came on for jury trial on April 26 and 27, 2018. The Court further finds that at trial evidence regarding issues not raised by the pleadings was brought by both parties. The Court further finds

Filed on: 07/19/2018 LAWRENCE County, South Dakota 40CIV15-000052

that issues of John Doe's fault in causing the Plaintiff's damages were raised in the evidence. No evidence at trial was objected to on the basis that it was not within the issues made by the pleadings.

The Court concludes that such evidence was taken and argued by the parties by their mutual consent. The Court concludes that said issues of John Doe's fault should be treated in all respects as if they had been raised in the pleadings. The Court further concludes that amendment to conform to the evidence was timely made upon motion of the Plaintiff. The Court concludes that the merits of the above-action will be subserved by allowing the Complaint to be amended to conform to the transcript. The Court concludes that the Defendant has failed to satisfy the Court that he objected to any evidence for the reason that it was outside the pleadings, and that even if he had, the admission of such evidence would not prejudice him in maintaining his defense upon the merits.

NOW THEREFORE IT IS HEREBY ORDER, ADJUDGED AND DECREED that the Plaintiff's oral motion to amend the complaint served herein to conform to the evidence in the transcript should be and is hereby granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Complaint shall be and hereby is amended to include any issues set forth by the facts evidenced in the transcript.

BY THE COURT:

Signed: 7/19/2018 2:56:32 PM

Circuit Court Judge

ATTEST: CAROL LATUSECK, CLERK

BY: KRISTIE GIBBENS, DEPUTY

Filed on: 07/19/2018 LAWRENCE County, South Dakota 40CIV15-000052

STATE OF SOUTH DAKOTA)) SS. COUNTY OF LAWRENCE)	IN CIRCUIT COURT FOURTH JUDICIAL CIRCUIT
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff, vs. GIYO BRYAN MIRANDA, Defendant/ Third-Party Claimant, vs. JOHN DOE, Third-party Defendant.	40 CIV. 15-52 **ORDER GRANTING EMERGENCY MOTION TO SUPPLEMENT**

The Plaintiff's Emergency Motion to Supplement the Record came before the Court on the 27th day of June, 2018 in the courtroom of the Lawrence County Courthouse. The Plaintiff appeared telephonically through counsel, Benjamin L. Kleinjan of Helsper, McCarty & Rasmussen, of Brookings, South Dakota. Defendant appeared through counsel, Matthew McIntosh of Beardsley, Jensen & Lee, of Rapid City, South Dakota. The Court heard argument from both parties regarding the settlement of the record as it relates to Exhibit "A".

The Court finds that the parties both participated in the preparation of jury instructions. The Court further finds that the parties discussed jury instructions with the Court at the pre-trial conference and that the Court requested and appreciates the parties' cooperation in preparing of drafts of instructions in an efficient and orderly fashion so that it can be clear which instructions are objected to and so as to minimize any unnecessary delay and inconvenience to the jury. The Court further finds that various drafts of instructions were prepared by both parties, including instructions

that were objected to, and those objections were made on the record. The Court further finds that the question of the inclusion of sudden emergency language as a legal excuse to negligence per se in the instruction was squarely before the Court, argued, and ruled on when instructions were settled. The Court finds that various drafts of said instruction were before the Court and the Exhibit "A" version was denied, but the instruction with the sudden emergency legal excuse to negligence per se was granted, both over Plaintiff's objection. The Court did instruct and urge the parties to prepare the drafts. The Court further finds that Exhibit "A" does not appear in the clerk's file, but the Court does not find that said absence in the file was due to any mistake or inadvertence of the Plaintiff. The Court specifically finds that the Plaintiff is acting in good faith and is not making any misrepresentation of fact, and is not responsible for the prior absence of Exhibit "A". The Court further finds that the Court considered the sudden emergency defense pursuant to the Plaintiff's objection, but ultimately overruled that objection.

The Court concludes that the uninvited error doctrine does not apply, and for purposes of the record, it should be supplemented to include Exhibit "A" to the Plaintiff's Affidavit in Support of the Emergency Motion to Supplement the Record. The Court further concludes that justice requires that the record be complete, including the supplementation of said Exhibit "A".

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiff's Emergency Motion to Supplement the Record should be and hereby is granted.

IT IS FURTHER ORDERED, ADJUGDED AND DECREED that the Court denied the instructions set forth in Exhibit "A" mentioned herein, which was proposed by the Plaintiff, and over Plaintiff's objection.

Signed: 7/19/2018 2:57:25 PM

BY THE COURT:

Circuit Court Judge

CAROL LATUSECK, CLERK

STIE GIBBENS, DEPUTY

Filed on: 07/19/2018 LAWRENCE County, South Dakota 40CIV15-000052

Instruction No. ____

A statute in this state provides:

Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway.

This statute sets the standard of care of a reasonable person.

If you find defendant violated it, such violation is negligence unless you find from all the evidence that compliance was excusable because Defendant Giyo Miranda was faced with an emergency, not of his own making, by reason of which he is unable to comply with the statute because of the emergency.

SDPJI 20-200-20

Dartt v. Berghorst, 484 N.W.2d 891, (S.D. 1992).

Instruction No. ____

A statute in this state provides:

Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway.

This statute sets the standard of care of a reasonable person.

If you find defendant violated it, such violation is negligence unless you find from all the evidence that compliance was excusable because Defendant Giyo Miranda was faced with an emergency, not of his own making, by reason of which he is unable to comply with the statute because of the emergency.

Denial. 4/27/18.

FILED

APR 27 2018

SOUTH DAKOTA UNIFIED JUDICIAL SYSTEM
4TH CIRCUIT CLERK OF COURT

By _____

Instruction No. ____

A statute in this state provides:

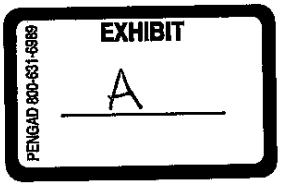
Upon all highways of sufficient width, except upon one-way streets, the driver of a vehicle shall drive the same upon the right half of the highway.

Another statute in this state provides:

It is unlawful for any person to drive a motor vehicle on a highway located in this state at a speed greater than is reasonable and prudent under the conditions then existing or at speeds in excess of those conspicuously post signs at the beginning and end of a portion of highway to show the maximum speed limit established on that portion of highway.

This statute sets the standard of care of a reasonable person.

If you find defendant violated either statute, such violation is negligence.



Instruction No. ____

The issues to be determined by you in this case are these:

First, was the defendant negligent?

If your answer to that question is "no," you will return a verdict for the defendant. If your answer is "yes," you will have a second issue to determine, namely:

Was that negligence a legal cause of any injury to the plaintiff?

If your answer to that question is "no," plaintiff is not entitled to recover; but if your answer is "yes," you then will determine the amount of damages, if any, plaintiff is entitled to recover and return a plaintiff's verdict for the amount thereof.

You should first determine the questions of liability before you consider the question of damages.

SDPJI 1-50-10 [revised by Plaintiff]

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

No. 28695

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
A/S/O LOYD NIELSON,
PLAINTIFF/APPELLANT,

vs.

GIYO BRYAN MIRANDA,
DEFENDANT/APPELLEE,

vs.

JOHN DOE,
THIRD PARTY DEFENDANT/APPELLEE.

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

THE HONORABLE ERIC J. STRAWN
Circuit Court Judge

APPELLANT'S REPLY BRIEF

Benjamin Kleinjan
Helsper, McCarty, & Rasmussen, P.C.
1441 Sixth Street, Ste. 200
Brookings, S.D. 57006

Attorneys for Appellant

Matthew McIntosh
Beardsley, Jensen & Lee
4200 Beach Dr., Ste #3
PO Box 9579
Rapid City, SD 57709
Attorneys for Appellee

NOTICE OF APPEAL FILED AUGUST 20, 2018.

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IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, Plaintiff/Appellant, vs. GIYO BRYAN MIRANDA, Defendant/ Third-Party Claimant/, Appellee, vs. JOHN DOE, Third-party Defendant/ Appellee.	)	No 28695 **APPELLANT'S REPLY BRIEF**

PRELIMINARY STATEMENT

In addition to the reference designations in Appellant's Brief, references to Appellant's Brief will be designated "AB" and references to Appellee's Brief will be designated "AEB".

JURISDICTIONAL STATEMENT

The parties agree this Court has jurisdiction over this appeal. AB 1–2; AEB 1.

REQUEST FOR ORAL ARGUMENT

Appellant respectfully renews and joins Appellee's request for the privilege of oral argument. AB 2; AEB 26.

ARGUMENT

A. Introduction

Appellant identified three issues. Appellee raised two new issues. The parties appear to agree that the primary issue is the Sudden Emergency doctrine, and that the remaining issues are secondary.

B. The Trial Court did Err regarding the Sudden Emergency Doctrine

This doctrine has not been squarely before this Court since *Carpenter v. City of Belle Fourche*. 2000 S.D. 55, ¶ 2, 609 N.W.2d 751, 755, which emphasized narrow application from *Meyer v. Johnson*, 254 N.W.2d 107 (S.D. 1977). Before the Sudden Emergency doctrine can apply, there must be "*evidence that something other than the negligence of one of the parties caused the mishap*." *Carpenter*, 2000 S.D. at ¶ 32 (quoting *Meyer*, 254 N.W.2d at 110) (emphasis in *Carpenter*).

1. Counterargument authorities are inapposite.

Appellee cites *Kappelman v. Lutz*, 217 P.3d 286 (Wash. 2009). AEB 7. *Kappelman* is divergent factually. It involves a motorcyclist who hit a deer, resulting in injuries to a passenger. The motorcyclist did not have the proper license endorsement, which was irrelevant. *Kappelman* aligns with *Meyer* and *Carpenter's* proposition that another party's sudden negligence does not constitute an emergency. *See id.* at 290, n. 12. "Not every sudden occurrence will constitute an emergency." *Id.* (citing *Seholm v. Hamilton*, 419 P.2d 328 (Wash. 1966) (pedestrian crossing road at night); *Mills v. Park*, 409 P.2d 646 (Wash. 1966) (rear-end collision); *Brown v. Spokane County*, 668 P.2d 571 (Wash. 1983) (fire truck entering an intersection); *Sonnenberg v. Remsing*, 398 P.2d 728

(Wash. 1965) (vehicle parked partway onto roadway); *Johnson v. Barnes*, 350 P.2d 471 (Wash. 1960) (child ran onto arterial and into the side of a car)).

Kappelman applies a rule on the minority side of the jurisdictional split.[1] *Compare Kappelman*, 217 P.3d at 290 (holding defendant "is not liable for negligence although the particular act might constitute negligence") to *Weiss v. Bal*, 501 N.W.2d 478, 481 (Iowa 1993) ("the sudden emergency doctrine is merely an expression of the reasonably prudent person standard of care.") (citing *Meyer*, 254 N.W.2d at 110-11; William L. Prosser and W. Page Keeton, PROSSER AND KEETON ON TORTS § 33, at 196–97 (5th ed. 1984)). Reliance upon *Kappelman* is against the modern trend and South Dakota authority.

Both parties cited *Knapp v. Stanford*, 392 So. 2d 196 (Miss. 1980), which is the more apposite case. Appellant sides with the majority, and Appellee with the minority dissent. Appellee takes an all-or-nothing approach. AEB 19–20. *Knapp's* principles apply with or without abolishing the doctrine prospectively.

2. Division of the issues to raise a preservation counterargument is not consistent with the record.

Appellee splits the sudden emergency issue to create a technical argument. AEB 7, 22. At instruction settlement, the trial court addressed sudden emergency as it relates to negligence on April 26, and as it relates to negligence per se on April 27. TT 166–75; 178–195. Appellee maintains that "an objection to one is not an objection to the other."

[1] "[T]he sudden emergency doctrine cannot properly be considered a defense to allegations of negligence, as instead, it provides a qualified standard of care . . . . [O]ther courts view the sudden-emergency doctrine as an affirmative defense, or otherwise treat it as though it was a defense or justification. . . ." 57A Am Jur 2d *Negligence* § 198

HT 30. The trial court held it was clearly apprised of the sudden emergency issue for both. HT 32.

In *Meyer*, this Court held Sudden Emergency is not an affirmative defense to negligence, but "is merely an expansion of the reasonably prudent person standard of care." 254 N.W.2d at 110. However, "'A legal excuse ... must be something that would make it impossible to comply with the statute.'. Noncompliance must be caused by circumstances beyond the driver's control and not produced by his own misconduct." *Dartt v. Berghorst*, 484 N.W.2d 891, 896 (S.D. 1992) (quoting *Albers v. Ottenbacher*, 116 N.W.2d 529, 532 (S.D.1962)). "Unlike the doctrine of legal excuse-which exonerates a party from liability for negligence per se-the sudden emergency doctrine is merely an expression of the reasonably prudent person standard of care." *Weiss v. Bal*, 501 N.W.2d 478, 481 (Iowa 1993) (citing *Meyer*, 254 N.W.2d at 110–11; Prosser § 33).

> SDCL 15-6-51 is not intended to be used as a technical excuse for overlooking the trial court's erroneous instructions. In making objections, no particular formality is required if it is clear that the trial judge was informed of the possible errors so that he may have the opportunity to correct the instructions. *Schmidt v. Wildcat Cave, Inc.*, 261 N.W.2d 114, 116 (S.D. 1977) (internal citations omitted).

The rule requires the party objecting to state some grounds for the objection. SDCL 15-6-51(c). "Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in any motion." SDCL § 15-6-10(c).

Both parties submitted preliminary written objections on April 19, 2018. SR 98–160. Appellant cited *Carpenter*, *Meyer*, *Plucker*,[2] and *Heinrichs*.[3] APP 24. In the written

[2] *Plucker v. Kappler*, 311 N.W.2d 924 (S.D. 1981).

[3] *Henrichs v. Inter City Bus Lines*, 111 N.W.2d 327 (S.D. 1961).

pleading, grounds were adopted by reference. APP 26, 29, 31, 33. Both parties supplemented preliminary written objections with extensive oral argument on the elements. TT 166–175; 178–195. The objections were sufficiently specific for the trial court to dig into the elements of legal excuse in light of the speed testimony. The trial judge was sufficiently into the issues to be informed of the possible errors in all legal excuse instruction. In *Junge*,

> The court proposed to instruct the jury on the contributory negligence of the plaintiff Junge. The record reveals that Junge objected to contributory negligence instructions on the ground that there was "no evidence to substantiate that there could have been any contributory negligence." The court overruled all such objections. *Junge v. Jerzak*, 519 N.W.2d 29, 30 (S.D. 1994).

On appeal, Jerzak argued sufficiency of the objection. *Id.* at 31. This Court held:

> We also disagree with Jerzak's contention that Junge failed to properly preserve the error on instruction of the jury. Pertinent language of SDCL 15-6-59(a) provides that an error of law "must be based upon an objection [.]" As previously detailed, Junge objected to all jury instructions on contributory negligence, and these objections were overruled by the court. . . . It would have been fruitless for Junge to request an instruction commanding the jury that Jerzak was negligent as a matter of law, when the court made clear that it intended to instruct on Junge's contributory negligence. *Id.* at 32.

Frey v. Kouf, 484 N.W.2d 864 (S.D. 1992), involves the same technical argument under SDCL § 15-6-51(a)1. *Id.* at 867. "[Kouf] misapprehends Frey's argument. Frey is not objecting because the trial court rejected a proposed jury instruction. Rather, Frey is objecting to the instruction adopted by the trial court." *Id.* at 866 (citations omitted). "[T]he objection is sufficient if the judge was informed of the possible error so that he might have the opportunity to make corrections." *Frey*, 484 N.W.2d at 867.

This record has more support than *Frey*. in addition to objecting, the submission of pattern instructions, which were rejected, preserved the issue. SR 165, 167–69; APP

47–50. “Counsel properly preserved the record for appeal by offering South Dakota's pattern jury instruction on this affirmative defense, which the trial court rejected.” *Bauman v. Auch*, 539 N.W.2d 320, 326 (S.D. 1995).

3. Counterarguments fail to demonstrate that the first *Meyer* element was met.

Appellee does not acknowledge that the rest of the discussion within *Meyer*, as well as subsequent cases such as *Carpenter*, which show that the negligence of another party to the crash cannot satisfy the first element. AEB 7. Appellee’s less restrictive approach opens the floodgates. Appellee argues that the instruction “should” be given if the elements are met. AEB 7. But *Meyer* warns that like instructions are “surplusage” to be “restrictively used” or else the requesting party “incurs the hazard of appeal.” *Id*. at 110 (quoting *Herman v. Spiegler*, 145 N.W.2d 916 (S.D. 1966)). The instruction’s only practical purpose is to muddy the waters because it “is usually covered by other instructions given, especially those on negligence, proximate cause, and burden of proof.” *Henrichs*, 111 N.W.2d at 332.

Appellee denies any “testimony or evidence presented at trial that the brightness of the unidentified vehicle’s headlights either caused Miranda to swerve or presented a sudden emergency.” AEB 10. However, on opening, defense counsel explained, “both Kevin and Giyo are going to tell you that through this dark November night, they’re watching as they see a set of headlights and it’s in the eastbound lane, and as they round this corner, they see the lights go from the eastbound lane to shining on their face. And suddenly, Giyo’s faced with an emergency.” TT 45–46. This testimony followed: “Q Was it dark then? [Giyo Miranda] Yes, it’s dark.” TT 146. “Q Was it kind of dusk, was

there still some light, or was it black, was it night? [Kevin Miranda] It was black. It was night." KM 21. "Q And how do you know that it's coming into your lane? [Giyo Miranda] Because of the headlight. It just – for like a really quick instant the headlights went like straight towards our vehicle." TT 148. "Q Did you just notice it when the headlights were right there in your face? [Kevin Miranda] A Yes, sir." KM 21. "Q And you didn't see what color or what make or model of car it was that was coming at you? [Kevin Miranda] No sir. Q And so you didn't see it approach from the distance? A I didn't." KM 21.

The trail court considered it a cumulative surprise factor "It was not isolated to the headlights and not specifically to the icy road or conditions, but accumulative effect of all of those elements that the jury could reasonably look at and determine whether or not a sudden emergency has existed." HT 23–24.

The Appellee's secondary authorities validate Appellant's argument. *Myhaver v. Knutson*, 942 P.2d 445 (Ariz. 1997), is a Phoenix case under different circumstances. It gives a nod to *Knapp* and a stern warning to Arizona trial courts:

> [W]e join those courts that have discouraged use of the instruction and urge our trial judges to give it only in the rare case. *The instruction should be confined to the case in which the emergency is not of the routine sort produced by the impending accident* but arises from events the driver could not be expected to anticipate. *Id.* at 450 (emphasis added).

Appellee's argument is precisely that the impending accident with Doe was the emergency.

Haderlie v. Sondgeroth, 866 P.2d 703, 718 (Wyo. 1993), involves a dead horse, which was a nonemergency due to attenuation. *Id*. at 706. *Divilly v. Port Auth. of Allegheny Co.*, 810 A.2d 755 (Pa. 2002), applies Pennsylvania common carrier liability to

a passenger, a completely different standard. In *Piper v. McMillan*, 730 N.E.2d 481, 489 (Ohio 1999), the Ohio court rejected the sudden emergency argument since the proponent was following too close. *Id.* at 490.

Appellee claims, "State Farm also argues, without any authority, that Miranda should have anticipated that another driver would come into his lane of travel on the icy roads." AEB 11 (citing AB 21). That authority is *Dartt*, 484 N.W.2d at 896 ("While this case does not involve an unavoidable accident instruction, our cases which have discussed the propriety of such instructions are helpful in analyzing the issue before us.") (citing *Howard v. Sanborn*, 483 N.W.2d 796, 798 (S.D.1992); *Stevens v. Wood Sawmill, Inc.*, 426 N.W.2d 13, 17 (S.D. 1988); *Plucker*, 311 N.W.2d 924; *Cordell v. Scott*, 111 N.W.2d 594, 598 (1961)).

The sudden appearance of a vehicle is not dispositive. A vehicle suddenly appeared in *Dwyer*,[4] *Meyer*, *Stevens*, *Howard*, *Dartt*, and *Carpenter*. In *Weber v. Bernard*, 349 N.W.2d 51 (S.D. 1984), cited by Appellee, a vehicle did not suddenly appear; black ice did. Most car accidents involve another vehicle that suddenly appears. Appellee seeks an open ended concept of "emergency" that begs the question: What is not an emergency? Appellee's argument would expand the sudden emergency doctrine to apply in virtually every crash.[5]

"[A] motorist has the right to assume that other drivers will obey the rules of the road." AEB 11 (quoting *Harmon v. Washburn*, 2008 S.D. 42, ¶ 17, 751 N.W.2d 297, 302). "However, this does not relieve a motorist from keeping a lookout, or using

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[4] *Dwyer v. Christensen*, 75 N.W.2d 650 (S.D. 1956).

[5] Both State Farm and De Smet Insurance would benefit from an expansion of the doctrine.

reasonable care, with due regard for the safety of others. 'In other words, a motorist may not be blithely oblivious to the obvious.'" *Treib v. Kern*, 513 N.W.2d 908, 913 (S.D. 1994) (quoting *Nelson v. McClard*, 357 N.W.2d 517, 519 (S.D.1984)). "[P]eople may not close their eyes to obvious dangers, [or] facts from which [they] would be legally charged with appreciation of the danger.'" *Carpenter*, 2000 S.D. at ¶ 34, 609 N.W.2d at 764 (quoting *Goepfert v. Filler*, 1997 SD 56, ¶ 9, 563 N.W.2d 140, 143). Miranda appreciated the icy roads and darkness. Under the counterargument, whenever the other driver breaks the law, the sudden emergency doctrine may apply. This is counter to *Carpenter's* emphatical quote of *Meyer*.

Appellee claims no "cases cited by State Farm involve a third-party John Doe or phantom vehicle." AEB 12. In *Knapp*, the injured plaintiff happened to be sitting in the defendant's vehicle instead of out on the road. In *Carpenter*, the plaintiff was not an innocent bystander, but instead contributed to the crash. No rational reason exists to expand the protection against an innocent bystander plaintiff, but not a contributing plaintiff. The doctrine unfairly emphasizes one party's argument. There is no reason why this rationale might not extend to three party actions. The risk of undue emphasis on a single party's argument is even greater in three party accidents.

4. Counterarguments fail to demonstrate that the second *Meyer* element was met.

Appellee concedes the doctrine is prohibited when the proponent is negligent, but argues more than slight contribution must be proved by the objecting party. AEB 12. Mr. Miranda exceeded the posted speed limit on the curved portion of the icy road prior to encountering Doe's headlights. AB 23–24. He was looking at the speedometer, not

guessing. TT 150. "It is settled law a party can claim no better version of the facts than he has given in his own testimony." *Dartt*, 484 N.W.2d at 897 (citations omitted). On opening defense counsel explained, "even though he just had entered into a 45-mile-per-hour area, he's doing 30 to 35 miles per hour because he knows that the roads are bad." TT 45–46. It turned out to be a 30 mph zone, not a 45 mph zone. The testimony of Giyo Miranda and Trooper Vopat shows he was exceeding the speed limit and safe speed *prior to* entering the 45 mph zone. AB 23–24 (quoting TT 63, 149–50, 154, 155, 156, 158, 160–61).

Under *Meyer*, a proponent must show he did not contribute. The burden is on the proponent. *Carpenter* held that sufficient evidence of contribution bars the doctrine, consistent with *Dwyer*, 75 N.W.2d at 654 ("While our statute does not specifically require a diminution of speed when proceeding with headlights temporarily on low beam, it may well be that such action is necessary to satisfy the standards of a reasonably prudent person."). South Dakota uses the "slight" comparative negligence standard. *See* SDCL § 20-9-2. The sudden emergency doctrine must be read considering that standard. *See Roberts v. Estate of Randall*, 51 P.3d 204, 209 (Wyo. 2002) (holding Wyoming comparative negligence statutes do not preclude application of the sudden emergency doctrine). Here, the defendant was either slightly negligent, consistent with *Dwyer*, or negligent per se, consistent with *Albers*, in either case barring the doctrine.

Appellee conflates the impact site (a 45 mph zone) with the Doe encounter on the curve (a 30 mph zone). *Compare* AEB 13 *to* TT 155–56. "[Y]our testimony is that you evade a vehicle in this curved area? [Giyo Miranda] Yes, I did." TT 155. "Your testimony is that as you're going around the curve, you go off the edge into the shoulder;

right? [Giyo Miranda] Yes, to avoid the vehicle." TT 156. The critical time is when "the dangerous situation was perceived." *Meyer*, 254 N.W.2d at 110. The issue must be "determined by looking toward the event rather than back at it." *Dartt*, 484 N.W.2d at 897 (citations omitted). At the point Miranda perceived Doe, he was exceeding the posted speed limit.

Appellee cites *Stephens v. Hypes*, 610 S.E.2d 631, 632 (Ga. Ct. App. 2005), where the driver swerved to miss a deer, resulting in a deadly "T-bone-type collision." Georgia applies a different test.[6] Unlike Mr. Miranda, the defendant driver could not testify because she was dead. In *Vialpando v. Cooper Cameron Corp.*, 92 F. App'x 612, 618 (10th Cir. 2004), defendant observed plaintiff run a stop sign before turning out right in front of him, resulting in a deadly crash. *Id.* Without the surviving witness, dueling experts evaluated speed. *Id.* at 614–15.

Here, Mr. Miranda survived and testified that when he saw Doe he was going between 30 and 35 mph, based on his observation of his own speedometer, in a 30 mph zone, on an icy curve, even though he knew he should be going slower, knew of the ice,[7] and Trooper Vopat confirmed he should be going slower. He cannot now claim that he was going slower. "It is settled law a party can claim no better version of the facts than he has given in his own testimony." *Dartt*, 484 N.W.2d at 897.

The speculative counterargument was also rejected in *Stevens*.

> Defendants counter that Plaintiff did not prove that their negligence caused the collision. . . . This defense is unacceptable. In *Lohr v. Watson*, 68 S.D. 298, 2 N.W.2d 6 (1942), this Court overturned a

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[6] *See Sawyer v. Marjon Enters*., 718 S.E.2d 922, 924–25 (Ga. Ct. App. 2011)

[7] Compare to driver "suddenly faced with unexpectedly slippery road conditions upon reaching the exit ramp." *Weber v. Bernard*, 349 N.W.2d 51, 53 (S.D. 1984).

> verdict lacking support in the evidence. A verdict cannot rest on an inference based on speculation and conjecture. *Lohr*, 68 S.D. at 304, 2 N.W.2d at 8. Here, the situation is reversed. The Defendants seek to excuse the violation of their statutory duty to properly maintain their truck on the basis of speculation . . . . Plaintiff's powerful circumstantial evidence of statutory violation, . . . is essentially unchallenged. *Stevens v. Wood Sawmill*, 426 N.W.2d at 16.

Appellee discusses "the reasonableness of his conduct prior to the accident." AEP 16. But "[e]vidence of due care does not furnish an excuse or justification." *Dartt*, 484 N.W.2d at 896 (citing *Albers*, 116 N.W.2d at 532). Mr. Miranda contributed by maneuvers that he admitted were improper and incorrect. TT 158. If the emergency was not attenuated per *Knapp*, then this admitted contribution defeats the second element.

5. Counterarguments fail to demonstrate that the third *Meyer* element was met.

The question is when choices became available to Mr. Miranda. "[B]efore an instruction on the doctrine of sudden emergency is given, the evidence should be sufficient to support a finding that alternative courses of action *in meeting the emergency* were open to the actor." 57A Am Jur 2d Negligence § 206 (emphasis added). Here, the alternatives open *after* Miranda evaded Doe. The evidence must be viewed looking toward the event, not back at it. *Dartt*, 484 N.W.2d at 897.

Appellee argues that Miranda had the option to hit his brakes. AED 18. Mr. Miranda testified he had only one choice available, he "steered to the right so I don't have a head-on collision with that vehicle." TT 148. He further testified that "Since the road is bad, I don't want drastic brakes or smashing of the brake because I know I'm going to lose control because of the icy road." TT 162. "I know I'm going to lose control if I try to brake." TT 162. Mr. Miranda denied that there was "time to think about the other actions

you should be taking" at "the moment that you were deciding to pull to the right." TT 162–63. "Q So with icy roads, could you have stopped? A No." TT 163. That was not an option at the instant Miranda saw Doe. That option emerged later.

The option to stop afterward raises the "attenuation" issue regarding the second maneuver back onto the road. "Mr. Haderlie knew of the dangerous condition for a period of time, at least a minute and a half, before the second accident which negates any showing that an unknown or unforseen condition arose unexpectedly." *Haderlie*, 866 P.2d at 718 (holding that trial court's reasoning regarding attenuation is logical). "[I]t is clear that the 'sudden emergency' was over and that another factor caused the driver to lose control of the vehicle." *Knapp*, 392 So.2d 197. Appellee distinguishes *Knapp* based on a few seconds. AEB 20. Those distinctions go to attenuation question, but do not change the fact that he testified his only choice was to veer to the right. The other choice opened after Doe passed into the night.

6. The Fourth Meyer element is not an issue in this case.

The parties appear to agree that the fourth element is not an issue. AEB 18–19.

C. The Trial Court Erred by Burden Shifting under Instruction 22.

Appellee does not argue that Instruction 22 is a correct statement of law. Instead, the first argument is another "sufficiency of the objection" argument.

Appellant filed a written objection to the instruction on April 19, 2018, which incorporated arguments per SDCL § 15-6-10(c), and reiterated objections per *Junge* and *Frey*. Both parties supplemented objections during oral argument at the settlement

conference on April 26, 2018. Both parties further supplemented the objection during oral argument at the settlement conference on April 27, 2018.

Alternatively, Appellant requested a pattern version of Instruction 22 omitting the offending language on April 19, 2018, Appellee objected in writing, and the trial court denied it on April 27. SR 139–140, 169. "Counsel properly preserved the record for appeal by offering South Dakota's pattern jury instruction on this affirmative defense, which the trial court rejected." *Bauman*, 539 N.W.2d at 326.

"[N]o particular formality is required if it is clear that the trial judge was informed of the possible errors so that he may have the opportunity to correct the instructions." *Schmidt*, 261 N.W.2d at 116. The record clearly shows that the form of the objection and oral supplementation were sufficient to apprise the trial judge of the issues and burdens. The objection was squarely before the trial court that considered which of the two instructions to give to the jury, and which to reject, and he went through the elements one at a time.

Alternatively, "A court may consider a plain error in the instructions affecting substantial rights that has not been preserved as required." SDCL 15-6-51(d). "It is settled law that a defendant has the burden of proving legal excuse." *Dartt*, 484 N.W.2d at 894.

In *Alvine Family, L.P. v. Hagemann*, 2010 S.D. 28, 780 N.W.2d 507, the instruction included a surplus element. No discussion on the elements was presented. *Id*. at ¶ 20. The motion for new trial did not raise instructional error. *Id.* at ¶ 21. Unlike in *Alvine Family*, the objection here was specific enough for the judge to actually go

through the elements one by one. The instructional error was also raised on Appellant's post-trial motion.

As to Instruction 25, Appellee is trying to have it both ways. Appellee splits the first issue into two because the elements of sudden emergency and legal excuse have similar but different elements. Then, Appellee throws that distinction out the window when it appears that some of those elements are missing. It is undisputed that Instruction 25 does not set forth an accurate statement of law consistent with *Dartt*. 484 N.W.2d at 894. In *Bauman*, "The trial court's instruction left out the third element. This element was highly critical in this case . . . This incomplete instruction was prejudicial error." *Bauman*, 539 N.W.2d at 326 (citing *Dartt*, 484 N.W.2d at 894). Like in *Bauman*, several elements were missing, and did not appear in a different instruction. This case should be reversed just like *Bauman*.

D. The Trial Court Improperly Directed the Verdict in Instruction 20.

Instruction 20 is a confusing Rube Goldberg device. Appellee again argues failure to preserve. AEB 29. Appellant made initial written objection to this instruction with reasons on April 17, 2018, and offered an alternate, which Appellee objected to. SR 131–135. Both parties' objections were supplemented during the settlement conferences on April 26 and 27, and the trial court gave Appellee's version and denied Appellant's version. SR 168. Appellant argued instructional error in the motion for new trial. SR 343–418. Appellant's proposed findings and conclusions that were rejected by the trial court. SR 842. The issue has clearly been preserved.

Appellee argues that there is no prejudice. AEB 29–30. "Erroneous instructions are prejudicial under SDCL 15-6-61 when in all probability they produced some effect

upon the verdict and were harmful to the substantial rights of a party." *Vetter v. Cam Wal Elec. Co-op., Inc.*, 2006 S.D. 21, ¶ 10, 711 N.W.2d 612, 615. "[N]o court has discretion to give incorrect, misleading, conflicting, or confusing instructions. *Stern Oil Co., Inc. v. Brown*, 2018 S.D. 15, ¶ 12, 908 N.W.2d 144, 150, reh'g denied (Mar. 30, 2018) (quoting *Karst v. Shur-Co.*, 2016 S.D. 35, ¶ 8, 878 N.W.2d 604, 609). The defense closing first ignited passion against an institutional plaintiff, then run that plaintiff through Instruction 20's meat grinder. TT 212, 217.

Appellee argues that Appellant never pursued John Doe in other instructions or argument. On the contrary, joint and several instructions were agreed to, and the jury was urged to consider this as a clear joint and several case, where both John Doe and Mr. Miranda were liable.

E. The Trial Court did not Err in Granting the Motion to Amend the Pleadings to Conform to the Evidence.

This issue is moot and a red herring. Appellee objected to the form of the complaint. Appellant moved to amend to conform to the evidence. HT 10. "South Dakota still adheres to the rules of notice pleading, and therefore, a complaint need only contain '[a] short and plain statement of the claim showing that the pleader is entitled to relief[.]' *Gruhlke v. Sioux Empire Fed. Credit Union*, 2008 SD 89, ¶17, 756 NW 2d 399, 409, (quoting SDCL 15-6-8(a)(1)). "All pleadings shall be so construed as to do substantial justice." SDCL 15-6-8(f).

The rule is SDCL 15-6-15(b). Appellee's argument at trial was to shift the blame from himself to John Doe. Both parties impliedly consented to the jury considering the negligence per se of John Doe. It was in the verdict form. Where an issue has been tried

without objection, it is treated in all respects as if it had been raised in the pleadings. *In re Estate of Borsch*, 353 N.W.2d 346 (S.D. 1984). Appellee raised a form objection, forcing the motion to conform, which the trial court "shall" do "freely." This issue is also likely of no consequence because under the rule "failure so to amend does not affect the result of the trial of these issues." There is no error, and this issue is moot.

F. The Trial Court did not Err in Granting the Emergency Motion to Supplement the Record.

This is another red herring. A post-trial fact determination by the trial court indicates the draft was present at the settlement conference.

1. Background Facts

On April 27, 2018, due to speed testimony, counsel distributed two new instruction drafts. TT 185–89; SR 751. Both identified the new issue. One included the sudden emergency legal excuse, and the other did not. The trial court heard argument regarding the two possible drafts. TT 185–86. Appellee's counsel objected to the version without the legal excuse language. TT 186:21. The trial court "threw out" the originally proposed version, SR 151, and took up the new versions. TT 187. The trial court indicated it would write "denied" and file the new proposed instruction that was denied. TT 188–89. The trial court evidently did not do so.

Appellee seized upon the fact that the blank negligence per se instruction had disappeared. Appellant moved to supplement. TT 188–89. The trial court found no misrepresentation as to the form being actually considered and ruled on at settlement. HT 26. The trial court found that it had multiple forms and must have been lost in the shuffle. HT 26. Appellee argued invited error, since the instruction was typed by Appellant's

counsel, and not objected to in the preliminary set before trial. HT 29. Appellant responded that a rule that tied preservation to who was the typist would defeat judicial economy and common sense. HT 31. The speed issue did not appear until trial, after the preliminary set was filed. The trial court made an affirmative finding that the issue was fully before it, preserved, and not invited error. HT 32; SR 865.

2. Analysis

This issue is moot and nonprejudicial because the argument was preserved by objection under *Junge* and *Frey*. Alternatively, counsel properly requested permission to supplement the file so all documents that the trial court actually had before it on April 27 were actually in the file. "After the close of the evidence, a party may: (b) with the court's permission file untimely requests for instructions on any issue." SDCL 15-15-51(a). The trial court gave the permission, and the proposed draft disappeared through no fault of any party. SR 865.

Appellee argues against the facts found by the trial court as to which documents were presented. The trial court is in a better position to determine that fact. Regardless of whether a clearly erroneous standard or an abuse of discretion standard is applied, the trial court did not err in allowing the draft that had been presented at the settlement to be filed.

CONCLUSION

The counterarguments of the Appellee are not well founded. The issues raised for review are red herrings. This matter should be reversed.

Dated this 20th day of December, 2018.

HELSPER, McCARTY, & RASMUSSEN P.C.

/s/ Benjamin Kleinjan

Benjamin L. Kleinjan
Attorneys for Appellant
1441 Sixth Street, Suite 200
Brookings, S.D. 57006
(605) 692-7775

CERTIFICATE OF SERVICE

The undersigned certifies that on the 20th day of December, 2018, the foregoing brief and attached appendix were transmitted to the South Dakota Supreme Court electronically, with one Original bearing manually affixed signatures and two photocopies via U.S. mail, and with service upon the following by U.S. Mail:

Matthew McIntosh
4200 Beach Dr Ste 3,
Rapid City, SD 57702

HELSPER, McCARTY, & RASMUSSEN P.C.

/s/ Benjamin Kleinjan

_____

Benjamin L. Kleinjan
Attorneys for Appellant
1441 Sixth Street, Suite 200
Brookings, S.D. 57006
(605) 692-7775

CERTIFICATE OF COMPLIANCE

The undersigned, Benjamin L. Kleinjan, attorney for the Appellant in the above-captioned matter, hereby certifies, pursuant to SDCL 15-26A-66(b)(4) that the Appellant's Brief was completed in Times New Roman typeface, 12 point, and according to the word-processing system used to prepare the brief, Microsoft Word 2016, it contains 4,954 words, excluding table of contents, table of cases, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel.

Dated this 20th day of December, 2018.

HELSPER, McCARTY, & RASMUSSEN P.C.

/s/ Benjamin Kleinjan

Benjamin L. Kleinjan
Attorneys for Appellant
1441 Sixth Street, Suite 200
Brookings, S.D. 57006
(605) 692-7775