IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

Appeal No. 29496

TALYN SHEARD, a/k/a TALYN O'CONNER, as Personal Representative for the Estate of Chalan Hedman, and JEFFREY PAUL HOLSHOUSER

Appellants,

vs.

ROBERT HATTUM, TODD HATTUM, and **CHELSEA HATTUM, jointly and severally, DBA HATTUM FAMILY FARMS**

Appellees.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE MARGO NORTHRUP
Circuit Court Judge

APPELLANT TALYN SHEARD'S BRIEF

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Notice of Appeal filed December 18, 2020

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I. PRELIMINARY STATEMENT

Throughout this brief, Appellants, Talyn Sheard, a/k/a Talyn O'Conner, will be referred to as "Sheard" or "Appellants." Appellees, Hattum Family Farms, et al., will be referred to as "Hattum" or "Appellees." References to transcripts and records will be referred to as follows:

Settled Record ..... SR

Motion Hearings Transcript ..... MT

Each citation will be followed by the appropriate page number(s) and line number(s).

II. JURISDICTIONAL STATEMENT

On July 5, 2018, Appellant served and filed a claim against the Defendants for wrongful death and a survivor's claim alleging strict liability and unsafe workplace related to the death of Chalan Hedman. The lawsuit was filed in Hughes County, South Dakota, where the incident occurred. Talyn Sheard is the biological mother of Zayden O'Conner. Chalan Hedman is the biological father of Zayden. Sheard and Hedman were never married. Sheard brough this action as the Personal Representative of the Estate of Chalan Hedman on behalf of her son, Zayden O'Conner, Hedman's only child.

Defendants filed their Motion for Summary Judgment on April 20, 2020; hearing was held on Defendants' Motion on

June 10, 2020. The trial court granted Defendants' motion for summary judgment against Plaintiff Sheard. (SR 110). (SR 679). It is from that Order Plaintiff Sheard now appeals in accordance with SDCL 15-26A-3(1). For purposes of this appeal, Appellant Sheard will only be addressing the trial court's Order granting summary judgment in favor of Defendants as it applies to Appellant Sheard and not Plaintiff Jeffrey Holshouser. Notice of Appeal was served and filed December 18, 2020.

III. STATEMENT OF THE ISSUES

1. **WHETHER GENUINE ISSUE OF MATERIAL FACTS EXISTS PRECLUDING SUMMARY JUDGMENT ON PLAINTIFF SHEARD'S CLAIM FOR STRICT LIABILITY**

   Trial Court: The trial court granted Appellees' Motion for Summary Judgment.

   RELEVANT CASE LAW:

   1. *Cashman v. Van Dyke, 2012 S.D. 43, 850 N.W.2d 308*
   2. *Fleege v. Cimple, 305 N.W.2d 409, 414 (S.D. 1981)*
   3. *Kirlin v. Halverson, 2008 S.D. 107, 758 N.W.2d 436*
   4. *Sollein v. Norbeck and Nicholson, 34 S.D. 79, 147 N.W. 266*

   RELEVANT STATUES:

   1. SDCL 15-6-56(c)

2. **WHETHER A GENUINE ISSUE OF MATERIAL FACT EXISTS PRECLUDING SUMMARY JUDGMENT ON PLAINTIFF SHEARD'S CLAIM FOR UNSAFE WORK PLACE.**

Trial Court: The trial court granted Appellees' Motion for Summary Judgment.

RELEVANT CASE LAW:

1. *Platt v. Meier, 83 S.D. 10, 153 N.E.2d 404*
2. *Stone v. Von Eye Farms, 2007 S.D. 115, 741 N.W.2d 767*
3. *Stoner v. Eggers, 77 S.D. 395, 92 N.W.2d 528 (1958)*
4. *Sollein v. Norbeck and Nicholson, 34 S.D. 79, 147 N.W. 266*

RELEVANT STATUTES:

1. SDCL 15-6-56(c)

3. WHETHER A GENUINE ISSUE OF MATERIAL FACT EXISTS PRECLUDING SUMMARY JUDGMENT ON PLAINTIFF SHEARD'S CLAIM FOR PUNITIVE DAMAGES.

Trial Court: The trial court granted Appellees' Motion for Summary Judgment.

RELEVANT CASE LAW:

1. *Harvey v. Regional Health Network, Inc., 2018 S.D. 3*
2. *Stabler v. First State Bank of Roscoe, 2015 S.D. 44, 865 N.W.2c 466*
3. *Fluth v. Schoenfelder Construction, Inc., 2018 S.D. 65*

RELEVANT STATUTES:

1. SDCL 15-6-56(c)
2. SDCL 21-3-2

IV. STATEMENT OF THE CASE AND FACTS

Hattum's own property in Hughes County, South Dakota, known as Hattum Family Farms. Robert Hattum is the father of Todd. Todd is married to Chelsea. Troy was the son of

Todd and Chelsea and grandson of Robert.[1] Chalan Hedman and Jeff Holshouser were employees of Hattum's during the relevant timeframe. Talyn Sheard is the biological mother of Zayden O'Conner. Chalan Hedman is the biological father of Zayden. Sheard and Hedman were never married. Sheard brought this action as the Personal Representative of the Estate of Chalan Hedman on behalf of her son, Zayden O'Conner. (See Estate of Chalan Hedman, Hughes County file #32PRO17-36).

On August 8, 2016, Chalan Hedman and Troy Hattum lost their lives in a shop fire located at the Hattum farm. (SR 3). Chalan and Troy were employed by Robert, Todd and Chelsea Hattum at the time of the fire. Jeff Holshouser was also an employee of the Hattum's and was injured in the shop fire. (Holshouser deposition 8:22-25; 9-12:1-21.) Holshouser is the only survivor of the shop fire and the only surviving eye witness of what occurred that day.[2]

Sometime prior to the shop fire Hattum's had pulled a semi up to the shop for repair of a leaking fuel tank. Troy, Chalan and Holshouser were told to work on it the first "slow day". On the day of the incident, they removed

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[1] When this lawsuit was commenced, Robert Hattum was alive. Unfortunately, Robert has since passed away.

[2] Holshouser also filed a complaint against Hattum's but has not filed Notice of Appeal from the court Order Granting Summary Judgment in favor of Hattum's.

the fuel tank from the truck. Troy came out and located the crack in the fuel tank, and never left after that and was in charge of the welding. They rinsed the tank out, used compressed air to blow out moisture to dry the inside of the tank and made sure the area of the tank was clean. They used a grinder to shine up the surface. Troy was the welder and was in charge, he was the only Hattum at the truck. (SR 369, Exhibit A, Answers to Interrogatories).

Holshouser went to the shop bench located on the west wall, about 20 feet or so from the tank and proceeded to straighten the mounting straps and check the mounting brackets to ensure that they were ready to be used to remount the fuel tank to the truck. Chalan and Holshouser prepped the tank together. Holshouser prepared the mounting devices alone at the shop bench. Holshouser did question the welding method. Chalan and Troy brought in a 4-wheeler (ATV) and left it running. They hooked a hose from the exhaust of the ATV and placed the other end in the filler hole of the fuel tank they intended to weld. Holshouser is not a welder; he's never even seen this method before and went over and questioned it because it seemed to be odd. Holshouser was assured by Troy that this was text book correct. The three proceeded to repair the fuel tank. Troy even showed Holshouser a spot on the same fuel tank he had

welded the previous year using the same exact method. Chalan and Troy were the ones doing the welding. Troy said he knew what he was doing, so Holshouser went back to the shop bench and went to work on the project of preparing the mounting brackets. The wind was blowing in to the shop through the open doorways making it hard to weld. In order to block the wind, Chalan and Troy lowered the overhead door until it was resting on the seat of the ATV and closed the walk-through door. Chalan found a large piece of cardboard to use as a wind break. He stood beside Troy and held the cardboard behind both of them. Troy began to weld. Shortly thereafter, all hell broke loose and the explosion occurred. The force blew Holshouser forward on to the shop bench, and immediately both Troy and Chalan began screaming. They were both on fire. They were both on fire. Holshouser turned around to see the entire area of the shop where they were welding (front center) totally engulfed in flames - floor to ceiling. The entire front part of the shop was on fire. Holshouser was unable to see either of the men due to the flames. He noticed that Chalan's screams were coming from outside the shop and knew Troy was still in the shop. He could not see Troy but could hear him in the shop. Holshouser began to hurry to the back corner of the shop where previously he knew there were fire

extinguishers. The fire extinguishers had been removed. Holshouser went back toward Troy's voice. Seconds later, he observed Troy move toward the middle of the shop towards him. Troy was engulfed in flames. Holshouser yelled at him to drop and roll. Troy did so. Holshouser dove on top of him and tried to roll with him in order to put out the flames. Holshouser realized about the second roll that the floor was on fire where he had been rolling. It was not on fire before that. Holshouser noticed that his shirt, pants and cap were burning. He jumped up, peeled off his jacket and shirt and tried to knock the flames off of his pants. He could hear the hissing of the gases of the oxygen and/or acetylene tanks that were in the shop. He knew that there were at least four tanks in the area, four welding and cutting devices. He knew that he did not have much time to get out. He grabbed Troy's hand and said - come on now, we've got to get out of here now. Troy pulled his hand away as if in pain, but continued to move forward in the direction of the door. He moved on ahead and pulled the walk-in door open; he turned toward Troy and noticed he was several feet behind him. Holshouser motioned for him to come toward him and the door when without warning, a tank or container for the gas torch (he was assuming) exploded. It was off to the side, but at a distance back but was

between Troy and Holshouser. He lost sight of Troy - not sure if it knocked him down or just that the increase in flames made it impossible to see him. The closest thing was a piece of equipment, a trailer in the yard - 30 feet from Holshouser. Holshouser went to the trailer and grabbed the small fire extinguisher that was inside it. He ran back to the doorway and was going to re-enter, but the extinguisher did not work; he threw it down and ran to the fire truck, maybe 200 feet away, where he knew there was another fire extinguisher. By the time he got back, Troy was visible and moving, he was walking out of the shop. Holshouser immediately used his hands to extinguish - brush off what little flames were still burning on Troy's body. Holshouser placed a jacket or something around Troy's shoulders and guided him to the front of Todd Hattum's house where there is a pool. The kids were home but in the house at the time of the explosion and not outside with Chalan. Holshouser recalls one of Troy's sisters had come over to them. She took Troy over to the front of the house. Holshouser collapsed on the steps of the tractor that was there and explains that he must have been in total shock. Holshouser does not recall that on first exiting the shop, he glanced around and saw Chalan coming out of the pool. Holshouser was relieved that he made it out and was not on fire - had

sense enough to jump in the pool - not sure exactly how, but the only possible way for Chalan to have gotten out of the shop was to have gone under the overhead door. Holshouser's face, arms, hands, ears, upper torso and clothes were burned. His nylon coat was melted and come off in chunks. It had melted on to his skin in places. The ambulance took him to the emergency room at Avera St. Mary's Hospital. Holshouser rode in the ambulance with Chalan. He heard Chalan scream most of the way to the hospital. Holshouser indicates that he can still hear his screams. (SR 369, Exhibit A, Answers to Interrogatories Number 25)[3].

The only people present when the welding and explosion occurred were Troy Hattum, Chalan Hedman and Jeff Holshouser. Troy Hattum's siblings came out of the house after the initial explosion, but at some point before Troy came out of the shop, all were with Chalan Hedman. Another employee of Hattum's came down from the feedlot area after Troy came out and was being attended to by his siblings. Holshouser was unaware that the other employee was even on

[3] SR 369 has 2 Exhibit A attached to it. Only one is referenced in SR 369 which is the Affidavit of Jeff Holshouser. The additional Exhibit A which was filed but not identified in SR 369 are Holshouser's Answers to Defendants' Interrogatories.

the property at the time. Chalan died of his injuries about 8 days later. Troy also passed away.

V. LAW

A. Summary judgment.

A circuit court's entry of summary judgment is reviewed under the de novo standard of review. *Harvieux v. Progressive N. Ins. Co.*, 2018 S.D. 52, ¶ 9, 915 N.W.2d 597, 700 (quoting *Wyman v. Bruckner*, 2018 S.D. 17, ¶ 9, 908 N.W.2d 170, 174). "When conducting a de novo review, "[w]e give no deference to the circuit court's decision[.]" *Zochert v. Protective Life Ins. Co.*, 2018 S.D. 84, ¶ 18, 921 N.W.2d 479, 486 (quoting *Oxton v. Rudland*, 2017 S.D. 35, ¶ 12, 897 N.W.2d 356). "On appeal from a grant of summary judgment, we must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law." *Niesche v. Wilkinson*, 2013 S.D. 90, ¶ 9, 841 N.W.2d 250, 253. "We view the evidence in favor of the nonmoving party and reasonable doubts are resolved against the moving party, but the nonmoving party must have presented specific facts showing that a genuine, material issue for trial existed." *Id.* See also *In re Estate of Tank*, 2020 S.D. 2, ¶ 19.

Summary judgment is only proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. SDCL § 15-6-56(c). Summary Judgment is not the proper method to dispose of factual questions." *Keystone Plaza Condominiums Ass'n v Eastep*, 2004 SD 28, ¶8, 676 NW2d 842, 846. "Only when fact questions are undisputed will issues become questions of law for the court." *Id.* The non-moving party must present specific facts showing that a general, material issue for trial exists. *Peters v. Great Western Bank*, 2015 SD 4, ¶5.

In *Owners Insurance Co. v. Tibke Constr., Inc.*, 2017 SD 51, ¶18, 901 N.W.2d 80, 85 the Court stated:

> "We review a court's denial of a motion for summary judgment under the de novo standard of review." N. Star Mut. Ins. v. Korzan, 2015 SD 97, ¶ 12, 873 NW2d 57, 61. "Summary judgment is appropriate 'if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.'" Id. (quoting SDCL 15-6-56(c)).

"Summary judgment is proper in negligence cases if no duty exists as a matter of law." *Bordeaux v. Shannon County*

Schools, 2005 S.D. 117, ¶11, 707 N.W.2d 123, 126 (citation omitted).

> Negligence is the breach of a duty owed to another, the proximate cause of which results in an injury. This Court has repeatedly stated that questions of negligence, contributory negligence and assumption of the risk are for the jury in all but the rarest of cases so long as there is evidence to support the issues. It is only when reasonable men can draw but one conclusions from facts and interferences that they become a matter of law and this rarely occurs. (Emphasis added).

Pierce v. City of Belle Fourche, 2002 S.D. 41, ¶21, 624 N.W.2d 353, 356-57.

Plaintiffs' Complaint asserts two theories of liability; 1) strict liability and, 2) unsafe workplace. In addition to compensatory damages Plaintiff has also made a claim for punitive damages.

Defendants moved for summary judgment on all claims. (SR 110 and 113). In Defendant's Motion for Summary Judgment, they assert that, 1) respondeat superior, vicarious liability and agency are inapplicable, 2) decedent, Chalan Hedman, disobeyed Defendants' instructions to leave the truck alone, 3) Defendants' did not have a duty to Chalan Hedman because the danger was obvious, 4) the fellow servant rule bars liability, 5) assumption of the risk, and 6) contributory negligence. Defendants also moved for summary judgment on Plaintiffs' punitive damage

claim asserting that it must fail because Defendants did not breach any duty to Chalan Hedman and because there is no evidence of malice. (SR 110 and 113).

B. Theories of liability.

1. Strict liability.

In determining whether or not an activity is abnormally dangerous, South Dakota looks at the following factors:

a. Existence of a high degree of risk of harm to the person, land or chattels of others;
b. Likelihood that harm that results from it will be great;
c. Inability to eliminate the risk by the exercise of reasonable care;
d. Extent to which the activity is not a matter of common usage;
e. Inappropriateness of the activity to the place where it is carried on; and
f. Extent to which its value to the community is outweighed by its dangerous attributes.

Whether an activity is abnormally dangerous is to be decided by a court upon consideration of these factors. *See Cashman v. Van Dyke*, 2012 S.D. 43, ¶11, 850 N.W.2d 308; *Fleege v. Cimpl*, 305 N.W.2d 409, 414 (SD 1981); *Restatement (Second) of Torts*, § 520 (1977). Defendants are liable for the acts of its employees under several theories which include respondeat superior, agency and vicarious liability.

2. Unsafe workplace

Defendants were negligent in failing to provide a proper and safe workplace for Chalan, Jeff Holshouser and Troy Hattum. See *Platt v. Meier*, 83 S.D. 10, 153 N.W.2d 404 (1967) and *Stone v. Von Eye Farms*, 2007 S.D. 115, 741 N.W.2d 767. Employers have a non-delegable duty to provide their employees with reasonably safe places to work. *Smith v. Community Co-op Association of Murdo*, 87 S.D. 440, 444, 209 N.W.2d 891, 893 (1973) (citing *Stoner v. Eggers, supra.*) Inherent to this duty is the obligation that employers provide employees with proper training and supervision, *Id.* at 444-45, 209 N.W.2d at 893 (citing *Restatement, Second § 492, et seq.; 56 CJS Master and Servant § 186). Stone,* 2007 S.D. 115, ¶19.

It is the duty of the master to furnish his servant with a reasonably safe place to work. *Stoner v. Eggers, 77 S.D. 395, 92 N.W.2d 528 (1958),* also *Schmeling v. Jorgensen*, 77 S.D. 8, 16, 84 N.W.2d 558, 563, (1957) and *Voet v. Lampert Lumber Co.*, 70 S.D. 142, 15 N.W.2d 579, (1944) which uses the phrase "a reasonably safe place"; *Olson v. Kem Temple, A.A.O.M.S.*, 77 N.D. 365, 43 N.W.2d 385; and 35 Am.Jur., Master and Servant, §§ 138 and 183.

A master cannot be held liable for failure to furnish a reasonably safe place to work if the condition or so

called danger is so obvious and is before the servant's eyes to such an extent that he must know by the use of ordinary intelligence the possible danger that confronts him. *Stoner v. Eggers*, supra, and *Eklund v. Barrick*, 82 S.D. 280, 144 N.W.2d 605.

Even if Chalan is found to be contributorily negligent, it does not prevent recovery if his negligence was slight in comparison to Defendants. SDCL 20-9-2. See also *Klutman v. Sioux Falls Storm*, 2009 S.D. 55, 76 N.W.2d 440; *Steffen v. Schwan's Sales Enters, Inc.*, 2006 S.D. 41, 713 N.W.2d 714. If under all of the evidence both parties could be found to be negligent, then the comparative negligence of the parties is a question of face within the province of a jury. *Carpenter v. City of Belle Fourche*, 2000 S.D. 55, ¶ 19, 609 N.W.2d 751.

1. Punitive damages.

SDCL 21-3-2 provides:

> In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, or any case of wrongful injury to animals, being subjects of property, committed intentionally or by willful and wanton misconduct, and disregard of humanity, the jury, in addition to the actual damage, may give damages for the sake of example, and by way of punishing the defendant.

Punitive damages are not an independent cause of action. In order to pursue a claim for punitive damages Plaintiffs must first make a preliminary showing of a reasonable basis to support that punitive damages may be proper. This requires clear and convincing evidence that there is a reasonable basis to believe that there had been willful, wanton, or malicious conduct on the part of the defendants. *Harvey v. Regional Health Network, Inc.*, 2018 S.D. 3, ¶47. See also *Stabler v. First State Bank of Roscoe*, 2015 S.D. 44, 865 N.W.2d 466.

C. Defenses

1. Respondeat Superior, Vicarious Liability and Agency inapplicable.

The doctrine of respondeat superior holds an employee or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency. The question of whether the acts of a servant was within the scope of employment must, in most cases, be a question of fact for the jury. *Kirlin v. Halverson*, 2008 S.D. 107, ¶16, 758 N.W.2d 436, 444. The Supreme Court has applied a two-part test when analyzing vicarious liability claims. The fact finder must first determine whether the act was wholly motivated by the agent's personal interest or whether the act had a dual purpose, that is, to serve

the master and to further personal interest. When a servant acts with an intention to serve *solely* his own interest, this act is not within the scope of employment and his master may not be held liable for it. If the act was for a dual purpose, the fact finder must then consider the case presented and the factors relevant to the acts foreseeability in order to determine whether a nexus of foreseeability existed between the agent's employment and the activity which caused the injury. If such a nexus exists, the fact finder must finally consider whether the conduct was so unusual or startling that it would be unfair to include the loss caused by the injury among the costs of employer's business. *See Leafgreen v. American Family Mutual Insurance Company*, 393 N.W.2d 275, 280-81 (SD 1986); *Hass v. Wentzlaff*, 2012 S.D. 50, ¶20-21, 816 N.W.2d 86.

A principle may be liable for an agent's acts where the agent's purpose, however misguided, is wholly or in part to further the principle's business but if the agent acts from purely personal motives, he is considered in the ordinary course to have departed from his employment and the master is not liable. An essential focus on the inquiry remains: were the agent's acts in furtherance of his employment? (If the answer is yes, then employer liability may exist even if *his* agent's conduct was expressly

forbidden by the principle.) When an agent acts with an intention to serve solely his own interest, this act is not within the scope of employment and the principle may not be held liable for it. *Hass*, 2012 SD at ¶ 23, see also *Deuchar v. Foland Ranch, Inc.*, 410 N.W.2d 177, 181 (SD 1987). A principle is liable for tortuous harm caused by an agent where a nexus sufficient to make the harm foreseeable exists between the agent's employment and the activity which actually caused the injury; foreseeable is used in the sense that the employee's conduct must not be so unusual or startling that it would be unfair to include the loss caused by the injury among the cost of the employer's business. Foreseeability as used in the respondeat superior context differs from foreseeability as used for proximate causation analysis in tort law. In respondeat superior foreseeability includes a range of conduct which is fairly regarded as typical of or broadly incidental to the enterprise undertaken by the employer. *Leafgreen v. American Family Mutual Ins. Co*, 393 N.W.2d 75 (SD 1986); *Hass*, 2012 S.D. at ¶ 27.

In analyzing foreseeability as it relates to vicarious liability, the *Restatement (Second) of Agency*, § 229(2) lists ten factors relevant to the scope of employment inquiry:

a. Whether or not the act is one commonly done by such servants;
b. The time, place and purpose of the act;
c. The previous relations between the master and the servant;
d. The extent to which the business of the master is apportioned between different servants;
e. Whether or not the act is outside the enterprise of the master or if within the enterprise has not been entrusted to any servant;
f. Whether or not the master has reason to expect that such an act will be done;
g. The similarity and quality of the act done to the act authorized;
h. Whether or not the instrumentality by which the harm is done has been furnished by the master to the servant'
i. The extent of departure from the normal method of accomplishing an authorized result; and
j. Whether or not the act is seriously criminal.

Hass, 2012 SD at ¶ 28.

Restatement (Second) of Agency, § 219(2) provides four exceptions to the general rule that a principle is liable for the torts of an agent only if the agent was acting within the scope of his or her employment. One exception provides a principle may be liable for the torts of an agent acting outside the scope of his or her employment if the agent was aided in accomplishing the tort by the existence of agency relation. In those cases, liability attaches because the tort feasors employment enabled or endowed him with a unique advantage to perpetrate the tortuous acts. The comment to section 219(2)(d) explains

that the agent may be able to cause harm because of his position as agent, as where a telegraph operator sends false messages purporting to come from a third person. *Hass*, 2012 SD at ¶ 36.

Finally, SDCL Chap. 59-3 codifies the powers of an agent. SDCL 59-3-3 provides:

> Ostensible authority is such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess.

See *Krause v. Reyelts*, 2002 S.D. 64, 646 N.W.2d 732; *Bernie v. Catholic Diocese of Falls*, 2012 S.D. 63, 821 N.W.2d 232.

2. Fellow-Servant Rule.

SDCL 60-2-2 is declaratory of the common law fellow-servant rule. It states in part:

> An employer, except as otherwise specifically provided, is not bound to indemnify his employee for losses suffered by the latter … in consequence of the negligence of another person employed by the same employer in the same general business unless he has neglected to use ordinary care in the selection of the culpable employee.

In the case of *Sollein v. Norbeek and Nicholson Company*, 34 S.D. 79, 147 N.W. 266 (1914), the plaintiff, an employee of the defendant, was injured by the negligent act of his foreman. The court held that the foreman was not acting as a fellow servant within the meaning of the rule. In so holding, Judge McCoy, writing for the court, stated:

> "the one who represents the master whether he be termed vice-principle or superior servant, may act in a dual capacity, in that (1) as vice-principle or superior servant; (2) as a fellow-servant; and whether or not the master will be held to be liable for the negligent act of such servant will depend upon whether the act, which is alleged to constitute the negligence was performed by such person in his capacity as vice-principle or in his capacity as fellow-servant. If the act was done in the performance of a duty resting upon the master, then the master would be liable for the negligent performance of such duty by the vice-principle; but if the act was done in the performance of a duty resting upon a fellow-servant then the master would be liable.

Applying these principles to this case it is clear that the plaintiffs are not precluded from recovery by the fellow-servant rule. One of the non-delegable duties of the master is to furnish his employees with a reasonably safe place to work. *Stoner v. Eggers*, 77 S.D. 395, 92 N.W.2d 528 (1958). This includes the duty of establishing proper methods of work and adequate supervision of the work in which its employees are engaged. *Restatement, Second* § 492 et. seq.; 56 CJS Master and Servant § 186. See also *Smith v. Community Co-op Association of Murdo*, 87 S.D. 440, 209 N.W.2d 891 (1973).

Defendants assert that there is no duty owed to Chalan Hedman. *Stone v. Von Eye Farms*, held as follows:

> Employers have a non-delegable duty to provide their employees with reasonably safe places to work. Inherent to this duty is an obligation that

employers provide employees with proper training and supervision.

Stone, 2007 S.D. 115, ¶9.

VI. ARGUMENT

A. Strict liability

Defendants have not asserted at any time that welding a gas tank is not an abnormally dangerous activity.

1. Defendants did not personally engage in welding the fuel tank. Defendants have testified that Chalan and Troy were instructed to leave the truck alone. No such instruction was given to Holshouser. (SR 422, ¶ 14). Holshouser's testimony contradicts Defendants' testimony and raises a genuine issue of material fact. Holshouser's testimony, via affidavit and deposition was as follows:

> 11. Holshouser was an employee of Hattum's. Holshouser Depo 8:22-25; 9-12:1-21. Because Troy was a Hattum family member, Holshouser understood that he was vested with authority to tell him what to do on the ranch. Holshouser Depo. 78:6-22. Troy was the boss over the welding project. Holshouser Depo. 78:23-25; 79:1-11. Troy was giving orders and telling people what to do. Holshouser Depo. 79:1-11.
>
> 14. Jeff Holshouser was never advised/told by Bob Hattum or Todd Hattum not to repair the fuel tank. Holshouser Depo. 79:19-23. The hired hands on the ranch did what the bosses told them. Holshouser Depo. 80:2-13. Troy was the boss on the welding job. Holshouser Depo. 78:23-25; 79:1-5. Bob Hattum and Todd Hattum would tell Troy what to do from time to time and Troy would follow their instructions. Holshouser Depo. 80:5-13. (modified).

2. Respondeat Superior, Vicarious Liability and Agency.

Defendants assert that Chalan and Troy were told to leave the truck alone. They were not told that they should not weld the fuel tank. The only two individuals Defendants assert received this instruction died in the fire. Holshouser was very clear, Troy is a Hattum and he was in charge when Bob and Todd were not around. Holshouser and Chalan were taking orders from Troy as they had done in the past. There is no evidence of any discussions between Holshouser, Troy and Chalan concerning instructions from Robert or Todd to "leave the truck alone", there is no evidence of any debate between the three whether or not the fuel tank should be welded or not. Troy gave the orders and Holshouser and Chalan complied. Holshouser described the chain of command as Robert, Todd and Troy.

11. This is how it works on a farm owned by family. There are not statements that "Troy is your boss", it is rather every day occurrences that the Hattum family owners, Bob and Todd, give authority to their son, or grandson, (the next Hattum generation) to run the hired hands and keep the place running.

12. In short, the chain of authority was from Bob and Todd and Troy. It was exercised, in fact, throughout the years that I worked there in that manner. There is no doubt about it: that I was to take instructions from Troy, especially when Bob and Todd were not present.

13. Chalan, equally, would have known that he was to take instructions from Troy. I saw Troy give him

instructions over the length of time that he worked there and he accepted them.

14. There was from the actual day-to-day operation of the farm, over many years, increased as Troy got older. (SR 369, Exhibit A, ¶ 11, 12, 13 and 14).

Holshouser understood that Troy was vested with the authority to tell him what to do on the ranch because he was a member of the Hattum family. (SR 422, p. 3, ¶11). Troy was giving orders and telling people what to do. (SR 359, Exhibit B, Holshouser depo. 78:6-22, 23-25; 79:1-11). It was made clear to employees that if Bob or Todd Hattum were not present, that Troy Hattum was in charge - next in line. (SR 369, Exhibit A p. 2, ¶3, 4, 8 and 12). Holshouser was never told by either Robert or Todd Hattum not to weld/repair the fuel tank. (SR 422, p.3, ¶14). Troy was the boss on the welding job and hired hands did what the bosses told them to. (SR 422, p. 3, ¶14). (SR 369, Exhibit B, Holshouser depo. 78:23-25; 79:1-5, 80:2-13).

Robert Hattum knew the gas tank was leaky and intended to replace it with a new tank. He believes that Todd located a tank and was "pretty sure" that he had purchased it. (SR 422, p. 4, ¶20) (SR 369, Exhibit C Robert Hattum depo. 22:25; 23:1-4). Todd Hattum did not order a new tank. (SR 422, p. 4, ¶20) (SR 369, Exhibit D, 10:24-25; 11:1-3; 12:1-20).

When preparing to weld the tank, Holshouser questioned Troy about what he was doing, Troy responded that the way he was going to weld the tank was the "textbook" way to do it. (SR 369, Exhibit A, p. 4, ¶17). Troy also informed Holshouser that he welded the same tank the year before and utilized the same method. Troy showed him the weld from the year before. (SR 369, Exhibit A, p. 4, ¶18-21).

When asked about his experience of welding Robert Hattum testified that he is "not a welder." (SR 422, p. 4, ¶24) (SR 369, Exhibit C, p. 24:16). Robert later testified that he and Todd are both welders and that Troy learned to weld from him and Todd. Robert described having used the exact same method to weld fuel tanks that Troy described using to weld the fuel tank which exploded. (SR 422, p. 4, ¶24) (SR 369, Exhibit C, p. 24-26).

Troy had authority to direct Chalan and Holshouser to assist him in welding the fuel tank. Troy's actions, coupled with the testimony of Robert and Todd established that Troy had been taught how to weld a fuel tank by his grandfather, Robert Hattum. Robert described the same process that Holshouser described Troy had used. As Holshouser put it, it was the "textbook" method.

It must be noted that these three men were employees of Defendants, they were at Defendants' farm, working on

Defendants' truck, using Defendants' equipment, and taking orders from Troy Hattum. Finally, Todd Hattum testified as follows:

Q So that leaky tank, you knew that that tank had a leak in it; right?

A Yes.

Q Do you know whether or not Troy knew it had a leak?

A I'm sure he did.

Q Did you ever talk to him about it?

A No.

Q Okay. Did you ever talk to Chalan about the leak on that tank?

A No.

Q Okay. How about Jeff Holshouser?

A No.

Q Okay. So you've never - prior to this incident, you never had any discussion with those guys about that leaky tank?

A No.

(SR 369, Exhibit D, p. 12:17-25; 13:1-7).

A question of material fact exists regarding Troy's authority to order Holshouser and Chalan to assist with the welding. Jeff Holshouser's testimony supports the

conclusion that Troy had the authority not only to weld the tank but to direct Holshouser and Chalan to assist him. Holshouser also testified that Troy showed him the welding location from the year before. Robert Hattum knew how to weld fuel tanks, he instructed Troy how to weld fuel tanks, a new fuel tank had not been purchased, and Holshouser saw a weld on the same tank from the year before and no one told them not to weld the tank.

The fuel tank was owned by Defendants, the truck was owned by Defendants, the welding equipment was owned by Defendants, the shop was owned by Defendants, and Chalan, Troy Hattum and Jeff Holshouser were on Defendants' property. Chalan Hedman was not furthering a personal interest by welding Defendants' fuel tank. The truck was solely used to advance Defendants' farming business only.

Further, Holshouser disputes Defendants' assertion that the fuel tank was being repaired for Chalan's benefit, i.e., he did not want to drive a truck that did not have air conditioning in it. Holshouser never heard Chalan suggest that he was only going to drive a truck that had air conditioning. (SR 422, ¶ 16). In his affidavit Holshouser also stated:

> 23. To my experiences, Chalan was not a "stubborn" or unreasonable person. Also, both he and I had operated units without air

> conditioning. I never at any time heard Chalan say he would not drive a truck, or other unit, unless it had air conditioning.
>
> 24. Even if Chalan preferred not to drive a truck without air conditioning, there were at least 5 others at Hattum's ranch who could drive it. 1. Troy; 2. Todd; 3. Bob, 4. Ben; and 5. me. Hattum's also had other trucks. None of the silage truck I drove had air conditioning.

(SR 369, Exhibit A, ¶ 23 and 24).

Even if a fact finder determined that the repair was being done so Chalan could operate a truck with air conditioning, the truck would still be used to advance Defendants' business.

3. Fellow Servant Rule.

Troy was acting in a dual capacity and therefore not acting as a fellow servant within the meaning of the rule. He was acting as a vice-principal or superior servant, akin to a foreman as in *Sollein*.

One of the non-delegable duties of the employer is to provide a safe workplace for the employees. Inherent in that duty is the obligation to provide employees with proper training and supervision. Chalan did not disobey any instructions from his employers; he followed the instruction of Troy Hattum who had authority to weld the tank and direct Chalan and Holshouser to assist him.

Further, the danger was not obvious and the injury was not foreseeable.

a. Obvious danger or foreseeability of harm.

Troy told Holshouser he was using the textbook method of preparing a fuel tank for welding. He showed Holshouser that he had successfully welded the same tank the year before. Troy held himself out to be an experienced welder that had previous experience welding fuel tanks successfully and that the method he used was "textbook." Because of these representations Holshouser and Chalan remained in the shop while the welding took place, no one forced him to stay. Any injury was not foreseeable based on Troy's recommendation. Holshouser was personally involved in washing out the tank; the hose from the ATV was used to force exhaust fumes in to the tank to dry it and force gas fumes out. Any damage or risk of injury was to have been eliminated by this process. Had some type of cleaning process not been used Defendants' concerns of danger and injury may have some merit. (SR 369, Exhibit B, p. 83:3-6).

4. Assumption of The Risk

There is no assumption of the risk for the same reasons set forth under Paragraph 3 hereinabove. Troy's representations to Holshouser was that he welded the same fuel tank a year ago without incident and that he used the

"textbook" method of welding the fuel tank. There is no evidence that anyone was supposed to remain in the shop at the time the welding was occurring; no one took any special precautions to protect themselves or had there been any concern over a fire or explosion. Chalan remained in the shop and did not take any other means to protect himself other than assisting Troy with the welding process.

5. Contributory Negligence.

For the same reasons previously stated, Chalan, nor Holshouser did anything that would be considered contributory negligence. Defendants' assert that remaining in the shop would constitute contributory negligence. If it is, it is slight comparison to the Defendants' failure to keep a safe workplace.

6. Punitive Damages.

SDCL 21-3-2 provides:

> In any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed, or any case of wrongful injury to animals, being subjects of property, committed intentionally or by willful and wanton misconduct, and disregard of humanity, the jury, in addition to the actual damage, may give damages for the sake of example, and by way of punishing the defendant.

Punitive damages are not an independent cause of action. In order to pursue a claim for punitive damages

Plaintiffs must first make a preliminary showing of a reasonable basis to support that punitive damages may be proper. This requires clear and convincing evidence that there is a reasonable basis to believe that there had been willful, wanton, or malicious conduct on the part of the defendants. *Harvey v. Regional Health Network, Inc.*, 2018 S.D. 3, ¶47. See also *Stabler v. First State Bank of Roscoe*, 2015 S.D. 44, 865 N.W.2d 466.

Punitive damages may be awarded when a person acts willfully or wantonly to the injury of others. (Citation omitted). It implies that the act complained of was conceived in the spirit of mischief or criminal indifference to civil obligation. Punitive damages are recoverable in cases involving willful and wanton misconduct that indicates a reckless disregard for one's rights. *Fluth v. Schoenfelder Constr., Inc.*, 2018 S.D. 65, ¶ 32, _____ N.W.2d _____.

Should this court conclude that punitive damages may be disposed of by summary judgment then there remains an issue of Defendant's and Troy Hattum's conduct, i.e., did he/they act in reckless disregard of Chalan's rights. Troy Hattum directed Chalan to assist in the welding of a fuel tank. He represented to Holshouser, basically, there would not be a problem because he was using the "textbook" method

for welding a fuel tank. Holshouser's testimony was that Chalan stood next to Troy. There was also evidence/testimony from Holshouser that this was a method he was not familiar with. Defendants have not challenged the assertion that this activity is abnormally dangerous. Thus, there is a question of fact as to whether Troy acted with reckless disregard.

VII. CONCLUSION

A. Genuine Issues of Material Fact.

1. Strict Liability and Unsafe Work Place.

a. Whether or not Troy Hattum had the authority to require Chalan Hedman to help assist repair/weld the fuel tank.

i. If Troy Hattum had such authority can Defendants be liable for his death under the doctrines of Respondeat Superior, Vicarious Liability or Agency?

b. Whether or not Troy Hattum was a fellow-servant or acted in a dual capacity as a vice principal or superior servant.

i. Whether there was an obvious danger or foreseeable harm I

welding the fuel tank which would absolve Defendants of any liability.

c. Whether or not Chalan assumed a known risk.

d. Whether or not Chalan was contributorily negligent more than slight.

e. Whether or not Punitive Damages can be dismissed via summary judgment.

Genuine issues of material fact exist by virtue of Jeff Holshouser's testimony. In short, he contradicts virtually every statement of fact asserted by Defendants. Jeff Holshouser is the only eye witness and survivor of this horrible incident. "The Supreme Court has repeatedly stated that questions of negligence, contributory negligence and assumption of the risk are for the jury in all but the rarest of cases so long as there is no evidence to support the issues. It is only when reasonable persons can draw but one conclusion from the facts and inferences that they become a matter of law and this rarely occurs. *Stone*, 2007 S.D. 15, ¶6; *Pierce v. City of Belle Fourche*, 2001 S.D. 41, ¶22, 624 N.W.2d 353, 356-57 (Emphasis added). As previously stated herein, Defendants have not claimed

that welding a fuel tank is not an abnormally dangerous activity.

Defendants owned the property where Chalan Hedman was killed and Jeff Holshouser injured, Defendants owned the truck, Defendants owned the fuel tank, Defendants owned the shop, Defendants owned the welding equipment, Defendants employed Chalan Hedman. Troy Hattum was in charge and was trained how to weld a fuel tank. The trial court should be reversed and this matter scheduled for trial.

Dated March 1, 2021.

THE SCHREIBER LAW FIRM, Prof. L.L.C.
Attorney for Appellant Sheard

Brad A. Schreiber
1110 E Sioux Ave
Pierre, SD 57501
Phone (605) 494-3004

CERTIFICATE OF SERVICE

I, Brad A. Schreiber, hereby certify that on March 1, 2021, I caused a copy of the foregoing **APPELLANT SHEARD'S BRIEF** to be served upon

Gary D. Jensen
Brett A. Poppen
Attorneys for Appellees
gjensen@blackhillslaw.com
bpoppen@blackhillslaw.com

by electronic service.

Brad A. Schreiber

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STATE OF SOUTH DAKOTA COUNTY OF HUGHES	))SS.)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT

TALYN SHEARD, a/k/a TALYN O'CONNER, as Guardian Ad Litem for Z.O., a minor child, and as Personal Representative for the Estate of Chalan Hedman, and JEFFREY PAUL HOLSHOUSER,

Plaintiffs,

v.

ROBERT HATTUM, BEVERLY HATTUM, TODD HATTUM and CHELSEA HATTUM, jointly and severally, DBA HATTUM FAMILY FARMS,

Defendants.

32CIV18-000134

ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A hearing on Defendants' Motion for Summary Judgment was held before this Court on June 10, 2010. Brad Schreiber appeared telephonically on the behalf of Plaintiff Talyn Sheard, a/k/a/ Talyn O'Conner, as Guardian Ad Litem for Z.O., a minor child, and as Personal Representative of the Estate of Chalan Hedman. Tom Maher appeared telephonically on the behalf of Plaintiff Jeffrey Paul Holshouser. Gary Jensen and Brett Poppen appeared on the behalf of Defendant Robert Hattum, Todd Hattum, and Chelsea Hattum D/B/A Hattum Family Farms. Having considered the filings and arguments of counsel, and consistent with the Court's oral decision and order at the close of the hearing which is incorporated herein, the Court:

HEREBY ORDERS that Defendants' Motion for Summary Judgment is granted as to each and every claim and cause of action asserted by Plaintiff Talyn Sheard, a/k/a/ Talyn O'Conner, as Guardian Ad Litem for Z.O., a minor child, and as Personal Representative of the Estate of Chalan Hedman (Plaintiff Sheard), specifically:

> Consistent with South Dakota law, including SDCL 21-3-2, Defendants' Motion for Summary Judgment is granted as to Plaintiff Sheard's claim for punitive damages;
>
> Consistent with South Dakota law, including the South Dakota Supreme Court's decisions in *Platt v. Meier*, 153 N.W.2d 404 (S.D. 1967), and *Jackson v. Van Buskirk*, 424 N.W.2d 148, 149 (S.D. 1988), Defendants' Motion for Summary Judgment is granted as to Plaintiff Sheard's claim for unsafe workplace; and
>
> Consistent with South Dakota law, including the Restatement (Second) of Torts § 519, Defendants' Motion for Summary Judgment is granted as to Plaintiff Sheard's claim for strict liability; and

ORDERS that, consistent with South Dakota law, including the South Dakota Supreme Court's decisions in *Platt v. Meier*, 153 N.W.2d 404 (S.D. 1967), and *Jackson v. Van Buskirk*, 424 N.W.2d 148, 149 (S.D. 1988), Defendants' Motion for Summary Judgment is granted as to Plaintiff Jeffrey Holshouser's claim and cause of action for unsafe workplace; and further

ORDERS that Defendants' Motion for Summary Judgment is denied as to Plaintiff Jeffrey Holshouser's claim and cause of action for strict liability.

Dated this 25th day of June, 2020.

BY THE COURT:

Margo D. Northrup
Honorable Margo Northrup,
Circuit Court Judge

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

E-mail: gjensen@blackhillslaw.com
E-mail: bpoppen@blackhillslaw.com
Attorneys for Defendants Hattum

CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November, 2020, I served a true and correct copy of ***Notice of Entry of Judgment*** upon the following person by the following means:

Brad A. Schreiber Schreiber Law Firm 1110 E. Sioux Ave. Pierre, SD 57501	[ ] [ ] [X] [ ]	First Class Mail Hand Delivery Odyssey System Electronic Mail
Thomas M. Maher Thomas P. Maher Maher Law Office, LLP 204 North Euclid Avenue Pierre, SD 57501	[ ] [ ] [X] [ ]	First Class Mail Hand Delivery Odyssey System Electronic Mail

/s/ Brett A. Poppen
Brett A. Poppen

Summary judgment having been entered in favor of Defendants as to all claims and causes of action of each Plaintiff in the above-captioned action, it is hereby

ORDERED, ADJUDGED, and DECREED that the claims and causes of action asserted by Plaintiff Talyn Sheard, a/k/a Talyn O'Conner, as Personal Representative for the Estate of Chalan Hedman and by Plaintiff Jeffrey Holshouser in the above-captioned action are hereby dismissed on the merits, with prejudice, and that Defendants shall recover of Plaintiff Talyn Sheard, a/k/a Talyn O'Conner, as Personal Representative for the Estate of Chalan Hedman and Plaintiff Jeffrey Holshouser the costs of defending such claims and causes of action in the sum of $_____, which are to be hereafter determined and taxed by the Clerk of Courts.

Dated this _____ day of _____, 2020.

BY THE COURT:
Signed: 11/12/2020 4:39:43 PM

Margo D Northrup
Honorable Margo Northrup,
Circuit Court Judge

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

_____,

7

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS.	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

TALYN SHEARD, a/k/a TALYN O'CONNER, as Guardian Ad Litem for Z.O., a minor child, and as Personal Representative for the Estate of Chalan Hedman, and JEFFREY PAUL HOLSHOUSER, Plaintiffs, v. ROBERT HATTUM, BEVERLY HATTUM, TODD HATTUM and CHELSEA HATTUM, jointly and severally, DBA HATTUM FAMILY FARMS, Defendants.	)	32CIV18-000134 **STATEMENT OF UNDISPUTED MATERIAL FACTS**

Defendants Robert Hattum, Todd Hattum, and Chelsea Hattum, pursuant to the provisions of SDCL 15-6-56(c)(1), submit this statement of undisputed material facts in support of their motion for summary judgment.

1. On August 8, 2016, Chalan Hedman and Jeffrey Holshouser received injuries when a fuel tank exploded while it was being welded in Defendants' shop (hereafter "the accident"). Sheard Complaint, ¶¶ 4-6; Holshouser Complaint, ¶ 5; Holshouser Dep. 64:11-16.

2. On August 8, 2016, Chalan Hedman, Jeffrey Holshouser, and Troy Hattum engaged in a community effort to fix a leak in a fuel tank from a farm truck (hereafter "the truck"). Holshouser Dep. 46:6-10, 58:8-10, 64:4-5, 91:19-22, *see* generally Holshouser Dep. pages 36-64; Holshouser Dep. Exh. 4.

3. On that date, Chalan Hedman and Jeffrey Holshouser removed the fuel tank from the truck. Holshouser Dep. 36:17-21, 37:19-38:2, 38:25-39:1, 42:22-23.

4. After the fuel tank was removed from the truck, Chalan Hedman, Jeffrey Holshouser, and Troy Hattum dumped out the remaining fuel and rinsed the tank with water. Holshouser Dep. 38:21-24, 39:12-18, 41:9-11, 41:17-21, 41:24-42:3, 42:24-44:20.

5. Chalan Hedman, Jeffrey Holshouser, and Troy Hattum then located a split in the fuel tank. Holshouser Dep. 44:25-45:3, 46:6-10.

6. Chalan Hedman or Troy Hattum parked a four-wheeler ATV in the doorway of the shop and closed the overhead door part way, resting it on the seat of the four-wheeler ATV. Holshouser Dep. 49:20-50:12, 53:21-54:12, 56:12-57:15, 60:1-3; Holshouser Dep. Exh. 4.

7. Chalan Hedman or Troy Hattum or both hooked up a hose from the exhaust on the four-wheeler ATV and placed the other end inside the fuel tank, which was in the shop. Holshouser Dep. 49:20-50:3, 51:2-3, 54:13-14, 56:12-57:15, 58:8-12; Holshouser Dep. Exh. 4.

8. The four-wheeler ATV was running with the exhaust going through the hose into the fuel tank while Jeffrey Holshouser had a conversation with Chalan Hedman and Troy Hattum. Holshouser Dep. 50:13-23, 51:7-22, 59:1-6, 73:11-21.

9. After the conversation, Jeffrey Holshouser stood at a bench in the shop straightening mounting brackets that had come off of the truck when the

fuel tank was removed. Holshouser Dep. 47:16-48:15, 52:24-53:4, 56:12-57:15, 58:15-25, 59:7-17, 63:23-24; Holshouser Dep. Exh. 4.

10. At the same time, Chalan Hedman held a piece of carboard as a wind block and stood directly next to Troy Hattum while Troy Hattum welded the fuel tank. Holshouser Dep. 59:18-60:13, 60:20-21, 60:25-61:8, 62:13-24, 63:7-22.

11. No one made Jeffrey Holshouser stay in the shop. Holshouser Dep. 63:25-64:1.

12. No one made Chalan Hedman stay in the shop. Holshouser Dep. 64:2-3.

13. Shortly after the welding of the fuel tank began, there was an explosion. Holshouser Dep. 7:22-8:1, 62:13-63:16, 64:11-22.

14. Prior to August 8, 2016, Robert Hattum and Todd Hattum instructed Chalan Hedman and Troy Hattum to leave the truck alone. R. Hattum Dep. 38:9-19; T. Hattum Dep. 12:9-16, 13:8-13, 24:5-23.

15. Prior to August 8, 2016, Robert Hattum instructed Chalan Hedman to use a different truck, not the one that the fuel tank came from, for hauling silage. R. Hattum Dep. 38:20-24.

16. This other truck that Robert Hattum instructed Chalan Hedman to use for hauling silage did not have functioning air conditioning. R. Hattum Aff., ¶ 1; T. Hattum Aff., ¶ 1.

17. The truck the fuel tank came from had functioning air conditioning. R. Hattum Aff., ¶ 2; T. Hattum Aff., ¶ 2; T. Hattum Dep. 8:11-9:2.

18. On the morning of the accident, Chalan Hedman told Taylor Hattum that he was not going to use a truck that did not have air conditioning. Taylor Hattum Aff., ¶ 2.

19. Neither Robert Hattum, Todd Hattum, nor Chelsea Hattum instructed Chalan Hedman, Jeffrey Holshouser, or Troy Hattum to work on the truck. Holshouser Dep. 34:25-35:2, 36:4-16; R. Hattum Dep. 38:9-19; T. Hattum Dep. 13:8-13, 23:22-24:23; C. Hattum Aff, ¶ 1.

20. Neither Robert Hattum, Todd Hattum, nor Chelsea Hattum instructed anyone to weld a fuel tank. Holshouser Dep. 6:16-21, 35:3-7; R. Hattum Aff., ¶ 3; T. Hattum Aff., ¶ 3; C. Hattum Aff., ¶ 2.

21. While the fuel tank was removed from the truck and welded, Robert Hattum was not on the premises where those activities were taking place. Holshouser Dep. 34:20-21, 34:25-35:2, 64:6-10, 91:13-18; R. Hattum Dep. 19:12-20, 20:3-16.

22. While the fuel tank was removed from the truck and welded, Todd Hattum was not on the premises where those activities were taking place. Holshouser Dep. 34:20-24, 34:25-35:2, 64:6-10, 91:13-18; R. Hattum Dep. 19:12-20, 20:3-16; T. Hattum Dep. 15:13-15.

23. While the fuel tank was removed from the truck and welded, Chelsea Hattum was not on the premises where those activities were taking place. R. Hattum Dep. 19:12-20, 20:3-16; C. Hattum Aff., ¶ 3.

24. At the time of the accident, it had been over forty years since Robert Hattum welded a fuel tank, and he did not weld a fuel tank during Chalan Hedman's or Troy Hattum's lifetimes. R. Hattum Aff., ¶ 4.

25. Todd Hattum has never welded a fuel tank. T. Hattum Dep. 9:18-19, 13:14-16, 15:19-21.

26. Chelsea Hattum has never welded a fuel tank. C. Hattum Aff., ¶ 4.

27. Prior to the accident, Robert Hattum was unaware of any welding of a fuel tank taking place at Defendants' farm in the prior forty years. R. Hattum Aff., ¶ 5; R. Hattum Dep. 21:14-16.

28. Prior to the accident, Todd Hattum was unaware of any welding of a fuel tank taking place at Defendants' farm during his lifetime. T. Hattum Aff., ¶ 4; T. Hattum Dep. 10:1-6, 13:17-21.

29. Prior to the accident, Chelsea Hattum was unaware of any welding of a fuel tank taking place at Defendants' farm during her lifetime. C. Hattum Aff., ¶ 5.

30. Prior to the date of the accident, Jeffrey Holshouser was unaware of any welding of a fuel tank taking place at Defendants' farm. Holshouser Dep. 3:24-4:20, 6:16-21, 52:13-17.

31. Ben Reinert worked at Defendants' farm from 2006 through the date of the accident. Reinert Dep. 3:16-19; R. Hattum Dep. 11:18-22.

32. Prior to the accident, Ben Reinert was unaware of any welding of a fuel tank taking place at Defendants' farm. Reinert Dep. 21:7-18.

33. Prior to the accident, Robert Hattum had no knowledge that Chalan Hedman or Troy Hattum had ever welded a fuel tank. R. Hattum Aff., ¶ 6.

34. Prior to the accident, Todd Hattum had no knowledge that Chalan Hedman or Troy Hattum had ever welded a fuel tank. T. Hattum Aff., ¶ 5.

35. Prior to the accident, Chelsea Hattum had no knowledge that Chalan Hedman or Troy Hattum had ever welded a fuel tank. C. Hattum Aff., ¶ 6.

36. Prior to the accident, Robert Hattum did not know that anyone was going to weld a fuel tank at Defendants' farm. R. Hattum Aff., ¶ 7; R. Hattum Dep. 28:16-18.

37. Prior to the accident, Todd Hattum did not know that anyone was going to weld a fuel tank at Defendants' farm. T. Hattum Aff., ¶ 6.

38. Prior to the accident, Chelsea Hattum did not know that anyone was going to weld a fuel tank at Defendants' farm. C. Hattum Aff., ¶ 7.

39. Welding a fuel tank is dangerous due to the risk of explosion. Holshouser Dep. 4:21-5:14; Sheard Complaint, ¶¶ 6, 10, 14; Holshouser Complaint, ¶¶ 5, 9, 13.

40. Prior to the date of the accident, Jeffrey Holshouser knew and understood that there was danger of an explosion from welding on a fuel tank. Holshouser Dep. 4:21-5:14.

 13

41. At the time of the accident, Chalan Hedman was an employee of Defendants. Sheard Complaint, ¶ 3; T. Hattum Dep. 26:18-20.

42. At the time of the accident, Jeffrey Holshouser was an employee of Defendants. Holshouser Complaint, ¶ 3; Holshouser Dep. 12:13-17.

43. At the time of the accident, Troy Hattum was an employee of Defendants. Holshouser Complaint, ¶ 4; R. Hattum Dep. 14:21-15:2; R. Hattum Aff., ¶ 8; T. Hattum Aff., ¶ 7; C. Hattum Aff., ¶ 8.

44. Neither Robert Hattum, Todd Hattum, nor Chelsea Hattum placed Troy Hattum in charge of or in a supervisory position over Chalan Hedman or Jeffrey Holshouser. R. Hattum Dep. 14:12-23, 41:16-24; T. Hattum Dep. 5:13-6:15; Holshouser Dep. 28:10-17; R. Hattum Aff., ¶ 9; T. Hattum Aff., ¶ 8; C. Hattum Aff., ¶ 9.

45. Neither Robert Hattum, Todd Hattum, nor Chelsea Hattum ever told anyone that Troy Hattum was anyone's boss or that he was in charge of other employees. Holshouser Dep. 28:10-17; R. Hattum Aff., ¶ 10; T. Hattum Aff., ¶ 9; C. Hattum Aff., ¶ 10.

46. Chalan Hedman was a man of ordinary intelligence. *See* Plaintiffs' [Sheard's] Answers to Defendants Robert Hattum, Beverly Hattum, Todd Hattum and Chelsea Hattum's Interrogatories and Requests for Production of Documents, Interrogatory No. 25.

47. Jeffrey Holshouser was a man of ordinary intelligence. *See* Plaintiff's [Holshouser's] Answers to Defendants' Interrogatories and Responses to Requests for Production of Documents (First Set), Interrogatory No. 2.

Dated this 20th day of April, 2020.

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

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of April, 2020, I served a true and correct copy of ***Statement of Undisputed Material Facts*** upon the following person by the following means:

Brad A. Schreiber Schreiber Law Firm 1110 E. Sioux Ave. Pierre, SD 57501	[ ] [ ] [X] [ ]	First Class Mail Hand Delivery Odyssey System Electronic Mail
Thomas M. Maher Maher Law Office, LLP 204 North Euclid Avenue Pierre, SD 57501	[ ] [ ] [X] [ ]	First Class Mail Hand Delivery Odyssey System Electronic Mail

/s/ Gary D. Jensen
Gary D. Jensen

STATE OF SOUTH DAKOTA	)	**IN CIRCUIT COURT**
	) SS	
COUNTY OF HUGHES	)	**SIXTH JUDICIAL CIRCUIT**
TALYN SHEARD, a/k/a **TALYN O'CONNER**, as Guardian Ad Litem for Z.O., a minor child, and as Personal Representative for the Estate of Chalan Hedman, Plaintiffs, vs. **ROBERT HATTUM, BEVERLY HATTUM, TODD HATTUM**, and **CHELSEA HATTUM**, jointly and severally, DBA **HATTUM FAMILY FARMS**, Defendants.	)	32CIV18-134 **PLAINTIFFS' OBJECTIONS TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS**
JEFFREY PAUL HOLSHOUSER, Plaintiff, vs. **ROBERT HATTUM, BEVERLY HATTUM, TODD HATTUM**, and **CHELSEA HATTUM**, jointly and severally, DBA **HATTUM FAMILY FARMS**, Defendants.	)	32CIV19-6

COME NOW, the Plaintiffs, Talyn Sheard, a/k/a Talyn O'Conner, as Guardian Ad Litem for Z.O., a minor child, and as Personal Representative for the Estate of Chalan Hedman, by and through their attorney of record, Brad A. Schreiber, The Schreiber Law Firm, Prof. L.L.C., Pierre, South Dakota, and Jeffrey Paul Holshouser, by and through his attorney, Thomas M. Maher, Maher and Maher, Pierre,

South Dakota, and hereby submit these Objections to Defendants' Statement of Undisputed Material Facts.

1. No objection.

2. Objection. Jeffrey Holshouser testified that Chalan Hedman, Troy Hattum and himself were looking for a "split" in the gas tank. He referred to their efforts in attempting to locate this split as a "community effort" by the three of them. Holshouser Dep. 46:1-10. He also referred to hooking up the "hose" as a "community effort." Holshouser Dep. 58:8-10. Holshouser was asked, "nobody made anybody stay in the shop, did they?" Holshouser responded, "no." He was asked, "it was, as you say, a community effort?" He responded, "yes." Holshouser Dep. 64:2-5. Holshouser agreed on page 91:19-22 that the welding was a "community effort." Although, Troy Hattum, Chalan Hedman and Jeff Holshouser had separate responsibilities, Jeff was told by Troy Hattum to help clean the tank and take it off the truck. Holshouser Dep. 91:23-25; 92:1-2. Troy Hattum, Chalan Hedman and Jeff Holshouser cleaned the tank out together. Holshouser Dep. 38:23-24. The mounts on the truck were taken off by Jeff and Chalan. Holshouser Dep. 38:25; 39:1. Chalan Hedman and Jeff Holshouser carried the diesel tank to the shop. Holshouser Dep. 39:2-3. Troy Hattum or Chalan Hedman used a grinder to shine up the spot where the crack was located while Jeff worked on the brackets. Holshouser Dep. 47:10-25; 48:1-15. Troy Hattum, Chalan Hedman brought an ATV over to the shop and ran a hose from the exhaust on the ATV to the diesel tank. Holshouser Dep. 49:24-25; 50:1-12. Holshouser is sure that Troy is the one who went and got the ATV. Holshouser Dep. 50:8-10. Holshouser asked what was going on and Troy explained what they were going to do with the exhaust. Holshouser Dep. 50:13-23. Troy Hattum explained that this process was "text book" and told Jeff that is how they did it "last year." Holshouser Dep. 51:1-22; 83:3-10. Troy Hattum did the welding and Chalan Hedman was holding some cardboard. Holshouser Dep. 59:18-25; 60:11-13. Troy was the boss. Holshouser Dep. 78:23-25; 79:1-5.

3. No objection.

4. No objection.

5. No objection.

6. No objection.

7. No objection.

8. No objection.

9. No objection.

10. No objection.

11. Objection. Holshouser was an employee of Hattums. Holshouser Dep. 8:22-25; 9-12:1-21. Because Troy was a Hattum family member, Holshouser understood that he was vested with authority to tell him what to do on the ranch. Holshouser Dep. 78:6-22. Troy was the boss over the welding project. Holshouser Dep. 78:23-25; 79:1-11. Troy was giving orders and telling people what to do. Holshouser Dep. 79:1-11.

12. Objection. See Plaintiffs' Objection to Paragraph 11 incorporated herein by reference.

13. No objection.

14. Objection. Jeff Holshouser was never advised/told by Bob Hattum or Todd Hattum not to repair the fuel tank. Holshouser Dep. 79:19-23. The hired hands on the ranch did what the bosses told them. Holshouser Dep. 80:2-13. Troy was the boss on the welding job. Holshouser Dep. 78:23-25; 79:1-5. Bob Hattum and Todd Hattum would tell Troy what to do from time to time and Troy would follow their instructions. Holshouser Dep. 80:5-13. Based on the foregoing, Bob and Todd Hattum's credibility are at issue which raises a question of fact as to whether or not one or both of them instructed Troy Hattum or Chalan Hedman to weld the diesel tank.

15. Objection. Plaintiffs agree that this was Robert Hattum's testimony but as previously set forth in Plaintiffs' Objection to Number 14 his credibility is at issue concerning this testimony. Plaintiff incorporates herein by reference Plaintiffs' objections in Paragraph 14.

16. Objection. Plaintiffs incorporate herein by reference the objections set forth in Paragraphs 14 and 15 above. Further, Jeff Holshouser testified he never heard Chalan Hedman suggest that he was only going to drive a truck that had air conditioning. Holshouser Dep. 37:2-18.

17. No objection.

18. Objection. During the time Jeff Holshouser was with Chalan Hedman that morning, he never observed him on his phone speaking to anyone, nor did he mention talking to Taylor Hattum.

19. Objection. Plaintiffs incorporate herein by reference those objections set forth in Paragraphs 14, 15 and 16 hereinabove.

20. Objection. Robert Hattum testified he intended to replace the leaky diesel tank with a "new tank;" that Todd had found one and was "pretty sure" that it had been purchased. Robert Hattum Dep. 22:13-22. None of this information had been shared with Troy Hattum or Chalan Hedman. Robert Hattum Dep. 22:25; 23:1-4. Todd Hattum testified that he never actually ordered a new tank. Todd Hattum Dep. 10:24-25; 11:1-3; 12:1-20.

21. No objection.

22. No objection.

23. No objection.

24. Objection. Robert Hattum testified that he is "not a welder." Robert Hattum Dep. 24:16. Robert Hattum later testifies that he and Todd are both welders. Robert Hattum Dep. 25:6-7. He further testified that Troy learned how to weld from him and his father, Todd. Robert Hattum Dep. 25:3-7. Robert further testified that his father was a welder and taught him how to weld a fuel tank. He describes the exact same method used by Troy Hattum. Robert Hattum Dep. 26:2-11.

25. Objection. Todd Hattum's credibility is at issue. His testimony contradicts his father's concerning ordering a new diesel tank, see Paragraph 20 above. He also contradicts his father's testimony concerning any knowledge or experience welding a fuel tank. Robert describes the same method utilized by Troy and Troy was instructed how to weld by Robert Hattum and Todd Hattum. Further, Todd testified that he "never" talked to Troy Hattum or Chalan Hedman or Jeff Holshouser about the leak in this tank. Todd Hattum Dep. 12:20-25; 13:1-7.

26. No objection.

27. Objection. Credibility. Jeff Holshouser testified that as Troy Hattum, Chalan Hedman and he were preparing to put the hose from the ATV into the diesel tank, Troy commented that this is how they did it last year. They showed Jeff Holshouser a weld spot on the same leaky tank from the same year before. Holshouser Dep. 51:8-22.

28. Objection. Plaintiffs incorporate herein by reference the objection set forth in Paragraph 27 hereinabove.

29. No objection.

30. Objection. Jeff Holshouser's testimony was that he never saw Todd Hattum or anybody else weld a gas tank other than the day he watched Chalan Hedman and Troy Hattum. He was "aware" that welding that same tank had taken place the year before. Holshouser Dep. 51:8-23.

31. No objection.

32. No objection.

33. Objection. Credibility. See Plaintiffs' objection in Paragraphs 14 and 30 incorporated herein by reference.

34. Objection. Credibility. See Plaintiffs' objection in Paragraphs 14 and 30 incorporated herein by reference.

35. No objection.

36. Objection. Credibility. See Plaintiffs' objection in Paragraphs 14 and 30 incorporated herein by reference.

37. Objection. Credibility. See Plaintiffs' objection in Paragraphs 14 and 30 incorporated herein by reference.

38. No objection.

39. No objection.

40. No objection.

41. No objection.

42. No objection.

43. No objection.

44. Objection. Plaintiffs incorporate herein by reference the objections set forth in Paragraph 11 hereinabove.

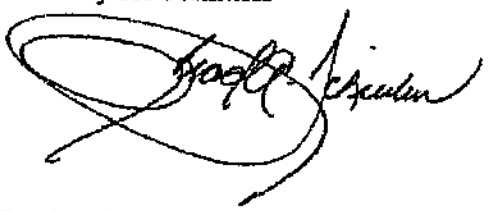
45. Objection. Plaintiffs incorporate herein by reference the objections set forth in Paragraph 11 hereinabove.

46. No objection.

47. No objection.

Dated May 4, 2020.

THE SCHREIBER LAW FIRM, Prof. L.L.C.
Attorney for Plaintiffs



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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on October 28, 2019, he served a true and correct copy of the following **PLAINTIFFS' OBJECTIONS TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS** on the following:

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IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 29496

TALYN SHEARD, a/k/a TALYN O'CONNER, as
Personal Representative for the Estate of Chalan Hedman,
Appellants,

And JEFFREY PAUL HOLSHOUSER,
Plaintiff,

vs.

ROBERT HATTUM, TODD HATTUM, and CHELSEA HATTUM,
jointly and severally, DBA HATTUM FAMILY FARMS,
Appellees.

APPELLEES' BRIEF

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE MARGO NORTHRUP
Circuit Court Judge

Notice of Appeal Filed December 18, 2020

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Restatement (Second) of Torts § 524 24

PRELIMINARY STATEMENT

Appellees, Robert Hattum, Todd Hattum, and Chelsea Hattum, D/B/A Hattum Family Farms, will be referred to as "Hattums." Appellant, Talyn Sheard, a/k/a Talyn O'Conner, as Personal Representative for the Estate of Chalan Hedman, will be referred to as "the Estate." Plaintiff, Jeffrey Holshouser, will be referred to as "Jeff." Reference to the record as in the Clerk's Alphabetical Index will be "R" followed by the applicable page; documents in the Appendix will be referred to by "APP" followed by the appropriate letter designation.

JURISDICTIONAL STATEMENT

The Estate appealed from the June 25, 2020, Order on Defendants' Motion for Summary Judgment granting summary judgment in favor of Hattums and from the November 12, 2020, Judgment in favor of Hattums. APP: E; R: 752-53. The Notice of Entry of Judgment was served on November 20, 2020. R: 754-55. Appellant's Notice of Appeal was filed on December 18, 2020. R: 761-62. This Court has jurisdiction pursuant to SDCL 15-26A-3.

STATEMENT OF THE ISSUES

I. Whether the Circuit Court correctly granted summary judgment for Hattums on the Estate's strict liability claim?

The Circuit Court held under the undisputed facts that Hattums did not engage in the abnormally dangerous activity and the fellow-servant rule barred liability.

Legal Authority:

- Restatement (Second) of Torts § 519
- SDCL 60-2-2
- *Dahl v. Sittner*, 429 N.W.2d 458 (S.D. 1988)
- SDCL 59-3-3

II. Whether the Circuit Court correctly granted summary judgment for Hattums on the Estate's unsafe workplace claim?

The Circuit Court held under the undisputed facts that Hattums were not liable to the Estate under the rule of nonliability for obvious dangers, Hattums had no duty because welding of the fuel tank was not foreseeable to them, and Chalan Hedman assumed the risk.

Legal Authority:

- *Platt v. Meier*, 153 N.W.2d 404 (S.D. 1967)
- *Jackson v. Van Buskirk*, 424 N.W.2d 148 (S.D. 1988)
- *Zerfas v. AMCO Ins. Co.*, 2015 S.D. 99, 873 N.W.2d 65
- *Schott v. S.D. Wheat Growers Ass'n*, 2017 S.D. 91, 906 N.W.2d 359

III. Whether the Circuit Court correctly granted summary judgment on the Estate's punitive damages claim?

The Circuit Court held under the undisputed facts there is no evidence of malice or willful or wanton conduct to support a claim for punitive damages.

Legal Authority:

- *Smizer v. Drey*, 2016 S.D. 3, 873 N.W.2d 697

STATEMENT OF THE CASE

The Estate alleges claims of strict liability, unsafe workplace, and punitive damages in connection with the death of Chalan Hedman resulting from an explosion during welding of a fuel tank removed from a truck.[1] Hattums moved for summary judgment. R: 110. The Honorable Margo Northrup granted the motion as to each of the Estate's claims and on June 25, 2020, entered a written order incorporating the oral decision. APP: A, B; R: 667-77, 679. Judgment was entered in favor of Hattums on all claims on November 20, 2020. APP: E; R: 752-53.

Robert and Todd Hattum instructed Chalan Hedman and Troy Hattum to leave the truck alone. APP: C, ¶¶ 14; R: 154. Hattums did not instruct anyone to work on the truck or to weld its fuel tank. APP: C, ¶¶ 19-20; R: 155. The danger posed by running exhaust into a fuel tank and introducing flame by welding was obvious to men of ordinary intelligence. Thus, the Court should affirm the Circuit Court's Order on Defendants' Motion for Summary Judgment and the resulting Judgment for Hattums.

STATEMENT OF THE FACTS

On August 8, 2016, Chalan Hedman and Jeff Holshouser received injuries when a fuel tank exploded while being welded in Hattums' shop

[1] Plaintiff Holshouser later sued alleging the same claims. The actions were consolidated. R: 69-70. The Circuit Court entered summary judgment in favor of Hattums as to all of Holshouser's claims and entered judgment for Hattums. APP: A, B, E; R: 667-77, 679, 738-747. Holshouser did not appeal.

("the accident"). APP: C, ¶ 1; R: 152. Troy Hattum, Robert Hattum's grandson and Todd and Chelsea Hattum's son, was also injured in the explosion. Chalan and Troy died as a result of their burns.

Chalan, Jeff, and Troy were employees of Hattums. APP: C, ¶¶ 41-43; R: 158. Chalan and Troy were buddies. R: 342. Chalan was close with the Hattum family, even living in their home for a period of time. *Id.* Chalan was engaged to Taylor Hattum at the time of the accident. R: 169, ¶ 1. Taylor is Robert's granddaughter and Todd and Chelsea's daughter. Talyn Sheard, biological mother of Chalan's child, brought this lawsuit on behalf of the Estate.

Welding the fuel tank was a community effort by Chalan, Troy, and Jeff to fix a leak in the tank. APP: C, ¶ 2; R: 152. Chalan and Jeff removed the fuel tank from a farm truck. APP: C, ¶ 3; R: 153. Chalan, Troy, and Jeff dumped out the fuel and rinsed the tank with water. APP: C, ¶ 4; R: 153. They located a split in the tank. APP: C, ¶ 5; R: 153.

Chalan or Troy parked an ATV in the doorway of the shop and closed the overhead door part way, resting it on the seat of the ATV. APP: C, ¶ 6; R: 153. Chalan or Troy or both hooked up a hose from the exhaust on the ATV and placed the other end inside the fuel tank. APP: C, ¶ 7; R: 153. While the ATV was running with exhaust going through the hose into the fuel tank, Jeff talked with Chalan and Troy. APP: C, ¶ 8; R: 153.

After the talk, Jeff stood at a bench in the shop straightening brackets that came off the truck when the tank was removed. APP: C, ¶ 9; R: 153-54. At the same time, Chalan held a piece of carboard as a wind block and stood next to Troy while Troy welded the fuel tank. APP: C, ¶ 10; R: 154. No one made Chalan stay in the shop. APP: C, ¶ 12; R: 154. After the welding began, there was an explosion. APP: C, ¶ 13; R: 154.

Robert and Todd had instructed Chalan and Troy to leave the truck alone. APP: C, ¶ 14; R: 154. Robert had also instructed Chalan to use a different truck for hauling silage. APP: C, ¶ 15; R: 154. This other truck Chalan was instructed to use did not have air conditioning, while the truck the fuel tank came from did. APP: C, ¶¶ 16-17; R: 154-55.

On the morning of the accident, Chalan told his fiancé, Taylor Hattum, he was not going to use a truck that did not have air conditioning. APP: C, ¶ 18; R: 155. Talyn Sheard says Chalan was strong-willed and stubborn. R: 347.

Neither Robert, nor Todd, nor Chelsea instructed Chalan, Jeff, or Troy to work on the truck. APP: C, ¶ 19; R: 155. Neither Robert, nor Todd, nor Chelsea instructed anyone to weld a fuel tank. APP: C, ¶ 20; R: 155. While the fuel tank was removed from the truck and welded, Robert, Todd, and Chelsea were not on the premises. APP: C, ¶¶ 21-23; R: 155-56.

It had been over forty years since Robert welded a fuel tank; he did not weld a fuel tank during Chalan's or Troy's lifetimes. APP: C, ¶ 24; R: 156. Todd and Chelsea have never welded a fuel tank. APP: C, ¶¶ 25-26; R: 156. Since the accident, Hattums learned that while Chalan was growing up on his family's farm he observed his father, Steve Hedman, weld fuel tanks while exhaust was pumped into the tanks from a motor vehicle. R: 171, ¶ 2.

Robert was unaware of any welding of a fuel tank at Hattums' farm the prior forty years. APP: C, ¶ 27; R: 156. Todd, Chelsea, and Jeff were unaware of any such welding. APP: C, ¶¶ 28-30; R: 156. Ben Reinert, who worked at Hattums' farm from 2006 through the date of the accident, was unaware of any such welding. APP: C, ¶¶ 31-32; R: 156-57.

Prior to the accident, Robert, Todd, and Chelsea had no knowledge that Chalan or Troy ever welded a fuel tank. APP: C, ¶¶ 33-35; R: 157. Robert, Todd, and Chelsea did not know that anyone was going to weld a fuel tank at their farm. APP: C, ¶¶ 36-38; R: 157.

Welding a fuel tank is dangerous due to the risk of explosion. APP: C, ¶ 39; R: 157. Prior to the accident, Jeff understood that danger. APP: C, ¶ 40; R: 157. Chalan was a man of ordinary intelligence. APP: C, ¶ 46; R: 158.

As to the relationship between Hattums' employees, neither Robert, nor Todd, nor Chelsea placed Troy in a supervisory position over Chalan

or Jeff. APP: C, ¶ 44; R: 158. Neither Robert, nor Todd, nor Chelsea ever told anyone that Troy was anyone's boss or that he was in charge of other employees. APP: C, ¶ 45; R: 158.

ARGUMENT AND AUTHORITIES

I. Legal Standard

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to a judgment as a matter of law[.]" SDCL 15-6-56(c). "While the moving party has the burden of showing there are no genuine issues of material fact, the non-moving party cannot merely rest on the pleading, but must present specific facts . . . showing the existence of genuine issues of material fact." *Wulf v. Senst*, 2003 S.D. 105, ¶ 18, 669 N.W.2d 135, 141-42 (citing *State Farm Mut. Auto. Ins. Co. v. Ragatz*, 1997 S.D. 123, 571 N.W.2d 155). "Speculation and innuendo, however, are not enough to raise a genuine issue of material fact." *Schwaiger v. Avera Queen of Peace Health Servs.*, 2006 S.D. 44, ¶ 13, 714 N.W.2d 874, 880.

II. No Genuine Dispute of Material Fact

The Estate asserts there is a dispute of fact as to whether Robert and Todd instructed Chalan and Troy to leave the truck alone. If that instruction stands undisputed—it does—all of the Estate's arguments to

defeat summary judgment fail. *See* APP: B; R: 621:9-14 (counsel conceding summary judgment rises or falls on that instruction).

Robert testified he told Chalan and Troy to leave the truck alone. R: 328. He instructed Chalan to use a different truck for hauling silage. *Id*. Todd testified he also told Chalan and Troy to leave the truck alone while the three of them were together a couple of days before the accident. R: 340. There is *no* evidence contrary to this testimony. *See* APP: B; R: 621:21-622:4 (counsel conceding, "I can't contradict those statements"). This key fact—Robert and Todd instructed Chalan and Troy to leave the truck alone—will be referred to as "the instruction."

Given this testimony, the Estate attempted to create an issue of material fact by asserting that Robert's and Todd's credibility is at issue. R: 424, ¶ 14. As the Circuit Court determined, the assertion has no basis factually or legally.[2] APP: B; R: 676:4-17.

The Estate claims contradictions in what Robert and Todd told Troy and Chalan versus what they told Jeff. However, that Robert and Todd did not tell *Jeff* to leave the truck alone or not to weld the tank does not contradict Robert's and Todd's testimony that they told *Chalan* (who usually operated the truck) and *Troy* to leave the truck alone.

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[2] The futility of the Estate's attempt to raise a dispute of material fact has led it to misstate the record. The Estate claims Robert testified he is not a welder. Appellant's Brief, p. 25. However, that was a statement of the Estate's counsel, not of Robert. R: 562. When this misstatement was made to the trial court, Hattums pointed out the error. APP: B, D; R: 541 at ¶ 24, 654:21-655:2. Yet, it was inexplicably repeated to this Court.

Likewise, that Robert and Todd knew the tank was leaking but did not talk to Chalan, Jeff, or Troy about the leak does not contradict Robert's and Todd's testimony that they instructed Chalan and Troy to leave the truck alone.

It was known that the tank had a leak. Chalan usually operated the truck and had used a bar of soap on the leak as a temporary fix in the past. R: 325:20-326:13, 565. Todd explained he told Chalan and Troy to leave the truck alone because another truck was ready for hauling silage, other preparations were needed for the silage harvest, and he did not want time wasted on the broken-down truck. R: 336-37, 566. Silage harvesting was to begin soon. R: 563. Another truck was ready for Chalan to use, and he was instructed to use it. R: 328, 336-37, 566. There was no reason to specifically discuss the leaking tank or repair with Chalan, Troy, or Jeff.[3]

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[3] The Estate's attempt to establish a contradiction regarding a replacement tank for the truck is likewise meritless. Robert and Todd intended to get a replacement tank. R: 324:3-11, 561, 565. During his deposition in March of 2019, Robert testified Todd had found a replacement tank and he was "pretty sure" but "not positive" it had been purchased at the time of the accident. R: 561. Todd testified:

> Q: Now was there actually another tank that had been ordered for that truck?
>
> A: I knew we were going to get one. I hadn't actually ordered it.

R: 565. This testimony is not contradictory and has no bearing on the instruction.

The Estate's argument that the instruction was not an instruction to not fix or weld the tank is a strawman. Hattums do not claim they told anyone not to fix or weld the tank. Rather, the undisputed facts establish Robert and Todd instructed Chalan and Troy to leave the truck alone. APP: C, ¶ 14; R: 154. That instruction is broad and encompasses *any* activity with the truck, whether fixing or operating it.[4] It is impossible to leave the truck alone but at the same time take off a component part and weld on it.

The Estate also engages in speculation and insinuation using Robert's testimony that he was taught by his father to weld a fuel tank using exhaust from a vehicle. The Estate relies upon a similar welding method used on the day of the accident to how Robert was taught forty-plus years ago to speculate that Robert and Todd instructed Troy in the method of welding used at the time of the accident. Yet, the Estate cites no evidence that Robert or Todd instructed Troy in this method. All evidence is to the contrary.

Even if it could be argued that there is a reasonable inference Robert told Troy about the method of welding a fuel tank using exhaust, which Hattums deny, such an inference standing alone is immaterial. So, the Estate attempts to take that inference and further speculate that

[4] An instruction to leave something alone is common parlance and of obvious meaning. When a mother instructs her child, "leave the cookies alone," there is no question that the instruction broadly includes not to eat, take, touch, or lick the frosting off the cookies.

Robert or Todd either instructed Troy to weld the tank or did not tell Troy and Chalan to leave the truck alone. Either way, these inferences are unreasonable and fail as a matter of law to raise a genuine issue of material fact.

To raise a genuine issue of material fact, an inference from the facts must be *reasonable*. *See Estate of Johnson by & through Johnson v. Weber*, 2017 S.D. 36, ¶¶ 29-30, 898 N.W.2d 718, 730 (noting all reasonable inferences from the facts must be construed in favor of the non-moving party but finding the asserted inference at issue unreasonable); *see also Rubinovitz v. Rogato*, 60 F.3d 906, 911 (1st Cir. 1995) (for an inference to be reasonable it "must flow rationally from the underlying facts; that is, a suggested inference must ascend to what common sense and human experience indicates is an acceptable level of probability" rather than resting on a "tenuous insinuation"); *Parrillo v. Com. Union Ins. Co.*, 85 F.3d 1245, 1250 (7th Cir. 1996) ("In deciding a case on summary judgment, the court is not required to draw every possible inference in favor of the non-movant, only all *reasonable* inferences.") (emphasis original); *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480, 1482 (11th Cir. 1985) ("an inference based on speculation and conjecture is not reasonable").

It is not reasonable to further infer from an inference—that Robert told Troy about welding a fuel tank using exhaust forty plus years ago—that Robert or Todd therefore either instructed Troy to weld the tank or

did not tell Chalan and Troy to leave the truck alone.[5] This is impermissible conjecture and speculation. An inference may not be stacked upon another inference to create a question of fact. *See Impro Products, Inc. v. Herrick*, 715 F.2d 1267, 1272 (8th Cir. 1983) (for purposes of summary judgment "an inference which a jury is entitled to draw must be based upon proven facts and not upon other inferences").

The Estate also implies Hattums knew welding took place on the tank the prior year. However, nothing in the record supports the assertion.

The Estate relies on the testimony of Jeff who testified that on the day of the accident Troy and Chalan told him they welded the tank the year before.[6] R: 304. Even assuming for purposes of summary judgment this was true, it does not establish Hattums knew of any such welding. Robert, Todd, and Chelsea have sworn they were unaware of any tank welding taking place on their farm during Chalan's or Troy's lifetimes;

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[5] The Estate's counsel essentially conceded the unreasonableness of such an inference, stating, "Now, I know nobody told them to go out and weld this fuel tank, but the evidence is this fuel tank has been welded before." R: 641:22-24.

[6] Much of Jeff's testimony was from an affidavit submitted after his deposition and the motion for summary judgment. The affidavit is filled with conclusory statements for which Jeff lacks foundation and impermissibly seeks to change his deposition testimony. In an effort to be concise, Hattums refer the Court to Appendix D, which was submitted as Exhibit A with Hattums' reply in support of its motion for summary judgment before the trial court, for their objections to Jeff's affidavit. Appendix D also includes Hattums' reply to the Estate's response to Hattums' statement of undisputed material facts and Hattums' response to the Estate's statement of disputed facts. R: 536-53.

they had no knowledge Troy or Chalan ever welded a fuel tank. R: 160-61 at ¶¶ 5-6, 163-64 at ¶¶ 4-6, 166-67 at ¶¶ 4-5, 326, 335, 337. Ten-year employee Reinert was unaware of any welding of a fuel tank at Hattums' farm. R: 156-57, ¶¶ 31-32. Even Jeff admitted that prior to the date of the accident he was unaware of any welding of a fuel tank taking place at Hattums' farm:

> Q: Is that the first you had ever heard of any previous welding on that tank?
>
> A: Yes.
>
> Q: You didn't see it the year before?
>
> A: No.

R: 305; *see also* R: 279-80, 282.

Further, Robert testified that at the time of the accident it had been over forty years since he welded a fuel tank, so he did not weld a fuel tank during Chalan's or Troy's lifetimes. R: 163, ¶ 4. Todd and Chelsea have sworn that they have never welded a fuel tank. R: 160 at ¶ 4, 334, 337-38. Likewise, Robert, Todd, and Chelsea have sworn that prior to the accident they did not know anyone was going to weld a fuel tank at their farm. R: 160 at ¶ 7, 164 at ¶ 7, 167 at ¶ 6, 327. Robert directly testified:

> Q: So, Mr. Hattum, did you have any idea that Troy and Chalan were going to weld that tank?
>
> A: No. It wouldn't have been allowed.

R: 327. There is *no* evidence to the contrary.[7]

Hattums had no reason to anticipate anyone would weld a fuel tank. Robert and Todd told Chalan and Troy to leave the truck alone. APP: C, ¶ 14; R: 154. Robert instructed Chalan to use a different truck. APP: C, ¶ 15; R: 154. Robert, Todd, and Chelsea have each sworn:

- They did not instruct Chalan, Jeff, or Troy to work on the truck; R: 160 at ¶ 1, 328, 337, 339-40;
- They did not instruct anyone to weld a fuel tank; R: 160 at ¶ 2, 163 at ¶ 3; 166 at ¶ 3; and
- They were not on the premises when the tank was removed and welded. R: 160 at ¶ 3, 324-25, 338.

Jeff's post-deposition affidavit attempts to change his testimony from Troy *and Chalan* conducting the purported prior welding on the tank to Troy and "the Hattums." *See* R: 362, ¶¶ 18-19. This should be rejected.

Jeff has no basis to testify that "the Hattums" conducted prior welding on the tank. He testified that prior to the date of the accident he was unaware of any welding on a fuel tank at Hattums' farm. R: 279-80, 282, 305. Nowhere does Jeff assert that Troy, Chalan, or anyone else told him that any other Hattum was involved in prior tank welding. So, Jeff's conclusory statement in his belated affidavit that "the Hattums" conducted prior welding on the tank must be rejected. *See Luther v. City of Winner*, 2004 S.D. 1, ¶ 11, 674 N.W.2d 339, 344-45 (holding

[7] Jeff admitted he has no such evidence. R: 319.

conclusory statements in affidavit were insufficient to raise a genuine issue of material fact); *see also Chem-Age Indus. v. Glover*, 2002 S.D. 122, ¶ 18, 652 N.W.2d 756, 765 ("Evidence submitted in affidavits as part of a summary judgment proceeding must be legally admissible."); SDCL 15-6-56(e) ("opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein").

Jeff may not change his deposition testimony. He unequivocally testified in his deposition it was Troy *and Chalan* that said they had welded the fuel tank the same way the year prior. R: 304-05. There is no evidence Hattums were involved in welding a tank the previous year or that they knew of any such welding at their farm during Troy's or Chalan's lifetimes.

III. The Fellow-Servant Rule and Agency

The Estate relies on agency arguments in an attempt to reverse the Circuit Court's order granting summary judgment; it argues Hattums are vicariously liable for the actions of Troy. That argument fails.

The fellow-servant rule bars liability for any actions of Troy. Statute provides:

> An employer, except as otherwise specially provided, is not bound to indemnify an employee for losses suffered by the employee in consequence of the ordinary risks of the business in which employed, *nor in consequence of the negligence of another person employed by the same employer in the same general*

> *business*, unless the employer has neglected to use ordinary care in the selection of the culpable employee.

SDCL 60-2-2 (emphasis added). The emphasized portion of the statute is codification of the common law fellow-servant rule. *See Smith v. Cmty. Coop. Ass'n of Murdo*, 209 N.W.2d 891, 893 (S.D. 1973). It is undisputed that Chalan, Jeff, and Troy were co-employees of Hattums. APP: C, ¶¶ 41-43; R: 158. So, pursuant to the fellow-servant rule Hattums are not obligated to indemnify Chalan (the Estate) for the acts of Troy.

The Estate incorrectly argues that an exception to the fellow-servant rule applies. It is true the fellow-servant rule does not apply where a vice-principal or superior servant is acting in such a capacity when he causes the injury, but Troy did not have that status. *See Smith*, 209 N.W.2d at 893 (citing *Solleim v. Norbeck & Nicholson Co.*, 147 N.W. 266, 268 (S.D. 1914)).

The person alleged to have caused injury must have had authority from the employer to exercise control or supervision over other employees for the exception to the fellow-servant rule to apply. *See* 30 C.J.S. *Employers' Liability* § 237, Westlaw (database updated Feb. 2020) ("To be a vice principal, the employee must enjoy a measure of authority sufficient to enable one to consider his or her acts as those of the employer."); 30 C.J.S. *Employers' Liability* § 238, Westlaw (database updated Feb. 2020) ("The decision as to whether the rule is to be applied depends on whether or not the so-called superior employee has the

authority to superintend or control the injured employee, and not merely on the grade or rank of the so-called superior employee. In the absence of such authority the employer is not liable on the theory that the negligent employee is a superior employee."); 27 Am.Jur.2d *Employment Relationship* § 334, Westlaw (database updated Feb. 2020) ("The fellow-servant rule does not apply when the party causing injury is a supervisor performing managerial acts."). Authority is either actual or ostensible. *Dahl v. Sittner*, 429 N.W.2d 458, 462 (S.D. 1988).

A. Troy did not have actual authority.

Troy did not have actual authority to act as Hattums' representative in dealings with Hattums' other employees. Hattums have sworn that they did not put Troy in charge of or in a supervisory position over Chalan and Jeff. APP: C, ¶ 44; R: 158. Hattums did not tell anyone that Troy was anyone's boss or that he was in charge of other employees. APP: C, ¶ 45; R: 158. Jeff admitted the same in his deposition. R: 286. Likewise, Hattums did not give Troy authority to work on the truck, as he and Chalan were told to leave the truck alone. APP: C, ¶ 14; R: 154. Troy did not have actual authority.

B. Troy did not have ostensible authority to direct Chalan to work on the truck.

The Estate relies upon ostensible authority. "Ostensible or apparent authority is 'such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess.'" *Dahl*, 429 N.W.2d at 462 (quoting SDCL 59-3-3).

The Estate argues Troy's last name establishes he had ostensible authority. However, sharing the same last name is insufficient to create ostensible authority. This Court has stated that "a marital relationship alone does not constitute a husband an agent of his wife." *Krause v. Reyelts*, 2002 S.D. 64, ¶ 27, 646 N.W.2d 732, 736 (quoting *Bauer v. Garner*, 266 N.W.2d 88, 95 (N.D. 1978)). Likewise, Troy having the last name of Hattum does not establish ostensible authority.

The Estate also relies on testimony of Jeff that Troy sometimes gave orders. Even if true, it alone is also insufficient. "If the apparent authority can only be established through the acts, declarations and conduct of the agent and is not in some way traceable to the principal, no liability will be imposed on him." *Dahl*, 429 N.W.2d at 462 (citing *Draemel v. Rufenach, Bromagen & Hertz, Inc.*, 392 N.W.2d 759, 763 (Neb. 1986) and *Kasselder v. Kapperman*, 316 N.W.2d 628, 630 (S.D. 1982)); *see also Bordeaux v. Shannon Cty. Sch.*, 2005 S.D. 117, ¶ 19, 707 N.W.2d 123, 128-29 (quoting *Kasselder*, 316 N.W.2d at 630) ("The allegations establishing an agency relationship 'must be traceable to the principal and cannot be established solely by the acts, declarations or conduct of an agent.'"); *Am. Prairie Const. Co. v. Hoich*, 560 F.3d 780, 795 (8th Cir. 2009) (citing *Kasselder*, 316 N.W.2d at 630) ("Under South Dakota law, the conduct of an agent is insufficient to create an ostensible agency.").

Courts have held that an employee may not, merely by his assumption of authority over others, become a foreman, vice-principal, master servant, or alter ego of the employer. *See Safety Insulated Wire & Cable Co. v. Matthews*, 151 F. 761, 762 (2d Cir. 1907) ("It is manifest that the mere assumption of the duties of general direction or superintendence by a fellow servant . . . does not constitute the servant, so assuming to act, the alter ego of the master."); *Wadiak v. Ill. Cent. R. Co.*, 208 F.2d 925, 929 (7th Cir. 1953) ("a fellow servant does not merely by the assumption of authority become a vice principal"); *Hilton & Dodge Lumber Co. v. Ingram*, 46 S.E. 895, 896 (Ga. 1904) ("A fellow servant, without the master's knowledge, cannot, by an assumption of authority, convert himself into a vice principal or alter ego."); *Lesicki v. J. Burton Co.*, 168 Ill.App. 46, 50-51 (1912) ("The mere fact that Code was accustomed to give orders to the men with whom he labored . . . would not make him vice-principal in respect to the common labor which he and the plaintiff in error at the time were engaged upon."); *Felch v. Allen*, 98 Mass. 572, 574 (1868) ("The case, then, is simply this: that two servants of a common master are employed upon the same work; that one of them, without authority from his employer, directs the other to use a machine for a dangerous and improper purpose, for which it was not intended or provided; and that he complies, and receives an injury. There is no principle of law which will make the employer answerable for the damages in such a case.").

After submission of Hattums' summary judgment brief with its explanation of the fellow-servant rule, Jeff submitted an affidavit alleging Troy gave Jeff and Chalan various instructions over the course of Jeff's employment while in the presence of Hattums. *See* R: 372-76. The Estate relies on these affidavit statements to contend Troy had ostensible authority. Even taking Jeff's affidavit assertion as true for purposes of summary judgment, it is of no help to the Estate.

Again, ostensible or apparent authority is authority "a principal intentionally, or by want of ordinary care, causes or allows a *third person* to believe the agent to possess." SDCL 59-3-3 (emphasis added). The third person here is Chalan. The Estate may not rely upon what Jeff may have believed to establish what Chalan believed. Todd told Troy (the purported agent) and Chalan (the third person) while the three were together to leave the truck alone. R: 340. Robert instructed the same. R: 328. As explained above, this is undisputed. *See* APP: C, ¶ 14; R: 154. Therefore, ostensible authority for Troy to direct work on the truck did not exist as to Chalan. Todd's instruction was not only express direction to leave the truck alone, but also notice to Chalan that Troy did not have authority to direct him to work on the truck.

This conclusion is supported by this Court's statements about the nature of ostensible authority. This Court has explained that ostensible agency is an estoppel that protects innocent third persons relying in good faith and without negligence upon the acts of an agent known to the

principal. *Fed. Land Bank of Omaha v. Sullivan*, 430 N.W.2d 700, 701 (S.D. 1988). Since Robert and Todd directed Troy and Chalan to leave the truck alone, Hattums are not estopped from denying Troy had authority to direct Chalan to work on the truck.

Further, Chalan was not an innocent third person reasonably assuming Troy had authority to direct him to work on the truck. "The third person dealing with the agent . . . must show . . . reasonable diligence and prudence in ascertaining the fact of the agency and *the nature and extent of the agent's authority*." *Dahl*, 429 N.W.2d at 462 (citing 3 Am.Jur.2d *Agency* §§ 80, 83 (1986)). Chalan knew Troy lacked authority.[8] There is *no* admissible evidence to the contrary.

Any ostensible authority Troy had to bind Hattums was terminated by the instruction. "Apparent authority, not otherwise terminated, terminates when the third party has notice of: (a) the termination of the agent's authority[.]" Restatement (Second) of Agency § 125(a); *see also id.* at cmt. a ("Apparent authority terminates when the third person has notice that the agent's authority has terminated[.]"); *id.* at cmt. b ("Apparent authority can exist only as long as the third person, to whom the principal has made a manifestation of authority, continues reasonably to believe that the agent is authorized. He does not have this

[8] The Estate cites Restatement (Second) of Agency § 219(2)(d) to suggest an employer is liable where an agent is aided in accomplishing a tort by the existence of the agency relation. That section is inapplicable here, because Chalan knew Troy had no authority to direct work on the truck.

reasonable belief if he has reason to know that the principal has revoked[.]"). Chalan had notice that Troy did not have authority as to the truck.

These agency principles are in accord with the fellow-servant rule and its exception. Even where an employee has authority over other employees, the employer is not liable for acts of the supervising employee that go beyond the authority conferred. *See* 30 C.J.S. *Employers' Liability* § 235, Westlaw (database updated March 2020) ("Generally, the employer is not liable for acts of an employee authorized to direct, supervise, or manage other employees where such acts are outside the scope of the authority conferred.").

The doctrine of *respondeat superior* is also of no avail to the Estate. It does not supplant the statutory fellow-servant rule. *See* SDCL 60-2-2. Since that rule applies, Hattums are not liable to the Estate. Summary judgment was correctly entered for Hattums.

IV. Strict Liability

The Estate alleges Hattums are strictly liable because welding a fuel tank is an abnormally dangerous activity. In considering such allegations, this Court has looked to the Restatement (Second) of Torts. *See Cashman v. Van Dyke*, 2012 S.D. 43, ¶ 11, 815 N.W.2d 308, 312; *Fleege v. Cimpl*, 305 N.W.2d 409, 414 (S.D. 1981). Restatement (Second) of Torts § 519 provides:

> (1) *One who carries on an abnormally dangerous activity* is subject to liability for harm to the person, land or chattels *of another* resulting from the activity, although he has exercised the utmost care to prevent the harm.
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

(Emphasis added). The rationale for the rule is those who carry on the abnormally dangerous activity should bear the cost of harm from the activity. *See id.* at cmt. d ("[The liability stated in this Section] is founded upon a policy of the law that imposes upon anyone who for his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving against that harm when it does in fact occur."); 57A Am.Jur.2d *Negligence* § 393, Westlaw (database updated Feb. 2020) ("the doctrine of abnormally dangerous activity imposes liability on those who, despite social utility, introduce an extraordinary risk of harm into the community for their own benefit").

Hattums did not carry on or engage in the activity alleged to be abnormally dangerous—the welding of the fuel tank. They:

- were not on the premises when the welding took place; APP: C, ¶¶ 21-23; R: 155-56;
- did not instruct Chalan, Jeff, or Troy to weld any fuel tank; APP: C, ¶ 20; R: 155; and
- did not instruct Chalan, Jeff, or Troy to work on the truck. APP: C, ¶ 19; R: 155.

Chalan and Troy violated the instruction. Jeff described the tank welding as a community effort involving co-employees Chalan, Jeff, and

Troy. APP: C, ¶¶ 2-10, 41-43; R: 152-54, 158. There is no principle of law allowing a person injured as a result of disobeying his employer's instructions to hold his employer strictly liable. The Estate cites no authority for such a proposition. Chalan was carrying on the tank welding, not Hattums.

As set forth in Part III above, the Estate cannot claim Hattums are vicariously liable for any actions of Troy. The fellow-servant rule applies and bars recovery.

Additionally, the Estate's strict liability claim fails because Chalan assumed the risk of injury and was contributorily negligent as explained in Parts VII and VIII below. *See* Restatement (Second) of Torts § 523 ("The plaintiff's assumption of the risk of harm from an abnormally dangerous activity bars his recovery for the harm"); Restatement (Second) of Torts § 524(2) ("The plaintiff's contributory negligence in knowingly and unreasonably subjecting himself to the risk of harm from the activity is a defense to the strict liability.").

The Circuit Court properly entered summary judgment for Hattums on the Estate's strict liability claim.

V. Unsafe Workplace

The Estate also alleges that Hattums failed to provide a safe and secure workplace or proper supervision and training. However, the fellow-servant rule and Chalan's disobedience bar liability. Further,

Hattums had no duty because the danger was obvious, and the injury was not foreseeable to them.

In addressing the unsafe workplace claim, it is important to keep in mind this is not a case where there was a hidden defect in a tool or the premises. Rather, the danger was created by the community effort of Chalan, Jeff, and Troy. APP: C, ¶¶ 1-10; R: 152-54.

A. The fellow-servant rule and Chalan's disobedience bar liability.

To the extent the Estate's unsafe workplace claim relies on the actions of Troy, the fellow-servant rule bars liability.

Further, the Estate may not recover under its unsafe workplace claim because Chalan disobeyed his employer's instruction. Where an employee is injured as the result of violating or disobeying his employer's instructions, the employer is not liable for the employee's injuries. *See Gossett v. Twin Cty. Cable T.V., Inc.*, 594 So.2d 635, 639 (Ala. 1992) (holding employee injured while violating an order of the employer "went outside the sphere of his employment, and [the employer], therefore, was absolved of a duty to provide him a safe workplace at the time of the accident"); *Card v. Wilkins*, 39 A. 676, 677 (N.J. 1898) ("When an employé receives an injury which has been brought about by his willful violation of rules laid down by the employer, and within the knowledge of the employé, he cannot hold the employer liable."); *Hunter Const. Co. v. Watson*, 274 P.2d 374, 377 (Okla. 1953) ("where an employee deliberately

disregards a rule or instruction of his employer thereby placing himself in a place of danger resulting in his injury, . . . the employee is guilty of primary negligence barring his recovery for injuries"); *McMellen v. Union News Co.*, 22 A. 706, 707 (Pa. 1891) (holding that since the employee's death was the result of disobeying his employer's instructions, there was no negligence chargeable to the employer); *Nat'l Hosiery & Yarn Co. v. Napper*, 135 S.W. 780, 783 (Tenn. 1911) ("The law is clear, of course, that, if a servant is injured while engaged in disobeying the orders of his superior, he cannot recover."); *Talkington v. Wash. Veneer Co.*, 112 P. 261, 263 (Wash. 1910) (holding it was error not to give a jury instruction stating that if the jury found that the employee was instructed to get down from a shaft and that he could have gotten down before the machinery started but refused to obey the instruction, then the employee could not recover from the employer); 27 Am.Jur.2d *Employment Relationship* § 285, Westlaw (database updated Feb. 2020) ("if the employer has given the employee warning of a danger or has given positive instructions as to methods of work, and the employee disregards such warning or, in violation of such instructions, attempts to follow his or her own ideas of work, the employee cannot hold the employer liable for injuries resulting therefrom"); Restatement (Second) of Agency § 526 ("a servant harmed by the occurrence of his own willful and unjustified violation of orders and the negligence of the master has no cause of action against his master for such harm."), cmt. a ("A servant hurt

because of a violation of orders may have no cause of action against his master[.]").

The rule is consistent with South Dakota public policy. *See* SDCL 61-6-14 and 61-6-14.1 (prohibiting unemployment compensation benefits to an unemployed person discharged for misconduct, including failure to obey orders, rules, or instructions); SDCL 62-4-37 (prohibiting worker's compensation benefits for injury or death due to the employee's willful misconduct).

It is undisputed that Robert and Todd instructed Chalan to leave alone the truck that the tank came from. APP: C, ¶ 14; R: 154. Chalan disobeyed the instruction, removed the tank, and was injured in the process of assisting with the welding of the tank. APP: C, ¶ 1-10, 13: R: 152-54. Because Chalan disobeyed the instruction, there can be no recovery.

The Estate was unable to cite any authority to the Circuit Court allowing an employee injured as a result of disobeying his employer's instructions to recover from his employer and has cited no such authority to this Court. *See* APP: B; R: 643:13-20; Appellant's Brief. The Court should affirm the entry of summary judgment against the Estate on its unsafe workplace claim.

B. Hattums had no duty to Chalan.

The second reason the Estate cannot recover under a claim of unsafe workplace is because Hattums owed Chalan no duty under the undisputed facts.

"The existence of a duty is a threshold issue in any case of tort liability." *Hagen v. City of Sioux Falls*, 464 N.W.2d 396, 398 (S.D. 1990), *abrogated on other grounds by Tipton v. Town of Tabor*, 538 N.W.2d 783 (S.D. 1995) (citing *Gilbert v. United Nat'l Bank*, 436 N.W.2d 23, 27 (S.D. 1989)). "A duty can be created by statute or common law." *Hendrix v. Schulte*, 2007 S.D. 73, ¶ 7, 736 N.W.2d 845, 847 (citing *Kuehl v. Horner Lumber Co.*, 2004 S.D. 48, 678 N.W.2d 809). "A duty will not spring up at the mere behest of those with grievances real or imagined." *A.M. Farms v. Cty. of Codington*, 2009 S.D. 28, ¶ 7, 765 N.W.2d 550, 553 (citing *Fisher v. Kahler*, 2002 S.D. 30, ¶ 6, 641 N.W.2d 122, 125).

"As a general rule, the existence of a duty is to be determined by the court." *Hendrix*, 2007 S.D. 73 at ¶ 8 (citing *Erickson v. Lavielle*, 368 N.W.2d 624 (S.D. 1985)). "Summary judgment in a negligence case is appropriate when the trial judge resolves the duty question in the defendant's favor." *Id.* (citing *Erickson*, 368 N.W.2d 624).

As to the existence of a duty in the employment context, this Court has stated:

> Employers have a nondelegable duty to provide their employees with reasonably safe places to work. Inherent to this duty is an obligation that employers

> provide employees with proper training and supervision.

Stone v. Von Eye Farms, 2007 S.D. 115, ¶ 9, 741 N.W.2d 767, 770 (internal citation omitted).

The reason this duty is imposed on an employer is to ensure the employee is provided information about dangers the employee is presumed not to have so work may be carried out in reasonable safety. *See, e.g.*, *Ecklund v. Barrick*, 144 N.W.2d 605, 607 (S.D. 1966) (quoting *Stoner v. Eggers*, 92 N.W.2d 528, 530 (S.D. 1958)) ("the purpose of a warning is to supply a party with information which he is presumed not to have"); *see also Platt v. Meier*, 153 N.W.2d 404, 407 (S.D. 1967) (quoting Restatement (Second) of Agency § 492, cmt. f) ("even 'if the master neglectfully or intentionally fails to perform what otherwise would be his duty, a servant who becomes aware of a dangerous condition of employment ordinarily has no cause of action for harm thereby suffered'"); *Ford v. Robinson*, 80 N.W.2d 471, 473 (S.D. 1957) ("The foundation of liability for negligence is knowledge of the peril which subsequently results in injury."); SDCL 60-2-2 (exempting the employer from, in addition to injuries by fellow servants, "losses suffered by the employee in consequence of the *ordinary risks of the business* in which employed") (emphasis added). However, when the employee has the same or more information about the danger than the employer, the rationale for imposing the duty is inapplicable because the employee has

the information necessary to act for his own safety. *See Ford*, 80 N.W2d at 473 ("the plaintiff is not entitled to recover if, at the time of the injury, his knowledge of the danger surpassed that of the defendant"). In those situations, the employer is not liable for any alleged failure to provide a safe workplace. *See Farmer v. Heard*, 844 S.W.2d 425, 427 (Ky. Ct. App. 1992) (referring to an employer's duty to furnish a reasonably safe place to work and explaining that the employer's liability "[r]ests upon the assumption that the employer has a better and more comprehensive knowledge than the employees, and the employer's liability ceases to be applicable where the employee's means of knowledge of the dangers to be incurred is equal to that of the employer").

1. Nonliability for obvious danger

This Court has instructed for decades that an employer is not liable for failure to provide a safe place to work if the danger is obvious. *See Platt*, 153 N.W.2d at 407 ("A master cannot be held liable for failure to furnish a reasonably safe place to work if the condition or so-called danger is so obvious and is before the servant's eyes to such an extent that he must know by the use of ordinary intelligence the possible danger that confronts him."); *see also Jackson v. Van Buskirk*, 424 N.W.2d 148, 149 (S.D. 1988) (same); *Smith v. Smith*, 278 N.W.2d 155, 161 (S.D. 1979) (same); *Bunkers v. Mousel*, 154 N.W.2d 208, 210 (S.D. 1967) (same); *Ecklund*, 144 N.W.2d at 607 (same); *Stoner*, 92 N.W.2d at 530 (same). "[T]he master owes no duty to warn or instruct his servants

of dangers obvious to a person of ordinary intelligence and judgment." *Jackson*, 424 N.W.2d at 149-50 (quoting *Stoner*, 92 N.W.2d at 530). "A danger is considered as within the rule where it ought to have been apparent to the senses of a person of ordinary intelligence, or where it is as easily discernible by the employee as by the employer, or where it is discoverable in the exercise of that reasonable care which persons of ordinary intelligence may be expected to take for their own safety." *Kubik v. Farmers Union Oil Co. of Reliance*, 209 N.W.2d 551, 554-55 (S.D. 1973) (quoting *Starnes v. Stofferahn*, 160 N.W.2d 421, 430 (S.D. 1968)).

In other words, the rule of nonliability applies to a danger when: (1) it is apparent; (2) it is as discernible to the employee as to the employer; or (3) it is discoverable in the exercise of reasonable care expected to be taken by the employee for his own safety. If the danger comes within *any* of the categories, the employer is not liable. Here, the danger of welding the fuel tank fits within *each* category.

The Circuit Court correctly determined the danger was obvious and the rule of nonliability applies.[9] APP: B; R: 671-74.

[9] In addition to finding the danger was discernable to the employees and they had constructive knowledge of it, the Circuit Court also considered that the parties assumed for purposes of summary judgment the fuel tank welding was an abnormally dangerous activity. Noting the factors necessary for determining whether an activity is abnormally dangerous, the Circuit Court determined the danger must necessarily also be apparent. APP: B; R: 671-74.

i. The danger was apparent.

Welding a fuel tank is dangerous due to the risk of explosion. APP: C, ¶ 39; R: 157. At the time of the accident, Chalan was 22 years old. *See* R: 250, ¶ 3. He was a man of ordinary intelligence. APP: C, ¶ 46; R: 158. Chalan knew welding a fuel tank pumped full of exhaust was going to take place. APP: C, ¶¶ 2-10; R: 152-54. A man of ordinary intelligence cannot claim the danger posed by this activity was not apparent to his senses.

Troy's alleged representations that the tank welding method was textbook and had been done before cannot be relied upon to deny the obvious. Even if an obviously dangerous activity has been done without incident in the past, it does not make the danger posed by the activity nonobvious.[10]

The Estate contends that because the employees rinsed out the fuel tank, the danger was not obvious. The opposite is true. Rinsing of the tank demonstrated consciousness of danger. The argument also ignores that the fuel tank was subsequently pumped full of exhaust. The Estate's argument is contrary to the position taken by its counsel when arguing punitive damages: "And when you put fire to gas even a layperson who doesn't have any experience can conclude that there could be an explosion or fire in a case like this." APP: B; R: 642:11-13.

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[10] For example, a person may successfully cross a street on multiple occasions without looking both ways. But that does not make the danger posed by such conduct nonobvious.

Because the danger posed by pumping exhaust into a fuel tank and introducing a flame by welding was apparent, the rule of nonliability applies. Hattums owed no duty to Chalan. The Court should uphold the entry of summary judgment for Hattums on the Estate's unsafe workplace claim.

ii. The danger was as discernible to the employees as to the employer.

Chalan had more information about the danger at the farm that day than Hattums. Hattums had *no* knowledge of the danger. They did not know welding a fuel tank was going to take place, did not instruct anyone to weld a fuel tank, and were not on the premises while the fuel tank was removed from the truck and welded. APP: C, ¶¶ 20-23, 36-38; R: 155-57. Chalan knew the tank welding was going to take place and assisted with it. APP: C, ¶¶ 1-10; R: 152-54. Since the danger from pumping exhaust into a fuel tank and introducing a flame to it by welding was at least as discernable to Chalan as to Hattums, the rule of nonliability apples. The case for nonliability as a matter of law is even stronger here than in *Jackson*, 424 N.W.2d 148 and *Stoner*, 92 N.W.2d 528 where this Court upheld directed verdicts for employers despite evidence the employers knew about the obvious dangers. The Court should uphold entry of summary judgment for Hattums on the Estate's unsafe workplace claim.

iii. The danger was discoverable in the exercise of ordinary care.

The danger posed by pumping exhaust into a fuel tank and introducing a flame by welding was "discoverable in the exercise of that reasonable care which persons of ordinary intelligence may be expected to take for their own safety." *See Kubik*, 209 N.W.2d at 554-55. It is undisputed that Chalan knew the welding of the fuel tank being pumped full of exhaust was taking place. APP: C, ¶¶ 1-10; R: 152-54. This is not a case where there was a hidden defect in a tool or the premises. Since the danger was discovered by Chalan, the rule of nonliability applies.

The rule of nonliability extends to any claimed duty to provide proper training and supervision. Those duties are part of the general duty to provide a safe place to work. *See Stone*, 2007 S.D. 115 at ¶ 9. To hold Hattums had any duty, whether to provide a safe workplace, to train, or to supervise, where they did not instruct anyone to weld a fuel tank or to do any work on the truck, and instructed Chalan and Troy to leave the truck alone, would be tantamount to making them an insurer of the safety of their employees. However, this Court has stated, "The employer is not an insurer of the safety of the tools or places of work but is liable only for negligence." *Smith*, 278 N.W.2d at 160.

Further, "The master's liability for unsafe working conditions does not extend to temporary dangerous conditions of which the conduct of fellow servants in the performance of the operative details of the work is the sole responsible cause." *Platt*, 153 N.W.2d at 408 (quoting

Restatement (Second) of Agency § 500). That is the case here. Welding of the fuel tank was a temporary dangerous condition created by the community effort of employees Chalan, Jeff, and Troy. APP: C, ¶¶ 1-10; R: 152-54.

The Court should uphold summary judgment for Hattums on the Estate's unsafe workplace claim.

2. The risk of harm was not reasonably foreseeable to Hattums.

Another reason the Estate may not recover is the risk of harm was not reasonably foreseeable to Hattums.

Even where a duty exists generally, a court must go on to examine the foreseeability of the risk of harm to determine if the scope of the duty extends to the specific facts. "The existence, scope, and range of a duty . . . depend upon the foreseeability of the risk of harm." *Zerfas v. AMCO Ins. Co.*, 2015 S.D. 99, ¶ 12, 873 N.W.2d 65, 70 (citing *Johnson v. Hayman & Assocs., Inc.*, 2015 S.D. 63, ¶ 13, 867 N.W.2d 698, 702). "'[F]oreseeability in defining the boundaries of a duty is always a question of law' and is examined at the time the act or omission occurred." *Id.* at ¶ 14 (quoting *Johnson*, 2015 S.D. 63, ¶ 13). In examining foreseeability, this Court has instructed that "[n]o one is required to guard against or take measures to avert that which a reasonable person under the circumstances would not anticipate as likely to happen." *Id.* at ¶ 16 (quoting *Wildeboer v. S.D. Junior Chamber of Commerce, Inc.*, 1997 S.D.

33, ¶ 18, 661 N.W.2d 666, 670). "The law requires 'reasonable foresight, rather than prophetic vision[.]'" *Janis v. Nash Finch Co.*, 2010 S.D. 27, ¶ 23, 780 N.W.2d 497, 505 (quoting *Peterson v. Spink Elec. Coop., Inc.*, 1998 S.D. 60, ¶ 19, 578 N.W2d 589, 593).

Reasonable people in the position of Hattums would not anticipate welding of a fuel tank was likely to happen, so they had no duty to guard against or take measures to avert it. It is undisputed that:

- Robert and Todd told Chalan and Troy to leave the truck alone; APP: C, ¶ 14; R: 154;
- Hattums did not instruct Chalan, Jeff, or Troy to work on the truck; APP: C, ¶ 19; R: 155;
- Hattums did not instruct anyone to weld a fuel tank; APP: C, ¶ 20; R: 155;
- Chalan, Jeff, and Troy did not remove the fuel tank and weld it until Hattums were away from the premises; APP: C, ¶¶ 21-23; R: 155-56;
- Todd and Chelsea never welded a fuel tank, and Robert had not welded one for over forty years, long before Chalan and Troy were born and before Jeff worked for Hattums; APP: C, ¶¶ 24-26; R: 156, 284;
- Hattums, Jeff, and employee Ben Reinert were unaware of any welding of a fuel tank taking place at Hattums' farm; APP: C, ¶¶ 27-32; R: 156-57;
- Hattums had no knowledge that Chalan or Troy had ever welded a fuel tank; APP: C, ¶¶ 33-35; R: 157; and
- Hattums did not know anyone was going to weld a fuel tank on their farm; APP: C, ¶¶ 36-38; R: 257.

Even Jeff admitted he does not have knowledge that Robert and Todd knew the welding was going to happen. R: 319.

As a matter of law, the incident was not foreseeable to Hattums. Therefore, they had no duty, and the Court should uphold summary judgment in favor of Hattums on the Estate's unsafe workplace claim.

VI. Assumption of the Risk

The Estate may not recover for the further reason that Chalan assumed the risk of injury as a matter of law.

"Assumption of the risk requires 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.'" *Jensen v. Menard, Inc.*, 2018 S.D. 11, ¶ 14, 907 N.W.2d 816, 820 (quoting *Duda v. Phatty McGees, Inc.*, 2008 S.D. 115, ¶ 13, 758 N.W.2d 754, 758). "Questions of negligence, contributory negligence, and assumption of the risk are for the jury in all but the rarest of cases so long as there is evidence to support the issues." *Id.* (quoting *Stensland v. Harding Cty.*, 2015 S.D. 91, ¶ 14, 872 N.W.2d 92, 96-97). As found by the Circuit Court, this is one of the rare cases where the undisputed facts establish assumption of the risk as a matter of law. APP: B; R: 674:11-25.

As to the first two elements, a plaintiff must subjectively know of and appreciate the danger. *Schott v. S.D. Wheat Growers Ass'n*, 2017 S.D. 91, ¶ 13, 906 N.W.2d 359, 362.

Chalan knew the facts that created the danger. He was involved in the community effort to fix a leak in the fuel tank. APP: C, ¶¶ 1-10; R:

152-54. Chalan was either directly involved in hooking up the hose to the exhaust or observed it, and stood next to Troy as Troy started to weld the fuel tank. APP: C, ¶¶ 7, 10; R: 153-54.

It is undisputed that welding a fuel tank is dangerous due to the risk of explosion. APP: C, ¶ 39; R: 157. Chalan's actions demonstrate that he understood the risk. Chalan assisted in dumping the fuel out of the tank and then rinsing it with water. APP: C, ¶ 4; R: 153. The only reasonable inference from these facts is that Chalan understood the danger posed by welding on a fuel tank. Therefore, Chalan knew and understood the danger.

In addition to Chalan's subjective knowledge and understanding, he had constructive knowledge and understanding. This Court has explained:

> On the other hand, the knowledge and appreciation-of-danger elements are not purely subjective questions in constructive knowledge cases. A plaintiff's own testimony as to what he knew, understood, or appreciated, is not necessarily conclusive. *There are some risks as to which no adult will be believed if he says that he did not know or understand them.* Typical examples of this kind of risk include such things as an adult's knowledge that one can burn from fire, drown in water, or fall from heights. Ultimately, whether the knowledge at issue is actual or constructive, knowledge of the risk and appreciation of its magnitude and unreasonable character are normally questions of fact for the jury. They may be resolved by the court only where reasonable people could not differ on the questions whether the plaintiff assumed the risk.

Schott, 2017 S.D. 91 at ¶ 14. (internal citations and quotations omitted) (emphasis added).

"Plaintiffs are charged with constructive knowledge of some risks that are so plainly observable that the injured party must be presumed to have had actual knowledge and appreciation of the risk." *Id*. at ¶ 17 (citing *Bartlett v. Gregg*, 92 N.W.2d 654, 657 (S.D. 1958)). This Court has instructed:

> In testing whether an individual assumed the risk, constructive knowledge may only be imputed for dangers recognizable in the exercise of ordinary common sense and prudence. Such a danger must be obvious, and a person has constructive knowledge of a risk only if it is plainly observable so that anyone of competent faculties is charged with knowledge of it[.]

Jensen, 2018 S.D. 11 at ¶ 22 (internal quotations and citations omitted).

Chalan knew welding was taking place on a fuel tank being pumped full of exhaust. *See* APP: C, ¶¶ 1-10; R: 152-54. Reasonable people cannot differ that the danger posed by that activity was "recognizable in the exercise of ordinary common sense and prudence." *See Jensen*, 2018 S.D. 11 at ¶ 22. Under the undisputed facts, the danger was "so plainly observable" that Chalan "must be presumed to have had actual knowledge and appreciation of the risk." *Schott*, 2017 S.D 91 at ¶ 17.

As to the final element of assumption of the risk, this Court has stated, "Whether a plaintiff has voluntarily accepted a risk depends on the existence of the 'reasonable alternative course of conduct' open to the

plaintiff to avert harm to himself." *Pettry v. Rapid City Area Sch. Dist.*, 2001 S.D. 88, ¶ 9, 630 N.W.2d 705, 708. A "reasonable alternative" means "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.

Chalan voluntarily accepted the risk. He was not instructed by Hattums to work on the truck that the fuel tank came from, let alone to remove the tank, pump it full of exhaust, and weld on it. APP: C, ¶¶ 19-20; R: 155. No one made him stay in the shop during the welding. APP: C, ¶ 12; R: 154.

Chalan had time to make an intelligent choice. He had time to leave the shop before the welding began. *See* APP: C, ¶¶ 8-10; R: 154-54, 315-16.

Reasonable people cannot differ that each element of the defense of assumption of the risk is met under the undisputed facts. Therefore, summary judgment should be upheld for Hattums on all of the Estate's claims.

VII. Contributory Negligence

Where a plaintiff's contributory negligence is more than slight compared to the defendant's negligence, the plaintiff is barred from recovery. SDCL 20-9-2.

The undisputed facts establish Chalan was negligent in taking part in welding the fuel tank. APP: C, ¶¶ 1-10; R: 152-54. Hattums did not

instruct Chalan to weld the fuel tank and told him to leave the truck alone. APP: C, ¶¶ 14, 19-20; R: 154-55. No one required him to stay in the shop while the welding took place, but he did. APP: C, ¶ 12; R: 154.

Whether Chalan's contributory negligence was more than slight may be decided as a matter of law. *See Wood v. City of Crooks*, 1997 S.D. 20, ¶ 3, 559 N.W.2d 558, 560; *Bunkers*, 154 N.W.2d at 211. This Court has observed that "one may not unnecessarily place and maintain oneself in such a dangerous position and then require others who failed to discover his peril to respond in damages." *First Nw. Trust Co. of S.D. for Schaub v. Schnable*, 334 N.W.2d 16, 19-20 (S.D. 1983) (quoting *Haase v. Willers Truck Serv.*, 34 N.W.2d 313, 317 (S.D. 1948)). The work on the fuel tank was a community effort among Chalan, Jeff, and Troy. APP: C, ¶¶ 1-10; R: 152-54. Chalan knew welding of the fuel tank as it was being pumped full of exhaust was taking place and remained in the shop. By contrast, Hattums neither knew the activity was taking place nor instructed that it take place. APP: C, ¶¶ 20-23, 36-38; R: 155-57. Chalan placed and maintained himself in a dangerous position and may not require Hattums, who did not know of the danger, to respond in damages.

Reasonable minds cannot differ that the negligence of Chalan was greater than slight as compared to any negligence alleged against Hattums. For this additional reason, summary judgment should be upheld in favor of Hattums as to all Estate claims.

VIII. Punitive Damages

As shown above, there was no breach of an obligation by Hattums to Chalan. Therefore, the Estate's punitive damages claim fails.

The claim also fails for the absence of malice, which is an essential element of the claim. *Smizer v. Drey*, 2016 S.D. 3, ¶ 20, 873 N.W.2d 697, 703. The Estate has neither pled malice nor identified facts establishing malice. *See* R: 3-7, 429-30. The Estate has not met its burden in responding to the motion for summary judgment. *See Wulf*, 2003 S.D. 105 at ¶ 18. The Court should uphold entry of summary judgment for Hattums on the Estate's punitive damages claim.

CONCLUSION

It is undisputed that Robert and Todd told Chalan and Troy to leave the truck alone. Troy had no authority to direct Chalan otherwise. Chalan violated Hattums' instruction. That violation and the fellow-servant rule bar liability on the part of Hattums.

Hattums did not participate in welding the fuel tank and did not instruct that it take place. They are not vicariously liable for any actions of Troy. Hattums were not carrying on an abnormally dangerous activity and are not liable under the Estate's strict liability claim.

Hattums did not have any duty to Chalan. Chalan knew welding a fuel tank pumped full of exhaust was taking place. The danger was obvious. By contrast, it was not foreseeable to Hattums that welding was going to take place. Chalan assumed the risk of injury from the welding

of the fuel tank and was contributorily negligent greater than slight compared to any negligence alleged against Hattums.

There was no breach of an obligation by Hattums to Chalan, and there is no evidence of malice. Therefore, the Estate's punitive damages claim fails as a matter of law.

For the foregoing reasons, the Circuit Court's Order on Defendants' Motion for Summary Judgment and the resulting Judgment for Hattums should be affirmed.

Dated this 26th day of March, 2021.

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ORAL ARGUMENT IS RESPECTFULLY REQUESTED

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL §15-26A-66(b)(4), I certify that Appellees' Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 49,426 characters from the Statement of the Case through the signature block of the Conclusion. I have relied on the character count of our processing system used to prepare this Brief. The original Appellees' Brief and all copies are in compliance with this rule.

BEARDSLEY, JENSEN & LEE,
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CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of March, 2021, I served a true and correct copy of ***Appellees' Brief*** upon the following person by the following means:

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I further certify that on the 26th day of March, 2021, I emailed the foregoing ***Appellees' Brief*** and sent two copies of the original by U.S. Mail, first-class postage prepaid to:

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IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 29496

TALYN SHEARD, a/k/a TALYN O'CONNER, as
Personal Representative for the Estate of Chalan Hedman,
Appellants,

And JEFFREY PAUL HOLSHOUSER,
Plaintiff,

vs.

ROBERT HATTUM, TODD HATTUM, and CHELSEA HATTUM,
jointly and severally, DBA HATTUM FAMILY FARMS,
Appellees.

APPELLEES' BRIEF

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE MARGO NORTHRUP
Circuit Court Judge

Notice of Appeal Filed December 18, 2020

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PRELIMINARY STATEMENT

Appellees, Robert Hattum, Todd Hattum, and Chelsea Hattum, D/B/A Hattum Family Farms, will be referred to as "Hattums." Appellant, Talyn Sheard, a/k/a Talyn O'Conner, as Personal Representative for the Estate of Chalan Hedman, will be referred to as "the Estate." Plaintiff, Jeffrey Holshouser, will be referred to as "Jeff." Reference to the record as in the Clerk's Alphabetical Index will be "R" followed by the applicable page; documents in the Appendix will be referred to by "APP" followed by the appropriate letter designation.

JURISDICTIONAL STATEMENT

The Estate appealed from the June 25, 2020, Order on Defendants' Motion for Summary Judgment granting summary judgment in favor of Hattums and from the November 12, 2020, Judgment in favor of Hattums. APP: E; R: 752-53. The Notice of Entry of Judgment was served on November 20, 2020. R: 754-55. Appellant's Notice of Appeal was filed on December 18, 2020. R: 761-62. This Court has jurisdiction pursuant to SDCL 15-26A-3.

STATEMENT OF THE ISSUES

I. Whether the Circuit Court correctly granted summary judgment for Hattums on the Estate's strict liability claim?

The Circuit Court held under the undisputed facts that Hattums did not engage in the abnormally dangerous activity and the fellow-servant rule barred liability.

Legal Authority:

- Restatement (Second) of Torts § 519
- SDCL 60-2-2
- *Dahl v. Sittner*, 429 N.W.2d 458 (S.D. 1988)
- SDCL 59-3-3

II. Whether the Circuit Court correctly granted summary judgment for Hattums on the Estate's unsafe workplace claim?

The Circuit Court held under the undisputed facts that Hattums were not liable to the Estate under the rule of nonliability for obvious dangers, Hattums had no duty because welding of the fuel tank was not foreseeable to them, and Chalan Hedman assumed the risk.

Legal Authority:

- *Platt v. Meier*, 153 N.W.2d 404 (S.D. 1967)
- *Jackson v. Van Buskirk*, 424 N.W.2d 148 (S.D. 1988)
- *Zerfas v. AMCO Ins. Co.*, 2015 S.D. 99, 873 N.W.2d 65
- *Schott v. S.D. Wheat Growers Ass'n*, 2017 S.D. 91, 906 N.W.2d 359

III. Whether the Circuit Court correctly granted summary judgment on the Estate's punitive damages claim?

The Circuit Court held under the undisputed facts there is no evidence of malice or willful or wanton conduct to support a claim for punitive damages.

Legal Authority:

- *Smizer v. Drey*, 2016 S.D. 3, 873 N.W.2d 697

STATEMENT OF THE CASE

The Estate alleges claims of strict liability, unsafe workplace, and punitive damages in connection with the death of Chalan Hedman resulting from an explosion during welding of a fuel tank removed from a truck.[1] Hattums moved for summary judgment. R: 110. The Honorable Margo Northrup granted the motion as to each of the Estate's claims and on June 25, 2020, entered a written order incorporating the oral decision. APP: A, B; R: 667-77, 679. Judgment was entered in favor of Hattums on all claims on November 20, 2020. APP: E; R: 752-53.

Robert and Todd Hattum instructed Chalan Hedman and Troy Hattum to leave the truck alone. APP: C, ¶¶ 14; R: 154. Hattums did not instruct anyone to work on the truck or to weld its fuel tank. APP: C, ¶¶ 19-20; R: 155. The danger posed by running exhaust into a fuel tank and introducing flame by welding was obvious to men of ordinary intelligence. Thus, the Court should affirm the Circuit Court's Order on Defendants' Motion for Summary Judgment and the resulting Judgment for Hattums.

STATEMENT OF THE FACTS

On August 8, 2016, Chalan Hedman and Jeff Holshouser received injuries when a fuel tank exploded while being welded in Hattums' shop

[1] Plaintiff Holshouser later sued alleging the same claims. The actions were consolidated. R: 69-70. The Circuit Court entered summary judgment in favor of Hattums as to all of Holshouser's claims and entered judgment for Hattums. APP: A, B, E; R: 667-77, 679, 738-747. Holshouser did not appeal.

("the accident"). APP: C, ¶ 1; R: 152. Troy Hattum, Robert Hattum's grandson and Todd and Chelsea Hattum's son, was also injured in the explosion. Chalan and Troy died as a result of their burns.

Chalan, Jeff, and Troy were employees of Hattums. APP: C, ¶¶ 41-43; R: 158. Chalan and Troy were buddies. R: 342. Chalan was close with the Hattum family, even living in their home for a period of time. *Id.* Chalan was engaged to Taylor Hattum at the time of the accident. R: 169, ¶ 1. Taylor is Robert's granddaughter and Todd and Chelsea's daughter. Talyn Sheard, biological mother of Chalan's child, brought this lawsuit on behalf of the Estate.

Welding the fuel tank was a community effort by Chalan, Troy, and Jeff to fix a leak in the tank. APP: C, ¶ 2; R: 152. Chalan and Jeff removed the fuel tank from a farm truck. APP: C, ¶ 3; R: 153. Chalan, Troy, and Jeff dumped out the fuel and rinsed the tank with water. APP: C, ¶ 4; R: 153. They located a split in the tank. APP: C, ¶ 5; R: 153.

Chalan or Troy parked an ATV in the doorway of the shop and closed the overhead door part way, resting it on the seat of the ATV. APP: C, ¶ 6; R: 153. Chalan or Troy or both hooked up a hose from the exhaust on the ATV and placed the other end inside the fuel tank. APP: C, ¶ 7; R: 153. While the ATV was running with exhaust going through the hose into the fuel tank, Jeff talked with Chalan and Troy. APP: C, ¶ 8; R: 153.

After the talk, Jeff stood at a bench in the shop straightening brackets that came off the truck when the tank was removed. APP: C, ¶ 9; R: 153-54. At the same time, Chalan held a piece of carboard as a wind block and stood next to Troy while Troy welded the fuel tank. APP: C, ¶ 10; R: 154. No one made Chalan stay in the shop. APP: C, ¶ 12; R: 154. After the welding began, there was an explosion. APP: C, ¶ 13; R: 154.

Robert and Todd had instructed Chalan and Troy to leave the truck alone. APP: C, ¶ 14; R: 154. Robert had also instructed Chalan to use a different truck for hauling silage. APP: C, ¶ 15; R: 154. This other truck Chalan was instructed to use did not have air conditioning, while the truck the fuel tank came from did. APP: C, ¶¶ 16-17; R: 154-55.

On the morning of the accident, Chalan told his fiancé, Taylor Hattum, he was not going to use a truck that did not have air conditioning. APP: C, ¶ 18; R: 155. Talyn Sheard says Chalan was strong-willed and stubborn. R: 347.

Neither Robert, nor Todd, nor Chelsea instructed Chalan, Jeff, or Troy to work on the truck. APP: C, ¶ 19; R: 155. Neither Robert, nor Todd, nor Chelsea instructed anyone to weld a fuel tank. APP: C, ¶ 20; R: 155. While the fuel tank was removed from the truck and welded, Robert, Todd, and Chelsea were not on the premises. APP: C, ¶¶ 21-23; R: 155-56.

It had been over forty years since Robert welded a fuel tank; he did not weld a fuel tank during Chalan's or Troy's lifetimes. APP: C, ¶ 24; R: 156. Todd and Chelsea have never welded a fuel tank. APP: C, ¶¶ 25-26; R: 156. Since the accident, Hattums learned that while Chalan was growing up on his family's farm he observed his father, Steve Hedman, weld fuel tanks while exhaust was pumped into the tanks from a motor vehicle. R: 171, ¶ 2.

Robert was unaware of any welding of a fuel tank at Hattums' farm the prior forty years. APP: C, ¶ 27; R: 156. Todd, Chelsea, and Jeff were unaware of any such welding. APP: C, ¶¶ 28-30; R: 156. Ben Reinert, who worked at Hattums' farm from 2006 through the date of the accident, was unaware of any such welding. APP: C, ¶¶ 31-32; R: 156-57.

Prior to the accident, Robert, Todd, and Chelsea had no knowledge that Chalan or Troy ever welded a fuel tank. APP: C, ¶¶ 33-35; R: 157. Robert, Todd, and Chelsea did not know that anyone was going to weld a fuel tank at their farm. APP: C, ¶¶ 36-38; R: 157.

Welding a fuel tank is dangerous due to the risk of explosion. APP: C, ¶ 39; R: 157. Prior to the accident, Jeff understood that danger. APP: C, ¶ 40; R: 157. Chalan was a man of ordinary intelligence. APP: C, ¶ 46; R: 158.

As to the relationship between Hattums' employees, neither Robert, nor Todd, nor Chelsea placed Troy in a supervisory position over Chalan

or Jeff. APP: C, ¶ 44; R: 158. Neither Robert, nor Todd, nor Chelsea ever told anyone that Troy was anyone's boss or that he was in charge of other employees. APP: C, ¶ 45; R: 158.

ARGUMENT AND AUTHORITIES

I. Legal Standard

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material facts and that the moving party is entitled to a judgment as a matter of law[.]" SDCL 15-6-56(c). "While the moving party has the burden of showing there are no genuine issues of material fact, the non-moving party cannot merely rest on the pleading, but must present specific facts . . . showing the existence of genuine issues of material fact." *Wulf v. Senst*, 2003 S.D. 105, ¶ 18, 669 N.W.2d 135, 141-42 (citing *State Farm Mut. Auto. Ins. Co. v. Ragatz*, 1997 S.D. 123, 571 N.W.2d 155). "Speculation and innuendo, however, are not enough to raise a genuine issue of material fact." *Schwaiger v. Avera Queen of Peace Health Servs.*, 2006 S.D. 44, ¶ 13, 714 N.W.2d 874, 880.

II. No Genuine Dispute of Material Fact

The Estate asserts there is a dispute of fact as to whether Robert and Todd instructed Chalan and Troy to leave the truck alone. If that instruction stands undisputed—it does—all of the Estate's arguments to

defeat summary judgment fail. *See* APP: B; R: 621:9-14 (counsel conceding summary judgment rises or falls on that instruction).

Robert testified he told Chalan and Troy to leave the truck alone. R: 328. He instructed Chalan to use a different truck for hauling silage. *Id*. Todd testified he also told Chalan and Troy to leave the truck alone while the three of them were together a couple of days before the accident. R: 340. There is *no* evidence contrary to this testimony. *See* APP: B; R: 621:21-622:4 (counsel conceding, "I can't contradict those statements"). This key fact—Robert and Todd instructed Chalan and Troy to leave the truck alone—will be referred to as "the instruction."

Given this testimony, the Estate attempted to create an issue of material fact by asserting that Robert's and Todd's credibility is at issue. R: 424, ¶ 14. As the Circuit Court determined, the assertion has no basis factually or legally.[2] APP: B; R: 676:4-17.

The Estate claims contradictions in what Robert and Todd told Troy and Chalan versus what they told Jeff. However, that Robert and Todd did not tell *Jeff* to leave the truck alone or not to weld the tank does not contradict Robert's and Todd's testimony that they told *Chalan* (who usually operated the truck) and *Troy* to leave the truck alone.

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[2] The futility of the Estate's attempt to raise a dispute of material fact has led it to misstate the record. The Estate claims Robert testified he is not a welder. Appellant's Brief, p. 25. However, that was a statement of the Estate's counsel, not of Robert. R: 562. When this misstatement was made to the trial court, Hattums pointed out the error. APP: B, D; R: 541 at ¶ 24, 654:21-655:2. Yet, it was inexplicably repeated to this Court.

Likewise, that Robert and Todd knew the tank was leaking but did not talk to Chalan, Jeff, or Troy about the leak does not contradict Robert's and Todd's testimony that they instructed Chalan and Troy to leave the truck alone.

It was known that the tank had a leak. Chalan usually operated the truck and had used a bar of soap on the leak as a temporary fix in the past. R: 325:20-326:13, 565. Todd explained he told Chalan and Troy to leave the truck alone because another truck was ready for hauling silage, other preparations were needed for the silage harvest, and he did not want time wasted on the broken-down truck. R: 336-37, 566. Silage harvesting was to begin soon. R: 563. Another truck was ready for Chalan to use, and he was instructed to use it. R: 328, 336-37, 566. There was no reason to specifically discuss the leaking tank or repair with Chalan, Troy, or Jeff.[3]

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[3] The Estate's attempt to establish a contradiction regarding a replacement tank for the truck is likewise meritless. Robert and Todd intended to get a replacement tank. R: 324:3-11, 561, 565. During his deposition in March of 2019, Robert testified Todd had found a replacement tank and he was "pretty sure" but "not positive" it had been purchased at the time of the accident. R: 561. Todd testified:

> Q: Now was there actually another tank that had been ordered for that truck?
>
> A: I knew we were going to get one. I hadn't actually ordered it.

R: 565. This testimony is not contradictory and has no bearing on the instruction.

The Estate's argument that the instruction was not an instruction to not fix or weld the tank is a strawman. Hattums do not claim they told anyone not to fix or weld the tank. Rather, the undisputed facts establish Robert and Todd instructed Chalan and Troy to leave the truck alone. APP: C, ¶ 14; R: 154. That instruction is broad and encompasses *any* activity with the truck, whether fixing or operating it.[4] It is impossible to leave the truck alone but at the same time take off a component part and weld on it.

The Estate also engages in speculation and insinuation using Robert's testimony that he was taught by his father to weld a fuel tank using exhaust from a vehicle. The Estate relies upon a similar welding method used on the day of the accident to how Robert was taught forty-plus years ago to speculate that Robert and Todd instructed Troy in the method of welding used at the time of the accident. Yet, the Estate cites no evidence that Robert or Todd instructed Troy in this method. All evidence is to the contrary.

Even if it could be argued that there is a reasonable inference Robert told Troy about the method of welding a fuel tank using exhaust, which Hattums deny, such an inference standing alone is immaterial. So, the Estate attempts to take that inference and further speculate that

[4] An instruction to leave something alone is common parlance and of obvious meaning. When a mother instructs her child, "leave the cookies alone," there is no question that the instruction broadly includes not to eat, take, touch, or lick the frosting off the cookies.

Robert or Todd either instructed Troy to weld the tank or did not tell Troy and Chalan to leave the truck alone. Either way, these inferences are unreasonable and fail as a matter of law to raise a genuine issue of material fact.

To raise a genuine issue of material fact, an inference from the facts must be *reasonable*. *See Estate of Johnson by & through Johnson v. Weber*, 2017 S.D. 36, ¶¶ 29-30, 898 N.W.2d 718, 730 (noting all reasonable inferences from the facts must be construed in favor of the non-moving party but finding the asserted inference at issue unreasonable); *see also Rubinovitz v. Rogato*, 60 F.3d 906, 911 (1st Cir. 1995) (for an inference to be reasonable it "must flow rationally from the underlying facts; that is, a suggested inference must ascend to what common sense and human experience indicates is an acceptable level of probability" rather than resting on a "tenuous insinuation"); *Parrillo v. Com. Union Ins. Co.*, 85 F.3d 1245, 1250 (7th Cir. 1996) ("In deciding a case on summary judgment, the court is not required to draw every possible inference in favor of the non-movant, only all *reasonable* inferences.") (emphasis original); *Blackston v. Shook & Fletcher Insulation Co.*, 764 F.2d 1480, 1482 (11th Cir. 1985) ("an inference based on speculation and conjecture is not reasonable").

It is not reasonable to further infer from an inference—that Robert told Troy about welding a fuel tank using exhaust forty plus years ago—that Robert or Todd therefore either instructed Troy to weld the tank or

did not tell Chalan and Troy to leave the truck alone.[5] This is impermissible conjecture and speculation. An inference may not be stacked upon another inference to create a question of fact. *See Impro Products, Inc. v. Herrick*, 715 F.2d 1267, 1272 (8th Cir. 1983) (for purposes of summary judgment "an inference which a jury is entitled to draw must be based upon proven facts and not upon other inferences").

The Estate also implies Hattums knew welding took place on the tank the prior year. However, nothing in the record supports the assertion.

The Estate relies on the testimony of Jeff who testified that on the day of the accident Troy and Chalan told him they welded the tank the year before.[6] R: 304. Even assuming for purposes of summary judgment this was true, it does not establish Hattums knew of any such welding. Robert, Todd, and Chelsea have sworn they were unaware of any tank welding taking place on their farm during Chalan's or Troy's

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[5] The Estate's counsel essentially conceded the unreasonableness of such an inference, stating, "Now, I know nobody told them to go out and weld this fuel tank, but the evidence is this fuel tank has been welded before." R: 641:22-24.

[6] Much of Jeff's testimony was from an affidavit submitted after his deposition and the motion for summary judgment. The affidavit is filled with conclusory statements for which Jeff lacks foundation and impermissibly seeks to change his deposition testimony. In an effort to be concise, Hattums refer the Court to Appendix D, which was submitted as Exhibit A with Hattums' reply in support of its motion for summary judgment before the trial court, for their objections to Jeff's affidavit. Appendix D also includes Hattums' reply to the Estate's response to Hattums' statement of undisputed material facts and Hattums' response to the Estate's statement of disputed facts. R: 536-53.

lifetimes; they had no knowledge Troy or Chalan ever welded a fuel tank. R: 160-61 at ¶¶ 5-6, 163-64 at ¶¶ 4-6, 166-67 at ¶¶ 4-5, 326, 335, 337. Ten-year employee Reinert was unaware of any welding of a fuel tank at Hattums' farm. R: 156-57, ¶¶ 31-32. Even Jeff admitted that prior to the date of the accident he was unaware of any welding of a fuel tank taking place at Hattums' farm:

> Q: Is that the first you had ever heard of any previous welding on that tank?
>
> A: Yes.
>
> Q: You didn't see it the year before?
>
> A: No.

R: 305; *see also* R: 279-80, 282.

Further, Robert testified that at the time of the accident it had been over forty years since he welded a fuel tank, so he did not weld a fuel tank during Chalan's or Troy's lifetimes. R: 163, ¶ 4. Todd and Chelsea have sworn that they have never welded a fuel tank. R: 160 at ¶ 4, 334, 337-38. Likewise, Robert, Todd, and Chelsea have sworn that prior to the accident they did not know anyone was going to weld a fuel tank at their farm. R: 160 at ¶ 7, 164 at ¶ 7, 167 at ¶ 6, 327. Robert directly testified:

> Q: So, Mr. Hattum, did you have any idea that Troy and Chalan were going to weld that tank?
>
> A: No. It wouldn't have been allowed.

R: 327. There is *no* evidence to the contrary.[7]

Hattums had no reason to anticipate anyone would weld a fuel tank. Robert and Todd told Chalan and Troy to leave the truck alone. APP: C, ¶ 14; R: 154. Robert instructed Chalan to use a different truck. APP: C, ¶ 15; R: 154. Robert, Todd, and Chelsea have each sworn:

- They did not instruct Chalan, Jeff, or Troy to work on the truck; R: 160 at ¶ 1, 328, 337, 339-40;
- They did not instruct anyone to weld a fuel tank; R: 160 at ¶ 2, 163 at ¶ 3; 166 at ¶ 3; and
- They were not on the premises when the tank was removed and welded. R: 160 at ¶ 3, 324-25, 338.

Jeff's post-deposition affidavit attempts to change his testimony from Troy *and Chalan* conducting the purported prior welding on the tank to Troy and "the Hattums." *See* R: 362, ¶¶ 18-19. This should be rejected.

Jeff has no basis to testify that "the Hattums" conducted prior welding on the tank. He testified that prior to the date of the accident he was unaware of any welding on a fuel tank at Hattums' farm. R: 279-80, 282, 305. Nowhere does Jeff assert that Troy, Chalan, or anyone else told him that any other Hattum was involved in prior tank welding. So, Jeff's conclusory statement in his belated affidavit that "the Hattums" conducted prior welding on the tank must be rejected. *See Luther v. City of Winner*, 2004 S.D. 1, ¶ 11, 674 N.W.2d 339, 344-45 (holding

[7] Jeff admitted he has no such evidence. R: 319.

conclusory statements in affidavit were insufficient to raise a genuine issue of material fact); *see also Chem-Age Indus. v. Glover*, 2002 S.D. 122, ¶ 18, 652 N.W.2d 756, 765 ("Evidence submitted in affidavits as part of a summary judgment proceeding must be legally admissible."); SDCL 15-6-56(e) ("opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein").

Jeff may not change his deposition testimony. He unequivocally testified in his deposition it was Troy *and Chalan* that said they had welded the fuel tank the same way the year prior. R: 304-05. There is no evidence Hattums were involved in welding a tank the previous year or that they knew of any such welding at their farm during Troy's or Chalan's lifetimes.

III. The Fellow-Servant Rule and Agency

The Estate relies on agency arguments in an attempt to reverse the Circuit Court's order granting summary judgment; it argues Hattums are vicariously liable for the actions of Troy. That argument fails.

The fellow-servant rule bars liability for any actions of Troy. Statute provides:

> An employer, except as otherwise specially provided, is not bound to indemnify an employee for losses suffered by the employee in consequence of the ordinary risks of the business in which employed, *nor in consequence of the negligence of another person employed by the same employer in the same general*

> *business*, unless the employer has neglected to use ordinary care in the selection of the culpable employee.

SDCL 60-2-2 (emphasis added). The emphasized portion of the statute is codification of the common law fellow-servant rule. *See Smith v. Cmty. Coop. Ass'n of Murdo*, 209 N.W.2d 891, 893 (S.D. 1973). It is undisputed that Chalan, Jeff, and Troy were co-employees of Hattums. APP: C, ¶¶ 41-43; R: 158. So, pursuant to the fellow-servant rule Hattums are not obligated to indemnify Chalan (the Estate) for the acts of Troy.

The Estate incorrectly argues that an exception to the fellow-servant rule applies. It is true the fellow-servant rule does not apply where a vice-principal or superior servant is acting in such a capacity when he causes the injury, but Troy did not have that status. *See Smith*, 209 N.W.2d at 893 (citing *Solleim v. Norbeck & Nicholson Co.*, 147 N.W. 266, 268 (S.D. 1914)).

The person alleged to have caused injury must have had authority from the employer to exercise control or supervision over other employees for the exception to the fellow-servant rule to apply. *See* 30 C.J.S. *Employers' Liability* § 237, Westlaw (database updated Feb. 2020) ("To be a vice principal, the employee must enjoy a measure of authority sufficient to enable one to consider his or her acts as those of the employer."); 30 C.J.S. *Employers' Liability* § 238, Westlaw (database updated Feb. 2020) ("The decision as to whether the rule is to be applied depends on whether or not the so-called superior employee has the

authority to superintend or control the injured employee, and not merely on the grade or rank of the so-called superior employee. In the absence of such authority the employer is not liable on the theory that the negligent employee is a superior employee."); 27 Am.Jur.2d *Employment Relationship* § 334, Westlaw (database updated Feb. 2020) ("The fellow-servant rule does not apply when the party causing injury is a supervisor performing managerial acts."). Authority is either actual or ostensible. *Dahl v. Sittner*, 429 N.W.2d 458, 462 (S.D. 1988).

A. Troy did not have actual authority.

Troy did not have actual authority to act as Hattums' representative in dealings with Hattums' other employees. Hattums have sworn that they did not put Troy in charge of or in a supervisory position over Chalan and Jeff. APP: C, ¶ 44; R: 158. Hattums did not tell anyone that Troy was anyone's boss or that he was in charge of other employees. APP: C, ¶ 45; R: 158. Jeff admitted the same in his deposition. R: 286. Likewise, Hattums did not give Troy authority to work on the truck, as he and Chalan were told to leave the truck alone. APP: C, ¶ 14; R: 154. Troy did not have actual authority.

B. Troy did not have ostensible authority to direct Chalan to work on the truck.

The Estate relies upon ostensible authority. "Ostensible or apparent authority is 'such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess.'" *Dahl*, 429 N.W.2d at 462 (quoting SDCL 59-3-3).

The Estate argues Troy's last name establishes he had ostensible authority. However, sharing the same last name is insufficient to create ostensible authority. This Court has stated that "a marital relationship alone does not constitute a husband an agent of his wife." *Krause v. Reyelts*, 2002 S.D. 64, ¶ 27, 646 N.W.2d 732, 736 (quoting *Bauer v. Garner*, 266 N.W.2d 88, 95 (N.D. 1978)). Likewise, Troy having the last name of Hattum does not establish ostensible authority.

The Estate also relies on testimony of Jeff that Troy sometimes gave orders. Even if true, it alone is also insufficient. "If the apparent authority can only be established through the acts, declarations and conduct of the agent and is not in some way traceable to the principal, no liability will be imposed on him." *Dahl*, 429 N.W.2d at 462 (citing *Draemel v. Rufenach, Bromagen & Hertz, Inc.*, 392 N.W.2d 759, 763 (Neb. 1986) and *Kasselder v. Kapperman*, 316 N.W.2d 628, 630 (S.D. 1982)); *see also Bordeaux v. Shannon Cty. Sch.*, 2005 S.D. 117, ¶ 19, 707 N.W.2d 123, 128-29 (quoting *Kasselder*, 316 N.W.2d at 630) ("The allegations establishing an agency relationship 'must be traceable to the principal and cannot be established solely by the acts, declarations or conduct of an agent.'"); *Am. Prairie Const. Co. v. Hoich*, 560 F.3d 780, 795 (8th Cir. 2009) (citing *Kasselder*, 316 N.W.2d at 630) ("Under South Dakota law, the conduct of an agent is insufficient to create an ostensible agency.").

Courts have held that an employee may not, merely by his assumption of authority over others, become a foreman, vice-principal, master servant, or alter ego of the employer. *See Safety Insulated Wire & Cable Co. v. Matthews*, 151 F. 761, 762 (2d Cir. 1907) ("It is manifest that the mere assumption of the duties of general direction or superintendence by a fellow servant . . . does not constitute the servant, so assuming to act, the alter ego of the master."); *Wadiak v. Ill. Cent. R. Co.*, 208 F.2d 925, 929 (7th Cir. 1953) ("a fellow servant does not merely by the assumption of authority become a vice principal"); *Hilton & Dodge Lumber Co. v. Ingram*, 46 S.E. 895, 896 (Ga. 1904) ("A fellow servant, without the master's knowledge, cannot, by an assumption of authority, convert himself into a vice principal or alter ego."); *Lesicki v. J. Burton Co.*, 168 Ill.App. 46, 50-51 (1912) ("The mere fact that Code was accustomed to give orders to the men with whom he labored . . . would not make him vice-principal in respect to the common labor which he and the plaintiff in error at the time were engaged upon."); *Felch v. Allen*, 98 Mass. 572, 574 (1868) ("The case, then, is simply this: that two servants of a common master are employed upon the same work; that one of them, without authority from his employer, directs the other to use a machine for a dangerous and improper purpose, for which it was not intended or provided; and that he complies, and receives an injury. There is no principle of law which will make the employer answerable for the damages in such a case.").

After submission of Hattums' summary judgment brief with its explanation of the fellow-servant rule, Jeff submitted an affidavit alleging Troy gave Jeff and Chalan various instructions over the course of Jeff's employment while in the presence of Hattums. *See* R: 372-76. The Estate relies on these affidavit statements to contend Troy had ostensible authority. Even taking Jeff's affidavit assertion as true for purposes of summary judgment, it is of no help to the Estate.

Again, ostensible or apparent authority is authority "a principal intentionally, or by want of ordinary care, causes or allows a *third person* to believe the agent to possess." SDCL 59-3-3 (emphasis added). The third person here is Chalan. The Estate may not rely upon what Jeff may have believed to establish what Chalan believed. Todd told Troy (the purported agent) and Chalan (the third person) while the three were together to leave the truck alone. R: 340. Robert instructed the same. R: 328. As explained above, this is undisputed. *See* APP: C, ¶ 14; R: 154. Therefore, ostensible authority for Troy to direct work on the truck did not exist as to Chalan. Todd's instruction was not only express direction to leave the truck alone, but also notice to Chalan that Troy did not have authority to direct him to work on the truck.

This conclusion is supported by this Court's statements about the nature of ostensible authority. This Court has explained that ostensible agency is an estoppel that protects innocent third persons relying in good faith and without negligence upon the acts of an agent known to the

principal. *Fed. Land Bank of Omaha v. Sullivan*, 430 N.W.2d 700, 701 (S.D. 1988). Since Robert and Todd directed Troy and Chalan to leave the truck alone, Hattums are not estopped from denying Troy had authority to direct Chalan to work on the truck.

Further, Chalan was not an innocent third person reasonably assuming Troy had authority to direct him to work on the truck. "The third person dealing with the agent . . . must show . . . reasonable diligence and prudence in ascertaining the fact of the agency and *the nature and extent of the agent's authority*." *Dahl*, 429 N.W.2d at 462 (citing 3 Am.Jur.2d *Agency* §§ 80, 83 (1986)). Chalan knew Troy lacked authority.[8] There is *no* admissible evidence to the contrary.

Any ostensible authority Troy had to bind Hattums was terminated by the instruction. "Apparent authority, not otherwise terminated, terminates when the third party has notice of: (a) the termination of the agent's authority[.]" Restatement (Second) of Agency § 125(a); *see also id.* at cmt. a ("Apparent authority terminates when the third person has notice that the agent's authority has terminated[.]"); *id.* at cmt. b ("Apparent authority can exist only as long as the third person, to whom the principal has made a manifestation of authority, continues reasonably to believe that the agent is authorized. He does not have this

[8] The Estate cites Restatement (Second) of Agency § 219(2)(d) to suggest an employer is liable where an agent is aided in accomplishing a tort by the existence of the agency relation. That section is inapplicable here, because Chalan knew Troy had no authority to direct work on the truck.

reasonable belief if he has reason to know that the principal has revoked[.]"). Chalan had notice that Troy did not have authority as to the truck.

These agency principles are in accord with the fellow-servant rule and its exception. Even where an employee has authority over other employees, the employer is not liable for acts of the supervising employee that go beyond the authority conferred. *See* 30 C.J.S. *Employers' Liability* § 235, Westlaw (database updated March 2020) ("Generally, the employer is not liable for acts of an employee authorized to direct, supervise, or manage other employees where such acts are outside the scope of the authority conferred.").

The doctrine of *respondeat superior* is also of no avail to the Estate. It does not supplant the statutory fellow-servant rule. *See* SDCL 60-2-2. Since that rule applies, Hattums are not liable to the Estate. Summary judgment was correctly entered for Hattums.

IV. Strict Liability

The Estate alleges Hattums are strictly liable because welding a fuel tank is an abnormally dangerous activity. In considering such allegations, this Court has looked to the Restatement (Second) of Torts. *See Cashman v. Van Dyke*, 2012 S.D. 43, ¶ 11, 815 N.W.2d 308, 312; *Fleege v. Cimpl*, 305 N.W.2d 409, 414 (S.D. 1981). Restatement (Second) of Torts § 519 provides:

> (1) *One who carries on an abnormally dangerous activity* is subject to liability for harm to the person, land or chattels *of another* resulting from the activity, although he has exercised the utmost care to prevent the harm.
> (2) This strict liability is limited to the kind of harm, the possibility of which makes the activity abnormally dangerous.

(Emphasis added). The rationale for the rule is those who carry on the abnormally dangerous activity should bear the cost of harm from the activity. *See id.* at cmt. d ("[The liability stated in this Section] is founded upon a policy of the law that imposes upon anyone who for his own purposes creates an abnormal risk of harm to his neighbors, the responsibility of relieving against that harm when it does in fact occur."); 57A Am.Jur.2d *Negligence* § 393, Westlaw (database updated Feb. 2020) ("the doctrine of abnormally dangerous activity imposes liability on those who, despite social utility, introduce an extraordinary risk of harm into the community for their own benefit").

Hattums did not carry on or engage in the activity alleged to be abnormally dangerous—the welding of the fuel tank. They:

- were not on the premises when the welding took place; APP: C, ¶¶ 21-23; R: 155-56;
- did not instruct Chalan, Jeff, or Troy to weld any fuel tank; APP: C, ¶ 20; R: 155; and
- did not instruct Chalan, Jeff, or Troy to work on the truck. APP: C, ¶ 19; R: 155.

Chalan and Troy violated the instruction. Jeff described the tank welding as a community effort involving co-employees Chalan, Jeff, and

Troy. APP: C, ¶¶ 2-10, 41-43; R: 152-54, 158. There is no principle of law allowing a person injured as a result of disobeying his employer's instructions to hold his employer strictly liable. The Estate cites no authority for such a proposition. Chalan was carrying on the tank welding, not Hattums.

As set forth in Part III above, the Estate cannot claim Hattums are vicariously liable for any actions of Troy. The fellow-servant rule applies and bars recovery.

Additionally, the Estate's strict liability claim fails because Chalan assumed the risk of injury and was contributorily negligent as explained in Parts VII and VIII below. *See* Restatement (Second) of Torts § 523 ("The plaintiff's assumption of the risk of harm from an abnormally dangerous activity bars his recovery for the harm"); Restatement (Second) of Torts § 524(2) ("The plaintiff's contributory negligence in knowingly and unreasonably subjecting himself to the risk of harm from the activity is a defense to the strict liability.").

The Circuit Court properly entered summary judgment for Hattums on the Estate's strict liability claim.

V. Unsafe Workplace

The Estate also alleges that Hattums failed to provide a safe and secure workplace or proper supervision and training. However, the fellow-servant rule and Chalan's disobedience bar liability. Further,

Hattums had no duty because the danger was obvious, and the injury was not foreseeable to them.

In addressing the unsafe workplace claim, it is important to keep in mind this is not a case where there was a hidden defect in a tool or the premises. Rather, the danger was created by the community effort of Chalan, Jeff, and Troy. APP: C, ¶¶ 1-10; R: 152-54.

A. The fellow-servant rule and Chalan's disobedience bar liability.

To the extent the Estate's unsafe workplace claim relies on the actions of Troy, the fellow-servant rule bars liability.

Further, the Estate may not recover under its unsafe workplace claim because Chalan disobeyed his employer's instruction. Where an employee is injured as the result of violating or disobeying his employer's instructions, the employer is not liable for the employee's injuries. *See Gossett v. Twin Cty. Cable T.V., Inc.*, 594 So.2d 635, 639 (Ala. 1992) (holding employee injured while violating an order of the employer "went outside the sphere of his employment, and [the employer], therefore, was absolved of a duty to provide him a safe workplace at the time of the accident"); *Card v. Wilkins*, 39 A. 676, 677 (N.J. 1898) ("When an employé receives an injury which has been brought about by his willful violation of rules laid down by the employer, and within the knowledge of the employé, he cannot hold the employer liable."); *Hunter Const. Co. v. Watson*, 274 P.2d 374, 377 (Okla. 1953) ("where an employee deliberately

disregards a rule or instruction of his employer thereby placing himself in a place of danger resulting in his injury, . . . the employee is guilty of primary negligence barring his recovery for injuries"); *McMellen v. Union News Co.*, 22 A. 706, 707 (Pa. 1891) (holding that since the employee's death was the result of disobeying his employer's instructions, there was no negligence chargeable to the employer); *Nat'l Hosiery & Yarn Co. v. Napper*, 135 S.W. 780, 783 (Tenn. 1911) ("The law is clear, of course, that, if a servant is injured while engaged in disobeying the orders of his superior, he cannot recover."); *Talkington v. Wash. Veneer Co.*, 112 P. 261, 263 (Wash. 1910) (holding it was error not to give a jury instruction stating that if the jury found that the employee was instructed to get down from a shaft and that he could have gotten down before the machinery started but refused to obey the instruction, then the employee could not recover from the employer); 27 Am.Jur.2d *Employment Relationship* § 285, Westlaw (database updated Feb. 2020) ("if the employer has given the employee warning of a danger or has given positive instructions as to methods of work, and the employee disregards such warning or, in violation of such instructions, attempts to follow his or her own ideas of work, the employee cannot hold the employer liable for injuries resulting therefrom"); Restatement (Second) of Agency § 526 ("a servant harmed by the occurrence of his own willful and unjustified violation of orders and the negligence of the master has no cause of action against his master for such harm."), cmt. a ("A servant hurt

because of a violation of orders may have no cause of action against his master[.]").

The rule is consistent with South Dakota public policy. *See* SDCL 61-6-14 and 61-6-14.1 (prohibiting unemployment compensation benefits to an unemployed person discharged for misconduct, including failure to obey orders, rules, or instructions); SDCL 62-4-37 (prohibiting worker's compensation benefits for injury or death due to the employee's willful misconduct).

It is undisputed that Robert and Todd instructed Chalan to leave alone the truck that the tank came from. APP: C, ¶ 14; R: 154. Chalan disobeyed the instruction, removed the tank, and was injured in the process of assisting with the welding of the tank. APP: C, ¶ 1-10, 13: R: 152-54. Because Chalan disobeyed the instruction, there can be no recovery.

The Estate was unable to cite any authority to the Circuit Court allowing an employee injured as a result of disobeying his employer's instructions to recover from his employer and has cited no such authority to this Court. *See* APP: B; R: 643:13-20; Appellant's Brief. The Court should affirm the entry of summary judgment against the Estate on its unsafe workplace claim.

B. Hattums had no duty to Chalan.

The second reason the Estate cannot recover under a claim of unsafe workplace is because Hattums owed Chalan no duty under the undisputed facts.

"The existence of a duty is a threshold issue in any case of tort liability." *Hagen v. City of Sioux Falls*, 464 N.W.2d 396, 398 (S.D. 1990), *abrogated on other grounds by Tipton v. Town of Tabor*, 538 N.W.2d 783 (S.D. 1995) (citing *Gilbert v. United Nat'l Bank*, 436 N.W.2d 23, 27 (S.D. 1989)). "A duty can be created by statute or common law." *Hendrix v. Schulte*, 2007 S.D. 73, ¶ 7, 736 N.W.2d 845, 847 (citing *Kuehl v. Horner Lumber Co.*, 2004 S.D. 48, 678 N.W.2d 809). "A duty will not spring up at the mere behest of those with grievances real or imagined." *A.M. Farms v. Cty. of Codington*, 2009 S.D. 28, ¶ 7, 765 N.W.2d 550, 553 (citing *Fisher v. Kahler*, 2002 S.D. 30, ¶ 6, 641 N.W.2d 122, 125).

"As a general rule, the existence of a duty is to be determined by the court." *Hendrix*, 2007 S.D. 73 at ¶ 8 (citing *Erickson v. Lavielle*, 368 N.W.2d 624 (S.D. 1985)). "Summary judgment in a negligence case is appropriate when the trial judge resolves the duty question in the defendant's favor." *Id.* (citing *Erickson*, 368 N.W.2d 624).

As to the existence of a duty in the employment context, this Court has stated:

> Employers have a nondelegable duty to provide their employees with reasonably safe places to work. Inherent to this duty is an obligation that employers

> provide employees with proper training and supervision.

Stone v. Von Eye Farms, 2007 S.D. 115, ¶ 9, 741 N.W.2d 767, 770 (internal citation omitted).

The reason this duty is imposed on an employer is to ensure the employee is provided information about dangers the employee is presumed not to have so work may be carried out in reasonable safety. *See, e.g.*, *Ecklund v. Barrick*, 144 N.W.2d 605, 607 (S.D. 1966) (quoting *Stoner v. Eggers*, 92 N.W.2d 528, 530 (S.D. 1958)) ("the purpose of a warning is to supply a party with information which he is presumed not to have"); *see also Platt v. Meier*, 153 N.W.2d 404, 407 (S.D. 1967) (quoting Restatement (Second) of Agency § 492, cmt. f) ("even 'if the master neglectfully or intentionally fails to perform what otherwise would be his duty, a servant who becomes aware of a dangerous condition of employment ordinarily has no cause of action for harm thereby suffered'"); *Ford v. Robinson*, 80 N.W.2d 471, 473 (S.D. 1957) ("The foundation of liability for negligence is knowledge of the peril which subsequently results in injury."); SDCL 60-2-2 (exempting the employer from, in addition to injuries by fellow servants, "losses suffered by the employee in consequence of the *ordinary risks of the business* in which employed") (emphasis added). However, when the employee has the same or more information about the danger than the employer, the rationale for imposing the duty is inapplicable because the employee has

the information necessary to act for his own safety. *See Ford*, 80 N.W2d at 473 ("the plaintiff is not entitled to recover if, at the time of the injury, his knowledge of the danger surpassed that of the defendant"). In those situations, the employer is not liable for any alleged failure to provide a safe workplace. *See Farmer v. Heard*, 844 S.W.2d 425, 427 (Ky. Ct. App. 1992) (referring to an employer's duty to furnish a reasonably safe place to work and explaining that the employer's liability "[r]ests upon the assumption that the employer has a better and more comprehensive knowledge than the employees, and the employer's liability ceases to be applicable where the employee's means of knowledge of the dangers to be incurred is equal to that of the employer").

1. Nonliability for obvious danger

This Court has instructed for decades that an employer is not liable for failure to provide a safe place to work if the danger is obvious. *See Platt*, 153 N.W.2d at 407 ("A master cannot be held liable for failure to furnish a reasonably safe place to work if the condition or so-called danger is so obvious and is before the servant's eyes to such an extent that he must know by the use of ordinary intelligence the possible danger that confronts him."); *see also Jackson v. Van Buskirk*, 424 N.W.2d 148, 149 (S.D. 1988) (same); *Smith v. Smith*, 278 N.W.2d 155, 161 (S.D. 1979) (same); *Bunkers v. Mousel*, 154 N.W.2d 208, 210 (S.D. 1967) (same); *Ecklund*, 144 N.W.2d at 607 (same); *Stoner*, 92 N.W.2d at 530 (same). "[T]he master owes no duty to warn or instruct his servants

of dangers obvious to a person of ordinary intelligence and judgment." *Jackson*, 424 N.W.2d at 149-50 (quoting *Stoner*, 92 N.W.2d at 530). "A danger is considered as within the rule where it ought to have been apparent to the senses of a person of ordinary intelligence, or where it is as easily discernible by the employee as by the employer, or where it is discoverable in the exercise of that reasonable care which persons of ordinary intelligence may be expected to take for their own safety." *Kubik v. Farmers Union Oil Co. of Reliance*, 209 N.W.2d 551, 554-55 (S.D. 1973) (quoting *Starnes v. Stofferahn*, 160 N.W.2d 421, 430 (S.D. 1968)).

In other words, the rule of nonliability applies to a danger when: (1) it is apparent; (2) it is as discernible to the employee as to the employer; or (3) it is discoverable in the exercise of reasonable care expected to be taken by the employee for his own safety. If the danger comes within *any* of the categories, the employer is not liable. Here, the danger of welding the fuel tank fits within *each* category.

The Circuit Court correctly determined the danger was obvious and the rule of nonliability applies.[9] APP: B; R: 671-74.

[9] In addition to finding the danger was discernable to the employees and they had constructive knowledge of it, the Circuit Court also considered that the parties assumed for purposes of summary judgment the fuel tank welding was an abnormally dangerous activity. Noting the factors necessary for determining whether an activity is abnormally dangerous, the Circuit Court determined the danger must necessarily also be apparent. APP: B; R: 671-74.

i. The danger was apparent.

Welding a fuel tank is dangerous due to the risk of explosion. APP: C, ¶ 39; R: 157. At the time of the accident, Chalan was 22 years old. *See* R: 250, ¶ 3. He was a man of ordinary intelligence. APP: C, ¶ 46; R: 158. Chalan knew welding a fuel tank pumped full of exhaust was going to take place. APP: C, ¶¶ 2-10; R: 152-54. A man of ordinary intelligence cannot claim the danger posed by this activity was not apparent to his senses.

Troy's alleged representations that the tank welding method was textbook and had been done before cannot be relied upon to deny the obvious. Even if an obviously dangerous activity has been done without incident in the past, it does not make the danger posed by the activity nonobvious.[10]

The Estate contends that because the employees rinsed out the fuel tank, the danger was not obvious. The opposite is true. Rinsing of the tank demonstrated consciousness of danger. The argument also ignores that the fuel tank was subsequently pumped full of exhaust. The Estate's argument is contrary to the position taken by its counsel when arguing punitive damages: "And when you put fire to gas even a layperson who doesn't have any experience can conclude that there could be an explosion or fire in a case like this." APP: B; R: 642:11-13.

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[10] For example, a person may successfully cross a street on multiple occasions without looking both ways. But that does not make the danger posed by such conduct nonobvious.

Because the danger posed by pumping exhaust into a fuel tank and introducing a flame by welding was apparent, the rule of nonliability applies. Hattums owed no duty to Chalan. The Court should uphold the entry of summary judgment for Hattums on the Estate's unsafe workplace claim.

ii. The danger was as discernible to the employees as to the employer.

Chalan had more information about the danger at the farm that day than Hattums. Hattums had *no* knowledge of the danger. They did not know welding a fuel tank was going to take place, did not instruct anyone to weld a fuel tank, and were not on the premises while the fuel tank was removed from the truck and welded. APP: C, ¶¶ 20-23, 36-38; R: 155-57. Chalan knew the tank welding was going to take place and assisted with it. APP: C, ¶¶ 1-10; R: 152-54. Since the danger from pumping exhaust into a fuel tank and introducing a flame to it by welding was at least as discernable to Chalan as to Hattums, the rule of nonliability apples. The case for nonliability as a matter of law is even stronger here than in *Jackson*, 424 N.W.2d 148 and *Stoner*, 92 N.W.2d 528 where this Court upheld directed verdicts for employers despite evidence the employers knew about the obvious dangers. The Court should uphold entry of summary judgment for Hattums on the Estate's unsafe workplace claim.

iii. The danger was discoverable in the exercise of ordinary care.

The danger posed by pumping exhaust into a fuel tank and introducing a flame by welding was "discoverable in the exercise of that reasonable care which persons of ordinary intelligence may be expected to take for their own safety." *See Kubik*, 209 N.W.2d at 554-55. It is undisputed that Chalan knew the welding of the fuel tank being pumped full of exhaust was taking place. APP: C, ¶¶ 1-10; R: 152-54. This is not a case where there was a hidden defect in a tool or the premises. Since the danger was discovered by Chalan, the rule of nonliability applies.

The rule of nonliability extends to any claimed duty to provide proper training and supervision. Those duties are part of the general duty to provide a safe place to work. *See Stone*, 2007 S.D. 115 at ¶ 9. To hold Hattums had any duty, whether to provide a safe workplace, to train, or to supervise, where they did not instruct anyone to weld a fuel tank or to do any work on the truck, and instructed Chalan and Troy to leave the truck alone, would be tantamount to making them an insurer of the safety of their employees. However, this Court has stated, "The employer is not an insurer of the safety of the tools or places of work but is liable only for negligence." *Smith*, 278 N.W.2d at 160.

Further, "The master's liability for unsafe working conditions does not extend to temporary dangerous conditions of which the conduct of fellow servants in the performance of the operative details of the work is the sole responsible cause." *Platt*, 153 N.W.2d at 408 (quoting

Restatement (Second) of Agency § 500). That is the case here. Welding of the fuel tank was a temporary dangerous condition created by the community effort of employees Chalan, Jeff, and Troy. APP: C, ¶¶ 1-10; R: 152-54.

The Court should uphold summary judgment for Hattums on the Estate's unsafe workplace claim.

2. The risk of harm was not reasonably foreseeable to Hattums.

Another reason the Estate may not recover is the risk of harm was not reasonably foreseeable to Hattums.

Even where a duty exists generally, a court must go on to examine the foreseeability of the risk of harm to determine if the scope of the duty extends to the specific facts. "The existence, scope, and range of a duty . . . depend upon the foreseeability of the risk of harm." *Zerfas v. AMCO Ins. Co.*, 2015 S.D. 99, ¶ 12, 873 N.W.2d 65, 70 (citing *Johnson v. Hayman & Assocs., Inc.*, 2015 S.D. 63, ¶ 13, 867 N.W.2d 698, 702). "'[F]oreseeability in defining the boundaries of a duty is always a question of law' and is examined at the time the act or omission occurred." *Id.* at ¶ 14 (quoting *Johnson*, 2015 S.D. 63, ¶ 13). In examining foreseeability, this Court has instructed that "[n]o one is required to guard against or take measures to avert that which a reasonable person under the circumstances would not anticipate as likely to happen." *Id.* at ¶ 16 (quoting *Wildeboer v. S.D. Junior Chamber of Commerce, Inc.*, 1997 S.D.

33, ¶ 18, 661 N.W.2d 666, 670). "The law requires 'reasonable foresight, rather than prophetic vision[.]'" *Janis v. Nash Finch Co.*, 2010 S.D. 27, ¶ 23, 780 N.W.2d 497, 505 (quoting *Peterson v. Spink Elec. Coop., Inc.*, 1998 S.D. 60, ¶ 19, 578 N.W2d 589, 593).

Reasonable people in the position of Hattums would not anticipate welding of a fuel tank was likely to happen, so they had no duty to guard against or take measures to avert it. It is undisputed that:

- Robert and Todd told Chalan and Troy to leave the truck alone; APP: C, ¶ 14; R: 154;
- Hattums did not instruct Chalan, Jeff, or Troy to work on the truck; APP: C, ¶ 19; R: 155;
- Hattums did not instruct anyone to weld a fuel tank; APP: C, ¶ 20; R: 155;
- Chalan, Jeff, and Troy did not remove the fuel tank and weld it until Hattums were away from the premises; APP: C, ¶¶ 21-23; R: 155-56;
- Todd and Chelsea never welded a fuel tank, and Robert had not welded one for over forty years, long before Chalan and Troy were born and before Jeff worked for Hattums; APP: C, ¶¶ 24-26; R: 156, 284;
- Hattums, Jeff, and employee Ben Reinert were unaware of any welding of a fuel tank taking place at Hattums' farm; APP: C, ¶¶ 27-32; R: 156-57;
- Hattums had no knowledge that Chalan or Troy had ever welded a fuel tank; APP: C, ¶¶ 33-35; R: 157; and
- Hattums did not know anyone was going to weld a fuel tank on their farm; APP: C, ¶¶ 36-38; R: 257.

Even Jeff admitted he does not have knowledge that Robert and Todd knew the welding was going to happen. R: 319.

As a matter of law, the incident was not foreseeable to Hattums. Therefore, they had no duty, and the Court should uphold summary judgment in favor of Hattums on the Estate's unsafe workplace claim.

VI. Assumption of the Risk

The Estate may not recover for the further reason that Chalan assumed the risk of injury as a matter of law.

"Assumption of the risk requires 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.'" *Jensen v. Menard, Inc.*, 2018 S.D. 11, ¶ 14, 907 N.W.2d 816, 820 (quoting *Duda v. Phatty McGees, Inc.*, 2008 S.D. 115, ¶ 13, 758 N.W.2d 754, 758). "Questions of negligence, contributory negligence, and assumption of the risk are for the jury in all but the rarest of cases so long as there is evidence to support the issues." *Id.* (quoting *Stensland v. Harding Cty.*, 2015 S.D. 91, ¶ 14, 872 N.W.2d 92, 96-97). As found by the Circuit Court, this is one of the rare cases where the undisputed facts establish assumption of the risk as a matter of law. APP: B; R: 674:11-25.

As to the first two elements, a plaintiff must subjectively know of and appreciate the danger. *Schott v. S.D. Wheat Growers Ass'n*, 2017 S.D. 91, ¶ 13, 906 N.W.2d 359, 362.

Chalan knew the facts that created the danger. He was involved in the community effort to fix a leak in the fuel tank. APP: C, ¶¶ 1-10; R:

152-54. Chalan was either directly involved in hooking up the hose to the exhaust or observed it, and stood next to Troy as Troy started to weld the fuel tank. APP: C, ¶¶ 7, 10; R: 153-54.

It is undisputed that welding a fuel tank is dangerous due to the risk of explosion. APP: C, ¶ 39; R: 157. Chalan's actions demonstrate that he understood the risk. Chalan assisted in dumping the fuel out of the tank and then rinsing it with water. APP: C, ¶ 4; R: 153. The only reasonable inference from these facts is that Chalan understood the danger posed by welding on a fuel tank. Therefore, Chalan knew and understood the danger.

In addition to Chalan's subjective knowledge and understanding, he had constructive knowledge and understanding. This Court has explained:

> On the other hand, the knowledge and appreciation-of-danger elements are not purely subjective questions in constructive knowledge cases. A plaintiff's own testimony as to what he knew, understood, or appreciated, is not necessarily conclusive. *There are some risks as to which no adult will be believed if he says that he did not know or understand them.* Typical examples of this kind of risk include such things as an adult's knowledge that one can burn from fire, drown in water, or fall from heights. Ultimately, whether the knowledge at issue is actual or constructive, knowledge of the risk and appreciation of its magnitude and unreasonable character are normally questions of fact for the jury. They may be resolved by the court only where reasonable people could not differ on the questions whether the plaintiff assumed the risk.

Schott, 2017 S.D. 91 at ¶ 14. (internal citations and quotations omitted) (emphasis added).

"Plaintiffs are charged with constructive knowledge of some risks that are so plainly observable that the injured party must be presumed to have had actual knowledge and appreciation of the risk." *Id*. at ¶ 17 (citing *Bartlett v. Gregg*, 92 N.W.2d 654, 657 (S.D. 1958)). This Court has instructed:

> In testing whether an individual assumed the risk, constructive knowledge may only be imputed for dangers recognizable in the exercise of ordinary common sense and prudence. Such a danger must be obvious, and a person has constructive knowledge of a risk only if it is plainly observable so that anyone of competent faculties is charged with knowledge of it[.]

Jensen, 2018 S.D. 11 at ¶ 22 (internal quotations and citations omitted).

Chalan knew welding was taking place on a fuel tank being pumped full of exhaust. *See* APP: C, ¶¶ 1-10; R: 152-54. Reasonable people cannot differ that the danger posed by that activity was "recognizable in the exercise of ordinary common sense and prudence." *See Jensen*, 2018 S.D. 11 at ¶ 22. Under the undisputed facts, the danger was "so plainly observable" that Chalan "must be presumed to have had actual knowledge and appreciation of the risk." *Schott*, 2017 S.D 91 at ¶ 17.

As to the final element of assumption of the risk, this Court has stated, "Whether a plaintiff has voluntarily accepted a risk depends on the existence of the 'reasonable alternative course of conduct' open to the

plaintiff to avert harm to himself." *Pettry v. Rapid City Area Sch. Dist.*, 2001 S.D. 88, ¶ 9, 630 N.W.2d 705, 708. A "reasonable alternative" means "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.

Chalan voluntarily accepted the risk. He was not instructed by Hattums to work on the truck that the fuel tank came from, let alone to remove the tank, pump it full of exhaust, and weld on it. APP: C, ¶¶ 19-20; R: 155. No one made him stay in the shop during the welding. APP: C, ¶ 12; R: 154.

Chalan had time to make an intelligent choice. He had time to leave the shop before the welding began. *See* APP: C, ¶¶ 8-10; R: 154-54, 315-16.

Reasonable people cannot differ that each element of the defense of assumption of the risk is met under the undisputed facts. Therefore, summary judgment should be upheld for Hattums on all of the Estate's claims.

VII. Contributory Negligence

Where a plaintiff's contributory negligence is more than slight compared to the defendant's negligence, the plaintiff is barred from recovery. SDCL 20-9-2.

The undisputed facts establish Chalan was negligent in taking part in welding the fuel tank. APP: C, ¶¶ 1-10; R: 152-54. Hattums did not

instruct Chalan to weld the fuel tank and told him to leave the truck alone. APP: C, ¶¶ 14, 19-20; R: 154-55. No one required him to stay in the shop while the welding took place, but he did. APP: C, ¶ 12; R: 154.

Whether Chalan's contributory negligence was more than slight may be decided as a matter of law. *See Wood v. City of Crooks*, 1997 S.D. 20, ¶ 3, 559 N.W.2d 558, 560; *Bunkers*, 154 N.W.2d at 211. This Court has observed that "one may not unnecessarily place and maintain oneself in such a dangerous position and then require others who failed to discover his peril to respond in damages." *First Nw. Trust Co. of S.D. for Schaub v. Schnable*, 334 N.W.2d 16, 19-20 (S.D. 1983) (quoting *Haase v. Willers Truck Serv.*, 34 N.W.2d 313, 317 (S.D. 1948)). The work on the fuel tank was a community effort among Chalan, Jeff, and Troy. APP: C, ¶¶ 1-10; R: 152-54. Chalan knew welding of the fuel tank as it was being pumped full of exhaust was taking place and remained in the shop. By contrast, Hattums neither knew the activity was taking place nor instructed that it take place. APP: C, ¶¶ 20-23, 36-38; R: 155-57. Chalan placed and maintained himself in a dangerous position and may not require Hattums, who did not know of the danger, to respond in damages.

Reasonable minds cannot differ that the negligence of Chalan was greater than slight as compared to any negligence alleged against Hattums. For this additional reason, summary judgment should be upheld in favor of Hattums as to all Estate claims.

VIII. Punitive Damages

As shown above, there was no breach of an obligation by Hattums to Chalan. Therefore, the Estate's punitive damages claim fails.

The claim also fails for the absence of malice, which is an essential element of the claim. *Smizer v. Drey*, 2016 S.D. 3, ¶ 20, 873 N.W.2d 697, 703. The Estate has neither pled malice nor identified facts establishing malice. *See* R: 3-7, 429-30. The Estate has not met its burden in responding to the motion for summary judgment. *See Wulf*, 2003 S.D. 105 at ¶ 18. The Court should uphold entry of summary judgment for Hattums on the Estate's punitive damages claim.

CONCLUSION

It is undisputed that Robert and Todd told Chalan and Troy to leave the truck alone. Troy had no authority to direct Chalan otherwise. Chalan violated Hattums' instruction. That violation and the fellow-servant rule bar liability on the part of Hattums.

Hattums did not participate in welding the fuel tank and did not instruct that it take place. They are not vicariously liable for any actions of Troy. Hattums were not carrying on an abnormally dangerous activity and are not liable under the Estate's strict liability claim.

Hattums did not have any duty to Chalan. Chalan knew welding a fuel tank pumped full of exhaust was taking place. The danger was obvious. By contrast, it was not foreseeable to Hattums that welding was going to take place. Chalan assumed the risk of injury from the welding

of the fuel tank and was contributorily negligent greater than slight compared to any negligence alleged against Hattums.

There was no breach of an obligation by Hattums to Chalan, and there is no evidence of malice. Therefore, the Estate's punitive damages claim fails as a matter of law.

For the foregoing reasons, the Circuit Court's Order on Defendants' Motion for Summary Judgment and the resulting Judgment for Hattums should be affirmed.

Dated this 26th day of March, 2021.

BEARDSLEY, JENSEN & LEE,
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ORAL ARGUMENT IS RESPECTFULLY REQUESTED

CERTIFICATE OF COMPLIANCE

Pursuant to SDCL §15-26A-66(b)(4), I certify that Appellees' Brief complies with the type volume limitation provided for in the South Dakota Codified Laws. This Brief contains 49,426 characters from the Statement of the Case through the signature block of the Conclusion. I have relied on the character count of our processing system used to prepare this Brief. The original Appellees' Brief and all copies are in compliance with this rule.

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

By: */s/ Gary D. Jensen*
Gary D. Jensen

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of March, 2021, I served a true and correct copy of ***Appellees' Brief*** upon the following person by the following means:

Brad A. Schreiber	[X]	First Class Mail
Schreiber Law Firm	[ ]	Hand Delivery
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Pierre, SD 57501	[X]	Electronic Mail

I further certify that on the 26th day of March, 2021, I emailed the foregoing ***Appellees' Brief*** and sent two copies of the original by U.S. Mail, first-class postage prepaid to:

Shirley A. Jameson-Fergel, Clerk
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STATE OF SOUTH DAKOTA)SS. COUNTY OF HUGHES	)	IN CIRCUIT COURT SIXTH JUDICIAL CIRCUIT
TALYN SHEARD, a/k/a TALYN O'CONNER, as Guardian Ad Litem for Z.O., a minor child, and as Personal Representative for the Estate of Chalan Hedman, and JEFFREY PAUL HOLSHOUSER, Plaintiffs, v. ROBERT HATTUM, BEVERLY HATTUM, TODD HATTUM and CHELSEA HATTUM, jointly and severally, DBA HATTUM FAMILY FARMS, Defendants.	)	32CIV18-000134 **ORDER ON DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**

A hearing on Defendants' Motion for Summary Judgment was held before this Court on June 10, 2010. Brad Schreiber appeared telephonically on the behalf of Plaintiff Talyn Sheard, a/k/a/ Talyn O'Conner, as Guardian Ad Litem for Z.O., a minor child, and as Personal Representative of the Estate of Chalan Hedman. Tom Maher appeared telephonically on the behalf of Plaintiff Jeffrey Paul Holshouser. Gary Jensen and Brett Poppen appeared on the behalf of Defendant Robert Hattum, Todd Hattum, and Chelsea Hattum D/B/A Hattum Family Farms. Having considered the filings and arguments of counsel, and consistent with the Court's oral decision and order at the close of the hearing which is incorporated herein, the Court:

HEREBY ORDERS that Defendants' Motion for Summary Judgment is granted as to each and every claim and cause of action asserted by Plaintiff Talyn Sheard, a/k/a/ Talyn O'Conner, as Guardian Ad Litem for Z.O., a minor child, and as Personal Representative of the Estate of Chalan Hedman (Plaintiff Sheard), specifically:

> Consistent with South Dakota law, including SDCL 21-3-2, Defendants' Motion for Summary Judgment is granted as to Plaintiff Sheard's claim for punitive damages;
>
> Consistent with South Dakota law, including the South Dakota Supreme Court's decisions in *Platt v. Meier*, 153 N.W.2d 404 (S.D. 1967), and *Jackson v. Van Buskirk*, 424 N.W.2d 148, 149 (S.D. 1988), Defendants' Motion for Summary Judgment is granted as to Plaintiff Sheard's claim for unsafe workplace; and
>
> Consistent with South Dakota law, including the Restatement (Second) of Torts § 519, Defendants' Motion for Summary Judgment is granted as to Plaintiff Sheard's claim for strict liability; and

ORDERS that, consistent with South Dakota law, including the South Dakota Supreme Court's decisions in *Platt v. Meier*, 153 N.W.2d 404 (S.D. 1967), and *Jackson v. Van Buskirk*, 424 N.W.2d 148, 149 (S.D. 1988), Defendants' Motion for Summary Judgment is granted as to Plaintiff Jeffrey Holshouser's claim and cause of action for unsafe workplace; and further

ORDERS that Defendants' Motion for Summary Judgment is denied as to Plaintiff Jeffrey Holshouser's claim and cause of action for strict liability.

Dated this 25th day of June, 2020.

BY THE COURT:

Margo D Northrup

Honorable Margo Northrup,
Circuit Court Judge

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

STATE OF SOUTH DAKOTA
CIRCUIT COURT, HUGHES CO
FILED
JUN 25 2020
Clerk
By Deputy

STATE OF SOUTH DAKOTA) IN CIRCUIT COURT
SS
COUNTY OF HUGHES) SIXTH JUDICIAL CIRCUIT

TALYN SHEARD, a/k/a, TALYN O'CONNER, as Guardian Ad Litem for Z.O., a minor child, and as Personal Representative for the Estate of Chalan Hedman, and JEFFREY HOLSHOUSER,

Plaintiffs,

vs.

ROBERT HATTUM, BEVERLY HATTUM, TODD HATTUM, jointly and severally, DBA HATTUM FAMILY FARMS,

Defendants.

32CIV18-134

TRANSCRIPT OF MOTION HEARING

BEFORE: THE HONORABLE MARGO NORTHRUP
Judge of the Sixth Judicial Circuit, in Pierre, South Dakota, on the 10th day of June, 2020.

APPEARANCES:

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clear and convincing analysis.

THE COURT: Okay. All right. Anything else?

MR. POPPEN: No. Thank you, Your Honor.

THE COURT: All right. Who would like to go first, Mr. Schreiber or Mr. Maher?

MR. SCHREIBER: I will, Judge. This is Brad Schreiber.

THE COURT: Go ahead, Brad.

MR. SCHREIBER: Thank you.

Judge, I think the defendants' motion for summary judgment is going to rise or fall on what the Court believes or intends to do with that leave the truck alone statement that comes up numerous times in the brief and in their argument. I think that's where this case rises and falls.

And their position is that you've got to accept what their clients say that they told Chalan and Troy and totally disregard everything that Jeff Holshouser put in his affidavit.

So they're asking you to accept that those statements were actually made.

THE COURT: And, Mr. Schreiber, do you agree with me that the two parties to the conversation are both deceased? And so how would you be able to establish a direct fact that would contradict those statements?

MR. SCHREIBER: Judge, I can't contradict those statements,

but what we can do is indicate to the Court, show the Court, or at trial what Jeff Holshouser's experience was in this particular area, that it would be inconsistent for those statements to have been made.

Now, Jeff Holshouser, being an employee there for quite sometime, went, you know, through numerous things concerning what was done that day and what's been done in the past.

I think one of the things that he said is the truck was put at the shop because when trucks are put at the shop, they're put there to get repaired is what they've done.

One of the other things that is significant is that he indicated that Troy told him that particular tank had been welded in the past. In fact, he showed him the weld on this particular tank and that it was in the form of an L. Now, they're not saying that that didn't happen at all.

The other thing is, when they say leave the truck alone, what did Chalan and/or Troy interpret that to mean? They want the Court to -- it's a stretch to say that that meant two days later don't weld the truck.

What they're saying is this particular truck, their explanation is leave the truck alone because we have other trucks that we're going to use when we start cutting silage.

done before, but Robert Hattum has testified that he has welded a fuel tank and his grandson has done -- is very capable and is capable of welding a fuel tank also.

So this record can indicate that there was no prohibition to prevent these guys from welding on a fuel tank like this.

So the -- if there's malice indicated in this record, it's allowing these gentlemen to utilize the defendants' equipment to weld on something that is abnormally dangerous.

And when you put fire to gas even a layperson who doesn't have any experience can conclude that there could be an explosion or fire in a case like this.

THE COURT: Is there anything -- maybe you've answered this. But so when the Court analyzes punitive damages summary judgment motion, one of the other things that they look at is whether there's any conduct of willful and wanton -- I guess willful or wanton conduct.

I mean, is there anything in the record at this point that shows that other than your, I guess, assertion that just by allowing them to weld on this fuel truck is willful and wanton?

MR. SCHREIBER: I would say that would be it, Judge. If you're going to put somebody in a situation where they're going to conduct an abnormally dangerous activity and they

acknowledge it's abnormally dangerous, then that would be willful and wanton because if they know that how dangerous it is and injuries and/or death can result, I believe that's willful and wanton.

THE COURT: Okay. Thank you, Mr. Schreiber. Anything further?

MR. SCHREIBER: No, Your Honor.

THE COURT: I'm just going to look through my questions real quick.

MR. MAHER: Are you ready for me, Your Honor?

THE COURT: Yeah, just give me a second. I'm going to look through my questions real quick.

Oh, and I guess the other question I have, Mr. Schreiber, is did you have any legal authority, or did you find any legal authority that says a defendant can hold its employers strictly liable if it disobeys its employer's instructions?

I don't think there's any South Dakota law cited to that effect. I assume you didn't find any either.

MR. SCHREIBER: I did not, Judge.

THE COURT: Okay. All right.

Go ahead, Mr. Maher.

MR. MAHER: Thank you, Your Honor.

I'm going to try and organize this around I think about three phrases that have been front here and talked

heard insinuation after insinuation in contradiction to direct testimony from both of my clients.

Now, it was suggested that what contradicts the testimony is the fact that Robert and Todd never -- or Robert and Todd never spoke to Jeff, Chalan, or Troy about the leaking tank.

But, again, as we discussed earlier, Your Honor, it was well known that the tank was leaking. Chalan had even used a bar of soap on it before. You don't have to say it out loud. Everyone knew. That was well known.

There was a suggestion that there must be a credibility issue because of the issue of was a new tank bought or not.

But, Your Honor, when Robert testified that he was pretty sure but not positive that Todd had already got a replacement tank. And then Todd testified, well, yeah, our plan was to replace it, but I hadn't bought it yet. That's not contradictory. That doesn't create a credibility issue, and it certainly doesn't create anything with their direct testimony about leave the truck alone.

Judge, they went so far to try to scrape the bottom of the barrel here trying to create an issue that in their briefing they suggested that, well, Robert has credibility issues because he says I'm not a welder but then testified he's a welder.

The I'm not a welder was counsel's own statement in his question. It wasn't the statement of my client.

And so they're not able to point to anything to contradict that testimony.

They talk about Robert welding 40 years ago. Again, they can't get to contradicting leave the truck alone without trying to place speculation upon speculation upon speculation.

And, in fact, as Mr. Schreiber did point out, Chalan did have prior experience seeing his own father weld a fuel tank using the exhaust, but it's not material where the idea came from.

And so, Judge, that absolute essential fact is not in dispute. They can't point to anything. I didn't hear anything that's a reasonable inference from any fact in this record that puts that in dispute.

And, again, relying on Jeff Holshouser's testimony that at different times in the past, Robert -- excuse me -- Troy had given him instruction, has even given Chalan instructions in the presence of Robert and Todd. Again, because Todd told Robert -- excuse me -- Todd told Troy and Chalan a couple days before the accident, that terminated any authority that Troy had to direct work on the truck.

And, Your Honor, I just wanted to touch quickly on Mr. Schreiber's point that he's saying that contributory

the truck, it doesn't mean move it around. Leave it alone.

It's just like when a mom tells the kid to leave the cookies alone, it doesn't mean go take one or break a piece off or take a little bit a frosting. Or leave your sister alone, it doesn't mean tease her or maybe go poke her. It's clear. That's common parlance.

They didn't have to say it in the manner that a lawyer would say it.

THE COURT: Okay.

MR. POPPEN: Thank you.

THE COURT: Thank you.

All right. I'll be back in about five minutes.

(A brief recess was taken.)

THE COURT: All right. Let's go back on the record.

Mr. Schreiber and Mr. Maher, are you both still present?

MR. MAHER: Yes.

MR. SCHREIBER: I am, Your Honor.

THE COURT: Okay. Summary judgment standard is well settled in South Dakota. This is a very sad case, and my sympathies go out to the families, to both the plaintiffs and defendants.

I think the facts in play that are undisputed show that Chalan Hedman and Jeff Holshouser were employees of the defendants.

On August 8 of 2016, Chalan and Jeff were injured as a result of a fuel tank explosion that occurred in the defendants' shop.

On the date of that explosion, Chalan and Jeff, along with fellow employee Troy Hattum, removed a fuel tank from a truck owned by the defendants.

The three dumped out the remaining fuel and rinsed the tank with water. The three men located a split in the fuel tank and were purportedly trying to fix a leak in the fuel tank.

Chalan and Troy then parked a four-wheeler ATV in the doorway of the shop and closed the overhead door partway with the door resting on the seat of the ATV.

Chalan and Troy hooked up a hose from the exhaust on the ATV, and placed the other end inside of the fuel tank located in the shop.

The four-wheeler ATV was running with the exhaust going through the hose into the fuel tank.

Jeff stood at a bench located in the shop working on straightening the mounting brackets removed from the fuel tank.

Chalan had a piece of cardboard as a wind block and stood directly next to Troy while Troy welded the fuel tank.

Jeff apparently at some point questioned the two about

what they were doing, and Troy Hattum apparently told him this was a textbook way to weld a fuel tank.

After a minute or two, an explosion occurred. And as a result of that explosion, Chalan Hedman and Troy Hattum ultimately died after a period in the hospital due to the severity of their injuries, and Jeff Holshouser also suffered injuries.

Defendants contend that Chalan and Troy were undergoing this project so Chalan could use an air-conditioned truck for his farming duties.

Plaintiffs, however, contend that the three were using a community effort, which was actually Holshouser's words, to undergo the project in furtherance of defendants' business.

Specifically, Jeff Holshouser indicated in his deposition testimony that he believed it was understood that they were to work on the truck during slow times.

It's undisputed by the parties that plaintiffs were utilizing defendants' tools to fix defendants' truck in defendants' shop.

It's also undisputed on the day of the explosion, the defendants did not participate in the welding. They were not at the shop when the explosion took place.

Defendants alleged that both Chalan and Troy were told to leave the truck alone. Plaintiffs allege that what

Chalan and Troy were told in relation to that truck is in dispute.

The parties apparently agree that Jeff was not told anything by the defendants about the truck and was never told to leave the truck alone.

It's clear that Chalan, Jeff, and Troy were employees of the Hattums. Troy was related to the Hattums. Defendants alleged that they were co-employees. And plaintiffs allege that Troy was acting in a supervisory role.

Jeff testified in his deposition that no one ever told him that Troy was the boss; however, later in an affidavit, he indicated that he believed that Troy had authority over him and Chalan.

So the plaintiff, Talyn Sheard, as personal representative of the estate of Chalan Hedman, brought suit against the defendants alleging strict liability as a result of Chalan assisting and performance of an abnormally dangerous activity on defendants' property without providing proper training and/or supervision, and not properly supervising the same.

They also allege that they failed to provide a safe and secure work environment and proper supervision and training for employees who are welding or assisting in welding the gas tank.

Plaintiff also alleges -- I believe it was just the estate that alleged they are also entitled to punitive damages.

So I'm going to start in reverse order in reference to the punitive damages claim. I will grant summary judgment in favor of the defendants on this claim.

Under South Dakota law, punitive damages are not recovered unless expressly authorized by the statute.

There needs to be either actual malice or presumed malice shown, or there needs to be some evidence of willful or wanton conduct.

I believe that there isn't anything in the record that plaintiffs were able to point to that shows that there was malice or willful and wanton conduct.

I believe that just by -- I think the allegation was that they allowed them to work on the truck. I don't think that that rises to the level of having punitive damages claim.

And so to the extent -- I understand that's not a second or a separate cause of action, but I do believe that the punitive damages claim can be resolved in the favor of the defendants.

In reference to Count 2, which is the failure to provide a reasonably safe place to work, I do find in favor of the defendants and grant summary judgment on the unsafe

workplace cause of action for the following reasons.

As stated in the Platt v. Meier case, a master cannot be liable for failure to furnish a reasonably safe place to work if the condition or so-called danger is so obvious as before the servant size to such an extent that he must know by the use of ordinary intelligence the possible danger that confronts him.

Further, pursuant to the Jackson v. Van Buskirk case, the master owes no duty to warn or instruct his servant of dangers obvious to a person of ordinary intelligence and judgment.

The Court starts with a premise, and I understand that this is an abnormally dangerous activity that applies to the strict liability claim, but nonetheless, the parties have asked the Court to assume for purposes of the summary judgment that welding on a fuel truck is abnormally dangerous.

And so I believe when you look at those -- that criteria, you're looking at the existence, at least for the Court to find there's an abnormally dangerous activity, which I believe that it is.

You're looking at an existence of a high degree of risk of harm to a person. You're looking at likelihood that harm will result and that that harm -- that the result would be great. You're looking at the fact that there's an

inability to eliminate that risk by the exercise of reasonable care.

You're looking at whether or not the extent to which the activity is not a manner of common usage, and whether it's inappropriate that that activity took place where it was carried on, which would have been the shop, and the extent to which its value to the community is outweighed by its dangerous attributes.

So when you look at the rule of non-liability, it's -- I think just by the fact of it being a dangerous activity, if it's apparent to the parties that the danger is present, I believe that's also supported by the undisputed testimony of Mr. Holshouser whereby he understood that welding a fuel truck could be dangerous.

I believe that it is discernable to both the employee and the employer, and is discoverable in the exercise of reasonable care expected to be taken by the employee for his own safety.

There was testimony that Mr. Holshouser did not have to stay in the shop. He could have left the shop at any point.

He even at one point questioned whether or not this was -- or what they were doing. I mean, he wanted to know more about it. So I think it's reasonable to infer that his antenna had went up that this was a dangerous activity.

And so I believe that's one reason that you can grant summary judgment.

I also believe that there was no duty -- that the action was not foreseeable. They definitely had an actual or constructive knowledge of the risk, appreciated the character, and voluntarily accepted that risk.

Both of the plaintiffs knew that they were taking part in an effort to weld on a fuel tank.

It's undisputed that welding of that fuel tank is dangerous due to the risk of explosion.

Holshouser, of course, admitted that. And Chalan -- it can be inferred by Chalan's actions that he understood that risk by staying and helping with the project.

I also find that there are some risks that can be inferred with constructive knowledge, and the Court finds and holds that welding a fuel tank while pumping it full of exhaust is one of those risks that can be inferred by quick constructive knowledge.

I also find, at least in reference to this cause of action, that both plaintiffs voluntarily accepted the risk.

I understand that assumption of the risk is usually something that would go to the jury, but in this particular fact circumstances -- or fact pattern, I do believe that this is one of those rare cases that rises to the level of assumption of risk applying as a matter of law.

Now, in reference to the strict liability claim, I think you start with the general premise that according to the Restatement Second of Torts, one who carries on an abnormally dangerous activity is subject to liability for harm to a person.

And so if you take that as step one, it's clear that the defendant did not engage in the welding, and I don't believe that there's any facts that show that the defendants instructed anyone to weld the tank.

And so that gets us to the agency arguments that the plaintiffs have put forward, specifically respondeat superior agency and vicarious liability.

It's clear to the Court that we're looking at the exception to the fellow servant rule. I mean, normally, if these were co-employees, that would be barred.

But I think you have to go to the exception which indicates whether or not the fellow servant rule applies to a vice principal or superior servant is acting in such a capacity.

I believe that there is a question of fact on specifically what authority Troy Hattum had on the parties.

Taking the facts in the light most favorable to the plaintiffs, they've alleged that that Mr. Hattum -- I guess to make it clear for the record -- that Troy Hattum at least had the ability to direct both Jeff and Chalan to do

things on the farm.

So I believe that the evidence shows at least that there's enough of a dispute in that regard.

However, in reference to Chalan, I think that the clear undisputed facts indicate that he was told to leave the truck alone.

The -- when I looked back at the specific objections that the plaintiffs have made to the statement of leave the truck alone, first of all, they're relying on credibility, which I don't believe is a proper reason to dispute the fact.

But there isn't anything specific in the record that they can point to that would show otherwise, that there was anything else said but leave the truck alone.

Of course, that would only apply to Chalan. And so, accordingly, summary judgment would be granted in favor of the defendants on Chalan's claim.

But in reference to Holshouser, that same thing wasn't said. It was not told that he needed to leave the truck alone. He had no idea -- didn't have any specific information one way or the other, and so I believe that there is enough undisputed material facts to allow that claim to go forward on the strict liability for Jeff Holshouser's claim.

At this point, I don't think the Court believes

there's enough case law that would allow her to move to the assumption of the risk or contributory negligence as it applies to strict liability, so I don't find that that's one of the reasons, at least on the strict liability claim. I think that's different than it would be on the regular negligence claim.

All right. Is there anything further from either one of the parties?

Would you please prepare an order for my review relying on the law that I have cited today?

MR. POPPEN: I will, Your Honor. Thank you.

THE COURT: Okay. Anything else from any of the parties?

MR. JENSEN: Nothing from us, Your Honor.

MR. SCHREIBER: No, Your Honor.

MR. MAHER: No, Your Honor.

(End of proceedings.)

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS.	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

TALYN SHEARD, a/k/a TALYN O'CONNER, as Guardian Ad Litem for Z.O., a minor child, and as Personal Representative for the Estate of Chalan Hedman, and JEFFREY PAUL HOLSHOUSER,	)	32CIV18-000134
Plaintiffs,	)	**STATEMENT OF UNDISPUTED MATERIAL FACTS**
v.	)	
ROBERT HATTUM, BEVERLY HATTUM, TODD HATTUM and CHELSEA HATTUM, jointly and severally, DBA HATTUM FAMILY FARMS,	)	
Defendants.	)	

Defendants Robert Hattum, Todd Hattum, and Chelsea Hattum, pursuant to the provisions of SDCL 15-6-56(c)(1), submit this statement of undisputed material facts in support of their motion for summary judgment.

1. On August 8, 2016, Chalan Hedman and Jeffrey Holshouser received injuries when a fuel tank exploded while it was being welded in Defendants' shop (hereafter "the accident"). Sheard Complaint, ¶¶ 4-6; Holshouser Complaint, ¶ 5; Holshouser Dep. 64:11-16.

2. On August 8, 2016, Chalan Hedman, Jeffrey Holshouser, and Troy Hattum engaged in a community effort to fix a leak in a fuel tank from a farm truck (hereafter "the truck"). Holshouser Dep. 46:6-10, 58:8-10, 64:4-5, 91:19-22, *see* generally Holshouser Dep. pages 36-64; Holshouser Dep. Exh. 4.

APP. C

3. On that date, Chalan Hedman and Jeffrey Holshouser removed the fuel tank from the truck. Holshouser Dep. 36:17-21, 37:19-38:2, 38:25-39:1, 42:22-23.

4. After the fuel tank was removed from the truck, Chalan Hedman, Jeffrey Holshouser, and Troy Hattum dumped out the remaining fuel and rinsed the tank with water. Holshouser Dep. 38:21-24, 39:12-18, 41:9-11, 41:17-21, 41:24-42:3, 42:24-44:20.

5. Chalan Hedman, Jeffrey Holshouser, and Troy Hattum then located a split in the fuel tank. Holshouser Dep. 44:25-45:3, 46:6-10.

6. Chalan Hedman or Troy Hattum parked a four-wheeler ATV in the doorway of the shop and closed the overhead door part way, resting it on the seat of the four-wheeler ATV. Holshouser Dep. 49:20-50:12, 53:21-54:12, 56:12-57:15, 60:1-3; Holshouser Dep. Exh. 4.

7. Chalan Hedman or Troy Hattum or both hooked up a hose from the exhaust on the four-wheeler ATV and placed the other end inside the fuel tank, which was in the shop. Holshouser Dep. 49:20-50:3, 51:2-3, 54:13-14, 56:12-57:15, 58:8-12; Holshouser Dep. Exh. 4.

8. The four-wheeler ATV was running with the exhaust going through the hose into the fuel tank while Jeffrey Holshouser had a conversation with Chalan Hedman and Troy Hattum. Holshouser Dep. 50:13-23, 51:7-22, 59:1-6, 73:11-21.

9. After the conversation, Jeffrey Holshouser stood at a bench in the shop straightening mounting brackets that had come off of the truck when the

fuel tank was removed. Holshouser Dep. 47:16-48:15, 52:24-53:4, 56:12-57:15, 58:15-25, 59:7-17, 63:23-24; Holshouser Dep. Exh. 4.

10. At the same time, Chalan Hedman held a piece of carboard as a wind block and stood directly next to Troy Hattum while Troy Hattum welded the fuel tank. Holshouser Dep. 59:18-60:13, 60:20-21, 60:25-61:8, 62:13-24, 63:7-22.

11. No one made Jeffrey Holshouser stay in the shop. Holshouser Dep. 63:25-64:1.

12. No one made Chalan Hedman stay in the shop. Holshouser Dep. 64:2-3.

13. Shortly after the welding of the fuel tank began, there was an explosion. Holshouser Dep. 7:22-8:1, 62:13-63:16, 64:11-22.

14. Prior to August 8, 2016, Robert Hattum and Todd Hattum instructed Chalan Hedman and Troy Hattum to leave the truck alone. R. Hattum Dep. 38:9-19; T. Hattum Dep. 12:9-16, 13:8-13, 24:5-23.

15. Prior to August 8, 2016, Robert Hattum instructed Chalan Hedman to use a different truck, not the one that the fuel tank came from, for hauling silage. R. Hattum Dep. 38:20-24.

16. This other truck that Robert Hattum instructed Chalan Hedman to use for hauling silage did not have functioning air conditioning. R. Hattum Aff., ¶ 1; T. Hattum Aff., ¶ 1.

17. The truck the fuel tank came from had functioning air conditioning. R. Hattum Aff., ¶ 2; T. Hattum Aff., ¶ 2; T. Hattum Dep. 8:11-9:2.

18. On the morning of the accident, Chalan Hedman told Taylor Hattum that he was not going to use a truck that did not have air conditioning. Taylor Hattum Aff., ¶ 2.

19. Neither Robert Hattum, Todd Hattum, nor Chelsea Hattum instructed Chalan Hedman, Jeffrey Holshouser, or Troy Hattum to work on the truck. Holshouser Dep. 34:25-35:2, 36:4-16; R. Hattum Dep. 38:9-19; T. Hattum Dep. 13:8-13, 23:22-24:23; C. Hattum Aff, ¶ 1.

20. Neither Robert Hattum, Todd Hattum, nor Chelsea Hattum instructed anyone to weld a fuel tank. Holshouser Dep. 6:16-21, 35:3-7; R. Hattum Aff., ¶ 3; T. Hattum Aff., ¶ 3; C. Hattum Aff., ¶ 2.

21. While the fuel tank was removed from the truck and welded, Robert Hattum was not on the premises where those activities were taking place. Holshouser Dep. 34:20-21, 34:25-35:2, 64:6-10, 91:13-18; R. Hattum Dep. 19:12-20, 20:3-16.

22. While the fuel tank was removed from the truck and welded, Todd Hattum was not on the premises where those activities were taking place. Holshouser Dep. 34:20-24, 34:25-35:2, 64:6-10, 91:13-18; R. Hattum Dep. 19:12-20, 20:3-16; T. Hattum Dep. 15:13-15.

23. While the fuel tank was removed from the truck and welded, Chelsea Hattum was not on the premises where those activities were taking place. R. Hattum Dep. 19:12-20, 20:3-16; C. Hattum Aff., ¶ 3.

24. At the time of the accident, it had been over forty years since Robert Hattum welded a fuel tank, and he did not weld a fuel tank during Chalan Hedman's or Troy Hattum's lifetimes. R. Hattum Aff., ¶ 4.

25. Todd Hattum has never welded a fuel tank. T. Hattum Dep. 9:18-19, 13:14-16, 15:19-21.

26. Chelsea Hattum has never welded a fuel tank. C. Hattum Aff., ¶ 4.

27. Prior to the accident, Robert Hattum was unaware of any welding of a fuel tank taking place at Defendants' farm in the prior forty years. R. Hattum Aff., ¶ 5; R. Hattum Dep. 21:14-16.

28. Prior to the accident, Todd Hattum was unaware of any welding of a fuel tank taking place at Defendants' farm during his lifetime. T. Hattum Aff., ¶ 4; T. Hattum Dep. 10:1-6, 13:17-21.

29. Prior to the accident, Chelsea Hattum was unaware of any welding of a fuel tank taking place at Defendants' farm during her lifetime. C. Hattum Aff., ¶ 5.

30. Prior to the date of the accident, Jeffrey Holshouser was unaware of any welding of a fuel tank taking place at Defendants' farm. Holshouser Dep. 3:24-4:20, 6:16-21, 52:13-17.

31. Ben Reinert worked at Defendants' farm from 2006 through the date of the accident. Reinert Dep. 3:16-19; R. Hattum Dep. 11:18-22.

32. Prior to the accident, Ben Reinert was unaware of any welding of a fuel tank taking place at Defendants' farm. Reinert Dep. 21:7-18.

33. Prior to the accident, Robert Hattum had no knowledge that Chalan Hedman or Troy Hattum had ever welded a fuel tank. R. Hattum Aff., ¶ 6.

34. Prior to the accident, Todd Hattum had no knowledge that Chalan Hedman or Troy Hattum had ever welded a fuel tank. T. Hattum Aff., ¶ 5.

35. Prior to the accident, Chelsea Hattum had no knowledge that Chalan Hedman or Troy Hattum had ever welded a fuel tank. C. Hattum Aff., ¶ 6.

36. Prior to the accident, Robert Hattum did not know that anyone was going to weld a fuel tank at Defendants' farm. R. Hattum Aff., ¶ 7; R. Hattum Dep. 28:16-18.

37. Prior to the accident, Todd Hattum did not know that anyone was going to weld a fuel tank at Defendants' farm. T. Hattum Aff., ¶ 6.

38. Prior to the accident, Chelsea Hattum did not know that anyone was going to weld a fuel tank at Defendants' farm. C. Hattum Aff., ¶ 7.

39. Welding a fuel tank is dangerous due to the risk of explosion. Holshouser Dep. 4:21-5:14; Sheard Complaint, ¶¶ 6, 10, 14; Holshouser Complaint, ¶¶ 5, 9, 13.

40. Prior to the date of the accident, Jeffrey Holshouser knew and understood that there was danger of an explosion from welding on a fuel tank. Holshouser Dep. 4:21-5:14.

41. At the time of the accident, Chalan Hedman was an employee of Defendants. Sheard Complaint, ¶ 3; T. Hattum Dep. 26:18-20.

42. At the time of the accident, Jeffrey Holshouser was an employee of Defendants. Holshouser Complaint, ¶ 3; Holshouser Dep. 12:13-17.

43. At the time of the accident, Troy Hattum was an employee of Defendants. Holshouser Complaint, ¶ 4; R. Hattum Dep. 14:21-15:2; R. Hattum Aff., ¶ 8; T. Hattum Aff., ¶ 7; C. Hattum Aff., ¶ 8.

44. Neither Robert Hattum, Todd Hattum, nor Chelsea Hattum placed Troy Hattum in charge of or in a supervisory position over Chalan Hedman or Jeffrey Holshouser. R. Hattum Dep. 14:12-23, 41:16-24; T. Hattum Dep. 5:13-6:15; Holshouser Dep. 28:10-17; R. Hattum Aff., ¶ 9; T. Hattum Aff., ¶ 8; C. Hattum Aff., ¶ 9.

45. Neither Robert Hattum, Todd Hattum, nor Chelsea Hattum ever told anyone that Troy Hattum was anyone's boss or that he was in charge of other employees. Holshouser Dep. 28:10-17; R. Hattum Aff., ¶ 10; T. Hattum Aff., ¶ 9; C. Hattum Aff., ¶ 10.

46. Chalan Hedman was a man of ordinary intelligence. *See* Plaintiffs' [Sheard's] Answers to Defendants Robert Hattum, Beverly Hattum, Todd Hattum and Chelsea Hattum's Interrogatories and Requests for Production of Documents, Interrogatory No. 25.

47. Jeffrey Holshouser was a man of ordinary intelligence. *See* Plaintiff's [Holshouser's] Answers to Defendants' Interrogatories and Responses to Requests for Production of Documents (First Set), Interrogatory No. 2.

Dated this 20th day of April, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of April, 2020, I served a true and correct copy of ***Statement of Undisputed Material Facts*** upon the following person by the following means:

Brad A. Schreiber	[ ]	First Class Mail
Schreiber Law Firm	[ ]	Hand Delivery
1110 E. Sioux Ave.	[X]	Odyssey System
Pierre, SD 57501	[ ]	Electronic Mail
Thomas M. Maher	[ ]	First Class Mail
Maher Law Office, LLP	[ ]	Hand Delivery
204 North Euclid Avenue	[X]	Odyssey System
Pierre, SD 57501	[ ]	Electronic Mail

/s/ Gary D. Jensen
Gary D. Jensen

EXHIBIT A TO DEFENDANTS' REPLY IN SUPPORT OF SUMMARY JUDGMENT

DEFENDANTS' REPLY TO PLAINTIFFS' OBJECTIONS TO STATEMENT OF UNDISPUTED MATERIAL FACTS

Both Plaintiffs submitted objections to Defendants' Statement of Undisputed Material Facts. The objections are identical, except every instance where an objection is lodged, Plaintiff Holshouser includes nearly every paragraph of his affidavit and a multi-page answer to an interrogatory.[1] Only the statements of fact to which an objection was lodged are addressed below. Defendants' reply establishes there are no actual disputes of fact.

2. On August 8, 2016, Chalan Hedman, Jeffrey Holshouser, and Troy Hattum engaged in a community effort to fix a leak in a fuel tank from a farm truck (hereafter "the truck"). Holshouser Dep. 46:6-10, 58:8-10, 64:4-5, 91:19-22, *see* generally Holshouser Dep. pages 36-64; Holshouser Dep. Exh. 4.

Plaintiffs' Reponses: Objection. Jeffrey Holshouser testified that Chalan Hedman, Troy Hattum and himself were looking for a "split" in the gas tank. He referred to their efforts in attempting to locate this split as a "community effort" by the three of them. Hols. Dep. 46:1-10. He also referred to hooking up the "hose" as a "community effort." Hols. Dep. 58:8-10. Holshouser was asked, "nobody made anybody stay in the shop, did they?" Holshouser responded, "no". He was asked, "it was, as you say, a community effort?" He responded, "yes". Hols. Dep. 64:2-5. Holshouser agreed on page 91:19-22 that the welding was a "community effort". Although, Troy Hattum, Chalan Hedman and Jeff Holshouser had separate responsibilities, Jeff was told by Troy Hattum to help clean the tank and take it off the truck. Hols. Dep. 91:23-25; 92:1-2. Troy Hattum, Chalan Hedman and Jeff Holshouser cleaned the tank out together. Hols. Dep. 38:23-24.

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[1] Holshouser's objection provides, "Objection is further made on the basis of the sworn Affidavit of Jeffrey Paul Holshouser In Opposition To Defendants' Motions For Summary Judgment on file herein and fully incorporated by this reference. Particularly paragraphs 1-21, 24-26, plus Exhibit A attached to said Affidavit from Holshouser's Answers to Interrogatories." While Defendants' replies account for this objection, it will not be reproduced under every statement where Plaintiffs otherwise object. Additionally, Defendants' object to the consideration of Holshouser's objection as failing to comply with the provisions of SDCL 15-6-56(c)(2), which requires the opposing party to respond to each numbered paragraph in the moving party's statement with *appropriate* citations to the record. Citing over twenty paragraphs of an affidavit and a four-page exhibit does not constitute an appropriate citation to the record.

The mounts on the truck were taken off by Jeff and Chalan. Hots. Dep. 38:25; 39:1. Chalan Hedman and Jeff Holshouser carried the diesel tank to the shop. Hols. Dep. 39:2-3. Troy Hattum or Chalan Hedman used a grinder to shine up the spot where the crack was located while Jeff worked on the brackets. Hols. Dep. 47:10-25; 48:1-15. Troy Hattum, Chalan Hedman brought an ATV over to the shop and ran a hose from the exhaust on the ATV to the diesel tank. Hols. Dep. 49:24-25; 50:1-12. Holshouser is sure that Troy is the one who went and got the ATV. Hols. Dep. 50:8-10. Holshouser asked what was going on and Troy explained what they were going to do with the exhaust. Hols. Dep. 50:13-23. Troy Hattum explained that this process was "text book" and told Jeff that is how they did it "last year." Hols. Dep. 51:1-22; 83:3-10. Troy Hattum did the welding and Chalan Hedman was holding some cardboard. Hols. Dep. 59:18-25; 60:11-13. Troy was the boss. Hols. Dep. 78:23-25; 79:1-5.

Defendants' Reply: None of the testimony cited in Plaintiffs' response contradicts the statement of fact.[2] Indeed, the response concedes, "Holshouser agreed on page 91:19-22 that the welding was a 'community effort.'" Further, Plaintiffs do not object to statements of undisputed fact numbers 3 through 10, which are simply the details of the community effort between Chalan, Holshouser, and Troy Hattum to fix the leak in the fuel tank.

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[2] Plaintiffs' response includes misstatements of the record. It asserts, "Holshouser is sure that Troy is the one who went and got the ATV." However, Holshouser testified:

> Q: So who went to get and drive the ATV?
>
> A: Troy.
>
> Q: Are you sure or not sure?
>
> A: *Not sure*, but he was there, *it was Troy and Chalan.*
>
> Q: It could have been Chalan that got the ATV, you don't know?
>
> A: *I don't know.* I'm pretty sure it was Troy.
>
> Q: Could have been Chalan?
>
> A: *Could have been but don't know.*

Holshouser Dep. 50:4-12 (emphasis added).

11. No one made Jeffrey Holshouser stay in the shop. Holshouser Dep. 63:25-64:1.

Plaintiffs' Reponses: Objection. Jeff Holshouser was an employee of Hattums. Hols. Dep. 8:22-25; 9-12:1-21. Because Troy was a Hattum family member, Holshouser understood that he was vested with authority to tell him what to do on the ranch. Hols. Dep. 78:6-22. Troy was the boss over the welding project. Hols. Dep. 78:23-25; 79:1-11. Troy was giving orders and telling people what to do. Hols. Dep. 79:1-11.

Defendants' Reply: This fact is not in dispute. This is Holshouser's exact testimony:

Q: Nobody made you stay in that shop, did they?

A: No.

Holshouser Dep. 63:25-64:1. None of the testimony cited by Plaintiffs contradicts this direct testimony.

12. No one made Chalan Hedman stay in the shop. Holshouser Dep. 64:2-3.

Plaintiffs' Reponses: Objection. See Plaintiffs Objection to Paragraph 11 incorporated herein by reference.

Defendants' Reply: This fact is not in dispute. Holshouser:

Q: Nobody made anybody stay in the shop, did they?

A: No.

Holshouser Dep. 64:2-3. None of the testimony cited by Plaintiffs contradicts this direct testimony.

14. Prior to August 8, 2016, Robert Hattum and Todd Hattum instructed Chalan Hedman and Troy Hattum to leave the truck alone. R. Hattum Dep. 38:9-19; T. Hattum Dep. 12:9-16, 13:8-13, 24:5-23.

Plaintiffs' Responses: Objection. Jeff Holshouser was never advised/told by Bob Hattum or Todd Hattum not to repair the fuel tank. Hols. Dep. 79:19-23. The hired hands on the ranch did what the bosses told them. Hols. Dep. 80:2-13. Troy was the boss on the welding job. Hols. Dep. 78:23-25; 79:1-5. Bob Hattum and Todd Hattum would tell Troy what to do from time to time and Troy would follow their instructions. Hols. Dep. 80:5-13. Based on the foregoing, Bob and Todd Hattum's credibility are at

issue which raises a question of fact as to whether or not one or both of them instructed Troy Hattum or Chalan Hedman to weld the diesel tank.

Defendants' Reply: The fact that Holshouser was not told by Robert or Todd not to repair the fuel tank does not contradict that Robert and Todd instructed Chalan and Troy to leave the truck alone. As set forth in Defendants' reply brief, Holshouser's conclusory statements about who he understood was the boss on the welding job do not raise a material fact as to the Estate. The assertion that Robert's and Todd's credibility is at issue does not comply with SDCL 15-6-56(c)(2), which requires the opposing party to respond to each numbered paragraph in the moving party's statement with appropriate citations to the record. Additionally, Defendants' reply brief establishes that Robert's and Todd's credibility is not at issue. Plaintiffs cite no evidence that Robert and Todd did not instruct Chalan and Troy to leave the truck alone. Nothing cited by Plaintiffs raises a dispute as to this fact.

15. Prior to August 8, 2016, Robert Hattum instructed Chalan Hedman to use a different truck, not the one that the fuel tank came from, for hauling silage. R. Hattum Dep. 38:20-24.

Plaintiffs' Reponses: Objection. Jeff Holshouser agrees that this was Robert Hattum's testimony but as previously set forth in Plaintiffs Objection to Number 14 his credibility is at issue concerning this testimony. Plaintiff incorporates herein by reference Plaintiff's objections in Paragraph 14.

Defendants' Reply: See Defendants' reply to Paragraph 14. Plaintiffs cite no evidence that Robert did not instruct Chalan to use a different truck for hauling silage. Nothing cited by Plaintiffs raises a dispute as to this fact.

16. This other truck that Robert Hattum instructed Chalan Hedman to use for hauling silage did not have functioning air conditioning. R. Hattum Aff., ¶ 1; T. Hattum Aff., ¶ 1.

Plaintiffs' Responses: Objection. Plaintiff Holshouser incorporates herein by reference the objections set forth in Paragraphs 14 and 15 above. Further, Jeff Holshouser testified he never heard Chalan Hedman suggest that he was only going to drive a truck that had air conditioning. Hols. Dep. 37:2-18.

Defendants' Reply: See Defendants' reply to Paragraphs 14 and 15. That Holshouser testified he never heard Chalan suggest that he was only going to drive a truck that had air conditioning does not contradict the fact that the truck he was instructed to use for hauling silage did not

have functioning air conditioning. Nothing cited by Plaintiffs raises a dispute as to this fact.

18. On the morning of the accident, Chalan Hedman told Taylor Hattum that he was not going to use a truck that did not have air conditioning. Taylor Hattum Aff., ¶ 2.

Plaintiffs' Response: Objection. During the time Jeff Holshouser was with Chalan Hedman that morning, he never observed him on his phone speaking to anyone, nor did he mention talking to Taylor Hattum.

Defendants' Reply: That Holshouser did not observe Chalan on his phone or did not hear Chalan mention speaking with Taylor Hattum does not contradict Taylor's sworn statement. Indeed, nothing in Holshouser's affidavit establishes that he has personal knowledge of what Chalan did or who he spoke with before Holshouser arrived at the farm that day. His affidavit indicates that he arrived at the farm that day at "9 or 10 am". Holshouser Aff., ¶ 22. In his deposition, Holshouser testified he got there at "8 a.m., 10, 9:30, whenever." Holshouser Dep. 34:18-19. Clearly, he was not with Chalan every minute of the day before the accident. Nothing cited by Plaintiffs raises a dispute of fact.

19. Neither Robert Hattum, Todd Hattum, nor Chelsea Hattum instructed Chalan Hedman, Jeffrey Holshouser, or Troy Hattum to work on the truck. Holshouser Dep. 34:25-35:2, 36:4-16; R. Hattum Dep. 38:9-19; T. Hattum Dep. 13:8-13, 23:22-24:23; C. Hattum Aff, ¶ 1.

Plaintiffs' Response: Objection. Plaintiff Holshouser incorporates by reference Plaintiffs' those objections set forth in Paragraphs 14, 15 and 16 hereinabove.

Defendants' Reply: See Defendants' reply to Paragraphs 14-16. Nothing cited by Plaintiffs contradicts this statement. Indeed, Holshouser testified that Robert and Todd were gone all day prior to the accident. Holshouser Dep. 34:25-35:2. He also testified that he was not part of any conversation about what was supposed to happen to the truck prior to that day. *Id.* at 36:4-8, 36:14-16.

20. Neither Robert Hattum, Todd Hattum, nor Chelsea Hattum instructed anyone to weld a fuel tank. Holshouser Dep. 6:16-21, 35:3-7; R. Hattum Aff., ¶ 3; T. Hattum Aff., ¶ 3; C. Hattum Aff., ¶ 2.

Plaintiffs' Response: Objection. Robert Hattum testified he intended to replace the leaky diesel tank with a "new tank;" that Todd had found one and was "pretty sure" that it had been purchased. Robert Hattum dep.

22:13-22. None of this information had been shared with Troy Hattum or Chalan Hedman. Robert Hattum dep. 22:25; 23:1-4. Todd Hattum testified that he never actually ordered a new tank. Todd Hattum dep. 10:24-25; 11:1-3; 12:1-20.

Defendants' Reply: Nothing cited by Plaintiffs raises a dispute of fact. Both Robert and Todd testified they intended to get a replacement tank. R. Hattum Dep. 19:8-11, 22:14-16; T. Hattum Dep. 11:12-20. That Robert testified that Todd had found a tank to replace the one on the truck and that he was "pretty sure" but "not positive" it had been purchased at the time of the accident does not contradict Todd's testimony that he knew they were going to get a tank but had not ordered one yet. The fact that Robert and Todd did not share their intention to get a replacement tank with Chalan and Troy does not contradict the fact that Defendants did not instruct anyone to weld a fuel tank.

24. At the time of the accident, it had been over forty years since Robert Hattum welded a fuel tank, and he did not weld a fuel tank during Chalan Hedman's or Troy Hattum's lifetimes. R. Hattum Aff., ¶ 4.

Plaintiffs' Response: Objection. Robert Hattum testified that he is "not a welder." Robert Hattum dep. 24:16. Robert Hattum later testifies that he and Todd are both welders. Robert Hattum dep. 25:6-7. He further testified that Troy learned how to weld from him and his father, Todd. Robert Hattum dep. 25:3-7. Robert further testified that his father was a welder and taught him how to weld a fuel tank. He describes the exact same method used by Troy Hattum. Robert Hattum dep. 26:2-11.

Defendants' Reply: Nothing cited by Plaintiffs raises a dispute of fact. Robert did not testify that he is not a welder; that was a statement by the Estate's counsel! R. Hattum Dep. 24:16. That Robert testified Troy learned to weld from Todd does not contradict the statement that it had been over forty years since Robert welded a fuel tank and that he did not do so during the lifetimes of Chalan and Troy. That Robert's father taught him how to weld a fuel tank forty plus years ago also does not contradict the statement that Robert had not welded a fuel tank for over forty years. Likewise, that the method of welding a fuel tank Robert's father taught him forty plus years ago was similar to the method used on the day of the accident does not contradict the statement that Robert had not welded a fuel tank in over forty years.

25. Todd Hattum has never welded a fuel tank. T. Hattum Dep. 9:18-19, 13:14-16, 15:19-21.

Plaintiffs' Response: Objection. Todd Hattum's credibility is at issue. His testimony contradicts his father's concerning ordering a new diesel tank, see Paragraph 20 above. He also contradicts his father's testimony concerning any knowledge or experience welding a fuel tank. Robert describes the same method utilized by Troy and Troy was instructed how to weld by Robert Hattum and Todd Hattum. Further, Todd testified that he "never" talked to Troy Hattum or Chalan Hedman or Jeff Holshouser about theleak in this tank. Todd Hattum dep. 12:20-25; 13:1-7.

Defendants' Reply: Nothing cited by Plaintiffs raises a dispute of fact. See Defendants' reply to Paragraph 20 explaining that there was no contradiction between Robert's and Todd's testimony concerning ordering a new tank. Robert specifically testified he thought, but was not certain, that a tank had already been purchased. R. Hattum Dep. 22:14-16. Todd testified that he knew they were going to get a replacement tank but had not actually ordered it yet. T. Hattum Dep. 11:12-15. This is not a contradiction. They both testified they intended to get a replacement tank. R. Hattum Dep. 19:8-11, 22:14-16; T. Hattum Dep. 11:12-20. Contrary to the provisions of SDCL 15-6-56(c)(2), Plaintiffs fail to cite any testimony of Todd Hattum for their assertion that "[h]e also contradicts his father's testimony concerning any knowledge or experience welding a fuel tank." That Todd did not talk to Chalan, Troy, or Holshouser about the leak in the tank does not contradict the statement that Todd has never welded a fuel tank. Plaintiffs cite no evidence that Todd has ever welded a fuel tank.

27. Prior to the accident, Robert Hattum was unaware of any welding of a fuel tank taking place at Defendants' farm in the prior forty years. R. Hattum Aff., ¶ 5; R. Hattum Dep. 21:14-16.

Plaintiffs' Response: Objection. Credibility. Jeff Holshouser testified that as Troy Hattum, Chalan Hedman and he were preparing to put the hose from the ATV into the diesel tank, Troy commented that this is how they did it last year. They showed Jeff Holshouser a weld spot on the same leaky tank from the same year before. Hols. Dep. 51:8-22.

Defendants' Reply: Simply stating "credibility" is not a legal objection and does not comply with the provisions of SDCL 15-6-56(c)(2). Holshouser's statement that Troy commented that this is how they did the weld the previous year and showed the weld spot on the tank to Holshouser does not contradict the statement that Robert was unaware of any welding of a fuel tank at Defendants' farm the prior forty years. Holshouser testified that he never saw anyone weld a gas tank until the day of the accident. Holshouser Dep. 3:24-4:20. In fact, until the day of the accident, Holshouser was likewise unaware of any welding of a fuel tank at Defendants' farm:

Q: Is that the first you had ever heard of any previous welding on that tank?

A: Yes.

Q: You didn't see it the year before?

A: No.

Holshouser Dep. 52:13-17.

28. Prior to the accident, Todd Hattum was unaware of any welding of a fuel tank taking place at Defendants' farm during his lifetime. T. Hattum Aff., ¶ 4; T. Hattum Dep. 10:1-6, 13:17-21.

Plaintiffs' Response: Objection. Plaintiff Holshouser incorporates herein by reference the objection set forth in Paragraph 27 hereinabove.

Defendants' Reply: See Defendants' reply to Paragraph 27.

30. Prior to the date of the accident, Jeffrey Holshouser was unaware of any welding of a fuel tank taking place at Defendants' farm. Holshouser Dep. 3:24-4:20, 6:16-21, 52:13-17.

Plaintiffs' Response: Objection. Jeff Holshouser's testimony was that he never saw Todd Hattum or anybody else weld a gas tank other than the day he watched Chalan Hedman and Troy Hattum. He was "aware" that welding that same tank had taken place the year before. Hols. Dep. 51:8-23.

Defendants' Reply: The testimony cited by Plaintiffs does not contradict the statement. The statement refers to the period "[p]rior to the date of the accident". The testimony cited by Plaintiffs says nothing about Holshouser being aware that the same tank had been welded the year before. In fact, the testimony shows he was being shown the weld for the first time on the day of the accident. Importantly, while Holshouser described being shown a prior weld on the day of the accident, he testified:

Q: *Is that the first you had ever heard of any previous welding on that tank*?

A: *Yes.*

Q: You didn't see it the year before?

A: No.

Holshouser Dep. 52:13-17. Holshouser also testified that he never saw anyone weld a gas tank until the day of the accident. Holshouser Dep. 3:24-4:20. Since Holshouser testified he neither heard of previous welding on the same tank nor saw any welding of a gas tank before the day of the accident, he could not have been aware, prior to the day of the accident, that there had been welding on that same tank. Nothing cited by Plaintiffs raises a dispute of fact.

33. Prior to the accident, Robert Hattum had no knowledge that Chalan Hedman or Troy Hattum had ever welded a fuel tank. R. Hattum Aff., ¶ 6.

Plaintiffs' Response: Objection. Credibility. See Plaintiffs' objection in Paragraphs 14 and 30 incorporated herein by reference.

Defendants' Reply: Simply stating "credibility" is not a legal objection and does not comply with the provisions of SDCL 15-6-56(c)(2). See Defendants' reply to Paragraphs 14 and 30. Nothing cited by Plaintiffs' raises a dispute of fact.

34. Prior to the accident, Todd Hattum had no knowledge that Chalan Hedman or Troy Hattum had ever welded a fuel tank. T. Hattum Aff., ¶ 5.

Plaintiffs' Response: Objection. Credibility. See Plaintiffs' objection in Paragraphs 14 and 30 incorporated herein by reference.

Defendants' Reply: Simply stating "credibility" is not a legal objection and does not comply with the provisions of SDCL 15-6-56(c)(2). See Defendants' reply to Paragraphs 14 and 30. Nothing cited by Plaintiffs' raises a dispute of fact.

36. Prior to the accident, Robert Hattum did not know that anyone was going to weld a fuel tank at Defendants' farm. R. Hattum Aff., ¶ 7; R. Hattum Dep. 28:16-18.

Plaintiffs' Response: Objection. Credibility. See Plaintiffs' objection in Paragraphs 14 and 30 incorporated herein by reference.

Defendants' Reply: Simply stating "credibility" is not a legal objection and does not comply with the provisions of SDCL 15-6-56(c)(2). See Defendants' reply to Paragraphs 14 and 30. Nothing cited by Plaintiffs' raises a dispute of fact. Indeed, Holshouser admitted he has nothing to contradict this statement, acknowledging in his deposition

that he has no knowledge whether Robert knew the welding was going to take place. Holshouser Dep. 91:13-16.

37. Prior to the accident, Todd Hattum did not know that anyone was going to weld a fuel tank at Defendants' farm. T. Hattum Aff., ¶ 6.

Plaintiffs' Response: Objection. Credibility. See Plaintiffs' objection in Paragraphs 14 and 30 incorporated herein by reference.

Defendants' Reply: Simply stating "credibility" is not a legal objection and does not comply with the provisions of SDCL 15-6-56(c)(2). See Defendants' reply to Paragraphs 14 and 30. Nothing cited by Plaintiffs' raises a dispute of fact. Indeed, Holshouser admitted he has nothing to contradict this statement, acknowledging in his deposition that he has no knowledge whether Todd knew the welding was going to take place. Holshouser Dep. 91:13-16.

44. Neither Robert Hattum, Todd Hattum, nor Chelsea Hattum placed Troy Hattum in charge of or in a supervisory position over Chalan Hedman or Jeffrey Holshouser. R. Hattum Dep. 14:12-23, 41:16-24; T. Hattum Dep. 5:13-6:15; Holshouser Dep. 28:10-17; R. Hattum Aff., ¶ 9; T. Hattum Aff., ¶ 8; C. Hattum Aff., ¶ 9.

Plaintiffs' Response: Objection. Plaintiffs incorporate herein by reference the objections set forth in Paragraph 11 hereinabove.

Defendants' Reply: Nothing cited by Plaintiffs raises a dispute of material fact as to the Estate.

45. Neither Robert Hattum, Todd Hattum, nor Chelsea Hattum ever told anyone that Troy Hattum was anyone's boss or that he was in charge of other employees. Holshouser Dep. 28:10-17; R. Hattum Aff., ¶ 10; T. Hattum Aff., ¶ 9; C. Hattum Aff., ¶ 10.

Defendants' Reply: Holshouser admitted this in his deposition:

Q: Up until this particular day, did Bob Hattum ever say to you that Troy was in some way your boss?

A: No.

Q: Did Bob ever say Troy was anybody's boss?

A: No.

Q: Did Todd ever say Troy was anybody's boss?

A: No.

Holshouser Dep. 28:10-17. Nothing cited by Plaintiffs raises a dispute of material fact.

DEFENDANTS' RESPONSE TO PLAINTIFFS STATEMENT OF MATERIAL FACTS IN DISPUTE

Both Plaintiffs submitted identical statements of fact they contend to be in dispute.

1. Troy Hattum had authority over Chalan Hedman and Jeffrey Holshouser. Jeff Holshouser Aff. ¶ 3, 4, 5, 6, 7, 8, 10, 11, 12, 13.

Defendants' Response: See Defendants' objections to ¶¶ 3-4, 7-8, 11-13 of Holshouser's Affidavit. Further, this alleged fact is not material. Additionally, the is alleged fact is overbroad, as it does not identify what authority Troy allegedly had over Chalan and Holshouser.

2. Troy Hattum was not a fellow-servant. He instructed and supervised the welding. Jeff Holshouser Aff. ¶ 17, 18, 19, 20 and 21.

Defendants' Response: Objection. This is a legal conclusion contrary to the provisions of SDCL 15-6-56(c)(2). See Defendants' objections to ¶¶ 18-19, 21 of Holshouser's Affidavit. Further, this alleged fact is not material.

3. Defendants are liable to Plaintiffs under theories of Respondeat Superior, Agency and Vicarious liability for the acts of inaction or Troy Hattum that resulted in personal injury and death to Plaintiffs.

Defendants' Response: Objection. This is a legal argument contrary to the provisions of SDCL 15-6-56(c)(2).

4. Defendants never instructed Plaintiffs or Troy Hattum not to weld the leaky fuel tank. Todd Hattum Dep. 12:20-25; 13:1-7.

Defendants' Response: This fact is not material. Chalan and Troy were instructed to leave the truck alone. SUMF ¶ 14.

5. There was no obvious or apparent danger to Plaintiffs or Troy Hattum. Under Troy's supervision they used the "text book" method of welding a fuel tank. Jeff Holshouser Aff. ¶ 17, 18, 19, 20.

Defendants' Response: See Defendants' objections to ¶¶ 18-19, 21 of Holshouser's Affidavit. Objection is further made to the extent this alleged fact calls for a legal conclusion as to an objective—rather than subjective—standard for obvious or apparent dangers. Finally, nothing cited by Plaintiffs supports the statement that there was no obvious or apparent danger as viewed by Chalan.

6. Chalan Hedman has driven Defendant's trucks without air conditioning. Jeff Holshouser Aff. ¶ 23-24.

Defendants' Response: This fact is not material.

DEFENDANTS' LEGAL OBJECTIONS TO THE AFFIDAVIT OF JEFFREY PAUL HOLSHOUSER

Defendants' legal objections to Plaintiff Holshouser's Affidavit are set for the below:

1. Both Robert Hattum (hereafter Bob) and Todd Hattum (hereafter Todd) have now stated in their Affidavits seeking to have this case dismissed that: "I did not place Troy Hattum in charge of or in a supervisory position over Chalan Hedman or Jeffrey Holshouser" and "I never told anyone that Troy Hattum was anyone's boss or that he was in charge of other employees".

2. Both Bob and Todd use identical language. However, that is not in fact how Hattum Family Farms (hereafter Hattum ranch) was actually run, operated and controlled.

Objection: The second sentence is a conclusory statement that does not comply with the provisions of SDCL 15-6-56(e), which requires that "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein[.]" *See also Luther v. City of Winner*, 2004 S.D. 1, ¶ 11, 674 N.W.2d 339, 344-45 (holding that conclusory statements in affidavit were insufficient to raise a genuine issue of material fact); *Chem-Age Indus. v. Glover*, 2002 S.D. 122, ¶ 18, 652 N.W.2d 756, 765 ("Evidence submitted in affidavits as part of a summary judgment proceeding must be legally admissible.").

3. The Hattum ranch is owned by the Hattum family. It was made clear to employees that if Bob or Todd were not present, that Troy Hattum (hereafter Troy) was in charge-next in line.

Objection: Holshouser sets forth no facts showing he has personal knowledge of who owns "Hattum ranch" in violation of the provisions of SDCL 15-6-56(e), which requires that "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein[.]" Moreover, the first sentence is vague and meaningless as Holshouser does not identify who he includes in "the Hattum family". The second sentence is an improper conclusory statement in violation of the provisions of SDCL 15-6-56(e); *see also Luther v. City of Winner*, 2004 S.D. 1, ¶ 11, 674 N.W.2d 339, 344-45 (holding that conclusory statements in affidavit were insufficient to raise a genuine issue of material fact). Indeed, Holshouser does not identify who purportedly made this clear, by what means, or to what employees. Holshouser testified in his deposition that neither Robert nor Todd ever told Holshouser that Troy was Holshouser's boss or anybody's boss. Holshouser Dep. 28:10-17. Holshouser may not change his testimony in this manner.

4. The Hattum ranch operated this way over all of the years that I worked for them. On many occasions, Troy gave me instructions in the presence of Bob and/or Todd and I followed them and they knew he was giving the instructions and that I was following them. The older Troy got the more authority he had.

Objection: As to the first and last sentence of this paragraph, see the objection to the second sentence of Paragraph 3.

7. In fact, there were times when I would report to work, that the Hattums would tell me to go find Troy and find out what he wanted me to work on. This increased over the years as Troy got older, and was in effect all the way through the day of the accident.

Objection: This is contradictory to Holshouser's deposition testimony where he testified that neither Robert nor Todd ever told Holshouser that Troy was his boss. Holshouser Dep. 28:10-17. There is no explanation for the change in testimony. Therefore, the statements are inadmissible. *Taggart v. Ford Motor Co.*, 462 N.W.2d 493, 503 (S.D. 1990) (stating that contradictory affidavit submitted for the purpose of creating a material issue of fact when there was no explanation for the change in testimony from the deposition does not create a material issue of fact). The statement is also vague, as Holshouser does not identify who is included in "the Hattums".

8. It was clear to me that Bob and Todd expected and required that I follow Troy's instructions. They acquiesced in every instruction, and they knew that he was instructing me and could see that I was doing as

Troy instructed. Troy also instructed Chalan Hedman (hereafter Chalan), as well, in my presence. Bob and Todd knew of said instructions and did not in any manner suggest that Troy did not have authority to give instructions.

Objection: The last sentence includes a conclusory statement in violation of the provisions of SDCL 15-6-56(e), which requires that "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein[.]" *See also Luther v. City of Winner*, 2004 S.D. 1, ¶ 11, 674 N.W.2d 339, 344-45 (holding that conclusory statements in affidavit were insufficient to raise a genuine issue of material fact). It is impossible for Holshouser to have personal knowledge as to what Robert and Todd said about Troy's authority or lack thereof to Chalan at times when Holshouser was not present.

9. Also, we knew to work on the truck in question when it was a "slow day". The only thing wrong with said truck was the leak in the fuel tank.

Objection: This is vague and ambiguous, as who is included in "we" is not identified. This is also a conclusory statement based on speculation and surmise in violation of the provisions of SDCL 15-6-56(e), which requires that "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein[.]" *See also Luther v. City of Winner*, 2004 S.D. 1, ¶ 11, 674 N.W.2d 339, 344-45 (holding that conclusory statements in affidavit were insufficient to raise a genuine issue of material fact). Holshouser does not identify how he knew to work on the truck the first slow day. Holshouser had sworn under oath in his interrogatory answers: "We were told to work on it the first 'slow day'." Holshouser Aff. Exh. A, Interrogatory No. 25. That testimony fell apart in his deposition, where Holshouser testified:

Q: Bob and Todd did not tell anybody that you heard to do anything to this tank, correct?

A: No.

Q: Correct?

A: Correct.

Q: The second sentence says, "We were told to work on it the first

slow day." Now, who is "we"?

A: The crew.

Q: I want you to tell me specifically who the "we" are.

A: Tory and Chalan, me, Ben.

Q: Who told you to do that?

A: Troy.

Q: When?

A: *A couple days before*, whatever, that's why stuff was pulled to the shop, we worked on it.

Q: I get that that truck is there, that's why you are saying it was there. But this is important, and I want you to tell me in all honesty if somebody had told you before that day to work on this truck and leaking tank, and if they did, I want you to tell me who and when and where.

A: No.

Q: You don't know?

A: All I know is the truck was pulled to the shop to be repaired. *Until that day, I didn't know.*

Q: You didn't know anything about it, right? Correct?

A: Correct.

Q: *And weren't part of any conversation about what was supposed to happen to that truck before that day, were you*?

A: No.

Q: Correct?

A: *Correct.*

* * *

Q: *You had absolutely no discussion about this truck before that*

morning, true?

A: ***True.***

Holshouser Dep. 35:3-36:16. There is no explanation for the change in testimony, so the statement is inadmissible. T*aggart v. Ford Motor Co.*, 462 N.W.2d 493, 503 (S.D. 1990) (stating that contradictory affidavit submitted for the purpose of creating a material issue of fact when there was no explanation for the change in testimony from the deposition does not create a material issue of fact).

11. This is how it works on a farm owned by a family. There are not statements that "Troy is your boss", it is rather every day occurrences that the Hattum family owners, Bob and Todd, give authority to their son, or grandson, (the next Hattum generation) to run the hired hands and keep the place running.

Objection: These are conclusory statements and opinions in violation of the provisions of SDCL 15-6-56(e), which requires that "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein[.]" *See also Luther v. City of Winner*, 2004 S.D. 1, ¶ 11, 674 N.W.2d 339, 344-45 (holding that conclusory statements in affidavit were insufficient to raise a genuine issue of material fact).

12. In short, the chain of authority was from Bob and Todd and Troy. It was exercised, in fact, throughout the years that I worked there in that manner. There was no doubt about it: that I was to take instructions from Troy, especially when Bob and Todd were not present.

Objection: The first sentence is a conclusory statement in violation of the provisions of SDCL 15-6-56(e), which requires that "opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein[.]" *See also Luther v. City of Winner*, 2004 S.D. 1, ¶ 11, 674 N.W.2d 339, 344-45 (holding that conclusory statements in affidavit were insufficient to raise a genuine issue of material fact).

13. Chalan, equally, would have known that he was to take instructions from Troy. I saw Troy give him instructions over the length of time that he worked there and he accepted them.

Objection: The first sentence is impermissible speculation in violation of the provisions of SDCL 15-6-56(e), which requires that

"opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein[.]"

16. On the day of the explosion, when I got to the Hattum ranch, the truck was already pulled up by near the shop door. We knew that was where units were placed to be repaired, over the years, by the Hattums. From experience, I knew the units placed in that position were to be repaired when we had a "slow day".

Objection: See objection to Paragraph 9.

18. Further, Troy informed me that he had previously worked on said fuel tank for a prior year, in the same manner. (See pages 10, 11, 12 and 13 of my Answer to Interrogatory 25, a copy of which is attached as Exhibit A and fully incorporated by this reference.)

Objection: This is a change in testimony for which no explanation has been provided. So, the statement is inadmissible. *Taggart v. Ford Motor Co.*, 462 N.W.2d 493, 503 (S.D. 1990) (stating that contradictory affidavit submitted for the purpose of creating a material issue of fact when there was no explanation for the change in testimony from the deposition does not create a material issue of fact). Holshouser unequivocally testified in his deposition that Chalan also said this:

Q: Was anything else said?

A: Yeah, I said -- well, he said, yeah, that's exactly how we did it last year, you can see, and he showed me a spot where they had welded maybe two or three inches from this one the year before, there was a weld spot on that tank.

Q: That's what Troy said?

A: Yes.

Q: Did *Chalan* say anything?

A: *Same thing*, just yeah, this is how you do it.

Q: They both said that's how you do it?

A: Yeah.

Q: *They* both said that's how *we* did it last year?

A: *Yes*, it evidently worked on it the year before.

Holshouser Dep. 51:7-19. Holshouser further testified:

Q: You took it, though, that *both Troy and Chalan had done it the same way a year before*?

A: *Yes*.

Q: They were going to repeat what *they* had done last year?

A: Exactly.

***Id.* at 52:18-23.**

19. In fact, Troy showed me where the Hattums had welded this tank, before, using this same method. Troy knew where the prior weld was, and pointed it out to me. Troy's statements assured me that this could and would be done safely in the same manner, as before.

Objection: See objection to Paragraph 18. In his deposition, Holshouser never testified that "the Hattums" had welded the tank. Holshouser Dep. 51:7-19, 52:18-23. This is an inadmissible change in testimony. *See Taggart v. Ford Motor Co.*, 462 N.W.2d 493, 503 (S.D. 1990) (stating that contradictory affidavit submitted for the purpose of creating a material issue of fact when there was no explanation for the change in testimony from the deposition does not create a material issue of fact).

21. To reassure me, Troy said: I have done this exact same thing on this tank, and here is how I did it: Troy rolled the tank on the stand and said: here it is. It was a L shape weld.

Objection: See objections to Paragraphs 18 and 19.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	)SS.	
COUNTY OF HUGHES	)	SIXTH JUDICIAL CIRCUIT

TALYN SHEARD, a/k/a TALYN O'CONNER, as Personal Representative for the Estate of Chalan Hedman, and JEFFREY PAUL HOLSHOUSER,	)	32CIV18-000134
Plaintiffs,	)	**JUDGMENT**
v.	)	
ROBERT HATTUM, TODD HATTUM and CHELSEA HATTUM, jointly and severally, DBA HATTUM FAMILY FARMS,	)	
Defendants.	)	

This Court entered its Order on Defendants' Motion for Summary Judgment, which is incorporated herein, granting summary judgment in favor of Defendants on each and every claim and cause of action asserted by Plaintiff Talyn Sheard, a/k/a Talyn O'Conner, as Personal Representative for the Estate of Chalan Hedman in the above-captioned action on the 25th day of June, 2020. By the same Order on Defendants' Motion for Summary Judgment, the Court granted summary judgment in favor of Defendants on Plaintiff Jeffrey Holshouser's claim and cause of action for unsafe workplace. This Court entered its Order Granting Defendants' Motion for Summary Judgment on Plaintiff Holshouser's Strict Liability Claim, which is incorporated herein, granting summary judgment in favor of Defendants on Plaintiff Holshouser's claim and cause of action for strict liability on the 9th day of November, 2020.

Summary judgment having been entered in favor of Defendants as to all claims and causes of action of each Plaintiff in the above-captioned action, it is hereby

ORDERED, ADJUDGED, and DECREED that the claims and causes of action asserted by Plaintiff Talyn Sheard, a/k/a Talyn O'Conner, as Personal Representative for the Estate of Chalan Hedman and by Plaintiff Jeffrey Holshouser in the above-captioned action are hereby dismissed on the merits, with prejudice, and that Defendants shall recover of Plaintiff Talyn Sheard, a/k/a Talyn O'Conner, as Personal Representative for the Estate of Chalan Hedman and Plaintiff Jeffrey Holshouser the costs of defending such claims and causes of action in the sum of $ 2,368.89 , which are to be hereafter determined and taxed by the Clerk of Courts.

Dated this _____ day of _____, 2020.

BY THE COURT:

Signed: 11/12/2020 4:39:43 PM

Margo D Northrup

Honorable Margo Northrup,
Circuit Court Judge

Attest:
Deuter-Cross, TaraJo
Clerk/Deputy

_____,

IN THE SUPREME COURT OF THE STATE OF SOUTH DAKOTA

Appeal No. 29496

TALYN SHEARD, a/k/a TALYN O'CONNER, as Personal Representative for the Estate of Chalan Hedman, and JEFFREY PAUL HOLSHOUSER

Appellants,

vs.

ROBERT HATTUM, TODD HATTUM, and **CHELSEA HATTUM, jointly and severally, DBA HATTUM FAMILY FARMS**

Appellees.

APPEAL FROM THE CIRCUIT COURT
SIXTH JUDICIAL CIRCUIT
HUGHES COUNTY, SOUTH DAKOTA

THE HONORABLE MARGO NORTHRUP
Circuit Court Judge

APPELLANT TALYN SHEARD'S REPLY BRIEF

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Notice of Appeal filed December 18, 2020

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I. JURISDITONAL STATEMENT

Appellant's Jurisdictional Statement is set forth in Appellant's Brief.

II. STATEMENT OF THE ISSUES

Appellant's Statement of the Issues is set forth in the Appellant's Brief

III. STATEMENT OF FACTS AND ARGUMENT

Appellees are under the mistaken belief that because Robert Hattum and Todd Hattum testified that they instructed Chalan and Troy Hattum to "leave the truck alone" that the analysis is over and they prevail. This would ignore the summary judgment standard and the testimony of Jeff Holshouser which raises a genuine issue of material fact as to each issue.

Jeff Holshouser is the only survivor of the shop fire and the only surviving witness who can accurately described what occurred on that horrific day in August. As much as Appellees would like their testimony to be uncontradicted it remains contradicted by Jeff Holshouser thereby raising numerous issues of material fact.

Chalan Hedman was an employee of the Appellees. Chalan, Troy Hattum and Jeff Holshouser were at the Hattum Farm welding Hattum's fuel tank, using Hattum's welding equipment in Hattum's shop to make Hattum's truck operable.

Jeff Holshouser has testified via Affidavit and deposition that Troy Hattum was in charge, he had the authority to "run the hired hands"; the chain of command was Bob, Todd and Troy, there was no doubt about that. (SR 359, Jeff Holshouser Affidavit ¶ 11 and 12.)

When Chalan Hedman, Jeff Holshouser and Troy Hattum began preparing the fuel tank for welding, they brought in an ATV. Chalan and Troy Hattum brought in the ATV and hose and pumped exhaust into the fuel tank to dry it out. This is a method utilized by Robert Hattum which was described by Troy Hattum to Jeff Holshouser as "text book." (SR 369, Holshouser Dep. 51:5; 83:3-8.) Since Troy did not have any formal training in welding, he clearly learned this method for a reason and learned it from his grandfather, Robert Hattum, and his father, Todd Hattum. (SR 369, Robert Hattum Dep. 28:21-23.)

Todd Hattum testified that he knew the fuel tank was leaky but never talked to Troy, Chalan or Jeff Holshouser about it. There was never any discussion with any of them about repairing the leak. (SR 369, Todd Hattum dep. 12:17-25; 13:1-7.) He just told them to leave the tank alone. (SR 369, Todd Hattum dep. 13:10.)

Holshouser testified that Troy Hattum showed him where the truck had been welded the year before. (SR 359,

Holshouser Aff. ¶19-20.) Robert Hattum testified that Troy Hattum was a very, very good welder. (SR 369, Robert Hattum Dep. 24:12-13.) He also testified that Troy was capable of welding a fuel tank. (SR 369, Robert Hattum Dep. 27:18-20.)

Troy Hattum's instructions came from Appellees. (SR 359, Holshouser Aff. ¶3-13.) Troy Hattum was in charge of the welding. (SR 359, Holshouser Aff. ¶16-22.)

Holshouser's affidavit provides as follows:

3. The Hattum ranch is owned by the Hattum family. It was made clear to employees that if Bob or Todd were not present, that Troy Hattum (hereafter Troy) was in charge-next in line.

4. The Hattum ranch operated this way over all of the years that I worked for them. On many occasions, Troy gave me instructions in the presence of Bob and/or Todd and I followed them and they knew he was giving the instructions and that I was following them. The older Troy got the more authority he had.

5. This included not only such things as what equipment to use, what field to go to, what job to perform, where to deliver grain or hay, what field to work in, etc., but also how to do the work.

7. In fact, there were times when I would report to work, that the Hattum's would tell me to go find Troy and

find out what he wanted me to work on. This increased over the years as Troy got older, and was in effect all the way through the day of the accident.

8. It was clear to me that Bob and Todd expected and required that I follow Troy's instructions. They acquiesced in every instruction, and they knew that he was instructing me and could see that I was doing as Troy instructed. Troy also instructed Chalan Hedman (hereafter Chalan), as well, in my presence. Bob and Todd knew of said instructions and did not in any manner suggest that Troy did not have authority to give instructions.

9. Also, we knew to work on the truck in question when it was a "slow day." The only thing wrong with said truck was the leak in the fuel tank.

12. In short, the chain of authority was from Bob and Todd and Troy. It was exercised, in fact, throughout the years that I worked there in that manner. There was no doubt about it: that I was to take instructions from Troy, especially when Bob and Todd were not present.

13. Chalan, equally, would have known that he was to take instructions from Troy. I saw Troy give him instructions over the length of time that he worked there and he accepted them. (SR; 359, Holshouser Affidavit ¶ 3-13.)

In addition, Todd Hattum testified as follows:

Q. So that leaky tank, you knew that that tank had a leak in it, right?

A. Yes.

Q. Do you know whether or not Troy knew it had a leak?

A. I'm sure he did.

Q. Had you ever talked to him about it?

A. No.

Q. Okay. Had you ever talked to Chalan about the leak on that tank?

A. No.

Q. Okay. How about Jeff Holshouser?

A. No.

Q. Okay. So, you've never – prior to this incident, you never had any discussion with those guys about that leaking tank?

A. No.

(SR 369, Todd Hattum Dep. 12:17-25; 13:1-7.)

Todd Hattum's deposition contradicts Appellee's position. Clearly, he did not discuss the leak on the fuel tank with any of them and did not instruct them not to fix it. Also, missing from their testimony is a time frame when

they allege, they told Chalan and Troy Hattum to leave the truck alone.

1. Fellow Servant Rule and Agency

Troy Hattum was acting in a dual capacity and therefore not acting as a fellow-servant within the meaning of the rule.

In the case of *Sollein v. Norbeek and Nicholson Company*, 1914, 34 S.D. 79, 147 N.W. 266, the plaintiff, an employee of the defendant, was injured by the negligent act of his foreman. The court held that the foreman was not acting as a fellow servant within the meaning of the rule. In so holding, Judge McCoy, writing for the court, stated:

> "[T]he one who represents the master whether he be termed vice-principle or superior servant, may act in a dual capacity, in that (1) as vice-principle or superior servant; (2) as a fellow-servant; and whether or not the master will be held to be liable for the negligent act of such servant will depend upon whether the act, which is alleged to constitute the negligence was performed by such person in his capacity as vice-principle or in his capacity as fellow-servant. If the act was done in the performance of a duty resting upon the master, then the master would be liable for the negligent performance of such duty by the vice-principle; but if the act was done in the performance of a duty resting upon a fellow-servant then the master would be liable.
>
> Further, ostensible authority is such as a principal intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess. SDCL 59-3-3; Krause v. Reyelts, 2002 S.D. 64, 646 N.W.2d 732

2. Strict Liability

Appellees are strictly liable to Appellants.

Welding a fuel tank is an abnormally dangerous activity. See Cashman v. Van Dyke, 2012 S.D. 42, 850 N.W.2d 309; Fleege v. Cimple, 305 N.W.2d 409 (S.D. 1981) and Restatement Second Torts ¶519. It must be reiterated that Appellee's did not argue at summary judgment or include within their motion that welding a fuel tank is not an abnormally dangerous activity. Rather, they argued that they are not liable for the following reasons:

a. They were not on the property at the time the welding occurred.
b. They did not participate in the welding.
c. They told Troy Hattum and Chalan to leave the truck alone.

For the reasons previously set forth above, a question of fact exists regarding Troy's authority to weld the tank and instruct Jeff and Chalan to assist. This leaves a question of fact for a jury.

3. Unsafe Workplace

Appellees are liable for failing to provide a safe work place.

Stone v. Von Eye Farms, held as follows:

> Employers have a non-delegable duty to provide their employees with reasonably safe places to work. Inherent to this duty is an obligation that employers provide employees with proper training and supervision. *Stone*, 2007 S.D. 115, ¶9.

Under *Stone*, the duty exists.

Appellant argues that it does not apply to Jeff Holshouser or Chalan Hedman. Jeff Holshouser testified that he was not a welder; Troy was in charge and told Jeff exactly how it had to be done. (SR 359, Jeff Holshouser Affidavit, ¶20-21.) Troy Hattum told Jeff Holshouser that this method of welding was "text book." (SR 369, Jeff Holshouser Dep. 51:5; 83:3-8.) There is no evidence that Chalan Hedman had any knowledge or training on how to weld a fuel tank and therefore, it is unknown if he had an appreciation for the risks. Like Jeff Holshouser, Chalan Hedman was taking orders from Troy Hattum, Troy Hattum was the boss and had assured Jeff Holshouser that this method was "text book." There is no evidence indicating that Chalan Hedman did not rely on the same information as Jeff Holshouser. As Robert Hattum testified, Troy did welding on the farm and was capable of welding a fuel tank.* (SR 369, Robert Hattum Dep. 29:8-22.) It should also be noted that Troy never had any formal training in welding but was basically trained by Defendants Robert Hattum and Todd Hattum. (SR 369, Robert Hattum Dep. 30:2-11.) Therefore,

* Robert Hattum could only know if Troy was capable of welding a fuel tank if he knew the method he used or had witnessed him welding a fuel tank.

Troy Hattum gained his knowledge on how to weld a fuel tank from his grandfather, Defendant Robert Hattum and his father, Todd Hattum. Recall, Jeff Holshouser testified this fuel tank had a leak that had been repaired the year before.

The danger was not obvious or apparent because Troy Hattum had represented that utilizing exhaust fumes from the ATV to dry out the fuel tank was "text book." (SR 369, Jeff Holshouser Dep. 51:5; 83:3-8.) The damage was not apparent, nor discernible and the danger was supposed to have been eliminated by this "text book" process. That was the purpose of using the exhaust. Once this process had been completed, Troy Hattum began to weld. There is no evidence to suggest that the process would not work. There is no evidence that Troy recommended any safety procedures, such as making fire extinguishers available. The tank had also been emptied of fuel and washed out before exhaust was used. (SR 369, Jeff Holshouser Dep. 41:9-25; 42:1-25; 43:1-25; 44:1-20.) Troy Hattum, Chalan Hedman and Jeff Holshouser took action to clean out the inside of the fuel tank to make it safe for welding. This was done to eliminate the danger of fire or explosion. When Troy was satisfied this task was complete, he began to weld. Troy

Hattum was directing the work and believed the danger had been eliminated before he began welding.

The risk of harm was not reasonably foreseeable. As previously set forth, action was taken to eliminate the risk of harm. Troy Hattum used what was represented to be the "text book" method of welding a fuel tank, washing it out and inserting exhaust into the tank to dry it out. This action (which was utilized by his grandfather, Robert Hattum) was intended to eliminate any reasonable, foreseeable risk of harm to Chalan Hedman or Jeff Holshouser or Troy Hattum. Even if Robert, Chelsea or Todd Hattum did not know Troy Hattum, Chalan Hedman and Jeff Holshouser were going to weld the tank, their liability still falls under respondeat superior, agency and vicarious liability and through the actions of Troy Hattum who Jeff Holshouser testified was the boss in charge.

4. Assumption of the Risk

Chalan did not assume a known risk.

A defendant asserting assumption of the risk must establish three elements: 1) That the plaintiff had actual or constructive knowledge of the risk; 2) that the plaintiff appreciated the character of the risk; and 3) that the plaintiff voluntarily accepted the risk given the time, knowledge and experience to make an intelligent

choice. *Id.* ¶6, 563 N.W.2d 142. The failure to establish one of these three elements negates the defense. *Id.* (citing *Westover v. East River Electric Power Co-op, Inc.*, 488 N.W.2d 892, 901 (SD 1992).

1. Did Chalan Hedman and Jeff Holshouser have actual or constructive knowledge of the risk?

a. Chalan: No. Troy Hattum used the text book method to clean, dry and weld the tank. This was done to eliminate danger. He represented that it was the "text book" method.

b. Jeff Holshouser: No. He was not a welder. He even asked Troy Hattum what he was doing, Troy explained the technique and told Jeff it was "text book."

2. Did Chalan Hedman and Jeff Holshouser appreciate the character of the risk?

a. Chalan: No. Troy Hattum used the text book method to clean, dry and weld the tank. This was done to eliminate danger.

b. Jeff Holshouser: No. He was not a welder. He even asked Troy Hattum what he was doing, Troy explained the technique and told Jeff it was "text book."

3. Did Chalan Hedman and Jeff Holshouser accept the risk?

a. Chalan: No. He did some welding but did not have the talent or experience according to Robert Hattum.

b. Jeff Holshouser: No. He was not a welder. He even asked Troy Hattum what he was doing, Troy explained the technique and told Jeff it was "text book."

5. Contributory Negligence

Chalan was not contributorily negligent.

Contributory negligence is negligence on the part of the plaintiff which, when combined with the negligence of a defendant, contributes as a legal cause in bringing about injury to the plaintiff. SDCL 20-9-1; *Klutman v. Sioux Falls Storm*, 2009 S.D. 55, 769 N.W.2d 440; SD PJI 20-20-30. A plaintiff who is contributorily negligent may still recover damages if that contributory negligence is slight, or less than slight when compared with the negligence of the defendants. The term "slight" means small when compared with the negligence of the defendants. SDCL 20-9-2; *Wood v. City of Crooks*, 1997 S.D. 20, ¶4; SD PJI 20-20-31. It is only when the facts show beyond any dispute the plaintiff has committed negligence more than slight that it is appropriate for the circuit court to hold as a matter of law for a negligent defendant. *Wood*, 1997 S.D. 20, ¶14. Again, and as previously stated the doctrines of respondeat superior, agency and vicarious liability come into play. In an attempt not to be redundant, this not a situation where after the tank had been cleaned that Chalan, Troy or Jeff

had concerns of fumes or gas still in the tank. Their subsequent conduct was not consistent with persons who believed a risk remained after the "text book" method for welding fuel tanks was being utilized. If there was such a fear, they would have either taken more action to protect themselves or refrained from welding the fuel tank altogether. Holshouser testified that Troy showed him a weld on the same tank from the year before adds credibility to Holshouser's statements that Troy represented that he knew what he was doing and had done it before.

Appellees seem to assert that Chalan's sole act of negligence was remaining the shop. If that is an act of negligence, it is "slight" by comparison to Troy's or the Appellees.

At a minimum, a question of material fact exists concerning the alleged negligence of the Plaintiffs in comparison to the Defendants.

6. Punitive Damages

Punitive damages are not an independent cause of action. In order to pursue a claim for punitive damages Plaintiffs must first make a preliminary showing of a reasonable basis to support that punitive damages may be proper. This requires clear and convincing evidence that there is a reasonable basis to believe that there had been

willful, wanton, or malicious conduct on the part of the defendants. *Harvey v. Regional Health Network, Inc.*, 2018 S.D. 3, ¶47. See also *Stabler v. First State Bank of Roscoe*, 2015 S.D. 44, 865 N.W.2d 466.

IV. CONCLUSION

Chalan Hedman was an employee of Appellees. He was working on their fuel tank that was removed from their truck using their equipment in their shop on their farm under the direction of Troy Hattum for the purpose of advancing the Hattum farming business. Genuine issues of fact exist on all issues in accordance with the testimony of Jeff Holshouser.

For all the reasons set forth herein genuine issues of material fact exist and the trial court should be reversed.

Dated April 16, 2021.

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CERTIFICATE OF SERVICE

I, Brad A. Schreiber, hereby certify that on April 16, 2021, I caused a copy of the foregoing **APPELLANT SHEARD'S REPLY BRIEF** to be served upon

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by electronic service.

_____
Brad A. Schreiber