No. 27348

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

RICHARD KARST and SUSAN KARST,

Plaintiffs/Appellants,

v.

SHUR COMPANY AND WILSON TRAILER COMPANY,

Defendants/Appellees.

On Appeal from the Circuit Court of the Fourth Judicial District
Corson County, South Dakota
The Honorable Michael W. Day, Circuit Court Judge

APPELLANTS' OPENING BRIEF

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ORAL ARGUMENT REQUESTED

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JURISDICTIONAL STATEMENT

This is an appeal from a final Judgment entered December 1, 2014. SR2 521; App. 13.[1] Notice of Entry of Judgment was filed December 1, 2014. SR2 523. Plaintiffs/Appellants Richard and Susan Karst filed a motion for a new trial December 12, 2014. SR2 656. The motion was deemed denied pursuant to S.D.C.L. §15-6-59(b) January 1, 2015. Notice of Appeal was timely filed January 29, 2015. SR2 789; App.11.

STATEMENT OF THE ISSUES

I. WHETHER THE KARSTS SHOULD HAVE BEEN ALLOWED TO PURSUE FAILURE-TO-WARN CLAIMS AT TRIAL.

The Circuit Court erroneously granted summary judgment, dismissing Plaintiffs' failure-to-warn claims on the grounds there was insufficient evidence that Richard Karst (Karst) read Defendants' warning for their electric tarp system. The Court granted summary judgment, SR1 1299-1331 at 1329; App. 45, despite the fact that: 1) there was no warning of the hazard that injured Karst; 2) assuming the on-product label was intended to warn of the hazard that injured Karst, it was improperly placed; 3) due to brain-injury-induced amnesia, Karst was entitled to a presumption that he read the label; and 4) if the on-product label was intended to warn of the hazard that injured Karst, circumstantial evidence allows a reasonable juror to conclude that Karst read it.

- *Rhodes v. Interstate Battery System of America*, 722 F.2d 1517 (11th Cir. 1984)
- *In re Levaquin Products Liab. Litig.*, 700 F.3d 1161 (8th Cir. 2012)

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1. "SR1" and "SR2" refer to the two volumes of the e-Record, with the page numbers assigned to each document in the Clerk's Index. "CD-sep." refers to the CD that accompanied the Omnibus Affidavit of G. Bryan Ulmer, III (SR1 689) with exhibit numbers included. "App." refers to the Appendix, with page numbers included.

- *Lakeman v. Otis Elevator Co.*, 930 F.2d 1547 (11th Cir. 1991)
- *Schultz & Lindsay Const. Co. v. Erickson*, 352 F.2d 425 (8th Cir. 1965)

II. WHETHER JURY INSTRUCTION 20 MISSTATED SOUTH DAKOTA LAW, MISLEADING AND CONFUSING THE JURY.

The Circuit Court erroneously gave non-pattern Jury Instruction 20, SR2 3592:10-3598:10; App. 483 - 489, which this Court has never approved. Instruction 20 conflicts with the risk-utility test for products liability, which all parties agreed applied in this case. Therefore, Instruction 20 misled and confused the jury.

- *First Premier Bank v. Kolcraft Enterprises, Inc.,* 2004 S.D. 92, 686 N.W.2d 430
- *Bertelsen v. Allstate Ins. Co.*, 2013 S.D. 44, 833 N.W.2d 545
- *Wallahan v. Black Hills Elec. Co-op, Inc.*, 523 N.W.2d 417 (S.D. 1994)
- *Pease v. Cochran*, 173 N.W. 158 (S.D. 1919)

III. WHETHER THERE WAS SUFFICIENT EVIDENCE TO INSTRUCT THE JURY ON AN ASSUMPTION-OF-RISK DEFENSE.

The Circuit Court instructed the jury on an assumption-of-risk defense. However, there was insufficient evidence that Karst had actual or constructive knowledge of the specific risk involved, or that the risk would be encountered during the activity he was performing at the time he was injured. SR2 3516:25-3526:06, 3599:15-3602:06; App. 471-481, 490-492.

- *Goepfert v. Filler*, 1997 S.D. 56, 563 N.W.2d 140
- *Wangsness v. Builders Cashway, Inc.*, 2010 S.D. 14, 779 N.W.2d 136
- *Wolf v. Graber*, 303 N.W.2d 364 (S.D. 1981)

IV. WHETHER THE KARSTS SHOULD HAVE BEEN ALLOWED TO PRESENT EVIDENCE THAT IMPEACHED MISLEADING TESTIMONY FROM DEFENSE WITNESSES AND NEGATED THE ASSUMPTION-OF-RISK DEFENSE.

The Circuit Court excluded evidence of product warnings, manuals, and instructions pursuant to its erroneous grant of summary judgment, without considering that such evidence was also crucial for other purposes, such as impeachment and/or rebutting misleading testimony related to the assumption-of-risk defense. SR2 1472:19-1474:5; App. 358-360. Defendants created the false impression that there was a "safe" procedure for converting the tarp system to manual use, that Defendants informed Karst of this procedure, and that he intentionally ignored it. The jury should have been allowed to hear that there was no "safe" procedure stated in any warning label or manual, that Defendants' representatives came up with their own ad hoc methods of neutralizing the danger, and that only a few farmers incidentally received instruction about the danger at isolated farm shows.

- *Davis v. Kressly*, 122 N.W.2d 219 (S.D. 1963)
- *Valadez v. Watkins Motor Lines, Inc.*, 758 F.3d 975 (8th Cir. 2014)

STATEMENT OF THE CASE

Karst was seriously injured when struck by the spring-loaded flex-arm of an electric tarp system. The Karsts brought negligence and strict liability claims for defective design and failure to warn against Shur-Company (Shur-Co), the system's designer/manufacturer, and against Wilson Trailer Company (Wilson), the system's assembler/seller. The Karsts appeal from the grant of summary judgment dismissing

their failure-to-warn claims, two improper jury instructions, and the exclusion of crucial evidence at trial.

Shur-Co moved for partial summary judgment, arguing the Karsts could not pursue failure-to-warn claims due to a lack of evidence that Karst read the alleged "warning." Plaintiff argued the solitary "warning" on the product (and the warning in the manual) did not apply to the hazard that injured Karst and that, if intended to apply, the on-product warning was improperly placed. The Circuit Court recognized that a failure-to-warn claim may proceed if the plaintiff challenges the location of the warning even if the injured party did not read the warning — but it did not follow this rule. Instead, it granted summary judgment, finding insufficient evidence Karst read "the warning" without addressing: whether there was a relevant warning; whether it was improperly located (assuming it applied); or, whether Karst was entitled to a presumption he read the warning. The Karsts addressed these issues in a motion for reconsideration. The Circuit Court orally denied the motion. SR2 3272:21-22; App. 253.

After voir dire, during which product warnings and instructions were discussed extensively, the Circuit Court granted Defendants' Motion in Limine precluding evidence of warnings, instructions, and manuals associated with the tarp system. Defendants then blamed Karst for not using the "safe" procedure for converting the tarp system — which apparently entailed avoiding the trailer's built-in work platform and tying back the flex-arm — even though that procedure was not contained in any warning or manual. The Karsts were unfairly precluded from offering evidence showing that Defendants never informed Karst of this "safe" procedure. The Karsts were also prevented from impeaching defense testimony regarding warnings, which violated Defendants' own

motion in limine. Thus, the jury not only lacked critical information when it went to deliberate; it also was affirmatively misled.

Finally, the Court gave two improper jury instructions: (1) an assumption-of-the-risk instruction that was unsupported by the evidence, and (2) non-pattern Instruction 20, which added new and undefined elements to the Karsts' liability case. The Karsts' motion for a new trial was deemed denied.

STATEMENT OF FACTS

Shur-Co designs and manufactures tarp systems used to cover trailers. SR2 1122:3-1123:22; App. 277-278. Wilson assembles and sells those tarps with its trailers. SR2 1672:22-1676:7; App. 377-381. In November 2007, Wilson delivered a grain trailer equipped with a Shur-Co electric tarp system to Karst. SR1 1891, 1893, 1895; App. 240, 242, 244. This system used an electric motor and spring-loaded flex-arms to open and close the tarps. CD-sep. Ex. 1; App. 89. The system could be converted from electric to manual use in the event of an electrical failure. *Id.*; SR2 1132:1-14, 1133:23-1134:12; App. 279, 280-281. Shur-Co was aware the system could fail when the tarp was open, and when outside help was not available. SR2 1135:1-1136:15; App. 282-283. On December 15, 2009, Karst's system failed shortly after he received a load of oats into his open trailer. SR2 1726, 1729:4-1731:8, App. 385, 386-388. Karst attempted to convert the system from electric to manual use to close the tarp; during the conversion, the flex-arm unexpectedly burst loose and threw Karst from his truck's built-in work platform, seriously injuring him. SR2 1731:1-1740:1; App. 388-397.

A. CONVERTING FROM ELECTRIC TO MANUAL USE

To convert the system from electric to manual use, Karst climbed his trailer's ladder and used its work platform to reach the sleeve of the flex-arm where it attaches to the roll-tube onto which the tarp rolls and unrolls. SR2 1733:1-14, 1737:11-16; App. 390, 394. For convenience, annotated photographs showing the system are provided below.

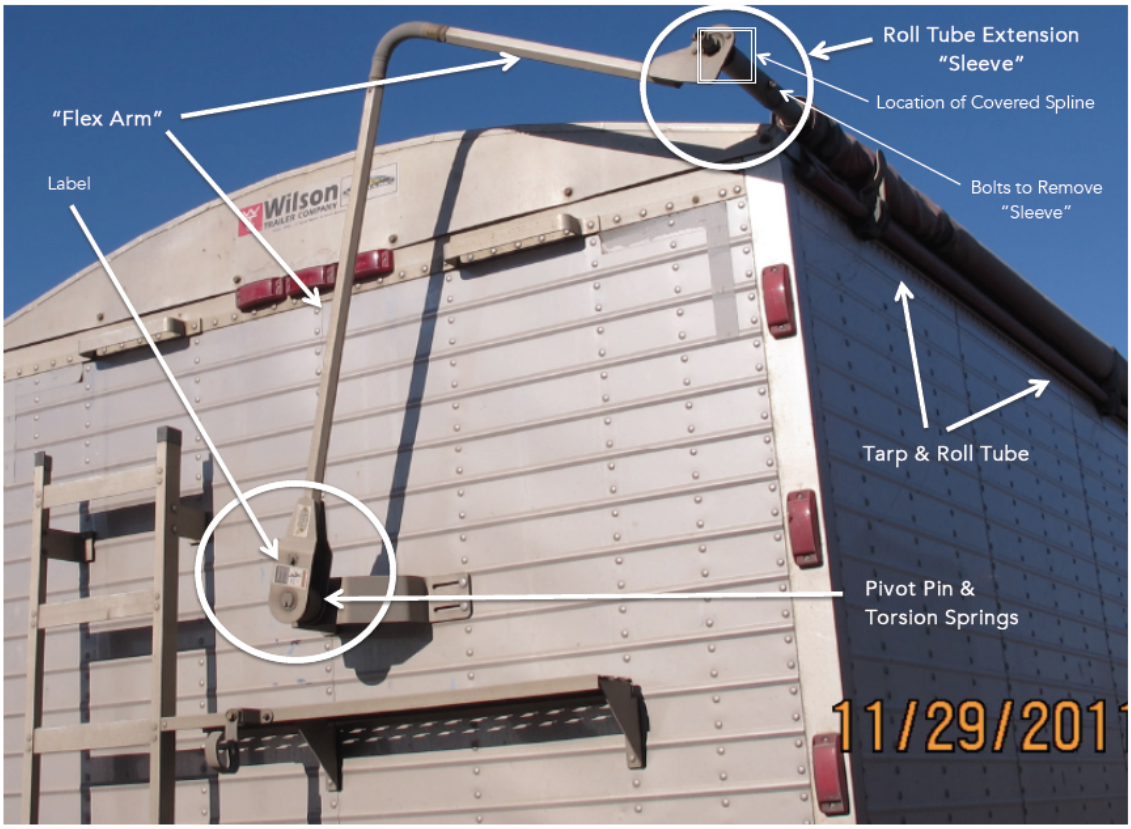

Figure One

Where the flex-arm attaches to the roll tube, a metal sleeve covers a grooved spline for attaching a hand crank that allows users to open and close the tarp manually. SR2 1141:22-1142:6; App. 284-285. In the defective design at issue, the spline is hidden by this sleeve — which must be removed to access the spline and attach the hand crank:

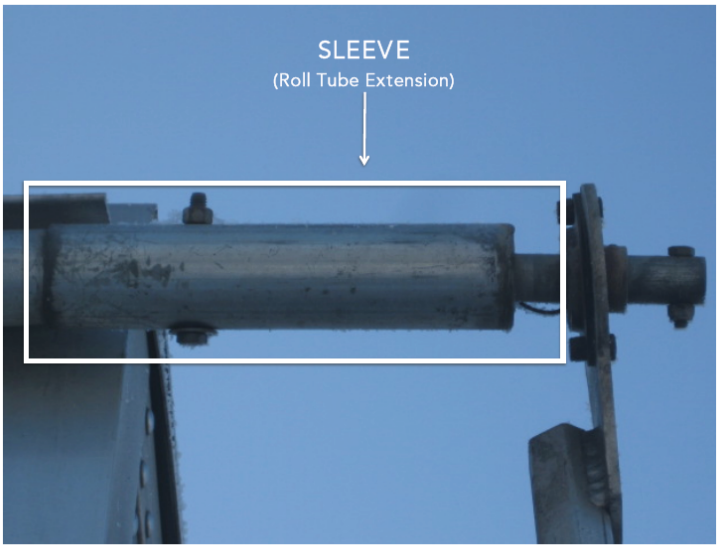

Figure Two[2]

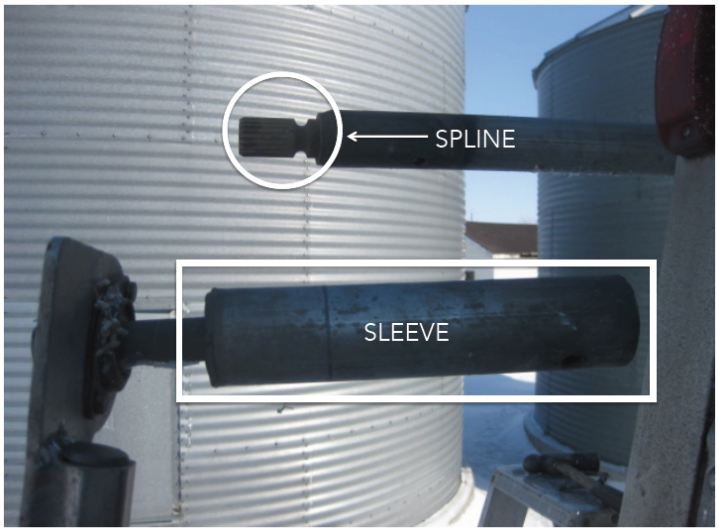

Figure Three[3]

Removing the sleeve exposes the user to unrestrained tension from torsion springs at the pivot point of the flex-arm. SR2 1507:5-12; App. 361.

2. Trial exhibit photo at SR1 1903; App. 246.

3. Trial exhibit photo at SR1 1900; App. 245.

B. THE INCIDENT

When the system failed, Karst inspected the wiring and connections on the system before beginning the conversion. SR2 1730:24-1731:22; App. 387-388. He climbed the ladder on his trailer and examined where the sleeve covered the spline. SR2 1732:1-1733:6; App. 389-390. He climbed down, read something,[4] and asked for tools. CD-sep. Ex 7; App. 117. Karst stood on the work platform to access the sleeve. SR2 1732:1-1733:6; App. 389-390. He was not in a hurry. CD-sep. Ex 13; App. 128. He was not angry or frustrated. CD-sep. Ex 8; App. 122. Karst used a hammer to tap the sleeve off the roll tube. SR2 1733:9-14; App. 390.

Figure Four[5]

4. Although no one saw what Karst read, a reasonable juror could infer from the circumstances that it was the manual. Additionally, following the incident the manual for the electric tarp system was *not* at his home shop where manuals were typically kept. CD-sep. Ex 10; App. 125.

5. Eyewitness testimony places Karst in this position when removing the sleeve. SR2 1797:24-1798:19, 1800:24-1801-4; Photo at SR2 372, close up at SR2 373; App. 405-406, 407-408, 249, 250.

An eyewitness who worked at the elevator testified he thought the arm would be loose when the sleeve was removed and that Karst was not doing anything dangerous. SR2 1764:21-1765:21; App. 401-402.[6]

When Karst removed the sleeve, the tension in the springs suddenly and forcefully released, throwing Karst from his truck. SR2 2263:14-2265:9; App. 424-426.[7] Karst hit the ground sounding like a "slab of meat." SR2 1739:6-12; App. 396. His skull fractured when he hit the ground, causing a severe and permanent brain injury. SR2 2114:12-25; App. 413. ; SR2 2429:3-2430:13; App. 431-432. He can no longer drive a truck for a living, SR2 2131:23-2132:6, 2454:13-2455:14; App. 419-420, 435-436, and cannot be left alone to care for himself, SR2 2136:24-2138:24, 2456:23-2458:4; App. 421-423, 437-439. He has difficulties cognitively and emotionally, SR2 2126:8-2131:22; App. 414-419, and serious problems comprehending and communicating, SR2 2436:16-2437:24; App. 433-434. He cannot remember the accident and has difficulty remembering events leading to it. SR2 3065:19-3067:4; App. 446-448.

C. FAILURE TO WARN

The product manual has a page devoted to converting the system from electric to manual use, but does not instruct the user what to do if the tarp fails while open. CD-sep. Ex 1; App. 89.; SR2 1154:21-24; App. 293. The first step in the manual is "close the tarp," but instructions do not explain how to do this when the electric system has failed. *Id.* The manual warns to use caution when "assembling and disassembling arms," (which

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6. The witness had worked at the elevator over twenty years loading grain trucks. SR2 1724:23-1725:10; App. 383-384.

7. A video introduced at trial showed the forceful movement of a flex-arm when the sleeve is removed while the tarp is open. SR2 3796; App. 251.

is unnecessary when converting to manual use) but does not warn to use caution when removing the sleeve to expose the spline, or warn that the system is under the most tension — and therefore is the most dangerous — when the tarp is open. *Id.*

A solitary label, located on the pivot point of the flex-arm, says to use caution when "disassembling flex arm." CD-sep. Ex 32, 15; App. 155, 137. The label advises to consult the manual. *Id*. But, as discussed above, the manual does not instruct how to convert a failed open tarp from electric to manual use. The label contains no warning about conversion. CD-sep. Ex 32; App. 155. There is no warning near the sleeve — the area where conversion occurs — instructing how to convert an open tarp or warning of hazards. SR2 1154:21-24; CD-sep. Ex 32, 15; App. 293, 155, 137.

The Karsts supported their defective warnings claims with expert testimony of Kenneth Laughery, Ph.D. He opined in his deposition that: Defendants gave no instructions for converting from electric to manual use when a tarp failed while open; Defendants did not warn about the hazard that injured Karst; and the warnings Defendants gave, even if relevant, were inadequate and improperly located. CD-sep. Ex 13, 25; App. 128, 142. Based upon his expertise and review of evidence and testimony, Laughery also testified from a human factors perspective that Karst was a careful, responsible person who would have read and complied with adequate warnings. *Id.* He noted Karst would refer to manuals when needed but that Shur-Co's manual was deficient and provided no guidance how to avoid hazards associated with the conversion process and mentioned none of the ways — such as avoiding the built-in work platform

and tying down the flex-arm — that would have prevented this accident. CD-sep. Ex 27; App. 146.[8]

By the time Karst took possession of his trailers and tarp systems in November 2007, Shur-Co had already started designing a new system with an exposed spline accessible for converting to manual use without removing a sleeve. SR2 1162:19-23, 1163:18-22, CD-sep. Ex 36; App. 298, 299, 157.

Figure Five[9]

In the new system, flex-arm tension is always restrained, SR2 1169:5-1170:23; App. 300-301,[10] which makes the system safer, SR2 1169:5-1171:19, 1264:20-1265:5, 1430:6-

8. The jury was precluded from considering the actual language in the manual and on the label, as well as Dr. Laughery's testimony, due to the Circuit Court's grant of partial summary judgment and refusal to allow evidence at trial.

9. Trial exhibit photo at SR1 1917; App. 248.

10. Shur-Co also designed a retrofit kit to convert the hidden spline to an exposed spline, but it did not actively promote the existence of the retrofit kit. CD-sep. Ex 37, SR2 1171:20-24; 1431:7-24; App. 160, 302, 354.

1431:6, 1648; App. 300-302, 304-305, 353-354, 376a. The exposed spline allowed for faster and more efficient conversion and was less expensive to manufacture than the hidden-spline system that injured Karst. SR2 1263:3-1264:6; App. 303-304. It is undisputed that the hidden spline conferred no benefits whatsoever.

D. TRIAL PROCEEDINGS

After voir dire, where warnings and instructions were discussed extensively, Defendants moved in limine to exclude evidence of warnings or instructions as irrelevant based upon the Court's grant of summary judgment. SR2 1022-1029; App. 265-272. The Karsts responded that the information was necessary to counter Defendants' affirmative defenses of contributory negligence and assumption-of-the-risk. *Id.* But, the Circuit Court precluded Plaintiffs from presenting the evidence throughout the trial.

At trial, Defense witnesses testified that — though it was foreseeable people would use the built-in ladder and work platform on the trailers to access the tarp system — Shur-Co would not recommend using either to access the sleeve. SR2 1145:12-23, 1146:2-8, 1158:21-1159:19; App. 286, 287, 296-297. The first witness, Shur-Co engineer Wade Dangler, testified users should avoid the built-in ladder and platform on the trailer and stand on something else (e.g. an extension ladder, a fence post, or a pick-up truck) to access the hidden spline. SR2 1146-1148; App. 287-289. There is no evidence Defendants developed this "procedure" before Karst was injured; indeed, this "procedure" is not described anywhere in the manuals or on the product label. CD-Sep. Ex. 1, 32; App. 89, 155.

Defendants then violated their own motion in limine: while discussing the made-up procedure, Dangler testified there was a label warning that the flex-arm is under

tension. SR2 1148:24-1149:3; App. 289-290. Dangler referred to "instructions" as to how to use the product and repeatedly referenced the manual — but the Karsts were precluded from meaningfully cross-examining him to show the manual contained no guidance as to where a user should position himself to convert the system or what to do if the tarp failed when open. SR2 1149:16-1151:2; App. 290-292. Dangler later commented that Shur-Co knew a spring under tension could maim or kill, and volunteered, "[t]hat's why we have the warning sticker on there." SR2 1155:10-22; App. 294. The Karsts were prevented from correcting this misleading testimony on cross-examination by showing that the warning did not apply to the conversion process and that, even assuming it did, it was both inadequate and improperly located. SR2 1472:19-1474:5; App. 358-360.

Counsel for the Karsts made an offer of proof including manuals and photos of the product label. SR2 1271-1311; SR1 1614, 1615, 1727, 1754, 1779; App. 306 - 346, 172, 173, 194, 209, 234. Dangler agreed there is no warning on the sleeve, SR2 1279:24-1282:2; App. 314-317; no warning to use caution when removing the sleeve, SR2 1287:1-1288:13; App. 322-323; no instruction not to remove the sleeve when the tarp is open, SR2 1283:14-21, 1286:5-9; App. 318, 321; and no instruction how to close the tarp if it fails while open, SR2 1289:10-18; App. 324. The jury was not allowed to hear this evidence correcting the misleading impression that Karst intentionally ignored relevant warnings.

Defendants also strategically created an inaccurate picture of a non-existent "safe procedure" through their cross-examination. Defendants elicited testimony from the Karsts' engineering expert, Jeff Warren, that Karst would not have been injured if he had

used a separate ladder and restrained the flex-arm. SR2 1564:11-18; App. 362. The Circuit Court then rejected an offer of proof showing Defendants did not tell consumers to use a separate ladder or restrain the flex-arm. SR2 1578:9-17; App. 363. It also denied a subsequent offer of proof addressing the relevance of the testimony to rebut defenses of contributory negligence and assumption of the risk. SR2 1584-1587; App. 368-371.

In light of these repeated rulings from the trial court, counsel confirmed that the Circuit Court would not allow *any* testimony concerning warnings, instructions, or manuals, and realized that it would be futile to call the Karsts' warnings expert, Dr. Laughery, because his testimony would be excluded entirely. The Karsts tendered his report, affidavit, and portions of his deposition as an offer of proof. SR2 1580:14-1583:24; App. 364-367.[11]

Despite the lack of instruction to avoid using the built-in work platform or to tie down the flex-arm, the jury heard that ladders and ropes were available at the elevator where Karst was loading grain. SR2 1768:15-16, 1792:23-1793:6; App. 402a, 403-404. Defendants' expert, Paul Adams, stated the "safe" method was to use a separate ladder on the side of the trailer outside the path of the flex-arm to access the sleeve, and to restrain the arm by tying it down. SR2 3374:10-3377:7, 3379:3-25; App. 454-457, 458. Moreover, Adams speculated, over objection, that Karst *knew* this. SR2 3379:3-3380:18;

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11 . Dr. Laughery would have testified that he "saw no indication anywhere that [Karst] would ignore information he already had, or information he was given by an effective warning system, regarding a safety issue such as this." SR1 894; App. 168. He explained a warning system was needed to get people "to think about the right issue at the right time." He testified "the knowledge that there was spring loading there is not sufficient to fully define the hazard." *Id*. He also clarified "that he saw nothing that would indicate Karst was aware of the hazards to which he was exposed." *Id*.

App. 458-459.[12] The Circuit Court again denied an offer of proof in which Adams admitted a manufacturer should inform a user how to use a product safely, and how to deal with product failures that pose a risk of serious injury or death. SR2 3424:2-3427:4; App. 462-465.

The Karsts thereafter moved for judgment as a matter of law on the assumption-of-risk defense, arguing there was insufficient evidence Karst had actual or constructive knowledge of the specific risk, that he appreciated the character of the specific risk, or that he voluntarily accepted the risk. SR2 3518-3522; App. 473-477. Despite initial misgivings,[13] the Circuit Court denied the directed verdict, SR2 3525-3526:6; App. 480-481, and over Plaintiffs' objection instructed the jury on the assumption-of-the-risk defense, SR2 3536; 3599-3600; 3602; App. 482, 490-491, 492.

ARGUMENT

I. THE CIRCUIT COURT ERRONEOUSLY GRANTED SUMMARY JUDGMENT DISMISSING THE KARSTS' FAILURE-TO-WARN CLAIMS.

The Circuit Court should not have required Karst to prove he read warnings that were irrelevant to the task he performed or the hazard that injured him. Moreover, the

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12. Adams also suggested farmers have greater skill and understanding than average consumers. SR2 3415-3416; App. 460-461. However, the Circuit Court prevented the Karsts from presenting testimony showing that farmers were *not* aware of the danger posed by the flex-arms during the conversion process. Specifically, in offers of proof Dangler stated the process of conversion was not readily apparent, SR2 1162:24-1163:4; App. 298-299, and Shur-Co's National Marketing Manager, Michael Krajewski, stated he had to tell farmers both to restrain flex-arms and where to tie them, SR2 1469-1472; SR1 1618-1625, 1781, 1783; App. 355-358, 176-183, 236, 238.

13. At the start of the trial, the Judge remarked "this man, if there was a problem, was invited on top of that platform. That's what he was supposed to do, to go up there. And so my point to the Defense is, what's he supposed to do?" SR2 1027:23-1028:8; App. 270-271.

Circuit Court should have applied the location-of-the-warning exception it previously recognized. Furthermore, because Karst's brain injury prevented him from testifying he read the warning, he is entitled to a presumption that he did so. Finally, there is sufficient un-rebutted circumstantial evidence for a reasonable juror to conclude Karst read the warnings. This Court should reverse the Circuit Court's grant of summary judgment, and remand for a new trial on *all* claims. [14]

A. STANDARD OF REVIEW

In reviewing a grant of summary judgment,

> [a]ll reasonable inferences drawn from the facts must be viewed in favor of the nonmoving party and reasonable doubts should be resolved against the moving party. The burden is on the moving party to clearly show an absence of any genuine issue of material fact and an entitlement to judgment as a matter of law. [This Court's] task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied by the lower court.

Gul v. Ctr. for Family Med., 2009 S.D. 12, ¶ 8, 762 N.W.2d 629, 632 (internal quotation marks and citations omitted). "Summary judgment is a drastic remedy, and should not be granted unless the moving party has established a right to a judgment with such clarity as

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14. "A partial new trial 'may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice.' " *Reinfeld v. Hutcheson*, 2010 S.D. 42, ¶ 21, 783 N.W.2d 284, 290 (quotation omitted). "If multiple issues are so interwoven that they cannot be submitted to the jury independently of one another without confusion and uncertainty, a partial new trial would amount to a denial of a fair trial, and there should be a new trial on all the issues." *Id*.

As described in Part IV below, the warnings issue is not distinct from the issue of Defendants' assumption-of-risk defense. Therefore, these issues are sufficiently interwoven that a new trial should be granted on all claims. Moreover, on retrial the jury will hear evidence of the product's dangers, regardless of whether the Court orders a partial or complete retrial. The jury would be confused if the Karsts were limited to only complaining about the lack of a warning for these dangers — instead of arguing primarily that the dangers should have been designed out of the product.

to leave no room for controversy." *Berbos v. Krage*, 2008 S.D. 68, ¶ 15, 754 N.W.2d 432, 436 (quotation omitted). Proximate cause questions are almost always questions for the jury, so it is only where the facts are undisputed or are such that reasonable men could not differ that it becomes a question of law for the court. *Blakely v. Boos*, 83 S.D. 1, 9, 153 N.W.2d. 305, 309 (1967).

B. THE FAILURE TO READ A NON-EXISTENT (OR IRRELEVANT) WARNING DOES NOT BAR A FAILURE-TO-WARN CLAIM.

Defendants did not warn Karst to avoid using the built-in ladder or work platform, or to tie down the flex-arm. Defendants did not warn of the hazards associated with removing the sleeve when the tarp was stuck open. Shur-Co recognized the hazard associated with uncontrolled tension if the sleeve was removed from the roll tube as part of the conversion, but never warned about it. And, although there was a product label warning that the flex arm was under tension, this warning was located on the pivot point (nowhere near the covered spline) and warns the user to exercise caution while "assembling or disassembling the flex-arm" — which is *not* required during the conversion process.[15] CD-sep. Ex 32; App. 155. The label does not even depict the area of the tarp system where Karst was working. *Id.* Indeed, Karst was not assembling or disassembling the flex-arm when he was injured. He was converting to manual use by removing the sleeve to expose the spline. SR2 1736-1737; App. 393-394. Even if a person were to pursue the discretionary step of removing the flex-arm, which, as discussed above is not *required* during the conversion process, the manual recommends

15. Removing the flex-arm merely cleans up the back of the trailer. For example, Tom Heinen testified that after Karst was injured, he used the hand crank to close the tarp and then used a strap to keep the flex-arm from hanging loose before driving Karst's truck and trailers to Karst's home. Heinen did not disassemble the flex-arm. It remained attached to the trailer. SR2 1751-1753; App. 398 - 400.

disassembling the flex-arm only *after* removing the sleeve — the step that injured Karst. CD-sep. Ex 1; App. 89.

The manual also fails to explain how to perform a conversion when the tarp has failed in the "open" position (which creates dangerous flex-arm tension). This is illustrated by the manual's directive to "close the tarp" as the first step in the conversion process, even though it is impossible to use the switch to "close the tarp" when the electrical system fails. CD-sep. Ex 1; App. 89. The warnings were thus not intended to warn about the dangers of an "open tarp" conversion, and they do not do so.

Even assuming Karst did not read the irrelevant flex-arm assembly/disassembly warning, that fact should not preclude the Karsts from claiming Defendants failed to instruct on how to perform an entirely different procedure (conversion to manual use). The reason courts generally require a plaintiff to have read a warning prior to challenging its content is grounded on causation – the crucial link between the warning and the incident. *See, e.g.*, *Derienzo v. Trek Bicycle Corp.*, 376 F. Supp. 2d 537, 568 (S.D.N.Y. 2005) ("While it is true that, in many cases, a plaintiff who admits that he failed to read a warning that was issued with the product will have failed to show that any deficiency in that warning was the proximate cause of his injuries, plaintiff's failure to read an insufficiently conspicuous or prominent warning will not necessarily defeat the causation element of a failure to warn claim."). But here, there is no causal link between the warnings about disassembling the flex-arm and the injuries caused by removing the sleeve, which does not require disassembling the flex-arm. A reasonable juror easily could find that Karst was injured as a result of Defendants' failure to instruct him on how to safely convert to manual use with the tarp open, or to warn him about the risk of flex-

arm tension during such a conversion. Reading and heeding an irrelevant warning about flex-arm disassembly would not have prevented the accident. Because there is no causal link between the warnings and the incident, a purported failure to read warnings addressing the dangers of assembling and disassembling the flex-arm should not preclude a claim based on the lack of warnings about performing an "open tarp" conversion.

C. THE KARSTS' FAILURE-TO-WARN CLAIM IS NOT BARRED BY A LACK OF EVIDENCE THAT KARST FAILED TO READ THE WARNING.

Summary judgment was also inappropriate because the warning was improperly placed and failed to draw a user's attention to the hazard at the right time and place. The Circuit Court correctly recognized that while a warnings claim may fail if the plaintiff did not read the defective content of the warning, "there is an exception when the plaintiff can establish his failure to read the manual or label stemmed from the inadequate efforts to draw his attention to the label." SR1 1303; App. 19. There is ample support for this holding. *See In re Levaquin Products Liab. Litig.*, 700 F.3d 1161, 1168 (8th Cir. 2012) (observing that "failure to read a warning does not necessarily bar recovery where, as here, the plaintiff claims inadequate communication of the warning caused the failure to read it"); *Rhodes v. Interstate Battery Sys. of Am., Inc.*, 722 F.2d 1517, 1519 (11th Cir. 1984) ("Failure to read a warning does not bar recovery when the plaintiff is challenging the adequacy of the efforts of the manufacturer or seller to communicate the dangers of the product to the buyer or user."); *Humphrey v. Diamant Boart, Inc.*, 556 F. Supp. 2d 167, 181 (E.D.N.Y. 2008) (noting that "a plaintiff may be able to argue that the warnings, in addition to being substantively inadequate, were insufficiently conspicuous or prominent and, thus, be able to overcome his or her failure to read them"); *Derienzo v. Trek Bicycle Corp.*, 376 F. Supp. 2d 537, 568 (S.D.N.Y. 2005) ("While it is true that, in

many cases, a plaintiff who admits that he failed to read a warning that was issued with the product will have failed to show that any deficiency in that warning was the proximate cause of his injuries, plaintiff's failure to read an insufficiently conspicuous or prominent warning will not necessarily defeat the causation element of a failure to warn claim.").

The Circuit Court also found that the Karsts properly presented Dr. Laughery's testimony challenging the location of the warning, including his opinion that a warning should have been located on the sleeve covering the spline where a user would see it during the conversion process. SR1 1300-1304; CD-sep. Ex 25; App. 16-20, 142. Nevertheless, the Circuit Court granted summary judgment due to a perceived lack of evidence that Karst read any warnings. SR1 1329; App. 45. Inexplicably, the Circuit Court did not apply the undisputed law to the undisputed facts. Because the Karsts presented evidence that the warning was improperly located, it was error to dismiss their failure-to-warn claim on the grounds there was insufficient evidence Karst read the label.

D. KARST IS PRESUMED TO HAVE READ THE WARNINGS.

South Dakota has embraced the idea that it is fundamentally unfair to require a plaintiff to offer proof made unavailable by the defendants' wrongful conduct. Thus, it is presumed "in the absence of evidence to the contrary, that a person killed in an accident was exercising due care for his protection at, and immediately before, the accident." *Dehnert v. Garrett Feed Co.*, 84 S.D. 233, 236, 169 N.W.2d 719, 721 (1969). Although this Court has not yet decided the issue, the same policy that justifies applying the presumption to decedents also supports applying it to amnesiacs. *See Schultz & Lindsay Const. Co. v. Erickson*, 352 F.2d 425, 434 (8th Cir. 1965) ("There is no rational

reason why the presumption should not be extended to cover situations in which injury causes loss of memory; in fact, logic supports such an extension, since a person without memory of an accident can supply no more information about the circumstances of the accident than can a person who was killed."); *Hot Shot Express, Inc. v. Brooks*, 563 S.E.2d 764, 769-70 (Va. 2002) (collecting cases) ("We perceive no significant distinction between the rationale underlying this presumption in wrongful death cases or those where the plaintiff's injuries render him incapable of testifying on his own behalf and the rationale which supports this presumption in a case of traumatic retrograde amnesia."); *see also Merritt v. Reed*, 185 N.W.2d 261, 263 (Neb. 1971) (noting that the "presumption of due care as is presumed for a deceased prevails where the party's version is unavailable due to disability or loss of memory"); *Haider v. Finken*, 239 N.W.2d 508, 521 (N.D. 1976) (holding amnesiac entitled to presumption of due care); *Anderson v. Schulz*, 527 P.2d 151, 152 (Wyo. 1974) (noting "well-recognized rule" that plaintiff suffering amnesia resulting from injuries sustained in an accident is presumed to have exercised due care); *see also Rock v. Technical Chem. Co.*, No. 92-cv-26, 1993 WL 475531, at *1-2 (W.D. Mich. Apr. 5, 1993) (applying presumption decedent would have heeded warning, because death rendered this testimony unavailable, and noting: "If courts required the degree of certainty on the proximate cause issue which defendant suggests they must, it would be literally impossible to bring such a claim on behalf of a deceased person.").

Defendants should not be allowed to cause Karst's severe injuries and then complain to their ultimate benefit that Karst was unable to present "required" testimony

as a result of those injuries. Because reading warnings is part of the exercise of due care, the trial court should have applied the presumption that Karst read the warnings.

E. CIRCUMSTANTIAL EVIDENCE SUPPORTS A CONCLUSION KARST READ THE WARNINGS.

Summary judgment was also improper because there was evidence that, when viewed in the light most favorable to the Karsts, Karst read the warnings. Conversely, there was *no* evidence he did not.[16] First, Wilson sales manager Richard Gase testified he would give customers the Shur-Co manual, and advise customers it was important to read it. CD-sep. Ex 5; App. 144. By all accounts, Karst was a careful man who would have read the manual. *See* CD-sep. Ex 13; App. 128. ("This was a guy who wasn't in a hurry, who had awareness of the need to convert from electric to manual, was trying to do that, and this was a guy who, by all the things that I read, was responsible, that had had he been given adequate information, adequate warnings, he would have complied with them."). This is enough evidence that Karst, in fact, read the warnings. *See, e.g.*, *Lakeman v. Otis Elevator Co.*, 930 F.2d 1547, 1553 (11th Cir. 1991) (testimony showing decedent was a careful and safety conscious employee allowed jury to conclude he would have read and heeded an adequate warning label).

Second, after the system failed, Karst climbed the ladder to the work platform, looked at something, and then came down and read something. CD-sep. Ex 7; App. 117.

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16. The cases on which the Circuit Court relied are distinguishable. SR1 1299 at 1327; App. 43. All involved affirmative evidence that the plaintiff did not read the warnings. In *Johnson v. Niagara Mach. & Tool Works*, 666 F2d 1223, 1225 (8th Cir. 1981), the plaintiff "testified that he had never read the warning even though he knew it was on the press and had glanced at it." *See also Palmer v. Volkswagen of Am., Inc.*, 904 So. 2d 1077, 1083 (Miss. 2005) ("the plaintiffs — by their own admission — did not read or rely on [the warnings]"). Karst never affirmatively testified that he failed to read any warning; he simply does not remember due to amnesia caused by his severe brain injury.

He next asked for tools, and then proceeded to follow steps forth in the manual. CD-sep. Ex 8; App. 122. This evidence created a genuine issue of material fact precluding summary judgment.

II. INSTRUCTION 20 MISSTATED SOUTH DAKOTA LAW, MISLEADING AND CONFUSING THE JURY.

A. STANDARD OF REVIEW

Although a Circuit Court's wording of jury instructions is reviewed for an abuse of discretion, "a court has no discretion to give incorrect or misleading instructions, and to do so prejudicially constitutes reversible error." *Kadrmas, Lee & Jackson, Inc. v. Morris*, 2010 S.D. 61, ¶ 5 n.1, 786 N.W.2d 381, 384 n.1.

B. THE CIRCUIT COURT UNDERMINED A PROPER, PATTERN JURY INSTRUCTION BY GIVING A CONFUSING NON-PATTERN INSTRUCTION THAT IS UNSUPPORTED BY SOUTH DAKOTA LAW AND UNRELATED TO THE EVIDENCE AND ISSUES SUBMITTED TO THE JURY.

1. Instruction 19 Properly Instructed the Jury on the Risk-Utility Standard for Products Liability.

"Strict liability arises when a manufacturer 'sells any product in a defective condition unreasonably dangerous to the user or consumer.' " *Nationwide Mut. Ins. Co. v. Barton Solvents Inc.*, 2014 S.D. 70, ¶ 13, 855 N.W.2d 145, 150 (quotation omitted). Two alternative tests determine whether a product is "in a defective condition unreasonably dangerous to the user or consumer": the consumer-expectation test from South Dakota Pattern Jury Instruction 20-120-20 and the risk-utility test from South Dakota Pattern Jury Instruction 20-120-30.

All parties agreed this case was governed by the risk-utility test[17] and approved of Instruction 19, which repeated the pattern risk-utility instruction verbatim: "A product is in a defective condition unreasonably dangerous to the user if it could have been designed to prevent a foreseeable harm without significantly hindering its function or increasing its price." SR2 3592, 3595:16-25; App. 483, 486.

2. The Circuit Court Erroneously Believed it was Bound by *Kolcraft* to Give Non-Pattern Instruction 20.

Over vigorous objection, the Circuit Court gave Instruction 20:

> A product can be dangerous without being unreasonably dangerous. Even if a product is defective in some manner, you must find that the defect renders the product "unreasonably" dangerous. A product is not in a defective or unreasonably dangerous condition merely because it is possible to be injured while using it.

SR1 1835; App. 170. SR2 3592-3598; App. 483-489.

The Karsts objected to this instruction, noting that it was non-pattern and confusing, conflicted with Instruction 19, and was not supported by South Dakota law. SR2 3595-3597; App. 486-488. The Circuit Court erroneously construed *First Premier Bank v. Kolcraft Enterprises, Inc.*, 2004 S.D. 92, 686 N.W.2d 430, as requiring Instruction 20. SR2 3598; App. 489.

In *Kolcraft*, the trial court gave a three-part jury instruction. Part one was the pattern consumer-expectation test. Part two was the pattern risk-utility test. Part three was non-pattern language identical to Instruction 20 here, which had never been

17. As noted in the comments to 2012 South Dakota Civil Pattern Jury Instruction 20-120-30, this is consistent with the Restatement (Third) of Torts: Products Liability § 2 comments (a)-(c), under which the consumer-expectation test applies to manufacturing defects, and the risk-utility test applies to design defects.

approved by any court.[18] The three parts were not separated by conjunctions. 2004 S.D. 92 at ¶ 28.

On appeal, the plaintiff argued the instruction was erroneous because it suggested part one (the consumer-expectation test) and part two (the risk-utility test) are alternative rather than cumulative methods of proving that a product is in "a defective condition unreasonably dangerous to the user or consumer." *Id.* at ¶ 29. The Court agreed, explaining that the disjunctive "or" should have been placed between parts one and two to avoid confusion. *Id.* The Court did not discuss — much less endorse — part three.

3. Instruction 20 was Reversible Error.

This Court should view non-pattern instructions with heightened skepticism. *See State v. Eagle Star*, 1996 S.D. 143, ¶ 15 n.2, 558 N.W.2d 70, 73 n.2 ("[T]he pattern jury instructions have been carefully drafted to reflect the law."); *see also Strain v. State*, 423 S.W.3d 1, 4 (Ark. 2012) (non-pattern instructions should be given only where pattern instructions fail to adequately state the law); *State v. Torres*, 273 P.3d 729, 738 (Kan. 2012) (discouraging trial courts from using non-pattern instructions due to the increased risk of reversible error).

Here, Instruction 19 correctly informed the jury that a product is in a defective condition unreasonably dangerous to the user if it could have been designed to prevent a foreseeable harm without: 1) significantly hindering its function or 2) increasing its price.

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18. Part three is apparently derived in part from *Community Television Services, Inc. v. Dresser Industries, Inc.*, 435 F. Supp. 214 (D.S.D. 1977), where the federal court gave a one-sentence summary of comment k to the Restatement (Second) of Torts § 402A as follows: "A product can be dangerous without being unreasonably dangerous." *Id.* at 216. By its terms, comment k applies only to those rare products (typically medicines used to treat deadly illnesses) that are unavoidably dangerous. Moreover, *Community Television* made this statement in the context of noting that products liability and breach of warranty are distinct legal theories. *Id.* It did not endorse morphing its remark into a jury instruction.

Defendants did not dispute that an alternative design (i.e. an exposed spline) was available at the time Karst's system was manufactured. Nor did they dispute that it was safer, more functional, and less expensive than a hidden spline.

"When jury instructions mislead, conflict or confuse the jury, it constitutes reversible error." *Schaffer v. Edward D. Jones & Co.*, 1996 S.D. 94, ¶ 19, 552 N.W.2d 801, 808; *see also Wallahan v. Black Hills Elec. Co-op, Inc.*, 523 N.W.2d 417, 423 (S.D. 1994). Instruction 20 confused and misled the jury:

First, sentence one of Instruction 20 suggests that, in addition to satisfying the risk-utility test, the Karsts separately had to satisfy an additional "unreasonable dangerousness" test. Just as the instruction in *Kolcraft* was reversible error because it suggested the plaintiff had to satisfy both the consumer-expectation and risk-utility tests, Instruction 20 is reversible error because it suggested that the Karsts had to satisfy both the risk-utility test and a separate, additional test of "unreasonable dangerousness."

Second, Instruction 20 contains no internal standards for when a product is "unreasonably dangerous" as opposed to merely "dangerous." It therefore invited the jury to select some arbitrary level of danger below which it would not impose liability.

Relatedly, the lack of a standard for what qualifies as "unreasonably dangerous" under Instruction 20 opened the door for misleading argument by Defendants. Defendants contended that the tarp system was not "unreasonably dangerous" because Karst continued to use it following the accident, and because Defendants were not aware of other accidents or near misses. SR2 3726-3727; App. 495-496. These arguments that the tarp system was not dangerous have nothing to do with the test set forth in Instruction 19 and were, therefore, misleading and confusing.

Third, whereas Instruction 19 uses the unitary phrase "in a defective condition unreasonably dangerous to the user or consumer," sentence two of Instruction 20 divides the phrase into two separate elements: "Even if a product is defective in some manner, you must find that the defect renders the product 'unreasonably' dangerous."

This Court has never held that "defectiveness" and "unreasonable dangerousness" are separate elements. It has never defined either term in isolation. It has never specified separate proof required for each term. Therefore, the distinction that Instruction 20 draws between "defectiveness" and "unreasonable dangerousness" has no basis in South Dakota law and invited the jury to speculate how these terms might possibly be defined and what proof might relate to each term. This was reversible error. *See State Highway Comm'n v. Fortune*, 91 N.W.2d 675, 686 (S.D. 1958) ("A term [in a jury instruction] should not be so used that doubt can arise as to its meaning and application to the facts.").

Fourth, Instruction 20 was reversible error because it was an abstract principle of law irrelevant to the evidence and issues submitted to the jury. *See Pease v. Cochran*, 173 N.W. 158, 160 (S.D. 1919) (court committed reversible error by giving jury instruction that correctly stated the law, but had no factual basis in the record); *see also Graham v. Babinski Properties*, 1997 S.D. 39, ¶ 7, 562 N.W.2d 395, 397 ("Courts should instruct on issues supported by competent evidence in the record."); *Stammerjohan v. Sims*, 31 N.W.2d 449, 451 (S.D. 1948) ("Instructions should state the law as applicable to the particular facts which the evidence tends to prove, and not in abstract and general terms.").

If Instruction 20 were appropriate in *any* case, it would only be where the exact same quality that renders a product dangerous also renders it useful. This is precisely how counsel for Wilson interpreted Instruction 20:

> Importantly, Jury Instruction No. 20, "A product can be dangerous without being unreasonably dangerous."
>
> * * * *
>
> If you think about this, there are a lot of unsafe products. Things are just dangerous. Knives, guns, your iron, anything with electric, a heating element, the cars that you drive here every day. There's danger in all sorts of equipment. But something being dangerous or capable of causing injury is not the same thing as it being — is as a thing being defective. That's an entirely different notion, and it's Plaintiffs' burden to establish that in this case.

SR2 3731-3732; App. 497-498. Where the same aspect of a product creates both danger and utility (as is the case with a knife or a gun), then arguably the jury might need to be reminded that it must accept some level of danger in order for the product to be useful. However, where the dangerous aspect of the product provides no utility whatsoever, and where the alternative is simply to omit that useless aspect, the jury need not accept *any* level of danger.

Such is the case here. It is undisputed that the hidden spline made the tarp system less functional and more expensive. It is undisputed that there was an available alternative that entirely eliminated the danger posed by the spring-loaded flex-arm during the conversion process: simply exposing the spline (as shown in *Figure Five* above). This jury was not required to tolerate *any* level of danger from the hidden spline. Thus, even if Instruction 20 had any basis in South Dakota law, and even if it were not hopelessly confusing, it was inappropriate on the facts of this case.

Fifth, even ignoring all of Instruction 20's other failings, it unfairly emphasized defendants' theory of the case. This too is reversible error. *See Bertelsen v. Allstate Ins. Co.*, 2013 S.D. 44, ¶ 47, 833 N.W.2d 545, 562 (trial court erred by giving legally accurate instruction that unduly emphasized one party's position); *Wallahan v. Black Hills Elec. Co-op, Inc.*, 523 N.W.2d 417, 423 (S.D. 1994) ("In South Dakota it has been long recognized that it is improper for the trial court to unduly emphasize one party's position or evidence."); *Mueller v. Mueller*, 221 N.W.2d 39, 42 (S.D. 1974) ("[E]ven correct statements of law if unduly emphasized may constitute reversible error." (quoting *Jorgenson v. Dronebarger*, 143 N.W.2d 869, 872 (S.D. 1966)).

Here, Instruction 19 gave the jury all of the law it needed to decide whether defendants were liable on a product-defect theory. Instruction 20 then emphasized three vague and undefined reasons for the jury to find against the Karsts. This unfairly prodded the jury towards a defense verdict — particularly given defendants' invocation of the Circuit Court's imprimatur when discussing the instruction. SR2 3740-3741; App. 499-500. ("This isn't just the attorneys trying to advocate. This is what the law says from Judge Day . . . .")

4. Conclusion

"[A] jury instruction should be as clear and simple as reasonably possible to aid the jury in understanding the law." *Nommensen v. Am. Cont'l Ins. Co.*, 629 N.W.2d 301, 309 (Wis. 2001). Instruction 19, a pattern instruction, provided a clear, simple, and undisputed standard for when a defendant can be held liable in a product-defect case. Because Instruction 20 does not reflect South Dakota law, invited the jury to import new and undefined elements into the test for strict products liability, did not relate to the

evidence and issues actually submitted to the jury, and unfairly emphasized defendants' position, this Court should reverse and remand for a new trial on the Karsts' product-defect claims.

III. THERE WAS INSUFFICIENT EVIDENCE TO INSTRUCT THE JURY ON AN ASSUMPTION-OF-RISK DEFENSE.

A. ELEMENTS OF THE ASSUMPTION-OF-RISK DEFENSE.

An assumption-of-risk defense requires proof the plaintiff "(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." *Goepfert v. Filler*, 1997 S.D. 56, ¶ 6, 563 N.W.2d 140, 142. Failure to establish any one of these elements defeats the defense. *Westover v. East River Elec. Power Co-op., Inc.,* 488 N.W.2d 892, 901 (S.D. 1992).

Knowledge of the risk will be imputed only "if the risk is so plainly observable that 'anyone of competent faculties [could be] charged with knowledge of it.'" *Goepfert*, 1997 S.D. 56, ¶ 8, 563 N.W.2d at 143 (quotation omitted). For example, a passenger who jumped out of a moving car had constructive knowledge of the danger. *Id.*, 1997 S.D. 56, ¶¶ 8 – 9, 563 N.W.2d at 143. So did a person who jumped out of a car raised six feet in the air by a mechanic's lift. *Carlson v. Peterson*, 756 F.2d 72, 73-74 (8th Cir. 1985). Also, "[t]he plaintiff must have knowledge of the specific defect and risk posed rather than simple generalized knowledge that he has entered a zone of danger." *Wangsness v. Builders Cashway, Inc.*, 2010 S.D. 14, ¶ 13, 779 N.W.2d 136, 141. Thus, Karst's general knowledge that he was high up and that machinery can be dangerous is

irrelevant; to justify a jury instruction there had to be evidence Karst knew that removing the sleeve would cause the flex-arm to forcefully spring towards him. *See id*.

"[A]n individual will be held to have appreciated the danger undertaken if it was a risk that no adult person of average intelligence can deny." *Goepfert*, 1997 S.D. 56, ¶ 9, 563 N.W.2d at 143 (quotation omitted). Knowing and appreciating the danger is key, as "[one] may not close his eyes to obvious dangers, and cannot recover where he was in possession of facts from which he would be legally charged with appreciation of the danger." *Id*. (quotation omitted). On the other hand, where the specific, particular risk is not so obvious, one cannot be deemed to have appreciated the danger. *See Thomas v. St. Mary's Roman Catholic Church*, 283 N.W.2d 254, 260 (S.D. 1979) (noting that while the plaintiff may have assumed certain risks of playing basketball, he did not assume the risk that a nearby glass panel would break upon impact: "Since knowledge and appreciation of a particular risk are essential to the defense of assumption of risk, a plaintiff must only be held to assume the risk he appreciates, not the risk which he does not.").

The third element — that a plaintiff voluntarily accepted the risk — is particularly important if the plaintiff is inexperienced with the implement that caused the harm. *See Bauman v. Auch*, 539 N.W.2d 320, 326 (S.D. 1995) (noting plaintiff's inexperience with the particular horse that injured him).

In sum, the most critical issues are knowledge, appreciation, and awareness of the danger. *Smith v. Smith*, 278 N.W.2d 155, 161 (S.D. 1979) (describing assumption-of-risk in terms of the plaintiff proceeding to use a product despite knowing that the product is defective and unreasonably dangerous); *Duda v. Phatty McGees, Inc.*, 2008 S.D. 115, ¶

12, 758 N.W.2d 754, 758 ("'Knowledge of the risk is the watchword of assumption of risk.' " (quotation omitted)).

B. THERE WAS INSUFFICIENT EVIDENCE TO SUPPORT AN ASSUMPTION-OF-RISK JURY INSTRUCTION.

A jury should only be instructed on the assumption-of-risk defense if there is competent evidence to support it. *See Wolf v. Graber*, 303 N.W.2d 364, 368 (S.D. 1981) (ruling the trial court erred in giving the assumption-of-risk instruction in the absence of sufficient evidence indicating plaintiff had actual or constructive knowledge of the dangerous situation); *see also Jay v. Moog Auto., Inc.*, 652 N.W.2d 872, 881 (Neb. 2002) (noting it is prejudicial error to give an assumption-of-risk instruction "when the evidence is not sufficient to support the defense"). Here, there was insufficient evidence to justify the instruction:

First, there was no evidence Karst had actual knowledge of the risk posed by the spring-loaded flex-arm. There was no evidence he understood the flex-arm needed to be restrained (in fact, the evidence — had Karst been allowed to present it — was that Karst was never warned of the danger or instructed on how to guard against it). There was no evidence from which a jury could properly infer Karst ever converted the system to manual use prior to the incident.

Defendants attempted to establish "actual knowledge" by arguing Karst once ordered a replacement motor for the system, yet they could not show Karst actually replaced the motor himself. Rather, a single mechanic testified that he did not do it — but also that there were other mechanics in the area, and Karst "spread his business around." SR2 3513-3514; App. 470-471. Mrs. Karst testified "I could hardly believe [Karst] would do it, because as far as anything mechanically inclined, he had no clue on

how to do things." SR2 2579:17-19; App. 440.[19] A conclusion that Karst replaced the motor himself is sheer speculation, which cannot support a jury instruction. *U.S. v. Scout*, 112 F.3d 955, 961 (8th Cir. 1997) (observing it would be improper to give self-defense instruction if evidence to support it is insufficient, as "[i]t is not the purpose of a jury instruction to invite jury speculation of the facts").

Even assuming Karst replaced the motor himself, knowledge of the nature of the tension cannot be inferred from this fact. Shur-Co's lead engineer, Steve Knight, testified that one does not need to remove the flex-arm (where one would learn of the tension) to replace the motor. SR2 3098:6-17; App. 449. Moreover, even if Karst personally replaced the motor, *and* went through the more onerous process of removing the flex-arm to do so, the only way he would learn the nature of the tension would be to perform these tasks with the tarp open – and there is no evidence suggesting that he did so.

Second, as for constructive knowledge, Knight testified that one could tell the flex-arm was under tension only if one knew what to look for. SR2 3098:23-3099:10; App. 449-450. One could not tell just by looking at the springs that the flex-arm was under tension. *Id.* Even Shur-Co engineers and its owner could not agree on, or define, the character of the risk. Jason Anderson, Shur-Co engineer, could not define the degree of the hazard — only that there was a potential. SR2 1643; App. 376. Knight and William Shorma, Shur-Co's founder, both stated their belief one could restrain the flex-arm by simply holding it back with one hand, SR2 1715, 3098:18-22; App. 382, 449, but the evidence showed this belief was incorrect, SR2 1155-1156; App. 294-295. If the

19. Mrs. Karst testified that Karst was not mechanically inclined, and that workers in a repair shop "would always harass him because he took something there that someone might think is easy to fix, and he would just take it in and say, 'I just can't do it,' and they would do it." SR2 2580; App. 441.

people responsible for the product cannot articulate the degree of force involved, then surely the risk is not so plainly observable that "anyone of competent faculties [could be] charged with knowledge of it." *Goepfert*, 1997 S.D. 56, ¶ 8, 563 N.W.2d at 143. Tom Heinen, who loaded grain at the elevator where the incident occurred (and had been doing so for about twenty years, SR2 1724:13-1725:2; App. 383-384) testified that he did not think what Karst was doing at the time of the incident was dangerous, or that the flex-arm would do anything other than hang "loose" when the sleeve was removed. SR2 1764:21-1765:11; App. 401-402.

In sum, there was no evidence Karst knew of the danger of converting from electric to manual with the tarp open. There was no evidence that the danger was so plainly observable that "anyone of competent faculties [could be] charged with knowledge of it." *Goepfert*, 1997 S.D. 56, ¶ 8, 563 N.W.2d at 143 (quotation omitted). The danger to which Karst was exposed — the violent force of the unrestrained flex-arm — was not akin to the danger posed by jumping out of a moving or elevated vehicle. The inappropriate instruction requires a new trial.

IV. THE CIRCUIT COURT ERRED BY PRECLUDING RELEVANT EVIDENCE THAT NEGATED THE ASSUMPTION-OF-RISK DEFENSE AND IMPEACHED DEFENSE WITNESSES.

Regardless of how this Court rules on the Karsts' failure-to-warn claims, evidence related to manuals, labels, and instructions should have been admitted to rebut misleading testimony from defense witnesses and to counter the assumption-of-risk defense. Evidence inadmissible for one purpose may be admissible for another. *Davis v. Kressly*, 122 N.W.2d 219, 222 (S.D. 1963); *State v. Wright*, 1999 S.D. 50, ¶ 17, 593 N.W.2d 792, 800; *see also Valadez v. Watkins Motor Lines, Inc.*, 758 F.3d 975, 981 (8th Cir. 2014)

("Evidence that is inadmissible for one purpose may be admissible for another purpose."). A limiting instruction ensures that the jury will not consider the evidence for any improper purpose. *See* S.D.C.L. § 19-9-12 ("When evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.").

The Circuit Court erroneously believed that it was bound by its ruling on the Karsts' failure-to-warn claims to exclude all evidence related to warnings. However, Defendants were allowed to present misleading evidence related to warnings, and the Karsts were unfairly prohibited from responding to that testimony. Moreover, much of the evidence related to warnings also related to the assumption-of-risk defense.

A. THE CIRCUIT COURT IMPROPERLY PREVENTED THE KARSTS FROM CHALLENGING THE ASSUMPTION-OF-RISK DEFENSE.

As discussed above, the elements of the assumption-of-risk defense are knowledge, appreciation, and acceptance of the danger. The Karsts were barred from presenting critical evidence on these issues, specifically: 1) that the manual and warning label did not contain any "proper" procedure for converting to manual use when the tarp failed while open, or for neutralizing the danger posed by the spring-loaded flex-arm, such as avoiding the built-in ladder and work platform, or tying back the flex-arm; 2) that Shur-Co representatives warned farm show attendees about the danger posed by the flex-arm on an informal basis, SR1 1618-1625; App. 176-183; and, 3) the process for an open tarp conversion and the associated hazards were not obvious.

Defendants were allowed to present unrebutted testimony that there was a warning and a "safe procedure" communicated to Karst that he failed to follow. The jury should not have been limited to this lopsided and inaccurate depiction of the facts. This

severe prejudice was compounded by the fact that warnings and instructions were discussed heavily during voir dire — before the Circuit Court adopted the blanket exclusion. Jurors indicated a predisposition to rely on warnings and instructions. Prospective jurors repeatedly stated that they were are "necessary," "beneficial to me and my family," and "quite instructional." SR2 890; 892; App. 256, 258. Most prospective jurors expected, SR2 891-892; App. 257-258, and relied on instructions and warnings — either reading them from the outset or when problems arose. SR2 893-895 App. 259-261. This discussion primed the jury to believe Defendants' misleading testimony that there were relevant warnings and instructions that Karst ignored.[20] *See e.g.*, SR2 958-959; App. 263-264.

Plaintiffs were also precluded from showing Karst lacked constructive knowledge of the danger. Again, constructive knowledge can only be established if the specific danger — the risk posed by an unrestrained, violently swinging spring-loaded flex-arm — was plainly obvious to anyone. But the Karsts were prevented from showing that Shur-Co's marketing manager, Mike Krajewski, testified farm show attendees (i.e. farmers) asked about converting the system from electric to manual use and had to be told to tie back the flex-arm. SR2 1428-1430; App. 351-353. This refutes Defendants'

---

20. The blanket exclusion of all warnings — which was not articulated until the trial was underway — also created practical difficulties. It was logistically impossible for Karst to explain the tarp system to the jury, yet avoid using any photographs that included the warning label on the pivot point — particularly without advance notice that evidence related to warnings would be categorically barred. Therefore, the jury saw some photos that depicted the warning label — but did not show it in enough detail that the jury could read it and determine that it was irrelevant. *See, e.g.*, SR1 1733; App. 190. Duct tape covered the warning label on the actual flex-arm used as a demonstrative exhibit. The demonstrative was vital to enabling the jury to understand the case. However, the obviously present yet unreadable warning label reinforced the inaccurate defense testimony that there were relevant warnings that Karst ignored.

argument the risk was so obvious any mechanically inclined farmer would be aware of it. The jury should have heard this evidence.

B. IMPEACHMENT

The Circuit Court's exclusion of evidence prevented the Karsts from impeaching misleading defense witness testimony. Under S.D.C.L. § 19-14-8, "[t]he credibility of a witness may be attacked by any party." Impeachment evidence is important to ensure a fair trial. *See, e.g., State v. Piper*, 2006 S.D. 1, ¶ 19, 709 N.W.2d 783, 795 (noting in criminal context that a new trial may be granted if impeachment evidence is withheld by the prosecution). Because it is the jury's role to "evaluate the credibility of the witnesses," *City of Bridgewater v. Morris, Inc.*, 1999 SD 64, ¶ 14, 594 N.W.2d 712, 716, the jury should have heard the Karsts' impeachment evidence to properly evaluate the testimony about the "safe procedure" that "everyone," including Karst, purportedly knew about. Defendants should not have been allowed to violate their own motion in limine by stating that there were warnings and discussing the manual, but then escape cross-examination showing that those warnings were not relevant to the task or hazard that injured Karst.

In sum, the Karsts were not allowed to introduce evidence of the instructions given to trade show attendees, and of the warning label and the user manuals that made no mention of using a separate ladder and "tying back the arm," and of the fact that Defendants' representatives developed their own ad hoc procedures for neutralizing the danger posed by the flex-arm. This evidence shows there was no "safe procedure" — much less one that Karst "knew." Nonetheless, Defendants were allowed to suggest as much through misleading testimony Karst was prevented from impeaching.

CONCLUSION

This Court should reverse the Circuit Court's Order granting partial summary judgment against the Karsts' failure-to-warn claims, and remand for a new trial on all claims, because they are interwoven. Moreover, due to the instructional errors and the improper exclusion of evidence, this Court should reverse the judgment for the Defendants and remand for a new trial on all claims against both Defendants. The Karsts respectfully request oral argument, which will assist the Court in rendering a just and proper decision.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. The body of the brief uses proportionally spaced Times New Roman with 12-point typeface. Excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues, addendum materials, and certificates of counsel, the brief contains 9,844 words as calculated by Microsoft Word for Mac 2011, version 14.5.1.

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 27348

RICHARD KARST AND SUSAN KARST,

Plaintiffs/Appellants,

vs.

SHUR COMPANY AND WILSON TRAILER COMPANY,

Defendant/Appellees.

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

HONORABLE MICHAEL W. DAY

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Notice of Appeal was filed January 29, 2015

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JURISDICTIONAL STATEMENT

The Karsts' January 29, 2015 Notice of Appeal from the final judgment was timely. Shur Co. objected to jurisdiction of Appellants' Issue 1 because it challenged a memorandum decision not incorporated into a reviewable order. *Moulton v. State*, 363 N.W.2d 405, 409 (S.D. 1985). Even if the memorandum decision had been incorporated into an order, Shur Co. contends that the appeal from the final judgment would not include the memorandum decision because that decision did not necessarily affect the final judgment as required by SDCL § 15-26A-7. *Oahe Enters., Inc. v. Golden*, 218 N.W.2d 485, 488 (S.D. 1974). On August 7, 2015, this Court issued an Order denying Shur Co.'s motion to dismiss. If the Court has concerns about the reviewability of Issue 1, that issue was briefed in relation to Shur Co.'s motion to dismiss.

STATEMENT OF THE ISSUES

1. The court granted partial summary judgment on the Karsts' failure to warn claims because Karst could not prove causation. The court concluded Karst could not prove that the allegedly inadequate content of Shur Co.'s owner's manual or warning label caused the accident because Karst cannot say whether he read those materials. The court implicitly concluded that the Karsts' expert affidavit submitted in response to summary judgment was insufficient to create a jury question whether inadequate placement of the label caused the accident. Did the court correctly grant summary judgment on the Karsts' warning claims?

   The court correctly granted summary concerning the Karsts' content and placement theories.

   Nationwide Mut. Ins. Co. v. Barton Solvents, Inc., 2014 S.D. 70, 855 N.W.2d 145

   Burley v. Kytec Innovative Sports Equipment, Inc., 2007 S.D. 82, 737 N.W.2d 397

2. The court gave a series of instructions on the Karsts' strict liability design claim, including Instruction 20. Instruction 20 informed the jury that a product can be dangerous without being unreasonably dangerous and the fact of an injury alone is not enough to establish a product is unreasonably dangerous. Did the court abuse its discretion and commit reversible error by giving Instruction 20?

   The court's strict liability instructions correctly stated the law and the Karsts cannot demonstrate prejudice.

   Community Television Serv., Inc. v. Dresser Indus., Inc., 435 F. Supp. 214 (D.S.D. 1977), *aff'd*, 586 F.2d 637 (8th Cir. 1978)
   RESTATEMENT (SECOND) OF TORTS § 402A, *comment I*
   Premier Bank v. Kolcraft Enterprises, Inc., 2004 S.D. 92, 686 N.W.2d 430

3. The court instructed the jury concerning assumption of the risk based on substantial evidence from, among other things, Mr. Karst himself that he understood the flex arm was under tension and that the most tension existed when the tarp was in the open position. Because the jury concluded that the Karsts did not prove either strict liability or negligence, however, the jury did not address the questions on the special verdict form concerning assumption of the risk. In these circumstances, was it prejudicial error to instruct the jury concerning assumption of the risk?

   The court correctly submitted assumption of the risk to the jury, but in any event the Karsts cannot demonstrate prejudicial error because the jury did not reach this issue.

   Bell v. East River Elec. Power Co-op, Inc., 535 N.W.2d 750 (S.D. 1995)

   Nelson v. Nelson Cattle Co., 513 N.W.2d 900 (S.D. 1994).

4. At trial, the court rejected the Karsts' argument that evidence of warnings and instructions was relevant to the assumption of the risk defense. The jury never reached assumption of the risk. The Karsts also contend that they should have been permitted to impeach testimony related to warnings given by a witness during direct examination by the Karsts' attorney. The court gave a curative jury instruction. In these circumstances, was it prejudicial error to exclude evidence of warnings and instructions?

   The court did not abuse its discretion and the Karsts were not prejudiced by the conclusion that evidence of warnings was not relevant to assumption of the risk nor necessary to rebut testimony given while the

Karsts were questioning a witness.

Anderson v. Johnson, 441 N.W.2d 675 (S.D. 1989)
Kallis v. Beers, 375 N.W.2d 642 (S.D. 1985)
State v. Dillon, 2010 S.D. 72, ¶ 28, 788 N.W.2d 360, 369.

STATEMENT OF THE CASE

The Karsts brought suit in Corson County for injuries Karst sustained on December 15, 2009 while converting a Shur Co. 3500 electric tarp to manual power. (SR1-2.) The Amended Complaint asserted claims for design defect and failure to warn. Shur Co. moved for partial summary judgment on the warning claims. (SR1-251, 483.) Wilson Trailer Company moved for summary judgment on all claims.

The court granted summary judgment to Shur Co. and Wilson Trailer on the warning claims, and to Wilson Trailer for negligence. (SR1-1299.)

On November 3 to 19, 2014, the remaining claims were tried to a jury with the Honorable Michael W. Day presiding, and by special verdict, the jury found in both defendants' favor concerning allegations. (SR1-1808.) On December 1, 2014, judgment in defendants' favor was entered. (SR2-521.) That same day, notice of entry of judgment was filed. (SR2-523.) The Karsts filed a motion for new trial, which was denied by operation of law. The Karsts filed a timely notice of appeal on January 29, 2015. (SR2-789.) Wilson Trailer filed a timely notice of review on February 13, 2015.

STATEMENT OF FACTS

Karst used a manual tarp system from 1980 until 2007, when he received new trailers with a Shur Co. 3500 electric tarp system. (SR1-1103.) Karst knew the electric tarp had springs at the base of the front and rear flex arms. (SR1-1107.) He knew the

spring tension was strongest when the roll tube was on the trailer's passenger side, with the tarp in the open position. (SR1-1107.) Karst remembered replacing an electric tarp motor before the accident, (Shur Co.'s App. 15, 16), but did not think he had converted the tarp to manual power. (SR1-1107.) Karst knew that converting to manual required him to disconnect the flex arm from the roll tube to expose a spline. (SR1-1108.) A manual crank could then be attached to the spline.

Karst could not say whether he read the manual or label before the accident. (SR1-532; SR1-1109.) He kept manuals related to his trailers in his Hoven shop. (SR1-532.) The Karsts produced no evidence that, after the accident, the manual was found at the McLaughlin elevator or in Karst's truck. Mrs. Karst testified that she could not find the manual in Karst's shop the morning of her deposition, 3.5 years after the accident. (Appellant's App. 127.)

Karst does not remember of the accident. (SR1-533.) Eye witnesses say he drove to the McLaughlin elevator to pick up oats. After loading, Karst was unable to close the pup trailer's tarp electrically. (SR2-1730.) Why he was unable to do so is unknown. (SR2-3091.) Karst decided to convert to manual power. One elevator employee saw Karst reading something, but had no idea what it was. (SR1-544.)

Karst did not follow the first step in the manual's conversion instructions, which is to close the tarp. (SR1-523.) Nor did he express frustration that he could not close the tarp. (Appellant's Brief at 8.) Instead, he climbed onto the trailer's catwalk and hammered the flex arm's sleeve off the roll tube with the flex arm in the open position. (SR1-541 to 42.) With his other hand, he was gripping the flex arm sleeve--the same part

he was tapping off with the hammer. (SR2-1736.) His legs and feet were "braced" in a "ready position." (SR2-1773 to -74.) Shur Co.'s expert testified Karst's grip and braced legs showed he knew "a forceful resistance" was required and he expected the flex arm to move with "a fair amount of force" upon disconnection. (SR2-3372.) Witnesses agreed Exhibits 1035-E and -X demonstrate what Karst was doing. (Shur Cos. App. 40-41.)

When the flex arm was disconnected, the spring tension forcefully moved the flex arm toward the driver's side, and Karst fell, suffering a severe brain injury. (SR2-354.) Karst testified that he would prefer not to disconnect the flex arm while in the open position because there is more spring tension on the flex arm in that position. (SR1-1109.) He agreed that it would not be wise to hold onto the flex arm sleeve for balance while disconnecting it. (SR1-1109.) Karst testified that he had the ability to tie down the flex arm. (Shur Co. App. 36) He and the elevator employees said they would have given him rope or a ladder upon request. (SR1-544; Shur Co. App. 8, 36.) Karst's product expert testified that Karst not using a ladder was a proximate cause of the accident. (SR2-1564.) Karst's warning expert did not testify at trial, but admitted in deposition that he was making no assumption whether Karst read the label or manual, would have to speculate to say Karst felt a need to consult the manual on the day of the accident, and assumed Karst did not have the manual at the elevator. (SR1-553 to -54, SR1-734.)

When Shur Co. began selling the 3500, it was state of the art. (SR2-1201; SR2-1708.) Shur Co. subsequently adopted a design improvement that left the spline exposed. (SR2-1224.) Shur Co. has no knowledge of another accident or near miss involving the flex arm. (SR2-1224.)

ARGUMENT

The Karsts alleged design defect and failure to warn claims. At summary judgment, the court correctly discerned that design defect was the theory that presented a jury question. Both the Karsts' warning and product expert expressed a preference for a design solution over a warning. (SR1-549; SR1-561.) Karst admitted he could not say whether he read and relied upon the manual or label's content. His warning expert admitted it would be speculation for him to say that Karst felt a need to consult the manual that day, and assumed Karst did not have the manual with him anyway. In a last ditch effort to save the warning claim, the Karsts responded to Shur Co.'s motion for summary judgment with a new affidavit from their warning expert concerning the label's placement, but it was too late and failed to establish that the label's placement was inadequate or improper.

The court allowed the Karsts to try strict liability and negligent design claims and a negligent post-sale failure to warn claim against Shur Co. The Karsts presented 27 witnesses, including 6 experts, in a 12-day trial. By special verdict, the jury rejected both the strict liability and negligence theories and thus did not even reach any affirmative defenses. The Karsts have not demonstrated any basis to overturn the jury's verdict.

1. The court correctly held that Karst's failure to present evidence he read Shur Co.'s warnings precluded the Karsts from establishing causation.

A. Alleged inadequacies in an unread owner's manual or warning label cannot cause an accident.

The court correctly recognized the common sense proposition that the content of an allegedly inadequate manual or label cannot cause an accident when the plaintiff had

not read, and was not relying upon, that content when the accident occurred. This conclusion is supported by South Dakota law and numerous cases from other jurisdictions. As this Court recently stated, "In a products liability case premised on alleged inadequate warnings, both causation and inadequate warnings are separate but necessary elements of negligence and strict liability." *Nationwide Mut. Ins. Co. v. Barton Solvents, Inc.*, 2014 S.D. 70, ¶ 17, 855 N.W.2d 145, 150-51. It is therefore not enough for the Karsts to contend that the content of the manual and label was inadequate. To survive summary judgment, they were also required to establish a jury question whether the alleged inadequacies caused the accident. *Id.* ("Therefore, to successfully resist summary judgment, Nationwide was required to provide 'an evidentiary basis' for both elements."); *Burley v. Kytec Innovative Sports Equip., Inc.*, 2007 S.D. 82, ¶ 39, 737 N.W.2d 397, 410-11 (requiring testimony establishing how the alleged lack of warnings was the legal cause of plaintiff's injuries). A grant of summary judgment is reviewed de novo. *In re Matheny Family Trust*, 2015 S.D. 5, ¶ 7, 859 N.W.2d 609, 611.

Nationwide and *Burley* require plaintiffs to produce competent evidence, including expert testimony, that the alleged inadequacies in a warning legally caused an accident. As the court recognized, it is simply impossible for a plaintiff who cannot prove that he or she ever read and relied upon a warning to show that alleged inadequacies in the warning's content caused the accident: "A plaintiff's inability to prove that he read the allegedly inadequate instructions and warnings provided to him precludes the plaintiff as a matter of law from establishing that a defect in those warnings caused the incident in question." (SR1-1327.)

Courts in many other jurisdictions have also concluded that a plaintiff who cannot prove he or she read a warning cannot establish, as a matter of law, that the warning's allegedly inadequate content caused the accident. As the Supreme Court of Mississippi succinctly put it: "The presence or absence of anything in an unread owner's manual simply cannot cause a plaintiff's damages." *Palmer v. Volkswagon of America, Inc.*, 904 So. 2d 1077, 1084 (Miss. 2005); *see also Johnson v. Niagara Mach. & Tool Works*, 666 F.2d 1223, 1225 (8th Cir. 1981) ("As noted by the district court, an issue as to the adequacy of a warning presupposes that the operator has read the warning."); *J&W Enters., Inc. v. Economy Sales, Inc.*, 486 N.W.2d 179, 181 (Minn. App. 1992) ("Absent a reading of the warning, there is no causal link between the alleged defect and the injury."); *Powell v. Harsco Corp.*, 433 S.E.2d 608, 610 (Ga. App. 1993) ("The alleged inadequacy of the installation instructions cannot be the proximate cause of the collapse of the catwalk and Mr. Powell's death when the installer did not read the installation directions that Harsco's subsidiary actually provided.").

The Karsts ask the Court to ignore this principle based on their contention that reading the warnings in the 3500's manual and label would not have prevented this accident. This argument fails because Shur Co.'s motion did not attempt to establish that the warning it gave was adequate as a matter of law. Shur Co. instead challenged the Karsts' ability to meet their burden concerning causation. *Nationwide* and *Burley* make it very clear that South Dakota law requires the Karsts to prove not only that the warning was inadequate but also that those inadequacies caused the accident:

In a products liability case premised on alleged inadequate warnings, both

> causation and inadequate warnings are separate but necessary elements of negligence and strict liability.

Nationwide, 2014 S.D. 70, ¶ 17, 855 N.W.2d at 150-51.

> Therefore, Burley [the plaintiff] must establish a causal relationship between Kytec's failure to warn and her injury. This requires testimony about the product's design and how, even though Horacek bent the hook, the lack of warnings included with or on the Overspeed Trainer was the legal cause of her injuries.

Burley, 2007 S.D. 82, ¶39, 737 N.W.2d at 410-11. Because the adequacy of a warning and causation are separate elements, it does not matter whether Shur Co. can prove as a matter of law that its warnings would have prevented the accident. What matters is whether the Karsts can meet their burden to show that the alleged inadequacies in Shur Co.'s manual or label caused Karst's accident. The court correctly determined that the Karsts cannot meet this burden without competent evidence that Karst read and relied on the supposedly inadequate instructions or warning. This Court should reject the Karsts' attempt to ignore *Nationwide* and *Burley* by conflating the elements of the adequacy of a warning and causation.

B. No basis exists to presume Karst read the manual or label.

The Karsts alternatively ask this Court to presume that Karst read and relied upon the allegedly inadequate manual or label based on "a presumption, in the absence of evidence to the contrary, that a person killed in an accident was exercising due care for his protection at, and immediately before, the accident." *Dehnert v. Garrett Feed Co.*, 169 N.W.2d 719, 721 (S.D. 1969). The Karsts ask for this principle to be expanded from the context of fatal auto accidents to reading a manual or label by accident victims with

impaired memories. This argument fails for multiple reasons.

First, the Karsts did not include this argument in their summary judgment response, and thus it is not a basis to reverse the court. (*See* SR1- 610 to -21.) This Court "generally do[es] not reverse trial courts for reasons not argued before them." *Rogen v. Monson*, 2000 S.D. 51, ¶ 15, 609 N.W.2d 456, 460. The Karsts raised this argument in their motion for reconsideration, which was served just 5 business days before the trial. (SR1-1483.) The motion was never set for hearing and was denied without comment, during a teleconference concerning Shur Co.'s motion to continue the trial. (SR2-3272.) A motion for reconsideration, however, cannot be used to introduce new theories on which to appeal. *See Tonsager v. Laqua*, 2008 S.D. 54, ¶ 5 n.2, 753 N.W.2d 394, 396 (refusing on appeal to consider plat submitted with a motion to reconsider summary judgment); *Dillon v. Select Portfolio Servicing*, 630 F.3d 75, 80 (1st Cir. 2011) (Plaintiff "first raised this argument in a motion for reconsideration of the district court's grant of summary judgment. When a party makes an argument for the first time in a motion for reconsideration, the argument is not preserved for appeal.").

Second, it would be a mistake to expand the presumption to the reading of a manual or label. South Dakota's presumption of due care was developed in the context of fatal auto accidents. *See, e.g., Thompson v. Mehlhaff*, 2005 S.D. 69, ¶ 44, 698 N.W.2d 512, 526 (there is "'a presumption in the absence of evidence to the contrary, that a person killed in an auto accident was exercising due care for his protection at, and immediately before, the accident'") (quoting *Olesen v. Snyder*, 277 N.W.2d 729, 735 (S.D. 1979)). The presumption assumes that the decedent was using due care in the

operation of his or her vehicle "'based on the natural instinct of self-preservation and the normal disposition to avoid self-destruction or personal harm.'" *Id.*

The Karsts' warning expert admitted that the natural instinct for self-preservation often does not include reading manuals or labels. Dr. Laughery testified:

> Q. Would evidence that he [Karst] had never read the manual or the label affect your opinion?
>
> A. No.
>
> Q. Why wouldn't that evidence affect your opinion?
>
> A. Well, because that would put him the category of most people. And I don't expect somebody to read a 20-page owner's manual full of technical information and carry all of that around in their head with them. That's – that's a memory issue as well.

(SR1-768 (emphasis added).) Dr. Warren similarly testified:

> Q. Do you agree that studies show most people who purchase products don't read the owner's manual?
>
> A. I haven't seen that study, but I would tend to agree with that general premise.

(SR1-548.) The Karsts are asking the Court to adopt a presumption contrary to what their experts say most people do and contrary to this Court's admonition in *Burley* that, in strict liability claims, "a causal relationship between the alleged defect and injury is not presumed." *Burley*, 2007 S.D. 82, ¶ 34, 737 N.W.2d at 409.

The cases the Karsts cite from other jurisdictions contain nothing suggesting that South Dakota should expand its presumption. None of the decisions cited by the Karsts that applied a presumption of due care to an amnesiac used the presumption to establish that a plaintiff had read a manual or label. *Schultz & Lindsay Constr. Co. v. Erickson,*

352 F.2d 425, 434 (8th Cir. 1965) (presuming due care by a plaintiff sitting on a bridge girder that collapsed); *Haider v. Finken*, 239 N.W.2d 508, 521 (N.D. 1976) (presuming due care by driver in auto accident); *Anderson v. Schulz*, 527 P.2d 151, 152 (Wyo. 1974) (presuming due care by passenger during a car accident).

The only product liability case the Karsts cite is an unpublished federal district court opinion from Michigan, *Rock v. Technical Chemical Co.*, No. 1:92:CV:26, 1993 U.S. Dist. LEXIS 6866 (April 5, 1993), a case where the plaintiff died by inhaling freon. *Id.* at *1. Under Michigan law, the issue was whether the deceased plaintiff would have read and followed a different warning. *Id.* at *2. The court held that the plaintiff's expert had not baselessly assumed the plaintiff would have read and followed a different warning, *id.* at *3, and that, because the plaintiff was dead, a jury could conclude a different warning would have been heeded. *Id.* at *5. *Rock* is not persuasive. It does not discuss whether a court should presume that a plaintiff had read the provided manual or label, nor does it recognize that most people do not read manuals or labels. In over 20 years, no case has cited it. Neither *Rock* nor any other case the Karsts cite justifies presuming that plaintiffs who cannot remember an accident had read a manual or label sometime before the accident.

The Karsts' cases demonstrate that, if this Court were to adopt a presumption concerning amnesiacs, the presumption would not apply to this case. The Karsts cite decisions stating that plaintiffs who could not testify due to amnesia were entitled to a presumption of due care if they established that their inability to remember facts was caused by the accident. *E.g., Hot Shot Express, Inc. v. Brooks*, 563 S.E.2d 764, 770 (Va.

2002). But none of these decisions applied the presumption to time periods when the plaintiff possessed some memory, nor did they apply the presumption without proof that the plaintiff's inability to remember a particular fact was due to the accident. To the contrary, *Hot Shot Express* refused to apply the presumption to a plaintiff who failed to establish that her inability to remember the conduct at issue: "We hold that Brooks [the plaintiff] was not entitled to receive the benefit of the presumption of ordinary care because she failed to establish that her retrograde amnesia was caused by the injuries she suffered in the accident." *Id.*

Karst likewise failed to demonstrate at summary judgment that he could not remember reading the manual or label due to the accident rather than the fact that he never read them. Karst testified he cannot say whether he read the manual or label during the two-year period he owned the tarp system before the accident. (SR1-532; SR1-1109.) The Karsts, however, produced no competent expert testimony that Karst's inability to remember reading that content was due to amnesia rather than simply not reading them.

This is significant because Karst owned the 3500 tarp system for two years before the accident. He testified that he has no memory of the day of the accident, and agreed that his memory of events in the months before the accident was "spotty." (SR1-533.) But he remembers many things during the two years before the accident, including events related to his tarp system. To give a few examples, Karst remembered that:

- In 2007, he called Wilson Trailer to say he was ready to buy new trailers, SR1-1105;
- The new trailers had the same specifications as his previous trailers and were supposed to be black, SR1-1105;

- By mistake, the new trailers were white, but Karst decided to keep them because he had already sold the old trailers, SR1-1105;
- When he picked up the new trailers, Wilson Trailer showed him how the tarp system worked, SR1-1106;
- Before the accident, a Hoven mechanic named Johnny Brenner serviced Karst's trailers, SR1-1103; but it was not possible that Brenner worked on the tarp system because that is not something Karst would have asked Brenner to do, SR1-532;
- Before the accident, Karst replaced an electric motor for the tarp system himself, SR1-533; but
- Karst did not think that he had converted the tarp system from electric to manual before the accident, SR1-1107.

These examples show Karst remembered many events during the two-year period between his receipt of the 3500 tarp system and the accident, including the fact—beneficial to his case—that he did not think he had converted the tarp system from electric to manual. The Karsts cite no decision allowing a plaintiff to testify to beneficial facts while claiming a presumption covering the same time period due to an impaired memory. Presuming that Karst read the manual and label, something his experts say most people do not do, during the same time period when he remembered many facts related to the tarp system would be an unprecedented and unwarranted expansion of the due care presumption.

C. There is no evidence that Karst read the content of Shur Co.'s manual or label.

The Karsts alternatively contend they presented circumstantial evidence that Karst read and relied upon the manual or label. The court correctly rejected this argument. The Karsts rely on elevator employee Todd Hauck's testimony that, after Karst first climbed onto the catwalk, he came back down and read something. But Hauck clearly testified that he had 'no idea" what Karst was reading. (SR1-545.) Hauck provided no description of what Karst was reading. He could not even say whether it was one or multiple pages. (SR1-544.)

The Karsts contend that, even though Hauck had no idea what Karst was reading, a jury could infer it was the Shur Co. manual. But this speculative possibility is eliminated by undisputed evidence, including Karst's testimony. Karst unequivocally testified that he kept all the manuals associated with the trailers in his Hoven shop:

> Q. Did you have one place where you stored all the manuals associated with the trailers?
>
> A. Yes.
>
> Q. Where is that place?
>
> A. It would have been in my shop.

(SR1-532.) Karst cannot "claim a better version of the facts that he testified to himself." *Lien v. Lien*, 2004 S.D. 8, ¶ 31, 674 N.W.2d 816, 826. Because Karst kept the manual in his shop in Hoven, whatever he read at the McLaughlin elevator could not have been the manual. The Karsts attempt to avoid the impact of Karst's testimony by citing Mrs. Karst's testimony that she could not find the manual in the shop on the morning of her

July 11, 2013 deposition. (Appellant's App. 127.) But Mrs. Karst's inability to find the manual in the shop 3.5 years after the accident falls far short of competent evidence that Karst did not keep the manual in his shop before the December 15, 2009 accident.

Although Karst's testimony is fatal to the argument that he read the manual at the elevator, it is noteworthy that Tom Heinen, the elevator employee who was in closest proximity and communication with Karst while he worked on the tarp system,[1] testified that he never saw Karst consult an owner's manual:

> Q. Okay. Okay. My understanding is that during the time that Mr. Karst was working on this project of trying to get the tarp closed you did not see him open an owner's manual, did you?
>
> A. No, I never.

(SR1-542.) He also testified that Karst never said he consulted an owner's manual:

> Q. Did Mr. Karst tell you he had looked at any owners' manuals, instructional manuals, or any other paperwork?
>
> A. No, he never.

(SR1-539.) In addition, if the document Karst read at the elevator was the manual, it should have been found at the accident scene or in Karst's truck. The Karsts, despite having the burden to resist summary judgment and to prove causation, produced no evidence that a manual was found in either location.

The Karsts are incorrect when they say Karst followed the steps in the owner's manual. To the contrary, it is undisputed that Karst did not perform the first direction in the manual, and thus his actions show he was not following the manual. The first

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[1]Hauck testified that Heinen was talking to Karst, whereas Hauck went in and out of the scale room office. (Appellant's App. 120.)

direction is "Close tarp but let roll tube hang loose under latchplate." (SR1- 523, Step A.) If Karst had been attempting to follow the manual, he should have closed the tarp before disconnecting the flex arm from the roll tube, or, expressed frustration that he did not know how to close the tarp before disconnecting the roll tube without electrical power. It is undisputed, however, that Karst did neither. Heinen testified that Karst did not express frustration. (Appellant's App. 124.) The Karsts themselves assert that Karst "was not angry or frustrated." (Appellant's Brief at 8.) Karst simply proceeded to disconnect the flex arm from the roll tube while it was in the open position and under tension, contrary to the manual's direction to first close the tarp. (SR1-541 to -42.) It is therefore undisputed that Karst did not follow the very first step in the manual, which is further evidence that he had not read, and was not relying upon, the manual when the accident occurred.

The Karsts point to Dr. Laughery's testimony, but his testimony supports the conclusion that Karst had not read the manual or label. The Karsts cite a statement by Dr. Laughery that, at the time of the accident, Karst "was a guy who wasn't in a hurry, who had an awareness of the need to convert to electric to manual, was trying to do that, and this was a guy, who, by all the things I read, was responsible, that had he been given adequate information, adequate warnings, he would have complied with them." (Appellants' App. 132.) The testimony cited by the Karsts, however, does not address the issue whether Karst had read and relied upon Shur Co.'s manual and label. Dr. Laughery actually asserted a different proposition—that Karst was responsible and would have complied with different warning content.

This is significant because Dr. Laughery addressed the specific issue whether Karst had read the manual or label and affirmatively testified that he was making no assumption whether Karst read those items and that not reading the manual would be typical:

> Q. So are you assuming that he had not read the owner's manuals before the accident?
>
> A. I'm making no assumption on that. But if his—there's no indication that he did read the owner's manual or that he remembered there being a section on page 17 about the conversion, that his behavior would be typical with respect to that.

(SR1-553.)

> Q. So what assumption are you making as to whether Mr. Karst had read the warning label before the accident?
>
> A. I'm not making any assumption about that.

(SR1-553.)

Although the Karsts do not cite it, Dr. Laughery testified that Mrs. Karst had described Karst as a person who would refer to manuals for guidance *when needed.* (SR1-553.) In addition to being hearsay because Dr. Laughery had not spoken to Mrs. Karst and inadmissible character evidence under SDCL § 19-19-404(a), this statement does not support an inference that Karst read the manual because Dr. Laughery unequivocally testified that it would be speculation for him to say whether Karst felt a need to consult an owner's manual on the day of the accident. (SR1-554.) Moreover, Dr. Laughery testified that he assumed Karst did not have the manual with him on the day of the accident, which means he could not have read it at the elevator. Because Dr. Laughery made no assumption whether Karst had read the manual or label, and testified

that most people do not read those items, the court correctly concluded that Dr. Laughery would "have to speculate to conclude that the Plaintiff read and relied on the allegedly defective information in the manual and label," and thus his testimony was insufficient to support a warning claim. (SR1-1327.) Because expert testimony is required, this alone justified summary judgment on the theory that the manual or label's content caused the accident. *Nationwide*, 2014 S.D. 70, ¶ 17, 855 N.W.2d at 151 ("Expert testimony is generally necessary to establish elements of negligence and strict liability.")

In sum, Hauck's testimony is sufficient at summary judgment to establish that Karst read something at the elevator in McLaughlin, but the court correctly concluded it did not create a jury question whether Karst was reading the manual. There is no conflict in the evidence whether Karst was reading the manual because Hauck admitted he had "no idea" what Karst was reading, and undisputed evidence eliminates the possibility that it was the manual, including: (1) Karst's testimony he kept the owner's manual in his Hoven shop; (2) Heinen's testimony that he never saw Karst reading a manual; (3) Heinen and Hauck's testimony showing Karst did not follow the manual's first step, or express frustration that he could not follow that step; (4) the absence of any evidence the manual was found at the accident scene or in Karst's truck. Even the Karsts' expert assumed that Karst did not have the owner's manual with him at the elevator and made no assumption whether Karst read the manual or label before the accident. (SR1-734.) Consequently, the court correctly concluded that the argument that Karst read and relied upon the manual or label amounted to "nothing more than the fact of the accident, speculation, and conjecture. Such a showing is insufficient to resist summary judgment."

Nationwide, 2014 S.D. 70, ¶ 19, 855 N.W.2d at 151 (cited by the court at SR1-1329); *see also Burley*, 2007 S.D. 82, ¶ 34, 737 N.W.2d at 409 ("To survive a motion for summary judgment, Burley 'must present more than [u]nsupported conclusions and speculative statements, [which] do not raise a genuine issue of fact.'"). This Court should affirm summary judgment as to the Karsts' theory that the manual or label's content caused the accident regardless of how it resolves the placement theory.

D. The Karsts failed to present sufficient expert testimony to support their placement theory.

The court's opinion did not expressly address the Karsts' theory that the warning label was inadequately placed. But the court's denial of the motion for reconsideration and evidentiary rulings at trial show the summary judgment included this theory as well. Summary judgment on the placement theory should be affirmed because the Karsts failed to submit an expert opinion sufficient to create a jury issue concerning this theory. "This Court has often stated that, '[i]f there exists any basis which supports the ruling of the trial court, affirmance of summary judgment is proper.'" *Jorgenson Farms, Inc. v. Country Pride Corp.*, 2012 S.D. 78, ¶ 20, 824 N.W.2d 410, 417.

Shur Co. placed a warning label at the base of the front and rear flex arms, where they connect to the front and back of the trailer, respectively. (Appellant's App. 156.) The Karsts' Amended Complaint contained no allegations that placing the label at the base of the flex arms was inadequate. (SR1-58 to -69.) Dr. Laughery's September 30, 2013 expert report criticized the label's content, but did not assert that placing the label at the base of the flex arms was inadequate. (*See* SR1-556 to -561.)

On July 7, 2014, Shur Co. moved for partial summary judgment on the Karsts' warning claims because the Karsts cannot prove the allegedly inadequate content caused the accident. In conjunction with the Karsts' summary judgment response, they submitted an affidavit from Dr. Laughery stating that a label placed on sleeve of the roll tube "is more likely to be effective." (Appellant's App. 142-45.) The Karsts argued, citing solely to Dr. Laughery's new affidavit, that even if Karst had not read the manual or label, a jury question existed whether Shur Co.'s placement of the label at the flex arm's base was inadequate. (SR1-620.)

Shur Co. acknowledges that a claim that the placement of a warning label was defective because the location failed to adequately call attention to the label is a separate theory from a claim that a label or manual's content was inadequate. *E.g.*, *Nowak v. Faberge USA Inc.*, 812 F. Supp. 492, 497 (M.D. Pa. 1992), *aff'd*, 32 F.3d 755 (3d Cir. 1994) (contending that placement of a warning on the back of a can, in the same color, and among other language was inadequate). One difference between the two types of warning claims is that the failure to read a label does not necessarily bar recovery under a placement theory. *Id.* at 498. But summary judgment on the placement theory should be affirmed under the "eleventh hour" affidavit rule and because Dr. Laughery's affidavit is insufficient create a jury question whether the label's placement was inadequate.

South Dakota follows the rule that affidavits cannot be used to avoid summary judgment by manufacturing a new issue: "An issue of material fact will not be created by a party who attempts to change its testimony without an explanation for its change or a showing that its answers were ambiguous and that the new affidavit merely seeks to

clarify that testimony." *DFA Dairy Financing Servs., L.P. v. Lawson Special Trust*, 2010 S.D. 34, ¶ 21, 781 N.W.2d 664, 670; *see also Seaton Ins. Co. v. Yosemite Ins. Co.*, 748 F. Supp. 2d 139, 148 n.4 (D.R.I. 2010) ("Seaton cannot avoid summary judgment by enlisting its expert to devise a new theory of how to read the Certificate."). Dr. Laughery's affidavit falls squarely within this category.

Dr. Laughery's report contained no criticism of the label's placement. (*See* SR1-556 to -561.) He then testified that his opinions were all set forth in that report:

> Q. Are all of the opinions you formed concerning this case set forth in your written report?
>
> A. I think so.
>
> Q. At this time have you been asked to do any supplemental work?
>
> A. No.

(SR1-552.) He repeated this testimony later in his deposition. (Appellant's App. 135.)

Even more specifically, Dr. Laughery agreed that the label's format was an acceptable way to call someone's attention to the label and so his criticism was focused on the label's content: " Yeah, the formatting is consistent with the ANSI standard. It's the content that I have the criticism of." (SR1-734.) Dr. Laughery's report and deposition testimony thus did not assert that Shur Co.'s placement of the warning label at the flex arms' base was inadequate. To the contrary, he testified that the criticisms of the label's content set forth in his report constituted all of his opinions concerning the case.

If there were anything in Dr. Laughery's report or deposition testimony asserting that the label's placement were inadequate, the Karsts would have responded to summary

judgment by citing those documents, rather than relying solely on a new affidavit. Dr. Laughery's affidavit tries to assert a new theory. It is a substantial and therefore impermissible change. Under the "eleventh hour" affidavit rule, it cannot create a jury question.

But even if the statements in the affidavit could be considered, it does not meet the Karsts' burden to offer competent expert testimony. Under South Dakota law, the essential elements of a warning claim include that "an inadequate warning was given" and that the inadequacy in the warning rendered the product defective and unreasonably dangerous. *Burley,* 2007 S.D. 82, ¶ 35, 737 N.W.2d at 409. Expert testimony is necessary to establish these elements. *Nationwide*, 2014 S.D. 70, ¶ 17, 855 N.W.2d at 151.

Dr. Laughery's affidavit is not sufficient to establish that Shur Co.'s placement was so inadequate as to be defective. Although the affidavit states that a warning label placed on the sleeve "is more likely to be effective," it does not state that the location chosen by Shur Co. was inadequate or defective, much less provide scientific support establishing why Shur Co.'s location was so unlikely to be noticed that placing the label there constituted a defect. (*See* Appellant's App. 144 ¶ 6.) This is significant because the law does not require a manufacturer to place a warning label in the position that a plaintiff's expert believes would have been most effective. The law merely requires the location to be adequate, which is why plaintiffs are required to prove that the chosen location was inadequate.

This affidavit was not an off-the-cuff opinion. The Court may safely conclude it

expresses the strongest opinions in the strongest terms that Dr. Laughery could offer. The Karsts' brief contends the affidavit opined that "a warning should have been located on the sleeve," so they presented evidence Shur Co.'s label "was improperly located." (Appellants' Brief at 20.) But that is not what Dr. Laughery said. Although he had every opportunity to use those precise words, he did not do so. Instead, he stated merely that putting a label on the sleeve "would have been appropriate" and "is more likely to be effective." *Id.* The Karsts failed to present evidence the flex arm's base was an improper or inadequate location.

Although summary judgment should be affirmed, the Karsts incorrectly contend a reversal would entitle them to a new trial on all claims. The theory that failing to place a label on the roll tube sleeve caused the accident is separate and distinct from the theory that inadequacies in the manual or label's content caused the accident. A plaintiff could easily assert one theory without the other. If this Court were to reverse the summary judgment on one theory but not the other, it should remand for further proceedings on the reversed theory alone.

Similarly, reversing summary judgment on one warning theory or even both would not affect the jury verdict. The only authority the Karsts cite is inapplicable because it addresses whether a new trial should be granted on some or all of damage issues that were tried together, and even it recognizes that "'the parties ought not to be compelled to try anew a question once disposed of by a decision against which no illegality can be shown.'" *Reinfeld v. Hutcheson*, 2010 S.D. 42, ¶ 22, 783 N.W.2d 284, 291 (quoting *Byre v. Wieczorek*, 88 S.D. 185, 217 N.W.2d 151, 159). Reversing

summary judgment would not show any illegality in the jury verdict because warning, design, and post-sale failure to warn claims are distinct. A plaintiff can bring one without the others, and win one while losing the others. The only overlap the Karsts assert is that they wanted to use warnings evidence to refute assumption of the risk. But the special verdict form shows the jury did not reach assumption of the risk, so reversing summary judgment would not undermine the jury verdict. *Burhenn v. Dennis Supply Co.*, 2004 S.D. 91, ¶ 37, 685 N.W.2d 778, 786 ("Since the jury's verdict did not consider, let alone depend upon, any issues related to assumption of the risk or contributory negligence, they are now moot.").

2. Instruction 20 was neither incorrect nor prejudicial.

The Karsts object to Instruction 20, which related solely to their strict liability design defect claim. The objection fails because Instruction 20 was neither erroneous nor prejudicial. This Court generally reviews "'a trial court's decision to grant or deny a particular instruction under the abuse of discretion standard.'" *Wangness v. Builders Cashway, Inc.*, 2010 S.D. 14, ¶ 10, 779 N.W.2d 136, 140 (quoting *State v. Cottier*, 2008 S.D. 79, ¶ 7, 755 N.W.2d 120, 125). Although no court has discretion to give incorrect, misleading, conflicting, or confusing instructions, to "constitute reversible error, an instruction must be shown to be both erroneous and prejudicial." *State v. Whistler*, 2014 S.D. 58, ¶ 13, 851 N.W.2d 905, 910. "Accordingly, 'jury instructions are to be considered as a whole, and if the instructions so read correctly state the law and inform the jury, they are sufficient. This is a question of law reviewed de novo.'" *Id.* (quoting *State v. Waloke*, 2013 S.D. 55, ¶ 28, 835 N.W.2d 105, 113).

The court instructed concerning strict liability at Instructions 18 to 22 and 25. The Karsts object only to Instruction 20, which stated:

> A product can be dangerous without being unreasonably dangerous. Even if a product is defective in some manner, you must find that the defect renders the product "unreasonably dangerous." A product is not in a defective or unreasonably dangerous condition merely because it is possible to be injured while using it.

(SR1-1835.) As an initial matter, the Karsts wrongly contend this instruction is subject to heightened scrutiny because it is not a pattern instruction. The case cited by the Karsts clarifies that, when reviewing instructions, the issue--regardless of the source of the instructions--is whether they correctly state the law. *State v. Eagle Star*, 1996 S.D. 143, ¶ 15, 558 N.W.2d 70, 73 ("The trial court may rely on the pattern jury instructions or draft its own instruction. '[A]ll that is required is that jury instructions, read as whole, correctly state the law and inform the jury.'") (quoting *State v. Latham*, 519 N.W.2d 68, 73 (S.D. 1994)).

Instruction 20 is a correct statement of the law. The first sentence simply states a product can be dangerous without being unreasonably dangerous, which the law recognizes. *E.g.*, *Community Television Serv., Inc. v. Dresser Indus., Inc.*, 435 F. Supp. 214, 316 (D.S.D. 1977) ("A product can be dangerous without being unreasonably dangerous."), *aff'd*, 586 F.2d 637 (8th Cir. 1978); RESTATEMENT (SECOND) OF TORTS § 402A, *comment I* ("The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer."). Otherwise, the word "unreasonably" would be rendered meaningless.

Instruction 20's second sentence states that, to impose liability, a defect must

render the product unreasonably dangerous to the user. This, too, is correct. RESTATEMENT (SECOND) OF TORTS § 402A, *comment I* ("The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer."); S.D. Civil Pattern Jury Instruction 20-120-10(1) (requiring plaintiff to prove product "was in a defective condition which made it unreasonably dangerous to the plaintiff user").

The last sentence of Instruction 20 is also true. The mere fact that a plaintiff suffered an injury while using a product is not sufficient to prove by itself that a product was defective or unreasonably dangerous. *E.g., Nationwide*, 2014 S.D. 70, ¶ 19, 855 N.W.2d at 151 (the mere fact that an accident occurred was insufficient basis to resist summary judgment); *Products Liability* § 8.05[1] (Matthew Bender & Co. 2014) ("The fact that a product caused injury, or that it may be dangerous, does not in and of itself support a conclusion that the product is unreasonably dangerous."). For example, even if a product was adequately designed, it is still possible that a person could be injured while using it due to misuse, contributory negligence, or just an unfortunate accident.

The Karsts incorrectly assert that Instruction 20 required the jurors to accept some level of danger in the tarp system. Telling the jurors that it is *possible* for a product to be dangerous without being unreasonably dangerous does not tell the jurors how much danger is acceptable in a particular product. Instruction 20 did not limit the jurors' ability to decide what amount of danger, if any, was reasonable for the tarp system. Instruction 20 in no way restricted the jurors' freedom to accept the Karsts' theory that the no amount of danger associated with the tarp system was reasonable based on the risk utility test in

Instruction 19.

Instruction 20 thus correctly states the law, without even considering the impact of *First Premier Bank v. Kolcraft Enterprises, Inc.*, 2004 S.D. 92, 686 N.W.2d 430. *Kolcraft*, however, supports this conclusion. In *Kolcraft*, the same language was given by the trial court in an instruction combined with the consumer expectation and risk utility tests for defect. *Id.* ¶ 28, 686 N.W.2d at 444-45. This Court held that the trial court erred by not clarifying that the plaintiff only needed to satisfy one of the defect tests. *Id.* ¶ 29, 686 N.W.2d at 445. But this Court did not state that the language used in Instruction 20 was erroneous, even though it addressed issues that were not necessary to its decision, but likely to arise on remand. *Id.* ¶ 30, 686 N.W.2d at 445. If the language used in Instruction 20 were erroneous, surely this Court would have said so because it analyzed the instruction containing it and due to the high probability that an amended version of the instruction would be used on remand.

The Karsts contend that, even if Instruction 20 is sometimes correct, it is only appropriate for products that are inherently dangerous. This is wrong. The instruction that it is possible for a product to pose some danger without being unreasonably dangerous is relevant to any strict liability claim because it helps a jury understand the range of possibilities associated with the risk utility test. For example, the product at issue in *Kolcraft* was a child's playpen, a product that did not involve any inherent danger, yet this Court did not state that it was wrong to use the language of Instruction 20. *Kolcraft*, 2004 S.D. 92, ¶ 2, 686 N.W.2d at 435.

Considering the other instructions about strict liability only strengthens the

conclusion that giving Instruction 20 was not erroneous. The court gave all the instructions concerning strict liability that the Karsts requested when instructions were settled, including Instruction 19, which contains the risk utility test. (SR1-1834.) The jury heard the definition of design defect that the Karsts requested. The Karsts nevertheless contend that Instruction 20 undermined Instruction 19 based on the premise that jurors should not receive any guidance concerning the meaning of "unreasonably dangerous" other than Instruction 19's risk utility test.

This premise is wrong. Instruction 21, which is a pattern instruction and is not challenged on appeal, told the jury that in determining whether the tarp system was "defective and unreasonably dangerous you may consider whether Shur Co. complied with the generally recognized state of the art."[2] (SR1-1836.) Allowing juries to consider whether a product was state of the art while determining whether it was unreasonably dangerous refutes the Karsts' argument that the risk utility test in Instruction 19 is the only legitimate instruction a jury may receive concerning the concept of "unreasonably dangerous."

The strict liability instructions as a whole did not unduly favor the defense. In addition to giving the definition of defect requested by the Karsts, the court gave Instruction 22, which told the jurors that if "Plaintiff proves the elements of a strict liability claim, then Defendants are liable even if Defendants exercised reasonable care in the preparation and sale of the product." (SR1-1837.) Instruction 25 told the jury: "The

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[2]This instruction was appropriate because based on testimony that the covered spline design was state of the art when Shur Co. licensed and began selling it. (SR2-1201; SR2-1708 to -09.)

contributory negligence of the Plaintiff, if any, is not a defense to the Plaintiff's strict liability claim." (SR1-1841.) Instructions 22 and 25 offer no benefit to defendants. Conversely, the Karsts may feel like Instruction 20 did not benefit them, but when the strict liability instructions are viewed as a whole, they were not unduly one-sided or prejudicial. The instructions as a whole correctly stated the law, so giving Instruction 20 was not erroneous.

Even more glaring is the Karsts' failure to establish that Instruction 20 was prejudicial. Erroneous instructions are prejudicial "'when in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party.'" *Wangness*, 2010 S.D. 14, ¶ 10, 779 N.W.2d at 140. This trial lasted 12 court days, and the Karsts presented 27 witnesses. Their experts included multiple medical experts, a product expert, a biomechanical expert, and an economist. Given the massive amount of evidence the Karsts presented to the jury, it is simply not credible to assert that the jury's verdict hinged on being confused or mislead by the instruction that it is possible for a product to be dangerous without being unreasonably dangerous or that the mere possibility of an injury does not establish a defect.

South Dakota law and Instruction 18 required the Karsts to show that the tarp system "was in a defective condition which made it unreasonably dangerous to Richard Karst." (SR1-1833.) Instruction 20 did not tell the jurors that they were required to accept any amount of danger posed by the tarp system, much less more than an unreasonable amount. The Karsts' have not demonstrated any reason to believe Instruction 20 caused the jurors to impose a higher standard than "unreasonably

dangerous." Giving Instruction 20 did not "in all probability" affect the verdict or harm the Karsts' substantial rights.

3. Although the court correctly instructed the jury on assumption of the risk, the issue is moot.

The Karsts incorrectly contend the jury should not have been instructed on assumption of the risk. This issue cannot constitute prejudicial error because the special verdict form shows the jury did not reach assumption of the risk. (SR1-1808 to -10.) One purpose of a special verdict form is to establish what impact, if any, a particular issue had on a verdict. *Wangsness*, 2010 S.D. 14, ¶ 15 n.2, 779 N.W.2d at 141. When a special verdict form shows that the appellant's objection concerns an instruction related to an issue the jury did not reach, it is impossible to prove prejudice. *Burhenn*, 2004 S.D. 91, ¶ 37, 685 N.W.2d at 786; *Bell v. East River Elec. Power Co-op, Inc.*, 535 N.W.2d 750, 755 (S.D. 1995) ("As the jury never reached the question of Bell's contributory negligence, Bell's Estate has failed to show how these instructions relating to contributory negligence would have resulted in a different verdict on assumption of the risk had they not been given.").

The court was correct, however, to submit assumption of the risk to the jury. This issue is "for the jury in all but the rarest cases." *Nelson v. Nelson Cattle Co.*, 513 N.W.2d 900, 903 (S.D. 1994). In "determining whether the instruction was proper, the plaintiff's 'claim that the evidence was insufficient to establish assumption of the risk is viewed in the light most favorable to upholding the verdict.'" *Wangsness*, 2010 S.D. 14, ¶ 14, 779 N.W.2d at 141. The Karsts concede the instruction was justified if the jury could

conclude "Karst knew that removing the sleeve would cause the flex arm to forcefully spring toward him." (Appellant's Brief at 31.) In reality, given Karst's precarious position on the catwalk, the instruction was justified if Karst knew the arm would move forcefully in any direction. (*See* Shur Co.'s App. 40-41.)

There was ample evidence for the jury to conclude Karst possessed actual knowledge (the defendants did not rely on constructive knowledge). The defendants presented Karst's deposition testimony at trial.[3] Karst used a manual tarp system for 27 years and used the electric tarp system for just over two years before the accident. (SR1-1103.) He knew there were springs at the flex arm's base. (SR1-1107.) Before the accident, he knew the spring tension would be strongest when the roll tube was on the right side of the trailer, also called the open position, (SR1-1107), and that converting to manual required him to disconnect the rear flex arm from the roll tube. (SR1-1108.) Without specifying a time frame, Karst testified that he would rather convert to manual with the roll tube on the left in the closed position than in the open position because there is less spring tension in the closed position. (SR1-1109.) He believed the flex arm would move away from the trailer upon disconnection from the roll tube. (SR1-1108 to -09.) Karst agreed that, if the flex arm was going to move away from the trailer, it would not be wise to rely on it as a source of balance when disconnecting it. (SR1-1109.) Karst testified that the flex arm typically does not go past the right side of the trailer, and the

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[3]The Karsts were permitted to designate portions to be read as well. For the portions the court permitted to be read, see SR2-SR2-3500 to -07. For the point during trial when they were read, see SR2-3514 to -15. The pages read at trial are in Shur Co.'s appendix.

only place for it to move in normal operation would be toward the driver's side. (Shur Co. App. 32.)

Karst testified that he was sure he changed one of the tarp's electric motors before the accident. (Shur Co. App. 15, 16.) Steve Knight, Shur Co.'s director of engineering, testified that he had replaced a motor and replacing the motor requires the front flex arm to be disconnected from the roll tube. (SR2-3098.) Knight allowed for the possibility that a method might exist to remove a motor without disconnecting the flex arm, but testified that, as far as he knows, the flex arm must be disconnected. (*Id.*) The Karsts did not follow up by introducing any method to remove the motor without disconnecting the flex arm from the roll tube. The jury could therefore conclude Karst disconnected the flex arm when he changed the motor.

Knight testified that, after the new motor is attached to the flex arm, the flex arm is rotated from the ground back up to the roll tube. During this rotation, the spring tension would be obvious and get more intense as the flex arm rotated toward the roll tube. (SR2-3094.) Interpreted in the light most favorable to the verdict, Knight's testimony would allow the jury to conclude that, when Karst replaced the motor, he encountered spring tension in the flex arm. Based on Karst's testimony that he knew the most tension occurred in the open position, the jury could also conclude that Karst knew the flex arm would have more tension in the open position than what he felt when he replaced the motor.

Heinen testified that, when the accident occurred, Karst was using a hammer to tap the flex arm sleeve off the roll tube. (SR2-1733.) Karst held the hammer in his right

hand and gripped the flex arm sleeve with his left hand in an overhand grip, (SR2-1736), as recreated in Ex. 1035-E and Ex. 1035-X. (SR2-1745.) Karst's left hand was still holding the sleeve when he disconnected it from the roll tube with the hammer. (SR2-1773.) He had his legs and feet "braced" in a "ready position." (SR2-1773 to -74.) Shur Co.'s product expert, Dr. Adams, testified that Heinen's testimony about Karst's posture and grip was strong evidence Karst knew the flex arm would move, (SR2-3364), and move forcefully: "This grip, the power grip that you have anticipates a forceful resistance is required. All right? So it's assuming that this is going to have to -- When this comes off, it's going to have a fair amount of force to it." (SR2-3372.) The circuit court correctly concluded that this evidence made assumption of the risk a jury question.

4. The court correctly excluded evidence of manuals and warnings, and the Karsts cannot prove prejudice.

The court correctly ruled that evidence that Shur Co.'s manuals, labels, and instructions was irrelevant at trial. "The trial court's evidentiary rulings are presumed correct and will not be overturned absent a clear abuse of discretion." *Veith v. O'Brien*, 2007 S.D. 88, ¶ 25, 739 N.W.2d 15, 23. When this first arose, the Karsts contended they would use this evidence to rebut defendants' assumption of the risk defense. (SR2-1026 to -27; SR2-1069.) The court ruled that the evidence was not relevant because the warning claims were not part of the trial. (SR2-1473 to -74.) The court's ruling was correct because the defendants' assumption of the risk defense did not contend Karst learned anything from those materials not did it rely on constructive knowledge. As explained in Section 1, at summary judgment the defendants contended there was no

evidence Karst read and relied upon Shur Co.'s information. Consequently, as set forth in Section 3, at trial the defendants relied on Karst's actual knowledge evidenced through his many years experience with manual tarp systems, two years experience with the 3500, and the eye witness testimony of his conduct. In opening and closing argument, the defendants never asserted that Karst learned or should have learned what to do from the manual, labels, or instructions.

In any event, the Karsts' contention that warning evidence would have helped them defeat assumption of the risk cannot constitute prejudicial error because the special verdict form proves the jury did not reach assumption of the risk. SR1-1808 to -10; *Anderson v. Johnson*, 441 N.W.2d 675, 677-78 (S.D. 1989); *Kallis v. Beers*, 375 N.W.2d 642, 644 (S.D. 1985).

The Karsts secondarily argue that they should have been allowed to use warning evidence to impeach unrebutted testimony that a warning and a safe procedure was communicated to Karst. It is telling, however, that they cite no place in the testimony where defendants did this. Defense counsel clearly did not make such an argument in either opening or closing arguments. The only testimony concerning warnings and manuals occurred while the Karsts' counsel was questioning the first witness, a Shur Co. employee named Wade Dangler that the Karsts called adversely. Although Dangler mentioned the warning label and manual on two occasions, he did not testify that this content was communicated to Karst. (SR2-1148 to -50; SR2-1155.) The questioning was stopped initially when Shur Co. objected, (SR2-1150), and by a bench conference after the second occurrence, (SR2-1155).

But after those references by Dangler, there was no further discussion of warning material by witnesses. Because the Dangler testimony was given during the Karsts' counsel's examination, it was invited error rather than testimony presented by the defendants. *Veith*, 2007 S.D. 88, ¶ 27, 739 N.W.2d at 24 (invited error doctrine means party cannot complain on appeal about error to which he contributed). Similarly, the discussion during voir dire about labels and manuals that the Karsts mention was initiated by their counsel and is invited error. (SR2-890 to -95.) The court did not abuse its discretion by concluding that neither voir dire nor Dangler's references to warnings and manuals opened the door to further evidence concerning the manual, warnings, and instructions.

In addition, the Karsts cannot show prejudice. First, during Dangler's testimony, the Karsts' counsel was permitted to ask multiple questions about alleged problems with the manual, including the absence of specific instructions how to close a tarp stopped in the open position, so the testimony was at least as helpful to the Karsts as it was to the defense. (SR2-1151 & -54.) Second, Dangler was the first witness in a case that lasted 12 days and the Karsts presented 26 witnesses after him.

Third, the Karsts fail to mention the court's curative jury instruction. Instruction 15A stated: "You should not consider whether there are any warnings, labels, or owner's manuals that may pertain to any of the issues you are being asked to decide. I have ruled that these matters are not relevant to the parties' claims." (SR1-1829.) The idea of a curative jury instruction was proposed by the Karsts. (SR2-1502.) The Karsts participated in crafting the language and had no objection to the final form. (SR1-3655 to

3657.) This Court "presume[s] that juries understand and abide by curative instructions." *State v. Dillon*, 2010 S.D. 72, ¶ 28, 788 N.W.2d 360, 369. The Karsts provide no reason to question this presumption. They have not shown the evidentiary rulings were an abuse of discretion. Nor have they shown that Dangler's brief discussion of warning material, which also benefitted them and was cured by a jury instruction, affected the verdict. *See Ruschenberg v. Eliason*, 2014 S.D. 42, ¶ 23, 850 N.W.2d 810, 817.

CONCLUSION

After more than 2 weeks of trial, testimony from 31 witnesses, and receipt of over 100 exhibits, a Corson County jury found against the Karsts on liability. Their complaints about the jury's refusal to award damages are unfounded. Settled South Dakota law supports dismissal of their warning claims due to the absence of any causal relationship between alleged flaws in the warnings and Karst's accident. Instruction 20 correctly stated South Dakota law and the instructions as a whole were neither confusing nor prejudicial. Based on the special verdict form, any complaints about the submission of the assumption of the risk instruction are moot. Finally, contrary to the Karsts' assertion, defendants never presented misleading evidence related to warnings, and to the extent that any such evidence reached the jury, the court's curative instruction properly admonished the jury. This Court should affirm the court's judgment.

Dated this 24th day of August, 2015.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using WordPerfect X6, Times New Roman, Font 13, and contains 9,910 words, excluding the table of contents, table of cases, jurisdictional statement, statement of legal issues and certificate of counsel. I have relied on the word and character count of the word-processing program to prepare this certificate.

Dated this 24th day of August 2015.

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I hereby certify that on the 24th day of August, 2015, I sent by e-mail transmission, a true and correct copy of the foregoing Appellee Shur Company's Brief, to the following:

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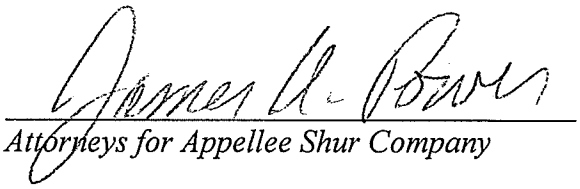

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APPENDIX

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Nos. 27348 and 27362

RICHARD KARST and SUSAN KARST,
Plaintiffs/Appellants,

vs.

SHUR COMPANY and WILSON TRAILER COMPANY,
Defendants/Appellees.

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

The Honorable Michael W. Day, Presiding Judge

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Notice of Appeal filed January 29, 2015 (No. 27348)
Notice of Review filed February 13, 2015 (No. 27362)

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REFERENCE LEGEND

The settled record appears in two volumes and will be referred to as "SR1" and "SR2" followed by the applicable page number. The Appendix to the Brief of Appellant will be referred to as "Appellants App." followed by the applicable page number. The Appendix to this Brief of Appellee Wilson Trailer Company will be referred to as "Wilson App." followed by the applicable page number.

Appellant Richard Karst will be referred to as "Karst." Appellants collectively will be referred to as "Plaintiffs." Appellee Wilson Trailer Company will be referred to as "Wilson." Appellee Shur Company will be referred to as "Shur-Co." Wilson and Shur-Co collectively will be referred to as "Defendants."

JURISDICTIONAL STATEMENT

Plaintiffs appeal from a judgment entered on a jury verdict in favor of Defendants Shur-Co and Wilson, in Circuit Court, Fourth Judicial Circuit, Corson County. SR2 521. Notice of Entry of Judgment was filed on December 1, 2014. SR2 523. Plaintiffs filed a motion for new trial on December 12, 2014, SR2 656, which was deemed denied in accordance with SDCL 15-6-59(b). Plaintiffs filed a Notice of Appeal on January 29, 2015. SR2 789. Wilson filed a timely Notice of Review with this Court on February 13, 2015 pursuant to SDCL 15-26A-22.

Plaintiffs/Appellants' Brief raises four issues. Pursuant to SDCL 15-26A-3(1), this Court has jurisdiction to consider Issues 2, 3, and 4. However, for the reasons set forth in Shur-Co's motion to dismiss Issue 1 of Appellants' Brief, Plaintiffs' attempted appeal from the circuit court's memorandum decision granting summary judgment to

Defendants on Plaintiffs' failure to warn claims is not properly before this Court. This Court denied Shur-Co's motion to dismiss Issue 1 by order dated August 7, 2015.

STATEMENT OF THE ISSUES

Appellants' Issues

1. Whether the circuit court properly granted summary judgment in favor of Defendants on Plaintiffs' failure to warn claims on the grounds that Plaintiffs presented no competent evidence Karst read the warning or owner's manual.

   The circuit court properly granted summary judgment in favor of Defendants on Plaintiffs' failure to warn claims.

   Most relevant authorities: *Nationwide Mut. Ins. Co. v. Barton Solvents Inc.*, 2014 S.D. 70, 855 N.W.2d 145; *Burley v. Kytec Innovative Sports Equip. Inc.*, 2007 S.D. 82, 737 N.W.2d 397; *Guilford v. Northwestern Public Serv.*, 581 N.W.2d 178 (S.D. 1998); *Taggart v. Ford Motor Credit Co.*, 462 N.W.2d 493 (S.D. 1990).

2. Whether the circuit court properly instructed the jury as to the Karsts' defective and unreasonably dangerous product claim, specifically in Instruction 20 and when viewing the jury instructions as a whole.

   The circuit court properly instructed the jury relying on established South Dakota case law, and the instructions as a whole correctly stated the law.

   Most relevant authorities: *First Premier Bank v. Kolcraft Enter. Inc.*, 2004 S.D. 92, 686 N.W.2d 430; *Kuper v. Lincoln-Union Elec. Co.*, 1996 S.D. 145, 557 N.W.2d 748; *Community Television Services, Inc. v. Dresser Industries, Inc.*, 435 F.Supp. 214 (D.S.D. 1977).

3. Whether the circuit court properly submitted the issue of assumption of the risk to the jury.

   The circuit court properly submitted assumption of the risk to the jury. The jury found in favor of Defendants on Plaintiffs' strict liability claim and never reached the issue of assumption of the risk.

   Most relevant authorities: *Gerlach v. Ethan Coop Lumber Ass'n*, 478 N.W.2d 828 (S.D. 1991); *Burhenn v. Dennis Supply Company*, 2004 S.D. 91, 685 N.W.2d 778; *Christenson v. Bergeson*, 2004 S.D. 113, 688 N.W.2d 421.

4. Whether it was an abuse of discretion for the circuit court to exclude evidence of warnings and the owner's manual.

The circuit court properly excluded evidence of warnings and the owner's manual given its grant of summary judgment in favor of Defendants on Plaintiffs' failure to warn claims. Because the jury found in favor of Defendants on Plaintiffs' strict liability claim, the jury did not reach the issue of assumption of the risk, so any error in excluding evidence to rebut the defense is harmless.

Most relevant authorities: *Veith v. O'Brien*, 2007 S.D. 88, 739 N.W.2d 15; *Burhenn v. Dennis Supply Company*, 2004 S.D. 91, 685 N.W.2d 778; *Baddou v. Hall*, 2008 S.D. 90, 756 N.W.2d 554.

Notice of Review Issue

5. Whether the circuit court erred in ruling Wilson is an "assembler" under SDCL 20-9-9.

   The circuit court ruled Wilson is an "assembler" under SDCL 20-9-9 for purposes of making Wilson, a retailer seller of a product, strictly liable for product defects, effectively granting Plaintiffs' partial summary judgment on this issue when Plaintiffs did not move for partial summary judgment on this issue, and Wilson did not agree to the circuit court deciding this factual issue.

   Most relevant authorities: SDCL 20-9-9.

STATEMENT OF THE CASE

In July 2011, Plaintiffs commenced this action in the Fourth Judicial Circuit, Corson County, seeking to recover damages for injuries Karst sustained on December 15, 2009, while attempting to convert a Shur-Co tarp system from electric to manual operation. SR1 2. The Complaint included negligence and strict liability claims against Shur-Co and Wilson. SR1 2. Defendants moved for summary judgment on Plaintiffs' failure to warn claims. SR1 483, SR 1 1323. Wilson also moved for summary judgment on Plaintiffs' negligence claims. SR1 251. The circuit court granted Defendants' motions for summary judgment on Plaintiffs' failure to warn claims. SR1 1299. The circuit court

also granted Wilson's motion for summary judgment on Plaintiffs' negligence claim.[1] SR1 1299.

Plaintiffs' remaining claims (design defect strict liability against both Defendants and negligence against Shur-Co) were tried to a jury, the Honorable Michael W. Day, presiding, from November 3 to November 19, 2014. The jury completed a special verdict form, finding in favor of Defendants on Plaintiffs' strict liability claim and in favor of Shur-Co on Plaintiffs' negligence claim. SR1 1808. Judgment was entered in favor of Defendants on December 1, 2014, SR2 521, and Notice of Entry of Judgment was filed on December 1, 2014. SR2 523. Plaintiffs filed a motion for new trial, which was denied by operation of law pursuant to SDCL 15-6-59(b). SR2 656. Plaintiffs filed a notice of appeal on January 29, 2015. SR2 789. Wilson filed a timely notice of review with this Court on February 13, 2015.

STATEMENT OF FACTS

The Accident

Karst's electric tarp system on his trailer would not close after loading oats at an elevator. SR2 1730-31. The tarp was stuck in the open position, with the tube around which the tarp rolls (the roll tube) running down the passenger side of the trailer. SR2 1732. A flex arm powered by spring tension at the pivot point attaches the roll tube to the rear of the trailer and assists with opening and closing the tarp. SR2 1143. In the open position, with the roll tube on the passenger side of the trailer, the flex arm's spring tension is greatest. SR2 1495. When the tarp is closed, the roll tube runs down the driver side of the trailer and the spring tension is low. *Id.* At the end of the flex arm is a metal

[1] Plaintiffs do not appeal from the grant of summary judgment on their negligence claim against Wilson.

sleeve connecting the flex arm to the roll tube. SR2 1141-42. The sleeve covers a grooved spline at the end of the roll tube to which a manual crank may be attached. *Id*. The sleeve must be removed, thereby detaching the flex arm from the roll tube, to connect the manual crank to the spline. *Id*.

Karst climbed onto an elevated work platform on the rear of his trailer to remove the sleeve. SR2 1733, 1737. The roll tube was on the passenger side of the trailer, in the open position, with the spring tension at its greatest. SR2 1726, 1729-31, 1797-98, 1800; 372 & 373 (photos). Karst knew tension was greatest with the tarp open. (Wilson App. 18: Karst Dep. at 54:8-24)[2]. Karst knew the flex arm, once released from the roll tube, would move (Wilson App. 20-21, Karst Dep. at 92:17-25 – 93:1-11), yet he used the flex arm for balance. SR2 885. Karst admitted relying on the flex arm for balance is unwise, since it will move immediately. (Wilson App. 21: Karst Dep. at 93:18-23).

Karst acknowledged he should not try to remove the sleeve when the tarp is open and roll tube is on the passenger side because of tension:

> Q. You'd rather rely on something more stable than that for your balance; correct?
>
> A. I would not try and take it off there, though.
>
> Q. And why wouldn't you try and take it off there?
>
> A. I'd rather get it -- get it down on the other side so there's less friction.
>
> Q. And I'm sorry. Did you say friction or tension? What did you say? I'm sorry.

[2] Portions of Karst's deposition transcript were read to the jury, pursuant to SDCL 15-6-32(a)(2). SR2 3448-3496 identifies which pages and lines were approved and what objections were made. SR2 3514-15 confirms that the approved portions of the deposition were read to the jury. *See also* SR2 3500-04.

A. Well, I said friction. But tension.

Q. Got you. By other side, did you mean the driver's side?

A. Yes.

(Wilson App. 21-22: Karst Dep. at 93:24-94:10).

Despite this knowledge, when the tarp was in the open position, Karst stood on the catwalk at the end of the trailer, straddling the flex arm and bracing himself, and attempted to detach the flex arm from the roll tube using a hammer. (Wilson App. 57, SR2 399) SR2 1736-38, 1773-74, 1778-80. After tapping the flex arm a few times with a hammer, the sleeve covering the spline came off. SR2 1738. When the sleeve came off, the flex arm moved from the passenger side to the driver side. SR2 2314-15, 3093. When Karst removed the sleeve, he was forced off (SR2 2263-65) the catwalk and was injured.

The Tarp System

In late 2006, when Shur-Co began selling the covered spline tarp system, it was state of the art. SR2 1201, 1708. Other than Karst, no other customer using the covered spline version of the Shur-Co tarp system has been injured. (Wilson App. 49, SR 1224) (Wilson App. 51-52, SR2 3381-82). While newer versions of the tarp system offered improvements, Plaintiffs' tarp system was reasonably safe. (Wilson App. 49, SR2 1224) (Wilson App. 53, SR2 3383, SR2 3379).

Shur-Co's engineering expert, Dr. Paul Adams, provided testimony about the reasonably safe nature of the tarp system:

Q. In your opinion, is the 3500 with the covered spline reasonably safe?

A. Yes.

Q. Why do you believe it is reasonably safe?

> A. Because doing this kind of maintenance activity can be done in a safe way. It is not something that a user normally encounters unless they try to do the disassembly. Disassembly of this is what we would consider a maintenance task. When you are trying to do a maintenance task, we assume people have certain basic levels of skill with tools and understanding of how equipment works. And I think, in this particular case, Mr. Karst had those skills. I think he had a sufficient understanding of the system to expect how this might move. And I think he simply misjudged his ability to do that and maintain his stability on that platform.

(Wilson App. 50-51, SR2 3380-81). *See also* (Wilson App. 51-52, SR2 3381-82).

Dr. Adams explained why product improvements do not make the covered spline design defective or unreasonably dangerous:

> While this is a modification or an improvement, just because things improve doesn't mean that what was there before was unsafe…We expect that new products, when they come out, are going to be better than the old ones, but that doesn't render the old one obsolete, necessarily, or unsafe. There's a reasonably safe way to do what he [Karst] was trying to do. This is not an unreasonably safe – or unreasonably dangerous product, the 3500 that is.

(Wilson App. 53, SR2 3383).

Wilson's Role

Shur-Co designed and manufactured the tarp system. SR2 1122-23. Wilson installed the tarp system on the trailer it sold to Karst. SR1 341. Plaintiffs do not allege Wilson improperly installed the tarp system. SR1 255, 671. Wilson often installs Shur-Co tarp systems on trailers, but some end users also install their own tarp systems. SR1 325. Other than labor and tools, Shur-Co provides everything needed to install tarp systems. (Wilson App. 38, SR1 256) (Wilson App. 39, SR1 672, SR1 292-93). The owner's

manual describes the process of placing a tarp system on a trailer as installation. (Wilson App. 38, SR1 256) SR1 350-395.

Wilson moved for summary judgment arguing it was not an assembler under SDCL 20-9-9. SR1 251. Plaintiffs opposed Wilson's motion. Plaintiffs did not file a cross motion for summary judgment. In its memorandum decision, the circuit court stated: (1) the parties agreed whether Wilson is an assembler for purposes of SDCL 20-9-9 is a question of law for the court to decide, (Wilson App. 7, SR1 1320); and (2) Wilson is an assembler for purposes of SDCL 20-9-9, (Wilson App. 6-7, SR1 1319-20). At trial, the circuit court reiterated, "I've ruled Wilson Trailer is an assembler under the statute [SDCL 20-9-9.]" SR2 1029; *see also* SR2 3109. The circuit court found that there were issues of fact as to whether Wilson is an assembler (Wilson App. 7, SR1 1320), but Wilson did not stipulate or agree that the court rather than the jury should resolve disputed issues of fact.

Failure to Warn Claims[3]

Plaintiffs pleaded claims for failure to warn (strict product liability and negligence). The circuit court granted summary judgment to Defendants on Plaintiffs' failure to warn claims:

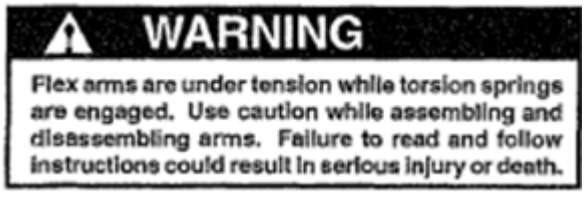
> In this case there is no evidence that Mr. Karst read and relied upon the allegedly defective warnings and/or instructions … A plaintiff's inability to prove that he read the allegedly inadequate instructions and warnings provided to him precludes the plaintiff as a matter of law from establishing that a defect in those warnings caused the incident in question.

[3] For the reasons set forth in Shur-Co's motion to dismiss Issue 1 of Appellants' Brief, Plaintiffs' appeal of the summary judgment decision on the failure to warn claims is not properly before this Court. However, because this Court denied Shur-Co's motion to dismiss, Wilson will address the merits of the issue, but by doing so, does not concede that the issue is properly before this Court.

SR2 779.

Plaintiffs' experts, Jeffrey Warren (engineering) and Kenneth Laughery (warnings/human factors), conceded "they would have to speculate to conclude that the Plaintiff read and relied on the allegedly defective information in the manual and label." *Id.*; (Wilson App. 37, SR1 549) (Wilson App. 33, SR1 553). No witness at the scene of the accident saw Karst reading or holding the owner's manual. (Wilson App. 30, SR1 539) (Wilson App. 31, SR1 542) (Wilson App. 27, SR1 544) (Wilson App. 28, SR1 545).

The owner's manual provides instructions how to convert from electric to manual and includes the warning depicted on the left below, (Wilson App. 25, SR1 369), while the flex arm itself includes the warning depicted to the right below (Wilson App. 24):



Karst was aware of the hazard, as he testified[4] as follows:

> Q. No. What was your understanding of what position the spring tension would be highest or strongest in?

[4] At trial, Defendants did not rely on the content of the warning label or owner's manual to support the assumption of risk defense.

Q. I'm interested in before the accident.

A. Okay.

MR. ULMER: Do you understand what he's asking?

THE WITNESS: Yes.

A. Most tension would be back on the [indicating]

Q. And you indicated to the right.

A. When I'm in the back, to the right.

Q. Right. In the open position?

A. Yes.

(Wilson App. 18, Karst Dep. at 54: 8-24). Karst admitted using the flex arm to balance while removing the sleeve in the open position would be unwise. (Wilson App. 21, Karst Dep. at 93: 18-23).

Karst admitted that one should not attempt to remove the sleeve when the tarp is in the open position because of the spring tension. (Wilson App. 22, Karst Dep. at 94: 1-10). Karst knew how to disengage the tarp system motor allowing the tarp to be hand-rolled to the closed position without removing the sleeve:

Q. Do you know how to disengage the motor that runs the tarp, 3500 Series Tarp systems?

A. Yes.

Q. How do you do that?

A. You've got to take those bolts out on the inside. Those bolts that hold that collar from going, you've got to take all of them off. And then get it out.

***

Q. If I go back to my numbers here, number nine, could you have disengaged the motor on the day of your accident and gotten

help from Tom or Todd and just simply hand rolled that tarp back over to the driver's side of the truck?

A. Yes.

(Wilson App. 23, Karst Dep. at 165: 5-24).

The Verdict

The trial lasted twelve days, and the jury heard testimony from thirty-one witnesses, including conflicting expert testimony as to whether the closed spline design was reasonably safe. SR2 815-3791 (trial transcript). The jury completed a Special Verdict Form which required the jury first to decide whether Plaintiffs established a product defect (Question No. 1) before deciding the issue of assumption of the risk (Question No. 5) (Wilson App. 1-3, SR1 1808-10). The jury completed the Special Verdict Form as follows:

Question No. 1 - Strict Liability for Design Defect

On Plaintiffs' claim against Defendant Shur-Company and Defendant Wilson Trailer Company for strict liability for design defect, we find in favor of:

Plaintiffs _____

Defendants Shur Co. and Wilson Trailer Company ____X_____

(Wilson App. 1, SR1 1808). The jury did not reach the issue of assumption of the risk. (Wilson App. 2, SR1 1809).

ARGUMENT

Plaintiffs raise two primary issues on appeal. First, Plaintiffs argue that the jury's verdict should be reversed because of prejudicial errors during the trial. Second, Plaintiffs argue that the circuit court's grant of summary judgment to Defendants on one of Plaintiffs' theories of recovery, failure to warn (Counts 2 and 4 of the Amended

Complaint), should be reversed. Wilson will first address why the jury's verdict on Plaintiffs' claim that the tarp system is unreasonably dangerous because of a design defect (Appellants' Issues 1, 2, and 3) should be affirmed.

I. The Verdict and Judgment Should Be Affirmed.

Plaintiffs assert the jury's verdict and Judgment should be reversed, and the case remanded for new trial. On appeal, Plaintiffs do not contend there was insufficient evidence to support a verdict for the Defendants. Rather, Plaintiffs appeal a jury instruction, an instruction copied verbatim from *First Premier Bank v. Kolcraft Enterprises, Inc.*, 2004 S.D. 92, ¶ 28, 686 N.W.2d 430, 445.

Plaintiffs' other bases for reversal are based upon the assumption of the risk defense. Plaintiffs contend the jury should not have been instructed on this issue and that evidence of allegedly defective warnings should have been admitted to rebut the defense. However, the jury did not reach this assumption of the risk. Accordingly, any alleged error in instructing the jury on this issue and excluding evidence offered rebut this defense, cannot, as a matter of law, be prejudicial. Plaintiffs also contend the circuit court should have admitted evidence of the allegedly defective warning and the owner's manual to rebut allegedly misleading testimony. The circuit court did not abuse its discretion by excluding evidence of the content of the warning label or the owner's manual.

A. The Jury Instructions Fully and Correctly Instructed the Jury on the Design Defect Claim.

1. Standard of Review

Jury instructions are reviewed for an abuse of discretion and reversal is allowed only when an instruction is both erroneous and prejudicial. *Wangsness v. Builders*

Cashway, Inc., 2010 S.D. 14 ¶ 10, 779 N.W.2d 136, 140. This Court "construe[s] jury instructions as a whole to learn if they provided a full and correct statement of the law." *Behrens v. Wedmore*, 2005 S.D. 79, ¶ 37, 698 N.W.2d 555, 570 (quoting *First Premier Bank v. Kolcraft Enterprises, Inc.*, 2004 S.D. 92, ¶ 40, 686 N.W.2d 430, 448). Plaintiffs have "the dual burden of showing that the instruction was erroneous and prejudicial. An erroneous instruction is prejudicial if in all probability it produced some effect upon the verdict and is harmful to the substantial rights of the party assigning it." *Id*.

2. Waiver Precludes Plaintiffs from Arguing about Closing Arguments and Undue Emphasis of Defense Theory.

Plaintiffs contend Instruction 20 unfairly emphasized Defendants' theory of the case. Although Plaintiffs objected to Instruction 20, Plaintiffs did not argue that Instruction 20 unduly emphasized the defense theory of the case. Because Plaintiffs did not present this objection to the circuit court, Plaintiffs' assertion that Instruction 20 unfairly emphasized defendants' theory of the case is waived. "[N]o grounds of objection to the giving or the refusing of an instruction shall be considered . . . , unless presented to the court upon the 'settlement' of such instructions." *Parker v. Casa Del Ray*, 2002 S.D. 29, ¶ 15, 641 N.W.2d 112, 118 (citations omitted). "An attorney must be clear when objecting to jury instructions so the trial court is advised of what possible errors exist and be granted the opportunity to correct any instructions." *Id*. (internal quotation omitted).

Plaintiffs contend Instruction 20 opened the door to misleading arguments by Defendants. However, Plaintiffs did not object to the argument they now contend is misleading, SR2 3726-27, and Plaintiffs did not object to admission of the evidence forming the basis of the argument, SR2 1447, 1414-15. Plaintiffs waived these arguments by making them for the first time on appeal. *Isaac v. State Farm Mut. Auto. Ins. Co.*, 522

N.W.2d 752, 757 (S.D. 1994). Finally, Plaintiffs fail to articulate any reason that Defendants could not have made the same argument even if Instruction 20 had not been given.

3. Jury Instruction 20 Was Proper.

The circuit court provided the following as Instruction 20:

> A product can be dangerous without being unreasonably dangerous. Even if a product is defective in some manner, you must find that the defect renders the product "unreasonably" dangerous. A product is not in a defective or unreasonably dangerous condition merely because it is possible to be injured while using it.

SR1 1835. Instruction 20 is copied verbatim from *Kolcraft* ¶ 28.

In *Kolcraft*, this Court reviewed the following jury instruction:

> [1] *A product is in a defective condition and unreasonably dangerous to the user if it* is not reasonably fit for the ordinary and reasonably foreseeable purposes for which it was sold or manufactured and expected to be used.
>
> [2] *A product is in a defective condition unreasonably dangerous to the user if it* could have been designed to prevent a foreseeable harm without significantly hindering its function or increasing its price.
>
> [3] A product can be dangerous without being unreasonably dangerous. Even if a product is defective in some manner, you must find that the defect renders the product "unreasonably" dangerous. A product is not in a defective or unreasonably dangerous condition merely because it is possible to be injured while using it.

Id. ¶ 28 (emphasis added).

In *Kolcraft,* this Court specifically held that the instruction was erroneous, because the circuit court should have put the word "or" between the first and second paragraphs to clarify that either definition establishes liability. *Id*. ¶ 29. The Court explained the instruction "describes two different definitions of a defective condition, but

recites them without informing the jury that the plaintiff need only prove one ... leaving out the disjunctive … was error." *Id*.

The three-paragraph instruction provides two definitions of a defective condition, indicated above as [1] and [2]. This Court did not view the third paragraph as a separate, third definition of a product defect. *Id*. ¶ 29. Rather, the third paragraph clarifies what is and is not a product defect, thereby helping the jury analyze whether a product is defective and unreasonably dangerous. In this case, Plaintiffs proposed a non-pattern instruction, Instruction 23A, to help the jury analyze Defendants' assumption of the risk defense, and Instruction 23A was based upon the language set forth in one of this Court's decisions. SR1 1839, SR2 3600, 3645-46. Instruction 23A illustrates it is not uncommon, and certainly not reversible error, to rely on language from one of this Court's decisions to supplement the pattern instructions.

The third paragraph (and Instruction 20) is akin to the standard "mere fact of an accident" instruction. *See Baddou v. Hall*, 2008 S.D. 90 ¶ 14, 756 N.W.2d 554, 559 ("The mere fact an accident happened creates no inference that it was caused by someone's negligence."); *Kuper v. Lincoln-Union Elec. Co.*, 1996 S.D. 145, ¶ 33, 557 N.W.2d 748, 759. Just as an accident does not give rise to an inference that it was caused by anyone, the mere fact that someone is hurt while using a product does not give rise to an inference that the product is defective. *Nationwide Mut. Ins. Co. v. Barton Solvents, Inc.*, 2014 S.D. 70, ¶ 16, 855 N.W.2d 145 (recognizing that "the fact that an accident occurred" is not sufficient in most product liability cases to establish the essential elements of a plaintiff's claim).

In *Kolcraft*, this Court identified no error with respect to the third paragraph of the instruction it reviewed, 2004 S.D. 92 ¶¶ 28-29. In the first paragraph immediately following the analysis of the three-paragraph jury instruction, this Court noted, "Although we need not reach all of plaintiff's remaining assignments of error, we proceed to decide some of them because they will undoubtedly arise in the next trial." *Id*. ¶ 30. This Court then proceeded to address other issues the circuit court would surely face on retrial. Yet, this Court pointed out no error with respect to the third paragraph which is identical to Instruction 20. *Id*. ¶¶ 28-29.

South Dakota has adopted the strict liability standards set forth in the RESTATEMENT (SECOND) OF TORTS § 402A. *Smith v. Smith*, 278 N.W.2d 155, 158 (S.D. 1979). Comment i provides, "[t]he rule stated in this Section [402A] applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer." *See also Community Television Services, Inc. v. Dresser Industries, Inc.*, 435 F.Supp. 214, 216[5] (D.S.D. 1977). Instruction 20, on the basis of the language in Comment i and the established principle that the mere fact than an accident occurred does not establish liability, is a correct statement of the law in South Dakota.

Plaintiffs contend Instruction 20 could be appropriate only in a case in which the same quality that renders a product dangerous also renders it useful. In other words, whether Instruction 20 is a correct statement of the law depends on the nature of the

[5] In *Community Television*, the district court cited language from Comment i, but must have mistakenly cited Comment k. The language "even if a product is defective in some manner, that defect must render the product 'unreasonably' dangerous. A product can be dangerous without being unreasonably dangerous" does not appear in Comment k. Further, the "product" in issue in *Community Television* was a broadcasting tower, which is not the type of unavoidably unsafe or inherently dangerous product discussed in Comment k.

product and whether the product is inherently dangerous. In *Kolcraft*, the case from which Instruction 20 was drafted, the product in issue was a playpen, a product which is neither inherently dangerous nor one in which the danger renders it useful. If, as Plaintiffs contend, Instruction 20 could be appropriate only in a case in which the same quality that renders the product dangerous also renders it useful, in *Kolcraft,* when this Court was discussing issues the circuit court might face upon retrial, this Court would have advised the circuit court that the final paragraph of the reviewed instruction should not be given on remand. *Kolcraft* does not, in any way, indicate that the appropriateness of the final paragraph of the instruction the Court reviewed depends on the nature of the allegedly defective product.

Finally, Plaintiffs urge this Court to review Instruction 20 with "heightened skepticism" because it is not a pattern instruction. This Court has never held the use of non-pattern jury instructions is grounds for reversal, or even heightened skepticism.[6] Rather, all that is required is that the "jury instructions as a whole …provide[] a full and correct statement of the law." *Behrens* ¶ 37 (quoting *Kolcraft* ¶ 40). For the reasons stated above, the jury instructions, and Instruction 20 in particular, fully and correctly stated the law. Based on *Kolcraft*, Instruction 20 is proper and there is no basis for reversal.

4. The Instructions as a Whole Fully and Correctly Stated the Law.

The circuit court's strict liability product defect jury instructions fully and correctly stated the law. *Behrens* ¶ 37 (quoting *Kolcraft* ¶ 40.) Instructions 18 through 22,

[6] *State v. Eagle Star*, 1996 S.D. 143, 558 N.W.2d 70, the case on which Plaintiffs rely to urge this Court to review non-pattern jury instructions with heightened skepticism, does not seem to support Plaintiffs' position. In that case, this Court did recognize that "the pattern jury instructions have been carefully drafted to reflect the law," but the rest of the same sentence, which Plaintiffs did not set out in their brief, acknowledges that "*we have not mandated the use of pattern jury instructions.*" *Eagle Star* ¶ 15 n.2 (emphasis added).

(Wilson App. 12-16, SR1 1833-37), instructed the jury on the product defect claim. *See also* SR1 1841 (Instruction 25).

Instruction 18 established Plaintiffs' burden of proving: (1) the tarp system was in a defective condition making it unreasonably dangerous; (2) the defect existed when it left Defendants' control; (3) the tarp system reached Karst without substantial unforeseeable change; and (4) the defective condition caused Karst's injuries. Instruction 19 stated, "A product is in a defective condition unreasonably dangerous to the user if it could have been designed to prevent a foreseeable harm without significantly hindering its function or increasing its price." Instruction 20 clarified that a product can be dangerous without being unreasonably dangerous, and that a mere possibility of injury does not render a product defective and unreasonably dangerous. Instruction 21 addressed state of the art. Instruction 22 stated, "Defendants are liable even if Defendants exercise reasonable care in the preparation and sale of the product." Instructions 18 through 22, (Wilson App. 12-16, SR1 1833-37), presented a full and correct statement of the law.

Further, even if Instruction 20 should not have been given, an erroneous instruction is not necessarily prejudicial. *Schultz v. Scandrett*, 2015 S.D. 52, ¶ 12, 866 N.W.2d 128. Erroneous instructions are prejudicial, when in all probability they produced some effect upon the verdict and were harmful to the substantial rights of a party. *Schultz*, 2015 S.D. 52, ¶ 22. Because the instructions, when considered as a whole, fully and correctly stated the elements of a strict liability product defect claim, Plaintiffs have not met their burden of establishing the jury would not have returned a verdict for Defendants but for Instruction 20. The trial lasted twelve days, there were thirty-one witnesses, over a

hundred exhibits, consisting of thousands of pages, and substantial evidence the tarp system was reasonably safe.

B. Plaintiffs' Assumption of the Risk Arguments Are Not a Basis for Reversal.

1. Sufficient Evidence Supported Instructing the Jury on Assumption of the Risk

If there is competent evidence to support an assumption of the risk defense, then the jury should be instructed on assumption of the risk. *Wolf v. Graber*, 303 N.W.2d 364, 368 (S.D. 1981). There is evidence Karst: "(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." *Goepfert v. Filler,* 1997 S.D. 56, ¶ 6, 563 N.W.2d 140, 142. Plaintiffs argue knowledge cannot be imputed to Karst. Defendants rely on Karst's testimony, not imputed knowledge.

At trial, the jury was presented evidence that immediately before the accident, Karst climbed onto an elevated work platform at the rear of his trailer to remove the sleeve covering the spline at the end of the roll tube. (Wilson App. 57, SR2 399), SR 2 1778-80. He straddled the flex arm, braced himself, and held the spring loaded flex arm with one hand while using a hammer to tap the flex arm to remove the sleeve from the end of the roll tube. (Wilson App. 57, SR2 399), SR2 1736-38, 1773-74, 1778-80. At trial, Karst's testimony was that he was aware of the risk of actions presented. Karst testified that he was aware that the flex arm was spring loaded and that the tension was greatest when the tarp is in the open position. (Wilson App. 18). The jury was also presented evidence that Karst was aware that when the sleeve covering the spline at the end of the roll tube was removed, the flex arm would move and that the sleeve should not be removed when the tarp is in the open position. (Wilson App. 20-22). Karst testified

that he was aware that it would be unwise to use the flex arm for balance while attempting to remove the sleeve because the flex arm would move when the sleeve is removed. (Wilson App. 21). The jury was also presented testimony that Karst, prior to the accident, had encountered spring tension in the flex arm when he changed one of the tarp's electric motors. (Karst Dep. at 66, 72; SR2 3094, 3098).

There was sufficient evidence to submit the issue of assumption of the risk to the jury. "In considering whether there is evidentiary support for an instruction, a reviewing court must give the evidence the most favorable construction it will reasonably bear. If there is some evidence bearing on the issue, a reviewing court will not disturb the trial court's giving of an instruction." *Gerlach v. Ethan Coop Lumber Ass'n*, 478 N.W.2d 828, 830 (S.D. 1991) (quoting *Zee v. Assam*, 336 N.W.2d 162, 164 (S.D. 1983)). There is plainly at least "some evidence" to support assumption of the risk, as the circuit court correctly noted when denying Plaintiffs' motion for judgment as a matter of law on the issue of assumption of the risk. SR2 3525-26.

2. Because the Jury Never Reached the Issue of Assumption of the Risk, Any Alleged Error Is Harmless.

The Special Verdict Form includes special interrogatories establishing the jury never considered assumption of the risk after finding no product defect. (Wilson App. 1-2, SR1 1808-09). Therefore, any alleged error in submitting assumption of the risk to the jury was harmless.

In *Burhenn v. Dennis Supply Company*, plaintiff argued the trial court erred by instructing the jury on assumption of the risk. 2004 S.D. 91, ¶ 35, 685 N.W.2d 778, 786. The jury returned a defense verdict due to lack of causation. *Id*. ¶ 37. This Court held plaintiff's appeal with respect to all issues related to assumption of the risk was moot,

because the jury never considered assumption of the risk. *Id*. This Court reasoned as follows:

> The jury returned a verdict finding that [defendant] was negligent but that its negligence was not the legal cause of [plaintiff's] injuries. *In reaching this verdict, the jury did not consider the defendant's affirmative defenses. Since the jury's verdict did not consider, let alone depend upon, any issues related to assumption of the risk or contributory negligence, they are now moot*.

Id. (emphasis added).

Here, whether the circuit court should have instructed the jury on assumption of the risk is moot, because the jury "did not consider, let alone depend upon, any issues related to assumption of the risk[.]" *Id*. ¶ 39.

It is well established that if the jury does not reach an issue, then errors related to that issue are harmless and cannot be the basis for reversal. *See, e.g.*, *Ainsworth v. First Dakota Bank of South Dakota*, 472 N.W.2d 786, 788 (S.D. 1991) (any alleged error regarding a damage issue is not prejudicial when the jury finds in the defendant's favor on the issue of liability); *Christenson v. Bergeson*, 2004 S.D. 113, ¶ 30, 688 N.W.2d 421, 429 (holding any error in instructing the jury on contributory negligence was harmless because the jury never reached the issue). Here, the jury never considered assumption of the risk. Even if there was insufficient evidence to warrant instructing the jury on assumption of the risk, such error was harmless.

3. The Circuit Court Properly Excluded Evidence of Warnings and the Owner's Manual.

Plaintiffs contend that as a result of the circuit court's exclusion of evidence of warnings and the owner's manual, the jury "lacked critical information" and was "affirmatively misled." A careful review of the record and the proceedings leading to the circuit court's decision to exclude evidence of warnings and the owner's manual does not

support Plaintiffs' contention. Further, the allegedly critical evidence and misleading testimony pertains to the assumption of the risk defense, an issue the jury did not reach.

a. *Procedural Background.*

For the reasons set forth in its Memorandum Decision, the circuit court granted Defendants' motions for partial judgment and dismissed Plaintiffs' failure to warn claims. During voir dire, Plaintiffs' counsel, not Defendants' counsel, asked questions about warnings and owner's manual despite the fact that the warnings claims had been dismissed. (Appellants App. 256, SR2 890-95). After voir dire and before opening statements,[7] Defendants raised the issue of whether evidence of warnings and the owner's manual should be admissible. SR2 1022. The circuit court indicated that it expected counsel to adhere to its rulings on the warnings claims. SR2 1024-29, 1069-71. Throughout the trial, the circuit court continued to exclude testimony about the content of the warning label and the owner's manual because the warnings claims had been dismissed. SR2 1472-74.

Plaintiffs imply they were unfairly prejudiced by the timing of the circuit court's exclusion of evidence of warnings and the owner's manual. While the timing of the dismissal of the warnings claims may have hampered Plaintiffs' trial preparations, ease of trial preparation is not a reason to permit the introduction of evidence not relevant to any issue the jury is going to be asked to decide. Further, Plaintiffs should not be permitted to rely on their strategic decision to ask prospective jurors about warnings and instruction

[7] The motion in limine deadline was September 19, 2014. SR1 903. Defendants did not file a supplemental motion in limine seeking to preclude evidence of the content of the warning label or the owner's manual after receiving the circuit court's October 18, 2014 Memorandum Decision. However, even if the warnings claims had been dismissed prior to the motion in limine deadline, there is no court rule or case law that *requires* a party raise by way of motion of limine every evidentiary objection it may raise at trial.

manuals after the warnings claims had been dismissed to argue that they were prejudiced by exclusion of evidence of the warnings label or the owner's manual.

b. *Standard of Review.*

This Court has "repeatedly stated that a trial court's evidentiary rulings are presumed correct and will not be overturned absent a clear abuse of discretion." *St. John v. Peterson*, 2011 S.D. 58, ¶ 18, 804 N.W.2d 71, 76. Moreover, evidence improperly excluded must have "in all probability affected the outcome of the jury's verdict … [to] constitute[] prejudicial error." *Id*. (citing *Mousseau v. Schwartz*, 2008 S.D. 86, ¶ 41, 756 N.W.2d 345, 363).

c. *The Circuit Court's Exclusion of Evidence of Warnings and Owner's Manual Was Not An Abuse of Its Discretion.*

The circuit court properly excluded evidence of warnings and the owner's manual when it was offered to contest assumption of the risk. Defendants did not contend Karst assumed the risk because he had viewed the warning label or read the owner's manual. SR2 1028-29. Rather, Defendants contended Karst assumed the risk based upon his testimony about what he knew completely independent from the content of the warning label or the owner's manual. Karst testified that he knew: (1) the flex arm is under the greatest tension when the tarp is open; (2) once the sleeve is removed, the flex arm will move (yet he used it for balance); (3) the sleeve should not be removed when the tarp is open; and (4) how to safely close the tarp manually without removing the sleeve. (Wilson App. 18-23). Defendants relied on this testimony to support their assumption of the risk defense. The circuit court did not abuse its discretion in excluding evidence of the content of the warning label or information set forth in the owner's manual to rebut the assumption of the risk defense.

Even if the circuit court had erroneously excluded this evidence, however, the error is harmless, because the jury did not reach the issue of assumption of the risk. Evidence offered exclusively for the purpose of contesting a defense not considered by the jury cannot have affected the verdict or been prejudicial. *Burhenn* ¶ 37. In *Burhenn*, this Court found all issues related to assumption of the risk were moot, because the jury returned a defense verdict based on lack of legal cause, and never reached the affirmative defense of assumption of the risk. *Id*. ¶¶ 22, 33-39. This Court reasoned, "[t]he fact that evidence was introduced in order to prove [plaintiff's] assumption of the risk or contributory negligence is irrelevant since the jury did not actually reach the point of taking it into account." *Id*. ¶ 39. The Court held that all issues related to assumption of the risk were moot, because the jury never reached the issue of assumption of the risk. *Id*. Similarly, in this case, whether the circuit court improperly excluded evidence of warnings and the owner's manual Plaintiffs proffered to contest assumption of the risk is moot, because the jury never considered assumption of the risk.

Plaintiffs argue evidence of warnings and the owner's manual should have been allowed to correct allegedly misleading testimony, primarily from Shur-Co's witness, Wade Dangler, that violated Defendants' own motion in limine. Plaintiffs, however, ignore the context of the alleged motion in limine violation. Plaintiffs' counsel repeatedly questioned Dangler about what instructions Shur-Co provides:

> Q: … The fact is that Shur-Co does not tell people not to use that ladder or that work platform to access that piece of equipment?
>
> A: Shur-Co does not tell them to use or not to use that ladder.
>
> Q: Yeah. Shur-Co does not tell people not to remove that sleeve when the tarp is open?

A: We recommend you close the system before taking that sleeve off, yes.

Q: And Shur-Co does not tell people not to remove that sleeve when the tarp is in an open position; correct?

A: I thought that's what I said.

Q: No. You said, "We recommend that they close it." My question is: Do they tell people not to take the sleeve off when it's open?

A: Personally, I have told people that, yes.

Q: Okay. You might have told that, but do you know that Shur-Co, as a company, doesn't have any document anywhere that tells people not to remove that sleeve when the tarp is in the open position?

A: Our instructions tell them to close the tarp before removing the bolt to pull that sleeve off.

. . .

Q: Okay. You had mentioned, Mr. Dangler, earlier that what Shur-Co recommends is that they close the tarp; correct?

A: That is correct.

Q: Yet Shur-Co does not tell its customers how to do that; correct?

A: Not specifically, no.

Q: Okay. So let me make sure that the record's clear. Meaning Shur-Co does not specifically tell people how to close the tarp. Is that a true statement?

A: That is a true statement.

Q: And so if somebody has their system and it fails and it's open, Shur-Co recommends closing the tarp; Shur-Co doesn't recommend how to do that?

A; Not specifically in the manual, no.

. . .

> Q: But the manual does not tell the user what to do, how to close the tarp if the system fails when it's open or partially open. Do we agree with that?
>
> A: I agree with that.

(Appellants App. 290, 292, 293, SR2 1149, 1151, 1154).

After this series of questions, the following exchange occurred:

> Q. Okay. And that a spring under tension can maim or it can kill; correct?
>
> A. Yes. That's why we have the warning sticker there.

(Appellants App. 294, SR2 1155). Dangler did not "volunteer" testimony about warnings and instructions (as suggested in Appellants' Brief at page 13), but rather mentioned a warning sticker in response to questions by Plaintiffs' counsel. In fact, during a hearing later in the trial, the circuit court pointed out that Plaintiffs' counsel was asking the questions at the time Dangler referenced the warning sticker. SR2 2017.

Plaintiffs' counsel opened the door to the admission of this testimony, inviting the alleged error. *See Veith v. O'Brien*, 2007 S.D. 88 ¶ 27, 739 N.W.2d 15, 24 ("invited error…[applies when] the party who on appeal complains of the error has contributed to it."). Plaintiffs cannot complain about limited references to warnings and the owner manual when they invited the alleged error. *Id*.

Plaintiffs also assert that "[d]efendants were allowed to present unrebutted testimony that there was a warning and a 'safe procedure' communicated to Karst that he failed to follow." Appellants' Brief at 35. Plaintiffs do not cite to any portion of the trial testimony to support this assertion, and no witness testified about warnings or safe procedures that were communicated to Karst. While Plaintiffs argue Shur-Co's expert, Dr. Paul Adams, was allowed to "speculate," over objection, that Karst knew a safe way

to remove the sleeve, the record does not support Plaintiffs' implication that they objected based on speculation. (Wilson App. 50, SR2 3380).

During trial, Plaintiffs made numerous offers of proof, contending that they should be allowed to present the proffered testimony to refute the assumption of the risk defense. SR2 1271-1308, 1469-72, 1584-87, 3421-27, 3489-91. The circuit court correctly overruled the offers of proof and excluded the proffered evidence. However, even if some, or all, of the proffered evidence should have been admitted, the exclusion of such evidence is not reversible error for two reasons. First, the proffered evidence was offered to rebut the assumption of the risk defense, an issue the jury did not reach. Second, the circuit court gave a curative instruction addressing the limited reference to the warning label, an instruction to which Plaintiffs consented.

The circuit court instructed the jury: "You should not consider whether there are any warnings, labels, or owner manuals that may pertain to any of the issues you are being asked to decide. I have ruled that these matters are not relevant to the parties' claims." SR1 1829. As Plaintiffs note, some evidence was presented at trial which seemed to indicate that there was a label on the flex arm, although the content of the label was not visible. Plaintiffs' contention they were unfairly prejudiced by the "obviously present yet unreadable warning labels," Appellants' Brief at 36, n. 20, is not well founded given the cautionary instruction, Instruction 15A, which was given without any objection from Plaintiffs' counsel. Indeed, Plaintiffs' entire argument as to why they were unfairly prejudiced by the allegedly improper exclusion of evidence of warnings and the owner's manual is premised upon the assumption the jury ignored the cautionary instruction,[8]

[8] Appellants' Brief does not mention the cautionary instruction.

which is contrary to this Court's precedent. "With regard to curative instructions, we presume that juries understand and abide by instructions." *Baddou v. Hall*, 2008 S.D. 90 ¶ 15, 756 N.W.2d 554, 559 (citations omitted). Accordingly, any prejudice from a limited reference to the warning label was overcome by the curative instruction.

II. The Circuit Court Properly Granted Summary Judgment in Favor of Defendants on the Failure to Warn Claims.

The second primary issue Plaintiffs raise on appeal is whether the circuit court erred by granting summary judgment in favor of Defendants on the failure to warn claim. Initially, it is important to recognize that whether the circuit court properly granted summary judgment in favor of Defendants on the failure to warn claims is not, as Plaintiffs imply throughout their brief, intertwined and interwoven with the issue of the whether the jury's verdict in favor of the Defendants on the design defect claim should be affirmed. If the Court reverses the grant of summary judgment on the warnings claims, Plaintiffs, without citation to any authority, (Appellants' Brief at 38), assert that they should be permitted a second bite of the apple and get to retry the design defect claims even if there is no basis to reverse the jury's verdict that the tarp system is not unreasonably dangerous because of a design defect. Plaintiffs' assertion is simply incorrect. The design defect claims and the failure to warn claims are separate and distinct claims, and Plaintiffs should not be given a second chance to retry the design defect claims unless this Court determines that one of the grounds Plaintiffs urge for reversal of the jury's verdict is a reason to order a new trial of the design defect claims. Because the jury was properly instructed and the circuit court's evidentiary rulings were not an abuse of discretion, the jury verdict and the judgment in favor of Defendants on the design defect claims should be affirmed *regardless* of whether the Court affirms the

grant of summary judgment on the warnings claims. *See, e.g.*, *Sioux Falls Construction Co. v. City of Sioux Falls,* 297 N.W.2d 454 (S.D. 1980) (affirming jury verdict on a breach of contract claim but reversing grant of summary judgment on a negligence claim). For the reasons set forth below, the circuit court's grant of summary judgment on the failure to warn claims should be affirmed.

A. Standard of Review and Scope of Record on Review.

"In reviewing a grant or a denial of summary judgment under SDCL 15–6–56(c), [this Court] must determine whether the moving party demonstrated the absence of any genuine issue of material fact and showed entitlement to judgment on the merits as a matter of law. The evidence must be viewed most favorably to the nonmoving party and reasonable doubts should be resolved against the moving party. The nonmoving party, however, must present specific facts showing that a genuine, material issue for trial exists. [This Court's] task on appeal is to determine only whether a genuine issue of material fact exists and whether the law was correctly applied." *Saathoff v. Kuhlman*, 2009 S.D. 17, ¶ 11, 763 N.W.2d 800, 804.

Plaintiffs rely extensively on trial testimony at trial and numerous offers of proof to argue the circuit court erred in granting summary judgment. This is improper. SR2 1581. This Court should review the facts presented to the circuit court at the time of summary judgment. "When the grant of summary judgment is followed by the trial of a different claim, evidence adduced at trial may not be used to bolster the position of the party who appeals the summary judgment ruling." *Mercer v. City of Cedar Rapids*, 308 F.3d 840, 843 (8th Cir. 2002) (citations omitted); *see also Cameo Homes v. Kraus-Anderson Constr. Co.*, 394 F.3d 1084, 1087 n. 2 (8th Cir. 2005).

B. Plaintiffs Presented No Competent Evidence That Karst Read the Product Warning or Owner's Manual.

"In a products liability case premised on alleged in adequate warnings, both causation and inadequate warnings are separate but necessary elements of negligence and strict liability." *Nationwide Mut. Ins. Co. v. Barton Solvents, Inc.*, 2014 S.D. 70, ¶ 17, 855 N.W.2d. 145. Plaintiffs bear the burden of proof on both of these elements. *Id.* To overcome a motion for summary judgment on these claims, therefore, Plaintiffs were required to provide an evidentiary basis for both elements. *Id.* Because Plaintiffs did not come forward with evidence to support the causation element, the circuit court properly granted summary judgment on Plaintiffs' failure to warn claim. The circuit court's rationale for granting summary judgment concisely summarizes why its decision was proper:

> In this case there is no evidence that Mr. Karst read and relied upon the allegedly defective warnings and/or instructions … A plaintiff's inability to prove that he read the allegedly inadequate instructions and warnings provided to him precludes the plaintiff as a matter of law from establishing that a defect in those warnings caused the incident in question.

SR2 779. Because there was no competent evidence Karst read the warnings or owner's manual, any alleged inadequacy could not have caused his injury.

Contrary to Plaintiffs' contention, they did not come forward with sufficient circumstantial evidence for a reasonable juror to conclude Karst had read and relied upon the allegedly defective warning and instructions in the owner's manual. Plaintiffs' warnings/human factor expert, Laughery, testified that Karst was "responsible" and "had he been given adequate information, adequate warnings, he would have complied with them." Appellants App. 132. Laughery speculates how Karst would have responded *if* he had read adequate warnings and instructions, but Laughery's testimony says nothing of

whether Karst actually read the warnings and instructions provided. The circuit court's grant of summary judgment was not based upon whether Karst would have complied with an adequate warning had he read it. The issue was whether that there was evidence that Karst was aware of the allegedly inadequate warning and instructions that were provided. Laughery's testimony does not support Plaintiffs' position that there was evidence that Karst read and was aware of the allegedly inadequate instructions and warning. As the circuit court noted, Laughery would have to speculate to conclude that Karst read and relied on the allegedly defective information in the owner's manual and warning label. SR1 553. In fact, Laughery testified that "there's no indication that he did read the owner's manual." SR1 553. Further, there is no foundation for Laughery to opine that Karst is "responsible," and SDCL 19-19-404(a) precludes Laughery from opining that Karst is responsible. Contrary to Plaintiffs' assertion, Laughery's testimony is not sufficient evidence that Karst read the instructions and warnings.

Plaintiffs also rely upon the testimony of one of the elevator employees, Hauck, that he saw Karst reading something shortly before the accident. When Hauck was asked, "[a]t any point did you see Rick reading from an owner's manual or an instruction manual," Hauck responded, "I don't recall. But I think he was reading something. I'm not sure if it was an owner's manual or what it was." SR1 544. As the circuit court correctly noted, there was not competent, credible evidence what Hauck may have seen Karst reading. SR1 544-45. A jury would have to speculate on the basis of Hauck's testimony, when coupled with the undisputed testimony that Karst kept the owner's manual in his shop, not in his truck, SR1 532, to conclude that Karst reviewed the owner's manual immediately before the accident. *See Toll v. Lev*, 2011 S.D. 65 ¶ 11, 804 N.W.2d 440,

444 (speculation and conjecture insufficient to resist summary judgment); *Estate of Elliott v. A&B Welding Supply Co.*, 1999 S.D. 57 ¶ 16, 594 N.W.2d 707, 710 (mere possibility cannot establish a fact). Summary judgment on Plaintiffs' failure to warn claims was proper, because Plaintiffs did not come forward with competent, admissible evidence that Karst had read the warnings or owner's manual.

C. The Location of the Warning Label Is Not a Basis to Reverse the Circuit Court's Grant of Summary Judgment.

In their response to the motion for summary judgment, Plaintiffs, for the first time, contended that the warning label on the rear flex arm was inappropriately placed and relied on an affidavit from their warnings expert, Laughery, to support this new theory. In his report and during his deposition, Laughery criticized the content of the warning label and opined that as a result the warning was inadequate so as to render the tarp system defective. Appellants App. 135. However, Laughery did not criticize the location of the warning label in his report or during his deposition. SR1 556-61 (report), 734 (deposition), Appellants App. 135 (deposition). It is not proper to oppose a motion for summary judgment with an "eleventh hour" affidavit (CD-sep Ex. 25) contradicting an expert's prior report and deposition testimony. *See Guilford v. Northwestern Public Serv.*, 581 N.W.2d 178, 181 (S.D. 1998); *Taggart v. Ford Motor Credit Co.*, 462 N.W.2d 493, 503 (S.D. 1990).

Further, Plaintiffs assert that Laughery's last-minute affidavit establishes that the warning label was improperly placed and, as a result, the warning was defective. However, that is not what Laughery's affidavit says. Laughery merely opines that it "would have been appropriate" to place a warning on the sleeve, but he fails to opine that the absence of such a warning on the sleeve is inadequate or that the warning is defective

because of the location of the warning. Appellants App. 144, ¶ 6. Accordingly, even if Laughery's affidavit is considered, it is not sufficient to establish that the warning label is inadequate because of its placement. Plaintiffs' arguments regarding the location of the warning label is not a basis to reverse the circuit court's grant of summary judgment on the warnings claims.

D. There Is No Basis For Recognizing a "Heeding Presumption."

Plaintiffs argue the due care presumption in fatal accidents should apply to relieve them of the burden of proving causation because Karst has memory problems. However, Plaintiffs did not raise this argument in their response to the summary judgment motion.[9] *Hall v. State ex rel. S.D. Dep't of Transp.*, 2006 S.D. 24, ¶ 12, 712 N.W.2d 22, 26-27 (recognizing that this Court generally does not consider issues not presented to the trial court).

Further, the rationale underlying the presumption that a decedent was exercising due care at the time of a fatal accident simply does not apply when the issue is whether a product liability plaintiff, at any time, has read an owner's manual or warning label. *Thompson v. Melhaff*, 2005 S.D. 69, ¶ 44, 698 N.W.2d 512, 526 (recognizing the presumption is based upon the natural instinct of self-preservation).

It is undisputed that Karst does not recall the accident and the hours or perhaps even the day leading up to the accident. But Plaintiffs are not asking the Court to presume

[9] In their Motion to Reconsider, SR1 1467, Plaintiffs urged the circuit court to adopt a presumption that Karst would have read and heeded an adequate warning. In the same motion, Plaintiffs argued for the first time that the failure to read an irrelevant warning should not be sufficient to preclude a claim that the warning was inadequate, another argument on which Plaintiffs rely to urge reversal of summary judgment on the failure to warn claims. Appellants' Brief at 17-19. Plaintiffs should not be permitted, by way of a motion for reconsideration a few days before trial, to raise new arguments they elected not to present to the circuit court in response to Defendants' motions for summary judgment.

that Karst exercised due care[10] (i.e. read the owner's manual and warning label) during this limited time period. Plaintiffs are asking this Court to extend this presumption retroactively to November 2007 when Karst took delivery of the trailer on which the allegedly defective tarp system was installed. The cases on which Plaintiffs rely to urge this Court to extend the presumption of due care to persons injured in an accident and who cannot testify about the accident do not support the extension Plaintiffs are urging. More significantly, however, Karst's testimony establishes that he has memories in the years and months prior to his injury. (Wilson App. 19, Karst Dep. at 68: 15-18).

South Dakota law, the cases on which Plaintiffs rely, and the evidence presented to the circuit court during the summary judgment proceedings do not support recognizing a "heeding presumption" to reverse the circuit court's grant of summary judgment.

III. Whether Wilson Is an Assembler under SDCL 20-9-9 Should Have Been Submitted to the Jury.

Wilson moved for summary judgment on Plaintiffs' strict liability claims on the grounds that Wilson did not manufacturer the tarp system and that the possible grounds for liability under SDCL 20-9-9 are absent. SR1 251-53. To support its Motion for Summary Judgment, Wilson set forth evidence that it sold and installed the tarp system, but did not "assemble" it for purposes of seller strict liability under SDCL 20-9-9. SR1 254-63. Plaintiffs opposed Wilson's Motion for Summary Judgment and set out the evidence Plaintiffs contend supported their contention that Wilson did not merely install, but rather assembled and installed the tarp system. SR1 670-82. Plaintiffs did not file a cross motion for summary judgment. In its Memorandum Decision, the circuit court

[10] The opinions of Plaintiffs' warning expert do not support Plaintiffs' premise that end users read owner's manuals as matter of self-preservation. SR1 768.

stated that the parties had agreed that Wilson's status as an assembler was a decision for the court. (Wilson App. 4, SR1 1314). The circuit court then went on to determine that Wilson was an assembler and would be strictly liable for product defects under SDCL 20-9-9. (Wilson App. 4, SR1 1314). This decision was carried through to trial, so the jury did not decide whether Wilson was an assembler under SDCL 20-9-9. *Cf. Carpenter v. City of Belle Fourche*, 2000 S.D. 55, ¶ 8 n. 3, 609 N.W.2d 751, 757 (any order affecting the judgment from which an appeal is taken may be reviewed)

The record indicates Wilson advised the circuit court that if it determined that there were issues of fact, that it was not clear whether the issues should be resolved by the court or the jury. (Wilson App. 41-42, SR2 3217-18). The circuit court recognized there were issues of fact as to whether Wilson is an "assembler." (Wilson App. 7, SR1 1320). To the extent the circuit court's determination of this issue is based upon the premise that Wilson agreed that its status as an assembler under SDCL 20-9-9 was a question for the court, the circuit court misunderstood Wilson's position. *Id.* Accordingly, given the procedural posture by which this issue was presented, the circuit court should have denied Wilson's motion for summary judgment on this issue rather than, in effect, entering summary judgment in favor of Plaintiffs on this issue. If this Court remands this matter for a new trial on any of Plaintiffs' strict liability claims, it should instruct the circuit court the jury must decide this issue, or, in the alternative, order further proceedings on the issue of whether the circuit court or the jury decides whether Wilson is an "assembler."

CONCLUSION

The primary issues Plaintiffs raise on appeal are separate and distinct. After a lengthy trial, the jury found in favor of Defendants on the design defect claims. The jury's verdict should be affirmed and Plaintiffs should not be permitted to retry the design defect claims because there was no prejudicial error during the trial that is a basis for overturning the jury's verdict. Judgment in favor of Defendants on the design defect claims should be affirmed. The circuit court's grant of summary judgment to Defendants on the failure to warn claims (Counts 2 and 4 of the Amended Complaint) should also be affirmed because Plaintiffs did not come forward with any competent evidence to establish one of the essential elements of a failure to warn claim.

Dated at Sioux Falls, South Dakota, this 24th day of August, 2015.

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REQUEST FOR ORAL ARGUMENT

Appellee Wilson Trailer Company respectfully requests oral argument.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this Brief of Appellee Wilson Trailer Company complies with the type volume limitations set forth in SDCL 15-26A-66. Based on the information provided by Microsoft Word 2010, this Brief contains 9,824 words, excluding the table of contents, table of authorities, jurisdictional statement, statement of legal issues, any addendum materials, and any certificates of counsel. This Brief is typeset in Times New Roman (12 point) and was prepared using Microsoft Word 2010.

Dated at Sioux Falls, South Dakota, this 24th day of August, 2015.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing "Brief of Appellee Wilson Trailer Company" was filed electronically with the South Dakota Supreme Court and that the original and two copies of the same were filed by mailing the same to 500 East Capital Avenue, Pierre, South Dakota, 57501-5070, on August 24, 2015.

The undersigned further certifies that an electronic copy of "Brief of Appellee Wilson Trailer Company" was emailed to the attorneys set forth below, on August 24, 2015:

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Nos. 27348 & 27362

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

RICHARD KARST and SUSAN KARST,

Plaintiffs/Appellants,

v.

SHUR COMPANY AND WILSON TRAILER COMPANY,

Defendants/Appellees.

On Appeal from the Circuit Court of the Fourth Judicial District
Corson County, South Dakota
The Honorable Michael W. Day, Circuit Court Judge

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ORAL ARGUMENT REQUESTED

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A. GIVING JURY INSTRUCTION NO. 20 WAS REVERSIBLE ERROR.

1. *Kolcraft*

This Court should reject Defendants' argument that the *Kolcraft* Court implicitly approved of the language used in Instruction 20 because it did not expressly disapprove it. One does not equate to the other. In *First Premier Bank v. Kolcraft Enterprises, Inc.*, 2004 S.D. 92, 686 N.W.2d 430 this Court addressed "some" — but not all — of the issues briefed here. *Id.* at ¶ 30. This Court will not address non-briefed issues. *Daily v. City of Sioux Falls*, 2011 S.D. 48, ¶ 10 n.6, 802 N.W.2d 905, 910 n.6. Thus, it did not address the propriety of the instructional language at issue here, which was not briefed in *Kolcraft*. Supp. App.[1] at 1-24 (*Kolcraft* Appellant's Br.) *Kolcraft* does not establish that Instruction 20 is *ever* proper — especially not where a product is less functional and more expensive than a safe alternative.[2]

2. Section 402A Comment i

Restatement (Second) of Torts § 402A comment i undermines, rather than supports, Defendants' argument. It deals with products (whiskey, sugar, butter) where the aspect that creates utility (intoxicating effect, good flavor) also makes the product dangerous (unhealthy in excess). Only this type of product can be dangerous without being unreasonably dangerous. The hidden spline was not such a product. Defendants concede it was less functional and more expensive than the safe exposed-spline

1. "Supp. App." refers to the supplemental appendix included with this reply.

2. In contrast to the dangerous covered spline here, the dangerous flammable pad in *Kolcraft* was less expensive to manufacture than the safe alternative. Supp. App. at 18, Appellant's Br. in *Kolcraft* at *33.

alternative. *See* Appellants' Br. 11-12. Therefore, under the risk-utility test, the jury was not required to accept *any* level of danger. Shur-Co's vague claim that Instruction 20 "helps a jury understand the range of possibilities associated with the risk utility test" reinforces that it is an abstract proposition of law that is irrelevant and prejudicially misleading here.

3. "Fact of an Accident"

Defendants equate Instruction 20 to a "fact of an accident" instruction. This argument is a red herring because the Karsts press other aspects of Instruction 20 — and not the "fact of an accident" aspect — as error.

4. Prejudice

Defendants do not distinguish the cases finding prejudicial, reversible error under similar circumstances. They argue only that this was a long trial. As *Kolcraft* demonstrates, a long trial does not neutralize an erroneous instruction's prejudice. This Court held that the missing word "or" warranted reversal after a three-week trial. *See Kolcraft* at ¶¶ 5, 29.

And, although the circuit court here gave several correct instructions, none countered the specific prejudice of telling the jury that it could return a defense verdict, regardless of the risk-utility test, if it found the danger fell below some undefined level of "unreasonableness." The jury presumably followed the erroneous instruction. *Hutch v. State*, 922 S.W.2d 166, 172 (Tex. Crim. App. 1996). The instruction undoubtedly affected the verdict, warranting reversal. *Bertelsen v. Allstate Ins. Co.*, 2013 S.D. 44, ¶ 41, 833 N.W.2d 545, 560. Indeed, there is no other explanation for the defense verdict

where it is conceded that the hidden spline failed the risk-utility test by being less functional and more expensive than the safe exposed-spline alternative.

B. ERRORS RELATING TO THE ASSUMPTION-OF-RISK DEFENSE REQUIRE A NEW TRIAL.

1. THERE IS NO EVIDENCE THAT KARST KNEW OF THE SPECIFIC RISK.

♦ (Wilson Br. 19-20; Shur-Co Br. 32-34). There was insufficient evidence of Karst's actual knowledge of the specific risk – unrestrained, dangerously forceful tension – to support an assumption-of-risk instruction, even if Karst may have known the flex arm might "move." That Karst may have been aware of a small level of tension (such as in a mouse trap) cannot support an instruction that he was aware of the sudden release of a dangerously high level of tension (such as in a bear trap) – the specific risk that caused his injuries.[3]

Wilson describes Karst's testimony as showing he was aware the flex arm would "move," the sleeve should not be removed when the tarp is open, and one should not use the flex arm for balance. Wilson Br. 19-20. But this testimony was in response to questioning of Karst's awareness "[a]s you sit here today" – and not of his awareness prior to the accident. Wilson App. 20:3-5. Shur-Co's description of this testimony is similarly flawed as nearly all of it relies on Karst's testimony either "[a]s you sit here today," or after admonishing him that "I'm not trying to ask you what happened when

3. A plaintiff must be aware of the extent of the danger: "Thus the condition of premises upon which he enters may be quite apparent to him, but the danger arising from the condition may be neither known nor apparent, or, if known or apparent at all, it may appear to him to be so slight as to be negligible. In such a case the plaintiff does not assume the risk." Restatement (Second) of Torts § 496D cmt. b (1965).

your accident occurred. I'm asking you what you think would happen in general." Shur-Co App. 22 (Karst Dep. 92:3-5, 23-25). This testimony cannot establish Karst's knowledge prior to his injury.

Steve Knight's testimony that Karst encountered spring tension when he changed a motor, Wilson Br. 20, is speculative, as Knight testified that one is not *required* to remove flex-arm to change a motor (in which case one would not encounter tension), and even if one were exposed to tension, it was not at a dangerous level - Knight thought the tension could be "control[led] easily with one arm." Appellant App. 449 (SR2 3098:13-22). Speculation cannot support defendants' affirmative defense. *See, e.g., Nationwide Mut. Ins. Co. v. Barton Solvents Inc.*, 2014 S.D. 70, ¶ 10, 855 N.W.2d 145, 149 (entry of summary judgment mandated against a party who relies on speculation to establish an element on which the party bears the burden of proof at trial); *Mittlieder v. Chicago & N. W. Ry. Co.*, 413 F.2d 77, 81-82 (8th Cir. 1969) (where contributory negligence defense is supported by sheer speculation, it is prejudicial error to submit it to the jury); *McMurray v. Deere & Co.*, 858 F.2d 1436, 1441 (10th Cir. 1988) (new trial required where evidence of decedent's knowledge based on speculation and inference).

Similarly, Dr. Adams – "a product expert" – heard Heinen's testimony that Karst's left hand was on the flex-arm sleeve, and made the great inferential leap that Karst had a "power grip," which led to the further and even more tenuous conclusion that Karst "anticipate[d] a forceful resistance." Shur-Co Br. 34. Such wild speculation about what Karst may have been anticipating cannot be used to show Karst's actual knowledge. *See Duda v. Phatty McGees, Inc.*, 2008 S.D. 115, ¶ 12, 758 N.W.2d 754, 758 ("[Plaintiffs] must comprehend and appreciate the danger itself. The *standard to be*

applied is a subjective one, of what the particular plaintiff in fact sees, knows, understands and appreciates.")(internal quotation marks and citations omitted)(emphasis added).

♦ (Wilson Br. 19, 23; Shur-Co Br. 32, 34) Defendants can not assume that the jury based its decision on "actual knowledge." Though defendants now eschew reliance on constructive knowledge (conceding there is no evidence of constructive knowledge to support an assumption-of-risk instruction), the jury was nevertheless instructed on both theories - actual *and* constructive knowledge. The jury heard defendants' evidence and arguments on both theories and could have rendered its verdict based on either theory, regardless of which theory defendants rely upon now.[4]

The jury should not have been instructed on the assumption-of-risk defense in the first instance, and the circuit court's refusal to allow evidence of manuals and warnings further prejudiced the Karsts' ability to rebut the defense.

2. THE ASSUMPTION-OF-RISK ISSUE IS SUBJECT TO REVIEW.

♦ (Wilson Br. 20-21; Shur-Co Br. 31) That the foreperson followed the verdict form instruction to skip the assumption-of-risk section if it found for defendants on the Karsts' strict liability and negligence claims, *see* Wilson App. 001-2, doesn't mean the jurors never considered the assumption-of-risk defense. Jury Instruction No. 23 states that if a person assumes the risk, that person is not entitled to *any* recovery. Appellant App. 171

4 . Defendants imply evidence of manuals and warnings is relevant to only constructive knowledge (Shur-Co Br. 34). Not so. If the jury was allowed to determine (or presume) Karst read the manuals, then reading the manual would provide actual knowledge of only the danger of removing the flex-arm from the trailer – not removing the sleeve to expose the spline. To expressly warn of one danger implies exclusion of any other danger.

(SR1 1838). Instruction 27 states, with respect to negligence, "First, did Richard Karst assume the risk of injury or damage? If you find that Richard Karst assumed the risk, you will return a verdict for Shur Co." Supp. App. 25-26 (SR1 1843). Given these instructions, the jury considered the assumption-of-risk defense in making its negligence determination.

In *Burhenn v. Dennis Supply Co.*, 2004 SD 91, ¶ 10, 685 N.W.2d 778, 781, the jury determined the defendant was negligent, but that its negligence did not proximately cause the accident. The assumption-of-risk determination, however, had nothing to do with the proximate cause finding. In *Bell v. E. River Elec. Power Co-op., Inc.*, 535 N.W.2d 750, 755 (S.D. 1995), the decedent, an experienced carpenter who knew the wires hanging only a few feet away from the barn roof were "hot," and had warned others to be cautious of the line while working on the roof, was electrocuted while working on the roof, and was found to have assumed the risk. The plaintiff challenged an instruction that violation of a statute evidenced the decedent's negligence, but the court did not determine the issue because the jury found the decedent assumed the risk. *Id*. As in *Burhenn*, the determination of one issue (assumption of risk) had nothing to do with the determination of the second (contributory negligence). The two defenses are distinct, with separate elements required to prove each. *Compare Bell*, 535 N.W.2d. at 754 (listing assumption-of-risk elements), *with Klutman v. Sioux Falls Storm*, 2009 S.D. 55, ¶ 24, 769 N.W.2d 440, 450 (defining contributory negligence).

Here, in contrast, the jury's determination that Shur-Co was not negligent is likely due to the assumption-of-risk instructions 23 & 27. The jury's very *first* step in determining Shur-Co's negligence was to determine whether Karst assumed the risk. The

jury's verdict finding that Shur-Co was not negligent therefore *did* "consider" and "depend on" the assumption-of-risk defense. *Cf. Burhenn*, 2004 SD 91, ¶ 37, 685 N.W.2d at 786 (noting where a verdict finding no proximate cause "did not consider, let alone depend on, any issues related to assumption of risk," challenges based on that defense were moot). Likewise, the jury was instructed that assumption of the risk precluded recovery for strict liability and would have considered this when reaching its verdict.

C. THE CIRCUIT COURT'S ERRONEOUS GRANT OF PARTIAL SUMMARY JUDGMENT REQUIRES A NEW TRIAL.

1. DR. LAUGHERY'S OPINIONS PROPERLY ESTABLISHED THAT THE WARNINGS WERE DEFECTIVE.

♦ (Wilson Br. 32; Shur-Co Br. 21) Dr. Laughery's affidavit was proper; the circuit court rejected the defendants' motion to strike the affidavit, and defendants failed to appeal that ruling. The defendants are foreclosed from complaining about it now.. The circuit court found that the affidavit criticizing the location of the warnings was reflected in Dr. Laughery's deposition testimony and articles. Appellant App. 18-20. To the extent his opinions were not further developed in his deposition, the circuit court laid the blame squarely on the defendants for their inexplicable failure to ask follow-up questions. *Id*. During the summary judgment hearing, defendants argued that Dr. Laughery did not sufficiently challenge the location of the warning, but that even if he did, the affidavit should be stricken. Supp. App. 28-30 (SR2 3152:18 – 3154:20). In allowing the

affidavit, the circuit court disagreed with defendants on both points, and that ruling was not appealed.[5]

♦ (Wilson Br. 32-33; Shur-Co Br. 22-24) Defendants' argument that Dr. Laughery does not invoke the magic words, "the location of the warning made it defective," elevates form over substance. Dr. Laughery testified that warnings need to be placed where they are seen, and in the "right place." Appellant App. 19-20. He stated in his affidavit that: the warning needs to be appropriately placed to get the user to think about the right issue at the right time; a warning should have been placed up on the sleeve where the spline needed to be accessed during conversion; a warning placed at that location was more likely to be effective; and, that an instruction is most effectively communicated at the time of conversion. Appellant App. 144-45 (Laughery Aff. ¶¶ 5, 6 & 10). Dr. Laughery sufficiently testified that the location of the label (which was not placed near where the conversion occurred) was inadequate.

2. THERE IS SUFFICIENT EVIDENCE FROM WHICH A JURY COULD INFER THAT KARST READ THE WARNING.

♦ (Wilson Br. 30-31) Dr. Laughery did not testify that Karst read the manual, but his opinion that Karst was a careful man who would have done so could lead a jury to conclude that Karst did do so. *See Lakeman v. Otis Elevator Co.*, 930 F.2d 1547 (11th Cir. 1991).

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5. Also, the circuit court's *only* reason for granting summary judgment was its conclusion that the Karsts did not establish causation, Appellant App. 29, further showing that it rejected defendants' argument the Karsts lacked expert evidence the warnings were inadequate.

♦ (Shur Co. Br. 16) Shur-Co implies that Heinen was at Karst's side the whole time, but Heinen testified that he left Karst and went to the scale room office to retrieve a hammer, and that he was not "just following [Karst] around" because he had "other things to do." Supp. App. 32 (SR1 541 (Heinen Dep. 51:9 - 52:10)).

♦ (Shur Co Br. 16-17) Karst was obviously unable to perform step one in the manual, close the tarp, because the electric system failed. He did attempt to follow the next step, however, as he was injured when removing the sleeve that was covering the spline. *See* Appellant App. 109.

♦ (Shur-Co Br. 17-18) Dr. Laughery testified that, in general, people refer to manuals when confronted with a problem. Appellant App. 133 (Laughery Dep 78:19 – 79:1). Also, Dr. Laughery was entitled to rely on Susie Karst's statements that Karst was a careful person who would refer to manuals for guidance when needed, as this is the type of evidence that experts in his field –human factors and warnings – routinely rely upon. *See Supreme Pork, Inc. v. Master Blaster, Inc*., 2009 S.D. 20, ¶ 24, 764 N.W.2d 474, 482-83; SDCL § 19-19-703.

3. *NATIONWIDE*, *BURLEY*, AND THE OTHER CASES ON WHICH SHUR-CO RELIES ARE INAPPOSITE.

♦ (Shur-Co Br. 6-9) *Nationwide* and *Burley v. Kytec Innovative Sports Equip., Inc.*, 2007 S.D. 82, 737 N.W.2d 397, involved challenges to a warning's content, not location -- whether a plaintiff read a warning was not at issue. Also, unlike the *Nationwide* and *Burley* plaintiffs, the Karsts presented sufficient evidence of causation and inadequacy of the warnings.

In *Nationwide*, Barton Solvents warned A.H. Meyer that the heptane it provided was extremely flammable, could "travel" long distances, should only be used with "adequate" ventilation, and that there should be five feet between heptane and electrical switches. 2014 S.D. 70, ¶ 4, 855 N.W.2d at 148. A.H. Meyer complied with the warnings, yet an explosion occurred. 2014 S.D. 70, ¶¶ 5-7, 855 N.W.2d at 148-49. Nationwide's expert concluded that the explosion occurred because A.H. Meyer's ventilation system moved the heptane vapors beyond the five-foot radius. 2014 S.D. 70, ¶ 15, 855 N.W.2d at 150. But while Nationwide produced expert evidence of causation, it provided **no** evidence that the warnings were inadequate. 2014 S.D. 70, ¶ 18, 855 N.W.2d at 151. Nationwide argued that the warnings must have been inadequate because the explosion occurred despite compliance with them, but admitted that it did not have any witness to testify that the warning should have been different. 2014 S.D. 70, ¶¶ 11, 15, 18 n.4, 855 N.W.2d at 149-50, 151 n.4.

In *Burley*, a student injured by an athletic training device brought failure-to-warn and other claims against the manufacturer. 2007 SD 82, ¶¶1-2, 737 N.W.2d. at 400. Her coach read the product's instructions, but altered the design of the product by bending a hook, believing that would make the product work properly. 2007 SD 82, ¶¶ 4-5, 737 N.W.2d. at 400-01. The *Burley* court noted that due to the plaintiff's theory of the case (lack of testing) and the alteration, expert causation testimony was required:

> This requires testimony about the product's design and how, even though Horacek bent the hook, the lack of warnings included with or on the Overspeed Trainer was the legal cause of her injuries. . . . . *It is beyond the common expertise of a jury to determine that (1) the Overspeed Trainer was defective or unreasonably dangerous based on Kytec's failure to test or inspect it, (2) Horacek's bending of the hook was a foreseeable change in the product that Kytec had a duty to warn against, and (3) even though*

> *the hook was bent, Kytec's failure to warn was the legal cause of Burley's injuries.*

2007 S.D. 82, ¶¶ 39-40, 737 N.W.2d at 410-11 (emphasis added).

Because the cases don't involve whether a plaintiff read a warning, they are irrelevant here. Even so, there is sufficient causation evidence and evidence that the warnings were inadequate in this case such that summary judgment should have been denied. First, the circuit court recognized Dr. Laughery's opinions regarding the warning location, including his opinion that a warning should have been located on the sleeve where it is more likely to be encountered during conversion, and that warnings need to be placed where they can be seen. Appellant App. 18-20. Thus, there was expert evidence that the location of the warnings were inadequate to communicate the danger to Karst. Also, Dr. Laughery opined that the content of the warning was inadequate. S*ee* Appellant App. 148-154 (Laughery Report), 131 (Laughery Dep. 69:1-18), 134 (Laughery Dep. 99:9 – 101:3), and 135 (Laughery Dep. 117:11-22).

Second, there is evidence of causation. Shur-Co's sole argument below was that there was no causation due to a purported lack of evidence that Karst read the warning.[6] Unlike in *Nationwide* or *Burley*, this causation issue does not require "expert testimony." It is assuredly not "beyond the common expertise of a jury to determine" whether Karst read the manual. And not only is there evidence that Karst did read the warnings, or should be presumed to have done so, to the extent expert testimony is required on causation, Karsts provided it. Dr. Laughery provided expert testimony that the

6. The circuit court's sole reason for granting summary judgment was its conclusion that the Karsts did not establish causation due to a lack of evidence that Karst read the manual. Appellant App. 29.

inadequate warnings were a legal cause of the accident.[7] S*ee* Appellant App. 148-154, 131, 134, 135 and 142-45 (Laughery Aff. ¶¶ 3, 5-6, 8-10, 12).

♦ (Shur-Co Br. 8) The cases Shur-Co relies upon in arguing an unread warning cannot support a claim are distinguishable. In three, there was affirmative evidence – lacking here – that the plaintiff did not read the warning. *See Johnson v. Niagara Mach. & Tool Works*, 666 F.2d 1223, 1225 (8th Cir. 1981) ("Johnson testified that he had never read the warning even though he knew it was on the press and had glanced at it."); *Palmer v. Volkswagen of Am., Inc.*, 904 So.2d 1077, 1083 (Miss. 2005) ("the plaintiffs - by their own admission - did not read or rely on [the warnings]"); *Powell v. Harsco Corp.*, 433 S.E.2d 608, 610 (Ga.Ct.App. 1993) ("Ponderosa Georgia employee who installed the fiberglass catwalk testified that he had neither received nor followed any installation instructions"). In *J & W Enterprises, Inc. v. Econ. Sales, Inc.*, 486 N.W.2d 179, 181 (Minn. Ct. App. 1992), a case involving a fire extinguisher lacking an adequate warning, the user (who was not injured and did not have retrograde amnesia) remembered and testified about the incident, but stated that he did not remember reading the warning, and there was apparently no other evidence suggesting that he had.

4. THE PRESUMPTION OF DUE CARE ISSUE IS PRESERVED FOR THIS COURT'S REVIEW.

Defendants cite no South Dakota opinion refusing to entertain an argument made to the circuit court in reconsideration and new trial motions. That a reviewing court may not accept new *evidence* that was submitted to (but rejected by) the circuit court with a

7. Even if there is no evidence or presumption that Karst read the warning, summary judgment was improper because, as defendants concede, the causation element of a failure-to-warn claim is not defeated by a plaintiff's failure to read an *inconspicuous* warning.

motion to reconsider, *see Tonsager v. Laqua*, 2008 SD 54, ¶ 5 n.2, 753 N.W.2d 394, 396, has nothing to do with *arguments* presented below. Also, in *Moore v. Michelin Tire Co.*, 1999 SD 152, ¶¶ 42-44, 603 N.W.2d 513, 524-25, new evidence and argument was considered on appeal: The circuit court initially granted defendants' motion to dismiss, but after considering new evidence and argument on a motion to reconsider, changed its ruling. The appellate court determined that the facts presented on reconsideration supported the trial court's ruling. *See id. at* 1999 SD 152, ¶ 51, 603 N.W.2d at 526.[8]

Here, the presumption was discussed at the summary judgment hearing, Supp. App. 33-35 (SR2 3160:24 – 3162:24), and addressed in the Karsts' reconsideration motion filed four days after the circuit court's summary judgment ruling, SR1 1467-1483 at 1478-81, as well as their new trial motion, SR2 656-702 at 690-694. *See* S.D.C.L. § 15-26A-9 ("When reviewing an order denying a new trial, the Supreme Court may review all matters properly and timely presented to the court by the application for a new trial."). Defendants never challenged the arguments as untimely. The issue was argued to the circuit court repeatedly, and is properly preserved for review.

5. KARST IS ENTITLED TO THE PRESUMPTION OF DUE CARE.

♦ (Shur-Co Br. 11) Dr. Laughery testified that people do refer to manuals when they are confronted with a problem with the product. Appellant App. 133 (Laughery Dep. 78:19-79:1).

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8. The *Moore* Court's analysis implicitly rejects the federal courts' approach to Fed.R.Civ.P. 59(e) motions to alter or amend the judgment/motions for reconsideration that are filed after entry of judgment, so Shur-Co's reliance on *Dillon v. Select Portfolio Servicing*, 630 F.3d 75, 80 (1st Cir. 2011) is misplaced. *Dillon* relied on *Loguidice v. Metropolitan Life Ins. Co.*, 336 F.3d 1, 7 (1st Cir. 2003), which involved a motion to reconsider the district court's entry of judgment - a Rule 59 motion.

♦ (Shur-Co Br. 13; Wilson Br. 33-34) Shur-Co manipulates the *Hot Shot Express* holding that a plaintiff must show his *amnesia was caused by the accident* into a requirement that a plaintiff prove that his *inability to remember was caused by amnesia* – and not something else. No case so holds. Also, the cases defendants cite do not hold that a memory of *some* things in the past precludes application of the presumption. It is undisputed that Karst suffers from retrograde amnesia as a result of the accident.[9] It is undisputed that he does not remember whether he read the labels or manual. There is no evidence Karst did not remember reading warnings simply because he never read them.

Again, the evidence is that people do consult manuals when experiencing a problem with the product. Karst has no memory of the day of the accident – the critical time period during which a user is most likely to consult an owner's manual. At a minimum, Karst is entitled to a presumption that he consulted the manual on the day of the accident (especially in light of the evidence that he was seen reading and consulting "something" after the motor failed, and before he climbed up on the trailer to follow the manual's direction to remove the sleeve covering the hidden spline).

D. THE EXCLUSION OF EVIDENCE OF WARNINGS AND MANUALS REQUIRES A NEW TRIAL.

9. Defendants did not argue below that Karst's retrograde amnesia was not caused by the accident. A party cannot raise new arguments in a response brief on appeal to defend the grant of summary judgment below. *Hall v. State ex rel, South Dakota Dept. of Transp.*, 2006 SD 24, ¶ 12, 712 N.W.2d 22, 27. Had Defendants raised this issue below, the Karsts could have easily placed evidence in the record that Karst's retrograde amnesia was caused by the severe traumatic brain injury he sustained in the accident. There is no evidence that Karst experienced any memory problems prior to the incident, unlike the plaintiff in *Hot Shot Express, Inc. v. Brooks*, 563 S.E.2d 764, 770 (Va. 2002), who apparently "suffered episodes of memory loss, and other medical problems, prior to the date of the accident."

♦ (Wilson Br. 27-28; Shur-Co Br. 36-37) The instruction did not cure the prejudice. "If . . it appears the prejudicial effect of the admission was not fully overcome, despite the curative instruction, a new trial is warranted." *Young v. Oury*, 2013 S.D. 7, ¶ 18, 827 N.W.2d 561, 567. Considerations include (1) the extent to which the challenged evidence goes directly to a critical issue; (2) whether the evidence is inherently prejudicial and of such a character that it would likely impress itself upon the juror's minds; (3) whether the curative instruction was firm, clear, and given without delay; (4) whether there was misconduct on the part of the offering party. *Id*. at 2013 S.D. 7, ¶ 19, 827 N.W.2d at 567.

Evidence of warnings and instructions goes directly to a critical issue: defendants were allowed to suggest that there was a "safe procedure" Karst should have followed, and that he was warned of the danger. The evidence was inherently prejudicial because the jurors from the agricultural community showed a predisposition to rely on warnings and instructions in voir dire. *See* Appellants' Br. 35-36. The instruction was not given until after the jurors heard two weeks' of trial testimony regarding the "safe procedure" Karst should have followed. The misconduct of Shur-Co's witness – the first to testify - violating defendants' motion in limine and testifying about the warning further supports the grant of a new trial.

In addition to the curative instruction being insufficient to cure the prejudice of *allowing* some – but not all – evidence of warnings and instructions, the instruction certainly did not cure the prejudice of *excluding* the evidence needed to defeat the assumption-of-risk defense, and to impeach defense witnesses.

E. WILSON INVITED ANY ERROR RELATING TO WILSON'S STATUS AS AN "ASSEMBLER."

"[T]he doctrine of 'invited error' embodies the principle that a party will not be heard to complain on appeal of errors which he himself induced or provoked the court or the opposite party to commit." *Veith v. O'Brien*, 2007 S.D. 88, ¶ 27, 739 N.W.2d 15, 24 (quotation omitted). To the extent there was any error,[10] Wilson invited it, and cannot complain that the jury should have decided whether Wilson is an assembler.

Wilson informed the circuit court that whether it is an "assembler" is a question of law for the court. Wilson App. 004. During the summary judgment hearing, Wilson's counsel said "I don't know" who was to decide if Wilson was an assembler, and said he would "certainly give it some thought," and possibly provide further briefing or stipulate how it would be handled. Wilson App. 041-42. That was the last anyone heard of whether a court or a jury decides the issue.

Two days after the circuit court ruled that Wilson was an "assembler," Wilson submitted proposed jury instructions, SR1 1401 – 55, yet submitted *no* instruction on whether it was an assembler. And when assembler liability was discussed during the jury instruction conference, Wilson's counsel commented,

> . . . I don't think the jury -- Why do they need to be instructed that Wilson's been found to be an assembler? . . . Why they're being instructed on that because of a statute that our legislature passed, I don't think it's terribly helpful, and it can be confusing to them.
> . . .
> . . I don't think the Court needs to have an additional instruction that

10. In the case Wilson relied upon below, *Weyerhaeuser Co. v. Thermogas Co.*, 620 N.W.2d 819 (Iowa 2000), the court characterized the issue as a "legal question," engaged in statutory interpretation, considered the facts, and then "conclude[d] as a matter of law" that the defendant was an "assembler." *Id*. at 824-27. The issue is a question of law.

discusses the whole issue about assembler liability.

Supp. App. 36-37 (SR2 3587:10-19; 3588:6-8). If Wilson wanted to turn the assembler issue into a jury question, it had multiple opportunities to do so. It did not.

Wilson invited the error, and is entitled to no relief. Wilson does not even argue that the circuit court erred - or that Wilson is not, in fact, an assembler.[11] Wilson has not and cannot show any prejudice. Its appeal must fail. *See Tovsland v. Reub*, 2004 S.D. 93, ¶ 15, 686 N.W.2d 392, 398 (requiring party to show prejudice).

CONCLUSION

The circuit court's grant of partial summary judgment, as well as the judgment, should be reversed, and the case remanded for a new trial on all claims against both defendants.

Dated this 11th day of September, 2015.

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11. As a consequence, Appellants refrained from including evidence supporting the circuit court's conclusion.

CERTIFICATE OF COMPLIANCE

In accordance with SDCL § 15-26A-66(b)(4), I certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. The body of the brief uses proportionally spaced Times New Roman with 12-point typeface. Excluding the table of contents, table of cases, addendum materials, and certificates of counsel, the brief contains 4,931 words as calculated by Microsoft Word for Mac 2011, version 14.5.3.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served on the following attorneys for the Defendants vie e-mail and by sending two copies to them via U.S. Mail, addressed to the following:

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APPELLANTS' SUPPLEMENTAL APPENDIX
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