IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28067

BONITA JENSEN, Individually and as the Personal Representative of the Estate of RONALD MILTON JENSEN, Deceased,

Plaintiff-Appellee,

vs.

MENARD, INC.,

Defendant-Appellant.

Appeal from the First Judicial Circuit
Davison County, South Dakota
The Honorable Patrick Smith, Circuit Court Judge

APPELLANT'S BRIEF

Attorneys for Plaintiff-Appellee:
Scott G. Hoy
HOY TRIAL LAWYERS
901 West 10th Street, Suite 300
Sioux Falls, SD 57104
(605) 334-8900
scott@hoylaw.com

Michael W. Strain

MORMAN LAW FIRM
P.O. Box 729
Sturgis, SD 57785
(605) 347-3624
mike@mormanlaw.com

Attorneys for Defendant-Appellant:
William P. Fuller
Hilary L. Williamson
FULLER & WILLIAMSON, LLP
7521 South Louise Avenue
Sioux Falls, SD 57108
(605) 333-0003
bfuller@fullerandwilliamson.com

hwilliamson@fullerandwilliamson.com

Notice of Appeal Filed: December 9, 2016.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Dakota Cases:

Statutes:

Other Authorities:

PRELIMINARY STATEMENT

Appellant Menard, Inc. will be referred to as "Menard." Appellee Bonita Jensen, who is named as a plaintiff in her individual capacity, as well as her capacity as the personal representative of the Estate of Ronald Milton Jensen, will be collectively referred to as "Jensen." References to the Clerk's Register of Actions will be referred to as "RA" with the applicable page number. References to the Trial Transcript will be referred to as "TT" with the applicable page number. References to Menard's Appendix will be referred to as "App." with the applicable page number. References to Dr. John Sabow's trial deposition testimony, taken on October 26, 2016, will be referred to as "Sabow" with the applicable page number.

STATEMENT OF JURISDICTION

This Appeal stems from the action captioned *Bonita Jensen, Individually and as Personal Representative of the Estate of Ronald Milton Jensen v. Menard, Inc.*, 17 CIV. 12-000458, venued in Davison County, First Judicial Circuit, South Dakota, the Honorable Patrick Smith presiding. Menard appeals from the Judgment signed by Judge Smith on November 15, 2016, and filed on November 16, 2016, following a jury trial. (RA 711-14; App. 001-4.) Notice of Entry was served on November 16, 2016. (RA 715-718; App. 005-8.) Menard timely filed its Notice of Appeal on December 9, 2016. (RA 770-71; App. 009-10.) This Honorable Court has jurisdiction pursuant to SDCL §§ 15-26A-3(1) and (4) and SDCL § 15-26A-7.

REQUEST FOR ORAL ARGUMENT

Menard respectfully requests the privilege of appearing before this Honorable Court for oral argument on the issues stated herein.

STATEMENT OF THE ISSUES

I. Whether the trial court erred when it granted Jensen's motion for judgment as a matter of law on Menard's affirmative defense of assumption of the risk.

The trial court erred in granting Jensen's motion for judgment as a matter of law because there was compelling evidence to support the submission of Menard's affirmative defense of assumption of the risk to the jury.

- *Magner v. Brinkman*, 2016 S.D. 50, 883 N.W.2d 74.
- *Duda v. Phatty McGees, Inc*., 2008 S.D. 115, 758 N.W.2d 754.
- *Ballard v. Happy Jack's Supper Club*, 425 N.W.2d 385 (S.D. 1988).

II. Whether the trial court erred when it refused to instruct the jury on Menard's affirmative defense of assumption of the risk.

The trial court committed prejudicial error when it rejected Menard's proposed jury instructions regarding assumption of the risk.

- *Buxcel v. First Fidelity Bank*, 1999 S.D. 126, 601 N.W.2d 593.
- *Gerlach v. Ethan Coop Lumber Ass'n*, 478 N.W.2d 828 (S.D. 1991).

STATEMENT OF THE CASE

On or about August 23, 2012, Ronald (Ron) Jensen and Bonita Jensen filed a summons and complaint against Menard alleging that Menard's negligence caused Ron's injuries and damages. (RA 005-8.) The negligence claim arose from an unfortunate accident that occurred on July 28, 2012, while Ron was at the Menard store in Mitchell, South Dakota. On September 20, 2012, Jensen filed an Amended Complaint to specifically allege loss of consortium by Bonita Jensen. (RA 10-13.) Ron passed away during the pendency of this action. (RA 38-39.) Bonita Jensen was appointed as the personal representative of the Estate of Ronald Jensen and pursued the Estate's claim, as well as her own loss of consortium claim, against Menard.

A four-day jury trial was held October 31, 2016, through November 3, 2016, before the Honorable Patrick Smith at the Davison County Courthouse. At the close of evidence, Jensen moved for judgment as a matter of law as to her claims against Menard, and as to Menard's affirmative defenses of assumption of the risk and contributory negligence. (TT 486.) The trial court granted Jensen's motion for judgment as a matter of law as to assumption of the risk, but denied the balance of the motion. (TT 494.) The trial court subsequently rejected Menard's proposed jury instructions addressing assumption of the risk. (TT 494; RA 393-98; App. 011-16.)

The jury returned a verdict in favor of Jensen on November 3, 2016. (RA 449; App. 017.) On November 15, 2016, the trial court entered a judgment against Menard in the amount of $2,295,971.97, which included pre- and post-judgment interest. (RA 711-14; App. 001-4.) Menard received Notice of Entry of the Judgment on November 16, 2016. (RA 715-18; App. 005-8.) Menard filed a timely Notice of Appeal on December 9, 2016. (RA 770-71; App. 009-10.)

STATEMENT OF THE FACTS

This action stems from a tragic accident that occurred on July 28, 2012. That day, Ron Jensen and his brother-in-law, Don Farnam, traveled from Huron, South Dakota, to the Menard store in Mitchell to buy seven sheets of plywood to finish a tack room in the Jensens' barn. Ron drove Don's pickup ("the Farnam pickup"). It was particularly windy on that Saturday in Mitchell, with sustained wind speeds averaging 20 miles per hour and gusts measuring 27 miles per hour. (TT 34-35, 48; RA 661-72, 682-83.) Ron had been to this Menard before and was familiar with the store's layout. (TT 48-49.)

Ron parked in the front parking lot located on the north side of the store. (TT 35;

RA 656.) Ron and Don went inside where Ron paid for seven sheets of plywood. (TT 35; RA 664.) The plywood was located inside the store. (TT 97.) Customers may take their purchases out the front door to their vehicles using various types of carts. (TT 49.) Ron, however, chose to pay for the plywood and took his receipt to a loading area in the back of the store where there are numbered doors that customers can access and load their purchases. (TT 49-50.) Access to the back of the store is controlled by a security shack, where a Menard employee reviews the customer's receipt and directs them to the appropriate door. (*Id*.) This is precisely what occurred here.

Ron drove the Farnam pickup to the security shack. (TT 35-36.) The Menard employee in the security shack directed Ron to Door 15. (TT 36.) Door 15 is one of many exterior doors located inside of an enclosed bay along the back, south side of the store. (RA 685.) Door 15 consists of a glass overhead door with a glass door beside it. (*Id*.) The overhead door can be operated using a simple panel of buttons on the exterior or interior of the door. (*Id*.) Customers can and do pull their vehicles inside the bay area to load their purchases. (TT 298-99, 330, 402-03.) Customers can also choose to park outside of the bay. (TT 85-86, 106.) It is simply a matter of the customer's discretion. (TT 86, 106.) Once parked, customers can go inside the store and use a cart to load their purchased merchandise and take it out to their vehicle. (TT 177-78, 95.) Customers can also request assistance from a Menard employee. (TT 95.)

Ron drove the Farnam pickup into the yard and chose not to pull inside the bay housing Door 15. (TT 50, 178.) Instead, Ron chose to park parallel to the south side of the building outside of the bay housing Door 15. (TT 50.) Ron parked the Farnam pickup so that it was pointing east, with the driver's side door closest to the south side of

the building. (TT 85; RA 686.) Ron and Don both exited the vehicle. Clint Weyand, an assistant manager in the lumberyard area, was working that day. (TT 94.) He saw Ron holding a receipt and asked if he could be of any help. (TT 97.) Ron handed Clint the receipt and Clint went inside the store to retrieve the plywood. (*Id.*)

Menard has various kinds of carts in its stores, including single-rail carts, double-rail carts, and flat carts. (RA 592, 667.) A single-rail cart has only one set of rails, allowing more space for product on the platform. (RA 592, 686.) Sheeting such as plywood can be placed lengthwise on the platform of a single-rail cart with the top of the plywood leaning against the set of rails that run parallel with the platform below. (*Id.*) A double-rail cart consists of a platform with two sets of metal rails on either side that begin at the short end of the cart and run up and then above the platform lengthwise to the other end of the cart where they travel down and attach to the other short end of the platform. (RA 592.) Merchandise can be placed in the gap between the two sets of rails. (*Id.*) The flat cart consists of a metal frame on wheels and building materials are laid across it. (TT 351; RA 592.)

When Clint went inside the store, the only cart available was a single-rail cart. (TT 97-98.) He loaded seven four-foot-by-eight-foot sheets of plywood onto the cart by pulling each sheet off of the stack, placing it lengthwise on the cart, and then leaning the top end against the rail that ran above the platform. (TT 77, 98; RA 686.) After loading the plywood, Clint exited the store through Door 15 and pushed the cart over to the rear of the Farnam pickup where Ron and Don were waiting. (TT 37, 98.) Don was standing on the passenger side, looking to the east, not paying attention to the loading process. (TT 37, 51.)

(RA 689.)[1]

[1] In this photograph, the man on the left is representative of where Clint Weyand was standing during the loading process. The man in the middle is representative of where Ron Jensen was standing. The man on the right is representative of where Don Farnam was standing. However, Don testified at trial that he was facing east, not west as depicted in the photograph. (TT 51.)

Clint placed the cart behind the Farnam pickup. (TT 74-75; RA 661-72.) Ron stood at the west end of the cart closest to the tailgate. (TT 74, 99; RA 687.) Clint stood at the east end of the cart furthest from the tailgate. (*Id*.) Ron then helped Clint load the plywood into the Farnam pickup. (TT 74-75.) Clint grabbed the top edge of the plywood leaning against the rail and pulled it down towards the ground so that it laid flat. (TT 74, 76.) Ron did the same on the other end of the plywood. (*Id*.) The two men then guided the sheet over to the pickup bed and, once Ron's end was placed inside the bed, Ron let go and Clint slid the sheet forward. (TT 74-76; RA 689.) The pickup bed was less than eight feet long so each four-by-eight-foot sheet of plywood extended beyond the bed of the pickup. (RA 661-672.)

Before Ron and Clint could begin to repeat this same process for the second sheet, a 27 mph gust of wind came out of the south, causing the cart to move.[2] (TT 79-80; RA 680.) Clint stuck out his left elbow in an attempt to stop the cart, but the weight of the cart pushed him away. (TT 88, 104.) The plywood tipped out of the cart and fell to the ground. (TT 104-105, RA 661-72.) Ron either lost his balance as he tried to stop the cart from moving, lost his balance as he tried to stop the plywood from tipping out of the cart, or lost his balance from making contact with the falling plywood. (TT 299, 311; RA 647, 661.) In any event, Ron fell and landed on top of the plywood that had fallen over. (TT 104, 332.) The plywood underneath Ron had tipped out of the cart so that the top length of the sheet fell away from the cart, landing on the ground. (TT 104-05, 334, 437, 439.) The bottom length of the sheet remained on the cart, causing the sheets to lay splayed at an

[2] The July 28, 2011 weather records show that at the approximate time of the incident, 2:30 p.m., a wind gust from the south measured 27 mph. (RA 682-83.)

angle. (*Id*.)

Clint asked if Ron was hurt and Ron stated that he could not move. (TT 105.) Clint held onto the cart so the plywood that Ron was laying on would not slip off of the platform and cause Ron to move. (TT 105, 334.) Dustin Fitzler, Clint's supervisor, was getting ready to exit the store in a forklift through Door 15 when he saw the cart spin and Ron fall. (TT 332.) He immediately went over to Ron and asked Ron if he was hurt. (TT 334.) Ron similarly told Dustin that he could not move. (TT 333.) Dustin radioed the general manager, Mike Golden, who called 911. (TT 333, 436-37.) While Dustin waited at the scene, he noticed that the southwest corner of the piece of plywood in the pickup had been chipped off. Dustin assumed that this was where Ron had hit his head as he fell down.[3] (TT 334-35.)

After calling 911, Mike Golden went out to the scene and stayed with Ron until emergency personnel arrived. (TT 437, 439.) As the paramedics assessed Ron, Mike found a baseball hat and a pair of sunglasses on the ground. (TT 440.) He picked up those two items and gave them to Don Farnam, who he then learned was Ron's brother-in-law. (*Id*.) Don told Mike that Ron had been involved in a car accident years before and walked with a cane. (*Id*.) Neither Clint, Dustin, Mike, nor the paramedic that responded to the 911 call saw a cane at the scene at any time. (TT 99, 131, 334, 440.)

[3] Ron had an abrasion on his left ear consistent with hitting his head on the plywood sticking out of the pickup bed as he fell down. (TT 334.)

Ron was transported by ambulance to the emergency room in Mitchell where he was diagnosed with a spinal fracture at C3-C4. (RA 450.) He was then flown to Avera Hospital in Sioux Falls where he underwent a fusion of the vertebrae at C2-C3 and C4-C5. (TT 254.) After his surgery, Ron was transferred to the Craig Institute in Colorado for rehabilitation. (TT 257-58.) While there, he was diagnosed with high-grade bladder cancer. (TT 286; RA 642-43.) Ron was eventually transferred to The Ambassador Health System in Lincoln, Nebraska for long term care. (TT 258.) Ron passed away on January 31, 2013.[4] (RA 40.)

The Jensens sued Menard for negligence and loss of consortium in October 2012. (RA 006-8, 10-13.) After Ron passed away, Bonita pursued the Estate of Ronald Jensen's claim in her capacity as personal representative. (RA 49.) A four-day jury trial was held October 31, 2016, through November 3, 2016. At the close of evidence, Jensen moved for judgment as a matter of law as to Menard's affirmative defenses of contributory negligence and assumption of the risk. (TT 486.) The trial court granted the motion as to assumption of the risk, but denied the motion as to contributory negligence. (TT 494.) The trial court then rejected Menard's proposed jury instructions addressing assumption of the risk. (TT 494; RA 393-98; App. 011-16.) Menard appeals the trial court's decision granting Jensen's motion for judgment as a matter of law, and the trial court's refusal to instruct the jury on assumption of the risk. Menard respectfully requests that this Court vacate the jury verdict

[4] Jensen did not allege a wrongful death claim against Menard.

and remand this case for a retrial.

STANDARD OF REVIEW

This Court recently reexamined the standard of review applicable to a circuit court's grant or denial of a motion for judgment as a matter of law. In *Magner v. Brinkman*, 2016 S.D. 50, ¶ 14, 883 N.W.2d 74, 81, this Court rejected the abuse-of-discretion standard in favor of the de novo standard of review because "'[w]hether a judgment as a matter of law should be granted is a question of law[.]'" *Id.*, ¶ 11 (quoting 9B Arthur R. Miller, Federal Practice & Procedure, 2536 (3 ed.), Westlaw (database updated April 2016)). As a result, there is no deference given to the circuit court's ruling on a motion for judgment as a matter of law. *Id.*, ¶ 13. This Court, instead, reviews de novo whether there is a legally sufficient evidentiary basis for a reasonable jury to find that Ron assumed the risk of injury. *Id.,* ¶ 14. In making this determination, this Court, like the trial court, must view the evidence in the light most favorable to Menard, the non-moving party. *Id.* And if sufficient evidence exists so that reasonable minds could differ, judgment as a matter of law is not appropriate. *Id.* (quoting *Bertelsen v. Allstate Ins. Co.*, 2013 S.D. 44, ¶ 16, 833 N.W.2d 544, 545. The entry of a judgment as matter of law on Menard's assumption of the risk defense was and is not appropriate based on the record evidence here.

ARGUMENT

I. The trial court erred when it granted Jensen's motion for judgment as a matter of law as to Menard's asserted affirmative defense of assumption of the risk.

This appeal is not about judging the projected success of Menard's assumption of

the risk defense. This appeal is solely about whether there was sufficient evidence to allow Menard's assumption of the risk defense to be submitted to and resolved by the jury. That question should be answered in the affirmative here, just as it should have been at trial. There is compelling evidence in the record that Ron participated in loading the plywood on a windy day without the use of his cane, thereby knowingly and voluntarily exposing himself to the dangers and risks associated with that conduct.

Assumption of the risk is based on the principle that a plaintiff cannot recover for an injury where the plaintiff knowingly and voluntarily exposed himself to a known danger. *Duda v. Phatty McGees, Inc.*, 2008 S.D. 115, ¶ 12, 758 N.W.2d 754, 758 (quoting Prosser on Torts 68 (5th ed. 1984)). Under this Court's three-part test, a person assumes the risk of injury "when the person '(1) had actual or constructive knowledge of the risk; (2) appreciated its character; and (3) voluntarily accepted the risk, with the time, knowledge, and experience to make an intelligent choice."' *Id*., ¶ 13 (quoting *Ray v. Downes*, 1998 S.D. 40, 576 N.W.2d 896, 898). This Court has repeatedly[5] advised that

[5] *Duda*, 2008 S.D. 115, ¶ 13, 758 N.W.2d 754, 758 (holding that the question of assumption of the risk was appropriately submitted to the jury where the plaintiff intervened in a bar fight); *Pettry v. Rapid City Area School Dist.*, 2001 S.D. 88, 11, 630 N.W.2d 705, 709 (holding that assumption of the risk was a jury question where, viewing the facts in the light most favorable to the non-moving party, the plaintiff could have parked in a different location to avoid the "riskier" area where the slip and fall occurred); *Mack v. Kranz Farms, Inc.*, 1996 S.D. 63, ¶ 18, 548 N.W.2d 812, 816 (reversing summary dismissal of assumption of the risk defense and finding it should have been resolved by a jury); *Bell v. East River Elec. Power Co-op., Inc*., 535 N.W.2d 750, 754-55 (S.D. 1995) (concluding that the trial court did not err in instructing the jury on assumption of the risk); *Westover v. East River Elec. Power Co-op., Inc*., 488 N.W.2d 892, 896 (S.D. 1992) (assumption of the risk is a question for the jury "in all except the rarest of instances.") (internal citations and quotations omitted); *Underberg v. Cain*, 348 N.W.2d 145, 146 (S.D. 1984) (assumption of the risk instruction was proper where a snowmobiler

questions of assumption of the risk "are normally for the jury to decide" because in "the ordinary case[,] there is no conclusive evidence against the plaintiff on [assumption of the risk issues]." *Id.*, ¶ 16 (quoting Prosser on Torts § 68). This case is no different. The facts in the record are more than sufficient for a reasonable jury to conclude that Ron knowingly and voluntarily exposed himself to a known danger when he helped load plywood into the Farnam pickup in windy conditions without the use of his cane. Jensen's motion for judgment as a matter of law should have been denied. Menard is entitled to a new trial.

A. Ron had knowledge of the risk and appreciated its character.

1. There is sufficient evidence to conclude that Ron had knowledge that plywood falling over in the wind created a fall risk.

"Knowledge of the risk is the watchword of assumption of the risk." *Duda*, 2008 S.D. 115, ¶ 12, 758 N.W.2d 754, 758 (quoting Prosser on Torts § 68). The plaintiff must know of the facts which create the danger and comprehend and appreciate the danger itself. *Id*. The jury evaluates a plaintiff's actual and constructive knowledge of the risk of injury by what that "particular plaintiff in fact sees, knows, understand and appreciates." *Id.* Ron passed away during the pendency of this lawsuit and, given his condition, was unable to speak for most of the time leading up to his death. (TT 44-45.) As a result, neither

---

drove off a newly created embankment of which he had knowledge); *Frazier By and Through Frazier v. Norton By and Through Norton*, 334 N.W.2d 865, 869-70 (S.D. 1983) (sufficient evidence of assumption of the risk where the plaintiff was seen near a game of "horseplay" and, therefore, a jury could have concluded that the plaintiff voluntarily engaged in horseplay and assumed the risk of injury); *Matino v. Park Jefferson Racing Ass'n,* 315 N.W.2d 309, 314 (S.D. 1982) (holding that the question of assumption of the risk was for the jury).

Jensen nor Menard have the benefit of his testimony in the record. However, the record evidence establishes what Ron saw, knew, and understood when he helped load plywood into the Farnam pickup. And that evidence is sufficient for a jury to conclude that Ron had actual or constructive knowledge of the risk of injury and its character.

There was no dispute among the parties that July 28, 2012, was a windy day in Mitchell. The weather records for that day establish that there were sustained winds out of the south averaging 20.7 miles per hour and wind gust of 27 miles per hour at 2:30 p.m., the approximate time of the accident. (RA 682-83.) Ron traveled from Huron to Mitchell that day. (RA 664.) Upon arriving at Menard, Ron exited his vehicle and walked through the parking lot, at which time he would have been exposed to the strong southern winds. (TT 34-35; RA 656, 682-83.) Don Farnam testified that when he and Ron got to Menard that afternoon, he recognized that it was "very windy." (TT 34-35.) After paying for the plywood, Ron went back to the Farnam pickup and drove it around the building to the south side of the store. (TT 36-37.) He did not pull into the bay for Door 15, but instead chose to park outside of the bay, where he and the Farnam pickup were exposed to the strong winds coming out of the south. (RA 656, 680.) Ron would have also experienced the windy conditions on the south side of the store as he waited outside of the Farnam pickup for a Menard employee to approach him and offer assistance. (*Id*.) And the wind would have also been apparent while Ron waited outside for Menard employee Clint Weyand to return with Ron's plywood. (RA 656, 673.) Furthermore, every witness present at Menard on the date of the accident testified that it was noticeably windy. (TT 87, 149, 331, 436.) There is sufficient evidence for a jury to charge Ron with the knowledge that it was windy on July 28, 2012.

There is also sufficient evidence to charge Ron with the knowledge that the plywood was exposed to the wind and could blow over. Ron certainly knew Clint was getting plywood from inside the store and knew that Clint would bring that plywood to the Farnam pickup to load it. And when Clint exited the store with the plywood, Ron would have observed his use of a single-rail cart, with the plywood laying lengthwise, leaning against the rails. (RA 687.) At this time, Ron was standing at or near the rear of the Farnam pickup on the driver's side, the side closest to Door 15. (RA 656, 687.) Ron would have watched Clint place the cart of plywood at the end of the Farnam pickup. (RA 687.) Ron had the time and opportunity to observe the single-rail cart and how the plywood was positioned on it. A jury could reasonably find that Ron had knowledge of the wind, the vertical plywood, and the risk that it might tip over and cause him to fall.

But the undisputed observations Ron had while at Menard do not provide the only evidence establishing his knowledge of the risk. "A person is deemed to have appreciated the risk if it is the type of risk that no adult of average intelligence can deny." *Duda*, 2008 S.D. 115, ¶ 13, 758 N.W.2d 754, 758 (internal citations and quotations omitted). In other words, a person is deemed to have appreciated a risk that involves general, common sense principles of which an average adult is aware. This is precisely the type of risk that Jensen argued existed at Menard when Clint brought out the plywood on a single-rail cart that windy day in July 2012.

A central component in Jensen's case was that plywood and wind were two ingredients that, as a matter of "common sense," create an obvious danger, a risk of injury. Jensen's counsel elicited testimony from multiple witnesses that plywood kept in a vertical position on a single-rail cart creates a risk that the plywood can fall over or

become a "sail" in windy conditions.[6] Jensen argued that this risk was "common sense" and a matter of "common experience." (TT 11, 67, 83, 90, 155, 512.) Jensen also presented expert testimony from Terrance Grisim, a "safety engineer," that handling plywood in the wind creates a known hazard.

> The accident-causing condition here, being the wind and handling plywood, it acts like a sail. It's just, you know, it begs a question. It's a known hazard. It's there everyday. South Dakota is windy.

(TT 156.) But Menard could not, without the assumption of the risk defense, argue that this "known hazard" was equally known to Ron with any substantive legal effect. In fact, the absence of the assumption of the risk defense rendered a long list of record evidence without a vehicle with which to give it legal significance.

2. Ron chose to help load plywood in windy conditions with knowledge of his physical limitations and susceptibility to falls.

[6] In Jensen's counsel's opening statement, he argued that "common sense isn't that you should take plywood on its side from an inside area out into an area where you're making it into a sale." (TT 11.) Jensen's counsel also questioned various witnesses about the idea that "if you're hauling wood, we know that if it's flat, it doesn't fall over." (TT 67, 83.) Jensen's counsel went on to refer to plywood blowing over as "common sense" asking Clint Weyand to agree that "the commonsense standard tells you you should keep things flat when dealing with weather conditions outside?" (TT 90.) Similarly, he asked Menard employee Dustin Fitzler to agree with him that it is a "common experience" that "When you have a board flat, it doesn't fall over." (TT 512.) Jensen's counsel also suggested that it was common experience that plywood in a windy environment becomes a "sail." (TT 155.) Jensen's counsel then encouraged the jury to apply "common sense" and "common experience" in his closing argument. (TT 522.)

The only basis Jensen argued in support of her motion for judgment as a matter of law on Menard's assumption of the risk defense was that there was "no evidence that [Ron Jensen] ever intended to help load the vehicle."[7] (TT 492.) While the trial court did not specifically indicate whether it agreed with this erroneous characterization of the record, its rationale for granting Jensen's motion is irrelevant to this Court's analysis. This Court must review Jensen's motion for judgment as a matter of law under the de novo standard. *Magner*, 2016 S.D. 50, ¶ 13, 883 N.W.2d 74, 81. In doing so, it must view the evidence in the light most favorable to Menard. *Id*., ¶ 14. From this judicial perspective, there is more than sufficient evidence from which a jury could reasonably conclude that Ron was helping Clint load the plywood into the Farnam pickup at the time of the accident.

First and foremost, Clint testified that Ron helped him load the plywood into the Farnam pickup. (TT 74-75.) Clint described the process of him standing on the far end of the rail cart and Ron standing on the other end closest to the back end of the Farnam pickup. (RA 688.) The plywood was standing on its long end on the platform of the cart with the top half of the plywood leaning against the rail. (RA 686.) Clint explained that he and Ron grabbed the top of the plywood at their respective ends and tipped it over so that it was parallel with the ground. (RA 688.) Ron then guided his end so that it was placed on the lowered tailgate, and then Clint walked forward to slide the piece all the way to the back. (*Id*.) This testimony alone creates a dispute of fact as to whether Ron was assisting Clint with the loading process. The trial court was not free to reject this testimony or otherwise resolve this factual dispute. It should have viewed the evidence in

[7] In his opening statement, Plaintiff's counsel stated that Jensen "probably helped hold an end [of the plywood] up." (TT 8.)

the light most favorable to Menard and found that a reasonable jury could conclude that Ron was, in fact, helping load the plywood.

But Clint's testimony does not stand alone.[8] There is no dispute that Ron was standing at the back of the Farnam pickup next to the single-rail cart loaded with seven sheets of plywood. (RA 686, 688.) Dustin Fitzler testified that when he was driving the forklift towards Door 15, he saw a customer standing in the position that Clint described. (TT 331-32.) There is also testimony from Jensen's own witnesses that Ron was helping Clint load plywood. Don Farnam was the only other known individual standing in the vicinity at the time the plywood was being loaded into the Farnam pickup. He knew Ron was standing at the back end of the pickup. Don, however, testified that he was not paying attention and "wasn't interested" in what Ron was doing or how the plywood was being loaded into the pickup.[9] (TT 37.) Instead, Don testified that he was looking off to the east while the loading occurred behind him. (TT 37; RA 689.) Don could not and did not dispute Clint's testimony that Ron was helping load the plywood.[10] In fact, Don testified

---

[8] This Court has found sufficient evidence to support an assumption of the risk with far less evidence to support a plaintiff's involvement with an activity. *See Frazier By & Through Frazier*, 334 N.W.2d 865, 869-70 (S.D. 1983) (affirming trial court's instruction on assumption of the risk where, although witnesses could not say whether the plaintiff was involved in a game of horseplay at the time he was injured, "the game was nearby and there is evidence in the record that Ken grabbed Mark from behind while the game ensued.").

[9] Dustin Fitzler was operating a forklift inside the store shortly before the accident. (TT 331.) As he drove the forklift towards the garage door for Door 15, he could see Ron standing at the end of the Farnam pickup, close to the rail cart in question. (*Id*.) Dustin then saw the cart spin and saw Clint try to stop it. (TT 332.) He then saw Ron fall. (TT 332.) He did not see the loading process occur and could not say whether Ron was helping Clint. (*Id*.)

[10] Moreover, both Don and Bonita testified that Ron had helped load plywood

that it was possible that Ron was helping load the plywood as Clint had described. (TT 53.) So did Bonita. Bonita testified that if Ron had one hand on the pickup, he could have helped load the plywood by helping guide the plywood from the cart into the pickup just as Clint described. (TT 250, 254). Jensen's own witnesses agreed it was possible that Ron helped load the plywood. If there was a factual dispute as to this issue, it should have been resolved by the jury.

---

before. Don agreed that when he and Ron would go to Menard to buy plywood, Ron would help Don unload it when they returned home. (TT 53-54.) Don testified that he assumed he and Ron would have unloaded the plywood if they had taken it back to Huron on July 28, 2012. (TT 54.)

3. Ron suffered from paralysis in his legs, weakness, balance problems, the absence of spontaneous movement, and was susceptible to falls.

Ron's participation in the loading process is particularly significant in this case because Ron was not just an average seventy-one-year-old male helping Clint load plywood. Ron had specific physical limitations and disabilities that made him susceptible to losing his balance and falling. It was for these reasons that Ron was required to use a cane. But even using the cane, Jensen's expert neurologist Dr. John Sabow testified that if Ron was helping load the plywood, "he was asking for trouble." (Sabow 53 (App. 020).) And this trouble existed not because of windy conditions or a cart, but because Ron had sustained a spinal chord injury in a motor vehicle accident in 1977. (TT 280.) This spinal cord injury caused Ron to have permanent numbness and weakness in various areas of his legs and feet. (*Id*.) Bonita testified that Ron's feet were the worst, stating that he "could walk on a bed of nails and not feel it." (TT 280-81.) The spinal cord injury also weakened the muscles in Ron's right leg, causing him to suffer from a condition known as "drop foot." (TT 214.) This meant that the muscles responsible for lifting Ron's right foot were not capable of allowing him to point the top of his right foot up to allow him to walk. (TT 214.) For this reason, Ron wore a brace on the lower portion of his right leg to help him control his leg muscles so he could walk with less difficulty. (TT 214, 281.) And in 2008, Ron broke his right leg, which left him with additional weakness in that leg and less balance than before. (TT 249, 281-82.)

Ron's 1977 spinal chord injury also caused him to rely exclusively on visual cues to keep his balance. (TT 215.) Bonita testified that if Ron closed his eyes or if it was dark, he would immediately fall down. (TT 214-15.) As a result, Bonita always kept a

flashlight by Ron's recliner in case the power went out. (TT 215.) When Ron washed his face with a washcloth, he would need to hold on to the bathroom counter as he shut his eyes, or the washcloth covered his eyes, so that he would not fall down when his vision was interrupted. (TT 214.)

Dr. Sabow's testimony offered insight into how Ron's 1977 spinal cord injury made him more susceptible to falls. Dr. Sabow explained that the injury had affected the nerves responsible for balance which begin in the inner ear and travel down the spinal cord to the joints. (Sabow 51-52 (App. 020).) Dr. Sabow testified that the injury to those nerves meant that Ron had lost "all" spontaneous movement. (Sabow 52 (App. 020).) And while Ron had some truncal stability that allowed him to stand without a cane, he lacked the ability to recover from "even the slightest bit of spontaneous irregularity." (*Id.*) In other words, Dr. Sabow explained that Ron did not have the automatic recovery mechanism that "saves us . . . from falling." (Sabow 51 (App. 020).) Ron's lack of ability to move spontaneously, combined with his foot drop, meant that if the toe of Ron's right shoe hit a crack in the pavement, there was "a reasonably good, if not even more than reasonably good, chance" that Ron would fall. (*Id.*) And all of these issues were known to Ron, but not to Menard. (TT 84, 99, 475.) More importantly, all of these issues were the reason that Ron's doctors recommended that he use a cane, something that no one from Menard saw. (TT 99, 131, 216, 334, 440.)

4. Ron was not using his cane at the time of the accident.

Ron's cane was an important tool that prevented falls caused by unexpected obstacles or movement like, for instance, plywood that blows over in a gust of wind. As Dr. Sabow explained, although Ron could stand without a cane, his use of a cane was

"necessary" due to the weakness of his right leg and his "balance problems." (Sabow 11 (App. 019).) But there is sufficient evidence in the record to allow a jury to conclude that Ron was not using his cane at the time of the accident. Every single Menard employee that testified stated that they never saw a cane at the scene of the accident. (TT 99, 131, 334, 440.) Menard's general manager, Michael Golden, arrived at the scene within minutes of Ron's fall. (TT 436-37.) Mike called the ambulance and stayed with Ron until he was taken away by emergency medical technicians. (TT 437, 439-40.) Mike testified that he picked up Ron's cap and glasses and handed them to Don Farnam. (TT 440.) Mike testified that he did not see a cane. (*Id*.) If Ron had been using a cane, Mike would have seen it, picked it up, and handed it to Don, just like he did with the cap and glasses. Mike also testified that the only reason he learned Ron had a cane was because he spoke to Don after the accident, and Don told him that Ron walked with a cane because of a car accident that happened years before.[11] (TT 440.)

[11] Mike recorded that information in an incident report, which Jensen argued established that Ron was using a cane at the time of the accident and that Menard was aware of it. (TT 442.) But Jensen's motion for judgment as a matter of law is not about resolving this factual dispute. It is about recognizing the existence of evidence to support Menard's asserted assumption of the risk defense and viewing the facts in the light most favorable to Menard when doing so. *See Dakota Cheese, Inc. v. Ford*, 1999 S.D. 147, ¶ 15, 603 N.W.2d 73, 76-77 (quoting *Trammell v. Prairie States Ins. Co.*, 473 N.W.2d 460, 462 (S.D. 1991) (citations omitted) ("'[T]he benefit of any doubt about whether there is a material issue of fact goes to the nonmoving party.'").

Bonita Jensen testified about Ron's habits regarding the use of his cane, which provided further evidence upon which a jury could conclude that Ron did not have his cane at the time of the accident. Bonita testified that although Ron's doctor's wanted him to use a cane after his 1977 spinal cord injury, Ron was of the opinion that, "canes get in the way" of "[a]ll of these things you have to do," so "he usually had it with him, but it was usually in the pickup and it was always in the box behind the driver seat." (TT 216.)

The only person who testified that Ron was using his cane at the time of the accident was Don, who claimed he recollected picking up the cane before leaving Menard. (TT 47-48.) Don's testimony, at best, creates a disputed fact that should have been properly decided by the jury. Don did not see how the plywood was loaded into the pickup or whether Ron was helping with the process because Don himself testified that he "wasn't interested" and not paying attention. (TT 37.) Don was looking off to the east, the exact opposite direction from where Ron and Clint were loading plywood. (TT 51.) Moreover, the loading process was taking place to Don's left. Don testified that he has no peripheral vision in his left eye.[12] (TT 47-48.) Don also testified that he has problems with his memory due to a 2011 stroke. (*Id*.) It was certainly possible that a jury could reject Don's testimony and, consistent with the testimony of every other witness, conclude that Ron was not using his cane at the time of the accident. As Jensen's counsel stated, falling plywood can "do a lot of damage" to a man like Ron Jensen who "had paralysis in his legs and problems with his feet." (TT 311.) But a jury could have also concluded that falling plywood could pose an even greater risk of injury to Ron when he did not have his

[12] Don testified that his attention was drawn to Ron and Clint only when he heard someone yell "grab it." (TT 52.) He then "looked over" and saw Ron falling. (*Id*.)

cane. The jury should have been given the opportunity to reach this very conclusion.

5. Dr. Sabow testified that Ron should not have been helping load plywood because of his physical limitations and susceptibility to falls.

Dr. Sabow was allowed to testify as to his opinion about how the accident occurred. Dr. Sabow stated that everything that he had learned about Ron suggested that Ron probably did help load plywood on the day of the accident. Dr. Sabow also testified that Ron's physical condition prevented him from helping without compromising his own safety.

> A. The only thing I would say is I would not expect him to be capable safely of picking up a 4x8 piece of plywood, lifting it, say, to the back of a pickup, what would that be, about 2 and a half, maybe 3 feet high, and then putting it on the pickup. ***I would say that would be asking for trouble.***
>
> . . .
>
> Q And you wouldn't expect him to try to do that, based on his physical condition then?
>
> A You know what? I would expect him not to. But you know what? A person like him and everything you read about him and his friends, you would say this man was – he might – you know, he – he was a doer. He just didn't sit back and do nothing.

(Sabow 53 (App. 020 (emphasis added)).) While Dr. Sabow's testimony provides more than enough evidence for a jury to conclude that Ron was helping load plywood, it is also direct, unequivocal evidence that Ron should not have been helping load the plywood because of his personal physical limitations of which Menard had no knowledge. (TT 84, 99, 475.) But also embedded in Dr. Sabow's opinion is that Ron was known for pushing his limits. As Dr. Sabow recognized in his trial testimony, the record is replete with testimony from Ron's family describing the ways in which Ron stayed active despite his physical limitations, sometimes against his doctor's recommendations.

Bonita testified that after Ron's 1977 accident, he handled stock for a rodeo for many years, using his cane to prod the cattle rather than rely on it for walking. (TT 218-19.) After getting out of the rodeo business, the Jensens moved to DeSmet where Ron started helping their neighbor farm land by putting up hay, running the tractor, raking, baling, and mowing. (TT 220.) The Jensens eventually bought a home near Huron where Ron did the remodeling work himself. (TT 227.) Bonita described Ron as a "pretty good" carpenter who did projects in their home such as replacing windows, framing, and removing walls. (*Id*.) Ron also remodeled a shed on the property that the rural community used as a "Cowboy Church." (TT 229-30.) Ron put up sheetrock and rustic planks on the interior of the shed, as well as worked on a number of specialty woodworking projects for the church. (TT 239-40.) Ron also helped Don Farnam remodel his basement, working with plywood and drywall to construct rooms. (TT 283-84.) Ron was such a "doer" that many people in the DeSmet community who had known Ron for years were not even aware that he had physical limitations. (TT 282; Sabow 53 (App. 020).)

The fact that Ron had physical limitations that made him particularly susceptible to falls does not make Menard's claim that Ron was helping load plywood unbelievable as a matter of law. Instead, it makes Menard's claim that Ron was helping load plywood all the more significant to an assumption of the risk defense. According to Jensen's own expert, Dr. Sabow, Ron was just "asking for trouble" by helping load the plywood into the Farnam pickup. (Sabow 53 (App. 020).) Ron's particular limitations and susceptibility to falls created risk where risk may not have otherwise been present. When Ron made the decision to help Clint load plywood, Ron knew he wore a leg brace underneath his jeans, he

knew he did not have the ability to react to spontaneous movement, and he knew that was supposed to use a cane. Menard knew none of this. (TT 84, 99, 475.) Ron had been living with his limitations and susceptibility to falls for thirty years. Ron and Clint met only minutes before the accident. Ron voluntarily and knowingly exposed himself to the vert risk he knew he was most susceptible to by not using his cane.

An individual's history and personal susceptibility to falls supported an assumption of the risk jury instruction in the case of *Ballard v. Happy Jack's Supper Club*, 425 N.W.2d 385 (S.D. 1988). The challenged defense stemmed from a slip and fall in the parking lot outside of a bar. *Id*. at 386. The parking lot contained a number of white parking curbs which the plaintiff, Ballard, had navigated through without incident when he arrived at the bar earlier in the evening. *Id*. But when Ballard left the bar later that evening, he fell over one of the parking curbs, which he testified he was aware of but did not see. *Id*. The jury returned a verdict for the bar and Ballard appealed, arguing that the jury should not have been instructed on the defense of assumption of the risk. *Id.* This Court affirmed the trial court's submission of the defense of assumption of the risk to the jury.[13] *Id*. After repeating its common refrain that assumption of the risk is best left to the jury, this Court examined the trial record and specifically noted the following evidence:

> Ballard was a diabetic who had some loss of feeling in his lower legs. He seems to have had some difficulty in moving around. He also had arthritis, stemming from injuries incurred in previous falls.

Id. at 386. And in affirming the assumption of the risk instruction, this Court considered Ballard's physical condition and his prior falls as factors supporting the defense.

[13] The *Ballard* Court reversed the verdict based on an error in the substance of a jury instruction. *Ballard*, 425 N.W.2d at 389.

> On the facts of this case, where Ballard admitted he knew of the curbs, he had noticed the darkness, he had been injured by previous falls, and he could have avoided the curbs altogether by taking the same route to the car as when he had entered, the defendants must be regarded as having passed the *Wolf* test. There was evidence sufficient to reach the jury on the matter. Ordinarily, questions of negligence, contributory negligence and assumption of risk are for the jury, provided there is evidence to support them.

Id. at 389 (internal citations omitted).

Like *Ballard*, there are sufficient facts in the record to allow the assumption of the risk defense to go to the jury here. The evidence offered into the record by Jensen's own witnesses establishes that Ron was not just an ordinary person helping Clint load plywood on a windy day. Ron could not react as a normal person would to an unexpected event, like a piece of plywood blowing over in the wind. Ron may have tried to stop the cart from moving, like Clint did, but lost his balance. Ron may have tried to stop the plywood from falling off of the cart, like Clint did, but lost his balance. Or Ron may have been hit by the plywood as it fell, which caused him to lose his balance. The common denominator in each of those possible scenarios was a risk that Ron was personally aware of and assumed – the risk of falling. The jury should have been permitted to consider these facts and determine whether this knowledge served as a bar to Jensen's recovery against Menard.

B. There was sufficient evidence to establish that Ron had reasonable alternatives available to him that would have prevented the accident.

Voluntary acceptance of the risk is established where it is shown that the plaintiff had reasonable alternatives to the injury causing conduct, but subjected himself to the risk of harm notwithstanding those alternatives. *Stone v. Von Eye Farms*, 2007 S.D. 115, ¶ 22, 741 N.W.2d 767, 772 (holding that the circuit court erred in granting summary judgment

on the issue of assumption of the risk). "'[R]easonable' refers to whether one had a fair opportunity to elect whether to subject oneself to danger." *Goepfert v. Filler*, 1997 S.D. 56, ¶ 12, 563 N.W.2d 140, 144.[14] Ron had options available to him that would have prevented this accident.

[14] This standard is derived from Restatement of Law (Second) Torts, § 496E, p. 576 (1965), which provides in full:

> (1) A plaintiff does not assume a risk of harm unless he voluntarily accepts the risk.(2) The plaintiff's acceptance of a risk is not voluntary if the defendant's tortious conduct has left him no reasonable alternative course of conduct in order to(a) avert harm to himself or another, or(b) exercise or protect a right or privilege of which the defendant has no right to deprive him.

Pettry, 2001 S.D. 88, ¶ 9, 630 N.W.2d 705, 708.

Jensen argued that Menard was negligent by using a single-rail cart to handle plywood in the wind because of the danger that the plywood may blow over. But it was also Ron's proximity to the cart of plywood that put him in a position where he could be affected by such an event – in this case, falling and hitting his head on a piece of plywood that had already been loaded into the Farnam pickup. As part of Jensen's case-in-chief, she presented a number of alternatives that she argued Menard had available to it that would have prevented this accident. One of those alternatives was requiring Ron to back the Farnam pickup into the bay area housing Door 15 to provide protection from the wind during the loading process. But Ron could have made that decision himself. (TT 50, 106; RA 667.) Ron was told to go to Door 15, which is located inside the bay. (*Id*.) But Ron chose not to pull into the bay. Instead, Ron chose to park several feet outside the bay where he and the plywood were exposed to strong, southerly winds. (*Id*.) And when Ron saw Clint exit the store with the plywood on a single-rail cart, he could have offered to pull the Farnam pickup inside the bay. But he didn't. He and the Farnam pickup remained in an area exposed to the wind. (RA 656, 661, 680, 688.) Ron then not only stood near the cart, but helped Clint load the plywood. (TT 50, 106; RA 667.) Each of these steps was a choice that Ron made to accept the risk of injury despite other alternatives available to him.

Ron also had the alternative to avoid the risk of injury by choosing not to help Clint load the plywood. Clint testified that he loaded the plywood onto the rail cart by himself in the store. (TT 72, 97; RA 661.) When he got outside, Ron was standing at the end of the Farnam pickup and started helping Clint load it into the bed of the pickup. (TT 100; RA 686-89.) Ron had a reasonable alternative – he could have chosen not to help. He

could even have chosen to wait in the pickup, out of the wind, away from the cart of plywood, and away from the risk. But Ron did not. Ron chose to help and Ron chose to assume the risk.

Perhaps the most important alternative Ron had available to him was the use of his cane. Ron could have elected to use his cane while he helped load the plywood. Dr. Sabow testified that Ron's cane was "necessary" to help with Ron's weakness, balance, and his lack of ability to move spontaneously. (Sabow 11 (App. 019).) If he tried to move suddenly, Ron was likely to fall. The cane helped correct his balance in those instances. Ron also had severe weakness in his right leg, the leg closest to the cart of plywood. If Ron moved quickly to try and stop the cart from spinning or the plywood from falling, all without his cane, the odds of Ron falling were far more likely. But the jury could have concluded that Ron did not have and did not use his cane while he helped Clint load plywood. (TT 99, 131, 334, 440.) It could have also concluded that had Ron been using his cane, he may have reduced his chances of falling and this accident may not have occurred. There is more than sufficient evidence for a jury to reach the conclusion that Ron elected to help Clint without his cane, and Ron accepted the risk of doing so.

The record establishes that there are sufficient facts from which a reasonable jury could conclude that Ron voluntarily accepted the risk. There are, at a minimum, factual disputes as to the choices Ron made when he arrived at Menard and after he saw the single-rail cart of plywood. While Jensen argued that Menard should have told Ron to pull into the bay area because it provided more protection from the wind, Ron could have made the choice to pull into the bay area in the first instance. (TT 106; RA 509.) While Jensen argued that Menard should have told Jensen to wait inside of his pickup or moved

away from the back of the pickup, Menard argued that Ron was not required to help and could have waited in the Farnam pickup, away from the loading process, all without prompting from Menard. (TT 531; RA 509.) But those arguments had no legal affect in Menard's defense because the jury was never instructed on assumption of the risk. This was reversible error.

II. The trial court erred by failing to instruct the jury on assumption of the risk.

Menard proposed several jury instructions on the affirmative defense of assumption of the risk, all of which were denied by the trial court. (TT 506; RA 393-96; App. 011-16.) "When a proposed theory is supported by competent evidence, the trial court *must* instruct the jury on the applicable law, and failure to so instruct constitutes prejudicial error." *Buxcel v. First Fidelity Bank*, 1999 S.D. 126, ¶ 13, 601 N.W.2d 593, 596 (emphasis added); *see also Gerlach v. Ethan Coop Lumber Ass'n*, 478 N.W.2d 828, 830 (S.D. 1991) ("In considering whether there is evidentiary support for an instruction, a reviewing court must give the evidence the most favorable construction it will reasonably bear."). Menard's proposed theory of assumption of the risk has been discussed in detail. Ron had knowledge of the wind and the plywood on a single-rail cart, had knowledge of his susceptibility to falls, and yet still chose to help Clint load plywood on a windy day without the use of his cane despite the fact that Clint did not need to help, and despite the fact that Ron had the option of removing himself from the loading area completely. There was competent evidence to support this theory for the same reasons as discussed above. The trial court's failure to instruct the jury on the defense of assumption of the risk was prejudicial error. Menard is entitled to a new trial.

CONCLUSION

Menard is not required to prove that the assumption of the risk defense would have successfully barred Jensen's claims. Menard is only required to show that it was entitled to the opportunity to pursue that outcome. Menard has met that burden. There is sufficient evidence for a reasonable jury to conclude that Ron Jensen knew it was a windy day, knew that plywood could blow over in the wind, knew that the plywood was on a single-rail cart, knew that he was susceptible to falls, and, without the assistance of his cane, still chose to assist Clint with loading the plywood into the Farnam pickup. These factual disputes should not have been resolved in Jensen's favor nor deemed insufficient to support Menard's assumption of the risk defense. The jury should have been instructed on assumption of the risk so that it could have appropriately resolved this issue. The trial court erred by first granting Jensen's motion for judgment as a matter of law and then failing to instruct the jury on assumption of the risk. For these reasons, Menard respectfully requests that the jury's verdict in favor of Jensen be vacated and this Court remand this case for a new trial.

Dated: April 3, 2017.

FULLER & WILLIAMSON, LLP

/s/ Hilary L. Williamson

William P. Fuller
Hilary L. Williamson
7521 South Louise Avenue
Sioux Falls, SD 57108
(605) 333-0003

bfuller@fullerandwilliamson.com
hwilliamson@fullerandwilliamson.com
Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on April 3, 2017, I e-filed with the South Dakota Supreme Court's office, and served via electronic mail, a true and correct copy of the foregoing Appellant's Brief and Appendix, upon:

Scott G. Hoy
HOY TRIAL LAWYERS
scott@hoywlaw.com

Mr. Michael W. Strain
THE MORMAN LAW FIRM
mike@mormanlaw.com
Attorneys for Appellees

/s/ Hilary L. Williamson
One of the Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this Brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Word PerfectX6 and contains 9,034 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare

this certificate.

/s/ Hilary L. Williamson
One of the Attorneys for Appellant

APPENDIX INDEX

STATE OF SOUTH DAKOTA) :SS COUNTY OF DAVISON)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
BONITA JENSEN, Individually, and as the Personal Representative of the Estate of RONALD MILTON JENSEN, deceased, Plaintiff, vs. MENARD, INC., Defendant.	17 CIV. No. 12-000458 JUDGMENT

The above-captioned matter, having come on for jury trial in the above-entitled Court commencing on October 31, 2016 and continuing through November 3, 2016, the Honorable Patrick T. Smith presiding; Plaintiff appearing by and through Scott G. Hoy and Michael W. Strain, her counsel of record; Defendant appearing by and through William P. Fuller and Hilary L. Williamson, its counsel of record; the jury, having duly tried the issues and having returned a verdict in favor of Plaintiff and against Defendant; the Court, being fully advised in the premises and having found no legal cause why judgment should not be entered against Defendant, now, therefore, it is

ORDERED, ADJUDGED AND DECREED that Plaintiff recover of Defendant damages in the sum total of Two Million, Two Hundred Ninety-Five Thousand, Nine Hundred Seventy-One Dollars and Ninety-Seven cents ($2,295,971.97), consisting of medical expenses in the amount of One Million, Twenty-Eight Thousand, Three Hundred Sixty Eight dollars and Thirty-Six cents ($1,028,368.36) incurred by

Filed on: 11/15/2016 DAVISON County, South Dakota 17CIV12000458

Ronald Jensen, deceased, between July 28, 2012 and January 31, 2013, Four Hundred Twenty-Five Thousand Dollars ($425,000.00) in compensation for disability, disfigurement, pain, mental anguish, lost earnings and /or loss of enjoyment of life suffered by Ronald Jensen, deceased, between July 28, 2012 and January 31, 2013, Four Hundred Twenty-Five Thousand Dollars ($425,000.00) in compensation for the reasonable value of the loss of the service, aid, comfort, society, companionship and conjugal affections between Plaintiff Bonita Jensen and Ronald Jensen, deceased, suffered by Plaintiff between July 28, 2012 and January 31, 2013, prejudgment interest on the medical expenses in the amount of Four Hundred Twelve Thousand, Four Hundred Fifty-Seven Dollars and Forty-One Cents ($412,457.41) and post-verdict interest in the amount of Five Thousand One Hundred Forty-Six dollars and Twenty Cents ($5,146.20); it is further

ORDERED, ADJUDGED AND DECREED that Plaintiff also recover of Defendant taxable costs and disbursements, to be later inserted by the Clerk of Court, in the amount of $ $4,335.90 .

Signed: 11/15/2016 4:27:22 PM

Attest:
Lonni D Winsand
Clerk/Deputy

Prejudgment Interest:

Avera:

Amount of charges:	$353,954.26	
Date of discharge:	9-5-2012	
Days between discharge and verdict:	1,520	
Interest per day ($353,954.26 x 10% ÷ 365 days)	$96.97	
Subtotal		$147,394.40

Craig Hospital:

Amount of charges:	$594,937.98	
Date of discharge:	11-20-2012	
Days between discharge and verdict:	1,443	
Interest per day ($594,937.98 x 10% ÷ 365 days)	$162.99	
Subtotal		$235,194.57

Ambassador:

Amount of charges:	$79,476.12	
Date of discharge	1-31-2013	
Days between discharge and verdict:	1,372	
Interest per day: ($79,476.12 x 10% ÷ 365 days)	$21.77	
Subtotal:		$29,868.44

TOTAL: **$412,457.41**

Revised Post-Verdict Interest as of November 14, 2016:

(Mandated by SDCL § 15-16-3)

Amount of Verdict:	$1,878,368.36
Post-verdict interest per day	$514.62
($1,878,368.36 x 10% ÷ 365 days)	
Days between verdict and judgment:	10
(November 3, 2016 through November 14, 2016)	
Post-verdict interest:	$5,146.20

STATE OF SOUTH DAKOTA) :SS COUNTY OF DAVISON)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
BONITA JENSEN, Individually, and as the Personal Representative of the Estate of RONALD MILTON JENSEN, deceased, Plaintiff, vs. MENARD, INC., Defendant.	17 CIV. No. 12-000458 NOTICE OF ENTRY OF JUDGMENT

TO DEFENDANT MENARD, INC., AND TO WILLIAM P. FULLER AND HILARY L. WILLIAMSON, ITS ATTORNEYS:

PLEASE TAKE NOTICE that a Judgment was entered in the above-captioned matter on November 16, 2016. Attached hereto and incorporated herein by this reference is a true and correct copy of said Judgment.

Dated at Sioux Falls, South Dakota, this 16th day of November, 2016.

HOY TRIAL LAWYERS, PROF. L.L.C.

Scott G. Hoy
901 W. 10th Street, Suite 300
Sioux Falls, SD 57104
(605) 334-8900
Fax (605) 338-1918
E-mail: scott@hoylaw.com

and

Michael W. Strain
STRAIN MORMAN LAW FIRM
1134 Main Street - P.O. Box 729
Sturgis, SD 57785
Telephone: (605) 347-3624
Facsimile: (605) 347-2091
mike@mormanlaw.com

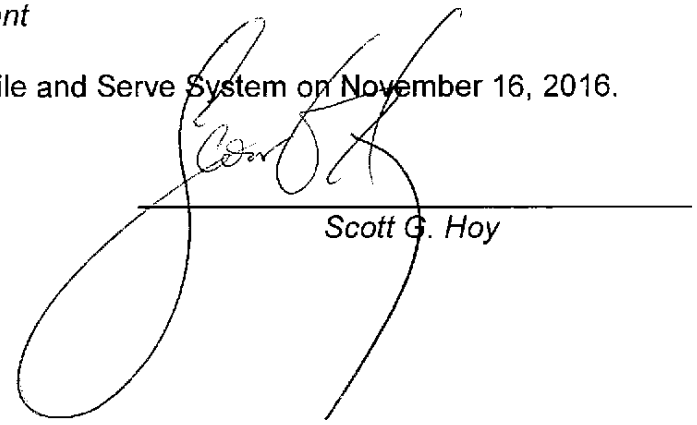
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing "NOTICE OF ENTRY OF JUDGMENT" was electronically served upon the following:

William P. Fuller and
Hilary L. Williamson
FULLER & WILLIAMSON, LLP
7521 South Louise Ave.
Sioux Falls, SD 57108
Attorneys for Defendant

by and through the Odyssey File and Serve System on November 16, 2016.



Scott G. Hoy

STATE OF SOUTH DAKOTA) :SS COUNTY OF DAVISON)	IN CIRCUIT COURT FIRST JUDICIAL CIRCUIT
BONITA JENSEN, Individually, and as the Personal Representative of the Estate of RONALD MILTON JENSEN, deceased, Plaintiff, vs. MENARD, INC., Defendant.	17 CIV. No. 12-000458 JUDGMENT

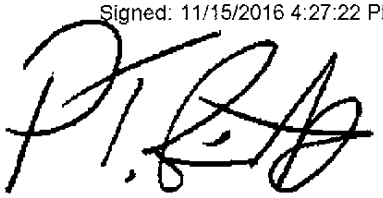
The above-captioned matter, having come on for jury trial in the above-entitled Court commencing on October 31, 2016 and continuing through November 3, 2016, the Honorable Patrick T. Smith presiding; Plaintiff appearing by and through Scott G. Hoy and Michael W. Strain, her counsel of record; Defendant appearing by and through William P. Fuller and Hilary L. Williamson, its counsel of record; the jury, having duly tried the issues and having returned a verdict in favor of Plaintiff and against Defendant; the Court, being fully advised in the premises and having found no legal cause why judgment should not be entered against Defendant, now, therefore, it is

ORDERED, ADJUDGED AND DECREED that Plaintiff recover of Defendant damages in the sum total of Two Million, Two Hundred Ninety-Five Thousand, Nine Hundred Seventy-One Dollars and Ninety-Seven cents ($2,295,971.97), consisting of medical expenses in the amount of One Million, Twenty-Eight Thousand, Three Hundred Sixty Eight dollars and Thirty-Six cents ($1,028,368.36) incurred by

Ronald Jensen, deceased, between July 28, 2012 and January 31, 2013, Four Hundred Twenty-Five Thousand Dollars ($425,000.00) in compensation for disability, disfigurement, pain, mental anguish, lost earnings and /or loss of enjoyment of life suffered by Ronald Jensen, deceased, between July 28, 2012 and January 31, 2013, Four Hundred Twenty-Five Thousand Dollars ($425,000.00) in compensation for the reasonable value of the loss of the service, aid, comfort, society, companionship and conjugal affections between Plaintiff Bonita Jensen and Ronald Jensen, deceased, suffered by Plaintiff between July 28, 2012 and January 31, 2013, prejudgment interest on the medical expenses in the amount of Four Hundred Twelve Thousand, Four Hundred Fifty-Seven Dollars and Forty-One Cents ($412,457.41) and post-verdict interest in the amount of Five Thousand One Hundred Forty-Six dollars and Twenty Cents ($5,146.20); it is further

ORDERED, ADJUDGED AND DECREED that Plaintiff also recover of Defendant taxable costs and disbursements, to be later inserted by the Clerk of Court, in the amount of $_____.

Signed: 11/15/2016 4:27:22 PM



Attest:
Lonni D Winsand
Clerk/Deputy

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

BONITA JENSEN, Individually, and as the Personal Representative of the Estate of RONALD MILTON JENSEN, Deceased,	:	17 CIV. 12-000458
Plaintiff,	:	NOTICE OF APPEAL
vs.	:	
MENARD, INC.,	:	
Defendant.	:	

TO PLAINTIFF AND HER COUNSEL OF RECORD:

PLEASE TAKE NOTICE that pursuant to SDCL §§ 15-26A-3(1) and (4) and SDCL § 15-26A-7, Defendant Menard, Inc., hereby respectfully appeals to the Supreme Court of South Dakota from the Amended Judgment signed on November 15, 2016, and filed on November 16, 2016. Notice of Entry of Judgment was served by Plaintiff upon Defendant on November 16, 2016.

Dated: December 9, 2016.

FULLER & WILLIAMSON, LLP

/s/ William Fuller

William P. Fuller
Hilary L. Williamson
7521 South Louise Avenue
Sioux Falls, SD 57108
(605) 333-0003
bfuller@fullerandwilliamson.com
hwilliamson@fullerandwilliamson.com
Attorney for Defendant

Certificate of Service

I certify that on December 9, 2016, I e-filed and served via Odyssey File & Serve, a true and correct copy of the foregoing Notice of Appeal, upon:

Scott G. Hoy
HOY TRIAL LAWYERS
scott@hoylaw.com
Attorney for Plaintiff

Michael W. Strain
MORMAN LAW FIRM
mike@mormanlaw.com
Attorney for Plaintiff

/s/ William Fuller
One of the Attorneys for Defendant

CIV12-458

Proposed Defense Instructions - Denied
11/3/16

Amended Defendant's Requested Instruction No. 12

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

First, did Ronald Jensen assume the risk of injury or damage?

If you find that Ronald Jensen assumed the risk, you will return a verdict for Defendant. If you find Ronald Jensen did not assume the risk, you have a second issue to determine, namely:

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 Ronald Jensen?

If your answer to that question is "no," Plaintiff is not entitled to recover; but if your answer is "yes," you will have a third issue to determine, namely:

Was Ronald Jensen contributorily negligent more than slight?

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

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

South Dakota Civil Pattern Jury Instruction 1-50-10; *Berry v. Risdall*, 1998 S.D. 18, ¶11, 576 N.W.2d 1; *Schmidt v. Wildcat Cave, Inc.*, 261 N.W.2d 114 (S.D. 1977); *Farmers Co-op Elevator Co. v. Johnson*, 273 N.W.2d 671 (S.D. 1976).

Defendant's Requested Instruction No. 26

If a person assumes the risk of injury or damage, the person is not entitled to any recovery. To establish an assumption of the risk defense, the defendant must show:

(1) that the plaintiff had actual or constructive knowledge of the existence of the specific risk involved; and

(2) that the plaintiff appreciated the risk's character; and

(3) that the plaintiff voluntarily accepted the risk, having had the time, knowledge, and experience to make an intelligent choice.

Defendant's Requested Instruction No. 27

While the same conduct on the part of the plaintiff may amount to both assumption of the risk and contributory negligence, the two defenses are distinct. Assumption of the risk involves a voluntary or deliberate decision to encounter a known danger whereas contributory negligence frequently involves the inadvertent failure to notice danger. In addition, contributory negligence must be a legal cause of the injury to be a defense, while assumption of the risk need not cause the injury to bar recovery.

South Dakota Civil Pattern Jury Instruction 20-40-20.

Defendant's Requested Instruction No. 22

You have been instructed on the subject of the measure of damages in this case because it is my duty to instruct you as to all of the law that may become pertinent to your deliberations. The fact that you have been instructed on the subject of damages must not be considered as intimating any view of my own on the issue of liability or as to which party is entitled to your verdict.

Federal Jury Practice and Instructions (5th Ed.) § 106.02 (modified).

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

BONITA JENSEN, Individually and as the Personal Representative of the Estate of RONALD MILTON JENSEN, Deceased,	:	17 CIV. 12-000458
Plaintiff,	:	
v.	:	DEFENDANT'S AMENDED REQUESTED VERDICT FORM
MENARD, INC.,	:	
Defendant.	:	

We, the jury, duly impaneled in the above-entitled action and sworn to try the issues, find as follows:

1. Do you find that Mr. Ronald Jensen assumed the risk?
   Yes __
   No __

   If you answer "no," you do not need to answer any other questions. Have the foreperson sign and date the end of this form. If you answer "yes," continue with question 2.

2. Do you find that Defendant Menard, Inc. was negligent?
   Yes __
   No __

   If you answer "no," you do not need to answer any other questions. Have the foreperson sign and date the end of this form. If you answer "yes," continue with question 3.

3. If you found Menard to be negligent, do you also find that the negligence of Menard's was the legal cause of any injuries and damages to Ronald Jensen?
   Yes __
   No __

   If you answer "no," you do not need to answer any other questions. Have the foreperson sign and date the end of this form. If you answer "yes," continue with question 4.

4. Do you find that Ronald Jensen was contributorily negligent more than slight?
Yes __
No __

If you answer, "yes," you do not need to answer any other questions. Have the foreperson sign and date the end of this form. If you answer "no," continue with question

5. If you find that Menard, Inc. was negligent and such negligence was the legal cause of Ronald Jensen's injuries, then set forth the amount of damages to be awarded to Ronald Jensen's estate to compensate it for damages, and enter that amount here.

$_____

Dated this __ day of November, 2016.

_____
Foreperson

4. If you find that Defendant Menard, Inc. was negligent and such negligence was the legal cause of Ronald Jensen's injuries, then set forth the amount of damages to be awarded to Ronald Jensen's estate to compensate it for damages, and enter that amount here.

1. For medical expenses, if any, incurred by Ronald Jensen, deceased, between July 28, 2012 and January 31, 2013:

$ 1,028,368 36

2. For disability and disfigurement, pain and mental anguish, lost earnings and/or loss of enjoyment of life suffered by Ronald Jensen, if any, between July 28, 2012 and January 31, 2013:

$ 425,000

3. For the reasonable value of the loss of the service, aid, comfort, society, companionship, and conjugal affections between Plaintiff Bonita Jensen and Ronald Jensen, if any, between July 28, 2012 and January 31, 2013;

$ 425,000

Dated this 30th day of November, 2016.

Theodore W. Fonke

Foreperson

STATE OF SOUTH DAKOTA)
)
COUNTY OF DAVISON)

IN CIRCUIT COURT

FIRST JUDICIAL CIRCUIT

BONITA JENSEN, Individually, and as the Personal Representative of the Estate of RONALD MILTON JENSEN, deceased,

Plaintiff,

vs.

MENARD, INC.,

Defendant.

CIV. 12-458

Video Deposition of:

DR. JOHN DAVID SABOW

COPY

BEFORE: Jeanne Speck Quinn
Court Reporter and Notary Public
Rapid City, South Dakota

DATE: October 26, 2016 at 3:00 p.m.

PLACE: Residence of Dr. John David Sabow
1145 Settlers Creek Place
Rapid City, South Dakota

APPEARANCES:

Representing the Plaintiff:

MR. SCOTT G. HOY
Hoy Trial Lawyers
901 West 10th Street
Suite 300
Sioux Falls, South Dakota

-and-

MR. MICHAEL W. STRAIN
Morman Law Office
850 Main Street
Sturgis, South Dakota

Representing the Defendant:

MR. WILLIAM P. FULLER
Fuller & Williamson
7521 South Louise Avenue
Sioux Falls, South Dakota

-and-

the spinal cord ends at L1, and then below that we have all the nerves that go out to the pelvis, to the sacrum, to your lower extremities, and it's quite possible that the -- that initial injury was below the spinal cord and in the area of the cauda equina, because that, too, would cause, if they -- it could cause the urinary problems also.

Q Sure.

A But from what I understand, and what is indicated in the records, this was a very, very active man. He apparently was always building this and building that, and raising horses; and his wife, I guess, liked horses, and he was building -- I think at the time of his injury, he was actually going to get some lumber for a tack room --

Q Sure.

A -- that he intended to build, and I guess primarily for his wife.

Q Okay.

A So what we had was a man with an incomplete, we call that incomplete, spinal injury. And we're not saying spinal cord, I'm saying spinal, because I'm not sure if it was the cord or the cauda equina.

Q Sure.

A And he had an incomplete spinal injury with, I would

call, excellent recovery and an excellent busy life. He was driving. He was doing all kind of things.

Q Would you -- would you say then that did he have, from what you could see, balance issues that -- requiring the cane and --

A Oh, yes, of course.

Q Okay.

A When you have an injury of that, and a -- and a cane is necessitated for your walking, that's not just for weakness of an extremity. That's also for balance.

Q Okay.

A So that cane was necessary. And there was no question he had balance problems. He had them ever since his injury of 31 years ago.

I think he used a short leg brace at times, also.

Q Okay.

A And, again, that was with some residual weakness.

Q Now, Doctor --

A But, again, expected.

Q Sure.

A That's what you'd expect.

Q Let's -- while we're talking about the cane, itself, given what you could see medically from his balance perspective, would you expect that a man in the state of Ron Jensen prior to this fall with a cane would be able

to, himself, participate in loading plywood?

[redacted]

A Can I answer?

Q (By Mr. Hoy:) Please.

A No, I wouldn't expect him at all.

Q Okay.

A A piece of plywood, I understand, is about 4 x 8.

Q Yes.

A And using a cane in one hand for balance and mobility, I don't know -- I'm not sure how you could use just one hand for any significant help --

Q Okay.

A -- loading a 4 x 8 piece of sheathing or whatever.

Q Then tell me this. What I want to do is talk about the fall, itself. Do you have an opinion based on your review of this file and the depositions as to what the mechanism of injury was in this fall that injured Ron Jensen?

A I do have, and in order for me to give you the honest answer, the correct answer, I have to give you the chronology of how I reached my opinion.

Q Okay.

A Because when I first reviewed the records, you asked me to review the records to kind of tell me what's going on

and what happened, and what we do know, and everybody knows, that he had a fracture dislocation, and the frac-- excuse me.

Okay. And the fracture dislocation was involving the 3rd cervical vertebra, and this is the neck right here, and the 4th cervical vertebra. These two vertebrae.

Now you'll notice right behind that is the cervical, that is, the spinal cord that resides in the neck; and so this is where the injury was right here.

Q Now you're referring, Doctor, to Exhibit 7, which is -- this is just a normal, not a drawing --

A This is --

Q -- but a representation, a side view, of the brain and the vertebra -- and the cervical vertebrae; is that right?

A Well, that's correct. This is normal an- -- this is an illustration of normal anatomy.

Q Okay.

A But then I was given the description of, and primarily by Dr. Puumala, the neurosurgeon, describing the x-rays, the imaging, the surgery, and so forth of exactly what happened.

Q Now we've got these other -- we've got these other boards here.

A Yeah, kind of all kinds of things --
Q Okay.
A -- described by his friends.
Q Okay.
A I had the -- I had the opportunity to review several depositions of friends of his.
Q And, obviously, building means putting up plywood or Sheetrock; correct?
A I believe so, yes.
Q And, in fact, that's why he went to Menard's that day was to get plywood; correct?
A That's correct.
Q And you said he had an excellent recovery from his first spinal injury, but then you also mentioned the fact that he walked with a cane, but he walked pretty well with a cane; did he not?
A Yeah, you know, that's certainly all relative. But, remember, we talked about not only we're talking about strength, but he obviously had to have some weakness in the lower extremities, but we're talking about balance also, which is a particularly important part of a spinal injury, especially that is -- requires the use of a cane for ambulation. So balance is involved in that also.
Q And I think you mentioned before that he was walking pretty well with, I think, a cane and a brace on his

leg, so that would mean that his truncal stability was pretty good.

Truncal stability is what?

A Yes. Now, let me explain, because this is really important. When you're talking about truncal stability, what you're saying is he could sit upright without falling side to side. He could stand probably without his cane. In fact, I would say almost definitely he could stand, hold his cane in the air, and stand there.

What happens to these spinal -- when you have a spinal cord injury, you lose all spontaneity. In other words, if you're walking, and say that you're -- the toe of your shoe, and we probably -- because he did use that brace, and almost all -- almost definitely was a foot lift brace. He probably had a drop foot. If he, for instance, was walking and his -- the toe of his shoe hit the crack in the pavement, there is not a -- there is a reasonably good, if not even more than reasonably good, chance that he's going to fall. He's going to fall to the ground.

When you have a spinal cord injury, you might have some truncal stability, but you lose that automaticity that saves us, all of us, all humans from falling because we're biped. And there's this built-in automatic recovery that comes from -- remember, excuse

me, this is important, remember I told you when we were looking at the inner area ear and I said the sacculus, those are the balance mechanisms?

Well, those balance mechanisms are very finely myelinated and they go right down the spinal cord to everywhere in your joints, and that -- and when you injure that, you lose the spontaneity to recover from even the slightest bit of spontaneous irregularity, that which you anticipate.

So if I see anticipation, a flat surface in front of me, you feel pretty good with a cane and you go on that. But if it's nighttime and you walk on that same thing and you don't have the visual cues, you do not feel stable in spite of somebody saying, you have pretty good truncal stability.

So truncal stability and balance and spontaneous balance are major different things. You must have -- you have to understand the physiology of the nervous system to comprehend what we mean by pure strength of skeletal muscles and the balance to save us from falls.

Q Obviously, you were not there when this happened; correct?
A Obviously.
Q And didn't see it happen, correct?
A Correct.

[redacted]

First of all, when you say "load plywood," what do you mean by that? When you say "loading plywood," what does that entail?

A The only thing I would say is I would not expect him to be capable safely of picking up a 4 x 8 piece of plywood, lifting it, say, to the back of a pickup, what would that be, about 2 and a half, maybe 3 feet high, and then putting it on the pickup. I would say that would be asking for trouble.
Q Okay.
A At least.
Q And you wouldn't expect him to try to do that, based on his physical condition then?
A You know what? I would expect him not to. But you know what? A person like him and everything you read about him and his friends, you would say this man was -- he might -- you know, he -- he was a doer. He just didn't sit back and do nothing.

So I don't know. No, I wouldn't expect him to do it. If he had help there, if -- and I understand there were a couple people from Menard's that were there to

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 28067

BONITA JENSEN, Individually and as the Personal Representative of the Estate of RONALD MILTON JENSEN, Deceased,

Plaintiff and Appellee,

vs.

MENARD, INC.,

Defendant and Appellant.

Appeal from the Circuit Court
First Judicial Circuit
Davison County, South Dakota
Honorable Patrick T. Smith, Circuit Court Judge

APPELLEE'S BRIEF

Scott G. Hoy
HOY TRIAL LAWYERS, Prof. L.L.C.
901 West 10th Street, Suite 300
Sioux Falls, SD 57104
(605) 334-8900
scott@hoylaw.com

Michael W. Strain
MORMAN LAW FIRM
P.O. BOX 729
Sturgis, SD 57785
(605) 347-3624
mike@mormanlaw.com
Attorneys for Plaintiff – Appellee

William P. Fuller
Hilary L. Williamson
FULLER & WILLIAMSON, LLP
7521 S. Louise Avenue
Sioux Falls, SD 57108
(605) 333-0003
bfuller@fullerandwilliamson.com
hwilliamson@fullerandwilliamson.com
Attorneys for Defendant - Appellant

Notice of Appeal filed December 9, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITY

PRELIMINARY STATEMENT

This is an action for personal injuries arising from a tragic occurrence on July 28, 2012 at the Menard Store in Mitchell, South Dakota. (ROA 10-12). A Menard employee was attempting to load some building materials when Ronald Jensen, a seventy-one-year-old customer, sustained a broken neck. (ROA 10-12).

Ronald Jensen survived for several months, but died during the pendency of this action. (ROA 40). After his death, Ronald's wife, Bonita Jensen, was appointed as the Personal Representative of Mr. Jensen's Estate and was substituted as the Plaintiff in this action. (ROA 48-49).

Pursuant to SDCL § 15-26A-63, Mrs. Jensen will be referred to as "Plaintiff". Ronald Jensen will be referred to as "Mr. Jensen". Defendant Menard, Inc. will be referred to as "Menard".

In accordance with SDCL § 15-26A-64, references to the Circuit Court Register of Actions will be designated by the letters "ROA" followed by the applicable page numbers. References to the Trial Transcript will be designated by the letters "TT" followed by the page number. References to the attached Appendix will be designated by the letters "APP" followed by the page number. References to the video deposition of Dr. John Sabow will be designated by the name "Sabow" followed by the page number. References to the trial exhibits will be designated by the letters "EX" followed by the number.

JURISDICTIONAL STATEMENT

Menard appeals from a judgment entered on November 15, 2016. (ROA 711 – 712). A notice of appeal was filed on December 9, 2016. (ROA 771). Jurisdiction is provided by SDCL § 15-26A-3(1).

STATEMENT OF THE ISSUES

Issue 1: Whether the trial court erred when it granted Jensen's motion for judgment as a matter of law on Menard's affirmative defense of assumption of risk.

The trial court did not expressly rule on the motion on the record because it was taken under advisement, never renewed and became moot after the settlement of instructions. Plaintiff respectfully submits that under the record presented, this issue has not been preserved for appeal.

- *Jack Rabbit Lines, Inc. v. Neoplan Coach Sales*, 1996 SD 80, 551 N.W.2d 18.
- *Mack v. Kranz Farms, Inc*., 1996 SD 63, 548 N.W.2d 812.
- *State v. Jones*, 416 N.W.2d 858 (S.D. 1987).

Issue 2: Whether the trial court erred when it refused to instruct the jury on Menard's affirmative defense of assumption of risk.

The trial court correctly ruled that Defendant failed its burden of offering competent proof of all three essential elements necessary to submit the assumption of risk defense to the jury.

- *Pettry v. Rapid City Area Sch. Dist*., 2001 SD 88, 630 N.W.2d 705.
- *Ray v. Downes*, 1998 SD 40, 576 N.W.2d 896.
- *Geopfert v. Filler*, 1997 SD 56, 563 N.W.2d 140.

STATEMENT OF THE CASE

This action was commenced by service of a summons and complaint dated August 23, 2012. (ROA 5-9). In the Complaint, Plaintiff alleged that one of Menard's employees, while acting within the course and scope of his employment, was negligent while attempting to load some building materials which caused catastrophic injuries to Mr. Jensen, including quadriplegia. (ROA 6-7).

Before Menard answered, Plaintiff served an Amended Complaint adding a claim for loss of consortium. (ROA 10-13). Menard served its answer on September 26, 2012. (ROA 2-5). In this answer, Menard specifically admitted that "a gust of wind blew OSB [oriented strand board] off the loading cart causing it to strike Plaintiff[.]". (ROA 3). This answer was never amended.

Despite the admission about the board striking Mr. Jensen, Menard denied any negligence, denied that any alleged negligence by its employee was a proximate cause of the claimed injuries and damages, and asserted, among other affirmative defenses, assumption of risk and contributory negligence. (ROA 3-4).

Prior to trial, Menard submitted several requested jury instructions, including a non-pattern instruction relating to premises liability. (ROA 250). That requested instruction proposed stated that "[a] landowner is not required to take measures against a risk that would not be anticipated by a reasonable person". (ROA 250). This instruction was ultimately given by the Court as instruction twenty-eight. (ROA 441).

The case proceeded to trial on Monday, October 31, 2016 at the Davison County Courthouse in Mitchell, South Dakota. (TT 5). The Honorable Patrick T. Smith, Circuit Court Judge, presided. (TT 5).

Plaintiff called five witnesses live and one by video deposition. (TT 287; Sabow 3 – 68). After Plaintiff rested, Menard called four witnesses live at trial. Menard declined to call one of its designated expert witnesses, Tom Reaves. (ROA 370; TT 251).

Menard rested during the afternoon of Wednesday, November 2, 2016. (TT 480). No rebuttal witnesses were called. (TT 480).

After the jury was excused, Plaintiff's counsel made a motion for judgment as a matter of law on the affirmative defense of assumption of risk. (TT 486). After hearing the comments of counsel, the trial court reserved ruling on that motion and indicated that "we can flush those issues out more while we discuss instructions and, then, you can remake those motions when we settle instructions." (TT 487).

The next morning, outside the presence of the jury, the court and counsel met to settle instructions on the record. (TT 487). Plaintiff's counsel did not formally renew the motion for judgment on the defense of assumption of risk which had been made the previous day. (TT 487-494). Instead, the viability of the assumption of risk defense was addressed by the court after Defendant's counsel objected to instruction number 20, "because it does not include the assumption of the witness [sic] defense". (TT 490).

After noting the objection and inviting counsel to make a record, the Court ruled as follows:

> THE COURT: All right. I've reviewed the Ballard case. I do distinguish it from these facts. In Ballard, you had an unattended sidewalk with a curb that someone tripped on that was, allegedly, negligently maintained in some fashion or some other reason that there was a negligence attached to it.
>
> Here, the negligence that's being discussed is the affirmative actions of an employee, which is more in flux than a stationary curb that may or may not have been negligently maintained and was known to all walking that it was there. My thoughts on this question are that we do not – this Court doesn't need to find evidence that Mr. Jensen assumed the risk of not falling, which doesn't give rise to liability, but the risk that it would have to be shown he assumed or that there was evidence to support he assumed was the risk that he would be harmed by the defendant's alleged negligence in the loading of the truck.
>
> Nothing presented by this – in this trial by the Court's perceptions indicates that Mr. Jensen actually perceived such a risk that he, subjectively, should have, nor that he instructively did. Now he may have contributed to that negligence, and I'm sure we'll address that question in the upcoming instructions, but that's a different conclusion than the one that is asked to be reached on the assumption of the risk.
>
> Based upon that, I will overrule your objection to Instruction 20 for it's failure to include assumption of the risk.

(TT 493-494).

Contrary to what Menard argues in its brief, the trial court did not expressly grant Plaintiff's motion for judgment on the assumption of risk defense on the record.[1] Plaintiff had no reason no renew the motion because the trial court's refusal to instruct on the affirmative defense rendered the issue moot. (TT 494.).

After the settlement of instructions, the issues of negligence, contributory negligence, causation and damages were submitted to the jury. (ROA 433 – 445, 449 – 450). The Jury found for the Plaintiff on the issues of negligence, contributory negligence and causation, and assessed Plaintiff's damages at $1,028,368.36 for medical expenses, $425,000 in other damages for Mr. Jensen through the time of his death, and $425,000 for Plaintiff regarding the consortium claim. (ROA 449, 550; APP 1-2).

A Judgment was entered on November 15, 2016. (ROA 711-712). On the next day, Plaintiff served a Notice of Entry of Judgment. (ROA 716-717).

Menard declined to file a motion for new trial pursuant to SDCL 15-6-59(a). (ROA 774). Instead, Menard filed a Notice of Appeal on December 9, 2016 (ROA 771).

[1]In its brief, Menard claims that on page 494 of the trial transcript, "[t]he trial court granted Jensen's motion for judgment as a matter of law as to assumption of risk." (Appellant's Brief p. 3). With all due respect, this statement is not supported by the record. Instead, the court merely ruled on Menard's pending objection to jury instruction 20. (TT 494).

The only issues raised on appeal relate to Menard's affirmative defense of assumption of risk. (ROA 774). In other words, Menard has not claimed any error or irregularity in the proceedings, the reception of evidence, or the jury instructions relating to the issues of negligence, comparative negligence, causation and damages. Accordingly, those matters are *res judicata*[2] as the determinations of the jury and the rulings of the court have been merged into the final judgment and have not been challenged, contested or otherwise assigned as error on appeal. (ROA 774).

STATEMENT OF THE FACTS

Mr. Jensen was born on July 9, 1941, in Huron, South Dakota. (EX 1). Plaintiff and Mr. Jensen met in 1972 or 1973. (TT 207). At that time, Mr. Jensen was a truck driver. (TT 207).

Plaintiff and Mr. Jensen were married in Wyoming in 1976. It was a second marriage for both of them. (TT 205, 210). Together, they shared a love for horses. (TT 208).

In 1977, Mr. Jensen was severely injured in a truck accident when his brakes failed coming down a mountain pass. (TT 211, 280). He broke his back in two places, had surgery and spent a month and a half at the Craig Hospital in Englewood, Colorado. (TT 212, 214).

[2] *See State v. Thomason*, 2015 SD 90, ¶ 20, 872 N.W.2d 70, 75; *Am. Family Ins. Group v. Robnik*, 2010 SD 69, ¶ 15, 787 N.W.2d 768, 774; *Lawrence County v. Miller*, 2010 SD 60, ¶ 244, 786 N.W.2d 360, 369.

As a result of his injuries, Mr. Jensen was never able to return to work. (TT 218). After surgery and physical therapy, he was able to regain enough function in his lower extremities to walk short distances with a brace on his right leg. (TT 213 – 215). He also frequently used a cane, especially after he broke his right leg in 2008 or 2009. (TT 26, 216, 217, 228, 243, 281; Sabow 50).

Despite his limitations, Mr. Jensen did his best to keep busy and was able to walk short distances, drive and do some light-duty work. (TT 220). He was able to help his neighbor put up hay and drive the tractor, and assisted Plaintiff with taking care of the horses. (TT 220, 282). He was also able to do some rough carpentry and remodeling work. (TT 227-228).

In July of 2012, Mr. Jensen turned seventy-one years old. (EX 1). He and Plaintiff were living on an acreage near Huron, SD. (TT 223). The property included a house and several buildings, including a barn. (TT 223, 224).

On July 28, 2012, Mr. Jensen was in the process of finishing a tack room in the barn (TT 244, 246). He needed some plywood to cover up the rafters, so Mr. Jensen and his brother-in-law, Don Farnam, went to the Menard store in Mitchell, SD. (TT 31, 246). Mr. Jensen drove because Mr. Farnam had problems with his vision. (TT 33).

It was a windy day. (TT 35). Mr. Jensen and Mr. Farnam walked into the store and told the cashier that they wanted to buy seven half-inch, four-foot by eight-foot sheets of OSB, or oriented strand board (hereinafter referred to as "plywood"). (TT 35, 72, 79, 108). They obtained a receipt, returned to the pickup

and drove to the security gate in order to gain access to the outside lumberyard. (TT35, 36).

The Menard employee at the security gate looked at the receipt and told them to drive to door number fifteen. (TT 36). Mr. Jensen followed his instructions and parked the truck facing east near the bay serviced by door fifteen. (TT 36, 85). Both Mr. Jensen and Mr. Farnam got out of the vehicle. (TT 36).

Menard employee Clint Weyand came to assist Mr. Jensen with the order. (TT 68, 69, 71, 97). Mr. Weyand knew that it was windy outside. (TT 68, 84). According to the Store Manager at that time, it was common knowledge of the employees that the wind swirls in the outdoor lumberyard. (TT 453).

According to Mr. Weyand, he did not say anything to Mr. Jensen before loading the truck, and Mr. Jensen did not say anything to him. (TT 71, 97, 99, 107). Mr. Weyand looked at the invoice and went inside the store to obtain the materials. (TT 69, 73, 97).

Mr. Weyand first looked for a flat cart, but couldn't find one. (TT 72, 92, 97). He wanted a flat cart because they are easier to load and unload, as you can roll the flat cart right up behind the back of a pickup and slide the sheets right in. (TT 98). Instead, Mr. Weyand grabbed a single rail cart and stacked the sheets of plywood tilted against the rail in a vertical fashion. (TT 72; see EX 514A). The cart did not have brakes or locks on the wheels. (TT 87).

Mr. Weyand testified that safety is the number one priority when assisting customers. (TT 90; see TT 446). Nevertheless, it is undisputed that Menard has

no Safety Director and maintains no written training manuals or procedures for employees regarding the safe loading of items purchased by customers. (TT 422, 435, 445, 472).

Mr. Weyand could have, but did not, tell Mr. Jensen to move the truck. (TT 86, 106). Instead, Mr. Weyand transported the materials on the rail cart out into the unprotected portion of the outdoor lumberyard, exposed to the elements. (TT 84). He knew it was windy. (TT 68, 108). He also knew that if the wind catches a sheet of plywood, it can blow over. (TT 83). Despite this knowledge, Mr. Weyand declined to ask for assistance from another Menard employee and chose to load the materials by himself. (TT 77).

Mr. Weyand was able to load the first sheet of plywood into the back of the pickup without incident. (TT 75, 79, 98, 103). During the second attempt, however, the wind came up and a terrible accident occurred. (TT 82).

As Mr. Weyand explained at trial, "I was getting ready to load up the second sheet of plywood, saw something move out of the corner of my eye, I turned my elbow up to try to stop the plywood and got pushed and turned out of the way.". (TT 104). The force of the wind on the cart and the load was sufficient to turn Mr. Weyand and to push him out of the way. (TT 88)

Although Mr. Farnam was not looking in Mr. Jensen's direction at the time of the accident, he testified that he heard someone yell "grab it". (TT 37, 38). Mr. Farnam testified that as he turned to see what was happening, he saw Mr. Jensen

fall and thought that his head struck the sheet of plywood in the back of the pickup. (TT 39).

In a split second, Mr. Jensen was on the ground and couldn't move. (TT 105). Although some of the sheets of plywood had fallen, Mr. Weyand held on to the rail cart to keep it moving or turning further in the wind. (TT 105, 334). Obviously, since he was holding onto the cart and its contents to keep them from moving further, he was not holding onto the second 4' by 8' sheet of plywood. (TT 105, 334).

After Mr. Jensen landed on the ground, Mr. Weyand asked him if he was all right. (TT 105). Mr. Jensen said that he couldn't move. (TT 105). By this time, co-worker Dustin Fitzler came upon the scene, who contacted Manager Mike Golden and requested an ambulance. (TT 105, 333, 436). At some point after the accident, Mr. Farnam found and picked up Mr. Jensen's cane, which was laying on the ground outside of the truck. (TT 41).

Within minutes of the occurrence, Mr. Weyand hand-wrote the following account in an incident report:

> Getting seven four-by-eight sheets, half-inch OSB. I put them on rail cart for OSB, leaning the OSB at an angle slightly tilted. When loading up the guest we loaded one sheet. The wind came up and blew the sheets of OSB over, striking the guest in the head. Then the guest made contact with the sheet and the truck.

(EX. 57; TT 79). At the scene, Mr. Weyand told co-worker Dustin Fitzler that the wind blew the plywood off the cart and struck Mr. Jensen. (TT 353). The same

information was provided to the ambulance personnel who arrived in minutes after the accident. (TT 120; EX 1 p. 37). Emergency Medical Technician Colt Mayfield wrote the following in his report:

> Upon arrival pt. lying on his side near a tipped stack of plywood. Employee states he was helping load plywood into the back of a truck when a gust of wind came up. Pt. was holding on to the plywood sheet and it hit him on the left side of the face causing him to fall to the ground. Pt. states he can't feel or move his legs or arms.

(EX 1 p. 37). Mr. Mayfield testified that a few sheets of plywood were tipped over "like a deck of cards". Someone told him that the plywood had fallen over and that Mr. Jensen had been struck. (TT 121).

When Mr. Jensen arrived at the emergency room in Mitchell, he reported the following:

> Pt. states he was standing by watching people load plywood when the wind caught a piece of plywood and it hit him on the left side knocking him to the ground. Pt. states he thought his neck was broke before he hit the ground because he could not feel anything.

(EX 1 p. 69). At the hospital, Mr. Jensen gave a similar account to Plaintiff. (TT 248). In its answer, Defendant specifically admitted that "a gust of wind blew OSB off the loading cart causing it to strike Plaintiff[.]" (ROA 3).

Nevertheless, at trial, Mr. Weyand attempted to recant his prior written statement about what he reported about the sheet of plywood striking Mr. Jensen. Instead of testifying that he saw the OSB strike Mr. Jensen, and that his head struck the back of the truck, Mr. Weyand testified that he assumed that these two events occurred, because the rail cart was pushed by the wind, pushing and turning

him out of the way, so that he was not in a position to see what happened to Jensen. (TT 80, 88, 104). Mr. Weyand further testified that when he did turn around to see what had occurred, he saw Mr. Jensen fall on top of the plywood (TT 89).

Mr. Jensen was taken by ambulance to the Emergency Room at Queen of Peace Hospital in Mitchell, SD, where he was diagnosed with cervical fracture and dislocation of levels C3 and C4. (EX 1 p. 12; Sabow 23). It was also noted that he had abrasions to his nose and a laceration to his left ear. (EX 1 pp. 16, 93).

Mr. Jensen was airlifted to Avera – McKennan Hospital in Sioux Falls, SD, where Michael Puumala, a neurosurgeon, performed surgery to fuse the fractured affected portions of the spine. (EX 1 pp. 30-32). Although the surgery was successful from the standpoint of stabilizing the cervical fractures, Mr. Jensen remained a total quadriplegic. (Sabow 41). In addition, he received a tracheostomy so that he could be placed on a ventilator permanently. (EX 1 pp. 34-36; Sabow 41).

Dr. Sabow, a neurologist, testified that Mr. Jensen's cervical fractures were not caused by a flying piece of plywood, nor by the fall to the ground, but by a severe hyperextension or flexion injury, when his head came into contact with a hard surface before the rest of his body stuck the ground. (Sabow 28, 30, 39, 37, 56, 62, 64, 68). According to Dr. Sabow, the most likely explanation was that Mr. Jensen's head struck the back of the tailgate before his body hit the ground, which caused the severe hyperextension or flexion injury. (Sabow 57). This is

consistent with the account initially reported by Mr. Weyand in the incident report, that Mr. Jensen was struck by the plywood and then made contact with the first sheet of plywood loaded in the back of the truck, as well as the eye witness testimony of Mr. Farnam, who stated that he thought that Mr. Jensen hit the end of the plywood that was in the back of the truck. (TT 39, 79).

On September 6, 2012, Mr. Jensen was admitted to the Craig Hospital in Englewood, CO for a comprehensive rehabilitation program. (EX 1 pp. 21-26). While there, a routine evaluation by an urologist revealed the presence of bladder cancer. (EX 1 p. 23). Because of his other medical problems, Mr. Jensen and his family, after consulting with the medical care providers, chose to decline any aggressive treatment. (EX 1 p. 223).

On November 20, Mr. Jensen was discharged from Craig Hospital and transferred to a long-term nursing facility in Lincoln Nebraska. (EX 1 p. 21; TT 258). During his stay there, he continued to suffer from a series of pulmonary infections which are associated with the use of the ventilator. (Sabow 45). After a period of declining health, Mr. Jensen was placed in hospice, where he passed away on January 31, 2013. (TT 273; EX 1).

At trial, Plaintiff claimed that the actions of Menard employee Clint Weyand were negligent, that this negligence was a legal cause of Mr. Jensen's injuries, and that as a result of these injuries, Mr. Jensen sustained medical and related health care expenses in the amount of $1,028,368.36 and that Plaintiff and Mr. Jensen sustained other damages until the time of Mr. Jensen's death. In

support of these allegations, Plaintiff offered the testimony of Dr. Sabow, who testified that all of the medical treatment was reasonable and necessary, as well as other opinions and conclusions regarding Mr. Jensen's injuries, medical condition and medical treatment.

In addition, Plaintiff offered the testimony of John Grisim, a Certified Safety Professional, who testified about safety and negligence issues. (Sabow 7, TT 133 – 193). Specifically, Mr. Grisim rendered the opinions that the Menard training materials do not meet the standard of care, that the selection and loading of the cart was not appropriate, that a flat cart would have been safer because the sheets would have stayed flat and that a double rail cart would have been safer because it would held the sheets of plywood in place. (TT 149, 150, 152, 161, 180). He further testified that the truck should have been moved into the bay and out of the wind, that the cart did not have brakes, that Mr. Weyand allowed Mr. Jensen to stand next to the load, that a seventy-one-year-old should not be expected to lift a sheet of plywood off a cart and place it in the truck, and that Mr. Weyand should not have attempted to load the materials, placed vertically on a single rail cart, out in the wind, by himself, without the assistance of another Menard employee. (TT 151, 154, 157, 173).

In response to these allegations, Menard offered the opinions of Joe Bernhard, a General Contractor from Sioux Falls, SD, and Jack Auflick, an Engineering Psychologist from Ann Arbor, Michigan. (EX 510). Mr. Bernhard testified that he was asked to form and express opinions as the conduct of Menard

and Clint Weyand regarding the handling of the plywood on the day of the accident. (TT 291). Essentially, he rendered the opinion that Mr. Weyand acted reasonably and appropriately, despite the facts that rail carts should be unloaded by two people, one on each side, as it is awkward for one person to handle plywood. (TT 291, 292, 300 302, 316). He further testified that the wind makes moving plywood difficult, if it gets in the air it can move on you, Mr. Jensen took no part in selecting the cart or loading the plywood onto the cart, the day was windy, the truck could have been moved out of the wind, the cart had no brakes and the cart, loaded with 300 pounds of materials, did move as a result of the wind. (TT 294, 300, 302, 304, 306, 307, 309, 310).

Dr. Auflick is employed by a company called ESI which performs a variety of engineering and scientific analysis for the purposes of litigation. (TT 370). In essence, Dr. Auflick opined that the likelihood of this type of accident happening was so low that it should have been considered "negligible". (TT 386, 389).

Using a multiplication formula to calculate the statistical chances of a similar accident happening, Dr. Auflick considered factors including the likelihood of a customer buying plywood, the likelihood that the customer will ask for assistance in loading, the likelihood that only a rail cart was available, the likelihood of parking in an easterly direction outside door fifteen, the likelihood that the wind was blowing from the south, the likelihood that the wind would gust with sufficient velocity to move the cart and plywood, the amount of exposure, the length time in the hazardous area while the wind was gusting and the probability

of falling in a manner where one strikes his head on the corner of a plywood sheet, all multiplied together exponentially. (EX 509 p. 10; TT 387).

Based upon his calculations, Dr. Auflick determined that the statistical chances of an accident happening similar to what occurred to Mr. Jensen were 0.00000001, or one out of one hundred million.[3] (EX 509 p. 10; TT 388). According to Dr. Auflick's analysis, Mr. Jensen was twenty-five times more likely to have been struck by lightning. (TT 410, 414). In the words of Dr. Auflick, the accident involving Mr. Jensen at the Menard store in Mitchell was a highly unlikely and unforeseeable event. (EX 509 p. 10; TT 412).

ARGUMENT

Issue I: This issue relating to judgment as a matter of law regarding the assumption of risk defense has not been preserved for appeal, as the trial court never ruled on the motion.

As previously noted, Plaintiff made a motion for directed verdict on the assumption of risk defense after both sides rested. (TT 486). The trial court reserved ruling and advised counsel to "remake those motions when we settle instructions." (TT 487). Plaintiff never renewed the motion, and the matter became moot after the settlement of instructions on assumption of risk. (TT 493-494).

[3]Regarding Dr. Auflick's statistical calculations, the jury had every right to disregard this analysis as irrational, unsound and misplaced. "Fact finders are free to reasonably accept or reject all, part or none of an expert's opinion." *Magner v. Brinkman*, 2016 SD 50, ¶ 16, 883 N.W.2d 74, 82. As Mark Twain was fond of saying, there are three kinds of falsehoods: "lies, damn lies and statistics." *See County of Los Angeles v. Shalala*, 192 F.3d 1005, 1023-1022 n.4 (DC Cir.1999); *West v. Swift, Hunt & Wesson*, 847 F.2d 490, 492 n. 2 (8th Cir. 1988).

It appears obvious that Menard is attempting to manufacture two separate appealable issues out of the same legal question in order to take two bites at the apple and take advantage of the "de novo" review regarding judgment as a matter of law articulated in *Magner*, 2016 SD 50, ¶ 13, 883 N.W.2d 74, 81. Unfortunately for Menard, however, the settled record simply does not support the contention that that Plaintiff's motion for judgment as a matter of law was ever granted. (See TT 486 – 494).

The party claiming error on appeal has the responsibility to insure that an appropriate record is made. *Jack Rabbit Lines, Inc*. 1996 SD 80, ¶ 13, 551 N.W.2d 18, 21; *Mack*, 1996 SD 63, 548 N.W.2d 812, 815, ¶ 16 n.2. "The settled record is the sole evidence of the circuit court's proceedings and, when confronted with an incomplete record, our presumption is that the circuit court acted properly." *Jack Rabbit Lines, Inc.*, 1996 SD 80, ¶ 13, 551 N.W.2d at 21 (quoting *State*, 416 N.W.2d 875, 878 (S.D. 1987); *see Mack*, 1996 SD 63, 548 N.W.2d at 815 n.2;.

Here, the issues pertaining to the assumption for risk defense were addressed by the trial court during the settlement of jury instructions. (TT 487 – 494). Plaintiff respectfully submits that no separate grounds for appeal can be based upon on a ruling for judgment as a matter of law that does not affirmatively appear on the record. *See Jack Rabbit Lines, Inc.*, 1996 SD 80, ¶ 13, 551 N.W.2d at 21*; Mack*, 1996 SD 63, 548 N.W.2d at 815 n.2. Because Issue II specifically addresses the propriety of the jury instructions as they pertain to the assumption of

risk defense, Plaintiff refers to and incorporates by this reference the arguments and authorities set forth below.

Issue II: The trial court properly ruled that Menard failed to establish competent proof of all three essential elements of the assumption of risk defense.

"Jury instructions are to be considered as a whole, and if the instructions so read correctly state the law and inform the jury, they are sufficient." *Schultz v. Scandrett*, 2015 SD 52, ¶ 12, 866 N.W.2d 128, 134 (quoting *State v. Doap Deng Chuol*, 2014 SD 33, ¶ 31, 849 N.W.2d 255, 263). "Trial courts can only present those issues to the jury by way of instructions which find support by competent evidence in the record." *Frazier v. Norton*, 334 N.W.2d 865, 869 (S.D. 1983); see *Wangness v. Builders Cashway, Inc*., 2010 SD 14, ¶ 14, 779 N.W.2d 136, 141. The court is "not required to instruct on issues that do not find support in the record". *Casper Lodging, LLC v. Akers*, 2015 SD 80, ¶ 62, 871 N.W.2d 477, 496 (quoting *Bauman v. Auch*, 539 N.W.2d 320, 323 (S.D. 1995)).

"[W]e generally review a trial courts' decision to grant or deny a particular instruction under the abuse of discretion standard." *Casper Lodging, LLC*, 2015 SD 80, ¶ 62, 871 N.W.2d at 496 (quoting *Wangsness*, 2010 SD 14, ¶ 10, 779 N.W.2d at 140); *see Karst v. Shur-Company*, 2016 SD 35, ¶ 8, 878 N.W.2d 604 at 609.

"To constitute prejudicial error, [instructions] must be both erroneous and prejudicial, such that 'in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party.'" *Schultz*, 2015 SD 52, ¶ 12,

866 N.W.2d at 133 – 134 (quoting *State v. Hauge*, 2013 SD 26, ¶ 17, 829 N.W.2d 145, 150). The burden is on the complaining party to show that the alleged error was prejudicial. *Kappenman v. Action, Inc*., 392 N.W.2d 410, 412 (S.D. 1985). In other words, "an appellant must show not only that a particular instruction was erroneous, but also that it was prejudicial, meaning the jury probably would have retuned a different verdict if the faulty instruction had not been given." *Davis v. Knippling*, 1998 SD 31, ¶ 4, 576 N.W.2d 525, 527; *LDL Cattle Co., Inc. v. Guetter*, 1996 SD 22, ¶ 32, 544 N.W.2d 523, 530.

Assumption of risk is an affirmative defense. *Mack*, 1996 SD 63, 548 N.W.2d 812, 814 ¶ 9. A party who asserts an affirmative defense carries the burden of proof at trial. *Rodriquez v. Miles*, 2011 SD 29, ¶ 16, 799 N.W.2d 722, 725; *Dakota Indus., Inc. v. Cabelas's.com, Inc*., 2009 SD 39, ¶ 12, 766 N.W.2d 510, 513.

A defendant asserting the assumption of risk bears the burden of showing that the plaintiff: (1) had actual or constructive knowledge of the risk; (2) had an appreciation of its character, and (3) voluntarily accepted the risk, having ad the time, knowledge and experience to make an intelligent choice. *Karst*, 2016 SD 35 ¶ 30, 878 N.W.2d at 616; *Duda v. Phatty McGees, Inc*., 2008 SD 155, ¶ 13, 758 N.W.2d 754, 758; *Stone v. Von eye Farms*, 2007 SD 115, ¶ 19, 741 N.W.2d 767, 772; *Carpenter v. City of Belle Fourche*, 2000 SD 55, ¶ 34, 609 N.W.2d 751, 764; *Ray*, 1998 SD 40, ¶ 11, 576 N.W.2d 896, 989; *Goepfert*, 1997 SD 56 ¶ 6, 563 N.W.2d 140, 142; *Ballard v. Happy Jack's Supper Clu*b, 425 N.W.2d 385, 389

(S.D. 1988); *Thomas v. St. Mary's Roman Catholic Church*, 283 N.W.2d 254, 259 (S.D. 1979). The failure to establish any one of these elements is fatal to the defense. *Goepfert*, 1997 SD 56, ¶ 6, 563 N.W.2d at 142; *Mack*, 548 N.W.2d at 814, *see Westover v. E. River Elec. Power Coop, Inc*., 488 N.W.2d 892, 901 (S.D. 1992).

Regarding the first element "[k]nowledge of the risk is the watchword of assumption of risk." *Duda*, 2008 SD 115, ¶ 12, 758 N.W.2 at 758 (quoting W. Keeton and W. Prosser, The Law of Torts § 68 (5th ed. 1984)). Nevertheless, a plaintiff's testimony about what he or she knew or understood is not necessarily conclusive. *Duda*, 2008 SD 115, ¶ 17, 758 N.W.2d at 759. "Constructive knowledge will be imputed if the risk is so plainly observable that 'anyone of competent faculties [could be] charged with knowledge of it.'" *Geopfert*, 1997 SD 56, ¶ 8, 563 N.W.2d at 143 (quoting *Westover*, 488 N.W.2d at 901).

Regarding the second element, "an individual will be held to have appreciated the danger undertaken if it was "a risk that no adult person of average intelligence can deny.'" *Geopfert*, 1997 SD 56, ¶ 9, 563 N.W.2d at 143 (quoting *Bell v. East River Elec. Power Co-op, Inc*., 535 N.W.2d 750, 754). "There are some risks to which no adult will be believed if he says he did not understand them." *Goepfert*, 1997 SD 56, ¶ 9, 563 N.W.2d at 143 (quoting *Staats v. Lawrence*, 576 A.2d 663, 668 (De. Super.Ct. 1990)).

The third element requires voluntary acceptance of the risk, "having had the time, knowledge and experience to make an intelligent choice." *Geopfert*, 1997

SD 56, ¶ 10, 563 N.W.2d at 143; *Duda*, 2008 SD 115 ¶ 13, 758 N.W.2d at 758; *Stone*, 2007 SD 115, ¶ 19, 741 N.W.2d at 772; "Acceptance of risk necessarily connotes attention to reasonable alternatives. *Geopfert*, 1997 SD 56, ¶ 12, 563 N.W.2d at 144. "Reasonable" refers to "whether one had a fair opportunity to elect whether to subject oneself to danger." *Geopfert*, 1997 SD 56, ¶ 12, 563 N.W.2d at 144; *Berg v. Sukup Mfg.Co.*, 355 N.W.2d 833, 835 (S.D. 1984).

"Acceptance is not voluntary if another's tortious conduct leaves no reasonable alternative to avert harm[.]" *Geopfert*, 1997 SD 56, ¶ 12, 563 N.W.2d at 144; *Mack*, 1996 SD 63, ¶ 15, 548 N.W.2d at 815 (quoting Restatement of Law (Second) Torts, § 496E, p. 576 (1965)); *see Stone*, 2007 SD 115, ¶ 22, 741 N.W.2d at 772; *Pettry*, 2001 SD 88, ¶ 9, 630 N.W.2d 705, 708. "[A]lthough one may assume the risk of the negligence of another if he is fully informed of such negligence, one is not, under the doctrine of assumption of risk, bound to anticipate the negligent conduct of others." *Ray*, 1998 SD 40 ¶ 14, 576 N.W.2d at 900.

At trial, Menard's entire defense was predicated upon instruction twenty-eight, which stated that "[a] landowner is not required to take measures against a risk that would not be anticipated by a reasonable person." (ROA 441). Almost without exception, every Menard employee and expert witness testified that the methods used to haul and load the plywood were safe and that the accident which occurred to Mr. Jensen was not foreseeable.

Menard employee Clint Weyand testified that he never had a sheet of plywood blow off a cart, he never lost control of a sheet in the wind before, no similar incidents had happened before, he had no concerns after loading the rail cart, he did not think it was a dangerous situation and he had no indication that an accident was about to take place. (TT 96, 98, 106). Expert Joe Bernhard testified that Clint Weyand acted reasonably and appropriately, the use of the cart to transport the plywood was appropriate, plywood is not inherently dangerous and Mr. Jensen's injuries were not foreseeable. (TT 291, 300, 309, 312).

Menard employee Dustin Fitzler testified that the use of the rail cart was appropriate, he had no concerns about the situation, there wasn't anything unsafe about it, and he had never seen boards blow over in a rail cart before. (TT 326, 336, 345, 354,365). Expert Jack Auflick testified that there was nothing unsafe about the use of the cart, Clint Weyand did nothing unsafe about the method he used to move the plywood, there was no evidence of negligence, the wind gust was a very unusual event, the likelihood of this type of occurrence was one out of one hundred million, or "negligible," and the accident was not foreseeable. (TT 386, 388, 392, 394, 412, 414, 417).

With all due respect, Menard's "unforseeability" defense offered at trial was inconsistent and incompatible with the assumption of risk defense from the standpoint of proof. Obviously, the jury disregarded the "unforeseeability" defense, found against the credibility of Weyand and Menard's trial story, and found for the Plaintiff on the issues of negligence, contributory negligence,

causation and damages. Nevertheless, based upon the evidence that Menard offered at trial, that the conditions were safe and that Menard's employees acted appropriately, none of Menard's witnesses expressed any opinions as to the specific risks or dangers expected to be encountered by Mr. Jensen or other customers under similar circumstances. Although Menard raised the assumption of risk defense in its answer, it essentially abandoned the defense by failing to offer any evidence of such risks at trial, even though it bore the burden of proof and had a full and fair opportunity to litigate the issues at trail.

Mr. Jensen never had the opportunity to testify. Thus, no evidence of his actual knowledge exists. The record is devoid of any indication that there were any warning or caution signs at the premises at the time of the accident. Mr. Weyand acknowledged that he had no conversations with Mr. Jensen prior to the accident, meaning that no conversations could have taken place about any dangers or risks. (TT 71, 97, 99, 107).

Regarding the first two elements of the assumption of risk defense, understanding and appreciation, Mr. Jensen obviously knew that he was purchasing plywood and undoubtedly knew that it was windy. Little more, however, can be established from the record presented.[4] An obvious disparity of

[4]As previously indicated, Mr. Jensen was not involved in choosing the cart, nor the loading of the same, nor selecting the place to load, nor was he informed of any risks or alternatives. There is no evidence of any discussion relating to warnings or safety. Mr. Weyand chose to unload the materials out in the wind and without assistance from another Menard employee. Menard's own expert, Joe Bernhard, testified that two people were needed to load the materials safely. (TT 292, 302).

knowledge existed between Mr. Weyand, who worked in a lumberyard, and Mr. Jensen, a customer, relating to the handling of construction materials.[5] The trial court concluded that nothing in the record suggested that Mr. Jensen either did or should have perceived the risk of harm which actually manifested, which was the risk caused by "the defendant's alleged negligence in the loading of the truck."[6]

The circumstances which ultimately gave rise to the danger encountered by Mr. Jensen were the acts and omissions of Clint Weyand which occurred right before the accident. Mr. Jensen did not know that Mr. Weyand was going to select the single rail cart. Mr. Jensen did not know that Mr. Weyand was going to stack the plywood in a vertical fashion. Mr. Jensen did not know that Mr. Weyand was going to decline to ask a second Menard employee to assist with the loading process. Mr. Jensen did not know that a sudden gust of wind would occur at the exact moment that Mr. Weyand went to load the second sheet of plywood.

In its brief, Menard makes multiple references to the comments of counsel. The jury was instructed that it should "disregard any argument, statement, or remark of counsel which has no basis in the evidence." (ROA 425).

---

[5]The comments to South Dakota Pattern Jury Instruction (Civil) § 20-40-10 states "[a]ssumption of risk is rarely applied in professional negligence cases because of the disparity of knowledge between professional and their clients."

[6]The comments to South Dakota Pattern Jury Instruction (Civil) § 20-40-10 states that "a trial court should instruct on assumption of the risk only if it determines that the actor possesses full comprehension and appreciation of the danger of injury which requires that the court perform an analysis of the actor's age, intelligence, experience and mental condition." In this case, the trial court performed such an analysis and ultimately concluded that the proof in the record was insufficient to warrant the submission of the assumption of risk defense. (TT 493 – 494).

The same should be true on appeal; the comments of counsel should not be considered as "evidence". *See Baddou v. Hall*, 2008 SD 90, ¶ 37 756 N.W.2d 554, 563; *Tunender v. Minnaert*, 1997 SD 62, ¶ 23, 563 N.W.2d 849, 854. Only "competent evidence" can support the giving of a requested jury instruction. see *Wangness*, 2010 SD 14, ¶ 14, 779 N.W.2d at 141; *Frazier*, 334 N.W.2d 865, 869 (S.D. 1983).

Menard's brief also makes several references to the actions of Mr. Jensen, as well as his use of his cane, his general state of health and his physical limitations. As previously noted, Mr. Farnam testified that he picked up Mr. Jensen's cane, which he found outside the truck, laying on the ground, after the accident. (TT 41).

Regarding Mr. Jensen's health and physical limitations, Menard takes its customers as it finds them. *See Stoleson v. United States*, 708 F.2d 1217, 1221 (7th Cir. 1986)*; Shippen v. Parrott*, 1996 SD 105, ¶ 12 n.3, 553 N.W.2d 503, 507. While Mr. Jensen's state of health may have been relevant to the contributory negligence defense, those issues were resolved in Mr. Jensen's favor and are now *res judicata*.[7] (ROA 449, 450; App. 1-2). Furthermore, the record is devoid of any evidence whatsoever that Mr. Jensen took any action when Mr. Weyand attempted to load the second sheet of plywood.

[7]*See State v. Thomason*, 2015 SD 90, ¶ 20, 872 N.W.2d 70, 75; *Am. Family Ins. Group v. Robnik*, 2010 SD 69, ¶ 15, 787 N.W.2d 768, 774; *Lawrence County v. Miller*, 2010 SD 60, ¶ 244, 786 N.W.2d 360, 369.

Regarding the third element of the assumption of risk defense, a plaintiff is not "bound to anticipate the negligent conduct of others." *Ray*, 1998 SD 40 ¶ 14, 576 N.W.2d at 900. "[A]cceptance is not voluntary if another's tortious conduct leaves no reasonable alternative to avert harm[.]" *Geopfert*, 1997 SD 56, ¶ 12, 563 N.W.2d at 144; *Mack*, 1996 SD 63, ¶ 15, 548 N.W.2d at 815 (quoting Restatement of Law (Second) Torts, § 496E, p. 576 (1965)); *see Stone*, 2007 SD 115 ¶ 22, 741 N.W.2d at 772; *Pettry*, 2001 SD 88, ¶ 9, 630 N.W.2d at 708. At the precise moment when the culmination of Mr. Weyand's tortious conduct caused the danger which manifested, Mr. Jensen had no "fair opportunity to elect whether to subject [himself] to danger." *Geopfort*, 1997 SD 56, ¶ 10, 563 N.W.2d at 143. No reasonable alternative existed. He had neither the time, opportunity nor options available to make any kind of intelligent choice.

Under Restatement of Law (Second) Torts, § 496E, if the defendant's tortious conduct leaves the plaintiff no reasonable alternative to avert harm, the defense of assumption of risk is not available as a matter of law. See Restatement of Law (Second) Torts, § 496E, p. 576 (1965); *Stone*, 2007 SD 115, ¶ 22, 741 N.W.2d at 772; *Pettry*, 2001 SD 88, ¶ 9, 630 N.W.2d 705; *Geopfert*, 1997 SD 56, ¶ 12, 563 N.W.2d at 144; *Mack*, 1996 SD 63, ¶ 15, 548 N.W.2d at 815. Because Menard had a full and fair opportunity to try the issues, and because Menard failed to challenge any matters on appeal with respect to the issues of negligence, contributory negligence, causation and damages, Menard is bound by the findings of the trial court and cannot now claim that its employee did not engage in tortious

conduct. *See State*, 2015 SD 90, ¶ 20, 872 N.W.2d 70, 75; *Am. Family Ins. Group*, 2010 SD 69, ¶ 15, 787 N.W.2d 768, 774; *Lawrence County*, 2010 SD 60, ¶ 244, 786 N.W.2d 360, 369.

"When a party to litigation fails to develop all of the issues and evidence available in a case, the party is not justified in later trying the omitted issues or facts in a second action based upon the same claim." *Wintersteen v. Benning*, 513 NW.2d 920, 922 (S.D. 1994). Because Menard has failed to prove all three essential elements of the assumption of risk defense by competent evidence, and because Menard has failed to establish the probability that instructing the jury on the defense of assumption of risk would have resulted in a different outcome, the rulings of the trial court should be affirmed.

CONCLUSION

Wherefore, Plaintiff requests that this Court affirm all issues on appeal.

Dated: May 5, 2017.

HOY TRIAL LAWYERS, Prof. L.L.C.

/S/ Scott G. Hoy
Scott G. Hoy
901 W. 10th Street Suite 300
Sioux Falls, SD 57104-3519
Phone: (605) 334-8900
E-mail: scott@hoylaw.com

And

Michael W. Strain
MORMAN LAW FIRM
PO Box 729
Sturgis, SD 57785
Phone 605-347-3624
Email: mike@mormanlaw.com

Attorneys for Appellee

Request for Oral Argument

Appellee respectfully requests oral argument.

/S/ Scott G. Hoy
Scott G. Hoy

Certificate of Compliance

Pursuant to SDCL § 15-26A-66(b)(4) the undersigned certifies that to the best of his knowledge, this brief complies with the type volume limitation in SDCL § 15-26-66(b)(2). This brief was prepared using Microsoft Office Word 2010, with proportionally spaced typeface of New Times Roman size 13 for the text and size 12 for the footnotes. According to the word processing system, this brief contains 7,181 words and 41,544 characters (with spaces), exclusive of the cover page, table of contents, table of cases, preliminary statement, jurisdictional statement, statement of legal issues, certificates of counsel and appendix.

/S/ Scott G. Hoy
Scott G. Hoy

Certificate of Service

The undersigned certifies that on May 5, 2017, he mailed two (2) correct copies of this Appellee's Brief by first-class mail, postage prepaid, to Appellant's attorneys, William P. Fuller and Hilary L. Williamson, FULLER & WILLIAMSON, LLP, 7521 S.. Louise Ave., Sioux Falls, SD 57108, and the original and two (2) copies for filing to the Clerk of the South Dakota Supreme Court, 500 E. Capitol, Pierre, SD 57501-5070.

/S/ Scott G. Hoy
Scott G. Hoy

APPENDIX

TABLE OF CONTENTS

APPENDIX

TABLE OF CONTENTS

STATE OF SOUTH DAKOTA) :SS
COUNTY OF DAVISON)

IN CIRCUIT COURT
FIRST JUDICIAL CIRCUIT

BONITA JENSEN, Individually and as the Personal Representative of the Estate of RONALD MILTON JENSEN, Deceased,

Plaintiff,

v.

MENARD, INC.,

Defendant.

17 CIV. 12-000458

VERDICT FORM

We, the jury, duly impaneled in the above-entitled action and sworn to try the issues, find as follows:

1. Do you find that Defendant Menard, Inc. was negligent?

   Yes X No __

   If you answer no, you do not need to answer any other questions. Have the foreperson sign and date the end of this form. If you answer yes, continue with question 2.

2. If you found Defendant Menard, Inc. to be negligent, do you also find that the negligence of Menards was the legal cause of any injuries and damages to Ronald Jensen?

   Yes X No __

   If you answer no, you do not need to answer any other questions. Have the foreperson sign and date the end of this form. If you answer yes, continue with question 3.

3. Do you find that Ronald Jensen was contributorily negligent more than slight?

   Yes __ No X

If you answer, yes, you do not need to answer any other questions. Have the foreperson sign and date the end of this form. If you answer no, continue with question 4.

4. If you find that Defendant Menard, Inc. was negligent and such negligence was the legal cause of Ronald Jensen's injuries, then set forth the amount of damages to be awarded to Ronald Jensen's estate to compensate it for damages, and enter that amount here.

1. For medical expenses, if any, incurred by Ronald Jensen, deceased, between July 28, 2012 and January 31, 2013:

$ 1,028,368.36

2. For disability and disfigurement, pain and mental anguish, lost earnings and/or loss of enjoyment of life suffered by Ronald Jensen, if any, between July 28, 2012 and January 31, 2013:

$ 425,000

3. For the reasonable value of the loss of the service, aid, comfort, society, companionship, and conjugal affections between Plaintiff Bonita Jensen and Ronald Jensen, if any, between July 28, 2012 and January 31, 2013:

$ 425,000

Dated this 3rd day of November, 2016.

Theodore W. Rhonke

Foreperson

APP. 2

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 28067

BONITA JENSEN, Individually and as the Personal Representative of the Estate of RONALD MILTON JENSEN, Deceased,

Plaintiff-Appellee,

vs.

MENARD, INC.,

Defendant-Appellant.

Appeal from the First Judicial Circuit
Davison County, South Dakota
The Honorable Patrick Smith, Circuit Court Judge

APPELLANT'S REPLY BRIEF

Attorneys for Plaintiff-Appellee:
Scott G. Hoy

HOY TRIAL LAWYERS
901 West 10th Street, Suite 300
Sioux Falls, SD 57104
(605) 334-8900
scott@hoylaw.com

Michael W. Strain

MORMAN LAW FIRM
P.O. Box 729
Sturgis, SD 57785
(605) 347-3624
mike@mormanlaw.com

Attorneys for Defendant-Appellant:
William P. Fuller
Hilary L. Williamson
FULLER & WILLIAMSON, LLP
7521 South Louise Avenue
Sioux Falls, SD 57108
(605) 333-0003
bfuller@fullerandwilliamson.com

hwilliamson@fullerandwilliamson.com

Notice of Appeal Filed: December 9, 2016.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Dakota Cases:

Statutes:

ARGUMENT

I. Jensen's motion for judgment as a matter of law was granted at trial and Jensen should not be permitted to abandon it on appeal.

Appellee Bonita Jensen's ("Jensen") only argument as to the trial court's ruling on her motion for judgment as a matter of law is an attempt to completely avoid the issue altogether by deeming it "moot." However, Jensen fails to recognize that this alleged "moot" issue is the entire reason Menard was not permitted to pursue the assumption of the risk defense at trial. A review of the record makes this, and the motion's erroneous resolution, clear.

Jensen made a motion for judgment as a matter of law on Menard's defenses of assumption of the risk and contributory negligence at the close of evidence. (TT 486); *see* SDCL § 15-6-50(a). The trial court heard arguments on Jensen's motion at that time, but reserved ruling and advised Jensen as follows: "I think that we can flush those issues out more while we discuss instructions and, then, you can remake those motions when we settle instructions." (TT 487.) The parties then went into chambers to settle jury instructions.[1] And, as requested by the trial court, it heard additional arguments and denied Jensen's motion as to contributory negligence, but granted the motion as to assumption of the risk. The trial court referenced this fact during the formal settlement of instructions as it reviewed each of the final instructions on the record. (TT 488-500.[2])

---

[1] After Menard rested its case, the trial court noted that it intended to informally settle instructions off the record. Once the final set of instructions was determined, it explained it would go back on the record to allow counsel to note any objections and allow the parties to offer any rejected instructions into the record. (TT 481-82.) This is precisely what occurred.

[2] Prior to reading the instructions, the trial court made the following comment:

When the trial court read Instruction 20, Menard objected because it did not include reference to its assumption of the risk defense. (TT 490; RA 433.) The trial court responded:

> All right. Just to make a record of why the Court does what it does. I note your objection, and I'll just state, *I have heard arguments off the record on that issue*. If anyone wants to be heard on it, again, I invite you to share any thoughts with me.

"Counsel and the Court met yesterday afternoon, informally, and went through all of the instructions and I've given instructions to the parties as to how I want them to make their record." (TT 488.)

(TT 490-91 (emphasis added).) Counsel again presented arguments as to Menard's assumption of the risk defense.[3] During those arguments, Jensen's counsel specifically noted that "we've been through all that soliloquy and they (Menard) can't present no [sic] evidence that plaintiff did intend to be involved in loading the vehicle. . . . [A]s we discussed yesterday, assumption of the risk does not apply here." (TT 492-93.) After hearing these arguments, the trial court ultimately overruled Menard's objection to Instruction 20, finding that there was insufficient evidence to support the defense of assumption of the risk. (TT 494.) The trial court did so, as Jensen's counsel had already noted, because it had already decided to grant Jensen's motion for judgment as a matter of law after discussing it in chambers the day before. This decision was precisely why the assumption of the risk defense did not appear in any of the trial court's final jury instructions it read into the record, why Menard had prepared separate jury instructions on the defense for inclusion in the record, why the trial court referenced having heard arguments off of the record the day before, and why the trial court rejected the jury instructions Menard proposed on assumption of the risk. (RA 393-98; App. 011-16.)

II. The trial court was required to instruct the jury on assumption of the risk because the defense was supported by sufficient, competent evidence in the record.

During her brief discussion of her motion for judgment as a matter of law, Jensen accuses Menard of manufacturing two separate legal issues in an effort to take "two bites at

[3] There were no additional discussions on the viability of Menard's contributory negligence defense at that time because the trial court had already denied Jensen's motion as to that defense during the in-chambers discussion. That defense, accordingly, appeared in the trial court's proposed jury instructions. (RA 444.)

the apple." (Brief at 18.) This accusation proves empty as it is based on the erroneous assumption that denying the existence of its own motion allows Jensen to obtain a more favorable standard of review when analyzed in the context of the absence of a jury instruction on assumption of the risk. Whether analyzing Jensen's allegedly abandoned motion or the complete absence of a jury instruction on assumption of the risk, however, the standard of review is de novo. This consistent standard of review finds its rationale in the fact that the trial court's analysis of both Jensen's motion and the trial court's decision not to instruct the jury on assumption of the risk was based on a single, erroneous conclusion – there was insufficient evidence in the record to support Menard's assumption of the risk defense. And this error can only be corrected by allowing Menard to pursue this defense in a new trial.

A. The absence of a jury instruction on assumption of the risk establishes prejudice as a matter of law.

Jensen's motive for abandoning her motion for judgment as matter of law is revealed in its reliance on the following quote in *Davis v. Knippling*, 1998 S.D. 31, ¶ 4, 576 N.W.2d 525:

> [A]n appellant must show not only that a particular instruction was erroneous, but also that it was prejudicial, meaning the jury probably would have returned a different verdict if the faulty instruction had not been given.

(Brief at 20.) Jensen's reliance on *Davis*, however, is misplaced.[4] In *Davis*, the Court

[4] All of the cases Jensen relies on in its brief address the adequacy and accuracy of a jury instruction that the trial court actually gave to the jury. None of these cases address the complete absence of any instruction on a legal theory supported by competent

considered whether the trial court's instruction to the jury on an obstructed view was a misstatement of the law. In other words, the Court considered the accuracy of the law that the jury was instructed to apply, which explains its ultimate conclusion: "Although Davis may have had an obstructed view of traffic approaching the intersection, *giving an instruction* based upon this statute was error." *Id*. ¶ 5 (emphasis added). However, in this context, the Court concluded the erroneous instruction was not prejudicial because the jury was also instructed on a proper theory, which could have served as the basis for the general verdict handed down by the jury. *Id*. ¶ 9. The Court could, therefore, presume that the jury decided the case on the proper legal theory and did not vacate the verdict for that reason.

---

evidence. *See Kappenman v. Action Inc*., 392 N.W.2d 410, 413-14 (S.D. 1986); *LDL Cattle Co., Inc. v. Guetter*, 1996 S.D. 22, ¶ 31, 544 N.W.2d 523, 529-30; *Schultz v. Scandrett*, 2015 S.D. 52, ¶ 14, 866 N.W.2d 128, 134; *Frazier v. Norton*, 334 N.W.2d 865, 869 (S.D. 1983); *Casper Lodging, LLC v. Akers*, 2015 S.D. 80, ¶¶ 63-64, 871 N.W.2d 477, 496-97.).

The analysis in *Davis* does not apply here. Unlike *Davis*, this appeal does not involve a faulty or legally erroneous instruction that the jury was given. This appeal involves the *complete absence* of an entire legal theory that is supported by the record. There can be no analysis of alternatives or presumptions regarding the application of the proper legal theories because the jury never had the opportunity to consider the assumption of the risk defense in the first instance. As this Court has repeatedly recognized, "[w]hen a proposed theory is supported by competent evidence, the trial court *must* instruct the jury on the applicable law, and failure to so instruct constitutes prejudicial error." *Kreager v. Blomstrom Oil Co.*, 379 N.W.2d 307, 309 (S.D. 1985) (emphasis added); *see also Schultz*, 2015 S.D. 52, ¶ 35, 866 N.W.2d at 140 (noting that the circuit court "has a duty to instruct the jury on applicable law where the theory is supported by competent evidence."); *Buxcel v. First Fidelity Bank*, 1999 S.D. 126, ¶ 13, 601 N.W.2d 593, 596 ("On issues supported by competent evidence in the record, the trial court should instruct the jury."); *Sundt Corp. v. State By and Through South Dakota Dept. of Transp.*, 1997 S.D. 91, ¶ 19, 566 N.W.2d 476, 480 (recognizing that the "[f]ailure to give a requested instruction that correctly sets forth the law is prejudicial error."); *Kuper v. Lincoln-Union Elec. Co.*, 1996 S.D. 145, ¶ 32, 557 N.W.2d 748, 758 (same); *Bauman v. Auch,* 539 N.W.2d 320, 326 (S.D. 1995) (concluding that the trial court's failure to instruct the jury on the third element of assumption of the risk was prejudicial error); *Jahnig v. Coisman*, 283 N.W.2d 557, 560 (S.D. 1979) ("Refusal to give a requested instruction setting forth applicable law is not only error, but prejudicial error."). Once Menard established that there was sufficient evidence to instruct the jury on

assumption of the risk, the trial court's failure to give such an instruction was prejudicial as a matter of law.

B. Jensen is not entitled to a limited or more favorable review of the record evidence.

Jensen's analysis of the odds of Menard's success on the assumption of the risk defense is rendered irrelevant under the applicable standard of review. However, in addition to this faulty analysis, Jensen makes several erroneous statements about the record and South Dakota law which cannot go uncorrected. Jensen conducted its analysis of the record in a vacuum, focusing only on Menard's position that it was not negligent. Jensen argues that Menard's "trial story" that the accident was not foreseeable prohibits this Court from finding any evidence in the record to support an assumption of the risk defense. This is not only a misstatement of the record evidence, but an erroneous assumption that the sufficiency of the evidence is examined with tunnel vision. The trial court does not analyze the sufficiency of the evidence by first identifying its origin and then considering only the evidence presented by the nonmoving party. If this analytical limitation applied, defendants in disputed liability cases such as this would be forced to either deny negligence and forgo affirmative defenses or admit negligence and rely solely on affirmative defenses. This is simply not South Dakota law. Sufficient, not singular, evidence is required.

While still entrenched in the incorrect standard of review, Jensen further concludes that Menard's "unforeseeability" defense was "inconsistent and incompatible with the assumption of the risk defense from the standpoint of proof." (Brief at 23.) Jensen goes on to argue that the jury disregarded this "'unforeseeability' defense" by concluding that

Menard was negligent and that Ron Jensen was not contributorily negligent.[5] (*Id*.) Jensen seems to suggest that the issues of negligence, contributory negligence, and assumption of the risk are one and the same. They are not. Assumption of the risk is a separate, stand-alone affirmative defense. If it were subsumed in the defense of contributory negligence, it would not require a separate jury instruction. But it does. And its distinct and separate existence is specifically addressed in a pattern jury instruction, which Menard proposed and the trial court rejected. (RA 393-98; App. 011-16); *Duda v. Phatty McGees, Inc*., 2008 S.D. 115, ¶ 36, 758 N.W.2d 754, 764 (Meierhenry, J., dissenting). This was error.

[5] Jensen claims that Menard is somehow attacking the jury's verdict on negligence. It is not. This appeal is, as Menard has consistently argued, limited to the fact that the assumption of the risk defense was not submitted to the jury and that there was, contrary to the trial court's decision, sufficient evidence upon which to do so.

Jensen's claim that Menard did absolutely nothing to pursue the assumption of the risk defense is demonstrably false. It was Menard who elicited testimony from Jensen's expert neurologist, Dr. David Sabow, that Ron was "probably" helping Clint Weyand load the plywood and that Ron was asking for trouble by doing so. (Sabow 53 (App. 020).) Similarly, it was Menard who elicited testimony from Don Farnam that it was possible that Ron was helping Weyand load the plywood. (TT 53.) And it was Menard who elicited testimony from Jensen's "safety engineer," Terrence Grisim, that Ron chose where to park the Farnam truck, Ron chose to get out of the truck, Ron chose where to stand during the loading process, and that no one from Menard asked Ron to help Weyand load the plywood into the Farnam truck. (TT 175-77.) There is no requirement.

C. There is sufficient evidence for a reasonable jury to conclude that Ron had knowledge of the risk that the vertically stacked plywood could tip out of the single-rail cart.

Jensen spends a significant amount of time discussing Ron's knowledge of the risk. *See Duda*, 2008 S.D. 115, ¶ 13, 758 N.W.2d at 758. But the most that Jensen establishes with these arguments is the existence of factual questions that should have been decided by the jury. Jensen argues that there is insufficient evidence of knowledge because Ron could not testify at trial about his subjective knowledge of the risk. However, Jensen then engages in a discussion about what it alleges Ron did *not* know, reciting the choices Menard's employee, Weyand, made related to retrieving and transporting Ron's plywood to the Farnam truck. Jensen's recitation abruptly ends with the following statement: "Weyand chose to unload the materials out in the wind and without assistance from another Menard employee." (Brief at 24, n. 4, 25.) But glaringly absent from Jensen's recitation of the facts is what Weyand testified happened next: Ron decided, without being asked, to

assist Clint with loading the plywood into the Farnam truck. (TT 74-75, 100, 103.) And, as Jensen acknowledges, Ron did so with the knowledge that it was windy. But Ron also did so with the knowledge that an adult of average intelligence cannot deny – that Weyand had selected a single-rail cart, which was stacked with plywood in a vertical fashion, and that vertically stacked plywood can tip over in the wind. And all of these statements are precisely what Jensen alleged were true at trial. (*See* Menard Brief at 14, n. 6.) Jensen presented the following testimony to support this theory through its own expert witness, Terrence Grisim:

> The accident-causing condition here, being the wind and handling plywood, it acts like a sail. It's just, you know, it begs a question. It's a known hazard. It's there every day. South Dakota is windy.

(TT 156.) Mr. Grisim also testified about what he viewed as the problem with Weyand's use of a single-rail cart, stating that the plywood stood on its tallest, least stable dimension on the cart, which did not have "any kind of kick plate to keep the stuff from sliding out at the bottom or at the top" and that it just was not "stable." (TT 150-151.) Jensen then engaged in the following exchange with Mr. Grisim:

> Q. Would you explain for the jury the safety mistake that was made by Mr. Weyand in taking this plywood on this cart out to that truck?
> A. Yes. My first thought is since he bought it from inside the building, he had to travel farther to bring it outside than he would have if he would had just brought the truck inside. So, that's issue number one, to get out of the wind. The second, as we've just finished discussing, is using the side of the cart with no restraints on it[.]

(TT 153.) This is what Jensen repeatedly argued created the dangerous condition at trial. Jensen now takes the position that it was not dangerous until the moment the wind unexpectedly gusted and the plywood tipped out of the cart. Jensen, again, is not entitled to a cherry-picked version of the facts. *Magner v. Brinkman*, 2016 S.D. 50, ¶ 14, 883

N.W.2d 74, 81.

Jensen cites, without analysis, the case of *Ray v. Downes*, 1998 S.D. 40, 576 N.W.2d 896. *Ray* is instructive for various reasons, including its distinct procedural context. In that case, Ray, a farm laborer, appealed the summary dismissal of his personal injury action against his employer and a fellow employee stemming from injuries Ray incurred when he was run over by a truck while assisting a custom combiner[6] who had been hired by Ray's employer. *Id.* ¶¶ 3-4. Ray had not been directed to assist the custom combiner. Instead, Ray had volunteered to help assist the custom combiner by positioning an auger under a trailer in order to unload corn. *Id.* ¶ 3. The custom combiner was to drive the truck to move the auger and the two agreed that Ray would use hand signals and then "holler" for the custom combiner to stop the truck when the auger was in place. *Id.* After the custom combiner began moving the truck, Ray "hollered" for the custom combiner to stop, but the custom combiner either did not hear Ray or did not see his hand signals, and ran over Ray's left leg. *Id.* ¶ 4. The custom combiner did not notice Ray had been run over until Ray's employer yelled for the custom combiner to stop, at which time Ray's leg was pinned under the trailer. *Id.*

[6] Ray sued both the custom combiner and the employee of the custom combiner, who was driving the truck at the time of the accident. *Ray*, 1998 S.D. 40, ¶¶ 2-3, 576 N.W.2d at 897. For ease of reference, Menard will refer to both the custom combiner and its employee collectively as "custom combiner."

In analyzing the propriety of the trial court's summary dismissal of Ray's claims against the custom combiner, this Court noted that it was required to view the evidence most favorably to Ray, the nonmoving party, and resolve reasonable doubts in his favor. *Id.* ¶ 6. The Court applied a de novo standard of review and examined the facts in the light most favorable to Ray. *Id.* ¶ 10. In this context, the Court recognized that "[r]isk is intrinsic to some acts" and Ray could appropriately be charged with knowledge of the intrinsic risk accompanied by putting himself in a position to be run over. *Id.* ¶ 13. However, the Court concluded that reasonable minds could differ as to whether Ray consented to the custom combiner failing to use reasonable care by disregarding the agreed upon hand signals and failing to notice that he ran over Ray until another person alerted him to that fact. *Id.* ¶¶ 14-15. Accordingly, the Court reversed the summary dismissal of Ray's claim against the combine driver and remanded the case to the trial court, specifically noting that its "disposition preserves the opportunity for [the custom combiner] to pursue traditional tort defenses such as assumption of the risk at trial." *Id.* ¶ 17. In other words, the presence of evidence in the record upon which a jury could conclude that Ray did not have actual knowledge of the risk rendered the assumption of the risk defense a jury question that was inappropriate for summary dismissal. *Id.*

This case suffers from the same procedural flaw that this Court corrected in *Ray* – the summary resolution of an assumption of the risk defense where sufficient evidence exists to create a factual question as to its application which should be resolved by the jury. Like the plaintiff in *Ray*, there was intrinsic risk associated with Ron's decision to put himself in harm's way by standing in a position to be affected by the cart of plywood on a windy day. Consistent with Jensen's "trial story," and viewing the evidence in the light

most favorable to Menard, a reasonable jury could charge Ron with knowledge of the risk that plywood, stacked in a vertical position on a single-rail cart, created a risk that it would tip over on a windy day. This intrinsic risk was, after all, Jensen's entire case against Menard. But what distinguishes this case from *Ray* is the lack of any factual basis for a jury to conclude that there was a subsequent duty to act with reasonable care separate and apart from the intrinsic risk Ron assumed by voluntarily assisting Weyand with the loading process.[7] Jensen did not argue, and there is no evidence to suggest, that the manner in which Weyand and Ron tipped the plywood out of the single-rail cart and slid it into the Farnam truck contributed to the accident. A reasonable jury certainly could have concluded that Ron assumed the intrinsic risk associated with this activity. And it should have been afforded the opportunity to do so.

[7] Even if there was evidence that Ron was presented with an unexpected danger or additional risk that is separate and apart from Weyand's use of a single-rail cart of vertically stacked plywood, it would only create a factual dispute as to the risk Ron had knowledge and appreciation of, which should appropriately be resolved by a jury.

The record is replete with instances demonstrating that Ron had significant experience in handling construction materials – such as the plywood at issue. Ron did the remodeling work himself at the Jensen's Huron home. (TT 227.) Bonita described Ron as a "pretty good" carpenter who could replace windows, put up framing, and remove walls. (*Id*.) Ron worked with sheetrock and plywood when he helped his brother-in-law, Don Farnam, remodel his basement. (TT 283-84.) Ron had also handled those materials when he remodeled a shed on his property to create the "Cowboy Church." (TT 229-30.) Ron was also a talented woodworker. (TT 240.) Moreover, Ron had been to Menard before. (TT 48-49.) He had purchased plywood and other buildings materials there just as he did on the day of the accident. (*Id*.) Ron previously helped unload plywood he purchased, something Don Farnam testified would have occurred that day had the accident not happened. (TT 53-54.) All of this evidence is in the record. This body of evidence is sufficient for a reasonable jury to conclude that Ron was familiar with handling construction materials and, more importantly, that he had the "common" knowledge Jensen argued made the single-rail cart of vertically stacked plywood a known risk in the wind.

In another attempt to distance Ron from the loading process, Jensen inexplicably claims, for the first time, that there is no evidence that Ron took action when Weyand attempted to load the second sheet of plywood. (Brief at 26.) This is a misstatement of the testimony. The accident occurred during the process of both Ron and Weyand loading the plywood into the Farnam truck. Ron and Weyand loaded one sheet of plywood into the truck, but before either of them could take any affirmative steps to load the second sheet of plywood, a gust of wind came up causing the cart to move, and the plywood began to tip.

(TT 74-76; RA 689.) Jensen's unconvincing effort to remove Ron from the loading process by isolating each step is, yet again, a factual nuance that is not appropriately resolved by the trial court, but by a jury.

D. Ron's susceptibility to falls and physical limitations provide sufficient evidence of Ron's appreciation of the risk that he may fall.

Jensen also suggests that Ron's health and physical limitations are irrelevant to assumption of the risk. However, all of these undisputed facts are relevant to Ron's knowledge and appreciation of the character of the risk. *See Duda*, 2008 S.D. 115, ¶ 13, 758 N.W.2d at 758. Ron was especially susceptible to falls due to his 1977 spinal cord injury, which injured the nerves responsible for Ron's balance. (TT 280-81.) As a result, Ron lost "all" spontaneous movement and lacked the ability to recover from "even the slightest bit of spontaneous irregularity." (Sabow 52 (App. 020).) Ron also relied exclusively on visual cues to keep his balance, meaning that if anything interfered with his vision, he would fall. (TT 214-15.) This all meant that Ron lacked the automatic recovery mechanism that "saves us . . . from falling." (Sabow 51 (App. 020).) In addition, Ron also suffered from foot drop in his right foot and numbness in his lower extremities. (TT 214, 280-81.) Jensen's expert, Dr. Sabow, testified that all of these issues combined to mean that if the toe of Ron's right shoe hit a crack in the pavement there was "a reasonably good, if not even more than reasonably good, chance" that Ron would fall. (Sabow 51 (App. 020).) And all of these issues were known to Ron, but not to Menard. (TT 84, 99, 475.) More importantly, all of these issues were the reason that Ron's doctors recommended that Ron use a cane. (TT 216.) And no one saw Ron using a cane at Menard on July 28, 2012, or found a cane on the ground after the accident. (TT

99, 131, 216, 333, 440.) A jury could reasonably conclude that Ron was not using his cane at the time of the accident.[8]

[8] Consistent with this fact, Bonita testified that Ron thought that canes got in the way and often kept his cane behind the seat of the truck. (TT 216.)

All of these undisputed facts are important to consider in light of the fact that Jensen asked the jury to conclude that vertically stacked plywood on a single-rail cart creates a risk that the plywood will fall over in the wind. The jury could find that Jensen, aware of all of these facts, appreciated the risk that the plywood may fall, even more so than the average person. Ron knew he could not react spontaneously or move away quickly and, if he tried, he was, in the words of Dr. Sabow, "asking for trouble." (Sabow 53 (App. 020).) In other words, Ron could not react to the single-rail cart moving in the wind like the average person could. Ron could not, like Weyand, try to stop the plywood or the cart and remain upright, especially without the assistance of his cane.

Notably, Jensen fails to discuss this Court's consideration of a plaintiff's susceptibility to falls when analyzing the plaintiff's post-verdict attack on the assumption of the risk defense in *Ballard v. Happy Jack's Supper Club*, 425 N.W.2d 385, 386 (S.D. 1988). In that case, the plaintiff argued that the defendant (a restaurant) was negligent after the plaintiff tripped and fell on white parking curbs used to mark the front end of each parking spot within the parking lot. *Id*. After reviewing the evidence in the light most favorable to the defendant, the Court concluded that there was sufficient evidence to support an assumption of the risk defense because the plaintiff was aware of the presence of parking curbs in the parking lot, could have avoided them, and had a history of falls due to neuropathy in his feet caused by diabetes. *Id*. at 388-89. Jensen's failure to offer some explanation as to why the *Ballard* Court's consideration of the plaintiff's physical condition and susceptibility to falls was erroneous or inapplicable here speaks for itself.

E. Jensen's attempt to artificially limit Ron's opportunity to elect reasonable alternatives must be rejected.

The only basis Jensen offers for concluding that there is no sufficient evidence to support the third element of assumption of the risk is the unsupported assertion that Ron "did not have the time, opportunity nor options available to make any kind of intelligent choice" at the "precise moment when the culmination of Mr. Weyand's tortious conduct caused the danger which manifested[.]" (Brief at 27.) This position is difficult to explain because of Jensen's consistent position that everyone knows that vertically stacked plywood is susceptible to tipping over in the wind. In addition, the idea that the gust of wind that occurred around the time of the accident was some risk-causing element that Ron did not otherwise have knowledge of is unconvincing. Jensen has already admitted that "Mr. Jensen obviously knew . . . it was windy." (Brief at 24.) And neither Jensen nor Menard has ever argued that it was not windy until the moment that this accident occurred. Indeed, every witness present at Menard on the date of the accident agreed that it was windy. And the weather records confirm the accuracy of their respective testimony. Accordingly, when Ron saw the single-rail cart of vertically stacked plywood, he had all of the information he needed about the risk of standing too close to the cart of plywood, especially given his susceptibility to falls and the absence of his cane. Ron also had the time to elect not to expose himself to the risk of tipping plywood. There is sufficient evidence in the record to support that Jensen chose where to park, chose to get out of the Farnam truck, chose where to stand, and chose to assist with the loading process, despite alternatives that would have removed Ron from the danger allegedly created by the single-rail cart of vertically stacked plywood. There is, as a result, sufficient and competent evidence upon which a jury could conclude that Ron voluntarily assumed the risk. The jury should have been allowed the opportunity to reach the same conclusion.

CONCLUSION

Jensen asks this Court to employ a litany of erroneous limitations during the course of its appellate review, all of which are contrary to well established South Dakota law. Menard was not, and is not, required to prove the probable success of its rejected defense or convince this Court that its witnesses or evidence is more "competent" or credible than the evidence presented by Jensen. For purposes of this appeal, all Menard is required to establish is that it should have had the *opportunity* to argue that Ron assumed the risk of injury because there was sufficient evidence in the record from which a reasonable jury could so find. Menard has met this burden. Menard respectfully requests that this Court vacate the jury verdict and remand this matter for a retrial as to the issue of assumption of the risk.

Dated: May 26, 2017.

FULLER & WILLIAMSON, LLP

/s/ Hilary L. Williamson

William P. Fuller
Hilary L. Williamson
7521 South Louise Avenue
Sioux Falls, SD 57108
(605) 333-0003
bfuller@fullerandwilliamson.com
hwilliamson@fullerandwilliamson.com
Attorneys for Appellant

CERTIFICATE OF SERVICE

I certify that on May 26, 2017, I e-filed with the South Dakota Supreme Court's office, and served via electronic mail, a true and correct copy of the foregoing Appellant's Reply Brief upon:

Scott G. Hoy
HOY TRIAL LAWYERS
scott@hoywlaw.com

Mr. Michael W. Strain
THE MORMAN LAW FIRM
mike@mormanlaw.com
Attorneys for Appellees

/s/ Hilary L. Williamson
One of the Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this Brief complies with the requirements set forth in the South Dakota Codified Laws. This Brief was prepared using Word PerfectX6 and contains 5,000 words from the Argument through the Conclusion. I have relied on the word count of a word-processing program to prepare

this certificate.

/s/ Hilary L. Williamson

One of the Attorneys for Appellant